No. 17-3403

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

ORCHARD HILL BUILDING COMPANY D/B/A GALLAGHER & HENRY,
Plaintiff-Appellant,

v.

UNITED STATES ARMY CORPS OF ENGINEERS
Defendant-Appellee.

Appeal from the U.S. District Court for the
Northern District of Illinois, No. 1:15-cv-06344 (Hon. John Robert Blakey)

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STATEMENT CONCERNING ORAL ARGUMENT

This case concerns a challenge to the U.S. Army Corps of Engineers' 2013 jurisdictional determination, which concluded that certain wetlands fall within the Corps' regulatory jurisdiction under the Clean Water Act, 33 U.S.C. § 1344. The issues on appeal include several complex legal and factual issues that depend on a proper understanding of a technical administrative record. The Corps believes that oral argument would be appropriate and helpful to the Court.

STATEMENT CONCERNING ADDENDUM

The addendum following this brief includes the version of the Corps' regulations, 33 C.F.R. § 328.3(a) (1994), that applied at the time of the agency's decision; excerpts of the Federal Register publications promulgating the relevant draft and final regulations; U.S. Department of Agriculture regulations relevant to the Corps' 1993 regulations; and the Corps' 1990 guidance on prior-converted cropland.

JURISDICTIONAL STATEMENT

The jurisdictional statement of Plaintiff-Appellant Orchard Hill Building Company d/b/a Gallagher & Henry ("Orchard Hill") is complete and correct.

STATEMENT OF THE ISSUES PRESENTED ON APPEAL

Orchard Hill challenges the July 19, 2013 jurisdictional determination of Defendant-Appellee U.S. Army Corps of Engineers ("Corps"). That determination found that 12.6 acres of wetlands on Orchard Hill's property are "waters of the United States" within the meaning of the Clean Water Act and are therefore subject to federal regulation under the Act. The district court rejected Orchard Hill's challenge, ruling that the Corps' determination was reasonable. This appeal presents the following questions:

1. Whether the Corps reasonably determined that the wetlands are "waters of the United States" because there is a significant nexus between these wetlands and the Little Calumet River, a traditional navigable water.

2. Whether the Corps reasonably determined that the wetlands are not "prior converted croplands" excluded from regulation under the Clean Water Act because the property became wetlands once again after farming operations ceased for a period greater than five years beginning in 1996.

STATEMENT OF THE CASE

A. The Clean Water Act grants the Corps regulatory authority over "waters of the United States."

The Clean Water Act establishes a comprehensive program designed to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). The Act prohibits the discharge of any "pollutant," including fill material, to "navigable waters" unless authorized under the Act, usually by a permit. *Id.* §§ 1311(a), 1362(12). The Act defines "navigable waters" to include all "waters of the United States." *Id.* § 1362(7).

The Corps and the Environmental Protection Agency ("EPA") share responsibility for implementing and enforcing the Clean Water Act, and they have promulgated substantively-equivalent regulatory definitions of "waters of the United States." 33 C.F.R. § 328.3(a) (1994) (Corps); 40 C.F.R. § 230.3(s) (1994) (EPA). (For simplicity's sake, this brief cites only the Corps' version of the regulations.) The regulations define "waters of the United States" to include, among other things, waters subject to the ebb and flow of the tide, waters that may be used in interstate commerce, "tributaries of [those] waters," and "wetlands adjacent" to tributaries of those waters. 33 C.F.R. § 328.3(a)(1)-(8) (1994).[1] The regulations define wetlands as

[1] The Corps and EPA promulgated a new regulatory definition of "waters of the United States" in 2015, 80 Fed. Reg. 37,054 (June 29, 2015), which also retained the "prior converted cropland" exclusion, 33 C.F.R. § 328.3(b)(2). The 2015 regulation, however, does not apply to the 2013 jurisdictional determination. *See also* 83 Fed. Reg. 5,200 (Feb. 6, 2018) (staying applicability of 2015 regulation until 2020).

"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." *Id.* § 328.3(b) (1994).

The Supreme Court construed the term "waters of the United States" in *Rapanos v. United States*, 547 U.S. 715 (2006). *Rapanos* involved the application of the Corps' Clean Water Act regulations to wetlands adjacent to non-navigable tributaries of navigable waters. *See* 547 U.S. at 729-730 (plurality opinion). All members of the Court agreed that the term "waters of the United States" encompasses some waters that are not navigable in the traditional sense. *See id.* at 731 (plurality opinion); *id.* at 767-768 (Kennedy, J., concurring in the judgment); *id.* at 793 (Stevens, J., dissenting).

Writing for the four Justice plurality, Justice Scalia focused on the meaning of the term "waters." He would have held that this term confers jurisdiction over "relatively permanent, standing or flowing bodies of water," including "seasonal" waters, and over wetlands with a "continuous surface connection" to permanent waters. *Id.* at 732 & n.5, 742. On the other hand, the Clean Water Act would not cover "[w]etlands with only an intermittent, physically remote hydrologic connection to 'waters of the United States.'" *Id.* at 742.

Justice Kennedy, concurring in the judgment and writing only for himself, offered a completely different test to determine whether particular waters are "waters of the United States." In his view, "the Corps' jurisdiction over wetlands depends

upon the existence of a significant nexus between the wetlands in question and navigable waters in the traditional sense." *Id.* at 779. He would have held that a "significant nexus" is present when wetlands, "either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" *Id.* at 780. The Corps applied Justice Kennedy's standard here and Orchard Hill does not dispute that the Corps could rely on the Kennedy standard. APPX0022-23;[2] APPX0036-43; *cf. United States v. Gerke Excavating, Inc.*, 464 F.3d 723, 724-25 (7th Cir. 2006) (authorizing use of Justice Kennedy's standard). In 2008, the Corps issued guidance that addresses what is a "significant nexus" of wetlands to traditional navigable waters. APPX0267-279.

To obtain certainty regarding whether an area is a water of the United States and thus within the Corps' Clean Water Act regulatory jurisdiction, a landowner may request that the Corps issue a "jurisdictional determination." 33 C.F.R. §§ 320.1(a)(6), 325.9. An "approved" jurisdictional determination is issued by a district engineer and is "a Corps document stating the presence or absence of waters of the United States on a parcel, or a written statement and map identifying the limits of waters of the United States on a parcel." *Id.* § 331.2. An approved jurisdictional determination may be administratively appealed to the relevant division engineer, to be processed by a

[2] The Short Appendix, Appendix, and Supplemental Appendix are cited herein as "S.APPX___", "APPX___", and "SA___", respectively.

reviewing officer. *Id.* §§ 331.3, 331.6-331.7. A reviewing officer may conduct a site investigation, though such an investigation is not required. *Id.* § 331.7(c). If an administrative appeal has merit, the reviewing officer may remand the decision to the district engineer to correct errors and to issue a new decision. *Id.* § 331.10(b).

B. Wetlands that were converted to farmland before 1985 are considered "waters of the United States" if farming there has been abandoned for a continuous five-year period, wetland conditions have returned, and the wetlands are sufficiently connected to traditional navigable waters.

Regulations implementing the Clean Water Act exclude certain waters from the definition of "waters of the United States." In 1993, the Corps adopted a regulation specifying: "Waters of the United States do not include prior converted cropland." 33 C.F.R. § 328.3(a)(8) (1994). That provision does not define what constitutes "prior converted cropland."

The cropland exclusion has its origins in the "Swampbuster" provisions of the Food Security Act, 16 U.S.C. §§ 3801-3862, administered by the U.S. Department of Agriculture's Natural Resources Conservation Service (formerly Soil Conservation Service). As enacted in 1985, the statute prohibited farmers from receiving certain federal benefits if they farmed wetlands that were converted to cropland *after* December 23, 1985. *See* 16 U.S.C. §§ 3821-3824; 7 C.F.R. §§ 12.1-12.34 (1993). For wetlands converted to cropland *before* that date, farmers could lose federal benefits if they abandoned farming operations (that is, did not farm for a consecutive five-year period) and the land became wetlands once again. *Id.* § 12.33(b) (1993).

The Soil Conservation Service developed and outlined guidance on the matter in 1988 in a document called the National Food Security Act Manual. *See* APPX0100-03. The Manual specifically provided that "[p]rior converted croplands" that "are abandoned and revert to wetlands are classified as wetland[s] and all wetland provisions will apply." APPX0103. Cropland "is considered abandoned if wetland criteria are present," and the area "has not been used, managed or maintained for cropping purposes for 5 successive years." *Id.*

In 1990, the Corps issued guidance on how to treat "wetland conversion for purpose of crop production." Regulatory Guidance Letter 90-7 (Sept. 26, 1990).[3] The Corps chose to treat converted wetlands in a manner similar to that of the Soil Conservation Service. In particular, the Corps defined "prior converted cropland" to include wetlands that were drained and cropped before December 23, 1985, to the extent they no longer exhibited important wetland values. *Id.* ¶ 5.a. The Corps also chose to define "abandonment" similarly to the Soil Conservation Service, providing that if farming was abandoned at a site and if the site became wetlands once again, the site would be subject to regulation under the Clean Water Act. *Id.* ¶ 5.e.

In 1993, to codify its guidance and to make the Clean Water Act regulations consistent with the Food Security Act regulations, the Corps (and EPA) promulgated

[3] The guidance is a public document available online at http://www.usace.army.mil/Portals/2/docs/civilworks/RGLS/rgl90-07.pdf (last visited Apr. 13, 2018).

regulations excluding prior converted "cropland from the definition of waters of the U.S." 58 Fed. Reg. 45,008-01, 45,031 (Aug. 25, 1993). As originally proposed, the regulations provided that "[w]aters of the United States do not include . . . (ii) [p]rior converted cropland, as defined by the National Food Security Act Manual, Second Edition, 180-V-NSFAM, Amendment 6, May 1991, Soil Conservation Service." 57 Fed. Reg. 26,894, 26,899 (June 16, 1992); *id.* at 26,897 (explaining that the Corps was incorporating the definition in the then-current Manual to achieve consistency with the Soil Conservation Service's treatment of prior converted cropland").

In the final version of the regulations, however, the Corps eliminated the express reference to the 1991 National Food Security Manual. 33 C.F.R. § 328.3(a)(8) (1994). The Corps explained that it could achieve its goal of ensuring consistency with the Soil Conservation Service by using the Manual as guidance in the same manner that the Soil Conservation Service does to inform its determination about "whether an area is prior converted cropland." 58 Fed. Reg. at 45,033. Moreover, the Corps wanted to maintain consistency with any further revisions to the Manual. *Id.*

The Corps stated, however, that it would follow then-current Manual when implementing this regulatory provision. *Id.* Among other things, it would "use the [Soil Conservation Service's] provisions on 'abandonment,'" to "ensur[e] that [prior-converted] cropland that is abandoned within the meaning of those provisions and which exhibit wetlands characteristics will be considered wetlands subject to [Clean Water Act] regulation." *Id.* at 45,034. Specifically, it would consider cropland currently

meeting wetlands criteria to be abandoned unless the area has been used "once in every five years" for the "production of an agricultural commodity." *Id.* These provisions "provide[d] a mechanism for 'recapturing' into [Clean Water Act] jurisdiction" abandoned areas "that revert back to wetlands." *Id.*

In 1996, Congress amended the Food Security Act to provide that farmers who continue to farm converted wetlands (converted prior to 1985) will generally remain eligible for program benefits, even if wetlands characteristics have returned to the cropland as a result of the lack of "maintenance," "management," or "circumstances beyond the control of the person." 16 U.S.C. § 3822(b)(2)(G); *see also* 7 C.F.R. § 12.5(b)(1)(ii); 61 Fed. Reg. 47,019, 47,027 (Sept. 6, 1996); 61 Fed. Reg. 52,664, 52,669 (Oct. 7, 1996). But this amendment to the Food Security Act did not alter the Corps' above-described position that once prior converted cropland is abandoned, it falls within the Corps' regulatory authority under the Clean Water Act. The Corps and the Department of Agriculture issued joint guidance in 2005 explaining that even if "abandoned prior-converted cropland" is not regulated by Agriculture, such cropland is nonetheless regulated as "waters of the United States" by the Corps. SA030; SA027. The Corps and EPA have continued to apply the abandonment provision in their jurisdictional determinations, and this approach has been upheld by district courts considering the issue. *See, e.g., Huntress v. U.S. Dep't of Justice*, 2013 WL 2297076, *10 (W.D.N.Y. May 24, 2013); *United States v. Righter*, 2010 WL 2640189, at *2 (M.D. Pa. June 30, 2010); *United States v. Cam*, No. 3:05cr141, Opinion and Order at 27 (D. Or.

Dec. 21, 2007) (available at APPX0375); *cf. New Hope Power Co. v. U.S. Army Corps of Engineers*, 746 F. Supp. 2d 1272, 1282 (S.D. Fla. 2010) (recognizing Corps' use of abandonment concept).

C. The Corps determined that Orchard Hill's property contains wetlands subject to regulation under the Clean Water Act.

Orchard Hill is a company that owns a large parcel in Cook County, Illinois, known as the Warmke parcel. APPX0036. Orchard Hill has already developed portions of the property for residential purposes. The portion of the property at issue is approximately 60 acres and surrounded by residential neighborhoods to the east and west, and by large water detention basins to the south. *Id.* The majority of the 60 acres is upland farmland, but that portion includes three different wetlands (Wetlands A, B, and C). *Id.*

Wetlands A and B (totaling 12.6 acres) are hydrologically connected to the Little Calumet River, a traditional navigable waterway. APPX0036-37. Specifically, the 0.6-acre Wetland A drains a short distance southwestward to the 12-acre Wetland B, which drains southward via an eroded ditch to an open-water detention basin. APPX0019; APPX0036. That open-water detention basin drains eastward through a storm sewer pipe into a second open-water detention basin. APPX0019; APPX0036. From there, water flows northward through another storm sewer pipe into a final open-water detention basin before discharging into Midlothian Creek. APPX0019; APPX0036. The creek is a perennial stream (classified by the Corps as a "relatively

permanent water") and a tributary of the Little Calumet River. APPX0011; APPX0037; *see also* APPX0009; APPX0065; APPX0057; APPX0052; SA064. During large rain events, water will also overflow into dry-bottom basins along the route. APPX0019. Wetland C (totaling .01 acres) has no traceable surface water connection to a traditional navigable water. APPX0027-28.

"The history of the Warmke Property jurisdictional determination can be described as lengthy, contentious and complex." APPX0003; APPX0005-7; SA058-62. At each stage in the process, the Corps "went to great lengths to understand the applicant's numerous arguments and provide thoughtful responses to each issue raised." APPX0003. In 2006, Orchard Hill hired a consultant to delineate the boundaries of any waters of the United States on the parcel. SA159; APPX0036. The consultant collected on-site data during two site visits and ultimately delineated two wetlands. SA159; SA163. The consultant submitted its delineation to the Corps' Chicago district engineer and requested, on behalf of Orchard Hill, a jurisdictional determination. SA156. (For ease of reference, unless additional detail is necessary, the Chicago district engineer will be referred to as "the Corps.")

In an initial jurisdictional determination issued in 2006, the Corps concluded that the wetlands are waters of the United States. APPX0236-40. This conclusion was based in part on the fact that the wetlands drain via a storm sewer pipe to Midlothian Creek. *Id.* Orchard Hill administratively appealed that decision to the Corps' Great Lakes and Ohio River division engineer. SA131-40. In 2007, the reviewing officer

remanded the decision in light of the 2006 *Rapanos* decision, which required the Corps to consider whether the wetlands have a "significant nexus" to a traditional navigable water. SA128-29.

Between 2008 and 2010, Orchard Hill corresponded with the Corps, and the Corps and EPA visited the site in March 2010. APPX0005-6. The Corps and EPA traced the hydrological connection between the wetlands and Midlothian Creek, and the agencies confirmed that the wetlands are jurisdictional. APPX0214; SA052. In late 2010, the Corps issued a second jurisdictional determination based on the documented physical hydrological connection. SA029-40. Orchard Hill again appealed. APPX0193-207. The reviewing officer denied that administrative appeal in June 2011. APPX0166-73. In addition to finding a significant nexus, the officer determined that Orchard Hill could not avail itself of the prior-converted cropland exception because farming had been abandoned and the land had been put to a non-agricultural use. APPX0168-70.

Orchard Hill requested that the Corps again reconsider its decision in light of a district court decision that invalidated 2009 Corps guidance that directed the Corps to assume regulatory jurisdiction over prior-converted cropland where agricultural uses are shifted to non-agricultural uses. APPX0051-52; SA001-40; *see also New Hope*, 746 F. Supp. 2d at 1275-76. That district court in *New Hope* ruled that an area's status as prior-converted cropland could only be lost through abandonment (that is, a failure to farm at least once in a five-year consecutive period), not by a mere change from

agricultural to non-agricultural uses. *Id.* at 1275-76, 1281-83. The Corps agreed to reconsider its decision here to determine whether *New Hope* affected the Warmke wetlands' status. APPX0155; APPX0154-160.

Upon further review, the Corps in March 2012 issued a new jurisdictional determination that upheld the Corps' regulatory jurisdiction based upon the abandonment principle because (1) farming at the Warmke wetlands had ceased in 1996 (and had therefore been abandoned); and (2) wetlands conditions had returned. Therefore, the site did not contain prior converted cropland excluded from Clean Water Act regulation. APPX0075-99. According to the Corps, *New Hope*'s reasoning did not mandate a different result because the "court explicitly left in place [the Corps'] longstanding previous interpretation of abandonment," and because farming of the wetlands at the Warmke parcel had been abandoned under that interpretation. APPX0075-76. *New Hope* "upheld the Corps' regulatory authority over wetlands that have formed in 'abandoned' [prior-converted] cropland areas." APPX0155; *see also* 746 F. Supp. 2d at 1282 (stating that prior-converted-cropland status can "be lost" due to "abandonment, which requires the land to revert to a present wetlands state").

Orchard Hill appealed again, asserting that the Corps had not adequately explained the significant nexus between the wetlands and the navigable water and that the Corps should have treated the wetlands as prior converted cropland excluded from regulation. APPX0064-72.

The reviewing officer conducted a second site visit for the Corps in September 2012, APPX0049, and ultimately remanded the decision for additional explanation as to why there was a "significant nexus" between the wetlands and the navigable water. APPX0048-054. Specifically, the reviewing officer directed the Corps "to follow the procedures set forth in the 2008 *Rapanos* Guidance" by "explain[ing] the[] basis for concluding whether or not the tributary and its adjacent wetlands, when considered together, have more than speculative or insubstantial effect on the chemical, physical, and biological integrity of the traditional navigable water." APPX053-54. As to Orchard Hill's cropland argument, the division engineer found that although the site had previously been farmed, farming had ceased by 1996 and wetlands conditions had returned, rendering the regulatory cropland exclusion inapplicable. APPX051; APPX0026.

In July 2013, the Corps issued its final jurisdictional determination, concluding that the 12.6 acres of wetlands on the Warmke parcel have the requisite significant nexus and are within the Clean Water Act's jurisdiction. APPX011-46. The Corps documented the hydrological connection between the wetlands and the Little Calumet River. APPX0036-37; APPX0019-20. Relying on federal inventories of wetlands, it identified similarly-situated wetlands in the Midlothian Creek watershed. APPX0037; APPX0020-22. It also explained the physical, chemical, and biological relationship between the Warmke wetlands, the Midlothian Creek, and the Little Calumet River. APPX0037-43; APPX0023. The Corps concluded that the wetlands alone, and in

combination with other similarly-situated wetlands, significantly impact the river (by reducing flooding and pollution, and providing habitat) and that those impacts constitute a significant nexus. APPX0037-43; APPX0023. In reaching its conclusion, the Corps considered maps and the wetlands delineation report prepared by Orchard Hill's consultant, data collected by the Corps, US Geological Survey maps, soil sampling reports, photographs, and studies. *See, e.g.,* APPX0025-26; SA041-42; SA088-91; SA093-125; SA152-207.

D. Orchard Hill challenged the 2013 jurisdictional determination and the district court affirmed it.

Orchard Hill challenged the 2013 jurisdictional determination under the Administrative Procedure Act, 5 U.S.C. § 706(2). S.APPX0009. The district court granted the Corps' motion for summary judgment on September 19, 2017. S.APPX0001-29. The court affirmed as reasonable the Corps' finding that the Warmke wetlands have a significant nexus to the Little Calumet River. S.APPX0015-18. The court concluded that the Corps' finding that the wetlands "significantly affect the physical, chemical, and biological integrity of the Little Calumet River" was "neither speculative nor insubstantial" and was entitled to deference. S.APPX0015. The court also affirmed the Corps' finding that the prior converted cropland exclusion did not apply because the site had not been farmed since 1996 and the property was once again wetlands. Orchard Hill timely appealed to this Court. S.APPX0018-24.

SUMMARY OF ARGUMENT

This Court should uphold the Corps' 2013 jurisdictional determination that the Warmke parcel contains wetlands subject to federal regulatory authority under the Clean Water Act because the wetlands on the parcel, in conjunction with the wetlands in the relevant watershed, have a significant nexus with the Little Calumet River. The Corps' findings are based on substantial evidence and are not arbitrary or capricious.

Orchard Hill contends that the record is insufficient to support the Corps' determinations. The record, however, shows that the Corps' findings are well-supported and reasonable. The Corps (accompanied by EPA) visited the site and documented the flow of water from the wetlands to Midlothian Creek, which in turn flows into the Little Calumet River. It also considered numerous studies documenting the contents of residential and agricultural runoff of the sort that flows along the site, the filtering functions of wetlands in the area with the same soil type as the Warmke wetlands, flooding issues in Midlothian Creek and the Little Calumet River, and the loss of habitat in the area.

Considering this information, the Corps detailed the many functions performed by the Warmke wetlands (and other similarly-situated wetlands in the Midlothian Creek watershed) that benefit Midlothian Creek and, in turn, the Little Calumet River. These functions include storing water to reduce flooding, filtering pollution out of water, and improving the aquatic habitat of the Little Calumet River, which suffers from massive flooding and nitrogen pollution. These documented "filtering and run-

off control functions," *Rapanos*, 547 U.S. at 775, support the Corps' conclusion that the Warmke wetlands have a significant nexus to the Little Calumet River. There is no evidence in the record that contradicts the Corps' findings and the Corps fully explained its reasoning. The Corps' scientific findings are owed the highest deference and this Court should affirm the conclusion that the Warmke wetlands have a significant nexus to the Little Calumet River.

The Corps also reasonably determined that the Warmke wetlands did not qualify as prior converted cropland under 33 C.F.R. § 328.3(a)(8) (1994), because the wetlands had not been actively farmed at least once every five years. Orchard Hill does not dispute that the site contains abandoned farmland. It instead challenges the Corps' interpretation of "prior converted cropland," arguing that the regulation cannot be read to exclude areas where farming has been abandoned and where the land is once again wetlands. The Corps' interpretation is reasonable, however, and should be affirmed.

The regulations do not define "prior converted cropland" and the term is capable of more than one meaning. It is therefore ambiguous and this Court should defer to the Corps' interpretation unless it is inconsistent with the regulations. Nothing in the regulations is inconsistent with the Corps' interpretation of the term. Moreover, the Corps' contemporaneous explanation of the term indicates that the agency intended it to exclude abandoned farmland where wetlands characteristics had returned. This interpretation reflects the Corps' longstanding practice of recapturing

into Clean Water Act regulatory jurisdiction abandoned areas that revert back to wetlands. This Court should defer to the Corps' interpretation of its regulations and affirm the Corps' decision that the Warmke wetlands do not qualify as prior converted cropland under 33 C.F.R. § 328.3(a)(8) (1994).

ARGUMENT

I. This Court reviews the Corps' jurisdictional determination under the deferential standards of the APA.

This Court reviews de novo the district court's grant of summary judgment reviewing an agency decision. *Clancy v. Office of Foreign Assets Control*, 559 F.3d 595, 599 (7th Cir. 2009).

The Corps' decision is reviewed under the "highly deferential" standard of review contained in the APA. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971). Under the APA, a federal agency action may be set aside only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). This Court must ask whether the agency "has relied on factors which Congress had not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42-43 (1983). The Court must not substitute its judgment for that of the agency. *Id.*

This standard of review applies both to review of the factual basis of an agency's decision, *Citizens*, 401 U.S. at 416, and to review of the agency's reasoning as distinguished from its fact finding, *Bowman Transp., Inc. v. Ark.-Best Freight Sys., Inc.*, 419 U.S. 281, 285-86 (1974). The arbitrary-and-capricious standard governs review of all proceedings subject to challenge under the APA, including the Corps' jurisdictional determination here. *See Allentown Mack Sales & Service v. NLRB*, 522 U.S. 359 (1998).

Courts review an agency's factual findings to determine if those factual conclusions are supported by substantial evidence. *See Dickinson v. Zurko*, 527 U.S. 150, 164 (1999). "Substantial evidence" is "such relevant evidence as a reasonable mind might accept as adequate to support the conclusion" reached by the agency. *Local 65–B v. NLRB*, 572 F.3d 342, 347 (7th Cir. 2009) (citation omitted). Review of an agency's factual findings under the substantial evidence standard is even more deferential than review of a district court's factual findings under the clearly erroneous standard. *Concrete Pipe & Products v. Construction Laborers Pension Trust*, 508 U.S. 602, 623 (1993).

Review is at its most deferential when a court reviews an agency's scientific and technical determinations. *Zero Zone, Inc. v. US Dep't of Energy,* 832 F.3d 654, 668 (7th Cir. 2016). When judicial review involves the meaning of an agency's ambiguous regulation, the agency's interpretation also receives substantial deference, and it will be sustained "unless plainly erroneous or inconsistent with the regulation." *Id.* (citation omitted); *see also Decker v. Northwest Envtl. Def. Ctr.*, 568 U.S. 597, 613 (2013).

II. The Corps reasonably determined that the Warmke wetlands have a significant nexus to the Little Calumet River.

Orchard Hill challenges (at 19-34) the jurisdictional determination, asserting that the Corps should have provided more evidence to support its findings. But the question before the Court is not whether the Corps could have provided additional evidence. Rather, the question is whether the Corps' factual findings were supported by *substantial evidence* and whether the Corps reasonably determined that the Warmke wetlands have a significant nexus to the Little Calumet River within the meaning of Justice Kennedy's opinion in *Rapanos*. *See Gerke*, 464 F.3d at 724-25. A review of the record answers those questions affirmatively.

Justice Kennedy interpreted the Clean Water Act to require the Corps to find that wetlands adjacent to non-navigable tributaries have a "significant nexus" to a traditional navigable water before the Corps may exercise regulatory jurisdiction over them. 547 U.S. at 782. Under this standard, "wetlands possess the requisite nexus, and thus come within the statutory phrase 'navigable waters,' if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical and biological integrity of other covered waters more readily understood as 'navigable.'" *Id.* at 780.

For wetlands adjacent to non-navigable tributaries, such as those at issue here, Justice Kennedy explained that the Corps should consider the "quantity and regularity of flow" and "further evidence about the significance" of the non-navigable tributary

on the navigable waters. *Id.* at 786; *see also id.* at 783-84. Accordingly, the Corps should also consider the functions of other wetlands adjacent to the tributary. *Id.*; *see also* APPX0274-75. This might include information about the wetlands' role in reducing pollutants, trapping sediment, recycling nutrients, reducing peak flow, and providing habitat. 547 U.S. at 783-84, 786; *see also* 33 C.F.R. § 320.4(b)(2). This standard requires the Corps to examine numerous factors, but it does not require the Corps to demonstrate any *particular* fact before it finds that wetlands adjacent to a non-navigable tributary have a significant nexus to a navigable water.

After a thorough analysis based on its scientific expertise, the Corps found that the Warmke wetlands, along with similarly situated wetlands in the watershed, significantly affect the chemical, physical, and biological integrity of the Little Calumet River, a traditional navigable water. The Corps determined that the relationship between the Warmke wetlands and the Little Calumet River constitutes a "significant nexus," and therefore the Warmke wetlands fall within its regulatory jurisdiction. The Corps' findings are supported by substantial evidence in the administrative record. Orchard Hill fails to show that these findings are arbitrary or capricious. We discuss each finding in turn.

A. The Warmke wetlands are hydrologically connected to the Little Calumet River.

The Corps documented the physical hydrological connection between the Warmke wetlands and the Little Calumet River, finding that it consists of a discrete

and confined intermittent flow. The Corps specifically found that water enters the wetlands via stormwater pipes from residential areas to the north and west and via overland from the 45-acre agricultural area to the east. APPX0037. The wetlands drain southward through a ditch into an open water detention basin. APPX0019; APPX0023. From there the water flows eastward through a storm sewer pipe to a second open water detention basin, and then northward through a third open water detention basin into Midlothian Creek. *Id.* Midlothian Creek is a steam classified by the Corps as a perennial "relatively permanent water," meaning that it typically flows year-round. PX0016; APPX0019; APPX0024. The creek flows directly to the Little Calumet River, a navigable water. APPX0016; APPX0019; APPX0024.

Besides the Warmke wetlands, the National Wetland Inventory map identifies 165 wetlands totaling 462.9 acres that are "adjacent" to Midlothian Creek, APPX0020-22, APPX0037, and that are consequently (under the Corps' guidance) considered "similarly situated" to the Warmke wetlands, APPX0276. The Midlothian Creek watershed's total area is 12,626 acres, with more than 70% being classified as urban land. APPX0037.

This "hydrologic connection" between the Warmke (and other) wetlands, Midlothian Creek, and the Little Calumet River "demonstrates the ability of the tributary to carry pollutants, flood waters, nutrients and organic carbon [from the wetlands] to the Little Calumet River." APPX0023; APPX0037. From that river, water

flows to the Calumet-Sag Channel then to the Des Plaines River then to the Illinois River, and from there to the Mississippi River Basin. APPX0037.

The Corps relied on various data to document the flow route. Several maps—including topographic, wetlands, and soil maps from the US Geological Survey, National Wetlands Inventory, and Soil Conservation Service—show that the site drains southward, then eastward and slightly northward to Midlothian Creek. SA041; SA045-51. In fact, Orchard Hill's own consultant first identified the particular flow route between the Warmke wetlands and the Little Calumet River in 2006. APPX023; APPX025; SA153-54; SA142-43. Contrary to Orchard Hill's contentions (at 30), the Corps and EPA verified the flow route during their 2010 field visit. Corps and EPA officials "[w]alked [the] entire drainage path from the site to Midlothian Creek" and "observed flowing water through stormsewer manholes and at each detention basin all the way to the creek." APPX0019; APPX0023; SA052-54. The Corps documented the site visit with pictures of the culverts (and water) connecting the site directly to the creek. *See* SA066-79. In the administrative process, Orchard Hill did not dispute the Corps' findings that "water from the site drains to Midlothian Creek." APPX0037; *cf.* Br. at 19 ("some flows from the stormwater retention system discharge intermittently through an outfall into Midlothian Creek").

B. The Warmke wetlands significantly affect the physical, chemical, and biological integrity of the Little Calumet River.

Having identified the hydrological connection between the Warmke wetlands and the Little Calumet River, the Corps then assessed whether the wetlands, either alone or in combination with similarly-situated lands in the region, significantly affect the physical, chemical, and biological integrity of the river. *See Rapanos*, 547 U.S. at 779-80. After considering numerous studies and the Warmke wetlands' characteristics, the Corps found that the wetlands have significant effects on the Little Calumet River. The Corps' factual findings are based on substantial evidence, and the Corps' scientific conclusions are owed the highest deference. *See Zero Zone,* 832 F.3d at 668.

1. The wetlands help reduce downstream flooding.

The Corps found that the Warmke wetlands provide significant flood control functions and benefits. The watershed suffers "extensive flooding problems costing millions of dollars on the local level and billions of dollars on a regional level." APPX0037-38. Flooding in the Midlothian Creek watershed threatens hundreds of structures and multiple roadways on an annual basis. APPX0038. The problem is expected to worsen due to an estimated 21% increase in population in this watershed from 2000 to 2030. The Metropolitan Water Reclamation District of Greater Chicago has accordingly identified this watershed as a priority for new flood-control projects and has recommended flood control projects costing more than $117 million to address flooding there. The Little Calumet River also suffers from extensive flood

problems. Midlothian Creek is a "major source of floodwaters" to the river and will contribute to an expected $75 million in damages resulting from flooding by the river over the next 50 years in Cook County alone. *Id.* The Corps is spending $270 million on a flood control project on the Little Calumet River just over the state line in Lake County, Indiana. *Id.* Flood problems worsen as water moves downstream to the Mississippi River, where several extreme floods have occurred in the past few decades. *Id.*

An important factor contributing to the severity of flooding has been the extensive loss of wetlands in the area. APPX0038. Wetlands provide flood control benefits by intercepting and storing stormwater runoff. The nature of the benefits provided by particular wetlands is determined by their characteristics. APPX0038; APPX0023. Contrary to Orchard Hill's assertions (at 30), the Corps evaluated the size, surface cover, topography, and location of the Warmke wetlands to determine the flood benefits provided. APPX0038-39.

Those wetlands are the fourth largest emergent wetlands in the watershed. *Id.* (The larger the wetland, the greater its flood storage capacity and the more it can reduce the velocity of flood waters as water moves downstream. *Id.*) Moreover, the Warmke wetlands are densely covered by tall, robust plants that create a rough surface. These plants create "frictional resistance" to water entering the site, in turn reducing the velocity of water flowing across the property. APPX0039. Wetlands with

"dense vegetation like this will intercept more stormwater and discharge less water than an area with less vegetative cover." *Id.*

The wetlands also have a gentle slope, which allows flowing water to widen out, thereby decreasing its velocity and increasing the amount of time water spends on-site before being released downstream. *Id.* The longer water stays on-site, the more that peak flows and downstream flooding are reduced. *Id.* Finally, the Warmke wetlands are located in the headwaters of the Midlothian Creek, playing an important role in reducing downstream flooding and erosion damage and, in turn, benefiting downstream wetlands by allowing vegetation there to become more established. *Id.*

Based on these facts, the Corps determined that the Warmke wetlands significantly reduce peak flows and flooding in both the Midlothian Creek and the Little Calumet River. APPX0037; APPX0019; APPX002. The benefits provided by the Warmke wetlands are not "speculative," as Orchard Hill contends (at 30-31).[4] The Warmke wetlands are 2.7% of the 462.9 total acres of wetlands in the watershed. APPX0039. Relying on a state water survey, the Corps found that loss of the Warmke wetlands and others in the watershed would increase peak stream flows in the creek by more than 13.5%. APPX0039. These physical impacts are significant.

[4] Orchard Hill incorrectly states (at 19, 30) that "the Corps concedes" that the wetlands "could have different flow control attributes" and "different qualities." The cited pages do not support its contention, and the Corps has consistently explained the connection between the wetlands and the river. *See, e.g.,* APPX0035-46.

2. The wetlands filter pollution out of water moving downstream.

The Corps also determined that the Warmke wetlands have a significant impact on the Little Calumet River because the wetlands filter, slow, and retain pollutants that enter the site through stormwater runoff. APPX0023; APPX0039. The Warmke parcel is located in northeastern Illinois, an area that produces significant runoff from residential development and agricultural production. APPX0040. Relying on a study of pollutants in urban runoff in northeastern Illinois, the Corps determined that water entering the Warmke wetlands likely contains organic matter, nitrogen, soluble phosphorus, and solids, among other pollutants. APPX0040. Studies show that wetlands retain and filter sediments and pollutants, thereby preventing them from entering downstream waters. *Id.* In particular, wetlands reduce nitrogen pollution through denitrification, sedimentation, and plant uptake. *Id.* Nitrogen pollution is a critical problem in the region of Midlothian Creek, the Little Calumet River, and Chicagoland. APPX0040-41. Nitrogen pollution from throughout the Mississippi River watershed is believed to have contributed to the "dead zone" in the Gulf of Mexico. *Id.*

Wetlands filter pollutants like nitrogen and phosphorus, improving water quality downstream. APPX0041. One study considered by the Corps found that wetlands in Illinois reduced nitrogen by 46%; other studies of wetlands with different soil types found they served similar functions, suggesting that there is "a commonality

in Midwest wetland nitrogen removal dynamics." APPX0041. While Orchard Hill faults the Corps for relying on studies from other areas, including the Netherlands, those studies merely confirmed the results from studies conducted nearer to the Warmke wetlands. *Id.*

The Corps determined that the Warmke wetlands are "particularly well-suited for nitrogen reduction." APPX0041. A wetland's effectiveness in removing pollutants is primarily influenced by how long water remains there. *Id.* The wetlands' position at the top of the watershed, its large size, and flat topography all ensure that water and pollutants entering the site reside long enough to interact with the vegetation there. *Id.* Moreover, the types of vegetation (such as *Phragmites australis*, a grassy reed) located at the site are "ideal" for removing nitrogen. *Id.*; *see also* SA114-19 (documenting vegetation at site).

The Corps did not test the water leaving the site, but it reasonably concluded (based on the above-mentioned studies and its analysis of the site's characteristics) that the "water [entering the wetlands] that eventually makes its way off the site to Midlothian Creek and Little Calumet River leaves much of its sediment and nitrogen behind." *Id.*; *see also* APPX0023. Moreover, no other wetlands sit between the site and Midlothian Creek, and the detention basins located in between "offer minimal water quality benefits." APPX0041-42. The Corps estimated that without the Warmke wetlands and the other wetlands in the watershed, 27-51% more nitrogen would enter and adversely affect Midlothian Creek, and in turn, the Little Calumet River (and

eventually, waters all the way to the Gulf of Mexico). APPX0040-41. Orchard Hill points to no contradictory evidence in the record; this Court should therefore "accept the [Corps'] finding[s] as true," *Precon Dev. Corp. v. U.S. Army Corps of Eng'rs*, 633 F.3d 278, 292 (4th Cir. 2011).

3. The Warmke wetlands provide habitat functions for downstream waters.

The Corps determined that the Warmke wetlands, in combination with the other wetlands in the watershed, significantly affect the biological integrity of the Little Calumet River because they "provide habitat and lifecycle support functions" for species that are present in the river. APPX0019; APPX0023. Wetlands are important ecosystems that provide valuable wildlife habitat; the destruction of Illinois wetlands has undermined the survival of native fish, mammals, birds, and amphibian populations that rely on these areas. APPX0042. Wildlife populations in the Midlothian Creek watershed and the Little Calumet River have suffered due to significant urban development that reduces both the availability and the quality of habitat (due to, for example, nitrogen pollution). *Id.* Nevertheless, the Corps noted that numerous wildlife species (including frogs, salamanders, and turtles) still use Midlothian Creek and the Little Calumet River for portions of their life cycles. APPX0042-43.

"The area surrounding the project site is mostly residential, leaving this site as one of the only remaining wetlands." APPX0023. "As a result a myriad of wildlife is

attracted to this wetland." *Id.* The site offers shallow, sparsely vegetated areas well suited for frogs and "important food sources" for larger vertebrates. APPX0043. Various wildlife species, such as American Toad and Western Chorus Frog, have been observed at the Warmke wetlands. *Id.* These and other species are expected to use the Warmke wetlands, other wetland areas in the watershed, Midlothian Creek, and the Little Calumet River "for a portion of their life cycle." *Id.*[5] The wetlands' nitrogen-filtering function also increases aquatic habitat quality downstream. APPX0042. Finally, wetlands generally "help maintain cooler water temperatures required for aquatic species downstream." APPX0023.

Accordingly, the Corps reasonably concluded that the loss of the wetlands on the site would affect fish and other types of wildlife in the Midlothian Creek and Little Calumet River by removing a portion of their upstream habitat and reducing aquatic habitat quality. APPX0022; APPX0042-043.

C. The Corps did not need to provide more evidence or explanation.

Orchard Hill's challenge (at 19-33) to the jurisdictional determination boils down to its argument the Corps should have provided additional "site specific evidence" (such as flow rates and pollution measurements) to satisfy Justice

[5] Orchard Hill's citation (at 33) of *United States v. Hallmark Construction Co.*, 30 F. Supp. 2d 1033, 1042 (N.D. Ill 1998) is misguided. In that case, the Corps provided no information showing that an area was "ponded over frequently" enough to be attractive to birds. Here, by contrast, the Corps explained that various species were actually observed at the site. APPX0042-43.

Kennedy's standard in *Rapanos*, 547 U.S. at 783, as well as decisions from other courts that are not binding in this Circuit, *see Precon*, 633 F.3d at 282; *Hawkes Co., Inc. v. U.S. Army Corps of Eng'rs*, 2017 WL 359170, at *2 (D. Minn. Jan. 24, 2017). Orchard Hill suggests that these cases impose some sort of heightened evidentiary burden on the Corps. The cases do not support its theory.

Justice Kennedy's opinion in *Rapanos* asks the Corps to analyze whether there is a significant nexus on a "case-by-case basis" for wetlands adjacent to non-navigable tributaries, such as these. 547 U.S. at 784. Rather than imposing a heightened evidentiary burden on the Corps, the significant nexus standard simply contrasts with the way that the Corps previously treated such waters, namely, as *automatically* under its regulatory jurisdiction. The opinion nowhere requires the Corps to measure water flow rates or pollution content or to trace the hydrological connection numerous times. *Id.* at 782.

Neither do the other decisions cited by Orchard Hill. In *Precon*, for example, the Fourth Circuit rejected the very same argument Orchard Hill advances. It joined with the Sixth Circuit in finding that "the significant nexus test does not require laboratory tests or any particular quantitative measurements in order to establish significance." 633 F.3d at 294 (citing *United States v. Cundiff*, 555 F.3d 200, 211 (6th Cir. 2009)). The Corps need only consider "some evidence of both a nexus and its significance." *Id.* This "might include" either "qualitative or quantitative" "documentation of the 'significance of the tributaries to which the wetlands are connected,' a 'measure of the

significance of [the hydrological connection] for downstream water quality,' and/or 'indication of the quantity and regularity of flow in the adjacent tributaries.'" *Id.* at 294 (citing *Rapanos*, 547 U.S. at 784, 786 (Kennedy, J., concurring)). The district court in *Hawkes* adopted *Precon*'s recitation of the requirement. *Hawkes*, 2017 WL 359170, at *2 (citing *Precon*, 633 F.3d at 294). Although all of these decisions refer to the "substantial evidence" standard of review, that standard does not do the work that Orchard Hill suggests (at 27-29); it requires this Court to ask only whether the Corps' factual findings were supported by evidence that a "reasonable mind might accept as adequate." *Local 65–B*, 572 F.3d at 347.

As explained above, the evidence considered by the Corps more than satisfies the substantial evidence standard. Unlike with respect to the Corps' decision at issue in *Hawkes*, 2017 WL 359170, at *2, *6, the Corps and EPA in a 2010 site visit *actually* observed water flowing from the wetlands to Midlothian Creek to the Little Calumet River along the same route identified by Orchard Hill's consultant. APPX0019; APPX0037; APPX0083. This was not the only time the Corps visited the site: it visited in 2006 and 2012 as well. SA058; APPX0050. The Corps also reviewed topographic and wetlands maps showing the movement of water across the site to traditional navigable waters, including the materials provided by Orchard Hill's consultant (which were themselves based on several site visits), to determine there was a hydrological connection. APPX0025-26.

In determining the manner in which the wetlands and tributary affect the Little Calumet River, the Corps considered the size, location, topography, soil composition, and vegetation cover of the wetlands. APPX0037-43. The Corps considered the likely chemical composition of water entering the site (established through studies of runoff in the area), APPX0039-41, and that various species have been observed using the wetlands, Midlothian Creek, and the Little Calumet River, APPX0043. It considered numerous studies of wetland functions and dynamics in northeastern Illinois (and other places), as well as studies concerning the unique flooding, pollution, and habitat issues facing the region, including in particular Midlothian Creek and the Little Calumet River. APPX0036-43.

