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Title 33—Navigation and Navigable Waters

For the reasons set forth in the preamble, the agencies propose to amend 33 CFR part 328 as follows:

PART 328—DEFINITION OF WATERS OF THE UNITED STATES

1. Authority: The authority citation for part 328 continues to read as follows: 33 U.S.C. 1251 *et seq.*
2. Section 328.3 is amended by revising paragraphs (a) through (c) and removing paragraphs (d) and (e) to read as follows:

§328.3 Definitions.

(a) For purposes of the Clean Water Act, 33 U.S.C. 1251 *et seq.* and its implementing regulations, subject to the exclusions in paragraph (b) of this section, the term “waters of the United States” means:

- (1) Waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including the territorial seas and waters which are subject to the ebb and flow of the tide;
- (2) Tributaries of waters identified in paragraph (a)(1) of this section;
- (3) Ditches that satisfy any of the conditions identified in paragraph (a)(1) of this section, ditches constructed in a tributary or that relocate or alter a tributary as long as those ditches also satisfy the conditions of the tributary definition, and ditches constructed in an adjacent wetland as long as those ditches also satisfy the conditions of the tributary definition;
- (4) Lakes and ponds that satisfy any of the conditions identified in paragraph (a)(1) of

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this section, lakes and ponds that contribute perennial or intermittent flow to a water identified in paragraph (a)(1) of this section in a typical year either directly or indirectly through a water(s) identified in paragraphs (a)(2) through (6) of this section or through water features identified in paragraph (b) of this section so long as those water features convey perennial or intermittent flow downstream, and lakes and ponds that are flooded by a water identified in paragraphs (a)(1) through (5) of this section in a typical year;

(5) Impoundments of waters identified in paragraphs (a)(1) through (4) and (6) of this section; and

(6) Adjacent wetlands to waters identified in paragraphs (a)(1) through (5) of this section.

(b) The following are not “waters of the United States”:

(1) Waters or water features that are not identified in paragraphs (a)(1) through (6) of this section;

(2) Groundwater, including groundwater drained through subsurface drainage systems;

(3) Ephemeral features and diffuse stormwater run-off, including directional sheet flow over upland;

(4) Ditches that are not identified in paragraph (a)(3) of this section;

(5) Prior converted cropland;

(6) Artificially irrigated areas, including fields flooded for rice or cranberry growing, that would revert to upland should application of irrigation water to that area cease;

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- (7) Artificial lakes and ponds constructed in upland (including water storage reservoirs, farm and stock watering ponds, and log cleaning ponds) which are not identified in paragraph (a)(4) or (a)(5) of this section;
- (8) Water-filled depressions created in upland incidental to mining or construction activity, and pits excavated in upland for the purpose of obtaining fill, sand, or gravel;
- (9) Stormwater control features excavated or constructed in upland to convey, treat, infiltrate or store stormwater run-off;
- (10) Wastewater recycling structures constructed in upland, such as detention, retention and infiltration basins and ponds, and groundwater recharge basins; and
- (11) Waste treatment systems.

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

- (1) *Adjacent wetlands*. The term *adjacent wetlands* means wetlands that abut or have a direct hydrologic surface connection to a water identified in paragraphs (a)(1) through (5) of this section in a typical year. Abut means to touch at least at one point or side of a water identified in paragraphs (a)(1) through (5) of this section. A direct hydrologic surface connection occurs as a result of inundation from a paragraph (a)(1) through (5) water to a wetland or via perennial or intermittent flow between a wetland and a paragraph (a)(1) through (5) water. Wetlands physically separated from a paragraph (a)(1) through (5) water by upland or by dikes, barriers, or similar structures and also lacking a direct hydrologic surface connection to such waters are not adjacent.
- (2) *Ditch*. The term *ditch* means an artificial channel used to convey water.