The Corps identified other wetlands adjacent to Midlothian Creek and calculated that the loss of the Warmke wetlands, in combination with similarly situated wetlands in the watershed, would increase peak flood flows in the creek by 13.5% and nitrogen pollution by an estimated 27-51%. APPX0039; APXX0041. Unlike in *Precon*, 633 F.3d at 294-95, the Corps documented the fact that flow from Midlothian Creek causes flooding and pollution in the Little Calumet River, as well as providing habitat for species using that navigable water. APPZ0037-42. This is precisely the level of analysis required for a case-by-case evaluation of the wetlands described in Justice Kennedy's opinion, 547 U.S. at 786, and this evidence is more than what "a reasonable mind might accept as adequate," *Local 65–B*, 572 F.3d at 347. Orchard Hill is simply inaccurate when it asserts (at 30-33) that the Corps did not

consider information specific to the Warmke wetlands and the navigable waters at issue.

The facts here differ markedly from those in *Precon*. In that case, the Corps initially provided information only about the wetlands' storage capacity and potential flow from the *tributaries* (two ditches) to the navigable waters. 633 F.3d at 294. The Corps did not provide information about actual flow of water. *Id.* Nor had the Corps discussed the significance of the tributaries to the navigable water. *Id.* For example, the Corps stated that the wetlands reduce nitrogen flowing into the navigable water, but it did not explain if the river at issue "suffer[ed] from high levels of nitrogen or sedimentation, or if it is ever prone to flooding." *Id.* at 294-95. By contrast, here, the fact that Midlothian Creek flows into the Little Calumet River is undisputed. Also, as explained above, the Corps thoroughly discussed the significance of the wetlands and creek on the river. The Corps' decision here is thus more akin to the decision the Corps issued after the remand in *Precon*, which included information about the Corps' actual observations of flowing water and which was subsequently upheld by the Fourth Circuit. 603 F. Appx. 149, 150 (4th Cir. 2015).

Orchard Hill also relies on *Hawkes* to assert (at 27-28) that the district engineer did not develop additional site-specific information after the administrative remand. The remand at issue here is unlike *Hawkes*, where the district engineer had never "definitively identif[ed the] flow present in the channel" connecting the site to the navigable water, the reviewing officer remanded with instructions to do so, and the

district engineer planned to (but never did) visit the site to identify the flow in the channel on remand. *Hawkes*, 2017 WL 359170, at *5. Here, the Corps complied with the administrative remand instructions. In those instructions, the reviewing officer found that the district "failed to provide the requisite explanation for its significant nexus determination," "(i.e. failed to show its work justifying its summary conclusions)." APPX0052-54. On remand, the Corps complied by more fully explaining the reasoning behind its conclusions, APPX0023, in an 11-page document, APPX0036-37. *Hawkes* is simply inapposite.

D. The Corps' identification of similarly-situated wetlands was reasonable.

Orchard Hill makes two arguments (at 33-34) concerning the Corps' identification of similarly-situated wetlands—that the Corps should have discussed each wetland individually and that the Corps should have provided evidence that each wetland is adjacent to Midlothian Creek. As a threshold matter, this Court should decline to consider these arguments because Orchard Hill did not raise them during the administrative process. A party must raise each specific issue in the administrative process; otherwise, it is foreclosed from seeking judicial review. *See Sims v. Apfel*, 530 U.S. 103, 109 (2000); *United States v. L.A. Trucker Truck Lines, Inc.*, 344 U.S. 33, 33-37 (1952); *Arch Mineral Corp. v. Director, Office of Workers' Compensation Programs, U.S. Dep't of Labor*, 798 F.2d 215, 220 (7th Cir. 1986); *Myron v. Chicoine*, 678 F.2d 727, 731 (7th Cir. 1982); *cf.* 33 C.F.R. § 331.12 (exhaustion required before challenging permitting

decisions). Orchard Hill did not challenge the Corps' treatment of similarly-situated wetlands in its administrative appeal, APPX0072; consequently, the Corps was not given an opportunity to address Orchard Hill's assertions administratively. This Court should thus decline to consider Orchard Hill's arguments on this point.

Should the Court excuse Orchard Hill's forfeiture of these arguments, it should nevertheless reject the arguments on the merits. Orchard Hill asserts (at 33-34) that the Corps should have discussed the characteristics of each similarly-situated wetlands rather than simply listing the wetlands. But there is no need for the Corps to discuss individually the characteristics of each similarly-situated wetland, given that the Corps considers those wetlands together with the wetlands at issue and the non-navigable tributary in its significant nexus analysis. APPX0276.

The Corps' holistic approach is reasonable and consistent with Justice Kennedy's opinion, which focused on the relationship between "wetlands" "*in combination with* similarly situated lands." 547 U.S. at 780 (emphasis added). How the Corps should evaluate this relationship is "open for considerable interpretation and requir[es] some ecological expertise to administer." *Precon*, 633 F.3d at 293. In the 2008 *Rapanos* guidance, the Corps (and EPA) interpreted the phrase "similarly situated" wetlands to "include all wetlands *adjacent* to the same tributary." APPX0276 (emphasis added). Corps' regulations define "adjacent" to mean "bordering, contiguous, or neighboring." APPX0271-72.

"Interpreting the phrase 'similarly situated' to include all wetlands adjacent to the same tributary is reasonable because such wetlands are physically located in a like manner (i.e., lying adjacent to the same tributary)." APPX0276. Tributaries and their adjacent wetlands have a well-documented scientific "ecological relationship" that "reflects their physical proximity as well as shared hydrological and biological characteristics." *Id.* This relationship is central to the "the flow parameters and ecological functions that Justice Kennedy describes as most relevant to an evaluation of significant nexus." APPX0275. It is therefore not necessary for the Corps to discuss each of the adjacent wetlands individually. This Court should hold (as the Fourth Circuit did) that "deference [is] due [to] the Corps' factual findings and interpretation of the phrase 'similarly situated.'" *Precon*, 633 F.3d at 290.

To the extent that Orchard Hill also claims that the Corps should have provided additional information to show that each of the 165 sites is "similarly situated" and "adjacent" to Midlothian Creek, this argument should be rejected. The Corps used the National Wetlands Inventory Map—maintained by the U.S. Fish and Wildlife Service—to identify the other wetlands adjacent to the Midlothian Creek. *See* APPX0020-22; APPX0037; *see also, e.g.,* SA048 (National Wetlands Inventory map). Orchard Hill has not argued that the Inventory is incorrect; nor is there any indication in the record that reliance on the Inventory is inappropriate. Moreover, Orchard Hill cites no authority for the proposition that the Corps needs to justify its reliance on the National Wetlands Inventory for identifying similarly-situated wetlands. The Corps'

use of the Inventory to identify similarly-situated wetlands in the Midlothian Creek watershed therefore meets the substantial evidence standard and was reasonable.

In sum, although Orchard Hill is dissatisfied with the amount of evidence that the Corps considered and believes that the Corps has not shown a significant nexus between the Warmke wetlands and the Little Calumet River, Orchard Hill points to no evidence in the record that would lead the Corps to a different conclusion. The Corps' findings are based on substantial evidence and demonstrate that the wetlands on the site meet Justice Kennedy's significant nexus standard.

III. The Corps reasonably determined that the Warmke wetlands are not "prior converted croplands" excluded from Clean Water Act regulatory jurisdiction.

Having found a significant nexus between the Warmke wetlands and the Little Calumet River, the Corps determined that the Warmke wetlands were not "prior converted cropland" within the meaning of the Clean Water Act, because farming was "abandoned" in 1996 and wetlands conditions had returned. APPX0090; APPX0066; APPX0156; SA132; APPX0014 (The "wetland areas have not been farmed for 15 consecutive years and wetland conditions have returned. This meets the abandonment requirement."). Orchard Hill does not argue (at 34-35) that the Warmke wetlands were farmed at least once every five years or dispute that the wetlands are abandoned farmlands. It instead asserts that the Corps may not withhold application of the prior-converted cropland exclusion on that basis. In its view (at 35-42), the Corps must treat the Warmke wetlands as non-jurisdictional prior converted cropland because the

concept of abandonment does not appear in the text of 33 C.F.R. § 328.3(a)(8) (1994). This argument fails.

The Corps promulgated the regulations at issue here pursuant to authority delegated by Congress in the Clean Water Act. 33 U.S.C. § 1344. Alhough the regulations provide that "[w]aters of the United States do not include prior converted cropland," they do not define "prior converted cropland." 33 C.F.R. § 328.3(a)(8) (1994). When the Corps adopted this provision, however, it explained that it would "use the [Soil Conservation Service] provisions on 'abandonment,' thereby ensuring that [prior converted] cropland that is abandoned within the meaning of those provisions and which exhibit wetlands characteristics will be considered wetlands subject to [Clean Water Act] regulation." 58 Fed. Reg. at 45,034. The Corps thus interprets "prior converted croplands" to exclude abandoned farmland—that is, cropland that has not been used at least once every five years for agricultural production—that exhibits wetlands characteristics. *Id.*; *see, e.g., Huntress*, 2013 WL 2297076, at *11; *New Hope*, 746 F. Supp. 2d at 1282. Incorporation of the abandonment concept into what types of lands constitute "prior converted cropland" "ensure[d] consistency in the way various federal agencies [were] regulating wetlands" at the time. 58 Fed. Reg. at 45,034; *see also* Section B, *supra* pp. 5-9. The Corps informed the public that it would interpret the regulation in this manner and gave the public opportunity to comment on this interpretation. *See* 57 Fed. Reg. at 26,899; 58 Fed. Reg. at 45,033-34.

The Corps applied the concept of abandonment to the Warmke parcel. It found that, although it was likely that the wetlands would be considered "prior converted cropland" by the Department of Agriculture (because the site was likely converted from wetlands to agricultural use before December 23, 1985), the wetlands were not "prior converted croplands" under its Clean Water Act regulations because farming activities had stopped in 1996 and the site had become wetlands once again. APPX0013-14; APPX0051-52.

The Corps' decision is reasonable. To be sure, the term "abandonment" does not appear in the text of 33 C.F.R. § 328.3(a)(8) (1994). But its absence from the regulation does not mean that the Corps lacks authority to interpret "prior converted cropland" to exclude cropland that has been abandoned and that now exhibits wetlands characteristics. The term "prior converted cropland" was left undefined in the regulation, and the regulation's language by itself "compel[s]" no particular interpretation. *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994) (internal quotation marks omitted). The Corps and EPA explicitly retained the authority to interpret the term for Clean Water Act purposes, "[n]otwithstanding the determination of an area's status as prior converted cropland by any other federal agency." 33 C.F.R. § 328.3(a)(8) (1994). That is why the agencies did not expressly incorporate the National Food Security Manuals' definitions. *See* APPX0262 (discussing reasons for leaving out reference to Manual). The agencies exercised their

discretion to interpret the meaning of the term in the regulation's preamble, providing notice to the public of their interpretation.

Courts "give controlling weight" to an agency's interpretation of its own ambiguous regulations unless that interpretation "is plainly erroneous or inconsistent with the regulation." *Thomas Jefferson Univ.*, 512 U.S. at 512 (citation omitted). Inconsistency may be evidenced by "indications of the [agency's] intent at the time of the regulation's promulgation." *Id.* (citation omitted). The Corps' interpretation of "prior converted cropland" as applied to the Warmke wetlands is neither plainly erroneous nor inconsistent with 33 C.F.R. § 328.3(a)(8). Rather, it is consistent with the Corps' and EPA's contemporaneous interpretation of § 328.3(a)(8), as explained by the agencies in the regulation's preamble. APPX0263. In fact, the Corps' consistent interpretation of "prior converted cropland" goes back even further—to the Corps' promulgation of its 1990 guidance on the subject and the agency has continued to interpret the term in this manner even after the Food Security Act was amended. *See* Section B, *supra* pp. 5-9. The Corps' interpretation reflects its "longstanding agency practice," and deserves this Court's deference. *Cf. Ass'n of Bituminous Contractors, Inc. v. Apfel*, 156 F.3d 1246, 1252 (D.C. Cir. 1998) (deferring to an agency's litigation position where it articulated an explanation of longstanding agency practice).

Orchard Hill contends (at 41) that the "rule unequivocally asserts that *all* prior converted cropland" is not considered a water of the United States, leaving no room for exceptions for abandoned farmland. But, unlike the provision at issue in the case

on which Orchard Hill relies (at 41), *In re Sealed Case*, 237 F.3d 657, 667 (D.C. Cir. 2001), the regulation here does not use the word "all" or "any" and thereby preclude a nuanced approach. Even if it did, the term "prior converted cropland" is undefined in the regulation itself, and therefore nothing prevents the Corps from interpreting the term to include only actively-farmed (not abandoned) prior-converted cropland that has not reverted to wetlands conditions.

Moreover, the concerns animating the D.C. Circuit in *In re Sealed Case* do not apply here. That decision addressed a situation where the statute at issue provided the agency with no authority to make an exception to the *statutory* requirements. *See* 237 F.3d at 670. The court accordingly held that "[a]gencies are not empowered to carve out exceptions to *statutory* limits on their authority." *Id.* (citing *Railway Labor Executives' Ass'n v. Nat'l Mediation Bd.*, 29 F.3d 655, 670 (D.C. Cir. 1994)) (emphasis added). This holding derives from the precept that agencies "owe their capacity to act to the delegation of authority, either express or implied, from the legislature." *Railway Labor*, 29 F.3d at 670. Regardless of whether the Corps' application of the abandonment concept is considered an "exception" to prior converted cropland's exempt status or, instead, an interpretation of what constitutes prior converted cropland, the Corps has acted within its statutorily-delegated discretion to administer the Clean Water Act. There is no language in the Act (or in the Corps' regulation, for that matter) that prevents the Corps from adopting and applying such an exception when determining what areas qualify as "waters of the United States." Orchard Hill has not asserted that

the Corps lacks *statutory authority* to apply the abandonment concept; any attempt on its part to do so in a reply brief should be rejected. *See Argyropoulos v. City of Alton*, 539 F.3d 724, 740 (7th Cir. 2008).

The Corps also provided the public with notice that it would apply the abandonment concept when it promulgated its regulations, and so the public had an opportunity to comment on that approach. *See* 58 Fed. Reg. at 45,033-34. Orchard Hill is simply incorrect when it suggests (at 37) otherwise. Moreover, the Corps has consistently applied the abandonment concept. "When an agency has committed itself to a settled course of behavior, a presumption in favor of that course arises." *Torrington Extend-A-Care Employee Ass'n v. NLRB*, 17 F.3d 580, 589 (2d Cir. 1994) (citations omitted). *In re Sealed Case* does not support Orchard Hill's argument that the Corps unreasonably applied the abandonment concept here. *Cf. Fort Wayne Cmty. Sch. v. Fort Wayne Educ. Ass'n, Inc.*, 977 F.2d 358, 366 (7th Cir. 1992) (where a statute leaves terms undefined, an agency charged with implementing the statute may fill the gaps); *Huntress*, 2013 WL 2297076, at *13 (rejecting argument that Corps lacked authority to apply abandonment provisions because it appeared in the regulation's preamble, rather than in the regulation's text).

Citing *Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533, 539 (D.C. Cir. 1986), Orchard Hill asserts (at 36-39) that the Corps could not limit "prior converted cropland" to actively-farmed areas because the Corps had defined the term in the preamble (rather than in the text of the regulation), and the preamble language is not

enforceable. *Brock* is inapplicable, however, because it addressed a situation in which an agency, when acting within the scope of its statutory authority, applied a regulation in a manner that was *different* from what it described in the explanation accompanying the regulation's publication in the Federal Register. 796 F.2d at 538-39. *Brock* held that because the agency was acting within its statutory authority, it was free to interpret its regulation and was not bound to follow explanatory language not included in the text of the regulation itself. *Id.* at 539. Here, by contrast, the Corps has acted consistently with its explanation of the regulation in the preamble. If anything, *Brock* supports the conclusion that the Corps *has* full authority to interpret and apply its regulations consistent with the preamble's language.

In this light, the Corps reasonably interpreted the term "prior converted cropland" to exclude cropland that has been abandoned and that now exhibits wetlands characteristics. The Corps' application of this interpretation has been acknowledged or affirmed by various district courts. *See Huntress*, 2013 WL 2297076, at *11; *New Hope*, 746 F. Supp. 2d at 1282; *Righter*, 2010 WL 2640189, at *2; *see also Hallmark Construction*, 30 F. Supp. 2d at 1038 (citing Corps guidance documents and the Federal Register to distinguish between "farmed wetland" and "prior converted cropland"). This Court should likewise uphold the Corps' interpretation.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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April 20, 2018
90-5-1-4-20526

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the appellate CM/ECF system on April 20, 2018.

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90-5-1-4-20526

No. 17-3403

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

ORCHARD HILL BUILDING COMPANY D/B/A GALLAGHER & HENRY,
Plaintiff-Appellant,

v.

UNITED STATES ARMY CORPS OF ENGINEERS
Defendant-Appellee.

Appeal from the U.S. District Court for the
Northern District of Illinois, No. 1:15-cv-06344 (Hon. John Robert Blakey)

REGULATORY ADDENDUM TO RESPONSE BRIEF OF DEFENDANT-APPELLEE

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PART 12—HIGHLY ERODIBLE LAND AND WETLAND CONSERVATION

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AUTHORITY: 16 U.S.C. 3801 *et seq.*

SOURCE: 52 FR 35200, Sept. 17, 1987, unless otherwise noted.

Subpart A—General Provisions

§ 12.1 General.

(a) This part sets forth the terms and conditions under which a person who produces an agricultural commodity on highly erodible land or designates such land for conservation use, plants an agricultural commodity on a converted wetland, or converts a wetland shall be determined to be ineligible for certain benefits provided by the United States Department of Agriculture and agencies and instrumentalities of the Department.

(b) The purpose of the provisions of this part are to remove certain incentives for persons to produce agricultural commodities on highly erodible land or converted wetland and to thereby—

(1) Reduce soil loss due to wind and water erosion,

(2) Protect the Nation's long term capability to produce food and fiber,

(3) Reduce sedimentation and improve water quality,

(4) Assist in preserving the Nation's wetlands, and

(5) Curb production of surplus commodities.

[52 FR 35200, Sept. 17, 1987; 53 FR 3999, Feb. 11, 1988, as amended at 56 FR 18635, Apr. 23, 1991; 56 FR 23735, May 23, 1991]

§ 12.2 Definitions.

(a) The following definitions shall be applicable for the purposes of this part:

(1) *Agricultural commodity* means any crop planted, and produced by annual tilling of the soil, including tilling by one-trip planters or sugarcane.

(2) *ASCS* means the Agricultural Stabilization and Conservation Service, an agency of the United States Department of Agriculture which is generally responsible for administering commodity production adjustment and certain conservation programs of the Department.

(3) *Conservation District* (CD) means a subdivision of a State or local government organized pursuant to the applicable law to develop and implement soil and water conservation activities or programs.

(4) *Conservation plan* means the document containing the decisions of a person with respect to the location, land use, tillage systems and conservation treatment measures and schedule which, if approved, must be or have been established on highly erodible cropland in order to control erosion on such land.

(5) *Conservation system* means the part of a cropland resource management system applied to a field or group of fields that provides for cost effective and practical erosion reduction based upon the standards contained in the SCS field office technical guide. A conservation system may include a single practice or a combination of practices.

(6) *Converted wetland* means wetland that has been drained, dredged, filled, leveled, or otherwise manipulated (including any activity that results in impairing or reducing the flow, circulation, or reach of water) that makes possible the production of an agricultural commodity without further application of the manipulations described herein if (i) such production would not have been possible but for such action; and (ii), before such action such land was wetland and was neither highly erodible land nor highly erodible cropland.

(7) *Conservation use* or set aside means cropland that is designated as conservation use acreage, set aside or other similar designation for the purpose of fulfilling any provisions under any acreage limitation or land diversion program administered by the Secretary of Agriculture, requiring that the producer devote a specified acreage to conservation or other non-crop production uses.

(8) *CCC* means the Commodity Credit Corporation, a wholly-owned government corporation within the United States Department of Agriculture organized under the provisions of 15 U.S.C. 714 *et seq.*

(9) *Department* means the United States Department of Agriculture.

(10) *Erodibility index* means a numerical value that expresses the potential erodibility of a soil in relation to its soil loss tolerance value without consideration of applied conservation practices or management.

(11) *ES* means the Extension Service, an agency of the United States Department of Agriculture which is generally responsible for coordinating the information and educational programs of the Department.

(12) *FmHA* means the Farmers Home Administration, an agency of the United States Department of Agriculture which is generally responsible for providing farm loans and loan guarantees under the Consolidated Farm and Rural Development Act (7 U.S.C. 1921 *et seq.*) and other laws.

(13) *FCIC* means the Federal Crop Insurance Corporation, a wholly-owned government corporation within the United States Department of Agriculture organized under the provision of 7 U.S.C. 1501 *et seq.*

(14) *Field* means a part of a farm which is separated from the balance of the farm by permanent boundaries such as fences, roads, permanent waterways, woodlands, croplines (in cases where farming practices make it probable that such cropline is not subject to change) or other similar features.

(15) *Highly erodible land* means land that has an erodibility index of 8 or more.

(16) *Hydric soils* means soils that, in an undrained condition, are saturated, flooded, or ponded long enough during a growing season to develop an anaerobic condition that supports the growth and regeneration of hydrophytic vegetation.

(17) *Hydrophytic vegetation* means plants growing in water or in a substrate that is at least periodically deficient in oxygen during a growing season as a result of excessive water content.

(18) *Landlord* means a person who rents or leases farmland to another person.

(19) *Local ASCS office* means the county office of the Agriculture Stabilization and Conservation Service serving the county or a combination of counties in the area in which a person's land is located for administrative purposes.

(20) *Operator* means the person who is in general control of the farming operations on the farm during the crop year.

(21) *Owner* means a person who is determined to have legal ownership of farmland and shall include a person who is purchasing farmland under contract.

(22) *Person* means an individual, partnership, association, corporation, cooperative, estate, trust, joint venture, joint operation, or other business enterprise or other legal entity and, whenever applicable, a State, a political subdivision of a State, or any agency thereof and such person's affiliates as provided in § 12.8 of this part.

(23) *Secretary* means the Secretary of the United States Department of Agriculture.

(24) *Sharecropper* means a person who performs work in connection with the production of a crop under the supervision of the operator and who receives a share of such crop for such labor.

(25) *SCS* means the Soil Conservation Service, and agency within the United States Department of Agriculture which is generally responsible for providing technical assistance in matters of soil and water conservation and for administering certain conservation programs of the Department.

(26) *Soil map unit* means an area of the landscape shown on a soil map which consists of one or more soils.

(27) *State* means each of the fifty states, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands of the United States, American Samoa, the Commonwealth of the Northern Mariana Islands, or the Trust Territory of the Pacific Islands.

(28) *Tenant* means a person usually called a "cash tenant", "fixed-rent tenant", or "standing rent tenant" who rents land from another for a fixed amount of cash or a fixed amount of a commodity to be paid as rent; or a person (other than a sharecropper) usually called a "share tenant" who rents land from another person and pays are rent a share of the crops or proceeds therefrom. A tenant shall not be considered the farm operator unless the tenant is determined to be the operator pursuant to this part and 7 CFR part 719.

(29) *Wetland,* except when such term is a part of the term "converted wetland", means land that

(i) Has a predominance of hydric soils;

(ii) Is inundated or saturated by surface or groundwater at a frequency and duration sufficient to support a prevalence of hydrophytic vegetation typically adapted for life in saturated soil conditions;

(iii) And under normal circumstances does support a prevalence of such vegetation, except that this term does not include lands in Alaska identified as having a high potential for agricultural development and a predominance of permafrost soils.

(b) In the regulations in this part and in all instructions, forms, and documents in connection therewith, all other words and phrases specifically relating to ASCS operations shall, unless the context of subject matter or the specific provisions of this part otherwise requires, have the meanings assigned to them in the regulations governing reconstitutions of farms, allotments and bases (7 CFR part 719).

[52 FR 35200, Sept. 17, 1987; 53 FR 3999, Feb. 11, 1988, as amended at 56 FR 18636, Apr. 23, 1991]

§ 12.3 Applicability.

(a) The provisions of this part shall apply to all land, including Indian tribal land, in the fifty States, the District of Columbia, the Commonweath of Puerto Rico, Guam, the Virgin Islands of the United States, American Samoa, the Commonwealth of the Northern Mariana Islands, and the Trust Territory of the Pacific Islands.

(b) The provisions of this part apply to all actions taken after and to determinations made after or pending on November 28, 1990, except to the extent that § 12.5(b)(6) through (b)(8) have retroactive application to December 23, 1985 for certain actions and determinations regarding wetlands and converted wetlands. Actions taken and determinations made prior to November 28, 1990 are subject to regulations set forth in this part as of November 27, 1990.

[52 FR 35200, Sept. 17, 1987; 53 FR 3999, Feb. 11, 1988, as amended at 56 FR 18636, Apr. 23, 1991]

§ 12.4 Determination of ineligibility.

(a) Except as provided in § 12.5, a person shall be ineligible for all USDA program benefits listed in paragraph (c) of this section if:

(1) The person produces an agricultural commodity on a field in which highly erodible land is predominant, or designates such a field as conservation use;

(2) The person produces an agricultural commodity on wetland that was converted after December 23, 1985; or

(3) After November 28, 1990, the person converts a wetland by draining, dredging, filling, leveling or other

means for the purpose, or to have the effect, of making the production of an agricultural commodity possible.

(b) A person determined to be ineligible under paragraphs (a)(1) or (a)(2) of this section shall be ineligible for all of the USDA program benefits listed in paragraph (c) of this section for which the person otherwise would have been eligible during the crop year for which the determination applies. A person determined to be ineligible under paragraph (a)(3) of this section for the conversion of a wetland shall be ineligible for all of the USDA program benefits listed in paragraph (c) of this section for which the person otherwise would have been eligible during the calendar year for which the determination applies and each subsequent calendar year until the converted wetland is restored.

(c) USDA program benefits covered by a determination of ineligibility under this rule are:

(1) Any type of price support or payment made available under the Agricultural Act of 1949, 7 U.S.C. *et seq.*), the Commodity Credit Corporation Charter Act (15 U.S.C. 714 *et seq.*), or any other Act;

(2) A farm storage facility loan made under section 4(h) of the Commodity Credit Corporation Charter Act (15 U.S.C. 714b(h));

(3) Benefits under the Federal Crop Insurance Act (7 U.S.C. 1501 *et seq.*);

(4) A disaster payment made under the Agricultural Act of 1949. (7 U.S.C. 1421 *et seq.*); or under section 132 of the Disaster Assistance Act of 1989 (16 U.S.C. 1421 *et seq.*) or any similar provisions enacted subsequent to August 14, 1989;

(5) A farm loan made, insured, or guaranteed under the Consolidated Farm and Rural Development Act (7 U.S.C. 1921 *et seq.*) or any other provision of law administered by the Farmers Home Administration if the Secretary determines that the proceeds of such loan will be used for a purpose that contributes to the conversion of wetlands that would make production of an agricultural commodity possible or for a purpose that contributes to excessive erosion of highly erodible land (i.e., production of an agricultural commodity or highly erodible land without a conversion plan or conservation system as required by this part);

(6) A payment made under section 4 or 5 of the Commodity Credit Corporation Charter Act (15 U.S.C. 714b or 714c) for the storage of an agricultural commodity acquired by the Commodity Credit Corporation;

(7) A payment made under section 8, 12, or 16(b) of the Soil Conservation and Domestic Allotment Act (16 U.S.C. 590h, 590(1), or 590p(b));

(8) A payment made under section 401 or 402 of the Agricultural Credit Act of 1978 (16 U.S.C. 2201 or 2202);

(9) A payment made under any contract entered into pursuant to section 1231 of the Food Security Act of 1985, as amended (16 U.S.C. 3831);

(10) A payment made under chapter 2, Agricultural Water Quality Incentives Program, or chapter 3, Environmental Easement Program, of subtitle D, Title XII of the Food Security Act of 1985, as amended; and

(11) A payment, loan, or other assistance under section 3 or 8 of the Watershed Protection and Flood Prevention Act (16 U.S.C. 1003 or 1006a).

(d) The provisions of paragraphs (a) and (b) of this section do not apply to any loan described in paragraph (c) of this section that was made prior to December 23, 1985.

(e) For the purposes of paragraph (a) of this section, a person shall be determined to have produced an agricultural commodity on a field in which highly erodible land is predominant or to have designated such a field as conservation use, to have produced an agricultural commodity on converted wetland, or to have converted a wetland if:

(1) SCS has determined that—

(i) Highly erodible land is predominant in such field, or

(ii) All or a portion of the field is converted wetland; and

(2) ASCS has determined that the person is or was the owner or operator of the land, or entitled to share in the crops available from the land, or in the proceeds thereof; and

(3) With regard to the provisions of paragraphs (a)(1) and (a)(2) of this section, ASCS has determined that the land is or was planted to an agricultural commodity or was designated as

conservation use during the year for which the person is requesting benefits.

(f) Persons who wish to participate in any of the USDA programs described in paragraph (c) of this section are responsible for contacting the appropriate agency of the Department well in advance of the intended participation date so that Form AD-1026 can be completed. This contact will help assure that the appropriate determinations regarding highly erodible land or wetland, and conservation plans or conservation systems are scheduled in a timely manner. A late contact may not allow sufficient time for USDA to service the request and could result in a substantial delay in receiving a USDA determination of eligibility or ineligibility.

[56 FR 18636, Apr. 23, 1991]

§ 12.5 Exemptions.

(a) *Exemptions regarding highly erodible land*—(1) *Highly erodible cropland in production or in Department programs during 1981 through 1985 crop years.* During the period beginning on December 23, 1985, and ending on the later of January 1, 1990, or the date that is two years after the date the cropland on which an agricultural commodity is produced was surveyed by the SCS to determine if such land is highly erodible, no person shall be determined to be ineligible for benefits as provided in § 12.4 as the result of the production of a crop of an agricultural commodity on any highly erodible land:

(i) That was planted to an agricultural commodity in any year 1981 through 1985; or

(ii) That was set aside, diverted or otherwise not cultivated in any such crop years under a program administered by the Secretary for any such crops to reduce production of an agricultural commodity.

(2) *Compliance with a conservation plan or conservation system.* As further specified in this part, no person shall be ineligible for the program benefits described in § 12.4 as the result of production of an agricultural commodity on highly erodible land or the designation of such land as conservation use if such production or designation is in compliance with an approved conservation plan or conservation system.

(i) With respect to the production of an agricultural commodity on any land identified under paragraph (a)(1) of this section, if, as of January 1, 1990, or the date that is 2 years after the date SCS has completed a soil survey of the cropland on the tract or farm, whichever is later, a person is actively applying a conservation plan based on the local SCVS field office technical guide and approved by the CD, in consultation with the local ASC committees and SCS, such person shall have until January 1, 1995, to fully comply with the plan without being determined to be ineligible for benefits under § 12.4.

(ii) A person shall not be ineligible for program benefits under § 12.4 as the result of the production of an agricultural commodity on highly erodible land or as the result of designation of such land as conservation use if the production or designation is:

(A) In an area within a CD, under a conservation system that has been approved by the CD after the CD determines that the conservation system is in conformity with technical standards set forth in the SCS field office technical guide for such district; or

(B) In an area not within a CD, under a conservation system that has been approved by SCS to be adequate for the production of such agricultural commodity on highly erodible land or for the designation of such land as conservation use.

(3) *Reliance upon SCS determination for highly erodible land.* A person may be relieved from ineligibility for program benefits as the result of the production of an agricultural commodity which was produced on highly erodible land or for the designation of such land as conservation use in reliance on a determination by SCS that such land was not highly erodible land, except that this paragraph shall not apply to any agricultural commodity that was planted on highly erodible land, or for the designation of highly erodible land as conservation use after SCS determines that such land is highly erodible land, and the

person is notified of such determinations.

(4) *Areas of 2 acres or less.* No person shall be determined to be ineligible under § 12.4 for noncommerical production of agricultural commodities on an area of 2 acres or less if it is determined by ASCS that such production is not intended to circumvent the conservation requirements otherwise applicable under this part.

(5) *Graduated sanctions.* (i) After November 28, 1990, no person shall become ineligible under § 12.4 as a result of the failure of such person to actively apply a conservation plan that documents the decisions of such person with respect to location, land use, tillage systems, conservation treatment measures and schedules if ASCS determines such person has—

(A) Not violated the highly erodible land provisions of this part within the past 5 years; and

(B) Acted in good faith and without the intent to violate the provisions of this part.

(ii) A person who is determined to meet the requirements of paragraph (a)(5)(i) of this section shall be subject, in lieu of the loss of all benefits specified under § 12.4(c) for such crop year, to a reduction in benefits of not less than $500 nor more than $5,000 depending upon the seriousness of the violation, as determined by ASCS. The dollar amount of the reduction will be determined by ASCS and may be based on the number of acres and the degree of erosion hazard for the area in violation, as determined by SCS, or upon such other factors as ASCS deems appropriate.

(iii) Any person whose benefits are reduced in a crop year under paragraph (a)(5) of this section may be eligible for all of the benefits specified under § 12.4(c) for any following crop year if SCS determines that such person is actively applying a conservation plan according to the schedule set forth in the plan on all highly erodible land planted to an agricultural commodity or designated as conservation use.

(6) *Allowable variances.* (i) Notwithstanding any other provisions of this part, no person shall be determined to be ineligible for benefits as a result of the failure of such person to actively apply a conservation plan if SCS determines that—

(A) The failure is technical and minor in nature and that such violation has little effect on the erosion control purposes of the conservation plan applicable to the land on which the violation has occurred; or

(B) The failure is due to circumstances beyond the control of the person; or

(C) SCS grants a temporary variance from the practices specified in the plan for the purpose of handling a specific problem with SCS determines cannot reasonably be addressed except through such variance.

(ii) A variance granted under this paragraph shall apply for oe crop year and shall not be counted as a violation for purposes of paragraph (a)(5)(i)(A) of this section.

(b) *Exemptions for wetland and converted wetland.* (1) A person shall not be determined to be ineligible for program benefits under § 12.4 as the result of the production of an agricultural commodity on converted wetland or the conversion of wetland:

(i) If the conversion of such wetland was commenced or completed before December 23, 1985; or

(ii) If the conversion is for a purpose that does not make the production of an agricultural commodity possible, such as conversions for fish production, trees, vineyards, shrubs, cranberries, or building and road construction and no agricultural commodity is produced on such land; or

(iii) If SCS has determined that the actions of the person with respect to the conversion of the wetland, or the production of an agricultural commodity on the converted wetland, individually and in connection with all other similar actions authorized by SCS in the area, would have only a minimal impact on the functional hydrological and biological aspect of wetlands; or

(iv) If the area is:

(A) An artificial lake, pond or wetland created by excavating or diking non-wetland to collect and retain water for purposes such as water for livestock, fish production, irrigation (including subsurface irrigation), a set-

tling basin, cooling, rice production, or flood control; or

(B) A wet area created by a water delivery system, irrigation, irrigation system, or application of water for irrigation; or

(C) Wetland on which the owner or operator of a farm or ranch uses normal cropping or ranching practices to produce agricultural commodities in a manner that is consistent for the area, where such production is possible as a result of natural conditions, such as drought, and is without action by the producer that destroys a natural wetland characteristic.

(D) Wetlands converted by actions of persons other than the person applying for USDA program benefits or any of the person's predecessors in interest after December 23, 1985, if such conversion was not the result of a scheme or device to avoid compliance with this part. Further drainage improvement on such lands is not permitted without loss of eligibility for USDA program benefits, unless the SCS determines under paragraph (b)(1)(iii) of this section that further drainage activities applied to such lands would have minimal effect on any remaining wetland values. In applying this paragraph, converted wetlands shall be presumed to have been converted by the person applying for USDA program benefits unless the person can show that the conversion was caused by a third party with whom the person was not associated through a scheme or device as described under § 12.10. In this regard, activities of a water resource district, drainage district or similar entity will be attributed to all persons within the jurisdiction of the district or other entity who are assessed for the activities of the district or entity. Accordingly, where a person's wetlands are converted due to the actions of the district or entity, the person shall be considered to have caused or permitted the drainage. Notwithstanding the provisions of the preceding sentences and as determined by ASCS to be consistent with the purposes of this part, the activities of a drainage district or other similar entity will not be attributed to a person to the extent that the activities of the district or entity were beyond the control of the person and the wetlands converted are not used by the person for the production of an agricultural commodity or a forage crop for harvest by mechanical means.

(2) The conversion of a wetland, for purposes of this section, is considered to have been completed before December 23, 1985 if before that date, the draining, dredging, leveling, filling or other manipulation, (including any activity that resulted in the impairing or reducing the flow, circulation, or reach of water) was applied to the wetland and made the production of an agricultural commodity possible without further manipulation described herein where such production on the wetland would not otherwise have been possible.

(3) Except as provided under paragraph (b)(4) of this section, the conversion of a wetland is considered to have been commenced before December 23, 1985 if before such date:

(i) Any of the activities described in § 12.2(a)(6) were actually started on the wetland; or

(ii) The person applying for benefits has expended or legally committed substantial funds either by entering into a contract for the installation of any of the activities described in § 12.2(a)(6) or by purchasing construction supplies or materials for the primary and direct purpose of converting the wetland; and

(4) Notwithstanding paragraph (b)(3) of this section, for lands which are within the boundaries of a drainage district or similar entity which has the authority to levy an assessment for any of the activities described in § 12.2(a)(6) on wetlands, the conversion of a wetland in conjunction with the activities of such district or other entity is considered to have been commenced before December 23, 1985, if before such date:

(i) A project drainage plan setting forth in detail the planned drainage measures or other works of improvement had been officially adopted by the district or other entity; and

(ii) The district or other entity started installation of the drainage measures, or legally committed substantial funds toward the conversion of wetlands by entering into a contract for

the installation of any of the activities described in § 12.2(a)(6) or by purchasing construction supplies and materials for the primary and direct purpose of converting wetland; and

(iii) The person applying for benefits can show that the wetland conversion with which the person is associated was the basis of a financial obligation to the district or other entity prior to December 23, 1985, and that a specific assessment for the project construction or a legal obligation to pay a specific assessment was made as to the person's wetlands prior to December 23, 1985.

(5) The purpose of the determination of conversion commencement made under paragraphs (b)(3) and (b)(4) of this section is to implement the legislative intent that those persons who had actually started conversion of wetland or obligated funds for conversion prior to the effective date of the Act (December 23, 1985) would be allowed to complete the conversion so as to avoid unnecessary economic hardship. Accordingly, the following requirements shall apply to all determinations of commencement made under paragraphs (b)(3) or (b)(4).

(i) All persons who believe they have a wetland or converted wetland for which conversion began but was not completed prior to December 23, 1985, must, before September 19, 1988, request ASCS to make a determination of commencement in order to be considered for exemption under this section.

(ii) A person must show that the commenced activity has been actively pursued or the conversion will not be exempt under this section. In this context, *actively pursued* means that efforts toward the completion of the conversion activity have continued on a regular basis since initiation of the conversion, except for delays due to circumstances beyond the person's control. With regard to wetland conversion by a person that is related to the project activities of a drainage district or other similar entity, the application of "actively pursued" begins when the project works are functional for connection and use by the person.

(iii) Any conversion activity considered to be commenced under this section shall lose its exempt status if not completed on or before January 1, 1995.

(iv) Only those wetlands for which the construction has begun or to which the contract or purchased supplies and materials relate may qualify for a determination of commencement. However, in those circumstances where the conversion of wetland does not meet the specific requirements of this paragraph, the person may request a commencement of conversion determination from the Deputy Administrator, State and County Operations, ASCS (the "Deputy Administrator"), upon a showing that undue economic hardship will result because of substantial financial obligations incurred prior to December 23, 1985, for the primary and direct purpose of converting the wetland.

(6) *Mitigation through restoration of another converted wetland.* (i) No person shall be determined to be ineligible under § 12.4 as the result of the conversion of a wetland that is frequently cropped (a wetland farmed more often than not, as determined from ASCS crop history data) or for the production of an agricultural commodity on a converted wetland that was converted between December 23, 1985 and November 28, 1990, if the wetland values and functions are mitigated through the restoration of a converted wetland, that was converted prior to December 23, 1985. Such mitigation will allow a person to produce agricultural commodities on the converted wetland without being ineligible for future benefits if such restoration:

(A) Is in accordance with a restoration plan approved by SCS with the agreement of the U.S. Fish and Wildlife Service, as described in § 12.30(b);

(B) Is in advance of, or concurrent with, the wetland conversion or the production of an agricultural commodity, as applicable;

(C) Is not at the expense of the federal government, in either supporting the direct or indirect costs of the restoration activity or costs associated with acquiring or securing mitigation sites;

(D) Occurs on lands in the same general area of the local watershed as the

converted wetlands, provided that for purposes of this paragraph, lands in the same general area of the local watershed may include regional mitigation banks;

(E) Is on lands for which the owner has agreed to grant an easement to USDA, recorded on public land records, for the maintenance of the restored wetland for as long as the converted wetland for which the mitigation occurred remains in agricultural use or is not returned to its original wetland classification with equivalent functions and values; and

(F) Provides the equivalent functions and values that will be lost as a result of the wetland conversion. Mitigation acreage will be determined by the SCS State Conservationist, in consultation with the U.S. Fish and Wildlife Service, to replace functional wetland values and may either be less than or more than the converted wetland acreage, but generally not greater than on a one for one acreage basis unless needed to provide equivalent functions and value.

(ii) Mitigation agreements required under paragraph (b)(6)(i) of this section involving greater than a one to one acreage restoration are appealable to SCS under § 12.12.

(7) *Graduated sanctions.* (i) A person who is determined under § 12.4 to be ineligible for benefits as the result of the production of an agricultural commodity on a wetland converted after December 23, 1985, or as the result of the conversion of a wetland after November 28, 1990, may regain eligibility for reduced benefits if—

(A) ASCS determines that the person has not otherwise violated the wetland provisions of this part in the previous 10-year period on any tract or farm owned, operated, or leased by such person, and that such person acted in good faith, without the intent to violate the wetland provisions of this part; and

(B) SCS determines that the person is actively retoring or has restored the converted wetland to the wetland conditions that existed prior to conversion according to a restoration plan and schedule approved by SCS in agreement with the U.S. Fish and Wildlife Service, as described in § 12.30(b).

(ii) After the requirements of paragraph (b)(7)(i) of this section are met, USDA may, in lieu of applying the ineligibility provisions of § 12.4, reduce program benefits by not less than $750 nor more than $10,000 for that crop year depending upon the seriousness of the violation, as determined by ASCS in consideration of relevant factors, such as the information available to the producer prior to the violation, previous land use patterns, the number of wetland acres affected, and the recovery time for full restoration of the wetland values.

(iii) The relief allowed by paragraphs (b)(7) (i) and (ii) of this section may apply retroactively to include the restoration of portions of benefits withheld for violations of the wetland conservation provisions of this part that occurred after December 23, 1985.

(8) *Reliance upon SCS determination for wetland or converted wetland.* A person shall not be ineligible for program benefits as the result of the production of an agricultural commodity on converted wetland or for the conversion of a wetland if such action was taken in reliance on an incorrect determination by SCS as to the status of such land. If the error caused the person to make a substantial financial investment, as determined by the appropriate agency of USDA, for the conversion of a wetland, the person may be relieved of ineligibility for actions related to that portion of the converted wetland for which the substantial financial investment was expended in conversion activities. The relief available under this paragraph shall not apply to the production of an agricultural commodity or to actions related to the conversion of wetland that take place after SCS informs the person of the error, or to situations in which the person knew or reasonably should have known that the determination was in error.

(9) It is the responsibility of the person seeking an exemption related to converted wetlands under this section to provide evidence, such as receipts, crop history data, drawings, plans or similar information, for purposes of determining whether the conversion or other action is exempt in accordance with this section.

[52 FR 35200, Sept. 17, 1987; 53 FR 3999, Feb. 11, 1988, as amended at 56 FR 18637, 18638, Apr. 23, 1991; 56 FR 23735, May 23, 1991]

§ 12.6 Administration.

(a) *General.* A determination of ineligibility for benefits in accordance with the provisions of this part shall be made by the agency of the Department to which the person has applied for benefits. All determinations required to be made under the provisions of this part shall be made by the agency responsible for making such determinations, as provided in this section.

(b) *Administration by ASCS.* (1) The provisions of this part which are applicable to ASCS will be administered under the general supervision of the Administrator, ASCS, and shall be carried out in the field in part by State ASC committees (STC) and county ASC committees (COC).

(2) The Deputy Administrator may determine any question arising under the provisions of this part which are applicable to ASCS and may reverse or modify any determination of eligibility with respect to programs administered by ASCS made by an STC or COC or any other ASCS office or ASCS official (except the Administrator) in connection with the provisions of this part.

(3) ASCS shall make the following determinations which are required to be made in accordance with this part:

(i) Whether a person produced an agricultural commodity on a particular field as determined under § 12.4(e);

(ii) The establishment of field boundaries as described in § 12.2(a)(14);

(iii) Whether land was planted to an agricultural commodity in any of the years, 1981 through 1985, for the purposes of § 12.5(a)(1);

(iv) Whether to allow a person to exchange certain crop acreage bases (CAB) between CAB's with crops that leave a high residue, if recommended by SCS for inclusion in the conservation plan.

(v) Whether land was set aside, diverted or otherwise not cultivated under a program administered by the Secretary for any crop to reduce production of an agricultural commodity under § 12.4(e) and § 12.5(a)(1);

(vi) Whether for the purposes of § 12.9, the production of an agricultural commodity on highly erodible land or converted wetland by a landlord's tenant or sharecropper is required under the terms and conditions of the agreement between the landlord and such tenant or sharecropper and

(vii) Whether the conversion of a particular wetland was commenced before December 23, 1985, for the purposes of § 12.5(b) (3) or (4).

(viii) Whether the conversion of a wetland was caused by a third party under § 12.5(b)(1)(iv)(D).

(ix) Whether certain violations were made in good faith. County Office good faith determinations shall be reviewed by the ASCS District Director if any of the following conditions apply to the case:

(A) The wetland was officially certified by SCS,

(B) USDA met with the producer to discuss the location of the wetland,

(C) The producer was involved in a previous swampbuster violation issue, or

(D) The wetland is in an uncropped field, and conversion brought new land into production through extensive modification of vegetation and hydrology.

(x) The determination of the amount of reduction in benefits based on the seriousness of the violation, based on technical information provided by SCS and FWS.

(4) A representative number of farms selected in accordance with instructions issued by the Deputy Administrator shall be inspected by an authorized representative of ASCS to determine compliance with any requirement specified in this part as a prerequisite for obtaining program benefits.

(5) ASCS will consult with U.S. Fish and Wildlife Service on pending commenced or third party determinations.

(6) ASCS shall maintain in its county offices a public listing of the farms or tracts that have a certified determination of wetland or converted wetland status.

(c) *Administration by SCS.*

(1) The provisions of this part that are applicable to SCS shall be administered under the general supervision of the Deputy Chief for Programs, and shall be carried out in the field by the state conservationist, area conservationist, and district conservationist.

(2) SCS shall make the following determinations which are required to be made in accordance with this part:

(i) Whether land is highly erodible or is a wetland or a converted wetland in accordance with the provisions of this part;

(ii) Whether highly erodible land is predominant on a particular field under § 12.4(b);

(iii) Whether the conservation plan that a person is actively applying is based on the local SCS field office technical guide and is approved by—

(A) The CD, in consultation with local ASC committees and SCS, or

(B) By SCS;

(iv) Whether the conservation system that a person is using has been approved by the CD under § 12.5(a)(3) or, in an area not within a CD, a conservation system approved by the SCS to be adequate for the production of an agricultural commodity on highly erodible land;

(v) Whether production of an agricultural commodity on a wetland is possible as a result of natural conditions and is possible without action by the producer that destroys a natural wetland characteristic; and

(vi) Whether the actions of a person with respect to the production of an agricultural commodity on converted wetland would have only a minimal impact on the hydrological and biological aspects of wetland.

(vii) Whether an approved conservation plan is being actively applied on highly erodible fields in accordance with the schedule specified therein or whether a failure to apply the plan is technical and minor in nature, due to circumstances beyond the control of the person, or whether a temporary variance from the requirements of the plan should be granted.

(viii) Whether an approved conservation system is being used on a highly erodible field.

(ix) Whether the conversion of a wetland is for the purpose or has the effect of making the production of an agricultural commodity possible.

(x) Whether a converted wetland is abandoned.

(xi) Whether the planting of an agricultural commodity on a wetland is possible under natural conditions.

(xii) Whether maintenance of existing drainage of a wetland described in § 12.32(a)(3) exceeds the scope and effect of the original drainage.

(xiii) Whether a plan and schedule for the restoration of a converted wetland will be approved and whether the restoration of a converted wetland is accomplished according to the approved restoration plan and schedule.

(xiv) Whether all pertinent data relating to the determination of a violation and severity of a violation has been provided to ASCS for making graduated sanctions determinations.

(3) SCS will provide such other technical assistance for implementation of the provisions of this part as is determined to be necessary.

(4) A person may obtain a highly erodible land or wetland determination by making a written request on Form AD 1026. The determination will be made in writing, and a copy will be provided to the person.

(i) A determination of whether or not an area meets the highly erodible land or wetland criteria may be made by the district conservationist based upon existing records or other information and without the need for an on-site determination. This determination will be made, if practicable, within 15 calendar days after receipt of the written request.

(ii) An on-site determination as to whether an area meets the applicable criteria shall be made by the district conservationist if the person has disagreed with the determination made under paragraph (c)(4)(i) of this section, or if adequate information is not otherwise available to the district conservationist on which to make a determination.

(iii) An on-site determination, where applicable, will be made as soon as possible, but no later than 60 calendar days following a request for such a determination unless site conditions are unfavorable for the evaluation of soils or vegetation in which case the time

period may be extended by the district conservationist until site conditions permit an adequate evaluation.

(iv) With regard to wetland determinations, if an area is continuously inundated or saturated for long periods of time during the growing season to such an extent that access by foot to make a determination of predominance of hydric soils or prevalence of hydrophytic vegetation is not feasible, the area will be determined to be a wetland.

(5) Persons who are adversely affected by a determination made under this section and believe that the requirements of this part were improperly applied may appeal, under § 12.12 of this part, any determination by SCS.

(d) *Administration by FmHA.* (1) The provisions of this part which are applicable to FmHA will be administered under the general supervision of the FmHA Administrator through FmHA's State, district, and county offices.

(2) FmHA shall determine whether the proceeds of a farm loan made, insured or guaranteed by FmHA will be used for a purpose that will contribute to excessive erosion of highly erodible land or to the conversion of wetland.

(e) *Administration by FCIC.* The provisions of this part which are applicable to FCIC will be administered under the general supervision of the Manager, FCIC.

(f) *Administration by ES.* The Extension Service shall coordinate the related information and eduction program for the Department concerning implementation of this rule.

[52 FR 35200, Sept. 17, 1987, as amended at 56 FR 18639, Apr. 23, 1991]

§ 12.7 Certification.

(a) In order for a person to be determined to be eligible for any of the benefits specified in § 12.4:

(1) It must be determined by SCS whether any farm in which the person applying for the benefits has an interest contains highly erodible land, wetland or converted wetland;

(2) The person applying for the benefits must certify in writing on Form AD-1026 that such person will not produce an agricultural commodity on highly erodible land, or designate such land as conservation use; or plant an agricultural commodity on a converted wetland; or convert a wetland in order to make possible the production of an agricultural commodity during the crop year in which the person is seeking such benefits, unless such actions are exempt, under § 12.5, from the provisions of § 12.4 of this part;

(3) The person applying for a FmHA insured or guaranteed farm loan must certify that such person shall not use the proceeds of the loan for a purpose that will contribute to excessive erosion on highly erodible land or to conversion of wetlands for the purpose, or to have the effect, of making the production of an agricultural commodity possible; and

(4) The person applying for the benefits must authorize and provide representatives of the Department access to all land in which such person has an interest for the purpose of verifying any such certification.

(b) Each agency of the Department shall make all certifications received by such agency and the results of investigations concerning such certifications available to other agencies.

(c) A certification made in accordance with this section does not relieve any person from compliance with the provisions of this part.

[52 FR 35200, Sept. 17, 1987, as amended at 56 FR 18639, Apr. 23, 1991]

§ 12.8 Affiliated persons.

(a) For purposes of this part, the following persons are considered to be "affiliated" and, in addition, the actions of such persons will be considered for the purposes specified in this part to be the actions of the person who has requested benefits from the Department:

(1) The spouse and minor child of such person and/or guardian of such child;

(2) Any corporation in which the person is a stockholder, shareholder, or owner of more than 20 percent interest in such corporation;

(3) Any partnership, joint venture, or other enterprise in which the person has an ownership interest or financial interest; and

(4) Any trust in which the person or any person listed in paragraphs (a)(1) through (a)(3) of this section is a beneficiary or has a financial interest.

(b) If the person who has requested benefits from the Department is a corporation, partnership, or other joint venture, then, for purposes of applying paragraph (a) of this section, any participant or stockholder therein, except for persons with a 20 percent or less share in a corporation, shall also be considered to be the person applying for benefits from the Department.

§ 12.9 Landlords and tenants.

(a) *Landlord eligiblity.* (1) Except as provided in paragraph (a)(2) of this section, the ineligibility of a tenant or sharecropper for benefits (as determined under § 12.4) shall not cause a landlord to be ineligible for USDA program benefits accruing with respect to land other than those in which the tenant or sharecropper has an interest.

(2) Paragraph (a)(1) of this section shall not be applicable to a landlord if the production of an agricultural commodity on highly erodible land or converted wetland by the landlord's tenant or sharecropper is required under the terms and conditions of the agreement between the landlord and such tenant or sharecropper and such agreement was entered into after December 23, 1985 or if the landlord has acquiesced in such activities by the tenant or sharecropper.

(b) *Tenant or renter eligibility.* (1) The ineligibility of a tenant or renter may be limited to the program benefits listed in § 12.4(c) accruing with respect to only the farm on which the violation occurred:

(i) The tenant or renter shows that a good faith effort was made to comply by developing an approved conservation plan for the highly erodible land in a timely manner and prior to any violation of the provisions of this part; and

(ii) The owner of such farm refuses to apply such a plan and prevents the tenant or renter from implementing certain practices that are a part of the approved conservation plan; and

(iii) ASCS determines that the lack of compliance is not a part of a scheme or device as described in § 12.10.

(2) If relief is granted under paragraph (b)(1) of this section, the tenant or renter must actively apply those conservation treatment measures that are determined to be within the control of the tenant or renter.

[52 FR 35200, Sept. 17, 1987, as amended at 56 FR 18639, Apr. 23, 1991]

§ 12.10 Scheme or device.

All or any part of the benefits listed in § 12.4 otherwise due a person from the Department may be withheld or required to be refunded if the person adopts or participates in adopting any scheme or device designed to evade, or which has the effect of evading, the provisions of this part. Such acts shall include, but are not limited to, concealing from the Department any information having a bearing on the application of the provisions of this part or submitting false information to the Department or creating entities for the purpose of concealing the interest of a person in a farming operation or to otherwise avoid compliance with the provisions of this part. Such acts shall also include acquiescence in, approval of or assistance to acts which have the effect of, or the purpose of, circumventing these regulations.

[52 FR 35200, Sept. 17, 1987, as amended at 56 FR 18640, Apr. 23, 1991]

§ 12.11 Action based upon advice or action of Department.

The provisions of part 790 of this Title, as amended, relating to performance based upon the action or advice of a County Comittee (COC) or State Committee (STC) shall be applicable to the provisions of this part. In addition, if it is determined by the appropriate USDA agency that the action of a person which would form the basis of any ineligibility under this part was taken by such person in good faith reliance on erroneous advice, information, or action of any other authorized representative of USDA, the appropriate agency may make such benefits available to the extent that similar relief would be allowed under 7 CFR part 790.

[52 FR 35200, Sept. 17, 1987, as amended at 56 FR 18640, Apr. 23, 1991]

§ 12.12 Appeals.

Any person who has been or would be denied program benefits in accordance with § 12.4 as the result of any determination made in accordance with the provisions of this part may obtain a review of such determination in accordance with the administrative appeal procedures of the agency which rendered such determination. Agency appeal procedures are contained in the Code of Federal Regulations as follows: ASCS, 7 CFR part 780; SCS, 7 CFR part 614; FmHA, 7 CFR part 1900, subpart B; and FCIC, 7 CFR 400.90.

Subpart B—Highly Erodible Land Conservation

§ 12.20 SCS responsibilities regarding highly erodible land.

In implementing the provisions of this part, SCS shall, to the extent practicable:

(a) Develop and maintain criteria for identifying highly erodible lands;

(b) Prepare and make available to the public lists of highly erodible soil map units;

(c) Make soil surveys for purposes of identifying highly erodible land; and

(d) Provide technical guidance to conservation districts which approve conservation plans and systems, in consultation with local county ASC committees and SCS, for the purposes of this part.

§ 12.21 Identification of highly erodible lands criteria.

(a) Soil map units and an erodibility index will be used as the basis for identifying highly erodible land. The erodibility index for a soil is determined by dividing the potential average annual rate of erosion for each soil by its predetermined soil loss tolerance (T) value. The T value represents the maximum annual rate of soil erosion that could occur without causing a decline in long-term productivity.

(1) The potential average annual rate of sheet and rill erosion is estimated by multiplying the following factors of the Universal Soil Loss Equation (USLE):

(i) Rainfall and runoff (R),

(ii) The degree to which the soil resists water erosion (K), and

(iii) The function (LS), which includes the effects of slope length (L) and steepness (S).

(2) The potential average annual rate of wind erosion is estimated by multiplying the following factors of the Wind Erosion Equation (WEQ): Climatic characterization of windspeed and surface soil moisture (C) and the degree to which soil resists wind erosion (I).

(3) The USLE is explained in the U.S. Department of Agriculture Handbook 537, "Predicting Rainfall Erosion Losses." The WEQ is explained in the paper by "Woodruff, N.P. and F.H. Siddaway, 1965. "A Wind Erosion Equation," Soil Science Society of America Proceedings, Vol. 29, No. 5, Pages 602-608. Values for all the factors used in these equations are contained in the SCS field office technical guide and the references which are a part of the guide.

(b) A soil map unit subject to significant erosion by either water or by wind shall be determined to be highly erodible if either the RKLS/T *or* the CI/T value for the map unit equals or exceeds 8.

(c) Whenever a soil map unit description contains a range of a slope length and steepness characteristics that produce a range of LS values which result in RKLS/T quotients both above and below 8, the soil map unit will be entered on the list of highly erodible soil map units as "potentially highly erodible." The final determination of erodibility for an individual field containing these soil map unit delineations will be made by an on-site investigation.

§ 12.22 Highly erodible field determination criteria.

(a) Highly erodible land shall be considered to be predominant on a field if either:

(1) 33.33 percent or more of the total field acreage is identified as soil map units which are highly erodible; or

(2) 50 or more acres in such field are identified as soil map units which are highly erodible.

(b) A person may request the modification of field boundaries for the purpose of excluding highly erodible land from a field. Such a request must be submitted to, and is subject to the approval of, ASCS.

(c) Small areas of noncropland within or adjacent to the boundaries of existing highly erodible crop fields such as abandoned farmsteads, areas around filled or capped wells, rock piles, trees or brush which are converted to cropland are considered to meet the requirement of § 12.5(a)(2) if they are included in an approved conservation plan for the entire highly erodible field.

[52 FR 35200, Sept. 17, 1987, as amended at 56 FR 18640, Apr. 23, 1991]

§ 12.23 Conservation plans and conservation systems.

(a) A conservation plan or a conservation system developed for the purposes of § 12.5(a) must be based on and in conformity with the SCS field office technical guide. For highly erodible croplands which were in production prior to December 23, 1985, the applicable conservation systems in the field office technical guide are designed to achieve substantial reductions in soil erosion, taking into consideration economic and technical feasibility and other resource related factors. For highly erodible lands that are converted from native vegetation, i.e., rangeland or woodland, to crop production after December 23, 1985, the applicable conservation systems in the field office technical guide are designed to control soil losses to a level that will attain or approximate the soil loss tolerance level. Any conservation plans or systems that were approved prior to February 11, 1988, are deemed to be in compliance with this paragraph.

(b) Any person who owns or operates highly erodible land that was under a Conservation Reserve Program contract as authorized by section 1231 of the Food Security Act of 1985, as amended, shall have 2 years after the expiration or termination of the contract to fully apply a conservation system if the conservation plan for such land requires the installation of structural measures for the production of an agricultural commodity. SCS officials may extend this period one additional year for circumstances beyond the control of the person.

(c) SCS, in providing assistance to a person for the preparation or revision of a conservation plan under this part, will provide such person with information concerning cost effective and applicable erosion control alternatives, crop flexibility, base adjustment or other conservation assistance options that may be available.

(d) Persons who require SCS assistance for the development of a conservation plan or the installation of a conservation system are encouraged to request this assistance well in advance of deadline dates for compliance; otherwise the person may not be able to comply with these provisions and maintain eligibility for USDA program benefits.

(e) Conservation districts approve or disapprove conservation plans or conservation systems after SCS determines that the plans or systems conform to the SCS field office technical guide. If a conservation district fails, without due cause, to act on a request for conservation plan or conservation system approval within 45 days, or if no conservation district exists, SCS will approve or disapprove, as appropriate, the conservation plan or system in question.

(f) A person is considered to be actively applying a conservation plan for purposes of § 12.5(a) if the plan is being applied according to the schedule specified in the plan and the applied practices are properly operated and maintained. It is the responsibility of the person to:

(1) Annually certify that the conservation plan is being actively applied after January 1, 1990 and

(2) Arrange for a revision of the conservation plan with SCS, if changes are made in land use, crop rotation or management, conservation practices, or in the original schedule of practice installation.

(g) Persons who are adversely affected by the determinations made under this subpart and believe that the re-

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quirements of this subpart were improperly applied may appeal the decision to SCS under § 12.12.

[52 FR 35200, Sept. 17, 1987, as amended at 53 FR 3999, Feb. 11, 1988; 56 FR 18640, Apr. 23, 1991]

Subpart C—Wetland Conservation

§ 12.30 SCS responsibilities regarding wetlands.

(a) In carrying out the provisions of this part, SCS shall:

(1) Make available to the public an approved county list of hydric soil map units, which is based upon the National List of Hydric Soils;

(2) Maintain a list of hydrophytic vegetation derived from the National List of Plant Species That Occur in Wetlands;

(3) Consult with the Fish and Wildlife Service on determinations of exemptions made under §12.5(b) and on matters relating to the identification of wetland,

(4) Oversee the development and application of criteria to identify hydric soils in consultation with the National Technical Committee for Hydric Soils, and

(5) Consult with the Fish and Wildlife Service and others in developing the National List of Plant Species that Occur in Wetlands and in providing guidance in applying the lists of hydric soils and plant species to matters concerning wetland and converted wetland.

(b) Technical determinations regarding the restoration of converted wetlands and the development of restoration plans under this part will be made through the agreement of the local representative of SCS and a representative of the U.S. Fish and Wildlife Service. If agreement cannot be reached at the local level, such determinations will be referred to the SCS state conservationist who will, in making such determinations, consult with the U.S. Fish and Wildlife Service. All determinations made by SCS state conservationists under this paragraph will be reported by the state conservationists and the representatives of the U.S. Fish and Wildlife Service to their respective national offices.

(c) SCS determinations of wetland status and any applicable exemptions granted under this part shall be delineated on a map of the farm or tract. Notification of the wetland determination, a copy of the wetland delineation and the SCS appeal procedures shall be provided to each person who completes a Form AD-1026. The wetland determination and wetland delineation shall be certified as final by the SCS official 45 days after providing the person notice or, if appeal is filed with SCS, after a final appeal decision is made by SCS.

(d) An on-site investigation of a wetland or converted wetland site will be made by SCS before any benefits are withheld and the person shall be provided an opportunity to appeal the on-site determination to SCS if the on site determination differs from the original determination, or the person was not provided an opportunity to appeal the original determination. Such action by SCS shall be considered a review of prior determinations and official certification of the delineation. A copy of the certified final determination and the wetland delineation shall be provided to ASCS, who will record the information on the official USDA farm map and on a public list. Wetland determinations made prior to November 28, 1990 shall be considered to be final and certified if they meet the criteria of § 12.31.

[52 FR 35200, Sept. 17, 1987, as amended at 56 FR 18640, Apr. 23, 1991]

§ 12.31 Wetland identification criteria.

(a) *Hydric soils.* (1) SCS shall identify hydric soils through the use of published soil maps which reflect soil surveys completed by SCS. If a published soil map is unavailable for a given area, SCS may use unpublished soil maps which were made according to the specifications of the National Cooperative Soil Survey or may conduct an on-site evaluation of the land.

(2) SCS shall determine whether an area of a field or other parcel of land has a predominance of hydric soils that are inundated or saturated as follows:

(i) If a soil map unit has hydric soil as all or part of its name, that soil map

unit or portion of the map unit related to the hydric soil shall be determined to have a predominance of hydric soils;

(ii) If a soil map unit is named for a miscellaneous area that meets the criteria for hydric soils (i.e., riverwash, playas, beaches, or water) the soil map unit shall be determined to have a predominance of hydric soils; or

(iii) If a soil map unit contains inclusions of hydric soils, that portion of the soil map unit identified as hydric soil shall be determined to have a predominance of hydric soils.

(3) *List of hydric soils.* (i) Hydric soils are those soils which meet criteria set forth in the publication "Hydric Soils of the United States 1985" which was developed by the National Technical Committee for Hydric Soils and which is incorporated by reference. This publication may be obtained upon request by writing the Soil Conservation Service, U.S. Department of Agriculture, P.O. Box 2890, Washington, DC 20013, and is available for inspection at the Office of the Federal Register Information Center, 800 North Capitol Street NW., suite 700, Washington, DC 20408. Incorporation of this publication by reference was approved by the Director of the Federal Register on June 24, 1986. The materials are incorporated as they exist on the date of the approval and a notice of any change in these materials will be published in the FEDERAL REGISTER.

(ii) An official list of hydric soil map units shall be maintained at the local SCS office and shall include—

(A) All soils from the National List of Hydric Soils that can be found in that field office area, and

(B) Any soil map units or areas which the State conservationist determines to meet such hydric soil criteria.

(iii) Any deletions of a hydric soil unit from the hydric soil map unit list must be made according to the established procedure contained in the publication "Hydric Soils of the United States, 1985" for adding or deleting soils from the National List of Hydric Soils.

(b) *Hydrophytic vegetation.* Hydrophytic vegetation consists of plants growing in water or in a substrate that is at least periodically deficient in oxygen during a growing season as a result of excessive water content.

(1) A plant shall be considered to be a plant species that occurs in wetland if such plant is listed in the National List of Plant Species that Occur in Wetlands. The publication may be obtained upon request from the U.S. Fish & Wildlife Service, National Wetland Inventory, Monroe Bldg. Suite 101, 9720 Executive Center Drive, Saint Petersburg, Florida 33702.

(2) For the purposes of the definition of "wetland" in § 12.2(a)(29) of this part, land shall be determined to have a prevalence of hydrophytic vegetation if:

(i) SCS determines through the use of the formula specified in paragraph (b)(3) of this section that under normal circumstances such land supports a prevalence of hydrophytic vegetation. The term "normal circumstances" refers to the soil and hydrologic conditions that are normally present, without regard to whether the vegetation has been removed; or

(ii) In the event the vegetation on such land has been altered or removed, SCS will determine if a prevalence of hydrophytic vegetation typically exists in the local area on the same hydric soil under the same hydrological conditions.

(3) The determination of prevalence of hydrophytic vegetation will be made in accordance with the following provisions:

(i) *Plant classification.* The National List of Plant Species that Occur in Wetlands classifies vascular plant species found in the United States and Puerto Rico into five indicator groups based upon their expected occurrence in wetlands. Obligate species are expected to occur in wetlands more than 99 percent of the time; facultative wet species, 66 to 99 percent of the time; facultative species, 33 to 65 percent of the time; facultative upland species, 1 to 32 percent of the time; and upland species, less than 1 percent of the time.

(ii) *Ecological indices.* The following ecological index values have been assigned the plant indicator groups for use in the formula to determine prevalence:

Indicator group	Ecological index
Obligate	1.
Facultative wet	2.
Facultative	3.
Facultative Upland	4.
Upland	5 (all plants not on the National List of Plant Species That Occur in Wetlands).

(iii) *Specific criteria.* If the area in question has met the criteria for hydric soils that are inundated or saturated, SCS will either visually or through the use of line transects, estimate the frequency of occurrence of plants within the community identified by indicator group to arrive at a prevalence index to indicate whether or not a prevalence of hydrophytic vegetation exists.

(iv) (A) The following formula shall be used to calculate the prevalence index, where:

PI = Prevalence Index.
F = Frequency of Occurrence of Plant Species.
n(1-5)= Ecological Index Values for Indicator Groups.

$$PI = \frac{(1 \times \Sigma F_1) + (2 \times \Sigma F_2) + (3 \times \Sigma F_3) + (4 \times \Sigma F_4) + (5 \times \Sigma F_5)}{\Sigma (F_1 + F_2 + F_3 + F_4 + F_5)}$$

(B) A mean prevalence index (PI) value of less than 3.0 shall indicate that the area exhibits a prevalence of hydrophytic vegetation.

(c) *Artificial wetland.* (1) An area shall be considered to be an artificial wetland for the purposes of § 12.5(b)(1)(iv) (A) and (B) of this part if such area was formerly nonwetland or wetland on which conversion was started or completed before December 23, 1985, but now meets wetland criteria due to the action of man.

(2) Notwithstanding the provisions of paragraph (c)(1) of this section, wetlands which are created in order to mitigate the loss of other wetlands as a result of irrigation, recreation, municipal water, flood control or other similar projects shall not be considered to be artificial wetland for the purposes of § 12.5(b)(1)(iv) (A) and (B) of this part.

(d) For the purposes of § 12.5(b)(1)(iii) of this part, SCS, in consultation with the Fish and Wildlife Service, U.S. Department of the Interior, shall determine whether the effect of any action of a person associated with the production of an agricultural commodity on converted wetland has a minimal effect on the hydrological and biological aspect of wetlands. Such determination shall be based upon an environmental evaluation analyzing the effect of the action on the maintenance of wetland values of the particular wetland under consideration and other related wetlands, and will be made through an on-site evaluation. A request for such determination will be made prior to the beginning of activities that would convert the wetland. If a person has converted a wetland and then seeks a determination that the effect of such conversion on wetland was minimal, the burden will be upon the person to demonstrate to the satisfaction of SCS that the effect was minimal. The production of an agricultural commodity on any portion of a converted wetland in conformance with a minimal effect determination by SCS is exempt under § 12.5(b) of this part. However, any additional action of a person that will change the hydrological or biological characteristics of a wetland for which a minimal effect determination has been made shall be reported to SCS for a determination of whether the effect continues to be minimal. The loss of a minimal effect determination will cause a person who produces an agricultural commodity on the converted wetland after such change in status to be ineligible, under § 12.4, for program benefits. In situations where the wetland values and functions are replaced by the restoration of a converted wetland that was converted prior to December 23, 1985, or other mitigation in accordance with a restoration or mitigation plan and schedule

approved by SCS in agreement with the U.S. Fish and Wildlife Service, as described in § 12.30(b), the exemption provided by the determination will be effective after approval of the plan and as set forth in the plan.

[52 FR 35200, Sept. 17, 1987, as amended at 53 FR 3999, Feb. 11, 1988; 56 FR 18640, Apr. 23, 1991]

§ 12.32 Converted wetland identification criteria.

(a) Converted wetland shall be identified by determining whether the wetland was altered so as to meet the definition of converted wetland set forth in § 12.2(a)(6). In making this determination, the following factors are to be considered:

(1) Where hydric soils have been used for production of an agricultural commodity and the drainage or other altering activity is not clearly discernable, SCS will compare the site with other sites containing the same hydric soils in a natural condition to determine if the hydric soils can or cannot be used to produce an agricultural commodity under natural conditions. If the soil on the comparison site could not produce an agricultural commodity under natural conditions, the subject wetland will be considered to be converted wetland.

(2) Where woody hydrophytic vegetation has been removed from hydric soils which permits the production of an agricultural commodity, and wetland conditions have not returned as the result of abandonment under § 12.33(b), the area will be considered to be converted wetland.

(3) A pothole or a playa shall not be determined to be converted wetland despite manipulations that occurred prior to December 23, 1985, if that area continues to meet wetland criteria. Any other wetland area that is seasonally flooded or ponded (surface water is present for extended periods especially early in the growing season even though it may be absent by the end of the season in most years) which has been manipulated prior to December 23, 1985 but otherwise continues to meet wetland criteria, shall not be determined to be converted wetland.

(b) A wetland shall not be considered to be converted if:

(1) Production of an agricultural commodity on such land is possible as a result of a natural condition, such as drought, and

(2) It is determined that the actions of the person producing such agricultural commodity does not permanently alter or destroy natural wetland characteristics. Destruction of herbaceous hydrophytic vegetation, (*i.e.*, plants other than woody shrubs or trees) as a result of the production of an agricultural commodity shall not be considered as altering or destroying natural wetland characteristic if such vegetation could and has been allowed to return following cessation of the natural condition which made production of the agricultural commodity possible.

§ 12.33 Use of wetland and converted wetland.

(a) The provisions of § 12.32(a)(3) are intended to protect remaining functional values of the wetlands described therein. Persons may continue to farm such wetlands under natural conditions or as they did prior to December 23, 1985. However, no action can be taken to increase effects on the water regime beyond that which existed on such lands on or before December 23, 1985 unless SCS determines the effect on remaining wetland values would be minimal under § 12.5(b)(1)(iii).

(b) Unless otherwise provided in this part, the production of an agricultural commodity on wetlands that were converted before, or for which the conversion was commenced before, December 23, 1985, is exempted by law from these regulations for the area which was converted or the minimum area the commenced activity could convert. Maintenance or improvement of these converted wetlands for the production of agricultural commodities are not subject to this rule so long as such actions do not bring additional wetland into the production of an agricultural commodity. Additional wetland means any natural wetland or any converted wetland that has reverted to wetland as the result of abandonment of crop production. Abandonment is the cessation of cropping, management or

maintenance operations related to the production of agricultural commodities on converted wetland. Where the cessation of such cropping, management or maintenance operations has occurred, converted wetland is considered to be abandoned unless it is shown that there was no intent to abandon; provided, however, that at the end of five successive years during which there was no crop production, such land shall be determined to be abandoned if the land meets the wetland criteria of § 12.31. Participation in a USDA set-aside, diverted acres, or similar programs shall not be deemed to constitute abandonment. Furthermore, the maintenance of any alteration or manipulation that affects the reach or flow of water made to a wetland that was cropped before December 23, 1985, would not cause a person to be determined to be ineligible under this part, provided that the maintenance does not exceed the scope and effect of the original alteration or manipulation, as determined by SCS, and provided that the area is not abandoned.

[52 FR 35200, Sept. 17, 1987, as amended at 56 FR 18640, Apr. 23, 1991]

§ 12.34 Paperwork Reduction Act assigned number.

The information collection requirements contained in this regulation (7 CFR part 12) have been approved by the Office of Management and Budget under provisions of 44 U.S.C. chaper 35 and have been assigned OMB Number 0560-0004.

[56 FR 18641, Apr. 23, 1991]

PART 14—DETERMINING THE PRIMARY PURPOSE OF CERTAIN PAYMENTS FOR FEDERAL TAX PURPOSES

Sec.
14.1 Purpose.
14.2 Applicability.
14.3 Objective.
14.4 Policy.
14.5 Procedure.
14.6 Criteria for determining the primary purpose of payments with respect to potential exclusion from gross income.
14.7 Non-Federal programs and payments.

AUTHORITY: Sec. 543, Pub. L. 95-600; as amended by sec. 105, Pub. L. 96-222; 26 U.S.C. 126, 1255 and 5 U.S.C. 301.

SOURCE: 45 FR 58507, Sept. 4, 1980, unless otherwise noted.

§ 14.1 Purpose.

(a) Part 14 sets forth criteria to be used by the Secretary of Agriculture in determining the primary purpose of certain payments received by persons under applicable programs. Determining the primary purpose for which applicable payments are made is one step toward the exclusion of all or part of the payments from gross income for Federal income tax purposes.

(b) The criteria set forth in part 14 apply only to the determinations to be made by the Secretary of Agriculture.

§ 14.2 Applicability.

(a) Part 14 applies only to payments received under the programs listed in paragraphs (a) (1) through (10) of this section. Payments received under programs not listed in paragraphs (a) (1) through (10) of this section, are not considered eligible for exclusion from gross income under this part.

(1) The rural clean water program authorized by section 208(j) of the Federal Water Pollution Control Act (33 U.S.C. 1288(j)).

(2) The rural abandoned mine program authorized by section 406 of the Surface Mining Control and Reclamation Act of 1977 (30 U.S.C. 1236).

(3) The water bank program authorized by the Water Bank Act (16 U.S.C. 1301 *et seq.*).

(4) The emergency conservation measures program authorized by title IV of the Agricultural Credit Act of 1978 (16 U.S.C. 2201 *et seq.*).

(5) The agricultural conservation program authorized by the Soil Conservation and Domestic Allotment Act (16 U.S.C. 590a).

(6) The Great Plains conservation program authorized by section 16 of the Soil Conservation and Domestic Allotment Act (16 U.S.C. 590p(b)).

(7) The resource conservation and development program authorized by the Bankhead-Jones Farm Tenant Act and by the Soil Conservation and Domestic Allotment Act (7 U.S.C. 1010; 16 U.S.C. 590a *et seq.*).

any initial session, and the recessing, reconvening, and adjournment thereof; and

(b) To take any other action necessary or appropriate to the discharge of the duties vested in them, consistent with the statutory or other authority under which the Chief of Engineers functions, and with the policies and directives of the Chief of Engineers and the Secretary of the Army.

§ 327.11 Public notice.

(a) Public notice shall be given of any public hearing to be held pursuant to this regulation. Such notice should normally provide for a period of not less than 30 days following the date of public notice during which time interested parties may prepare themselves for the hearing. Notice shall also be given to all Federal agencies affected by the proposed action, and to state and local agencies and other parties having an interest in the subject matter of the hearing. Notice shall be sent to all persons requesting a hearing and shall be posted in appropriate government buildings and provided to newspapers of general circulation for publication. Comments received as form letters or petitions may be acknowledged as a group to the person or organization responsible for the form letter or petition.

(b) The notice shall contain time, place, and nature of hearing; the legal authority and jurisdiction under which the hearing is held; and location of and availability of the draft environmental impact statement or environmental assessment.

PART 328—DEFINITION OF WATERS OF THE UNITED STATES

Sec.

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.

SOURCE: 51 FR 41250, Nov. 13, 1986, unless otherwise noted.

§ 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 through 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 lakes, or 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) through (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) through (6) of this section.

(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.

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.

(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.

(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.

[51 FR 41250, Nov. 13, 1986, as amended at 58 FR 45036, Aug. 25, 1993]

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

PART 329—DEFINITION OF NAVIGABLE WATERS OF THE UNITED STATES

Sec.

329.1 Purpose.
329.2 Applicability.
329.3 General policies.
329.4 General definition.
329.5 General scope of determination.
329.6 Interstate or foreign commerce.
329.7 Intrastate or interstate nature of waterway.
329.8 Improved or natural conditions of the waterbody.
329.9 Time at which commerce exists or determination is made.
329.10 Existence of obstructions.
329.11 Geographic and jurisdictional limits of rivers and lakes.
329.12 Geographic and jurisdictional limits of oceanic and tidal waters.
329.13 Geographic limits: Shifting boundaries.
329.14 Determination of navigability.
329.15 Inquiries regarding determinations.
329.16 Use and maintenance of lists of determinations.

AUTHORITY: 33 U.S.C. 401 *et seq.*

SOURCE: 51 FR 41251, Nov. 13, 1986, unless otherwise noted.

§ 329.1 Purpose.

This regulation defines the term "navigable waters of the United States" as it is used to define authorities of the Corps of Engineers. It also prescribes the policy, practice and procedure to be used in determining the extent of the jurisdiction of the Corps of Engineers and in answering inquiries concerning "navigable waters of the United States." This definition does not apply to authorities under the Clean Water Act which definitions are described under 33 CFR parts 323 and 328.

§ 329.2 Applicability.

This regulation is applicable to all Corps of Engineers districts and divisions having civil works responsibilities.

§ 329.3 General policies.

Precise definitions of "navigable waters of the United States" or "navigability" are ultimately dependent on judicial interpretation and cannot be made conclusively by administrative agencies. However, the policies and criteria contained in this regulation are in close conformance with the tests used by Federal courts and determinations made under this regulation are considered binding in regard to the activities of the Corps of Engineers.

§ 329.4 General definition.

Navigable waters of the United States are those waters that are subject to the ebb and flow of the tide and/or are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce. A determination of navigability, once made, applies laterally over the entire surface of the waterbody, and is not extinguished by later actions or events which impede or destroy navigable capacity.

§ 329.5 General scope of determination.

The several factors which must be examined when making a determination whether a waterbody is a navigable water of the United States are discussed in detail below. Generally, the following conditions must be satisfied:

(a) Past, present, or potential presence of interstate or foreign commerce;

(b) Physical capabilities for use by commerce as in paragraph (a) of this section; and

(c) Defined geographic limits of the waterbody.

§ 329.6 Interstate or foreign commerce.

(a) *Nature of commerce: type, means, and extent of use.* The types of commercial use of a waterway are extremely varied and will depend on the character of the region, its products, and the difficulties or dangers of navigation. It is the waterbody's capability of use by the public for purposes of transportation of commerce which is the determinative factor, and not the time, extent or manner of that use. As discussed in § 329.9 of this part, it is sufficient to establish the potential for commercial use at any past, present, or future time. Thus, sufficient commerce may be shown by historical use of canoes, bateaux, or other frontier craft, as long as that type of boat was common or well-suited to the place and period. Similarly, the particular items of commerce may vary widely, depending again on the region and period. The goods involved might be grain, furs, or other commerce of the time. Logs are a common example; transportation of logs has been a substantial and well-recognized commercial use of many navigable waters of the United States. Note, however, that the mere presence of floating logs will not of itself make the river "navigable"; the logs must have been related to a commercial venture. Similarly, the presence of recreational craft may indicate that a waterbody is capable of bearing some forms of commerce, either presently, in the future, or at a past point in time.

(b) *Nature of commerce: interstate and intrastate.* Interstate commerce may of course be existent on an intrastate voyage which occurs only between places within the same state. It is only necessary that goods may be brought from, or eventually be destined to go to, another state. (For purposes of this regulation, the term "interstate commerce" hereinafter includes "foreign commerce" as well.)

§ 329.7 Intrastate or interstate nature of waterway.

A waterbody may be entirely within a state, yet still be capable of carrying interstate commerce. This is especially clear when it physically connects with a generally acknowledged avenue of interstate commerce, such as the ocean or one of the Great Lakes, and is yet wholly within one state. Nor is it necessary that there be a physically navigable connection across a state boundary. Where a waterbody extends through one or more states, but substantial portions, which are capable of bearing interstate commerce, are located in only one of the states, the entirety of the waterway up to the head (upper limit) of navigation is subject to Federal jurisdiction.

§ 329.8 Improved or natural conditions of the waterbody.

Determinations are not limited to the natural or original condition of the waterbody. Navigability may also be found where artificial aids have been or may be used to make the waterbody suitable for use in navigation.

(a) *Existing improvements: artificial waterbodies.* (1) An artificial channel may often constitute a navigable water of the United States, even though it has been privately developed and maintained, or passes through private property. The test is generally as developed above, that is, whether the waterbody is capable of use to transport interstate commerce. Canals which connect two navigable waters of the United States and which are used for commerce clearly fall within the test, and themselves become navigable. A canal open to navigable waters of the United States on only one end is itself navigable where it in fact supports interstate commerce. A canal or other artificial waterbody that is subject to ebb and flow of the tide is also a navigable water of the United States.

(2) The artificial waterbody may be a major portion of a river or harbor area

or merely a minor backwash, slip, or turning area (see §329.12(b) of this part).

(3) Private ownership of the lands underlying the waterbody, or of the lands through which it runs, does not preclude a finding of navigability. Ownership does become a controlling factor if a privately constructed and operated canal is not used to transport interstate commerce nor used by the public; it is then not considered to be a navigable water of the United States. However, a private waterbody, even though not itself navigable, may so affect the navigable capacity of nearby waters as to nevertheless be subject to certain regulatory authorities.

(b) *Non-existing improvements, past or potential.* A waterbody may also be considered navigable depending on the feasibility of use to transport interstate commerce after the construction of whatever "reasonable" improvements may potentially be made. The improvement need not exist, be planned, nor even authorized; it is enough that potentially they could be made. What is a "reasonable" improvement is always a matter of degree; there must be a balance between cost and need at a time when the improvement would be (or would have been) useful. Thus, if an improvement were "reasonable" at a time of past use, the water was therefore navigable in law from that time forward. The changes in engineering practices or the coming of new industries with varying classes of freight may affect the type of the improvement; those which may be entirely reasonable in a thickly populated, highly developed industrial region may have been entirely too costly for the same region in the days of the pioneers. The determination of reasonable improvement is often similar to the cost analyses presently made in Corps of Engineers studies.

§ 329.9 Time at which commerce exists or determination is made.

(a) *Past use.* A waterbody which was navigable in its natural or improved state, or which was susceptible of reasonable improvement (as discussed in §329.8(b) of this part) retains its character as "navigable in law" even though it is not presently used for commerce, or is presently incapable of such use because of changed conditions or the presence of obstructions. Nor does absence of use because of changed economic conditions affect the legal character of the waterbody. Once having attained the character of "navigable in law," the Federal authority remains in existence, and cannot be abandoned by administrative officers or court action. Nor is mere inattention or ambiguous action by Congress an abandonment of Federal control. However, express statutory declarations by Congress that described portions of a waterbody are non-navigable, or have been abandoned, are binding upon the Department of the Army. Each statute must be carefully examined, since Congress often reserves the power to amend the Act, or assigns special duties of supervision and control to the Secretary of the Army or Chief of Engineers.

(b) *Future or potential use.* Navigability may also be found in a waterbody's susceptibility for use in its ordinary condition or by reasonable improvement to transport interstate commerce. This may be either in its natural or improved condition, and may thus be existent although there has been no actual use to date. Non-use in the past therefore does not prevent recognition of the potential for future use.

§ 329.10 Existence of obstructions.

A stream may be navigable despite the existence of falls, rapids, sand bars, bridges, portages, shifting currents, or similar obstructions. Thus, a waterway in its original condition might have had substantial obstructions which were overcome by frontier boats and/or portages, and nevertheless be a "channel" of commerce, even though boats had to be removed from the water in some stretches, or logs be brought around an obstruction by means of artificial chutes. However, the question is ultimately a matter of degree, and it must be recognized that there is some point beyond which navigability could not be established.

§ 329.11 Geographic and jurisdictional limits of rivers and lakes.

(a) *Jurisdiction over entire bed.* Federal regulatory jurisdiction, and powers of

improvement for navigation, extend laterally to the entire water surface and bed of a navigable waterbody, which includes all the land and waters below the ordinary high water mark. Jurisdiction thus extends to the edge (as determined above) of all such waterbodies, even though portions of the waterbody may be extremely shallow, or obstructed by shoals, vegetation or other barriers. Marshlands and similar areas are thus considered navigable in law, but only so far as the area is subject to inundation by the ordinary high waters.

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

(2) Ownership of a river or lake bed or of the lands between high and low water marks will vary according to state law; however, private ownership of the underlying lands has no bearing on the existence or extent of the dominant Federal jurisdiction over a navigable waterbody.

(b) *Upper limit of navigability.* The character of a river will, at some point along its length, change from navigable to non-navigable. Very often that point will be at a major fall or rapids, or other place where there is a marked decrease in the navigable capacity of the river. The upper limit will therefore often be the same point traditionally recognized as the head of navigation, but may, under some of the tests described above, be at some point yet farther upstream.

§ 329.12 Geographic and jurisdictional limits of oceanic and tidal waters.