- (3) *Ephemeral*. The term *ephemeral* means surface water flowing or pooling only in direct response to precipitation (*e.g.*, rain or snow fall).
- (4) *High tide line*. The term *high tide line* means the line of intersection of the land with the water's surface at the maximum height reached by a rising tide. The high tide line may be determined, in the absence of actual data, by a line of oil or scum along shore objects, a more or less continuous deposit of fine shell or debris on the foreshore or 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.
- (5) *Intermittent*. The term *intermittent* means surface water flowing continuously during certain times of a typical year and more than in direct response to precipitation (*e.g.*, seasonally when the groundwater table is elevated or when snowpack melts).
- (6) *Ordinary high water mark*. The term *ordinary high water mark* means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as 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.
- (7) *Perennial*. The term *perennial* means surface water flowing continuously year-round during a typical year.

- (8) *Prior converted cropland*. The term *prior converted cropland* means any area that, prior to December 23, 1985, was drained or otherwise manipulated for the purpose, or having the effect, of making production of an agricultural product possible. EPA and the Corps will recognize designations of prior converted cropland made by the Secretary of Agriculture. An area is no longer considered *prior converted cropland* for purposes of the Clean Water Act when the area is abandoned and has reverted to wetland, as defined in paragraph (c)(15) of this section. Abandonment occurs when prior converted cropland is not used for, or in support of, agricultural purposes at least once in the immediately preceding five years. For the purposes of the Clean Water Act, the EPA Administrator shall have the final authority to determine whether prior converted cropland has been abandoned.
- (9) *Snowpack*. The term *snowpack* means layers of snow that accumulate over extended periods of time in certain geographic regions and high altitudes (*e.g.*, in northern climes and mountainous regions).
- (10) *Tidal waters* and *waters subject to the ebb and flow of the tide*. The terms *tidal waters* and *waters subject to the ebb and flow of the tide* mean 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 and waters subject to the ebb and flow of the tide 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.
- (11) *Tributary*. The term *tributary* means a river, stream, or similar naturally occurring surface water channel that contributes perennial or intermittent flow to a water identified in paragraph (a)(1) of this section in a typical year either directly or

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indirectly through a water(s) identified in paragraphs (a)(2) through (6) of this section or through water features identified in paragraph (b) of this section so long as those water features convey perennial or intermittent flow downstream. A tributary does not lose its status as a tributary if it flows through a culvert, dam, or other similar artificial break or through a debris pile, boulder field, or similar natural break so long as the artificial or natural break conveys perennial or intermittent flow to a tributary or other jurisdictional water at the downstream end of the break. The alteration or relocation of a tributary does not modify its status as a tributary as long as it continues to satisfy the elements of this definition.

(12) *Typical year*. The term *typical year* means within the normal range of precipitation over a rolling thirty-year period for a particular geographic area.

(13) *Upland*. The term *upland* means any land area that under normal circumstances does not satisfy all three wetland delineation criteria (*i.e.*, hydrology, hydrophytic vegetation, hydric soils) identified in paragraph (c)(15) of this section, and does not lie below the ordinary high water mark or the high tide line of a water identified in paragraph (a)(1) through (6) of this section. Waters identified in paragraphs (a)(1) through (6) of this section are not upland.

(14) *Waste treatment system*. The term *waste treatment system* includes all components, including lagoons and treatment ponds (such as settling or cooling ponds), designed to convey or retain, concentrate, settle, reduce, or remove pollutants, either actively or passively, from wastewater prior to discharge (or eliminating any such discharge).

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- (15) *Wetlands*. The term *wetlands* means 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.

Title 40—Protection of Environment

For reasons set out in the preamble, the agencies propose to amend 40 CFR part 110 as follows:

PART 110—DISCHARGE OF OIL

3. Authority: The authority citation for part 110 continues to read as follows: 33 U.S.C. 1251 *et seq.*, 33 U.S.C. 1321(b)(3) and (b)(4) and 1361(a); E.O. 11735, 38 FR 21243, 3 CFR parts 1971-1975 Comp., p. 793.
4. Section 110.1 is amended by revising the definition of “navigable waters” to read as follows:

Navigable waters means waters of the United States, including the territorial seas.

(1) For purposes of the Clean Water Act, 33 U.S.C. 1251 *et seq.* and its implementing regulations, subject to the exclusions in paragraph (2) of this section, the term “waters of the United States” means:

- (i) Waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including the territorial seas and waters which are subject to the ebb and flow of the tide;