(a) *Ocean and coastal waters.* The navigable waters of the United States over which Corps of Engineers regulatory jurisdiction extends include all ocean and coastal waters within a zone three geographic (nautical) miles seaward from the baseline (The Territorial Seas). Wider zones are recognized for special regulatory powers exercised over the outer continental shelf. (See 33 CFR 322.3(b)).

(1) *Baseline defined.* Generally, where the shore directly contacts the open sea, the line on the shore reached by the ordinary low tides comprises the baseline from which the distance of three geographic miles is measured. The baseline has significance for both domestic and international law and is subject to precise definitions. Special problems arise when offshore rocks, islands, or other bodies exist, and the baseline may have to be drawn seaward of such bodies.

(2) *Shoreward limit of jurisdiction.* Regulatory jurisdiction in coastal areas extends to the line on the shore reached by the plane of the mean (average) high water. Where precise determination of the actual location of the line becomes necessary, it must be established by survey with reference to the available tidal datum, preferably averaged over a period of 18.6 years. Less precise methods, such as observation of the "apparent shoreline" which is determined by reference to physical markings, lines of vegetation, or changes in type of vegetation, may be used only where an estimate is needed of the line reached by the mean high water.

(b) *Bays and estuaries.* Regulatory jurisdiction extends to the entire surface and bed of all waterbodies subject to tidal action. Jurisdiction thus extends to the edge (as determined by paragraph (a)(2) of this section) of all such waterbodies, even though portions of the waterbody may be extremely shallow, or obstructed by shoals, vegetation, or other barriers. Marshlands and similar areas are thus considered "navigable in law," but only so far as the area is subject to inundation by the mean high waters. The relevant test is therefore the presence of the mean high tidal waters, and not the general test described above, which generally applies to inland rivers and lakes.

§ 329.13 Geographic limits: Shifting boundaries.

Permanent changes of the shoreline configuration result in similar alterations of the boundaries of the navigable waters of the United States.

Thus, gradual changes which are due to natural causes and are perceptible only over some period of time constitute changes in the bed of a waterbody which also change the shoreline boundaries of the navigable waters of the United States. However, an area will remain "navigable in law," even though no longer covered with water, whenever the change has occurred suddenly, or was caused by artificial forces intended to produce that change. For example, shifting sand bars within a river or estuary remain part of the navigable water of the United States, regardless that they may be dry at a particular point in time.

§ 329.14 Determination of navigability.

(a) *Effect on determinations.* Although conclusive determinations of navigability can be made only by federal Courts, those made by federal agencies are nevertheless accorded substantial weight by the courts. It is therefore necessary that when jurisdictional questions arise, district personnel carefully investigate those waters which may be subject to Federal regulatory jurisdiction under guidelines set out above, as the resulting determination may have substantial impact upon a judicial body. Official determinations by an agency made in the past can be revised or reversed as necessary to reflect changed rules or interpretations of the law.

(b) *Procedures of determination.* A determination whether a waterbody is a navigable water of the United States will be made by the division engineer, and will be based on a report of findings prepared at the district level in accordance with the criteria set out in this regulation. Each report of findings will be prepared by the district engineer, accompanied by an opinion of the district counsel, and forwarded to the division engineer for final determination. Each report of findings will be based substantially on applicable portions of the format in paragraph (c) of this section.

(c) *Suggested format of report of findings:*

(1) Name of waterbody:

(2) Tributary to:

(3) Physical characteristics:

(i) Type: (river, bay, slough, estuary, etc.)

(ii) Length:

(iii) Approximate discharge volumes: Maximum, Minimum, Mean:

(iv) Fall per mile:

(v) Extent of tidal influence:

(vi) Range between ordinary high and ordinary low water:

(vii) Description of improvements to navigation not listed in paragraph (c)(5) of this section:

(4) Nature and location of significant obstructions to navigation in portions of the waterbody used or potentially capable of use in interstate commerce:

(5) Authorized projects:

(i) Nature, condition and location of any improvements made under projects authorized by Congress:

(ii) Description of projects authorized but not constructed:

(iii) List of known survey documents or reports describing the waterbody:

(6) Past or present interstate commerce:

(i) General types, extent, and period in time:

(ii) Documentation if necessary:

(7) Potential use for interstate commerce, if applicable:

(i) If in natural condition:

(ii) If improved:

(8) Nature of jurisdiction known to have been exercised by Federal agencies if any:

(9) State or Federal court decisions relating to navigability of the waterbody, if any:

(10) Remarks:

(11) Finding of navigability (with date) and recommendation for determination:

§ 329.15 Inquiries regarding determinations.

(a) Findings and determinations should be made whenever a question arises regarding the navigability of a waterbody. Where no determination has been made, a report of findings will be prepared and forwarded to the division engineer, as described above. Inquiries may be answered by an interim reply which indicates that a final agency determination must be made by the division engineer. If a need develops for an energency determination, district engineers may act in reliance on a find-

ing prepared as in section 329.14 of this part. The report of findings should then be forwarded to the division engineer on an expedited basis.

(b) Where determinations have been made by the division engineer, inquiries regarding the *navigability* of specific portions of waterbodies covered by these determinations may be answered as follows:

This Department, in the administration of the laws enacted by Congress for the protection and preservation of the navigable waters of the United States, has determined that _____ (River) (Bay) (Lake, etc.) is a navigable water of the United States from _____ to _____. Actions which modify or otherwise affect those waters are subject to the jurisdiction of this Department, whether such actions occur within or outside the navigable areas.

(c) Specific inquiries regarding the *jurisdiction* of the Corps of Engineers can be answered only after a determination whether (1) the waters are navigable waters of the United States or

(2) If not navigable, whether the proposed type of activity may nevertheless so affect the navigable waters of the United States that the assertion of regulatory jurisdiction is deemed necessary.

§ 329.16 Use and maintenance of lists of determinations.

(a) Tabulated lists of final determinations of navigability are to be maintained in each district office, and be updated as necessitated by court decisions, jurisdictional inquiries, or other changed conditions.

(b) It should be noted that the lists represent only those waterbodies for which determinations have been made; absence from that list should not be taken as an indication that the waterbody is not navigable.

(c) Deletions from the list are not authorized. If a change in status of a waterbody from navigable to non-navigable is deemed necessary, an updated finding should be forwarded to the division engineer; changes are not considered final until a determination has been made by the division engineer.

PART 330—NATIONWIDE PERMIT PROGRAM

Sec.

330.1 Purpose and policy.
330.2 Definitions.
330.3 Activities occurring before certain dates.
330.4 Conditions, limitations, and restrictions.
330.5 Issuing, modifying, suspending, or revoking nationwide permits and authorizations.
330.6 Authorization by nationwide permit.
APPENDIX A TO PART 330—NATIONWIDE PERMITS AND CONDITIONS

AUTHORITY: 33 U.S.C. 401 et seq.; 33 U.S.C. 1344; 33 U.S.C. 1413.

SOURCE: 56 FR 59134, Nov. 22, 1991, unless otherwise noted.

§ 330.1 Purpose and policy.

(a) *Purpose.* This part describes the policy and procedures used in the Department of the Army's nationwide permit program to issue, modify, suspend, or revoke nationwide permits; to identify conditions, limitations, and restrictions on the nationwide permits; and, to identify any procedures, whether required or optional, for authorization by nationwide permits.

(b) *Nationwide permits.* Nationwide permits (NWPs) are a type of general permit issued by the Chief of Engineers and are designed to regulate with little, if any, delay or paperwork certain activities having minimal impacts. The NWPs are proposed, issued, modified, reissued (extended), and revoked from time to time after an opportunity for public notice and comment. Proposed NWPs or modifications to or reissuance of existing NWPs will be adopted only after the Corps gives notice and allows the public an opportunity to comment on and request a public hearing regarding the proposals. The Corps will give full consideration to all comments received prior to reaching a final decision.

(c) *Terms and conditions.* An activity is authorized under an NWP only if that activity and the permittee satisfy all of the NWP's terms and conditions. Activities that do not qualify for authorization under an NWP still may be authorized by an individual or regional general permit. The Corps will consider

DEPARTMENT OF DEFENSE

Corps of Engineers, Department of the Army

33 CFR Parts 323 and 328

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 110, 112, 116, 117, 122, 230, 232 and 401

Proposed Rule for the Clean Water Act Regulatory Programs of the Army Corps of Engineers and the Environmental Protection Agency

AGENCIES: U.S. Army Corps of Engineers, Department of the Army, DOD; and Environmental Protection Agency.

ACTION: Proposed rule.

SUMMARY: The Corps of Engineers and the Environmental Protection Agency (EPA) are proposing today to undertake the following actions with regard to the Clean Water Act Section 404 regulatory program: (1) Modify the definition of "discharge of dredged material;" (2) clarify when the placement of pilings is considered to result in a discharge of fill material; and (3) clarify that prior converted croplands are not waters of the United States. EPA is also proposing conforming changes to the Clean Water Act "waters of the United States" and "navigable waters" definitions in other Clean Water Act program regulations. This proposed rulemaking is consistent with the President's August 9, 1991, Wetlands Protection Plan. In addition, the first two proposed changes implement the settlement agreement in *North Carolina Wildlife Federation* v. *Tulloch*.

DATES: Written comments must be submitted by August 17, 1992.

ADDRESSES: Written comments should be submitted to: The Chief of Engineers, United States Army Corps of Engineers, ATTN: Mr. Sam Collinson, CECW–OR, Washington, DC 20314–1000.

FOR FURTHER INFORMATION CONTACT: Mr. Michael Davis, Office of the Assistant Secretary of the Army for Civil Works at (703) 695–1376 or Mr. John Studt (Corps) at (202) 272–0199 or Mr. Gregory Peck (EPA) at (202) 260–8794 or Ms. Hazel Groman (EPA) at (202) 260–8798.

SUPPLEMENTARY INFORMATION:

Background

On February 28, 1992, the Federal government agreed to settle a pending lawsuit brought by the North Carolina Wildlife Federation and the National Wildlife Federation (*North Carolina Wildlife Federation, et al.* v. *Tulloch*, Civil No. C90–713–CIV–5–BO (E.D.N.C. 1992)) involving section 404 of the Clean Water Act (CWA) as it pertains to certain activities in waters of the United States. In accordance with the settlement agreement, the Corps and EPA are proposing changes to their regulations to clarify that mechanized landclearing, ditching, channelization, and other excavation activities involve discharges of dredged material and when performed in waters of the United States will be regulated under section 404 of the CWA when such activities have or would have the effect of destroying or degrading waters of the United States, including wetlands. In addition, the Corps and EPA have agreed to incorporate into the section 404 regulations the substantive provisions of the Corps Regulatory Guidance Letter (RGL) 90–8 to clarify the circumstances under which the placement of pilings have the effect of "fill material" subject to regulation under section 404. These proposed changes will not affect in any manner the existing statutory exemptions for normal farming, ranching, and silviculture activities in section 404(f).

The settlement agreement is consistent with one of the components of President Bush's Plan for Protecting America's Wetlands which acknowledges the need to evaluate the scope of activities regulated under the section 404 program. The President's Plan, announced August 9, 1991, is a balanced approach of administrative actions that will enhance protection of wetlands on Federal lands, improve Federal wetlands research, and increase Federal land acquisition, revise the Federal wetlands delineation manual, and streamline and improve the section 404 regulatory program.

In addition to the changes proposed in accordance with the settlement agreement and consistent with the President's Wetlands Plan, the Corps and EPA are proposing to incorporate into the section 404 regulations the substantive provisions of the Corps RGL 90–7 to clarify that prior converted croplands are not waters of the United States subject to regulation under the CWA. EPA is also proposing conforming changes to the definitions of "waters of the United States" and "navigable waters" for all other CWA program regulations contained in 40 CFR parts 110, 112, 116, 117, 122, and 401 to provide consistent definitions in all CWA program regulations.

Overall, these proposed changes will promote national consistency, more clearly notify the public of regulatory requirements and ensure that the section 404 regulatory program is more equitable to the regulated public, enhance the protection of waters of the United States, and clarify which areas in agricultural crop production will not be regulated as waters of the United States.

Proposed Changes

33 Part 323—Permits for Discharges of Dredged or Fill Material into Waters of the United States

40 CFR Part 232—404 Program Definitions; Exempt Activities Not Requiring 404 Permits

33 CFR Secton 323.2(d) and 40 CFR 232.2(e)

The Corps and EPA jointly administer the CWA section 404 regulatory program. The CWA provides the Corps and EPA with broad authority to regulate activities involving a discharge of dredged or fill material into the Nation's waters, including wetlands. Based on this authority, the Corps and EPA have broad discretion in defining those activities that involve a discharge of dredged or fill material and therefore require authorization under section 404.

Historically, the Corps has regulated all activities involving discharges of fill material. However, Corps guidance has not been entirely clear or uniform among all Corps district offices regarding which activities involving discharges of material excavated (i.e., dredged) from the waters of the United States require authorization under section 404. The Corps has traditionally regulated ditching activities where the material was excavated and sidecast into adjacent wetlands resulting in spoil piles or berms. In situations where the excavated material was almost completely removed to the surrounding uplands, Corps districts have varied markedly in exercising their discretion to regulate the activity. Based in part on 15 years of experience, the Corps and EPA do not believe that it is possible to conduct mechanized landclearing, ditching, channelization, or other excavation activities in waters of the United States without at least some incidental discharge of dredged material; nor do the agencies believe that it is possible to completely remove all excavated material to the uplands.

The differences from one Corps district to another in the types of excavation activities regulated did not greatly affect the section 404 program until recently. The Corps has received numerous questions regarding which ditching activities would require a section 404 permit. This has increased

workload, and the resulting delays are taxing Federal resources and delaying project proponents who often wait for a written determination from the Corps on whether their activities are regulated. Furthermore, in certain circumstances, applicants with substantial resources appeared to attempt to avoid section 404 regulation for drainage activities by removing, as much as possible, the excavated material to uplands. As a result, project proponents were sometimes not regulated under the current Corps and EPA policy framework although the impacts of such projects were similar to those of projects currently being regulated. The changes that the Corps and EPA are proposing in this rule will make the regulatory program more equitable for all project proponents, and the agencies will be able to focus limited resources on reasonably regulating mechanized landclearing, ditching, channelization, or other excavation activities. States with authorized section 404 programs will need to review their statute and regulations for consistency and if necessary, change their regulations in accordance with 40 CFR 233.16(b).

The Corps' current definition of "discharge of dredged material," at 33 CFR 323.2(d), provides that *de minimis* incidental soil movement occurring during normal dredging operations is not considered to be within this regulatory definition. This exclusion derives, in part, from a desire to avoid duplicative regulation of dredging itself in waters within the jurisdictional scope of the Rivers and Harbors Act. EPA's regulations contain a similar definition, with the same exclusion, at 40 CFR 232.2(e).

Over the years, application of this "*de minimis*" language has become problematic, especially when applied to activities which did not involve dredging for the purposes of maintaining navigation in traditionally navigable waters. Because of the lack of guidance in the regulation, in some instances this language has been interpreted to exclude from regulation landclearing and drainage activities in wetlands where the actual quantity of excavated material discharged was relatively small, but where the discharge was part of an activity which could have significant environmental impacts on the waters of the United States, contrary to the intent of the Clean Water Act. While the Corps and EPA have attempted to address this problem through guidance memoranda, e.g., RGL 90–5, addressing which landclearing activities are subject to section 404 jurisdiction, the agencies believe that a regulatory change would lead to a better understanding of the scope of the term "discharge of dredged material" and would promote greater national consistency and more effective protection of the aquatic environment.

Under the proposal, language has been added to the definition of "discharge of dredged material" to clarify both what is included in the definition of regulated activities and what is excluded from the definition. For example, the proposal clarifies that the phrase "normal dredging operations" refers to "dredging to maintain, deepen, or extend navigation channels in the navigable waters of the United States, as defined in 33 CFR part 329 [section 10 waters], with proper authorization from the Corps."

In addition, the new language would clarify that, apart from the exclusion for "normal dredging operations," the term "discharge of dredged material" includes any discharge, i.e., addition or redeposition, of excavated material into waters of the United States which is incidental to any activity, including mechanized landclearing, ditching, channelization, or other excavation, which has or would have the effect of destroying or degrading any area of the waters of the United States. The term "discharge of dredged material" does not include *de minimis* soil movement incidental to activities which do not or would not have such an effect.

The Corps has regulated discharges associated with mechanized landclearing operations for many years. However, it has not always been clear which landclearing activities would result in discharges, in part due to uncertainty over whether the activity involved a discharge sufficiently large to trigger Section 404 regulation. Over the years the Corps has issued several RGLs to clarify this issue. Most recently, the Corps issued RGL 90–5, dated July 18, 1990, to address which landclearing activities should be subject to Section 404 jurisdiction. This issue was also addressed in *Avoyelles Sportsmen's League, Inc.* v. *Marsh*, 715 F.2d 897 (5th Cir. 1983). In this case the court stated that the term "discharge" may reasonably be understood to include "redeposit" and concluded that the term "discharge" covers the redepositing of soil taken from wetlands, such as occurs during mechanized landclearing activities. Our experience over the years, and the Fifth Circuit ruling in *Avoyelles*, have convinced us that mechanized landclearing, ditching, channelization, and other excavations do consistently involve discharges and that the activities which produce the discharges should be regulated where the activities would destroy or degrade waters of the United States.

We believe that it is appropriate to look at the environmental effect of activities that involve incidental soil movement for several reasons. First, the Federal government has broad authority under section 404(a) to regulate any discharge of dredged or fill material into any water of the United States. This authority has been upheld by many decisions of the Federal courts. Second, the Act contains no explicit exemption for *de minimis* discharges; any inference of one would need to be consistent with the environmental purposes of the Act. Third, the proposed language also parallels the approach and implements the policy of section 404(f), which generally exempts minor discharges from farming, ranching, and silvilcultural activities, but "recaptures" them when the activity alters waters of the United States. Specifically, CWA section 404(f)(2) states that "*any* discharge of dredged or fill material into navigable waters incidental to *any activity*" (emphasis added) that could bring any area of the waters of the United States into a new use and where the reach of the waters could be reduced or where their flow or circulation could be impaired shall be required to have a permit under section 404 (See 40 CFR 232.3 and 33 CFR 323.4 for a more detailed description of the scope of the section 404(f) exemptions). Furthermore, we believe that normal dredging operations, as we propose to define them, should not be regulated under section 404, since they generally do not alter the reach or flow or circulation of the waters, nor do they convert waters of the United States into dry land or degrade wetlands. Normal dredging in navigable waters will continue, however, to be regulated under section 10 of the Rivers and Harbors Act of 1899.

Discussion of Proposed Revisions

The Corps and EPA are proposing to change the definition of the term "discharge of dredged material" at 33 CFR 323.2(d) and 40 CFR 232.2(e). The practical effect of this change in definition is that the Corps, EPA as appropriate, and authorized states as appropriate, would regulate under Section 404 all mechanized landclearing, ditching, channelization, and other excavation activities performed in waters of the United States that have or would have the effect of destroying or degrading waters of the United States, including wetlands. This will eliminate the current inconsistencies associated with the regulation of these activities.

The proposed rule does not change in any way the manner in which the Corps and EPA determine whether an activity is exempt under section 404(f)(1) of the CWA. Therefore, the proposal will not, in any way, affect the exemptions for agriculture, silviculture or ranching activities now provided by CWA section 404(f).

Moreover, the proposed changes as a general rule will not result in the Corps regulating pumping of water from a waterbody, snagging operations, or vehicular traffic in wetlands. Pumping water from a wetland or other water of the United States or snagging vegetative material from a water of the United States generally would not, in and of itself, result in a discharge of dredged material. However, if excavation or filling would be done to accomplish the pumping and the activity would destroy or degrade a water of the United States (or if the snagging operation would result in a discharge through redeposition of soil and would destroy or degrade a water of the United States) then the activity would be regulated. The term "snagging" as used in this paragraph means the removal of trees, parts of trees, or the like, from a water body to prevent their interfering with navigation. Although vehicular traffic may result in a redeposition of material, that activity generally would not destroy or degrade a water of the United States. We invite specific comments from the public on all issues presented in this paragraph.

Although the Corps and EPA have not yet adopted a final definition for either the term "destroy" or the term "degrade," we propose the following and invite and encourage public comment on this issue. Under the proposed rule, destruction of a wetland, or other water of the United States, would occur when the activity that involved the discharge of dredged material alters the area in such a way that it would no longer be a water of the United States. Also under the proposal, degradation of a wetland or other water of the United States would occur when the activity that involves the discharge results in an identifiable decrease in the functional values of the water of the United States. Under these definitions, activities may come within section 404 jurisdiction, but could be regulated under a nationwide or regional general permit if they would have minimal environmental effects. We invite public comment identifying appropriate categories of excavation activities that would generally have minimal environmental effects and therefore be potential candidates for authorization under general permit.

The proposed definition of "degradation" is intended to define a threshold which excludes from regulation certain activities that would have no identifiable adverse effect on waters of the United States. The Corp and EPA are inviting suggestions on alternative methods for defining this threshold. The Corp and EPA are specifically inviting comment on whether "identifiable decreases" in aquatic resource functional value is an appropriate threshold test that is sufficiently clear for the purposes of implementing the regulatory program. For example, if a wetland is drained in such a way that the hydrologic regime is altered enough to change the vegetative composition of the area, the wetland will be considered to be degraded. Further, most sand and gravel mining in waters of the United States results in, at a minimum, incidental discharges and destroys or degrades waters of the United States and thus would be regulated. We invite public comment suggesting any categories of activities which might involve incidental discharges of dredged or fill material into waters of the United States, but which as a general rule would not be regulated under this regulation because they would not destroy or degrade waters of the United States.

Under the proposed rule, it would not be necessary for the Corps, EPA, or authorized states to establish, on a case-by-case basis, that mechanized landclearing, ditching, channelization, and other excavation activities involve a discharge of dredged material because, as discussed above, the agencies do not believe that it is possible to conduct these activities without redepositing some of the excavated material. Moreover, the agencies believe that, in virtually all cases, mechanized landclearing, ditching, channelization, and other excavation in waters of the United States would destroy or degrade waters of the United States, and the agencies will therefore apply a rebuttable presumption that these types of activities would have such an effect, and are therefore regulated under section 404. Where a project proponent believes that its activities will not destroy or degrade waters of the United States, the proponent will have the burden of demonstrating to the Corps that such effects will not occur as a result of the activity. The activity will be subject to regulation under section 404 unless the Corps, EPA when it is the lead enforcement agency or undertaking a section 404(c) action in advance of a specific permit application, or an authorized state as appropriate, determine that the project proponent has made such a showing.

33 CFR Section 323.3(c) and 40 CFR Section 232.2(r)

The Corps for many years has considered pilings to be structures regulated under section 10 of the Rivers and Harbors Act of 1989, but did not consider them as a general rule to constitute a discharge of fill material for purposes of section 404. However, the Corps has also long recognized that, under certain circumstances, pilings can have the effect of fill and thus should be regulated under section 404. Recognizing this problem, the Corps, on November 3, 1988, issued RGL 88–14. Subsequent to that RGL, additional questions were raised concerning when pilings should be regulated under section 404. A number of new projects were being proposed to be constructed on pilings in an attempt to avoid section 404 jurisdiction. These projects were for activities that would normally be constructed on fill such as hotels, industrial developments, stores, and parking structures. Since these issues were not addressed in RGL 88–14, a new RGL 90–8 was issued on December 14, 1990.

In summary, RGL 90–8 provides that there are two situations where pilings are regulated under section 404 of the CWA: (1) Pilings that have the physical effect of fill (including pilings that are closely spaced rather than normal open pile structures); and (2) Pilings that have the functional use and effect of fill (including pilings that support structures that are normally placed on fill such as multi-family housing, office buildings, etc.). Under RGL 90–8, however, pilings are not to be regulated in circumstances involving linear projects traditionally used to cross waters of the United States such as bridges, elevated walkways, and powerline structures. Similarly, placement of pilings would not be regulated for structures that traditionally are constructed on pilings such as piers, boathouses, wharves, marinas, lighthouses, and individual houses built on stilts where pile-supported construction is used to avoid substantial flooding.

In the settlement agreement reached between the Federal government and the National Wildlife Federation, as a result of the case *North Carolina Wildlife Federation, et al.* v. *Tulloch,* Civil No. C90–713–CIV–5–BO (E.D.N.C.), the Corps and EPA agreed to propose that the relevant portions of RGL 90–8 concerning the regulation of

pilings under section 404 be promulgated in the Code of Federal Regulations through notice and comment rulemaking under the Administrative Procedure Act process. Therefore, the Corps and EPA are seeking comments on this proposal to define clearly when pilings should be regulated under section 404. In particular, the Corps is considering adding some restaurants that are constructed on pilings to the list of activities that are not subject to regulation pursuant to RGL 90-8.

33 CFR Part 328-Definition of Waters of the United States
40 CFR Part 110-Discharge of Oil
40 CFR Part 112-Oil Pollution Prevention
40 CFR Part 116-Designation of Hazardous Substances
40 CFR Part 117-Determination of Reportable Quantities for Hazardous Substances
40 CFR Part 122-EPA Administered Permit Programs: The National Pollutant Discharge Elimination System
40 CFR Part 230-Section 404(b)(1) Guidelines for Specification of Disposal Sites for Dredged or Fill Material
40 CFR Part 232-404 Program Definitions; Exempt Activities Not Requiring 404 Permits
40 CFR Part 401-Effluent Guidelines and Standards

CFR Section 328.3(a)(8), 40 CFR Section 110.1, 40 CFR Section 112.2, 40 CFR Section 116.3, 40 CFR Section 117(i)(7), 40 CFR Section 122.2, 40 CFR Section 230.3(s)(8), 40 CFR Section 232.2(g)(8), and 40 CFR 401.11(1)

We propose to add new language to 33 CFR 328.3(a), 40 CFR 110.1, 40 CFR 112.2, 40 CFR 116.3, 40 CFR 117(i)(7), 40 CFR 122.2, 40 CFR 230.3(s), 40 CFR 232.2(g), and 40 CFR 401.11(1) which currently define waters of the United States. The Corps new language would note two examples of areas that are not waters of the United States. The first is simply waste treatment systems, as presently described at the referenced section. The second, in accordance with the President's Wetlands Plan, would codify the Corps and EPA's present policy regarding prior converted cropland. EPA's new language would not modify any current references to waste treatment systems, but would codify the Corps and EPA's policy regarding prior converted cropland at the referenced sections.

On September 26, 1990, the Corps issued RGL 90-7 "Clarification of the Phrase 'Normal Circumstances' as it Pertains to Cropped Wetlands," in order to establish greater consistency between the section 404 regulatory program and the Swampbuster provisions of the Food Security Act, as amended by the Food, Agriculture, Conservation and Trade Act of 1990, which is implemented by the Soil Conservation Service (SCS). Under RGL 90-7, "prior converted cropland," as defined by the SCS National Food Security Act Manual, are not wetlands within the meaning of the Corps and EPA regulations. Prior converted croplands are wetlands that, prior to December 23, 1985, were both manipulated (drained or otherwise physically altered to remove excess water from the land) and cropped to the extent that they are inundated for no more than 14 consecutive days during the growing season. Prior converted croplands do not include pothole or playa wetlands.

The Corps and EPA are proposing to amend their definitions of waters of the United States with regard to prior converted croplands in order to provide for consistency in the administration of the various Federal programs affecting these types of areas. This proposed change would achieve the agencies' policy objectives of achieving greater predictability for affected parties as they deal with the Federal government regarding prior converted cropland.

SCS determinations of prior converted cropland do not constitute section 404 jurisdictional determinations because only the Corps and EPA have the statutory authority to determine the geographic scope of section 404 jurisdiction. The final determination of whether an area is a water of the United States for purposes of section 404 regulation is made by the Corps or EPA as appropriate, pursuant to the January 19, 1989, Army/EPA Memorandum of Agreement on geographic jurisdiction. The Corps (and EPA, as appropriate) will accept and concur in SCS prior converted cropland designations to the extent possible. Nevertheless, any person considering a proposal that would involve the discharge of dredged or fill material into areas designated as prior converted cropland by the SCS is encouraged to obtain Corps (or EPA) concurrence in the prior converted cropland designation.

The Corps and EPA note that under today's proposal a prior converted cropland is considered to be abandoned unless: For once in every five years the area has been used for the production of an agricultural commodity; or, the area has been used and will continue to be used for the production of an agricultural commodity in a commonly used rotation with aquaculture, grasses, legumes or pasture production.

The Corps and EPA are proposing to define "prior converted cropland" in accordance with the SCS National Food Security Manual, Second Edition, 180-V-VPSAM, Amendment 6, May 1991. The National Food Security Act Manual sets forth SCS policy and procedures for implementing, *inter alia*, the Swampbuster provisions of the Food Security Act of 1985, as amended by the Food, Agriculture, Conservation, and Trade Act of 1990. By virtue of this incorporation by reference, the Corps and EPA are only incorporating the cited version of the National Food Security Act Manual, i.e., Second Edition, Amendment 6, May 1991. With respect to any subsequent version of the National Food Security Act Manual issued by SCS, the Corps and EPA will review any such subsequent version regarding changes made to the definition of "prior converted cropland" and determine at that time whether to incorporate by reference such subsequent version into the section 404 regulations and other CWA program regulations.

In proposing to codify the prior converted cropland RGL, the Corps and EPA do not intend to alter their longstanding position that a party cannot eliminate the jurisdiction of the CWA over an area through an unauthorized discharge activity. This, an area which becomes prior converted cropland by virtue of such unauthorized discharge is still covered by section 404 and subject to an enforcement action for any activity which violated the CWA.

By proposing to codify the prior converted cropland RGL into regulation, the agencies would be revising the definitions of "waters of the United States" and "navigable waters" for all EPA programs under the CWA to clarify that prior converted croplands are not within the scope of CWA jurisdiction. EPA is interested in receiving public comment on what effect, if any, such codification would have on compliance, response, and enforcement efforts under other EPA programs, in particular, the CWA Section 311 program which prohibits the discharge of oil and hazardous substances, requires notification of any such discharge, and sets requirements for prevention and clean-up (see 40 CFR 110.1, 112.2, 116.3, and 117.1).

Environmental Documentation

We have made a preliminary determination that this action does not constitute a major Federal action significantly affecting the quality of the human environment. However, an environmental assessment will be

prepared prior to making a final decision on this proposed regulation. If we determine that there would be a significant impact on the quality of the human environment an Environmental Impact Statement will be prepared before a final decision is made. Furthermore, appropriate environmental documentation is prepared for all permit decisions.

Executive Order 12291 and the Regulatory Flexibility Act

The Department of the Army and the Environmental Protection Agency have determined that the revisions to these regulations do not contain a major proposal requiring the preparation of a regulatory analysis under E.O. 12291. The Department of the Army and the Environmental Protection Agency certify, pursuant to Section 605(b) of the Regulatory Flexibility Act of 1980, that these regulations will not have a significant impact on a substantial number of entities.

Note 1.—The term "he" and its derivatives used in these regulations are generic and should be considered as applying to both male and female.

List of Subjects

33 CFR Part 323

Navigation, Water pollution control, Waterways.

33 CFR Part 328

Incorporation by reference, Navigation, Water pollution control, Waterways.

40 CFR Parts 110, 112, 116, 117, 122, 230, 232, and 401

Incorporation by reference, Wetlands, Water pollution control.

Dated: June 4, 1992.

Nancy P. Dorn,

Assistant Secretary of the Army (Civil Works), Department of the Army.

F. Henry Habicht, II,

Deputy Administrator Environmental Protection Agency.

Accordingly, 33 CFR parts 323 and 328 and 40 CFR parts 110, 112, 116, 117, 122, 230, 232 and 401 are proposed to be amended as follows:

33 CFR CHAPTER II—[AMENDED]

PART 323—PERMITS FOR DISCHARGES OF DREDGED OR FILL MATERIALS INTO WATERS OF THE UNITED STATES

1. The authority citation for part 323 continues to read as follows:

Authority: 33 U.S.C. 1344.

2. Section 323.2(d) is revised to read as follows:

§ 323.2 Definitions.

* * * * *

(d)(1) The term *discharge of dredged material* means any addition of dredged material into the waters of the United States. The term includes, without limitation, the addition of dredged material to a specified discharge site located in waters of the United States and the runoff or overflow from a contained land or water disposal area. Discharges of pollutants into waters of the United States resulting from the onshore subsequent processing of dredged material that is extracted for any commercial use (other than fill) are not included within this term and are subject to section 402 of the Clean Water Act even though the extraction and deposit of such material may require a permit from the Corps or applicable state. The term "discharge of dredged material" includes, without limitation, any addition or redeposit of dredged materials, including excavated materials, into waters of the United States which is incidental to any activity (except normal dredging operations as defined below), including mechanized landclearing, ditching, channelization, or other excavation which has or would have the effect of destroying or degrading any area of waters of the United States. The term does not include *de minimis* soil movement incidental to any activity which does not have or would not have the effect of destroying or degrading any area of waters of the United States. Moreover, the term does not include *de minimis*, incidental soil movement occurring during normal dredging operations, defined as dredging to maintain, deepen, or extend navigation channels in the navigable waters of the United States, as defined in 33 CFR part 329, with proper authorization from the Congress and/or the Corps. The term does not include plowing, cultivating, seeding and harvesting for the production of food, fiber, and forest products (See § 323.4 for the definition of these terms).

(2) For purposes of paragraph (d)(1), mechanized landclearing, ditching, channelization, or other excavation activities in waters of the United States result in a discharge of dredged material. Further, where such activities occur in waters of the United States, the activity is presumed to result in the destruction or degradation of such waters unless the project proponent demonstrates to the satisfaction of the Corps, or EPA as appropriate, that the activity would not have such an effect in a particular case.

§ 323.2 [Amended]

3. Section 323.2(e) is amended by adding a sentence at the end that reads as follows:

* * * * *

(e) * * * See § 323.3(c) concerning the regulation of the placement of pilings in waters of the United States.

* * * * *

4. Section 323.2(f) is amended by adding a sentence at the end that reads as follows:

* * * * *

(f) * * * See § 323.3(c) concerning the regulation of the placement of pilings in waters of the United States.

* * * * *

5. Section 323.3(c) is added to read as follows:

§ 323.3 Discharges requiring permits.

* * * * *

(c) *Pilings.* (1) The placement of pilings in waters of the United States shall require a section 404 permit when such placement is used in a manner essentially equivalent to a discharge of fill material in physical effect or functional use and effect. Examples include, but are not limited to, the following activities in waters of the United States:

(i) *Physical effect of fill:* Projects that in effect replace an aquatic area or change the bottom elevation of a waterbody as a result of the placement of pilings that are so closely spaced that sedimentation rates are increased or the pilings themselves essentially replace the bottom will require a section 404 permit. This circumstance would include pilings placed in waters of the United States for dams, dikes, or other structures utilizing densely spaced pilings, or as a foundation for large structures.

(ii) *Functional use and effect of fill:* Construction projects will require a section 404 permit where pilings serve essentially the same functional use as a solid fill foundation, and where the project would result in essentially the same effects as fill (e.g., alter flow or circulation of the waters, bring the area into a new, non-aquatic use, or significantly alter or eliminate aquatic functions and values). Regulated activities include the placement of pilings to facilitate the construction of office and industrial developments, parking structures, restaurants, stores, hotels, multi-family housing projects, and similar structures in waters of the United States.

(2) Placement of pilings in waters of the United States will not require a permit under section 404 in

circumstances involving linear projects such as bridges, elevated walkways, or powerline structures. Similarly, placement of pilings in waters of the United States will not require a section 404 permit in circumstances that involve structures that have been traditionally been constructed on pilings; examples are piers, boathouses, wharves, marinas, lighthouses, and individual houses built on stilts solely to reduce the potential of flooding (e.g., beach houses where road access is on uplands, but the house may be located in a low area necessitating construction on stilts). However, all pilings placed in the navigable waters of the United States (see 33 CFR part 329) require authorization under section 10 of the Rivers and Harbors Act of 1899 (see 33 CFR part 322).

PART 328—DEFINITION OF WATERS OF THE UNITED STATES

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

Authority: 33 U.S.C. 1344.

7. Section 328.3(a) is amended by removing the last sentence and adding a new paragraph (a)(8) that reads as follows:

§ 328.3 Definitions.

* * * * *

(a) * * *

(8) Waters of the United States do not include:

(i) 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); or

(ii) Prior converted cropland, as defined by the National Food Security Act Manual, Second Edition, 180–V–NFSAM, Amendment 6, May 1991, Soil Conservation Service. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies of the National Food Security Act Manual may be obtained from the U.S. Department of Agriculture, Soil Conservation Service, South Agriculture Building, room 0054, 14th and Independence Ave. SW., Washington, DC or at the Office of the Federal Register, 1100 L Street, NW., room 8401, Washington, DC.

* * * * *

40 CFR CHAPTER I—[AMENDED]

PART 110—DISCHARGE OF OIL

1. The authority citation for part 110 continues to read as follows:

Authority: 33 U.S.C. 1321 (b)(3) and (b)(4) and 1361(a); 33 U.S.C. 1517(m)(3).

2. Section 110.1, definition of navigable waters, is amended by adding three new sentences of concluding text at the end of the definition to read as follows:

§ 110.1 Definitions.

* * * * *

Navigable waters do not include prior converted cropland, as defined by the National Food Security Act Manual, Second Edition, 180–V–NFSAM, Amendment 6, May, 1991, Soil Conservation Service. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies of the National Food Security Act Manual may be obtained from the U.S. Department of Agriculture, Soil Conservation Service, South Agriculture Building, room 0054, 14th and Independence Avenue, SW., Washington, DC or at the Office of the Federal Register, 1100 L Street, NW., room 8401, Washington, DC.

* * * * *

PART 112—OIL POLLUTION PREVENTION

1. The authority citation for part 112 continues to read as follows:

Authority: 33 U.S.C. 1251 *et seq.*

2. Section 112.2(k), definition of navigable waters, is amended by adding three new sentences of concluding text at the end of the definition to read as follows:

§ 112.2 Definitions.

* * * * *

Navigable waters do not include prior converted cropland, as defined by the National Food Security Act Manual, Second Edition, 180–V–NFSAM, Amendment 6, May, 1991, Soil Conservation Service. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies of the National Food Security Act Manual may be obtained from the U.S. Department of Agriculture, Soil Conservation Service, South Agriculture Building, room 0054, 14th and Independence Avenue, SW., Washington, DC or at the Office of the Federal Register, 1100 L Street, NW., room 8401, Washington, DC.

* * * * *

PART 116—DESIGNATION OF HAZARDOUS SUBSTANCES

1. The authority citation for part 116 continues to read as follows:

Authority: 33 U.S.C. 1521 *et seq.*

2. In § 116.3, the definition of navigable waters is amended by adding three new sentences of concluding text at the end of the definition, as set forth below, and the definitions are placed in alphabetical order.

§ 116.3 Definitions.

* * * * *

Navigable waters do not include prior converted cropland, as defined by the National Food Security Act Manual, Second Edition, 180–V–NFSAM, Amendment 6, May, 1991, Soil Conservation Service. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies of the National Food Security Act Manual may be obtained from the U.S. Department of Agriculture, Soil Conservation Service, South Agriculture Building, room 0054, 14th and Independence Avenue, SW., Washington, DC or at the Office of the Federal Register, 1100 L Street, NW., room 8401, Washington, DC.

* * * * *

PART 117—DETERMINATION OF REPORTABLE QUANTITIES FOR HAZARDOUS SUBSTANCES

1. The authority citation for part 117 continues to read as follows:

Authority: 33 U.S.C. 1251 *et seq.*

2. The definition of navigable waters, § 117.1(i), is amended by adding three new sentences of concluding text at the end of the definition to read as follows:

§ 117.1 Definitions.

* * * * *

Navigable waters do not include prior converted cropland, as defined by the National Food Security Act Manual, Second Edition, 180–V–NFSAM, Amendment 6, May, 1991, Soil Conservation Service. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. §552(a) and 1 CFR part 51. Copies of the National Food Security Act Manual may be obtained from the U.S. Department of Agriculture, Soil Conservation Service, South Agriculture Building, room 0054, 14th and Independence Avenue, SW., Washington, DC or at the Office of the Federal Register, 1100 L Street, NW., room 8401, Washington, DC.

* * * * *

PART 122—EPA ADMINISTERED PERMIT PROGRAMS: THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM

1. The authority citation for part 122 continues to read as follows:

Authority: 33 U.S.C. 1251 *et seq.*

2. Section 122.2, definition of waters of the United States, is amended by adding three new sentences at the end of the definition to read as follows:

§ 122.2 Definitions.

* * * * *

Waters of the United States do not include prior converted cropland, as defined by the National Food Security Act Manual, Second Edition, 180–V–NFSAM, Amendment 6, May, 1991, Soil Conservation Service. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies of the National Food Security Act Manual may be obtained from the U.S. Department of Agriculture, Soil Conservation Service, South Agriculture Building, room 0054, 14th and Independence Avenue, SW., Washington, DC or at the Office of the Federal Register, 1100 L Street, NW., room 8401, Washington, DC.

* * * * *

PART 230—SECTION 404(b)(1) GUIDELINES FOR SPECIFICATION OF DISPOSAL SITES FOR DREDGED OR FILL MATERIAL

1. The authority citation for part 230 continues to read as follows:

Authority: 33 U.S.C. 1344(b) and 1361(a).

2. Section 230.3(s), definition of waters of the United States, is amended by adding three new sentences of concluding text at the end of the definition to read as follows:

§ 230.3 Definitions.

* * * * *

Waters of the United States do not include prior converted cropland, as defined by the National Food Security Act Manual, Second Edition, 180–V–NFSAM, Amendment 6, May, 1991, Soil Conservation Service. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies of the National Food Security Act Manual may be obtained from the U.S. Department of Agriculture, Soil Conservation Service, South Agriculture Building, room 0054, 14th and Independence Avenue, SW., Washington, DC or at the Office of the Federal Register, 1100 L Street, NW., room 8401, Washington, DC.

PART 232—404 PROGRAM DEFINITIONS; EXEMPT ACTIVITIES NOT REQUIRING 404 PERMITS

1. The authority citation for Part 232 continues to read as follows:

Authority: 33 U.S.C. 1344.

2. Section 232.2(e), definition of discharge of dredged material, is revised to read as follows:

§ 232.2 Definitions.

* * * * *

(e)(1) The term *discharge of dredged material* means any addition of dredged material into waters of the United States. The term includes, without limitation, the addition of dredged material to a specified discharge site located in waters of the United States and the runoff or overflow from a contained land or water disposal area. Discharges of pollutants into waters of the United States resulting from the onshore subsequent processing of dredged material that is extracted for any commercial use (other than fill) are not included within this term and are subject to section 402 of the Clean Water Act even though the extraction and deposit of such material may require a permit from the Corps or the State section 404 program. The term "discharge of dredged material" includes, without limitation, any addition or redeposit of dredged materials, including excavated materials, into waters of the United States which is incidental to any activity (except normal dredging operations as defined below), including mechanized landclearing, ditching, channelization, or other excavation which has or would have the effect of destroying or degrading any area of waters of the United States. The term does not include *de minimis* soil movement incidental to any activity which does not have or would not have the effect of destroying or degrading any area of waters of the United States. Moreover, the term does not include *de minimis*, incidental soil movement occurring during the normal dredging operations, defined as dredging to maintain, deepen, or extend navigation channels in the navigable waters of the United States, as defined in 33 CFR Part 329, with proper authorization from the Congress and/or the Corps. The term does not include plowing, cultivating, seeding and harvesting for the protection of food, fiber, and forest products (See § 323.4 for the definition of these terms).

(2) For purposes of paragraph (e)(1), mechanized landclearing, ditching, channelization, or other excavation activities in waters of the United States result in a discharge of dredged material. Further, where such activities occur in waters of the United States, the activity is presumed to result in the destruction or degradation of such waters unless the project proponent demonstrates to the satisfaction of the Corps, or EPA as appropriate, that the activity would not have such an effect in a particular case.

* * * * *

3. Section 232.2(f), definition of discharge of fill material, is revised to read as follows:

§ 232.2 Definitions.

* * * * *

(f)(1)The term "discharge of fill material" means the addition of fill material into waters of the United States. The term generally includes, without limitation, the following activities: placement of fill that is necessary for the construction of any structure in a water of the United States; the building of any structure or impoundment requiring rock, sand, dirt, or other material for its construction; site-development fills for recreational, industrial, commercial, residential, and other uses; causeways or road fills; dams and dikes; artificial islands; property protection and/or reclamation devices such as riprap, groins, seawalls, breakwaters, and revetments; beach nourishment; levees; fill for structures such as sewage treatment facilities, intake and outfall pipes associated with power plants and subaqueous utility lines; and artificial reefs. The term does not include plowing, cultivating, seeding, and harvesting for the production of food, fiber, and forest products (See Section 232.3 for the definition of these terms.)

(2) In addition, the placement of pilings in waters of the United States shall require a section 404 permit when such placement is used in a manner essentially equivalent to a discharge of fill material in physical effect or functional use and effect. In such cases, the placement of pilings in waters of the United States constitutes a discharge of fill material for purposes of Section 404. Examples includes, but are not limited to, the following activities in waters of the United States:

(i) *Physical effect of fill:* Projects that in effect replace an aquatic area or change the bottom elevation of a waterbody as a result of the placement of pilings that are so closely spaced that sedimentation rates are increased or the pilings themselves essentially replace the bottom will require a Section 404

permit. This circumstances would include pilings placed in waters of the United States for dams, dikes, or other structures utilizing densely spaced pilings, or as a foundation for large structures.

(ii) *Functional use and effect of fill*: Construction projects will require a Section 404 permit where pilings serve essentially the same functional use as a solid fill foundation, and where the project would result in essentially the same effects as fill (e.g., alter flow or circulation of the waters, bring the area into a new, non-aquatic use, or significantly alter or eliminate aquatic functions and values). Regulated activities include the placement of pilings to facilitate the construction of office and industrial developments, parking structures, restaurants, stores, hotels, multi-family housing projects, and similar structures in waters of the United States.

The term *discharge of fill material* does not include the placement of pilings in waters of the United States in circumstances involving linear projects such as bridges, elevated walkways, or powerline structures. Similarly, the term does not include the placement of pilings in waters of the United States in circumstances that involve structures that have been traditionally constructed on pilings; examples are piers, boathouses, wharves, marinas, lighthouses, and individual houses built on stilts solely to reduce the potential of flooding (e.g., beach houses where road access is on uplands, but the house may be located in a low area necessitating costruction on stilts). However, all pilings placed in the navigable waters of the United States (see 33 CFR part 329) require authorization under Section 10 of the Rivers and Harbors Act of 1899 (see 33 CFR part 322).

4. Section 232.2(q), definition of waters of the United States, is amended by adding three new sentences of concluding text at the end of the definition to read as follows:

§ 232.2 Definitions.

* * * * *

Waters of the United States do not include prior converted cropland, as defined by the National Food Security Act Manual, Second Edition, 180–V–NFSAM, Amendment 6, May, 1991, Soil Conservation Service. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies of the National Food Security Act Manual may be obtained from the U.S. Department of Agriculture, Soil Conservation Service, South Agriculture Building, room 0054, 14th and Independence Avenue, SW., Washington, DC or at the Office of the Federal Register, 1100 L Street, NW., room 8401, Washington, DC.

* * * * *

PART 401—EFFLUENT GUIDELINES AND STANDARDS

1. The authority citation for part 401 continues to read as follows:

Authority: 33 U.S.C. 1251 *et seq.*

2. Section 401.11(l), definition of navigable waters, is amended by adding three new sentences at the end of the definition to read as follows:

§ 401.11 General definitions.

* * * * *

* * * Navigable waters do not include prior converted cropland, as defined by the National Food Security Act Manual, Second Edition, 180–V–NFSAM, Amendment 6, May, 1991, Soil Conservation Service. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies of the National Food Security Act Manual may be obtained from the U.S. Department of Agriculture, Soil Conservation Service, South Agriculture Building, room 0054, 14th and Independence Avenue, SW., Washington, DC or at the Office of the Federal Register, 1100 L Street, NW., room 8401, Washington, DC.

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[FR Doc. 92–13720 Filed 6–15–92; 8:45 am]
BILLING CODE 3710–08–M

DEPARTMENT OF DEFENSE

Department of the Army

Corps of Engineers

33 CFR Parts 323 and 328

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 110, 112, 116, 117, 122, 230, 232 and 401

Clean Water Act Regulatory Programs

AGENCIES: U.S. Army Corps of Engineers, Department of the Army, DOD; and Environmental Protection Agency.

ACTION: Final rule.

SUMMARY: The U.S. Army Corps of Engineers (Corps) and the Environmental Protection Agency (EPA) are issuing today final regulations that implement the following actions with regard to the Clean Water Act (CWA) Section 404 regulatory program: (1) Modification of the definition of "discharge of dredged material;" (2) clarification of when the placement of pilings is a discharge of fill material; and (3) codification of the current policy that prior converted croplands are not waters of the United States. EPA is also issuing conforming changes to the definition of "waters of the United States" and "navigable waters" in other CWA program regulations. The first two changes implement the settlement agreement in *North Carolina Wildlife Federation* v. *Tulloch*, Civil No. C90–713–CIV–5–BO (E.D.N.C. 1992).

EFFECTIVE DATE: This rule becomes effective on [Insert 30 days from the publication in the **Federal Register**].

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SUPPLEMENTARY INFORMATION:

I. Background

On February 28, 1992, the Federal government agreed to settle a lawsuit brought by the North Carolina Wildlife Federation and the National Wildlife Federation (*North Carolina Wildlife Federation, et al.* v. *Tulloch*, Civil No. C90–713–CIV–5–BO (E.D.N.C. 1992)) involving CWA Section 404 as it pertains to certain activities in waters of the United States. In accordance with the settlement agreement, the Corps and EPA proposed changes to their regulations on June 16, 1992 to clarify that mechanized landclearing, ditching, channelization, and other excavation activities involve discharges of dredged material when performed in waters of the United States, and that these activities would be regulated under Section 404 of the CWA when they have or would have the effect of destroying or degrading waters of the United States, including wetlands. 57 FR 26894. In addition, the Corps and EPA agreed to propose to incorporate into the Section 404 regulations the substantive provisions of Corps Regulatory Guidance Letter (RGL) 90–8 to clarify the circumstances under which the placement of pilings have the effect of "fill material" and is subject to regulation under Section 404. The agencies stated that the proposal would not affect, in any manner, the existing statutory exemptions for normal farming, ranching, and silviculture activities in Section 404(f)(1).

In addition to the changes proposed in accordance with the settlement agreement, the Corps and EPA proposed to incorporate into the Section 404 regulations the substantive provisions of Corps RGL 90–7 to clarify that prior converted croplands are not waters of the United States for purposes of the CWA. EPA also proposed conforming changes to the definitions of "waters of the United States" and "navigable waters" for all other CWA program regulations contained in 40 CFR parts 110, 112, 116, 117, 122, and 401 to provide consistent definitions in all CWA program regulations.

Overall, these changes were proposed in order to promote national consistency, more clearly notify the public of regulatory requirements, ensure that the Section 404 regulatory program is more equitable to the regulated public, enhance the protection of waters of the United States, and clarify which areas in agricultural crop production would not be regulated as waters of the United States.

The proposed changes were published in the **Federal Register** on June 16, 1992, for public comment. The comment period closed on August 17, 1992. We received over 6,300 comments. The significant issues raised by public comments and the changes that have been made from the proposed rule are discussed below.

II. General Comments on the Proposed Rule

Several commentors raised general issues with regard to the proposed rule. These comments are addressed first below. Comments relating to the specific components of the rule are addressed in the following sections of this preamble.

Several commentors expressed concern that the agencies had agreed to propose these revisions as part of a settlement agreement with plaintiffs in the *Tulloch* lawsuit. These commentors felt that this procedural posture for the rulemaking impaired the agencies' ability to conduct the rulemaking impartially and based upon a good faith consideration of all public comments, as required by the Administrative Procedure Act. The commitments the agencies entered in the settlement of the *Tulloch* case have not, in any way, bound the agencies to reach a predetermined outcome in this rulemaking. The agencies agreed in the settlement agreement to propose certain revisions to their regulations in exchange for the plaintiffs' agreement to stay that litigation. The settlement agreement in no way binds the agencies to an outcome in the final rule, but provides that the plaintiffs in the lawsuit will dismiss their action if the final rule is "substantially similar" in language and effect as the proposal. The agencies do not view the settlement agreement as narrowing our discretion in any manner to adopt a final rule that best reflects relevant legal and policy considerations under Section 404. Because this rulemaking is of great national significance to the Section 404 program, EPA and the Corps have pursued this rulemaking based upon careful consideration of all the policy issues raised in the proposal and addressed by public comments. The agencies would not adopt policies in this final rule that we do not believe are appropriate merely to avoid reinitiation of litigation in the *Tulloch* lawsuit. As reflected by the discussion in this preamble, the agencies have fully considered all the public comments received on the proposal, and we have therefore fully complied with the procedural requirements of the Administrative Procedure Act.

Several commentors recommended that no decision on the final rule be made until a wetland definition was agreed upon by Congress. Two commentors stated that the wetlands definition was too broad and that it was not applicable across the country. Similarly, two commentors stated that because the rulemaking regarding the wetlands delineation manual was not yet complete, it was inappropriate to propose changes that would expand activities in wetlands covered under the program, thereby increasing uncertainty about the Federal government's regulation of wetlands. Several commentors were concerned about how

the functions and values of wetlands would be addressed or requested that a wetland classification system be developed. Some commentors requested that no decision be made until such a system was developed.

We do not agree that these concerns should delay promulgation of this rule. With the exception of the prior converted (PC) cropland aspect of this rulemaking, this rule addresses the scope of activities regulated under Section 404. The question of what activities result in a discharge of dredged or fill material is distinct and separate from the issue of what areas constitute wetlands, or how wetlands functions and values are considered in the permitting process. Today's rule will enable the Corps and EPA to make appropriate determinations as to whether an activity occurring in waters of the U.S. is subject to regulation under Section 404, however wetlands are defined. Therefore, there is no reason to delay this rulemaking pending completion of the delineation manual rulemaking. With regard to the PC cropland portion of this rule, the agencies do not believe that completion of this rulemaking should await conclusion of the manual rulemaking. The proposed revisions to the delineation manual did not alter the policy finding in Corps RGL 90–7 that PC cropland is not wetlands under the Act. Since the applicability of Section 404 to PC cropland is not an issue in the delineation manual rulemaking, delaying completion of this rule is not warranted. In any case, EPA and the Corps are both currently making wetlands delineations using the 1987 Corps Manual. Corps of Engineers Wetland Delineation Manual (Technical Report 4–87–1, Department of the Army, Corps of Engineers, Waterways Experiment Station, Vicksburg, MS). We believe that the guidance in that Manual is entirely consistent with our statutory and regulatory authorities under the CWA.

Several commentors requested that the comment period be extended. We believe that a 60-day comment period was sufficient time to provide an opportunity for the public comment, as reflected by the fact that we have received over 6,300 comments on the proposal. At least one commentor requested that the agencies hold a public hearing on the proposal. The agencies have declined to do so. The comments on the proposal addressed many legal and factual issues that were presented in great detail in written submissions, and the agencies have fully considered the submitted documents in developing the final rule. EPA and the Corps do not believe that the opportunity for meaningful public input or the agencies' understanding of public comments would have been materially advanced by the holding of a public hearing.

Several commentors requested that the Corps districts work with local regulatory agencies to avoid duplication of effort. We agree and encourage districts to develop regional general permits to avoid duplication of effort for those activities with minimal impacts.

III. Revisions to Definition of "Discharge of Dredged Material 33 CFR 323.2(d) and 40 CFR 232.2(e)

We have organized the numerous comments on the definition of discharge of dredged material into several issues. Our discussion of the comments is provided below.

A. Summary of Major Issues and Changes From the Proposal

The aspect of the rule which engendered the most public comment was the proposed revisions to the definition of "discharge of dredged material." Many commentors supported the proposed revisions on the grounds that they would better achieve the goals of the Section 404 program, and help ensure more equal treatment of different types of activities that adversely impact wetlands.

Opponents of the changes challenged the appropriateness of the proposed rule on both legal and factual grounds. In their legal arguments, many commentors contended that the proposal constituted a change in the Corps' longstanding approach to regulating landclearing and excavation activities, and that the agencies had failed to explain adequately the reasons for changing the existing approach, as required by the Administrative Procedure Act. Commentors also contended that EPA and the Corps lacked the authority under the CWA to regulate incidental discharges associated with mechanized landclearing, ditching, channelization and other excavation on the grounds that such incidental discharges do not constitute an "addition" of "dredged material" to waters of the U.S. within the meaning of the Act. These commentors also contended that the proposed rule would impermissibly regulate "activities" rather than "discharges," something they argued was beyond the agencies' jurisdiction under the statute. Other commentors argued that the proposed rule's establishment of a presumption that mechanized landclearing, ditching, channelization and other excavation destroy or degrade wetlands was contrary to the requirements of the CWA.

Factual contentions raised by commentors centered on objections to the finding in the proposed rule that mechanized landclearing, ditching, channelization and other excavation always result in a discharge of dredged material. Some commentors contended that the agencies had failed to compile an adequate factual record to support this finding, and a few commentors discussed activities which they believed did not result in a discharge. Some commentors also objected to the rebuttable presumption in the proposed rule that mechanized landclearing, ditching, channelization and other excavation destroy or degrade wetlands or other waters of the United States. Commentors suggested specific activities that they believed should be excluded from the regulation on the grounds that they did not cause such effects. Concerns were also raised in public comments that the term "degrade" was not adequately defined by the agencies.

Based upon public comments, the agencies have made certain changes to the language in the regulation defining "discharge of dredged material." However, the basic thrust of the proposal had not changed. Under the final rule, any addition or redeposition of dredged material associated with any activity, including mechanized landclearing, ditching, channelization and other excavation, that destroys or degrades waters of the United States requires a Section 404 permit.

The agencies have modified some of the language and structure of the final rule to improve clarity, since some public comments found the proposed rule language hard to follow. In response to public comments, we have decided to include definitions of the terms "destroy" and "degrade" in the final rule. These changes are discussed in section D.1, below.

In response to public comments, the agencies have deleted the irrebuttable presumption in the proposed rule that all mechanized landclearing, ditching, channelization and other excavation result in a discharge of dredged material. This change is discussed further in section C, below.

The agencies have modified the structure of the final rule to provide that any addition, including redeposit, of dredged material associated with any activity, including mechanized landclearing, ditching, channelization and other excavation, constitutes a discharge of dredged material. The final rule states, however, that a Section 404

permit is not required for an activity that would not destroy or degrade waters of the U.S. because it would have only a *de minimis* effect on such waters. Under the final rule, mechanized landclearing, ditching, channelization and other excavation activities resulting in a redeposition of dredged material associated with a discharge of dredged material require a Section 404 permit unless the discharger demonstrates to the satisfaction of the Corps, or EPA as appropriate, prior to the discharge, that the activity will not have such an effect. Under the final rule, the discharger bears the burden of demonstrating that its mechanized landclearing, ditching, channelization and other excavation activity will not destroy or degrade waters of the United States.

B. Comments on Agencies' Legal Authority To Promulgate This Regulation

Several commentors argued that EPA and the Corps lack legal authority under the Clean Water Act to issue the proposed regulation. Each of the bases for commentors' assertion is addressed below.

1. Definition of "Dredged Material"

Several commentors argued that the term "dredged material" has a narrow and specific meaning as used by Congress in the Clean Water Act, and that Congress never intended incidental discharges associated with landclearing, ditching, channelization and other excavation to be regulated as dredged material under Section 404.

These commentors cited a dictionary definition of the verb "to dredge" as meaning "to gather and bring up with a dredge, as oysters; to clear out or deepen with a dredge, as a channel," and the definition of the noun "dredge" as "a contrivance for gathering objects or material from the bed of a river, lake or harbor, by dragging along the bottom * * *. "New Webster's Dictionary of the English Language 301 (1984). According to these commentors, therefore, the term "dredged material" in Section 404 is limited to material taken from the bottom of a harbor, river or channel and cannot be construed as extending to material redeposited in the course of activities taking place in other waters of the United States, such as wetlands. While these commentors argued that the meaning of the statutory language was so clear that recourse to the legislative history was not necessary, they contended that the legislative history of the 1972 Amendments of the Clean Water Act also supports their view.

EPA and the Corps believe that these comments are unfounded, for several reasons. First, these comments are in fact not relevant to this rulemaking, for they do not address the revisions the agencies are making to the definition of the term "discharge of dredged material." Rather, these comments challenge, in effect, the agencies' definition of the term "dredged material" which includes "any material dredged or excavated from waters of the U.S." (see 40 CFR 232.2(g) and 33 CFR 323.2(c)). Presumably the commentors believe that this definition should have been revised so that it would be limited to material excavated from waterbodies such as harbors, rivers and channels. However, EPA and the Corps have not proposed to revise this longstanding definition in any respect in this rulemaking, and this comment is therefore not relevant to the proposal on which we solicited public comment.

Even if these comments were relevant to this rulemaking, however, EPA and the Corps disagree with the commentors that the statutory term "dredged material" was expressly limited by Congress to mean material dredged from the bottom of waterways such as lakes, rivers or channels. While the "narrow" and "specific" definition of this term favored by these commentors appears in the Webster's dictionary, it is not contained in any provision of the Clean Water Act. Congress therefore left to the agencies administering Section 404 the discretion to define this term. Since regulations were first promulgated implementing Section 404, the Corps has interpreted the term "dredged material" to mean any material excavated from waters subject to the full jurisdictional reach of the CWA (see 39 FR 12119, April 3, 1974), and the current language in the agencies' definition has been in existence since 1977 (see 42 FR 37145, July 19, 1977). This longstanding definition of the term "dredged material" is a straightforward and reasonable reading of the statutory language used by Congress.

The commentors' approach to defining dredged material, in contrast, would draw arbitrary distinctions in how the CWA regulates identical types of material based upon whether the waterbody from which it was excavated met some vague standard of wetness and water depth (i.e., material excavated from the bottom of a "lake" would qualify as dredged material but material excavated from a "drier" water such as a saturated wetland would not). Such distinctions are without any support in the language or structure of the CWA.

Because the commentors' approach does not reasonably reflect the structure of the Act, their suggested reading of the term "dredged material" would lead to anomalous results that we believe could not have been intended by Congress. For example, under their scenario, material excavated from a saturated wetland presumably would not qualify as "dredged material" under Section 404. However, the disposal of that material into waters of the U.S. would nonetheless require a permit under the Act, since the material, even if not meeting the definition of "dredged material," would in any case constitute a "pollutant" within the meaning of the Act (see section 502(6) of the Act, defining pollutant to include "sand" and "rock"). The disposal of such material, therefore, would require a permit under Section 402 of the Act, a regulatory provision ill-suited for authorizing such discharges. In our view, it is clearly more consistent with Congressional intent that all material dredged from and redeposited in waters of the U.S. be regulated under a single regulatory scheme—Section 404 of the CWA. Rather than draw the arbitrary distinctions suggested by these commentors, the agencies' definition of the term is a straightforward and logical interpretation of the statutory language in Section 404 that is consistent with the jurisdictional reach of Section 404 to all waters of the United States.

While the legislative history of the 1972 Amendments to the Clean Water Act reflects Congressional concern regarding disposal of material dredged from waterways to maintain navigation, EPA and the Corps do not read that legislative history as demonstrating Congressional intent to limit narrowly the agencies' discretion to define dredged material so that it includes any material excavated from waters of the U.S. The agencies' longstanding definition of this term is reasonable and fully consistent with the language and purposes of the Clean Water Act.

2. "Addition" of Pollutants to Waters of the U.S.

Some commentors argued that the activities that would be subject to this regulation are beyond the scope of Section 404 because they do not result in the "addition" of pollutants to U.S. waters, as required by the definition of "discharge" contained in section 502(6) of the Clean Water Act. According to these commentors, no such "addition" occurs when the material to be excavated falls back into the very same water being dredged. An "addition" only takes place, these commentors believe, where material is excavated from one water of the U.S. and falls into "another" water, "outside" the area

being excavated. These commentors cited as support the decisions in *National Wildlife Federation* v. *Consumers Power*, 862 F.2d 580 (6th Cir. 1988); *National Wildlife Federal* v. *Gorsuch*, 693 F.2d 156, 174–75 (D.C. Cir. 1982); and *U.S.* v. *Lambert*, 18 Env't Rep Cas (BNA) 1294 (M.D.Fl. 1981), *aff'd* 695 F.2d 536 (11th Cir. 1983).

In *Consumers Power* and *Gorsuch*, environmental groups challenged EPA's longstanding interpretation of the CWA that impacts on water quality and fish caused by the operation of dams were not covered by the CWA because the dams did not cause an "addition" of pollutants. EPA's longheld view was that impacts resulting from the passage of water through the dam did not constitute an "addition" because pollutants did not enter the water "from the outside world." See *Gorsuch*, 693 F.2d at 165. The *Consumers Power* and *Gorsuch* courts deferred to EPA's administrative interpretation of the CWA and upheld it as reasonable. Commentors argued that these holdings prevent EPA and the Corps from finding that redeposition of soil incidental to mechanized landclearing, ditching, channelization and other excavation constitutes an "addition" of pollutants.

We do not believe that the analysis of the *Gorsuch* and *Consumers Power* decisions is controlling here. These cases did not address what constitutes an addition of dredged material to waters of the United States. In our view, it would not be reasonable to require that dredged material enter waters of the U.S. "from the outside world" since dredged material, by definition, is contained in the waters themselves. This was the conclusion of the Fifth Circuit in *Avoyelles Sportsmen's League* v. *Marsh*, 715 F.2d 897 (5th Cir. 1983), which addressed the applicability of the *Gorsuch* case to mechanized landclearing activities. While the court did not rule on the question whether those activities resulted in a discharge of dredged material (finding that a discharge of fill material had occurred), the court rejected the notion that dredged material is only regulated if it enters waters from the "outside world." Since dredged material comes from the water itself, the court concluded that such an interpretation "would effectively remove the dredge-and-fill provision from the statute." 715 F.2d at 294, n.43. See also *U.S.* v. *Sinclair Oil Co.*, 767 F.Supp. 200 (D.Mont. 1990) (distinguishing *Gorsuch* and *Consumers Power* cases partially on the grounds that they were decided under the "separate regulatory framework" of Section 402, and holding that redistribution of riverbed materials constituted a "discharge" of fill material). *United States* v. *MCC of Florida, Inc.*, 772 F.2d 1501 (11th Cir. 1985) (holding that redeposition of seabed materials by tug-boat propellers on adjacent sea grass beds was an "addition" of dredged spoil).

Some commentors suggested that the appropriate test in this context should be whether dredged material is moved from "one place to another" or "from one water to another." If the material is not moved in this manner, these commentors argued, it does not trigger Section 404. The agencies do not believe that such a vague test would be a meaningful or appropriate one to adopt in this rule. If dredged material must be "moved" from one "location" to another in order to trigger Section 404, the question arises as to how far the material must be moved. The agencies see a strong potential for drawing arbitrary distinctions among activities that may be identical in terms of the amount of soil redeposited and their effects on the aquatic ecosystem, but differ only in terms of the distance the soil is moved. EPA and the Corps certainly do not view such a distinction as legally compelled by the Clean Water Act.

Commentors also cited as support for their position the decision of the district court in *U.S.* v. *Lambert*, Env't Rep. Cases (BNA) 1294 (M.D.Fla. 1981), *aff'd*, 695 F.2d 536 (11th Cir.1983), which held that "back-spill" of dredged material into the area from which it was excavated could not be considered to be an "addition" of a pollutant. Notably, however, the *Lambert* case was decided before the Supreme Court decision in *Chevron U.S.A.* v. *NRDC*, 467 U.S. 837 (1984), which now establishes a deferential standard of review of agency actions where Congress has not specifically addressed an issue. EPA and the Corps do not believe that Congress has specifically mandated in any provision of the CWA that redeposition of dredged material is only regulated if it is "moved" from one "place" to "another." Rather than focus simply on the spatial relationship between where the excavation and redeposition occur as the deciding factor determining regulatory jurisdiction under Section 404, this rule will regulate an activity (involving a discharge to any part of waters of the U.S.) taking into account the effect of the activity on the aquatic environment. The agencies believe that this approach is entirely consistent with the language of the CWA, and better effectuates the environmental protection goals of the statute than the approach suggested by commentors. See CWA section 101(a).

3. Regulation of "Activities," Not "Discharges"

Many commentors argued that the proposed rule was outside the agencies' authority under the CWA because the effects-based test for determining whether an activity requires a Section 404 permit impermissibly regulates "activities," whereas the statute only authorizes regulation of "discharges." These commentors also argued that if the agencies were to adopt the proposed rule, EPA and the Corps would be limited by Section 404 of the CWA to considering the environmental effects associated with the discharge itself, not the activity with which the discharge is associated. Commentors cited the decision of the district court in *Reid* v. *Marsh*, 20 Env't Rep. Cas. (BNA) 1337 (N.D.Ohio 1984) as supporting this argument.

EPA and the Corps agree with the point made by these commentors that the presence of a "discharge" into waters of the U.S. is an absolute prerequisite to an assertion of regulatory jurisdiction under Section 404. Based on the clear language in section 301(a) of the CWA, this has been the agencies' longstanding position, and we are not altering that view in this rulemaking. For the reasons explained in this preamble, the agencies believe that addition or redeposition of dredged material in the course of activities such as mechanized landclearing, ditching, channelization and other excavation meets the discharge requirement of section 301(a). Because this rule will only regulate activities where the jurisdictional prerequisite of a "discharge" is present, EPA and the Corps disagree with commentors who argued that this rule is outside the scope of the agencies' authority under Section 404.

Commentors are therefore flatly incorrect that this rule would trigger Section 404 jurisdiction over a discharge based upon the environmental effect of the associated activity. Under today's rule, the presence of certain environmental effects is not a prerequisite for Section 404 jurisdiction; rather, this rule looks to the environmental effects for purposes of creating an exception to the Section 404 permitting requirement that would otherwise apply to the discharge. Consideration of such effects is appropriate in order to ensure that the creation of a *de minimis* exception is consistent with the goals and objectives of Section 404. See discussion in section D, below. Since the agencies clearly have the authority under Section 404 to regulate *all* discharges of dredged

material into waters of the United States, without regard to effects on the aquatic environment, we fail to see how our decision in this rulemaking to regulate a subset of these activities could conceivably be overstepping our regulatory authority under Section 404. Because the only statutory condition for regulation under Section 404 is the presence of a "discharge," commentors' arguments about the scope of environmental effects that can be considered under Section 404 are irrelevant to the findings that EPA and the Corps are making to support today's rule.

To the extent commentors argued that EPA and the Corps can only consider the environmental effects of the discharge itself in administering Section 404 (i.e., in the Corps' permitting process or EPA's Section 404(c) process), such comments are not relevant to this rulemaking, which addresses the circumstances when a discharge or dredged material will required a Section 404 permit, not how the discharge will be addressed in the permitting or 404(c) process. In any case, however, EPA and the Corps wish to clarify that consideration of the environmental effects of activities associated with discharges covered by this rule is well within the agencies' authority in carrying out their authorities under Section 404. Because the scope of the agencies' authority to consider environmental effects is not relevant to our authority to issue this rule, the following discussion is not provided as a legal justification of today's rule, but rather as an attempt to help the public understand how we administer the Section 404 program generally.

Commentors' extremely narrow reading of the agencies' authority is first belied by the language of Section 404(f) of the Act, which was discussed in the preamble to the proposed rule. Section 404(f)(1) exempts certain activities from the requirement to obtain a Section 404 permit. Section 404(f)(2), however, requires that a permit nonetheless be obtained for "any discharge of dredged or fill material into the navigable waters incidental to any activity" which has the purpose of changing the water's use and the effect of impairing the water's flow or circulation, or reducing its reach. Commentors criticized the citation of Section 404(f)(2) in the preamble to the proposed rule. They argued that this provision merely recaptures activities that are exempted under Section 404(f)(1), but that it does not expand the underlying scope of activities covered by the permit requirement of Section 404(a). These commentors have misinterpreted the reason why the agencies cited Section 404(f)(2) in the preamble to the proposal. We agree with the commentors' point that Section 404(f)(2) does not expand the scope of activities subject to Section 404. However, the agencies do not rely on Section 404(f)(2) for such a proposition. Rather, we believe that Section 404(f)(2) contradicts the argument that Congress intended to preclude EPA and the Corps from considering under Section 404 the effects of activities associated with discharges of dredged or fill material, such as mechanized landclearing, ditching, channelization and other excavation. In Section 404(f)(2), Congress expressly required EPA and the Corps to implement the statutory exemptions based upon consideration of not only the effects of the discharge itself, but also the effects of the activity "incidental" to the discharge. Because Congress expressly required the agencies to consider such effects under Section 404(f), we do not believe it would be reasonable to conclude that Congress nonetheless intended to prohibit EPA and the Corps from otherwise considering such effects under Section 404.

Morever, EPA's longstanding interpretation of Section 404, as reflected in the Section 404(b)(1) Guidelines, demonstrates that EPA and the Corps are not limited to considering solely the environmental effects of the discharge itself. The Guidelines expressly require consideration of "secondary effects," which are defined as

> effects on an aquatic ecosystem that are associated with a discharge of dredged or fill materials, but do not result from the actual placement of the dredged or fill material.

40 CFR 230.11(h). Where an activity such as mechanized landclearing, ditching, channelization and other excavation activities are performed in waters of the U.S. and result in a discharge of dredged material to those waters, we believe that such activities are clearly "associated with" the discharge, within the meaning of Section 230.11(h), and therefore considering the effects of those activities is properly within the scope of Section 404.

Commentors nonetheless cite the decision in *Reid* v. *Marsh*, which addressed the Corps' authority to regulate dredging activities under Section 404. This case held that the Corps was limited under Section 404 to evaluating the effect of the discharge itself, and that the Corps could not look at the effects of the overall dredging activity. For the reasons noted above, however, *Reid* is simply not relevant to this rulemaking, since the sole trigger under this rule for asserting Section 404 jurisdiction is the presence of a "discharge of dredged material," and the agencies therefore have clear authority to regulate the activities covered by today's rule. *Reid* did not address in any manner the scope of the agencies' authority to establish a *de minimis* exception under Section 404.

In any case, we do not view the *Reid* decision as precluding EPA and the Corps from considering the effects of activities associated with a discharge of dredged material in the Section 404 permitting or veto process. Notably, *Reid* was decided before the Supreme Court decision in *Chevron U.S.A.* v. *NRDC* which, as discussed previously, now mandates that courts defer to any reasonable agency interpretation of a statute it administers unless Congress has specifically spoken to the question at issue. The *Reid* opinion failed to cite any provision of the Clean Water Act as precluding the Corps from looking beyond the effects of the discharge itself; nor did *Reid* discuss at all the well-established administrative interpretation in the Guidelines that secondary effects must be considered in issuing permits under Section 404. Since the CWA does not reflect specific Congressional intent that EPA and the Corps be precluded from considering secondary effects under Section 404, the agencies retain broad discretion in deciding whether such an approach is appropriate. EPA and the Corps believe that considering the primary and secondary effects of a discharge is clearly consistent with the language and intent of Section 404 to ensure protection of the aquatic system from effects associated with the discharge of dredged and fill material.

In addition, the *Reid* decision is at odds with the decision of the Tenth Circuit in *Riverside Irrigation District* v. *Andrews*, 758 F.2d 508 (10th Cir. 1985). In this case, the Corps denied nationwide permit coverage for the construction of a dam, the operation of which would have resulted in depleted stream flows that would adversely affect habitat of an endangered species. Even though the discharge of fill material itself to construct the dam would not have had an adverse impact, the court held that the CWA authorized the Corps to consider the total environmental impact of the discharge, including indirect effects such as the impact of the operation of the dam on flows downstream and associated wildlife impacts.

Several commentors cited cases under section 10 of the Rivers and Harbors Act, the National Environmental Policy Act (NEPA), and Section 402 of the CWA as supporting their argument that EPA and the Corps are narrowly constrained to evaluating the effects of the discharge itself. For the reasons discussed previously, these cases are simply not on point because this rule properly triggers Section 404 jurisdiction based upon the presence of a "discharge of dredged material," and arguments about the proper scope of environmental review under Section 404 are therefore not relevant to this rulemaking. In any case, for the reasons explained above, we disagree with commentors that EPA and the Corps are limited to considering only the direct effects of discharges themselves in implementing Section 404.

4. Authority Limited to Regulating Impacts on Water Quality

A few commentors contended that EPA and the Corps could only consider "degradation" of waters of the U.S. in terms of the impacts of an activity on chemical water quality. Some commentors cited for support for this argument the decision of the Seventh Circuit Court of Appeals in *Hoffman Homes* v. *EPA*, 961 F.2d 1310 (7th Cir. 1991), reh. granted and opinion vacated, 35 ENV'T Rep. Cases (BNA) 1328 (7th Cir. Sept. 4, 1992).

EPA and the Corps believe that this comment is erroneous. First, the decision in *Hoffman Homes* relied upon by some commentors has since been vacated by the Seventh Circuit. A new opinion issued by the Court in this case contains no support for the commentor's argument that the CWA is only intended to address impacts of an activity on chemical water quality (*Hoffman Homes* v. *EPA*, No. 90–8810 (July 19, 1993)). We believe, moreover, that there is no support in the CWA as a whole or in Section 404 for the proposition that impacts to the aquatic ecosystem under Section 404 are limited to impacts on chemical water quality, as opposed to impacts on other functions such as flood storage and wildlife habitat.

First, the language in Section 404 itself repudiates the notion that EPA and the Corps may only evaluate impacts of a discharge on chemical water quality. For example, Section 404(c) authorizes EPA to deny or restrict specification of a disposal site for dredged or fill material if the disposal would have an unacceptable adverse effect on a range of aquatic system values, including "shellfish bed and fishery areas (including spawning and breeding areas)," "wildlife," or "recreational areas." There is no language in Section 404 indicating that the adverse impacts to these other aquatic functions are only remediable under Section 404 if the impacts result directly from impacts to chemical water quality.

Similarly, Congress directed that the Section 404(b)(1) Guidelines be based upon criteria comparable to the ocean discharge criteria contained in Section 403(c) of the Act. Section 403(c) states that guidelines for ocean discharges shall include consideration of impacts of a discharge on "marine ecosystem diversity, productivity, and stability; and species and community population changes." Again, there is no language in Section 403(c) limiting the consideration of such impacts solely to those deriving directly from changes to chemical water quality itself. Therefore, the line that some commentors seek to draw around EPA's and the Corps' ability to protect the aquatic environment is simply not one that has been drawn by Congress.

The agencies' interpretation of Section 404, as reflected in the Section 404(b)(1) Guidelines, reaffirms their responsibility to consider impacts of discharges on the broader aquatic ecosystem, and not just water quality itself. For example, 40 CFR 230.10(c) prohibits any discharge of dredged or fill material that would cause significantly adverse effects on ecosystem diversity, productivity and stability such as loss of fish and wildlife habitat. See also 40 CFR 230.32 (describing wildlife values that must be considered in the permitting process); 40 CFR 230.41 (describing how discharges of dredged or fill material may damage or destroy habitat and adversely affect the biological productivity of wetlands).

5. Reversal of Agency Position

Commenters argued that the proposed rule was arbitrary because it represented an abandonment and reversal of an allegedly longstanding agency interpretation of the CWA, and because the agencies allegedly had failed to provide an adequate explanation of the change in policy.

In certain respects this final rule represents a change in Corps regulations and policy, but some commenters seemed to overstate and exaggerate both the extent and the "abruptness" of that change. The Corps and EPA expect that the net effect of this rule will be that most projects involving mechanized landclearing, ditching, channelization, mining, or other excavation activity in waters of the U.S. will require authorization under CWA Section 404. Although this new rule will regulate a number of projects that previously might have escaped Section 404 regulation, it is important to realize that the Corps has been regulating many projects involving mechanized landclearing, ditching, channelization, mining, or other excavation in waters of the U.S. for years because those projects frequently involved substantial discharges of dredged or fill material into waters of the U.S. For example, many drainage ditches in wetlands traditionally have been dug by sidecasting the excavated material into the wetlands; those activities have always been regulated under Section 404. Similarly, many channelization, mining, and other excavation activities in U.S. waters have been regulated under Section 404 over the years, because they involved substantial discharges through disposal or stockpiling of the excavated material in waters of the U.S., or "sloppy" excavation practices, or other substantial discharges. As we shall explain below, the Corps has gradually changed its policy and practice to increase our regulation of mechanized landclearing activities over a period of years. Thus, this final rule is not an abrupt change in policy, interpretation, or practice, that would suddenly begin to regulate all landclearing, ditching, channelization, and other excavation activities in U.S. waters for the first time.

Nevertheless, this final rule does represent both a clarification of agency guidance and a change of agency practice regarding a sub-class of excavation-type activities in waters of the U.S.: i.e., those that would take place with relatively small-volume, "incidental" discharges of dredged material that unavoidably accompany such excavation operations. Until the Corps and EPA undertook this present rulemaking, neither agency had ever promulgated written guidance explicitly and specifically addressing the question whether CWA Section 404 could or should regulate ditching, channelization, mining, or comparable excavation activities in waters of the U.S. based solely on their incidental discharges of dredged material. However, most Corps districts normally followed the practice of not regulating such activities so long as their discharges of dredged material were limited to small-volume, "incidental" discharges.

This practice by most Corps districts was generally consistent with the informal policy of the Department of the Army during much of the 1980s, which narrowly construed the scope of Section

404 jurisdiction over these activities. The practice of not regulating small, incidental discharges was also viewed by many Corps districts as consistent with the thrust of guidance dating from the late 1970s regarding *de minimis* discharges associated with normal dredging activities. This practice led to the adoption by the Corps in 1986 of the current language in the definition of "discharge of dredged material," which excludes from regulation "*de minimis,* incidental soil movement occurring during *normal dredging operations.*" 33 CFR 323.2 (1986) (emphasis added). This language was explained in several paragraphs in the preamble to the Corps' 1986 rule, which some commenters who oppose today's rule quoted to support their position. It states:

> Section 404 clearly directs the Corps to regulate the discharge of dredged material, not the dredging itself. *Dredging operations* cannot be performed without some fallback. However, if we were to define this fallback as a "discharge of dredged material," we would, in effect, be adding the regulation of *dredging* to Section 404 which we do not believe was the intent of Congress.

51 FR 41210 (Nov. 13, 1986) (emphasis added).

While some in the Corps (along with some commentors opposed to this rule) have interpreted this language as indicating that the Corps did not intend to regulate fallback associated with *any* activity, the Corps has never in fact adopted written guidance clarifying the scope of this exclusion, or defining the term, "normal dredging activities." Moreover, there is no explicit indication that the language of the rule, or the explanation statement in the preamble, applies generally to mechanized landclearing, ditching, channelization, or other excavation activities in the waters of the U.S. As discussed further below, an informal survey of Corps districts shows that, in fact, the districts have varied in their approach to regulating activities involving only incidental discharges, indicating that the language of the 1986 rule and preamble was not as definitive as some commentors have suggested.

Today's rule therefore represents the first time that the Corps and EPA have clarified the meaning of the term "normal dredging operations," which we have defined as:

> *Dredging for navigation* in *navigable waters of the United States,* as that term is defined in Part 329 of this chapter, with proper authorization from Congress and/or the Corps pursuant to Part 322 of this Chapter; however, this exception is *not* applicable to *dredging activities in wetlands,* as that term is defined at Section 328.3 of this Chapter. (Emphasis added).

By providing this definition, the Corps and EPA hope to substantially reduce the inconsistency among Corps District offices as to scope of the *de minimis* exclusion for discharges of dredged material.

Much of the inconsistency among the Corps district offices on this issue resulted from the decentralized nature of the Corps. Recognizing that conditions and situations differ tremendously across the country, the Corps confers a large amount of discretion upon each of its district engineers to operate the regulatory program in a reasonable manner. Each district engineer must therefore consider local and regional factors in applying national standards. This approach enables the program to remain flexible enough to interpret one standard set of regulations so that it applies to widely varying regional needs and circumstances. In carrying out their responsibilities, districts have therefore had to interpret terms used (but not defined) in the 1986 regulation, such as "*de minimis,*" "incidental," and "normal dredging operations" in response to specific projects, situations, and regional needs and these interpretations have differed somewhat across the country.

Corps headquarters did not intercede to halt the adoption of these varying interpretations so long as they did not conflict with the plain words of the regulations. The Corps has always provided its districts with the flexibility to interpret the Corps' regulations so that they may be reasonably applied to varying circumstances. So long as the districts abided by the regulatory language in Section 323.1(d), that indicates that the term "discharge of dredged material * * * does not include *de minimis,* incidental soil movement occurring during normal dredging operations," districts were not prohibited from developing their own operating interpretations of "*de minimis,*" "incidental," and "normal dredging operations."

Today's rule aims to rectify the ambiguity inherent in the 1986 rule's statements on "*de minimis* soil movement" and "normal dredging operations," first, by making it clear that the exclusion from Section 404 of "incidental movement" of dredged material only applies to such movement occurring in the course of "normal dredging operations"; all other incidental discharges of dredged material under this rule can be considered a discharge of dredged material regulated under Section 404. Second, today's rule for the first time defines "normal dredging operations," as quoted above.

As noted above, over the years Corps district offices have developed somewhat differing approaches to how they regulate the various activities that produce incidental discharges of dredged material. To semple this diversity, the Corps conducted an informal survey of eleven Corps district offices. The Corps selected the districts surveyed in order to obtain a cross-section of likely practices among district offices. The Corps did not intend, however, for this to be a "scientific" survey statistically representative of practices across the country; the Corps simply wanted to obtain anecdotal information regarding the range of interpretations and practices among the districts. In the survey the Corps found that many districts currently regulate some of the activities covered by this rule. Although the Corps is not aware of any district that regulates all the activities subject to the rulemaking in the same manner that today's rule dictates, there are several districts that regulate one or more of these activities in the same manner as provided for under this rule.

Since the issuance of the 1990 RGL on landclearing (RGL 90–5), the districts have been much more consistent in how they regulate landclearing. In the absence of comparable guidance on ditching, channelization, and mining, the Corps districts have shown a greater diversity in their regulation of these activities. By examining the informal survey results on an activity-by-activity basis, this diversity becomes readily apparent.

Virtually all of the districts surveyed regulate ditching activities that involve sidecasting. At least one of the districts surveyed regulates ditching activities that produce only incidental discharges. These incidental discharges were typically in the form of drippings or fallback from ditching machinery. Another district regulates ditching based on these same incidental discharges, but only if the water of the U.S. being ditched is covered by some type of vegetation that the district could use to classify the activity as landclearing, and thus, apply the guidance in RGL 90–5.

Several Corps districts surveyed regulate channelization activities based on incidental discharges. These districts tend to focus on those channelization operations that employ drag lines. At least one of these districts will only regulate these channelization activities if the activity is conducted in water.

At least three of the eleven districts surveyed regulate mining activities in

the waters of the U.S. Two of these districts are currently regulating these activities in virtually the same manner as they will be regulated under today's rule. Other districts only regulate mining activities if the material removed is in water. Yet another district regulates the discing of peat bogs, which is required in the mining of peat.

As explained above, mechanized landclearing is being regulated in a fairly consistent manner by all Corps districts due in large part to the series of regulatory guidance letters that have been issued by the Corps over the past decade. There is, however, some inconsistency in how the most recent RGL (RGL 90–5) is currently being applied by some districts. At least one district, as explained above, uses the RGL 90–5 to regulate discharges incidental to ditching, as long as the area has some type of vegetation on it.

Some degree of inconsistency among the Corps districts' in regulating ditching, channelization, mining, and even landclearing is therefore evident in the results of our survey. The Corps will readily concede that practically every district will have to change some number of their regulatory practices to conform to today's rule. However, the allegation that today's rule represents a sudden and radical departure from a longstanding, official interpretation of our Section 404 regulatory jurisdiction substantially overstates the case.

Commentors specifically cited several RGLs on landclearing, the only written, national guidance the Corps has issued concerning any of these activities, as evidence that the Corps, by promulgating this rule, allegedly is drastically departing from past agency positions. The commentors focused mainly on the RGLs that were issued by the Corps in 1982 and 1985 that more narrowly construed the extent to which mechanized landclearing activities would be subject to Section 404. RGL 82–5 stated that Section 404 did not cover "[m]inimal ("de minimis") movement of dirt, in and of itself, incidental to removal of planting of vegetation." Under this RGL, such activity would be covered if "accompanied by a land leveling operation which alters the topographic features of a 'water of the U.S.' through significant movement of soil." After the decision was issued by the 5th Circuit in *Avoyelles*, the Corps issued RGL 85–4, which provided that mechanized landclearing activities required a Section 404 permit if "the activity would involve burying logs or burying burn residue, or totally or partially filling in sloughs or low areas, or leveling the land." This RGL also stated that piling of trees, brush and stumps with *de minimis* amounts of soil attached or gathered in the piling operation did not necessarily constitute a Section 404 discharge unless it would totally or partially fill in sloughs or level the land. The RGL also stated that the filling of stump holes is normally a *de minimis* discharge because of the *de minimis* nature of the incidental soil movement.

EPA and the Corps acknowledge that the interpretation of the applicability of Section 404 to mechanized landclearing activities contained in these two earlier RGLs was more narrow than that reflected in today's regulation. Rather than view today's rule as a sharp departure of our past position, however, we believe that there has been an evolution in the agencies' treatment of mechanized landclearing under Section 404, which has gradually brought more and more mechanized landclearing activities under regulation by the Section 404 program. The 1982 RGL most narrowly construed the applicability of Section 404 to these activities, while the 1985 RGL recognized additional circumstances when mechanized landclearing would trigger Section 404 jurisdiction. Finally, almost three years ago, the Corps issued RGL 90–5, which took the position that mechanized landclearing activities generally are regulated under Section 404 because they result in the redeposition of dredged material. Today's rule is therefore entirely consistent with the guidance issued by the Corps in 1990.

Thus, while our position has changed over the course of the last decade regarding the applicability of Section 404 to mechanized landclearing activities, we do not agree with the commentors who argued that today's rule is an "abrupt" reversal of our longstanding position. The interpretation of Section 404 contained in the landclearing portion of today's rule is the position that has been taken by the Corps since 1990. This position reflects, moreover, the gradual increase in our appreciation of the severe adverse environmental effects associated with mechanized landclearing that has led us to conclude that regulation of these activities under Section 404 is warranted.

Even if one were to consider today's rule an "abrupt reversal" of a longstanding agency position, however, the Corps and EPA believe that such a change is warranted in light of our increased understanding of the severe environmental effects often associated with the activities covered by the rule, and the increasing sophistication of developers who seek to convert waters of the U.S. to uplands without being subject to the Section 404 regulatory program as previously administered by the agencies. As the Supreme Court recently provided in *Rust* v. *Sullivan*, an "agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis." 111 S. Ct. 1759, 1769 (1991), *quoting Chevron U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 863–64, 104 S. Ct. 2792. The Court further explained that agencies must be provided the flexibility to "'adapt [their] rules and policies to the demands of changing circumstances.'" *Id.*

Such changes, whether dramatic or slight, must be consistent with the authorizing statute and be based on a "'reasoned analysis.'" *Id. quoting Motor Vehicle Mfrs. Assn. of the United States* v. *State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 42, 103 S. Ct. 2856, 2866 (1983). The Corps and EPA both strongly believe that the regulatory mandates expressed in today's rule are within the authorities provided to our agencies pursuant to Section 404 of the Clean Water Act. Furthermore, we feel that, to whatever extent today's rule constitutes a change of previous practice, such a change is warranted, for the reasons we have explained in the preamble.

The Corps regulatory program over the years has proved to be remarkably adaptable to changes that has occurred in our appreciation of wetland functions and values and in our increased understanding of the effects of certain activities on wetlands. Ever since the Corps was first given authority to regulate discharges of dredged or fill material into waters of the U.S., the Corps and EPA have been shaping and defining the regulatory program with the broad discretion granted to the agencies by the CWA. Today's rule embodies many changes that we have gradually adopted through less formal guidance over the past two decades, and incorporates some refinements and clarifications to our policy that are long overdue.

In certain respects, and for every Corps district, today's rule will bring about changes in our previous practice; however, we believe that such changes are warranted in order to ensure that the Section 404 program can effectively protect our aquatic resources from the degradation that can result from unregulated mechanized landclearing, ditching, channelization, and other excavation activities. As discussed further below, we have learned increasingly over the last decade how

these activities can severely impact our nation's aquatic resources, and we therefore view today's rule as an important means of achieving the objectives of the CWA to "restore and maintain the chemical, physical and biological integrity" of those resources.

The specific facts of the case that led to the initiation of litigation in the *Tulloch* lawsuit provides a graphic example of how mechanized landclearing and ditching activities adversely affect the aquatic environment, and of the inequities that have resulted under the previous policies for regulating these activities. The facts in *Tulloch* help demonstrate the necessity of this rule by revealing how one developer with the technical expertise and financial resources was able, under past agency policies, to avoid the requirement to obtain a Section 404 permit for environmentally destructive activities in waters of the United States.

The *Tulloch* case involved an 1800 acre development project in New Hanover County, North Carolina, called the Pembroke Jones Park. In 1987, the Corps determined that about 700 acres of the site were wetlands. The developer performed numerous activities in the wetlands that "destroyed or degraded" them, yet the Wilmington District repeatedly determined, based on their understanding of the policies of the Corps, that the developer's activities should not be regulated under Section 404.

The developer originally applied for a permit for discharges associated with its development, but withdrew the application in light of concerns among the Corps and resource agencies about the significant adverse effects likely to be caused by the development. The developer subsequently met repeatedly with the Wilmington District of the Corps, presenting a strategy for constructing the same project without the need to obtain a Section 404 permit. First, the developer land cleared much of the wetland acreage. This was accomplished by pushing the vegetation from the cleared area. Wilmington District determined that since the developer removed all the vegetation and did not recontour the land, this activity did not require a Section 404 permit.

If these same activities were employed after the promulgation of today's rule, those activities would trigger Section 404 regulation. Under the rule, for example, the dirt falling from the roots of the trees as they were removed from the ground, in and of itself, would constitute a discharge of dredged material that would subject the mechanized landclearing operation to regulation. Pursuant to today's rule, these landclearing activities pursued by the developer would certainly destroy or degrade the wetlands and therefore require Section 404 authorization.

Second, the developer performed two types of excavation activities in the wetlands. He excavated some areas to create new ponds and excavated drainage ditches. The excavation was performed using draglines (in the ponds) and backhoes, which had sealed buckets. The soil excavated was either placed directly on uplands or placed in sealed containers resting on the beds of 4-wheel drive and 6-wheel drive trucks or pans. The excavation, for the most part, was performed in such a manner that only drippings from the buckets of the excavation machinery were allowed to fall back into the wetland.

Using computer modeling, the developer's consultant determined that by excavating ditches four feet deep every two hundred feet, the wetlands in the first conversion area could be drained, eliminating the presence of wetland hydrology and wetland vegetation, and thereby removing the area from Section 404 jurisdiction. After these ditches were completed and the water table had dropped sufficiently, the Wilmington District released the tract from jurisdiction. The developer used this technique in several other tracts which were also later released from jurisdiction.

The developer also excavated many acres of the wetlands in order to create approximately eighty-five acres of open water ponds. He also inundated portions of the wetlands acreage to create additional open water ponds. The work was accomplished by constructing wooden piers that the Wilmington District did not find to be an activity that was regulated under Section 404.

During the course of the excavation operations, the Wilmington District determined that these activities were not subject to regulation. By using sealed buckets and container trucks, the developer was able to substantially reduce the amount of dredged material being redeposited in the wetland. Although the Wilmington District later adopted a more strict position regarding excavation activities in wetlands, the District initially determined that it would not require the developer to secure a permit based on the "drippings" along.

As a result of this operation, hundreds of acres of environmentally valuable pocosin wetlands have been converted into a residential development and a golf course without being regulated, eliminating opportunities to avoid and mitigate adverse environmental effects. Pocosins are an unusual and relatively rare type of wetland found only in the Southeast. Owing their existence to poor drainage and abundant rainfall, pocosins typically serve important water quality and groundwater recharge functions, and often provide habitat for rare plants and animals. Because of the sophisticated methods employed, this developer was able to evade regulation under the Section 404 program while destroying these ecologically valuable wetlands.

It is clear that the methods used by the developer were expressly chosen because they would avoid triggering the need to obtain a Section 404 permit. The developer's representatives met repeatedly with the staff at the Wilmington District to determine what the District believed was the exact extent of its regulatory jurisdiction over wetland excavation. It was only after the developer was confident that it could successfully evade Corps regulation that it would proceed with the next destructive portion of its operation.

It is precisely because of operations like this development that the Corps and EPA have decided to promulgate this rule. At one time it appeared to be sufficient to base the regulation of ditching on sidecast material. This, as well as other similar projects, have demonstrated that this is no longer the case. It the Corps and EPA are to perform their assigned mission under the CWA, "to protect and restore the chemical, biological, and physical integrity of the waters of the U.S.," we believe that modification of earlier practices and policies is necessary and appropriate.

C. Presumption That Mechanized Landclearing, Ditching, Channelization and Other Excavation Result in Discharges

The proposed rule contained language that would have established an irrebuttable presumption that mechanized landclearing, ditching, channelization or other excavation activities in waters of the United States result in the discharge of dredged material (proposed 33 CFR 323.2(d)(2) and 40 CFR 232.2(e)(2)).

1. Public Comments and Changes to Proposed Rule

Commentors expressed several concerns with this approach. First, commentors argued that the terms "mechanized landclearing," "ditching," "channelization" and "excavation" are vague, and therefore do not provide clear guidance to the regulated public as to whether their activities would require

a permit under the rule. Commentors argued, moreover, that the agencies had not presented factual information in justify the conclusion that these activities invariably result in discharges. They contended that it is possible in some cases to conduct some of these activities without causing any fallback or redeposition of dredged material.

In response to these comments, and in order to ensure that the final rule is clear and understandable, the Corps and EPA have made certain changes in the final rule. The agencies have deleted the proposed rule language that would have established the irrebuttable presumption that the listed activities will result in discharges of dredged material. As explained in the preamble to the proposed rule and explained further below, we believe that it is virtually impossible to conduct mechanized landclearing, ditching, channelization or excavation in waters of the United States without causing incidental redeposition of dredged material (however small or temporary) in the process. However, the agencies cannot rule out the possibility that, in a highly unusual case, or with novel technology, one or more of these activities might be accomplished without such a discharge. Moreover, since the agencies' jurisdiction over a particular activity can only be triggered by the presence of a discharge in the specific case, the agencies declined to make a categorical finding in this regulation that the listed activities always result in discharges. That determination, by its nature, depends on the facts of a particular case. However, the agencies strongly admonish any party considering conducting any one of these activities without obtaining a permit that they may be proceeding at the risk of violating Section 404 since, under today's rule, a permit is required in any case where any incidental redeposition of dredged material (however small or temporary) is cause in connection with an activity that would destroy or degrade waters of the United States, unless otherwise exempted under Section 404(f).

Because this rule does not make a finding that mechanized landclearing, ditching, channelization and other excavation will always result in discharges, commentor's concerns about the factual support for such a finding are no longer relevant. Section C, below, however, provides a detailed description of how mechanized landclearing, ditching, channelization and other excavation activities can result in the redeposition of dredged materials.

Several commentors stated that the term "mechanized landclearing" should not be defined to include operations such as the moving or cutting of vegetation where the activity occurs at or above the soil/sediment line. Some commentors wanted the Corps and EPA to clarify which landclearing activities will be regulated under this rule. We agree that not all mechanized operations involving the removal of vegetation in wetlands and other waters of the United States should be regulated because not all these operations result in a discharge of dredged or fill material.

In response to these comments, the definition of discharge of dredged material in the final rule expressly excludes "activities that involve only the cutting or removing of vegetation above the ground (e.g., mowing, rotary cutting, or chainsawing) where the activity neither substantially disturbs the root system nor involves mechanized pushing, dragging, or other similar activities that redeposit excavated soil material." Under this language, a discharge only occurs when mechanized landclearing activities occurring in waters of the U.S. cause soils and other excavated dredged materials to be added or redeposited in such waters. So long as all work occurs above ground level, and root systems are not substantially disturbed, the cutting of vegetation, whether using hand-held equipment or equipment mounted on heavy machinery, would not cause either the addition or the redeposition of dredged material. For example, maintenance clearing of existing powerlines and chipping cut vegetation in place or shearing vegetation above the soil line where the vegetation is not subsequently windrowed or otherwise pushed would not usually cause a discharge regulated under Section 404.

Several commentors, however, appeared to argue that maintenance of utility line corridors would never result in a discharge of dredged or fill material. These commentors cited the decision of the Fifth Circuit in *Save Our Wetlands, supra,* which held that cutting of trees with a chainsaw and windrowing of the vegetation did not result in a discharge subject to Section 404. As noted above, today's rule expressly excludes from the definition of "discharge of dredged material" the cutting of vegetation above the ground. Under today's rule, if vegetation is cut above the surface and then lifted into windrows without causing redeposition of excavated material, then no Section 404 permit is required. If, however, windrowing is accomplished in a manner that would redeposit dredged material (for example, by pushing the fallen vegetation with a bulldozer or similar equipment), then a permit would be required.

Unlike certain commentors, however, we do not read *Save Our Wetlands* as holding that EPA and the Corps are precluded under the CWA from regulating landclearing unless it would result in a conversion of waters of the U.S. to uplands. That decision did not construe the scope of the agencies' statutory authority under Section 404, but rather turned on EPA's and the Corps' regulatory definition of discharge of dredged material. The court held that the activities in that case did not constitute a discharge of dredged material under the agencies' regulatory definition because the activity would not convert wetlands to uplands. An activity involving a discharge of dredged material subject to today's rule, however, would require a permit if it would destroy or degrade a water of the United States. We do not read *Save Our Wetlands* as addressing, in any respect, the agencies' statutory authority to adopt the regulatory approach we are taking here. Indeed, the court expressly noted in its opinion that Congress left to EPA and the Corps how to define the term "dredged or fill material." *Id.* at 647.

2. Description of Mechanized Landclearing, Ditching, Channelization and Other Excavation Activities

The agencies provide below a detailed description of the actual processes involved in mechanized landclearing, ditching, channelization and other excavation. This discussion is intended to be illustrative of the major types of landclearing and excavation techniques currently used, and is not intended to be exhaustive or limit in any manner the scope or applicability of the final rule. We are providing this description in order to illustrate the manner in which these types of activities cause incidental soil movement, which results in additions or redepositions of dredged material.

a. *Mechanized landclearing.* In the mechanized landclearing process, the addition or redeposit of dredged material can occur several ways. For example, implements used in the mechanized landclearing process are scraped along the surface of the ground or pushed into the ground and then moved through the soil, usually by bulldozers or loaders. Brushrakes, rootrakes, chunkrakes, disc harrows, root plows, rippers, bulldozer plows, and many types of shearing blades are characteristic of the type of equipment which operate in this way. Brushrakes, for example, have tines which scrape

below the ground level to gather and stockpile slash and loose rock; chunkrakes have bowl shaped blades frequently up to two feet or more in diameter, which cut into the ground and fluff the soil; disc harrows knock down, chop and partially bury weeds, brush, and small saplings by using concave disc, two feet or more in diameter, with sharp scalloped edges; root rakes remove roots and stumps by use of a fork-like blade pushed through the soil; shearing blades are tractor-mounted shears which can weigh up to several thousand pounds and can move large amounts of debris, soil and roots if they are moved along the surface of the ground. Rippers and deep plows are pulled along below the soil surface to break up hard pans or other stiff subsoil. The arm which attaches them to the bulldozer or loader drags through the soil surface, moving soil aside and thereby causing a discharge.

When the implements used in mechanized landclearing move along the ground or through the soil, they scrape, pick up, move or otherwise displace debris and soil (including leaf litter and humus) and usually have a leveling effect on the ground by moving debris from high areas to low areas. When soils are picked up, moved, or otherwise displaced, they are added or redeposited to waters of the United States at various distances from the excavation point as the implements used in the mechanized landclearing process move through waters of the United States. During the discing, tining, or raking process, for example, soil will ride in front of the disc, tine, or rake if the disc, tine, or rake scrapes or penetrates the ground, resulting in a displacement and redepositing of soils and sediments.

The addition or redeposit of dredged material also occurs when equipment is used to knock down trees and rip up root systems even if the equipment used does not, in itself, scrape across or penetrate the ground. When stumps are ripped out of the waters of the United States, soils and sediments are added or redeposited back into the waters of the United States. Also, holes and depressions are created in the ground which are typically filled by using the vehicle which removed the trees and their roots or subsequently by other vehicles or equipment. This filling or redeposition would constitute a discharge in addition to that which occurs by the removal of the stumps themselves. Tree pushers and tree splitters are examples of equipment which normally operate in this way. A tree pusher uses a bar mounted to the front of a bulldozer or loader while a tree splitter uses a V-shaped blade, which is usually about 18 to 20 feet in length. As the tree pusher or tree splitter knocks the tree down, the roots are usually ripped up out of the ground. Any roots remaining are then typically removed from the ground by the bulldozer's blade. Not all equipment used to remove trees disturbs root systems, or pushes, drags, or otherwise engages in an activity which results in a discharge of dredged material. Some tree shears or tree pinchers, for example, may be operated in such a manner so that they do not cause a discharge of dredged material, provided the vegetation is cut above the ground while leaving the soils and roots intact.

b. Ditching, channelization and other excavation. During excavation, material in either a solid or semi-solid form is removed from the waters of the United States. As material is excavated from the waters of the United States, the addition or redeposit of dredged material occurs through soil or sediment spills, drippings, and moving or displacing of soils and sediments as the dredging equipment moves through the soil or sediments.

Ditching and channelization are two types of excavation activities which often occur in wetlands and in other waters of the Untied States. As we use the terms here, ditching is the act of creating ditches (i.e., trenches or troughs) by excavating the earth. Channelization is the modification made to, within, or adjacent to an existing stream channel, as well as the rerouting of a steam channel. Both ditching and channelization are used to convey water, often for irrigation or drainage purposes and can be accomplished by using the same equipment.

Most ditching and channelization activities are accomplished using excavation equipment of some type, which is usually characterized by the use of some form of bucket or scoop to excavate soil and sediment.

Mechanial dredging equipment typically consists of a backhoe, a bulldozer, a dipper, or a bucket. A backhoe is a hoe-type or pull-type shovel usually attached to the back of a front loader. A backhoe, which shovels and then lifts soil or sediments from waters of the United States, is often used during the construction of ditches or for stream channelization projects. A dipper and bucket operate at the end of a boom, which is attached to a crane or other vehicle. Buckets are suspended from a cable and dippers are fixed directly to the boom, Typically, a crane drops the bucket into the soil or through the water column to the bottom. The bucket is filled with soil or sediments and lifted from the water or off the ground and dropped or sidecast on adjacent grounds or into vehicles where it is moved to another disposal site. Bucket dredging for ditching and channelization projects is commonly done with a dragline. Draglines, or other equipment of this kind, operate by dropping the bucket into the soil or sediment and then dragging it through the soil or sediment until it is filled. With a dipper, as with a backhoe, a bulldozer or loader pushes the scoop or hoe through the soil or sediment in order to fill up the dipper. The dipper is then moved off the bottom and the collected sediments disposed of as they are with buckets.

Many stream channelization projects are accomplished by using a bulldozer to push sediments, including cobble, gravel and sand, from a particular point in the stream to another location. To complete such work, the bulldozer blade is lowered into the bottom of the stream and then moved in a forward direction which results in the pushing of sediments to another location in the steam or to an upland area.

Because of the physical processes of soil movement inherent in the act of dredging, the use of bulldozers, draglines, dippers, and backhoes, or other equipment of this kind will, except in limited situations, result in some addition or redeposition of dredged material. The addition or redeposit of dredged material occurs as soils and sediments are picked up and moved during the excavation process.

For example, when a dragline or backhoe is dragged through soils or sediments, such soils and sediments are displaced and redeposited to various distances from the initial excavation point as the implement used in the excavation process gathers the dredged material. This same type of displacement and redeposition occurs as a bulldozer pushes sediments during a stream channelization project. Also, when the dragline or backhoe stops moving along the bottom and the bucket is raised, additional additions or redeposits of soils or sediments occur as such material falls from the bucket.

The cutterhead dredge is the most commonly used hydraulic dredger. It operates by using a rotating cutter to cut into the sediments. The rotating cutter is attached to a suction line which sucks in the material as it is being cut. Typically, a cutterhead is used to break up the sediment and mix it into a slurry and then pump it through a pipe to a disposal area. As the cutterhead moves through the bottom, it pushes the sediment around. The addition or

redeposit or dredged material occurs as the whirling of the cutter slings some of the dredged material away from the suction of the pump either as discrete clumps or in suspension and adds or redeposits it at various points from where the cutterhead moved through the bottom.

D. Effects of Mechanized Landclearing, Ditching, Channelization and Other Excavation

The agencies received substantial public comment regarding whether the activities that would be covered by this rule in fact destroy or degrade waters of the U.S. Many commentors cited activities that they believed did not cause such an effect. There was also confusion regarding the meaning of "degrade" in the proposed rule. Some commentors also objected to the presumption in the proposed rule that these activities destroy or degrade wetlands, and questioned the factual basis for such a presumption. These comments are addressed below.

1. Definition of "Destroy" and "Degrade"

The proposed rule did not contain definitions of the terms, "destroy" and "degrade." In the preamble to the proposal, however, the agencies solicited public comment on defining destruction as altering an area "in such a way that it would no longer be a water of the U.S," and defining degradation as occurring when a discharge "results in an identifiable decrease in the functional values of the water of the U.S." 57 Fed. Reg., 26896.

Several commentors supported the definition of "destroy," stating it was clear and concrete. A few commentors recommended that the definition of "destroy" be modified to clarify that it is only necessary to determine whether there is destruction in areas currently being delineated as waters of the United States. Two commentors felt the destruction threshold was inadequate and that destruction would also occur when a wetland or other special aquatic site is converted to open waterbody, such as conversion of a wetland to a retention pond. Another commentor disagreed and argued that this type of activity did not destroy, and possible did not even degrade, waters of the United States. We believe that the term "destroy" is sufficiently clear that no change in the proposed approach is appropriate.

We agree with commentors that the jurisdictional status of an area before and after an activity takes place should be based on current agency guidance for making such determinations. While we agree that conversion of a wetland or other water of the U.S. to another type of water of the U.S. (e.g., conversion of a wetland to open water such as a lake) does not necessarily "destroy" a water of the U.S., such a change could in fact "degrade" an area by adversely affecting at least one of the aquatic functions of the site. As discussed further below, while there may be some environmental benefits associated with such a project, any adverse effect on any aquatic function would mean that an activity required a Section 404 permit. While such an activity may well receive a permit based on consideration of the Corps' public interest review and the Section 404(b)(1) Guidelines, we do not believe that it would be appropriate to exclude such activities from the coverage of Section 404 entirely. For clarity, we have added the definition of destroy to the final rule (see 33 CFR 323.2(d)(4); 40 CFR 232.2(e)(4)).

By far, most commentors addressing these terms were concerned with the definition of "degrade" contained in the preamble to the proposal as "an identifiable decrease in the functional values of waters of the United States." The commentors stated that "identifiable decrease" and "functional values" were vague terms, which were not susceptible to measurement, and that adoption of these terms would only contribute to increased confusion over the Section 404 regulatory process, as a result of subjective determinations made by Corps or EPA personnel. Two commentors felt that the term "functional values" was inappropriate and should be replaced with "functions and values," to be judged separately since functions are measurable and values are subjective. A few commentors recommended that regulated waters be generally classified, according to potential functions and values, for their respective geographic areas, while two others felt functions should be directly related to the science of water quality. Several commentors stated that there is no established methodology to evaluate functional values for impact assessment. Therefore, they recommended that the Corps and EPA develop a methodology and/or identify a preferred method to provide a clear and precise standard to measure degradation. Further, two of these commentors also felt that the selected methodology should be implemented only after promulgation through notice-and-comment rulemaking.

Several commentors disagreed with the example presented in the proposed rule, *i.e.*, that if the hydrologic regime of a wetland is altered enough to change the vegetative composition of the area, it will be degraded. These commentors did not believe a mere change in vegetative composition automatically results in degradation. As a means of better clarifying the term "degradation," several commentors suggested that the definition refer to an "identifiable adverse effect that the proposed activity is likely to have on waters of the United States." Two commentors suggested replacing the word "identifiable" with "significant" and one commentor recommended changing "identifiable decrease" with "appreciable decrease."

Because there was confusion among the public about the term "degrade" we have chosen to include a definition of degradation in the final rule that incorporates suggestions made by some commentors. Under the final rule, an activity results in degradation when it would have more than a *de minimis* effect on the area by causing an identifiable individual or cumulative adverse effect on any aquatic function. As discussed further below, this standard is a threshold for determining whether an activity requires a Section 404 permit at all, so we believe that any adverse effect to any aquatic function of the site would constitute "degradation" under the final rule. Evaluation of the project and its overall impacts under the Section 404(b)(1) Guidelines and the Corps' public interest review would occur during the permit process.

This definition changes how the term "*de minimis*" is used in the rule from the way it has been used previously in the definition of "discharge of dredged material." In the previous rule, the term "*de minimis*" referred to the amount of soil moved during normal dredging activities, and the proposed rule similarly used this term to refer to the amount of soil moved in the process of mechanized landclearing, ditching, channelization and other excavation. The definition of degradation in the final rule uses the term "*de minimis*" to refer to the degree of environmental effects associated with these activities. This change makes sense for several reasons. First, using the term "*de minimis*" to refer to environmental effects is consistent with the intent of this rulemaking, which is to ensure that incidental discharges associated with mechanized landclearing, ditching, channelization and other excavation trigger Section 404 where those activities would have certain effects on waters of the U.S. Establishing a *de minimis* effects test also comports with the structure and goals of Section 404, which focus on providing protection of waters of the United States from adverse effects associated with discharges of dredged or fill material.

EPA and the Corps believe that the *de minimis* exception contained in today's regulation is within the agencies' authority under Section 404. The underlying focus of Section 404 is on evaluating and, where possible, reducing and avoiding adverse effects to the aquatic environment due to discharges of dredged or fill material. Section 404's focus on environmental effects is evident in numerous aspects of this statutory provision. For example, Section 404(c) authorizes EPA to prohibit, deny or restrict the specification of any site for the discharge of dredged or fill material if it would have "unacceptable adverse effects" on municipal water supplies, shellfish beds and fishery areas, wildlife or recreational areas. A similar focus on environmental effects is evident in Section 404(f)(2), which "recaptures" activities otherwise exempt under Section 404(f)(1) where the activities have the purpose of changing the use of an area of waters of the United States, and have the effect of impairing the flow or circulation, or reducing the reach, of waters of the United States.

Thus, the very purpose of Section 404 is to conduct an environmental review of discharges of dredged or fill material in order to determine the gravity of the environmental harm associated with the discharge, and evaluate ways in which that harm can be reduced or avoided. The focus of Section 404 on effects of discharges is reflected throughout the Section 404(b)(1) Guidelines which, for example, prohibit discharges where a practicable alternative would have less "adverse impact" on the aquatic ecosystem, where a discharge would cause or contribute to significant degradation of the aquatic environment or where appropriate and practicable steps have not been taken to minimize "adverse effects of the discharge on the aquatic ecosystem." See 40 CFR 230.10 (a), (c), and (d). See also 40 CFR 230.11 (listing types of effects that must be considered in the permitting process).

Therefore, subjecting *de minimis* activities to review under section 404 would be a needless paper exercise that would divert limited agency resources from focusing on discharges associated with environmental effects of concern under Section 404. Given the clear focus of Section 404 on regulating activities based on their environmental effects, we view an exception for discharges of dredged material having *de minimis* effects as a tool for advancing the goals and objectives of Section 404. See *Alabama Power Co.* v. *Costle*, 636 F.2d 323 (DC Cir. 1979).

We note that the exception addressed by this rulemaking was already present in the agencies' regulatory definition of "discharge of dredged material." This rule is clarifying, and narrowing the effect of, this pre-existing exception. Moreover, as discussed further below, EPA and the Corps have included provisions in the rule to help ensure that only truly *de minimis* activities are exempted from the Section 404 program by requiring that dischargers engaging in mechanized landclearing, ditching, channelization and other excavation obtain a finding by the Corps, or EPA as appropriate, prior to their discharge, that their activities do not require a permit.

We wish to emphasize that the threshold of adverse effects for the *de minimis* exception is a very low one. Under the final rule, an identifiable adverse individual or cumulative effect on any aquatic function is sufficient to subject an activity to Section 404 jurisdiction. Some activities may cause certain adverse effects on the aquatic ecosystem while having other beneficial effects. For example, an activity altering the hydrology of a wetland may result in restoring pre-existing hydrology, or may improve habitat value or water quality in the long-term. If the activity would result in some loss or identifiable reduction of any aquatic function to achieve this result, however, the activity would "degrade" waters of the U.S. and a permit would be required under today's rule. For example, if a discharge activity would have any adverse impact on the suitability of the area as habitat for any species utilizing the area, a permit would be required. It is not our intent, therefore, that the positive and negative effects of the activity be balanced and to require a permit only in those cases where the net effect is adverse. Rather, an adverse effect on any one aquatic function, even if it is temporary, would be sufficient under the final rule to trigger the Section 404 permit requirement.

In the case of endangered or threatened species, any effect of an activity on such species would trigger an inquiry by the Corps as to the nature of that effect, and whether the activity would destroy or degrade waters of the U.S. within the meaning of today's rule. If there is an effect on endangered or threatened species from an activity, the Corps in consultation with the Fish and Wildlife Service or the National Marine Fisheries Service (depending on the agency having jurisdiction over the species) under Section 7 of the Endangered Species Act, will determine whether the activity is likely to adversely affect the species. If the Corps finds that the activity is not likely to adversely affect the species, and the Service concurs in writing in this finding, then the activity would not "degrade" the water within the meaning of today's rule, and no permit would be required. If, however, either the Corps or the Service believes that the effect is likely to be adverse, then a Section 404 permit will be required for the activity.

Other examples of adverse effects on any aquatic function would be an adverse alteration of the area's hydrologic regime, or of the type, distribution of diversity of vegetation, fish and wildlife that depend on such waters. Again the threshold of effect under the final rule is a low one. It would not be necessary for a discharge activity to remove or significantly impair wetland hydrology to trigger the permit requirement. An activity that would, for example, likely reduce the duration of inundation or saturation of a portion of wetland would "degrade" the wetland within the meaning of this rule. Indeed, in some cases, increasing the duration of inundation or saturation may have an adverse effect on an aquatic function. Similarly, alteration of the vegetative composition of a water of the U.S. does not require that all vegetation be removed, or that the vegetative composition be so significantly altered that the area would no longer meet the hydrophytic vegetation criteria for delineating wetlands. A lesser change to the vegetation of an area can, for example, have an impact on the function of a wetland as a food source or as habitat for a species utilizing the area.

Activities such as walking, bicycling or driving a vehicle through a wetland would have *de minimis* effects except in extraordinary situations, and the agencies do not intend to devote scarce resources to regulating such typically innocuous activities.

In response to commentors who thought that the agencies should establish a higher effects threshold in this rule (e.g., activities would be regulated only when they have a "significant" effect on the environment), we wish to emphasize that the *de minimis* exception is necessarily a narrow one, limited to "trifling" or "inconsequential" effects (see *Alabama Power Co.* v. *Costle*, 636 F2d. at 360 (DC 1979). Moreover, the evaluation of effects under this rule is for the purpose of determining whether an activity is subject to regulation under the CWA at all. When an activity poses more than *de minimis* effects on the aquatic environment, the severity of those effects will be evaluated to determine whether, for example, a class of activities would have minimal effects and therefore could be authorized by a

general permit. See CWA Section 404(e). The severity of effects is also evaluated during the individual permitting process to determine whether a permit should be issued and, if so, with what conditions. Where the question, however, is whether an activity requires authorization at all, we believe that the threshold should be a low one, consistent with the nature of the legal *de minimis* exception.

The term "significant impacts" by contrast, generally suggests a severe adverse environmental effect. As used in the National Environmental Policy Act (NEPA), an action "significantly" affecting the environment triggers the most rigorous of environmental reviews, an environmental impact statement. Similarly, under the Section 404(b)(1) Guidelines, any discharge that would "significantly" degrade waters of the U.S. is prohibited. Such a high threshold is not appropriate where, as here, the question is whether an activity should be subject to regulatory scrutiny under Section 404 at all.

Because commentors expressed confusion regarding the application of the phrase "decrease in functional values" that was included in the proposed rule, this phrase is not included in the final rule. Nevertheless, an evaluation of the functions of a water of the U.S. is obviously relevant to determining whether an activity may cause an adverse effect on waters of the U.S. For example, an area whose functions include vegetation serving as a food source or habitat for migratory waterfowl would suffer a decrease in that function by the alteration or removal of vegetation. However, it is not our intent to place on the Corps or EPA a heavy burden of conducting a detailed evaluation of the water's functions and values and documenting how they would be impacted by an activity. Such an inquiry is more relevant to the evaluation conducted by the Corps under the Section 404(b)(1) Guidelines and Corps regulations in the permitting process itself. Again, we emphasize that this is merely the threshold inquiry of whether an activity should be subject to regulation under Section 404 at all. We believe it is sufficient for this purpose that the Corps or EPA, as appropriate, evaluate the available information to make a reasonable judgment of whether an activity will adversely affect waters of the U.S.

For similar reasons, we also disagree with commenters who suggested that the agencies should establish a scheme for classifying the values of wetland areas for purposes of this rule. The "value" of a water of the U.S. is again something that should be considered in the permitting process when the Corps determines whether a discharge complies with the Section 404(b)(1) Guidelines, and what type and level of mitigation is necessary to compensate for the impacts of a project. We do not view a detailed consideration of values of an area to be necessary for the Corps or EPA to determine whether an activity would simply have an "adverse effect" on a water of the U.S.

One commenter argued that the rule should list the specific activities that require a Section 404 permit based on the type, location, and known impact of the activities and also should identify "*de minimis*" activities that will not require a Section 404 permit. While such a list might be ideal from the regulated community's standpoint, the types of activities that involve a discharge and would destroy or degrade waters of the United States are too numerous and varied to list definitively. They generally must be evaluated on a case-by-case basis. However, today's rule does provide examples of several activities that require a permit unless the discharger demonstrates they would not destroy or degrade waters of the U.S. (i.e., mechanized landclearing, ditching, channelization and other excavation in waters of the United States).

Several commentors argued that the agencies had failed to give the public adequate notice of the meaning of the terms "destroy" and "degrade" as required by the Administrative Procedure Act. We disagree. Definitions of the terms "destroy" and "degrade" were discussed in the preamble of the proposed rule, along with a request for public comment. The definitions of "destroy" and "degrade" in the final rule reflect the proposal and the public comments received. We believe that the agencies have fully complied with the Administrative Procedure Act's rulemaking requirements.

One commentor felt that the definitions of "destroy" and "degrade" contradicted Section 101(g) of the CWA. It is entirely unclear to us how this rule conceivably would be inconsistent with Section 101(g), which provides that State water rights will not be superseded, abrogated, or impaired by the CWA. This aspect of the rule simply addresses what activities result in discharges of dredged material requiring a permit under Section 404 of the Act. Merely subjecting activities to the Section 404 permitting requirement cannot, in and of itself, result in any impact on allocation of water rights. The substantive criteria for processing Section 404 permits are not altered in any way by this rule.

Two commenters believed that the determination of degradation should be the responsibility of the State agency to ensure compliance with State water quality standards. We disagree, since the Corps and EPA are charged with administering the regulatory responsibilities of CWA Section 404. Moreover, degradation of waters of the U.S. will not necessarily be limited to consideration of State water quality standards.

2. Presumption That Activities Destroy or Degrade

The proposed rule also would have established a rebuttable presumption that mechanized landclearing, ditching, channelization and other excavation would result in the destruction or degradation of waters of the United States. See 33 CFR 323.2(c)(2); 40 CFR 232.2(e)(2). Some commenters supported the proposed rebuttable presumption because they felt these activities virtually always cause adverse impacts to the aquatic ecosystem.

Other commentors opposed the presumption in the proposal on the grounds that the government should bear the burden for demonstrating that it has jurisdiction over an activity. These commentors cited the discussion in the preamble to the proposed revisions to the wetlands delineation manual, in which the government stated that it bore the burden of demonstrating that it has geographic jurisdiction over a specific area under the statue. These commentors argued that such a burden should also fall on the government here. Some commentors contended that the presumption would impose unreasonable costs on project proponents seeking to rebut the presumption. Commentors also argued that the presumption was based upon a factual finding that these activities virtually always destroy or degrade wetlands, yet the agencies have not provided record support for such a conclusion beyond the reference to the "experience" of the agencies in administering the Section 404 program.

We believe that these commentors have misconstrued the nature of and basis of the approach in this rulemaking. In the proposed rule, the agencies stated that, in our experience, mechanized landclearing, ditching, channelization and other excavation virtually always destroy or degrade waters of the United States. While this statement accurately describes our experience, we are not relying on such a factual finding to support the approach in the final rule. Rather, we view the final rule as legally appropriate in light of the language and structure of

Section 404, which prohibits the discharge of dredged or fill material except in compliance with a permit under Section 404. In our view, the addition or redeposit of *any* dredged material into waters of the U.S. associated with mechanized landclearing, ditching, channelizaton and other excavation constitutes a "discharge," and is therefore prohibited if no permit is obtained under Section 404, unless otherwise exempted under Section 404(f).

The approach taken by the agencies in this rule is to carve out a narrow exception to the Section 404 permitting requirement for certain discharges that are associated with activities that have only *de minimis* environmental effects. We do not view this exception as compelled by the Act. There is no express *de minimis* exception in Section 404, and it would therefore be perfectly consistent with the statutory scheme to require that any person discharging dredged material in the course of mechanized landclearing, ditching, channelization, other excavation or any other activity to obtain a Section 404 permit, without regard to the effects of the associated activity on waters of the U.S. Nonetheless, the agencies believe that the better approach in this case is to maintain a narrow exception for those activities that have only a *de minimis* effect on waters of the U.S. This exception, as explained above, is consistent with Section 404 and will help improve the efficiency and effectiveness of the program by focusing limited agency resources on activities having more than inconsequential environmental effects.

The language and structure of the final rule have been modified to reflect the basis for the agencies' approach. First, the rule states that any addition or redeposit of dredged materials into waters of the U.S. incidental to any activity, including mechanized landclearing, ditching, channelization and other excavation constitutes a "discharge of dredged material." 33 CFR 323.2(d)(1)(iii); 40 CFR 232.2(e)(1)(iii). The rule therefore provides that a Section 404 permit is required for the incidental discharge unless the discharger demonstrates to the Corps, or EPA as appropriate, prior to the discharge, that the activity associated with the discharge does not have or would not have the effect of destroying or degrading any area of waters of the United States. Under the final rule, a discharger bears the burden of demonstrating that such activities will not destroy or degrade the waters of the U.S., including wetlands. 33 CFR 323.2(d)(3)(i); 40 CFR 232.2(e)(3)(i).

Given the language and structure of the Act, we believe that the approach adopted in the final rule is appropriate. Under the CWA, a party wishing to discharge dredged material into waters of the U.S. can only do so if it obtains a Section 404 permit, unless otherwise exempted. Therefore, if such a discharger conducting mechanized landclearing, ditching, channelization or other excavation desires to proceed without Section 404 authorization, we believe that it behooves the discharger to obtain an affirmative finding from the Corps, or EPA as appropriate, prior to the discharge, that the discharge is subject to the *de minimis* exception. Requiring dischargers to bear the burden of demonstrating that its activities do not require a Section 404 permit does not, as some commentors have asserted, place an unreasonable burden on the discharger. Rather, since the discharger would otherwise be required to obtain a permit for its activities, we believe that it behooves the discharger to demonstrate affirmatively that mechanized landclearing, ditching, channelization or other excavation activities should be exempted from the permitting requirement. Moreover, EPA and the Corps would not feel comfortable establishing a *de minimis* exception for mechanized landclearing, ditching, channelization or other excavation activities without the procedural protection of requiring an affirmative finding prior to the discharge by EPA or the Corps that the exception is appropriate in a particular case. This will ensure consistency in the application of the exception and guarantee that the exception is interpreted in a manner consistent with the purposes of the CWA. Under the final rule, dischargers conducting activities other than mechanized landclearing, ditching, channelization or other excavation which would not destroy or degrade waters of the United States (e.g., walking and vehicular traffic) do not require a prior finding by the relevant agency that the activity can proceed without obtaining a Section 404 permit. The agencies do not believe that it would be practical, or an efficient use of limited agency resources, to require a prior determination in such cases. However, should any activity—including activities other than mechanized landclearing, ditching, channelization or other excavation—undertaken by a discharger in fact have more than a *de minimis* effect on waters of the United States, that discharger is subject to enforcement action or citizen suit for discharging without a Section 404 permit.

Some commentors objected to the proposal of regulating only activities that are associated with incidental discharges where those activities produce certain environmental effects. These commentors felt that the agencies should regulate any addition or redeposit associated with mechanized landclearing, ditching, channelization and other excavation, regardless of its impact on the aquatic environment. We do not believe, however, that it would be an effective use of limited agency resources to eliminate completely the *de minimis* language in the current definition of "discharge of dredged material" so that all incidental discharges would be regulated, without regard to their environmental effect. The underlying purpose of Section 404 is to avoid, where possible, the degradation of our nation's aquatic resources due to discharges of dredged or fill material, and it is in keeping with that goal to focus limited agency resources on activities that have more than a *de minimis* effect on those waters. See *Alabama Power Co.* v. *Costle*, 636 F.2d 323, 357–360 (DC Cir. 1979).

We also do not agree with one commentor that there should be an opportunity for an appeal to an independent panel of a decision to require a Section 404 permit. The CWA grants the Corps or EPA, as appropriate, the authority to determine that a certain activity is subject to the Section 404 permitting requirement. Allowing an "appeal" at such a preliminary stage in the permitting process would not be in accordance with the agencies' roles under the statute, and would be wasteful of limited agency resources.

Many commentors recommended that the Corps specify the mechanism by which project proponents may demonstrate that their activity does not require a Section 404 permit. The Corps district engineer and EPA Region, as appropriate, will require the minimum information necessary to conduct an adequate evaluation of an activity's impacts. The submittal to the Corps district engineer will include, as necessary, the following information: A written description of the project; the specific landclearing, ditching, channelization, or excavation techniques to be used; the equipment to be used; the acreage and type of wetland or other waters of the U.S. to be affected; the extent and type of impacts projected; the change or loss of wetland functions and values that could be anticipated from the activity; a project location-vicinity map; the name, address and phone number of the applicant; and other site-specific information requested by the district

engineer. Based on this information, the Corps district engineer or EPA Region, as appropriate, will determine, within a reasonable length of time, whether a Section 404 permit is required.

One commentor recommended that the language of the proposed rebuttable presumption be modified to have the nature and extent of the impact assessed during the individual permit review process. We agree with the intent of this suggestion; however, no change is necessary. If an individual Section 404 permit application is submitted, the Corps will evaluate the nature and extent of the impacts of the activity and, if appropriate, return the application if no permit is required.

Finally, we do not believe that a determination by the Corps or EPA that a discharger must obtain a permit under today's rule would be subject to judicial review, since pre-enforcement review is not available under the CWA. See *e.g., Avella* v. *Corps,* 20 ELR 20920 (S.D. Fla. 1990), *aff'd* 916 F.2d 721 (11th Cir. 1990) (holding that Corps finding that a discharger could not proceed under a general permit and had to obtain an individual permit was not subject to judicial review).

3. Whether Specific Activities Will Destroy or Degrade Waters of the U.S.

In the preamble to the proposal, we solicited public comment on whether there were certain categories of activities which, as a general rule, did not destroy or degrade waters of the U.S. and which therefore would not come within the scope of this regulation. We address below comments that were submitted on this issue.

Many commentors felt that the modification of the definition of "discharge of dredged material" was too expansive and would result in the regulation of such activities as walking, grazing, vehicular traffic, and boating in waters of the United States. Several other commentors indicated that they believe vehicular traffic should be regulated. As indicated above, under today's rule, we are not regulating every discharge associated with activities in waters of the U.S., but only those associated with activities which have or would have the effect of destroying or degrading any area of a water of the United States. We believe that activities such as walking, grazing, vehicular traffic and boating (excluding prop-dredging) in waters of the United States would not generally be regulated under this rule because, even if they do result in discharges, they generally do not destroy or degrade waters of the United States. As discussed previously, activities such as these do not require a finding prior to the discharge that the activity would not destroy or degrade waters of the United States. If the effect of the activity is *de minimis,* then a Section 404 permit is not required.

One commentor stated that the following activities should be categorically excluded from regulation under Section 404: landclearing activities for the creation and maintenance of utility line corridors; mechanized landclearing in wetlands that are seasonally dry or frozen, provided that cutting of brush and timber occurs above the soil surface; and use of corduroy roads in constructing utility lines. Another commentor said that activities associated with the construction and maintenance of powerlines and distribution corridors should be exempted from regulation under Section 404 because they do not destroy or degrade wetlands. One commentor suggested that routine maintenance of pipeline rights-of-way should not require an individual permit since there is no long-term impact on vegetation. Another commentor stated that pipeline construction on Alaska's North Slope should be specifically identified as an activity that should be excluded from regulation under Section 404 because the pipelines are elevated and supported by pilings that result in only temporary *de minimis* discharges.

If a landclearing operation does not disturb the soil, no discharge occurs; thus, such activities would not be regulated (see 33 CFR 323.2(d)(1); 40 CFR 232.2(e)(2)(ii)). We do not believe that it would be appropriate, as this commentor has suggested, to categorically exclude from regulation mechanized landclearing to create utility line or transmission line corridors. As we have explained above, where a discharge occurs, we believe that it is appropriate for the discharger to bear the burden of demonstrating that a particular activity will not destroy or degrade waters of the United States. Pipelines that are normally built on pilings and where no landclearing or fill pad construction is required are generally not regulated under Section 404. Similarly, we do not believe it is appropriate to categorically exclude from regulation mechanized landclearing in frozen or seasonally dry wetlands. While we agree with the commentor that cutting of brush and timber in wetlands above the soil's surface does not normally result in a redeposition of soil (see 33 CFR 323.2(d)(1)(ii); 40 CFR 232.2(e)(2)(ii)), as described in today's preamble at section III(c), mechanized landclearing usually results in a discharge of dredged material, and the commentor has provided no basis for concluding that mechanized landclearing in seasonally dry or frozen wetlands will never result in such a discharge. We therefore do not believe there is a basis to exclude categorically such areas from the scope of this rule. Where a regulated discharge occurs, it is subject to this rule, regardless of the type of water of the U.S. in which it occurs.

In response to the commentor's request that corduroy roads, (i.e., roads which are created by placing cut timber and brush along the centerline of a utility line corridor through a wetland without the addition of dirt or rock fill), should be excluded from Section 404 regulation, we agree that this activity generally does not constitute a discharge of dredged material. However, this activity may constitute a discharge of fill material, and require Section 404 authorization. The agencies cannot, as suggested by this commentor, administratively expand the statutory exemptions for farm, forestry and mining roads to include corduroy roads used for utility line construction unrelated to farming, forestry, or mining operations.

Other activities that commentors contended should be excluded from regulation are: Maintenance of flood control structures according to design specifications; public health and safety projects; activities associated with the maintenance of natural or mitigated wetlands; construction or repair of water diversion structures to divert water under state water rights, where there is only a minor amount of excavation with temporary, minimal impacts; maintenance dredging of cooling water intake channels; dredging operations in wetlands; the creation of stormwater retention/detention basins for residential construction which involve only *de minimis* soil movement that should not destroy or degrade wetlands; certain wetland wildlife management activities, including wetland wildlife enhancement work and gravel placement in river channels to serve as salmon spawning habitat; and excavation in a dry streambed or similar areas, which will not cause destruction or degradation of a water of the United States.

We do not agree with these commentors that these activities would, as a general rule, not result in discharges of dredged material that would destroy or degrade waters of the U.S. For example, a category of activities such as "public health and safety projects" relates to the purpose of the activity, not to whether it causes additions or redeposits of dredged

material or whether it will destroy or degrade waters of the U.S. Activities associated with the maintenance of natural or mitigated wetlands might have an overall purpose of benefiting the environment, but may nonetheless cause certain adverse effects warranting review under Section 404. Such activities may be addressed through general permits if they would have minimal environmental impacts. Similarly, we do not believe that there is a basis for concluding that the other activities listed by this commentor will not destroy or degrade waters of the United States. However, some of these activities are authorized by existing nationwide and regional general permits. In addition, to the extent construction or repair of water diversion structures involve the construction or maintenance of irrigation ditches or the maintenance of drainage ditches, such activities may be exempt under Section 404(f) of the Act. Furthermore, we do not believe that today's rule will greatly burden the regulated public because, to the extent they involve minimal environmental impacts, the Corps will consider issuing general permits to regulate those activities.

Two commentors requested that the nationwide permits not be subject to the presumption and demonstration requirements of Section 323.2(d)(2). They recommended adding to § 323.2(d)(2), as follows: "(2) For the purposes of paragraph (d)(1), mechanized landclearing, ditching, channelization, or other excavation activities in waters of the United States result in a discharge of dredged material. Further, where such activities occur in waters of the United States and are not authorized under the Nationwide Permit Program at part 330, the activity is presumed to result in destruction * * *." We do not agree with the thrust of this comment. The tests in this rule go to the question whether an activity results in a discharge of dredged material requiring a permit under Section 404. By definition, activities already covered by a Section 404 permit (including nationwide permits) are subject to regulation. The scope, applicability and potential use of nationwide permits is not affected by today's rule. Those excavation activities that destroy or degrade waters of the U.S. but only have minimal adverse environmental effects may qualify for coverage under a nationwide permit. Corps districts are encouraged to develop general permits for those classes of mechanized landclearing, ditching, channelization, and other excavation that are determined to have only minimal individual and cumulative adverse effects.

Several commentors addressed discussion in the preamble to the proposed rule regarding "snagging," which we stated included "the removal of trees, parts of trees, or the like, from a water body to prevent their interfering with navigation." We concluded that such activities generally would not result in a discharge and therefore would not be subject to Section 404, unless in a particular case, the snagging operation would result in a discharge through redeposition of soil and would destroy or degrade a water of the United States. Some commentors agreed that snagging operations, such as the removal of trees and tree parts from streams, should be regulated. Two commentors stated that all snagging operations should be regulated. Another commentor asserted that snagging, especially in waters only subject to Section 404 jurisdiction and where Section 10 permits are not required, should be regulated because it involves a discharge and will result in significant adverse impacts to wetlands and water quality. One commentor suggested that the exclusion for snagging should be more narrowly defined to allow removal of tree and tree parts only where there is interference with navigation or where they are likely to obstruct normal stream flow. Several commentors expressed concern that the new proposed rules would negatively affect flood control activities, such as snagging and dredging, by requiring Section 404 permits. Two commentors stated that an exemption to Section 404 is needed for the maintenance of flood control projects that involve the removal of vegetation.

We have carefully considered these comments and believe that qualifying the term "snagging" in the proposal to include only the removal of trees and tree parts where that removal is to prevent their interfering with navigation is not appropriate. Therefore, for purposes of today's preamble, we are eliminating that qualification (i.e., prevention of interference with navigation). The determination of whether an activity involves a discharge of dredged material is not based on the intent of the activity; instead, that determination turns on whether there is any addition or redeposit of dredged material into waters of the United States. Where only vegetation is removed during a snagging operation and no discharge of dredged or fill material occurs, a permit is obviously not required. Consequently, snagging operations will only be regulated when they would result in incidental discharges through redeposition of soil and the activity would destroy or degrade waters of the United States. For this reason, we do not agree with the commentor who suggested inclusion of an additional qualifier (i.e., snagging only includes removal of trees or tree parts where they are likely to obstruct normal stream flow).

While today's rule may affect those flood control projects that involve snagging operations that result in discharges of dredged material by requiring authorization under Section 404, some such activities may already be exempted under sections 404(f)(1) (B) and (C), and others may be covered by current general permits. Also, in some cases, general permits may be developed where the adverse environmental effects of certain snagging operations that involve a discharge of dredged material into waters of the United States are determined to be minimal.

Several commentors expressed concerns that the regulation of excavation would affect normal drainage practices around small isolated wetlands that allegedly have little or no value. It is unclear what this commentor means by normal drainage practices. Section 404(f) provides an exemption for maintenance of existing drainage ditches, and such practices would therefore not be affected by today's rule. To the extent they are not exempt, such activities in small isolated wetlands may also be authorized by nationwide permit number 26 or other general permits. In general, however, we believe that the approach suggested by the commentor is overboard. Small isolated wetlands can be of great cumulative importance to the aquatic ecosystem. Categorically exempting drainage activities in these areas from Section 404 of the Act would therefore not be warranted or appropriate.

Two commentors stated that it was unclear how commercial sand and gravel dredging operations would be regulated and wanted exemptions for such operations. Several commentors wanted mining exemptions for the removal of overburden and sand and gravel mining operations in intermittent streams. While we appreciate these concerns, we believe that an exemption would be inappropriate for this type of activity since sand and gravel operations do involve excavation activities in waters of the U.S. and there is no basis to conclude categorically that these activities will not destroy or degrade waters of the U.S. Indeed, most mining activities result in significant alteration of the aquatic environment since their very purpose is to remove

overburden and substrate materials, and such activities generally would therefore have an identifiable adverse impact on the aquatic environment. We have, however, decided to include a grandfather provision for mining activities that have not been regulated prior to the adoption of this rule to allow time for operators to obtain the necessary permits and for the Corps to consider development and issuance of general permits for mining activities that have minimal individual and cumulative impacts.

One commentor expressed concern that the rule would regulate "normal reservoir operations." Such activities below the ordinary high water mark of a reservoir will often require Section 404 authorization; however, districts may develop regional general permits to authorize certain activities with minimal impacts, as appropriate.

One commentor expressed concern that the new regulations would discourage developers from creating stormwater management ponds through the excavation of existing wetlands. The agencies note that today's rule is not meant to "discourage" activities that comply with the Section 404(b)(1) Guidelines, including the construction of appropriate stormwater management ponds. Under today's rule, the creation of stormwater management ponds will be regulated under Section 404 to the extent that such creation involves a discharge of dredged material incidental to excavation activities which destroy or degrade wetlands or other waters of the United States. However, this does not mean these activities are prohibited, only that they require Section 404 authorization. As part of the permit evaluation process, the agencies will evaluate whether the proposal to excavate an existing wetland to create a stormwater management pond is the least environmentally damaging practicable alternative, and whether all appropriate actions have been taken to minimize impacts to the aquatic ecosystem, and whether other Section 404 permitting criteria are met. Moreover, to the extent creation of stormwater management ponds require the construction of dikes or berms, such activities would be regulated as a discharge of fill material, regardless of today's rule.

Several commentors indicated we should regulate the pumping of water because pumping water from a wetland has the same effect as draining, and, according to this commentor, "the impact of draining would be considered an identifiable decrease" in functions and values of waters of the U.S. We believe that pumping water from a wetland or other waters of the United States would not, in and of itself, necessarily result in a discharge of dredged material. *See Save Our Community* v. *EPA*, 971 F.2d 1155 (5th Cir. 1992). However, if excavation would be necessary to accomplish the pumping and the activity would destroy or degrade a water of the United States, then the discharge activity would be regulated under Section 404. Further, if the pumping resulted in a discharge of other pollutants to a water of the United States, such a discharge would be regulated under Section 402 of the CWA. Section 404 covers only discharges of dredged or fill material. We do not believe that simply placing a pipe into a water of the United States, per se, would necessarily involve a regulated discharge.

One commentor indicated that the deepening and widening of existing ditches should be regulated. Maintenance of existing drainage ditches are exempted from the permit requirement under Section 404(f)(1)(C), provided the original dimensions of the drainage ditches are not increased. Those excavation activities in drainage ditches that deepen or widen an existing drainage ditch beyond the original dimension do not qualify for an exemption and, if they would expand the carrying capacity of the ditch, would likely alter the hydrological regime of adjacent areas, and therefore result in degradation.

Some commentors indicated that they believe that many excavation activities are beneficial to the environment and result in increased aquatic functions and values, including excavation for purposes of stormwater management and maintenance of ditches, and were concerned that many such activities will be regulated under Section 404. However, even though these activities may have some beneficial effects, they can still have adverse effects by, for example, altering the hydrology of an area of the water of the U.S. Therefore, they may be covered under this rule. However, the Corps will consider the use of general permits where such environmentally beneficial activities otherwise result in minimal impacts. In addition, particular cases where the applicant can demonstrate that the activity would not destroy or degrade a water of the United States would not be regulated under Section 404.

One commentor indicated that the preamble should clarify that the excavation of wetlands to place drainage tiles should be regulated under Section 404 since this involves a discharge and destroys wetlands. The excavation of wetlands to place drainage tiles is currently regulated under Section 404 unless such activities qualify for a Section 404(f) exemption. Activities that involve replacing existing field drainage tiles where the replacement does not increase the extent of drainage beyond that provided by the original tiling would generally qualify for such an exemption.

E. Normal Dredging Operations

Many commentors suggested that all discharges of dredged material should be regulated, stating that it does not seem reasonable or consistent to exclude discharges incidental to "normal dredging operations" for navigation, while regulating excavation for non-navigation purposes. One commentor stated that the proposal was extremely confusing because, while the preamble discussed eliminating the *de minimis* exemption, the proposed rule mentioned exemptions for certain *de minimis* activities. The commentor stated that the proposed rule has created a disparity with respect to excavation in waters of the United States versus normal dredging operations in navigable waters of the United States. Several commentors stated that, contrary to the explanation that normal dredging operations "generally do not alter the reach or flow or circulation of the waters, nor do they convert waters of the United States into dry land or degrade wetlands," these operations do in fact have negative impacts. These commentors further cited specific examples, including increased sedimentation, changes in salinity, loss of habitat, alteration of flows, changes in circulation and lowered dissolved oxygen concentrations. Two commentors stated that the exemption for normal dredging operations to maintain navigation is acceptable so long as the term "navigation channel" is clearly defined as that type of channel capable of carrying commercial traffic. However, those commentors stated that the extension or deepening of navigation channels should be regulated under Section 404.

Today's rule clarifies that "normal dredging operations" will continue to be excluded from the definition of "discharge of dredged material." "Normal dredging operations" are defined as "dredging for navigation in navigable waters of the United States, as that term is defined in part 329 of this Chapter, with proper authorization from the Congress and/or the Corps pursuant to part 322 of this Chapter; however, this exception is not applicable to dredging activities in wetlands, as that terms is defined at § 328.3 of this Chapter" (33 CFR 323.2(d)(3)(ii)).

There are several reasons for continuing to exclude incidental soil movement occurring during "normal dredging operations" from the regulatory definition of "discharge of dredged material." The overriding goal is to ensure that discharges of dredged or fill material into the waters of the United States are regulated in a satisfactory manner. In light of this goal, the Corps, as well as all other Federal or private dredging entities, fully comply with the regulatory requirements of the Section 404 process for any and all disposal of the dredged material removed from the navigation channel during dredging and discharged in the waters of the United States, whether that dredged material has been generated by Corps or other dredging operations. Furthermore, the Corps applies for state Section 401 water quality certifications and any required state permits for these disposal activities.

The Corps has established a two-part regulatory framework for the actual dredging portion of its own normal dredging operations. Prior to conducting any normal dredging operations for Corps dredging projects, the Corps must comply fully with its Operations and Maintenance dredging regulations. (33 CFR 209, 335, 336, 337, and 338.) These regulations were developed by the Corps in 1986 specifically to address environmental and other aspects of normal dredging operations on the waters of the United States. Pursuant to these regulations the Corps must fully comply with NEPA, the Clean Water Act, including Section 401, the Coastal Zone Management Act, the Endangered Species Act, the Fish and Wildlife Coordination Act, the Marine Protection Research and Sanctuaries Act, and all other applicable environmental laws. Furthermore, each time a federally authorized navigation channel is designated or modified, Congress, in effect, conducts a public interest review through the authorization process. This provides another safeguard that the subsequent normal dredging operations to maintain these channels are in the best interests of the Nation.

The procedure is different for those normal dredging operations conducted by other Federal agencies or non-Federal entities. The Corps requires that these dredgers apply for a Section 10 Rivers and Harbors Act permit. The Section 10 permit process includes an extensive public interest review pursuant to which any adverse impacts of the proposed dredging are fully discussed and analyzed. The Corps must ensure that NEPA, CWA Section 401, the Coastal Zone Management Act, the Endangered Species Act, the Fish and Wildlife Coordination Act, the Marine Protection Research and Sanctuaries Act, and all other applicable Federal environmental laws are complied with prior to granting a Section 10 permit.

Considering these various types and levels of review, the Corps and EPA have concluded that it would not be in the public interest to require that the Corps, other Federal agencies, and private entities also be required to secure a Section 404 permit for each normal dredging operation. This process would be resource intensive and duplicative, and would only serve to divert limited Corps and EPA resources away from permit applications that deserve our careful scrutiny.

Additionally, the Corps and EPA believe that this is an appropriate approach because, as a general rule, normal dredging operations which have been subjected to the above regulatory process and associated environmental safeguards do not have a substantially adverse effect on the aquatic environment. It may be true, as some commentors have stated, that normal dredging operations can, in some cases, cause changes in sedimentation, salinity, habitat, flows and circulation patterns, and dissolved oxygen concentration. However, the Corps and EPA believe that these impacts are adequately addressed as part of the regulatory and congressional review processes described above and do not warrant the additional scrutiny of the Section 404 regulatory process.

As stated above, two commentors agreed that normal dredging operations conducted in Federal (Corps of Engineers) navigation channels should not be regulated under Section 404; however, these commentors argued that any deepening or extension of these channels should be regulated under Section 404. We disagree, and see no reason to distinguish between normal dredging operations, on the one hand, and channel deepening or extensions, on the other hand. For one thing, Congress must authorize any major extensions of, and any deepening of, any Corps Federal navigation channel. Through this authorization process, Congress is responsible for determining whether it is in the public interest to conduct these activities. Moreover, Federal agencies and non-Federal entities must apply for a Section 10 permit for any project to extend or deepen a Federal navigation channel.

The Corps' and EPA's position that incidental soil movement associated with normal dredging operations does not constitute a discharge under Section 404 is specifically addressed in the Corps' regulations at 33 CFR 323.2. Since 1977, the Corps has consistently held that Section 404 does not apply to incidental soil movement during normal dredging operations. We continue to believe that "normal dredging operations" to maintain or deepen navigation channels in the navigable waters of the United States, with proper authorization from the Congress and/or the Corps under Section 10, will not result in significant environmental impacts affecting the reach or flow or circulation of the waters, nor do they convert waters of the United States into dry land. The definition of "normal dredging operations" excludes dredging that takes place in wetlands. We made this exclusion to reflect the fundamental purpose of the normal dredging operations exception, which is to allow for the maintenance of navigation channels. We believe it would be a rare and exceptional circumstance for a party to propose dredging wetlands for purposes of navigation. If such an exceptional case were to arise, however, we believe that the activity should be evaluated under Section 404 in light of the special functions and values of wetlands that Section 404 is specifically designed to address.

As we stated in the proposed rule, it is our desire to avoid duplicative regulation of dredging itself in waters within the jurisdictional scope of the Rivers and Harbors Act. Normal dredging operations in the navigable waters will continue to be regulated and evaluated under Section 10 of the Rivers and Harbors Act of 1899.

F. Section 404(f)(1)(A) Exemptions

Several commentors expressed concern that the language of the proposed rule might be construed as weakening the exemptions provided for normal farming, silviculture, and ranching activities under Section 404(f)(1)(A). A few commentors urged the continued exemption for normal farming and forestry practices as provided in Section 404(f). Many commentors requested clarification that the 404(f)(1) exemptions would not be affected by the new regulations and some requested that the following language be added to the rule: "The term 'discharge or dredged material' does not include activities defined in 33 CFR 323.4(a)." One commentor requested assurance by suggesting changing § 323.2(d)(2) to state that the existing exemptions of Section 404(f) are not presumed to have the effect of destroying or degrading waters of the United States. A few commentors stated that § 323.2(d)(1) be amended to read

"the term does not include the activities defined in § 323.4(a)(1)–(6)." We disagree that any further clarification is necessary. As indicated in the Preamble of the proposed rule, this rule does not change, in any way, the manner in which the Corps and EPA determine whether an activity is exempt under Section 404(f) of the CWA. Therefore, this regulation will not, in any way, affect the exemptions for normal agriculture, silviculture or ranching activities now provided by Section 404(f)(1)(A) of the CWA, or any of the other exemptions found in Section 404(f)(1).

As part of today's rule, the agencies have also made an additional minor revision to the Corps' definition of "discharge or dredged material" which would make EPA's and Corps' definition consistent with each other and conform the definitions to the language and intent of Section 404(f). The EPA' pre-existing definition expressly excludes "plowing, cultivating, seeding and harvesting for the protection of food, fiber and forest products." 33 CFR 323.2(d). EPA's current definition, by contrast, does not contain this exclusion, see 40 CFR 232.2(e), although the proposal would have added the Corps' language in EPA's definition. The final rule deletes this exclusion entirely from the definition of "discharge of dredged material" because it has created confusion with regard to the effect of today's rule on the Section 404(f) exemptions.

This exclusion in the Corps' regulation predates the adoption of Section 404(f) in the 1977 Amendments to the CWA. Clean Water Act of 1977, Public Law No. 95–217, 91 Stat. 1566 (amending 33 U.S.C. 1251–1376). Section 404(f)(1)(A) expressly lists these activities as examples of normal farming, silviculture, and ranching activities exempt from Section 404, unless the activities would be recaptured under Section 404(f)(2). The exclusion of these activities from the definition of "discharge of dredged material" is broader than the exemption in Section 404(f) because, under the Corps' regulatory definition, these activities would never require a Section 404 permit, even if they would have effects "recapturing" the activities under Section 404(f)(2). Since Congress expressly stated in Section 404(f) that discharges associated with these activities require a permit if they would be recaptured under Section 404(f)(2), we believe that the exclusion in the current rule should be deleted in order to be consistent with Congressional intent in this area. The Corps and EPA reiterate that today's rule, including deletion of this sentence, has no effect with regard to the scope and applicability of the Section 404(f) exemptions. This is further emphasized in the rule at §§ 323.3(d)(3)(iv) and 232.2(e)(3)(iv). Under Section 404(f)(1), discharges of dredged or fill material associated with certain activities, including normal farming, ranching, and silviculture activities, are exempt from the Act's permit requirement, provided that they are not "recaptured" under Section 404(f)(2).

G. Grandfather Provision

Numerous commentors requested that the Corps and EPA include a grandfather provision as part of the revised definition of "discharge of dredged material." In light of these comments and consistent with past Corps practice, the Corps and EPA have included such a provision in this part of the final rule.

By including a grandfather provision here, the Corps and EPA are intending to avoid application of the revised definition of "discharge of dredged material" in a manner that would frustrate the reasonable expectations of persons who, as explained below, justifiably relied on the previous definition of that phrase as interpreted by the regulatory agencies. At the same time, however, we are also mindful of the goals of today's rule and the overall goals of the Clean Water Act.

Therefore, we have developed procedures to "grandfather" certain "discharges of dredged material" that, in some Corps districts, were not considered to be subject to regulation under the previous definition of that term. Under these procedures, Section 404 authorization will not be required for discharges of dredged material associated with ditching, channelization and other excavation activities in waters of the United States where such discharges were not previously regulated and where such activities had commenced or were under contract prior to the date of publication of this final rule in the **Federal Register**, and where such activities are completed within one year from the date of publication of the final rule. This provision does not apply to discharges associated with mechanized landclearing because the Corps current policy (reflected in RGL 90–5) has generally subjected this activity to Section 404 regulation. To further ensure that implementation of the revised definition proceeds in a fair and equitable manner, the Corps will be able to extend the one-year grandfather provision on a case-by-case basis subject to the following three conditions: (1) The excavation activity is of a type that occurs on an ongoing basis, either continuously or periodically (e.g., seasonally); (2) the discharger submits a completed individual permit application to the Corps within one year from the date of publication of this final rule; and (3) the total time period within which the excavation activity proceeds subject to this grandfather provision does not exceed three years from the date of publication of today's rule. The agencies recognize that the revised definition of "discharge of dredged material" is likely to apply to some persons who have been engaging in ongoing excavation activities, such as some mining or sand and gravel operations, which given their ongoing nature on either a continual or periodic basis, will not be able to be completed within one year from the date of publication of today's rule. Therefore, in situations where persons engaged in excavation activities occurring on an ongoing basis have acted in good faith by submitting a complete individual permit application seeking Section 404 authorization for such activities no later than one year from the date of publication of this rule, the agencies believe it is appropriate to retain sufficient flexibility to ensure that such persons are not prevented from proceeding with these excavation activities pending the evaluation of a Section 404 permit application for the discharges associated with the activity. The agencies have further determined that a grandfather period not to extend beyond three years from publication of today's rule is sufficiently long to ensure fair and equitable treatment of the regulated community in a manner consistent with the environmental goals of this rulemaking and the Clean Water Act. Moreover, discharges associated with activities that were regulated by a particular Corps district prior to the promulgation of this rule will not be subject to the grandfather provision in the regulation. If a discharger is uncertain whether its activity was regulated by the Corps district in which the discharge would take place, the discharger should contact the Corps district. Finally, the grandfather provision does not apply to landclearing activities, since the Corps has interpreted current regulatory provisions as covering mechanized landclearing under the Section 404 program since 1990. See RGL 90–5.

H. General Permit Comments

We invited public comment to identify mechanized landclearing, ditching, channelization, or other

excavation activities that would generally have minimal environmental impacts and therefore be potential candidates for authorization under general permits. Several commentors suggested activities that are either exempt from regulation or already covered under the nationwide general permit program. Several commentors suggested that activities having minimal environmental impacts should be authorized by general permits, but they did not give specific candidate activities. Another commentor indicated that all activities should be regulated on a case-by-case basis. Several activities were suggested for authorization by general permits. These include all mechanized landclearing; mechanized landclearing in seasonally dry or frozen wetlands where brush and timber cutting occurs above the soil surface; landclearing for creation and maintenance of utility line or overhead transmission line corridors; water diversion structures constructed to exercise water rights; activities when states already have effective regulatory controls; discharges incidental to dredging or excavation to improve fish and/or wildlife habitat or to restore previously filled wetlands; excavation in dry streambeds; use of a hydroax to clear vegetation; creation of stormwater retention/detention basins for residential construction; and sand and gravel mining activities having minor impacts.

The general permit program is an extremely important regulatory tool used by the Corps to regulate effectively activities with minimal impacts on the aquatic environment. The Corps does not have the resources to regulate all activities on a case-by-case individual permit basis. Therefore, we must focus our resources on those activities with more than minimal impacts. Moreover, general permits are very effective in protecting the aquatic environment, because they are issued with stringent conditions that limit authorized activities to those with minimal adverse effects. This regulation may increase the number of discharges regulated by the Corps nationwide. In order to administer reasonably the regulatory program and protect effectively the environment, the Corps will identify those activities with minimal impacts and pursue development of general permits. We appreciate the suggestions made and will consider them for possible issuance as nationwide or regional general permits in the near future. Any proposed nationwide permits will be published in the Federal Register and any proposed regional general permits will be proposed by public notice to obtain public comment before a decision is made whether to issue such nationwide or regional general permits.

IV. Revision to Definition of "Discharge of Fill Material;" 33 CFR 323.3(c) and 40 CFR 232.2(r)

We have organized the numerous comments on the regulation of pilings as fill material into several issues. Our discussion of the comments is provided below.

A. Summary of Major Issues and Changes From the Proposal

Many commentors supported the proposed revisions on the grounds that the regulation of the placement of pilings as a discharge of fill material was necessary under Section 404 to ensure that adverse impacts to wetlands and other aquatic resources are minimized. Many of these commentors, as explained in more detail below, also argued that the placement of pilings should be regulated as a discharge of fill material in *all* circumstances, and that the proposed revisions contained unnecessary and unjustified limitations and exceptions. Other commentors contended that EPA and the Corps lacked the authority under the CWA to regulate the placement of pilings as fill material. Concerns were also raised by commentors that the terms used in the proposed revisions were not adequately defined by the agencies.

Based upon public comments, the agencies have made certain changes to the language in the regulations to clarify when the placement of pilings constitutes a discharge of fill material subject to regulation under Section 404. Under the final rule, the placement of pilings in waters of the United States shall require a Section 404 permit when such placement has or would have the physical effect of a discharge of fill material.

The agencies have made two major changes to the rule in response to public comments. First, we have deleted the "functional use and effect" test in the proposed rule. In addition, the final rule does not contain an exception for structures "traditionally constructed" on pilings. For the reasons explained further below, we agree with commentors who argued that the physical effect of the placement of pilings (as opposed to its functional use, or whether the structure was traditionally placed on pilings) should be the focus for determining when placement of pilings constitutes a discharge of fill material. We recognize, however, that some projects generally use pilings in a manner that does not result in the same physical effect as the placement of fill material. Consequently, the final rule notes that placement of pilings for these projects (i.e., linear projects, piers, wharves, and individual houses on stilts) generally do not have the effect of a discharge of fill material and therefore a Section 404 permit will generally not be required for these projects. The Corps and EPA, nevertheless, reserve the right on a case-by-case basis to determine that the proposed placement of pilings to support a particular linear project or a particular pier, wharf, or individual home on stilts does have or would have the effect of fill material and therefore requires Section 404 authorization.

B. Need for Regulating Pilings Having the Effect of Fill

The Corps adopted RGL 90–8 in order to address projects placed on pilings in waters of the U.S. that would have the kinds of adverse environmental consequences generally associated with discharges of fill material, but which were not subject to any environmental review under Section 404 to avoid or mitigate those adverse effects. For example, in one case, a developer proposed a large, multi-use high rise waterfront complex which would have covered over 16 acres of the East River in New York. The developer proposed an unconventional construction method, using pilings instead of solid fill to support the 16 acres of structures. The developer apparently pursued this course of action in order to try to avoid the necessity of obtaining a Section 404 permit. To provide the necessary structural support, the pilings would have been so large and so closely spaced that they would have physically displaced over 20% of the bottom surface area and the water column. In addition to the physical displacement of aquatic habitat due to the extraordinarily dense spacing, the project would have substantially altered current and sedimentation patterns such that at least some of the covered area would have silted in and eventually lost its character as a water of the U.S.

In another case, a 13-acre hotel/office development project was proposed to be constructed in palustrine forested wetland in New Jersey. This wetland was identified as habitat for more than 80 species of birds, including numerous migratory birds that had witnessed decreasing population numbers due to fragmentation and loss of habitat. The developer originally proposed that the project be built on fill material, which would have required a Section 404 permit, but subsequently proposed to

build virtually the identical project on 12-16 inch diameter pilings. While the pilings did not need to be spaced densely to support the structure, as in the East River situation, the platform supporting the 13 acre development would have rested from 3 inches to approximately one foot above the wetland. The project would therefore have prevented sunlight from reaching almost all of the 13 acres of wetlands underneath the structures, thereby making wetland vegetation growth impossible and causing the area to lose virtually all of its wildlife habitat value. The project also would have contributed to soil erosion by killing vegetation that provide soil stability, resulting in interference with the site's natural flood protection function, and impairment to downstream water quality. Ultimately, the developer decided not to pursue this project.

In both of these cases, the environmental effects of the projects would have been severe, comparable in many respects to the effects that would have resulted had the projects been built on fill material. Adoption of RGL 90–8 reflected the Corps' belief that allowing such projects to proceed without any environmental review under Section 404 would not be consistent with the goals and objectives of the CWA or Section 404. Regulating pilings when the project would have the effect of fill will therefore help insure that potentially damaging activities constructed on pilings in waters of the United States are reviewed under Section 404.

C. Comments on Agencies' Legal Authority To Promulgate This Aspect of the Regulation

Several commentors argued that EPA and the Corps lack legal authority under the Clean Water Act to issue the proposed regulation. These commentors, however, did not cite any provision of the statute or discussion in the legislative history to support this contention; they simply asserted that placement of pilings having the effect of fill was not the same thing as a discharge of fill material itself. We believe, however, that today's rule is a reasonable exercise of our authority under the statute.

The CWA does not define the term, "fill material." Nor does the CWA specifically address, in any manner whatsoever, whether the placement of pilings in waters of the U.S. is a discharge of fill material subject to Section 404 of the Act. Therefore, it is up to EPA and the Corps to determine a reasonable regulatory approach to this activity, consistent with the language and purposes of the CWA. We have made what we believe to be a very straightforward determination here that placement of pilings is a discharge of fill material when it would have the effect of fill material on waters of the U.S. The agencies believe that this approach is entirely consistent with the language of the Act, and helps effectuate the underlying goal of the statute of protecting our nation's aquatic resources.

Several commentors requested that we not pursue this rulemaking but instead wait to see how Congress addresses pilings in the upcoming reauthorization of the CWA. Because this rule is entirely consistent with existing statute, we see no reason to delay promulgating this rule.

One commentor argued that there is no justification for regulating certain pilings under Section 10 of the Rivers and Harbors Act, but not regulating them as "fill" under the Clean Water Act, when the pilings are placed in waters subject to jurisdiction of both Acts. This commentor also suggested that Section 10 jurisdiction does not substitute for Section 404 jurisdiction. Today's decision to define fill material under Section 404 to include the placement of certain pilings is not in any manner related to the regulation of pilings under Section 10. Section 10 establishes an independent regulatory program that regulates any work, among other things, in navigable waters that affects the navigable capacity of those waters. Regulatory jurisdiction under Section 10 does not depend to any degree on whether the work involves a "discharge of fill material." Therefore, we do not believe, as this commentor does, that the scope of activities regulated under Section 10 of the Rivers and Harbors Act and Section 404 of CWA must be the same.

D. Establishment of "Effects" Tests and Exceptions to the Regulation of the Placement of Pilings as Fill Material

The proposed rule contained language that would have regulated the placement of pilings where the pilings were essentially equivalent to a discharge of fill material in physical effect or in functional use and effect. In addition, the rule would have provided exceptions to the regulation of the placement of pilings as fill material in circumstances involving linear projects or projects which have traditionally been constructed on pilings.

Commentors expressed several concerns with this approach. First, several commentors contended that all pilings, without exception, should be regulated. One commentor also argued that pilings are by definition "fill material" and therefore must be regulated in all cases. Numerous commentors were concerned that the proposed rule was arbitrary since it would regulate the placement of pilings based on what type of structure is built on the pilings. Asserting that the functional use of the pilings is irrelevant, several commentors suggested that the agencies rely solely on the physical effect test to determine when the placement of pilings would constitute fill material. Other commentors disagreed, supporting the inclusion of a functional use and effect test.

We agree with commentors who argued that it is not appropriate to determine whether Section 404 applies to the placement of pilings solely on the basis of the functional use of the pilings or whether the structures on the pilings have traditionally been built in this fashion. As discussed earlier, the agencies have deleted the "functional use and effect" test set forth in the proposed rule. We agree with certain commentors that this test was vague, and that focusing on the use of the pilings structure is not appropriate where our paramount concern is the effect of the placement of pilings on the aquatic environment. Our primary motivation in adopting the pilings RGL in December 1990 and in proposing this rule, has been to address the growing practice among some project proponents of building large development projects on pilings, even though they would normally have been placed on top of fill material. In these cases, the projects had a clear adverse impact on the aquatic environment, yet no permit was being required for the activity. While the type of structures built on top of pilings can be indicative of how the pilings will affect the aquatic environment, ultimately it is the effect of the pilings that is of concern to us. Focusing solely on those effects will therefore simplify implementation of this regulation.

For the same reasons, the final rule provides that the placement of pilings will not be excluded from regulation under Section 404 based on whether the structures they support are traditionally constructed on pilings. The final rule will require a Section 404 permit when the placement of pilings has or would have the effect of a discharge of fill material; this test will be applied in all circumstances. The final rule also provides examples of activities that generally have the effect of a discharge of fill material, including the following: projects where the pilings are so closely spaced that sedimentation rates would be increased; projects in which the

pilings themselves effectively would replace the bottom of a waterbody; projects involving the placement of pilings that would reduce the reach or impair the flow or circulation of waters of the United States; and projects involving the placement of pilings which would result in the adverse alteration or elimination of aquatic functions.

We disagree, however, with the commentor who argued that the placement of a piling is by definition a discharge of fill material in all cases and that all pilings must therefore be regulated under Section 404. As discussed above, the CWA does not define fill material. We believe that it is reasonable to define the placement of pilings as a discharge of fill material when such placement would have the effect of fill material. This commentor apparently believes that EPA and the Corps are compelled to regulate the placement of a piling in waters of the United States as a discharge of fill material, even where the placement would not have effects associated with discharges of fill material. We see no provision of the Clean Water Act that would compel the adoption of such an approach. We have taken what we believe to be a straightforward and common-sense approach to defining when the placement of pilings is a discharge of fill material, an approach that we believe is entirely consistent with the Clean Water Act.

Several commentors raised concern over the exception for the placement of pilings in linear projects. Some commentors suggested deleting the exception based on their concerns that adverse impacts to the aquatic ecosystem would occur as a result of the construction of linear projects. One commentor suggested that linear projects not be excepted if the project would "significantly alter the flow of water or increase sedimentation so that the quantity and quality of habitat is reduced." One commentor also suggested that the exception for projects that have traditionally been constructed on pilings be eliminated, while another commentor was concerned that determining what constitutes a pier or marina is subject to "elastic interpretations" and therefore should not be exempted. Other commentors supported the exception for linear projects, and one commentor requested that "hot-oil" pipelines constructed in Alaska's North Slope be included in the list of linear projects where the placement of pilings would not require a Section 404 permit. Some commentors argued that the proposed exceptions were too narrow, and suggested additional examples of activities involving the placement of pilings that should not be considered a discharge of fill material. In particular, several commentors suggested that the examples of structures that would not require a Section 404 permit due to their having been traditionally constructed on pilings should be expanded to include "commercial and industrial structures interrelated to wharves, piers, and marinas." Finally, one commentor suggested that all non-water dependent activities in waters of the United States be regulated under Section 404.

We believe that linear project construction on pilings will generally not have the physical effect of fill material. We recognize, however, the possibility that such projects could, in certain cases, have the effect of fill material and therefore should be subject to Section 404. Therefore, the regulation does not establish a definitive rule that linear projects will never have the effect of fill material.

Nonetheless, we believe that it will be a rare case when pilings used for linear projects have the effect of fill material and require authorization under Section 404. The most significant factors in determining whether placement of pilings has the effect of fill material are how densely the piles are placed, the size of the pilings, and the ground clearance of the structures built on pilings, and the overall areal coverage of the structures built on pilings.

Closely spaced pilings of any size, for example, can have the effect of substantially replacing an aquatic area. Very large pilings, regardless of their spacing, may also substantially replace an aquatic area. Large or closely spaced pilings can also affect current patterns and sedimentation rates. The above-ground clearance, and the overall areal coverage of the structures built on pilings, affect the suitability of the area underneath for vegetation and wildlife. The losses of aquatic and wetland functions and values under these circumstances can be the same as would occur from the discharge of fill material itself.

Most linear projects (piers, wharves, bridges, elevated roads and pipelines, etc.) do not require either closely spaced pilings or overly large pilings since they generally do not support massive structures requiring great support. Also, although some linear projects (e.g., bridges and elevated roads and pipelines) may be quite long, they generally are not very wide, and therefore would generally not result in the overall areal coverage that can result in substantial adverse effects on vegetation and suitability of the area as wildlife habitat.

Although an individual home on pilings is generally not "linear" in design, it generally shares many of the same attributes as linear projects so that we believe that it generally will not have the effect of fill material. Most pile supported individual houses require neither closely spaced nor large pilings. An individual home also generally does not cover large areas. Some commentors objected to the term "single-family" houses contained in the proposed rule. We agree that this term was somewhat vague and confusing. We have substituted the word "individual" for "single-family" in the final rule in order to more effectively exclude larger structures (e.g., a development of multiple single-family houses) that may indeed have the effect of a discharge of fill material, as outlined above.

We do not take the position that pile supported linear projects and an individual house on pilings can never have any adverse effects on the aquatic ecosystem. Obviously, aquatic life located where a single piling is placed will be crushed by the placement of the piling. Similarly, even less-than-massive structures on widely spaced pilings have some effects on the aquatic environment. We, however, are concerned with the cases where the pilings and structures they support cause impacts on the aquatic environment comparable to those which occur with the discharge of fill material (i.e., by displacing many or all of the aquatic functions of an area). Today's rule will ensure that such effects do not occur without undergoing environmental review under Section 404 of the CWA.

We do not agree with commentors who argued that we should expand the proposed exceptions to include "commercial and industrial structures interrelated to wharves, piers and marinas." Such a broad category of structures could certainly include those with large area coverage or those built on large or closely spaced pilings; therefore we cannot find as a general matter that these types of structures generally would not have the effect of fill material.

Several commentors expressed concern over the manner in which the effects tests were defined. Some of these commentors suggested that the rule should be consistent with the test proposed for determining whether a discharge of dredged material occurs, i.e., the rule should clarify that the placement of pilings should be regulated as a discharge of fill material only when the activity would destroy or

degrade any area of waters of the United States. One commentor suggested that the proposal to regulate the placement of pilings as fill material when a project "significantly alters or eliminates aquatic functions and values" was too vague. Another commentor was concerned that the proposed test of whether the "pilings are so closely spaced that sedimentation rates are increased" would be difficult to implement given technical difficulties in predicting sedimentation rates. Commentors also requested that we develop specific thresholds, such as flow/temperature, or volume change, to determine if pilings have the same physical or functional effect as fill material. For example, one commentor recommended setting a standard volume of piles to be used in one project below which a project would not be regulated because there would be "minimal environmental impact." One commentor suggested that use of the phrase "essentially the same effects as fill" was vague, and left open questions of how similar the effect would have to be in order to be "essentially the same."

The agencies disagree with the comments that suggested the inclusion of the same "destroy or degrade" test proposed for the definition of "discharge of dredged material." We note that the definition of "discharge of dredged material," unlike that of the "discharge of fill material," historically has contained an exclusion for *de minimis* discharges associated with "normal dredging operations." As part of today's rule, the agencies are narrowing that exclusion in a manner that we believe carries out the purposes and objectives of the CWA. There is no comparable language in the agencies' definition of "discharge of fill material" and we see no justification for adding such language.

In response to the comment that "significantly alters or eliminates aquatic functions and values" was too vague, we have deleted the term "significantly." We agree that this qualifier would add confusion to the determination of whether the placement of pilings should be regulated as fill material, and is unnecessary. We agree with the comment that precise predictions would be difficult. We believe, however, that Corps and EPA staff are able to make general predictions regarding sedimentation rates that may result from the placement of pilings. Moreover, we believe that such generalized findings would be sufficient to determine whether a placement of pilings would have the effect of a discharge of fill material. Consequently, we have retained this part of the proposed rule without modification.

We agree with the concern expressed over the use of the term "large" when referring to structures, and have deleted it from the final rule. We have not set specific standards or thresholds to measure the physical effect of pilings as suggested by comments, as we believe the circumstances related to each situation are so diverse that setting specific standards would be inappropriate. Instead, we believe the determination of the effect of the placement of pilings should be determined on a case-by-case basis considering the facts of each individual case. We agree with the commentor that "essentially" the same is unclear, and we have deleted use of the term "essentially" in the final rule.

E. Additional Comments

A few commentors expressed the need to note specifically that existing nationwide permits are not affected by this rule and that activities determined not to be subject to Section 404 regulation may still need a Section 10 permit when undertaken in traditionally navigable waters of the United States. With regard to the first point, today's rule does not modify, in any manner, current authorizations provided by existing nationwide permits. However, the Corps will examine the need for additional general permits under Section 404 for those projects involving the placement of pilings that have less than minimal adverse effects on the environment. In addition, as specifically provided for in today's rule, the placement of pilings in traditionally navigable waters of the United States remains subject to authorization under Section 10 of the Rivers and Harbors Act.

Another commentor expressed concern that the regulation will prohibit construction of any structures in wetlands (either on fill material or on pilings). This is clearly not our intent. The Corps authorizes thousands of projects involving fill material every year, and the Corps expects to authorize activities on pilings where appropriate. One commentor proposed that a set of quantifiable standards be developed for how and where structures such as decks may be built. We believe that national standards for pile supported structures are inappropriate; instead, these determinations are more properly addressed on a case-by-case basis in the permitting process. One commentor suggested that pilings should be defined to include pile caps, columns, piers and abutments which are part of linear projects, such as bridges. We agree with this comment.

V. Revision to the Definition of Waters of the United States to Exclude Prior Converted Cropland

A. Background and Rationale for the Final Rule.

The agencies proposed to add language in the definition of waters of the U.S. providing that the term does not include prior converted ("PC") cropland, as defined by the National Food Security Act Manual (NFSAM) published by the Soil Conservation Service (SCS). PC cropland is defined by SCS as areas that, prior to December 23, 1985, were drained or otherwise manipulated for the purpose, or having the effect, of making production of a commodity crop possible. PC cropland is inundated for no more than 14 consecutive days during the growing season and excludes pothold or playa wetlands. EPA and the Corps stated in the preamble to the proposal that we were proposing to codify existing policy, as reflected in RGL 90–7, that PC cropland is not waters of the United States to help achieve consistency among various federal programs affecting wetlands.

Some commentors supported the proposed change. They felt that it was important for EPA, the Corps and the Department of Agriculture to follow consistent procedures and policies, because to do otherwise undermines the credibility and effectiveness of federal wetlands protection programs. Other commentors opposed the change in its entirety or took issue with specific aspects of the PC cropland definition that they believed were inappropriate. We have decided to retain the approach contained in the proposed rule. The reasons for this approach and responses to comments opposing the proposal are discussed below.

As stated in the preamble to the proposal, we are excluding PC cropland from the definition of waters of the U.S. in order to achieve consistency in the manner that various federal programs address wetlands. One commentor argued that such consistency is not a "goal of the CWA," and that it was therefore not appropriate to base wetlands policy on this consideration. We believe, however, that effective implementation of the wetlands provisions of the Act without unduly confusing the public and regulated community is vital to achieving the environmental protection goals of the Clean Water Act. The CWA is not administered in a vacuum. Statutes other than the CWA and agencies other

than EPA and the Corps have become an integral part of the federal wetlands protection effort. We believe that this effort will be most effective if the agencies involved have, to the extent possible, consistent and compatible approaches to insuring wetlands protection. We believe that this rule achieves this policy goal in a manner consistent with the language and objectives of the CWA.

Moreover, we believe that excluding PC cropland from the definition of waters of the U.S. is consistent with EPA's and the Corps' paramount objective of protecting the nation's aquatic resources. By definition, PC cropland has been significantly modified so that it no longer exhibits its natural hydrology or vegetation. Due to this manipulation, PC cropland no longer performs the functions or has values that the area did in its natural condition. PC cropland has therefore been significantly degraded through human activity and, for this reason, such areas are not treated as wetlands under the Food Security Act. Similarly, in light of the degraded nature of these areas, we do not believe that they should be treated as wetlands for the purposes of the CWA.

The altered nature of PC cropland was discussed in RGL 90–7, in which the Corps concluded that cropped conditions constitute the "normal circumstances" of such areas. The Corps contrasted PC cropland with "farmed wetlands," defined by SCS as potholes and playas with 7 or more consecutive days of inundation or 14 days of saturation during the growing season, and other areas with 15 or more consecutive days (or 10 percent of the growing season, whichever is less) of inundation during the growing season. Because the hydrology of farmed wetlands has been less drastically altered than it has for PC cropland, the Corps stated in RGL 90–7 that farmed wetlands continued to retain their basic soil and hydrological characteristics, and that such areas should therefore be considered to be wetlands.

B. Technical Validity of Excluding PC Cropland From Regulation Under Section 404

Several commentors argued that it was not technically valid to treat all PC cropland as non-wetlands. These commentors pointed out that the SCS definition of PC cropland excludes areas that are inundated for more than 14 consecutive days a year, and they argued that this requirement was inconsistent with EPA's and the Corps' regulatory definition of wetlands, which includes areas that have wetland hydrology due to inundated or saturated soil conditions.

We believe that these commentors have oversimplified the relationship between the SCS definition of PC cropland and the wetlands definition under Section 404. In fact, except for a brief period of time after the adoption of the 1989 Federal Manual for Identifying and Delineating Jurisdictional Wetlands (1989 Manual), the Section 404 program has generally not considered such farmed areas as meeting the regulatory definition of wetlands under the CWA. In 1986, the Corps issued RGL 86–9, which interpreted the phrase "normal circumstances" in our regulatory definition of wetlands as referring to an area's characteristics and use in the present and recent past. Under this interpretation, cropped areas did not constitute wetlands where hydrophytic vegetation has been removed by the agricultural activity. In the 1989 Manual, EPA and the Corps modified this approach and evaluated whether a cropped area retained wetland hydrology to the extent that wetland vegetation would return if the cropping ceased. Under the 1989 Manual, therefore, the phrase "normal circumstances," as applied to agricultural areas, meant the circumstances that would be present absent agricultural activity. The Corps ceased using the 1989 Manual in August, 1991 at the direction of Congress (Energy and Water Development Appropriations Act of 1992, Publ L. 102–580) and began using its earlier 1987 Corps of Engineers Wetlands Delineation Manual (1987 Manual) for wetlands delineations. EPA is currently also using the Corps' 1987 Manual in implementing Section 404 (See 58 FR 4995, January 19, 1993). While the 1987 Manual does not address application of the "normal circumstances" phrase as it relates to areas in agricultural production, both agencies continue to follow the guidance provided by RGL 90–7, which interprets our regulatory definition of wetlands to exclude PC cropland.

The evolution over the last several years in the EPA and Corps policy for delineating wetlands in agricultural areas attests to the difficult technical, legal and policy considerations that bear on this issue. We therefore disagree with commentors who seemed to believe that ascertaining the jurisdictional status of PC cropland is a cut-and-dried technical question readily resolved by reference to generally accepted delineation methodologies. In utilizing the SCS definition of PC cropland for purposes of Section 404 of the CWA, we are attempting, in an area where there is not a clear technical answer, to make the difficult distinction between those agricultural areas that retain their wetland character sufficiently that they should be regulated under Section 404, and those areas that been so modified that they should fall outside the scope of the CWA. As is inevitable where the government engages in such line-drawing, we recognize that the particular line we have chosen to draw is not perfect. Two areas that are inundated for 14 days and 15 days a season respectively may not, in fact, differ materially in terms of their function and values. This criticism, however, could be made no matter where we chose to draw the line between wetlands and non-wetlands. We believe that the distinctions under the Food Security Act between PC cropland and farmed wetlands provides a reasonable basis for distinguishing between wetlands and non-wetlands under the CWA. In addition to the fact that we believe this distinction is an appropriate one based on the ecological goals and objectives of the CWA, adopting the SCS approach in this area will also help achieve the very important policy goal of achieving consistency among federal programs affecting wetlands.

C. Role of SCS PC Cropland Determinations

In the preamble to the proposal, we stated that jurisdictional determinations under the CWA can only be made by EPA and the Corps. While we stated we would accept and concur in SCS determinations to the extent possible, this rule does not alter the final authority of EPA regarding CWA jurisdiction.

This discussion in the preamble was criticized by commentors from several angles. Some commentors were concerned that the proposed rule effectively "delegated" EPA's and the Corps' authority regarding CWA jurisdiction to SCS. Some of these commentors urged that SCS be required to obtain Corps (or EPA) concurrence for the purposes of making PC cropland determinations. From the other side, commentors argued that EPA and the Corps should not be allowed to make an independent judgment at a site, and should be required to defer absolutely to SCS determinations.

In response to these comments, we note that today's rule does not "delegate" EPA's ultimate authority for determining the scope of geographic jurisdiction under the CWA. At the same time, we believe it is critical that duplication between the SCS's wetlands program and the CWA Section 404

program be reduced. In that regard, we believe that farmers should generally be able to rely on SCS wetlands determinations for purposes of complying with both the Swampbuster program and the Section 404 program. In order to make this reliance possible, we are working with SCS to develop appropriate procedures, including monitoring, for coordinating wetland determinations by the agencies. We are also working with SCS to develop field guidance for implementing the 1987 Corps Manual to clarify procedures for identifying wetlands in areas managed for agriculture, and are expediting current efforts to revise the SCS's NFSAM to provide greater consistency between our wetlands delineation procedures. Moreover, we are also developing an interagency training program with SCS and other agencies to ensure that agency field staff are properly trained, and that standard, agreed-upon methods are utilized in making wetland determinations. However, in order to clarify the relationship between determinations made by SCS and the Corps or EPA, we have added language to the rule itself stating that the final authority regarding CWA jurisdiction remains with EPA.

We also disagree with commenters who stated that SCS should be required to obtain EPA or Corps concurrence in their PC cropland determinations. First, since SCS is the administering agency under the Food Security Act, we do not believe it would be appropriate to require that SCS obtain the concurrence of other federal agencies before making determinations under that statute. Moreover, requiring EPA/Corps concurrence on every PC designation made by the SCS would be an inefficient use of our limited resources, since a site being evaluated by SCS may not be one where a regulated activity will occur (i.e., a discharge of dredged or fill material not exempt under Section 404(f)). In those cases, a Section 404 delineation will not be necessary at all, and expending our resources on delineations in such cases would be a waste of taxpayer money. In light of EPA's ultimate statutory responsibility for determining the scope of CWA jurisdiction, we cannot satisfy commentors who argued that we should be required to defer absolutely to SCS determinations. However, recognizing SCS's expertise in making these PC cropland determinations, we will continue to rely generally on determinations made by SCS.

Many commentors expressed concerns about the alleged lack of consistency and reliability in SCS prior converted cropland determinations. These commenters stated that most SCS PC cropland determinations are made based on aerial photos, and they argued that site visits were necessary to accurately delineate wetlands under Section 404. As discussed earlier, the SCS, in consultation with the Corps and EPA, is working to improve the consistency of its prior converted cropland determinations.

D. Expand Exclusion to All Agricultural Areas

Some commentors argued that the exclusion of agricultural areas should not be limited to land that meets the SCS definition of PC cropland but that the exclusion should apply to any agricultural area that is not inundated for more than 14 consecutive days during the growing season. While these commentors believed there would be advantages to treating all agricultural areas similarly in this manner, we believe that such considerations are outweighed by the importance of achieving the goal of consistency with the PC definition under the Food Security Act.

E. Incorporation of NFSAM Into EPA/Corps Regulations

Several commentors made the procedural argument that adoption of the NFSAM by reference into EPA's and the Corps' regulations violated the Administrative Procedure Act. These commentors pointed out that the NFSAM had not yet gone through rulemaking when it was adopted by SCS and they argued that reference to the NFSAM in the proposed rule was not legally adequate. Other commenters questioned the appropriateness of incorporating the NFSAM into EPA's and the Corps' regulatory provisions when the agency that developed the manual (SCS) uses it as a guidance document. Some commentors also felt that EPA and the Corps should retain the flexibility to follow future revisions to the NFSAM made by SCS.

As explained above, one of the primary reasons that EPA and the Corps are amending the definition of waters of the United States to exclude prior converted croplands is to ensure consistency in the way various federal agencies are regulating wetlands. We believe that consistency with SCS policy will best be achieved by our utilizing the NFSAM in the same manner as SCS, i.e., as a guidance document used in conjunction with other appropriate technical guidance and field testing techniques to determine whether an area is prior converted cropland. We also agree with the commentors' arguments about the need to be able to maintain consistency with SCS in the future when revisions are made to the NFSAM; incorporating one version of the manual into EPA's and the Corps' regulations would impair our ability to follow future revisions to the NFSAM in administering Section 404. The final rule, therefore, continues to exclude prior converted cropland from the definition of waters of the United States, but does not specifically incorporate by reference the provisions of the NFSAM. EPA and the Corps will, however, implement this exclusion in a manner following the guidance contained in the NFSAM and appropriate field delineation techniques, and will continue to rely, to the extend appropriate, on determinations made by SCS. The Corps and EPA will continue to work with SCS on procedures for implementing the prior converted cropland portion of the NFSAM. We will also issue policy guidance directing our field staff to utilize the guidance in the NFSAM when determining the presence of wetlands on agricultural lands.

By codifying our existing policy that prior converted croplands are not waters of the U.S., the final rule strengthens the regulatory basis for not regulating these areas under Section 404. The fact that we have not incorporated by reference the actual provisions of the NFSAM into our rules does not undercut our ability to maintain this consistency. Rather, as explained above, we believe that utilizing the NFSAM as a guidance manual, as it is used by SCS, will enhance consistency in the administration of the Food Security and Clean Water Act programs.

F. Section 404(f) Exemptions

Some commentors expressed concern that codifying Regulatory Guidance Letter 90–7 would eliminate all exemptions for agricultural activities under Section 404(f)(1)(A) of the Act. Other commentors felt that the rule was not needed and that prior converted croplands should be considered exempt under the Section 404(f) normal farming activities exemption.

As previously stated in this preamble, today's rule will not eliminate or in any way effect the exemptions for normal farming, ranching, or silviculture activities in Section 404(f)(1). Moreover, the exemptions apply only to discharges and not to the issue of whether an area is within the geographic scope of Section 404.

G. Criteria for Abandonment

Some commentors expressed concerns that the abandonment rule was not clear. A few commentors opposed

the use of prior converted croplands for non-agricultural uses. One commentor objected to the fact that there is no mechanism providing for "recapture" into Section 404 jurisdiction of those prior converted croplands that revert back to wetlands. One commentor objected to the requirement that a prior converted cropland is considered abandoned unless it is used for the production of an agricultural commodity at a regular interval, stating that it should include use for any agricultural production, including hay and pastureland.

The Corps and EPA will use the SCS provisions on "abandonment," thereby ensuring that PC cropland that is abandoned within the meaning of those provisions and which exhibit wetlands characteristics will be considered wetlands subject to Section 404 regulation. While we agree that SCS's abandonment provisions may be complex, SCS has been applying these provisions for several years in implementing the Swampbuster program, and farmers have become familiar with the standards used to determine whether a property has been "abandoned." If EPA and the Corps were to use different abandonment provisions in implementing today's rule, we believe the resulting inconsistency between the two regulatory programs would serve only to create confusion as to which standards are applicable to the same parcel of property. In response to commentors who opposed the use of PC croplands for non-agricultural uses, the agencies note that today's rule centers only on whether an area is subject to the geographic scope of CWA jurisdiction. This determination of CWA jurisdiction is made regardless of the types or impacts of the activities that may occur in those areas. The agencies also note that today's rule will provide a mechanism for "recapturing" into Section 404 jurisdiction those PC croplands that revert back to wetlands where the PC cropland has been abandoned. Finally, in response to the request that a PC cropland not be considered abandoned if the area is used for any agricultural production, regardless of whether the crop is an agricultural commodity, we note that SCS's abandonment provisions do recognize that an area may be used for other agricultural activities and not be considered abandoned. In particular, PC cropland which now meets wetland criteria is considered to be abandoned *unless*: For once in every five years the area has been used for the production of an agricultural commodity, or the area has been used and will continue to be used for the production of an agricultural commodity in a commonly used rotation with aquaculture, grasses, legumes or pasture production.

H. Grandfather Clause

One commentor said that RGL 90–7 results in the retroactive grandfathering of illegal drainage activities between 1977 and 1985. It has been and continues to be the position of the Corps and EPA that unauthorized discharge activity cannot eliminate Section 404 jurisdiction. Therefore, wetlands that were converted to prior converted cropland between 1972 and 1985 as a result of unauthorized discharges of dredged or fill material do not constitute "prior converted cropland" within the meaning of today's rule and remain "waters of the United States" subject to Section 404 regulation.

VI. Environmental Documentation

Some commentors wanted the Corps to prepare an Environmental Impact Statement (EIS), arguing that this rulemaking constitutes a major federal action significantly affecting the quality of the human environment. Some commenters felt that since these rules protected wetlands, an EIS would be needed to determine such environmental effects as mosquito infestation, odors, and gases. Others wanted an EIS prepared because they felt that these rules would result in a loss of wetlands. One commentor requested that the Corps prepare an EIS for farming, forestry and ranching disturbances and other questionable wetland impacts before proceeding with further rulemaking.

Section 511(c) of the CWA provides that, except for certain actions not relevant here, no action by EPA constitutes a major federal action significantly affecting the quality of the human environment with the meaning of NEPA. In this joint rulemaking by EPA and the Corps, these two agencies are making substantively identical revisions to their regulations in order to better carry out the purposes of Section 404 of the CWA. EPA is exempt from NEPA under Section 511(c), and we believe that, under the circumstances of this joint rulemaking, the Corps is exempt as well.

Nonetheless, the Corps has prepared an environmental assessment and determined that there will not be a significant impact on the quality of the human environment. This assessment is contained in the record for this rulemaking. Consequently, an EIS has not been prepared by the Corps. Furthermore, appropriate environmental documentation, including an EIS when required, is prepared by the Corps for all permit decisions.

VII. Executive Order 12291 and the Regulatory Flexibility Act

Numerous commentors indicated that a regulatory impact analysis under Executive Order 12291 should be done because the rule would allegedly cause an increase in the Corps' workload and in costs to permit applicants and because the rule will allegedly result in additional encumbrances or burdens on the public in the form of tax increases, project delays, project scrutiny and increased project costs. One commentor felt that agency resources would be diverted from larger, more significant projects by this rule. EPA and the Corps do not believe that this regulation meets the definition of a major rule under Executive Order 12291, and we therefore have not prepared a regulatory impact analysis for the rule.

Some commentors also argued that the agencies were required to perform a Regulatory Flexibility Analysis for this regulation under the Regulatory Flexibility Act, 5 U.S.C. 601–612. EPA and the Department of the Army certify, pursuant to Section 605(b) of the Regulatory Flexibility Act of 1980, that this regulation will not have a significant impact on a substantial number of entities. Therefore we have not prepared a regulatory flexibility analysis for this rule.

EPA and the Corps do not believe that this regulation will have a significant impact on a substantial number of small entities first because most of the components of this rule merely codify current agency policies and these aspects of the rule will therefore not result in any increased regulatory burden on the public, including small businesses. Since 1990, the Corps has followed the policy under RGL 90–5 of regulating mechanized landclearing activities under Section 404. Similarly, RGL 90–8 established, in December 1990, the Corps policy of regulating the placement of pilings when the activity would have the effect of discharge of fill material. The amendment of the definition of waters of the United States in today's rule also codifies the agencies' current policy of not regulating prior converted cropland under Section 404, as reflected by Corps RGL 90–7. RGL 90–7, moreover, eased the regulatory burden of the Section 404 program by excluding prior converted cropland from coverage under this provision.

EPA and the Corps believe, moreover, that coverage of discharges associated with ditching, channelization and other

excavation activities that would destroy or degrade waters of the United States should not result in a significant impact on a substantial number of small entities. Prior to today's rule, the Corps has uniformly regulated these activities where they were accomplished by excavating dredged material and sidecasting the material in adjacent waters of the United States. Conducting these activities without sidecasting dredged material is technically difficult and costly, and operators unable or unwilling to pay the costs to perform their activities in this manner have therefore already been subject to the Section 404 program. In addition, the practices of Corps districts have varied in this area, with some districts already regulating ditching, channelization and other excavation activities where dredged material was not sidecast. Therefore, we do not believe that the incremental regulatory burden associated with this aspect of the regulation should be significant.

Moreover, EPA and the Corps have included a provision in this regulation that would minimize any increased regulatory burden that may result from subjecting some activities to Section 404 jurisdiction for the first time. The rule does not regulate discharges of dredged material associated with activities that would not destroy or degrade waters of the United States. Establishing this threshold for requiring a Section 404 permit should be relevant for small entities in most instances, since they may be more likely than large operations to engage in minor activities having only a *de minimis* impact on the aquatic ecosystem. Some commentors believed that there would be regulatory impacts on the public due to regulating activities such as mowing, certain snagging activities, pumping, and vehicular traffic. While such activities may occur in waters of the United States, they generally do not involve a discharge of dredged material or would not have the effect of destroying or degrading a water of the United States and therefore would not trigger the requirement of a Section 404 permit.

In addition, as discussed elsewhere in this preamble, the Corps intends to issue general permits (regional or nationwide) for newly regulated activities that would have a minimal individual or cumulative impact on the aquatic environment. Issuance of general permits should further reduce any regulatory burden associated with complying with today's rule.

Finally, one primary purpose of the Regulatory Flexibility Act is to encourage agencies to explore regulatory alternatives that would minimize impacts of the regulatory scheme on small entities. See 5 U.S.C. 604(a)(2) (requiring that final regulatory flexibility analysis include "a description of each of the significant alternatives to the rule * * * designed to minimize any significant economic impact of the rule on small entities"). The only issue addressed in this rulemaking, however, is whether a discharge of dredged or fill material will require a Section 404 permit. Under Section 404, there are therefore only two regulatory "alternatives" available to the agencies: either a Section 404 permit is required or it is not. Section 404 does not authorize any other "intermediate" regulatory control mechanisms for regulated discharges that the agencies could consider establishing for small entities. Because, under Section 404, the requirement to obtain a permit is the sole tool for regulating activities covered by this provision, we do not believe that there are less burdensome alternatives available to achieve the objectives of this rulemaking. Rather, we believe that the appropriate forum for exploring means of reducing impacts on small businesses is through the permitting process itself (e.g., through issuance of general permits where appropriate, and by tailoring permit requirements to the severity of the environmental harm, which in turn may correlate with the size of the entity undertaking the project). As explained previously, the agencies have considered in this rulemaking alternatives that may, indirectly, have resulted in less of a regulatory burden on small entities (e.g., by excluding from regulation activities associated with a discharge of dredged material that would not have a "significant" effect on the environment). For the reasons explained in this preamble, however, we rejected these alternatives as not being consistent with the language, goals and/or objectives of Section 404. Therefore, we believe that the final rule reflects a regulatory approach that appropriately meets the requirements of Section 404.

Note 1.—The term "he" and its derivatives used in these regulations are generic and should be considered as applying to both male and female.

List of Subjects

33 CFR Part 323

Navigation, Water pollution control, Waterways.

33 CFR Part 328

Navigation, Water pollution control, Waterways.

40 CFR Parts 110, 112, 116, 117, 122, 230, 232, and 401

Wetlands, Water pollution control.

Dated: August 19, 1993.

Carol M. Browner,

Administrator, Environmental Protection Agency.

G. Edward Dickey,

Acting Assistant Secretary of the Army (Civil Works), Department of the Army.

Accordingly, 33 CFR parts 323 and 328 and 40 CFR parts 110, 112, 116, 117, 122, 230, 232 and 401 are amended as follows:

33 CFR Chapter II—Corps of Engineers, Department of the Army

PART 323—PERMITS FOR DISCHARGES OF DREDGED OR FILL MATERIAL INTO WATERS OF THE UNITED STATES

1. The authority citation for part 323 continues to read as follows:

Authority: 33 U.S.C. 1344.

2. Section 323.2(d) is revised to read as set forth below.

3. Section 323.2(e) is amended by adding a sentence at the end that reads as set forth below.

4. Section 323.2(f) is amended by adding a sentence at the end that reads as set forth below.

§ 323.2 Definitions.

* * * * *

(d)(1) Except as provided below in paragraph (d)(2), the term *discharge of dredged material* means any addition of dredged material into, including any redeposit of dredged material within, the waters of the United States. The term includes, but is not limited to, the following:

(i) the addition of dredged material to a specified discharge site located in waters of the United States;

(ii) the runoff or overflow from a contained land or water disposal area; and

(iii) any addition, including any redeposit, of dredged material, including excavated material, into waters of the United States which is incidental to any activity, including mechanized landclearing, ditching, channelization, or other excavation.

(2) The term *discharge of dredged material* does not include the following:

(i) discharges of pollutants into waters of the United States resulting from the onshore subsequent processing of dredged material that is extracted for any commercial use (other than fill). These discharges are subject to section 402 of the Clean Water Act even though the extraction and deposit of such

material may require a permit from the Corps or applicable state Section 404 program.

(ii) activities that involve only the cutting or removing of vegetation above the ground (e.g., mowing, rotary cutting, and chainsawing) where the activity neither substantially disturbs the root system nor involves mechanized pushing, dragging, or other similar activities that redeposit excavated soil material.

(3) Section 404 authorization is not required for the following:

(i) any incidental addition, including redeposit, of dredged material associated with any activity that does not have or would not have the effect of destroying or degrading an area of waters of the United States as defined in paragraphs (d)(4) and (d)(5) of this section; however, this exception does not apply to any person preparing to undertake mechanized landclearing, ditching, channelization and other excavation activity in a water of the United States, which would result in a redeposit of dredged material, unless the person demonstrates to the satisfaction of the Corps, or EPA as appropriate, prior to commencing the activity involving the discharge, that the activity would not have the effect of destroying or degrading any area of waters of the United States, as defined in paragraphs (d)(4) and (d)(5) of this section. The person proposing to undertake mechanized landclearing, ditching, channelization or other excavation activity bears the burden of demonstrating that such activity would not destroy or degrade any area of waters of the United States.

(ii) incidental movement of dredged material occurring during normal dredging operations, defined as dredging for navigation in *navigable waters of the United States,* as that term is defined in part 329 of this chapter, with proper authorization from the Congress and/or the Corps pursuant to part 322 of this Chapter; however, this exception is not applicable to dredging activities in wetlands, as that term is defined at section 328.3 of this Chapter.

(iii) those discharges of dredged material associated with ditching, channelization or other excavation activities in waters of the United States, including wetlands, for which Section 404 authorization was not previously required, as determined by the Corps district in which the activity occurs or would occur, *provided* that prior to August 25, 1993, the excavation activity commenced or was under contract to commence work and that the activity will be completed no later than August 25, 1994. This provision does not apply to discharges associated with mechanized landclearing. For those excavation activities that occur on an ongoing basis (either continuously or periodically), e.g., mining operations, the Corps retains the authority to grant, on a case-by-case basis, an extension of this 12-month grandfather provision *provided* that the discharger has submitted to the Corps within the 12-month period an individual permit application seeking Section 404 authorization for such excavation activity. In no event can the grandfather period under this paragraph extend beyond August 25, 1993.

(iv) certain discharges, such as those associated with normal farming, silviculture, and ranching activities, are not prohibited by or otherwise subject to regulation under Section 404. See 33 CFR 323.4 for discharges that do not required permits.

(4) For purposes of this section, an activity associated with a discharge of dredged material destroys an area of waters of the United States if it alters the area in such a way that it would no longer be a water of the United States.

[Note: Unauthorized discharges into waters of the United States do not eliminate Clean Water Act jurisdiction, even where such unauthorized discharges have the effect of destroying waters of the United States.]

(5) For purposes of this section, an activity associated with a discharge of dredged material degrades an area of waters of the United States if it has more than a *de minimis* (i.e., inconsequential) effect on the area by causing an identifiable individual or cumulative adverse effect on any aquatic function.

(e) * * * See § 323.3(c) concerning the regulation of the placement of pilings in waters of the United States.

(f) * * * See § 323.3(c) concerning the regulation of the placement of pilings in waters of the United States.

* * * * *

5. Section 323.3(c) is added to read as follows:

§ 323.3 Discharges requiring permits.

* * * * *

(c) *Pilings.* (1) Placement of pilings in waters of the United States constitutes a discharge of fill material and requires a Section 404 permit when such placement has or would have the effect of a discharge of fill material. Examples of such activities that have the effect of a discharge of fill material include, but are not limited to, the following: Projects where the pilings are so closely spaced that sedimentation rates would be increased; projects in which the pilings themselves effectively would replace the bottom of a waterbody; projects involving the placement of pilings that would reduce the reach or impair the flow or circulation of waters of the United States; and projects involving the placement of pilings which would result in the adverse alteration or elimination of aquatic functions.

(2) Placement of pilings in waters of the United States that does not have or would not have the effect of a discharge of fill material shall not require a Section 404 permit. Placement of pilings for linear projects, such as bridges, elevated walkways, and powerline structures, generally does not have the effect of a discharge of fill material. Furthermore, placement of pilings in waters of the United States for piers, wharves, and an individual house on stilts generally does not have the effect of a discharge of fill material. All pilings, however, placed in the *navigable waters of the United States,* as that term is defined in part 329 of this chapter, require authorization under section 10 of the Rivers and Harbors Act of 1899 (see part 322 of this chapter).

PART 328—DEFINITION OF WATERS OF THE UNITED STATES

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

Authority: 33 U.S.C. 1344.

7. Section 328.3(a) is amended by adding a new paragraph (a)(8) that reads as follows:

§ 328.3 Definitions.

* * * * *

(a) * * *

(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.

* * * * *

40 CFR Chapter I—Environmental Protection Agency

PART 110—DISCHARGE OF OIL

1. The authority citation for part 110 continues to read as follows:

Authority: 33 U.S.C. 1321 (b)(3) and (b)(4) and 1361(a); 33 U.S.C. 1517(m)(3).

2. Section 110.1, definition of *navigable waters,* is amended by adding three new sentences of concluding text at the end of the definition to read as follows:

§ 110.1 Definitions.

* * * * *

Navigable waters 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.

* * * * *

PART 112—OIL POLLUTION PREVENTION

1. The authority citation for part 112 continues to read as follows:

Authority: 33 U.S.C. 1251 *et seq.*

2. Section 112.2(k), definition of *navigable waters*, is amended by adding three new sentences of concluding text at the end of the definition to read as follows:

§ 112.2 Definitions.

* * * * *

Navigable waters 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.

* * * * *

PART 116—DESIGNATION OF HAZARDOUS SUBSTANCES

1. The authority citation for part 116 continues to read as follows:

Authority: 33 U.S.C. 1521 *et seq.*

2. In § 116.3, the definition of *navigable waters* is amended by adding three new sentences of concluding text at the end of the definition, as set forth below, and the definitions are placed in alphabetical order.

§ 116.3 Definitions.

* * * * *

Navigable waters 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.

* * * * *

PART 117—DETERMINATION OF REPORTABLE QUANTITIES FOR HAZARDOUS SUBSTANCES

1. The authority citation for part 117 continues to read as follows:

Authority: 33 U.S.C. 1251 *et seq.*

2. The definition of *navigable waters*, § 117.1(i), is amended by adding three new sentences of concluding text at the end of the definition to read as follows:

§ 117.1 Definitions.

* * * * *

Navigable waters 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.

* * * * *

PART 122—EPA ADMINISTERED PERMIT PROGRAMS: THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM

1. The authority citation for part 122 continues to read as follows:

Authority: 33 U.S.C. 1251 *et. seq.*

2. Section 122.2, definition of *waters of the United States*, is amended by adding three new sentences at the end of the concluding text of the definition to read as follows:

§ 122.2 Definitions.

* * * * *

* * * 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.

* * * * *

PART 230—SECTION 404(b)(1) GUIDELINES FOR SPECIFICATION OF DISPOSAL SITES FOR DREDGED OR FILL MATERIAL

1. The authority citation for part 230 continues to read as follows:

Authority: 33 U.S.C. 1344(b) and 1361(a).

2. Section 230.3(s), definition of *waters of the United States*, is amended by adding three new sentences of concluding text at the end of the definition to read as follows:

§ 230.3 Definitions.

* * * * *

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.

* * * * *

PART 232—404 PROGRAM DEFINITIONS; EXEMPT ACTIVITIES NOT REQUIRING 404 PERMITS

1. The authority citation for part 232 continues to read as follows:

Authority: 33 U.S.C. 1344.

2. In § 232.2, the definition of *discharge of dredged material* is revised to read as set forth below.

3. In § 232.2, the definition of *discharge of fill material* is revised to read as set forth below.

4. In § 232.2, the definition of *waters of the United States* is amended by adding two new sentences of concluding text at the end of the definition to read as set forth below.

§ 232.2 Definitions.

* * * * *

Discharge of dredged material. (1) Except as provided below in paragraph (2), the term *discharge of dredged material* means any addition of dredged material into, including any redeposit of dredged material within, the waters of the United States. The term includes, but is not limited to, the following:

(i) The addition of dredged material to a specified discharge site located in waters of the Untied States;

(ii) The runoff or overflow, associated with a dredging operation, from a contained land or water disposal area; and

(iii) Any addition, including any redeposit, of dredged material, including excavated material, into waters of the United States which is incidental to any activity, including mechanized landclearing, ditching, channelization, or other excavation.

(2) The term *discharge of dredged material* does not include the following:

(i) Discharges of pollutants into waters of the United States resulting from the onshore subsequent processing of dredged material that is extracted for any commercial use (other than fill). These discharges are subject to section 402 of the Clean Water Act even though the extraction and deposit of such material may require a permit from the Corps or applicable state.

(ii) Activities that involve only the cutting or removing of vegetation above the ground (e.g., mowing, rotary cutting, and chainsawing) where the activity neither substantially disturbs the root system nor involves mechanized pushing, dragging, or other similar activities that redeposit excavated soil material.

(3) Section 404 authorization is not required for the following:

(i) Any incidental addition, including redeposit, of dredged material

associated with any activity that does not have or would not have the effect of destroying or degrading an area of waters of the U.S. as defined in paragraphs (4) and (5) of this definition; however, this exception does not apply to any person preparing to undertake mechanized landclearing, ditching, channelization and other excavation activity in a water of the United States, which would result in a redeposit of dredged material, unless the person demonstrates to the satisfaction of the Corps, or EPA as appropriate, prior to commencing the activity involving the discharge, that the activity would not have the effect of destroying or degrading any area of waters of the United States, as defined in paragraphs (4) and (5) of this definition. The person proposing to undertake mechanized landclearing, ditching, channelization or other excavation activity bears the burden of demonstrating that such activity would not destroy or degrade any area of waters of the United States.

(ii) Incidental movement of dredged material occurring during normal dredging operations, defined as dredging for navigation in *navigable waters of the United States*, as that term is defined in 33 CFR part 329, with proper authorization from the Congress or the Corps pursuant to 33 CFR part 322; however, this exception is not applicable to dredging activities in wetlands, as that term is defined at § 232.2(r) of this Chapter.

(iii) Those discharges of dredged material associated with ditching, channelization or other excavation activities in waters of the United States, including wetlands, for which Section 404 authorization was not previously required, as determined by the Corps district in which the activity occurs or would occur, *provided* that prior to August 25, 1993, the excavation activity commenced or was under contract to commence work and that the activity will be completed no later that August 25, 1994. This provision does not apply to discharges associated with mechanized landclearing. For those excavation activities that occur on an ongoing basis (either continuously or periodically), e.g., mining operations, the Corps retains the authority to grant, on a case-by-case basis, an extension of this 12-month grandfather provision *provided* that the discharger has submitted to the Corps within the 12-month period an individual permit application seeking Section 404 authorization for such excavation activity. In no event can the grandfather period under this paragraph extend beyond August 25, 1996.

(iv) Certain discharges, such as those associated with normal farming, silviculture, and ranching activities, are not prohibited by or otherwise subject to regulation under Section 404. See 40 CFR 232.3 for discharges that do not require permits.

(4) For purposes of this section, an activity associated with a discharge of dredged material destroys an area of waters of the United States if it alters the area in such a way that it would no longer be a water of the United States.

Note: Unauthorized discharges into waters of the United States do not eliminate Clean Water Act jurisdiction, even where such unauthorized discharges have the effect of destroying waters of the United States.

(5) For purposes of this section, an activity associated with a discharge of dredged material degrades an area of waters of the United States if it has more than a *de minimis* (i.e., inconsequential) effect on the area by causing an identifiable individual or cumulative adverse effect on any aquatic function.

Discharge of fill material. (1) The term *discharge of fill material* means the addition of fill material into waters of the United States. The term generally includes, without limitation, the following activities: Placement of fill that is necessary for the construction of any structure in a water of the United States; the building of any structure or impoundment requiring rock, sand, dirt, or other material for its construction; site-development fills for recreational, industrial, commercial, residential, and other uses; causeways or road fills; dams and dikes; artificial islands; property protection and/or reclamation devices such as riprap, groins, seawalls, breakwaters, and revetments; beach nourishment; levees; fill for structures such as sewage treatment facilities, intake and outfall pipes associated with power plants and subaqueous utility lines; and artificial reefs.

(2) In addition, placement of pilings in waters of the United States constitutes a discharge of fill material and requires a Section 404 permit when such placement has or would have the effect of a discharge of fill material. Examples of such activities that have the effect of a discharge of fill material include, but are not limited to, the following: Projects where the pilings are so closely spaced that sedimentation rates would be increased; projects in which the pilings themselves effectively would replace the bottom of a waterbody; projects involving the placement of pilings that would reduce the reach or impair the flow or circulation of waters of the United States; and projects involving the placement of pilings which would result in the adverse alteration or elimination of aquatic functions.

(i) Placement of pilings in waters of the United States that does not have or would not have the effect of a discharge of fill material shall not require a Section 404 permit. Placement of pilings for linear projects, such as bridges, elevated walkways, and powerline structures, generally does not have the effect of a discharge of fill material. Furthermore, placement of pilings in waters of the United States for piers, wharves, and an individual house on stilts generally does not have the effect of a discharge of fill material. All pilings, however, placed in the *navigable waters of the United States*, as that term is defined in 33 CFR part 329, require authorization under section 10 of the Rivers and Harbors Act of 1899 (see 33 CFR part 322).

(ii) [Reserved]

* * * * *

Waters of the United States. * * *

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.

* * * * *

PART 401—EFFLUENT GUIDELINES AND STANDARDS

1. The authority citation for part 401 continues to read as follows:

Authority: 33 U.S.C. 1251 *et seq.*

2. Section 401.11(l), definition of *navigable waters*, is amended by adding two new sentences at the end of the definition to read as follows:

§ 401.11 General definitions.

* * * * *

(l) * * * Navigable waters 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.

* * * * *

[FR Doc. 93–20530 Filed 8–24–93; 8:45 am]
BILLING CODE 6560–50–M

Regulatory Guidance Letter 90-07

SUBJECT: Clarification of the Phrase "Normal Circumstances" as it Pertains to Cropped Wetlands

DATE: 26 September 1990 EXPIRES: 31 December 1993

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1. The purpose of this regulatory guidance letter (RGL) is to clarify the concept of "normal circumstances" as currently used in the Army Corps of Engineers definition of wetlands (33 CFR 328.3(b)), with respect to cropped wetlands.

2. Since 1977, the Corps and the Environmental Protection Agency (EPA) have defined wetlands as:

"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..." (33 CFR 328.3(b)) (emphasis added).

While "normal circumstances" has not been defined by regulation, the Corps previously provided guidance on this subject in two expired "normal circumstances" RGLs (RGLs 82-2 and 86-9). These RGLs did not specifically deal with the issue of wetland conversion for purpose of crop production.

3. When the Corps adopted the Federal Manual for Identifying and Delineating Jurisdictional Wetlands (Manual) on 10 January 1989, the Corps chose to define "normal circumstances" in a manner consistent with the definition used by the Soil Conservation Service (SCS) in its administration of the Swamp-buster provisions of the Food Security Act of 1985 (FSA). Both the SCS and the Manual interpret "normal circumstances" as the soil and hydrologic conditions that are normally present, without regard to whether the vegetation has been removed [7 CFR 12.31(b)(2)(i)] [Manual page 71].

4. The primary consideration in determining whether a disturbed area qualifies as a section 404 wetland under "normal circumstances" involves an evaluation of the extent and relative permanence of the physical alteration of wetlands hydrology and hydro-phytic vegetation. In addition, consideration is given to the purpose and cause of the physical alterations to hydrology and vegetation. For example, we have always maintained that areas where individuals have destroyed hydro-phytic vegetation in an attempt to eliminate the regulatory requirements of section 404 remain part of the overall aquatic system, and are subject to regulation under section 404. In such a case, where the Corps can determine or reasonably infer that the purpose of the physical disturbance to hydro-phytic vegetation was to avoid regulation, the Corps will continue to assert section 404 jurisdictions.

5. The following guidance is provided regarding how the concept of "normal circumstances" applies to areas that are in agricultural crop production:

a. "Prior converted cropland" is defined by the SCS (Section 512.15 of the National Food Security Act Manual, August 1988) as wetlands which were both manipulated (drained or otherwise physically altered to remove excess water from the land) and cropped before 23 December 1985, to the extent that they no longer exhibit important wetland values. Specifically, prior converted cropland is inundated for no more than 14 consecutive days during the growing season. Prior converted cropland generally does not include pothole or playa wetlands. In addition, wetlands that are seasonally flooded or ponded for 15 or more consecutive days during the growing season are not considered prior converted cropland.

b. "Farmed wetlands" are wetlands which were both manipulated and cropped before 23 December 1985, but which continue to exhibit important wetland values. Specifically, farmed wetlands include cropped potholes, playas, and areas with 15 or more consecutive days (or 10 percent of the growing season, whichever is less) of inundation during the growing season.

c. The definition of "normal circumstances" found at page 71 of the Manual is based upon the premise that for certain altered wetlands, even though the vegetation has been removed by cropping, the basic soil and hydrological characteristics remain to the extent that hydro-phytic vegetation would return if the cropping ceased. This assumption is valid for "farmed wetlands" and as such these areas are subject to regulation under section 404.

d. In contrast to "farmed wetlands", "prior converted croplands" generally have been subject to such extensive and relatively permanent physical hydrological modifications and alteration of hydro-phytic vegetation that the resultant cropland constitutes the "normal circumstances" for purposes of section 404 jurisdiction. Consequently, the "normal circumstances" of prior converted croplands generally do not support a "prevalence of hydro-phytic vegetation" and as such are not subject to regulation under section 404. In addition, our experience and professional judgment lead us to conclude that because of the magnitude of hydrological alterations that have most often occurred on prior converted cropland, such cropland meets, minimally if at all, the Manual's hydrology criteria.

e. If prior converted cropland is abandoned (512.17 National Food Security Act Manual as amended, June 1990) and wetland conditions return, then the area will be subject to regulation under section 404. An area will be considered abandoned if for five consecutive years there has been no cropping, management or maintenance activities related to agricultural production. In this case, positive indicators of all mandatory wetlands criteria, including hydrophytic vegetation, must be observed.

f. For the purposes of section 404, the final determination of whether an area is a wetland under normal circumstances will be made pursuant to the 19 January 1989 Army/EPA Memorandum of Agreement on geographic jurisdiction. For those cropped areas that have previously been designated as "prior converted

cropland" or "farmed wetland" by the SCS, the Corps will rely upon such a designation to the extent possible. For those cropped areas that have not been designated "prior converted cropland" or "farmed wetland" by the SCS, the Corps will consult with SCS staff and make appropriate use of SCS data in making a determination of "normal circumstances" for section 404 purposes. Although every effort should be made at the field level to resolve Corps/SCS differences in opinion on the proper designation of cropped wetlands, the Corps will make the final determination of section 404 jurisdiction. However, in order to monitor implementation of this RGL, cases where the Corps and SCS fail to agree on designation of prior converted cropland or farmed wetlands should be documented and a copy of the documentation forwarded to CECW-OR.

6. This policy is applicable to section 404 of the Clean Water Act only.

7. This guidance expires 31 December 1993 unless sooner revised or rescinded.

FOR THE COMMANDER:

PATRICK J. KELLY
Major General, USA
Director of Civil Works

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the appellate CM/ECF system on April 20, 2018.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Thekla Hansen-Young
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April 20, 2018
90-5-1-4-20526