# APPENDIX B

## 85 FR 2280-2282; Section III.B

## B. Territorial Seas and Traditional Navigable Waters

### 1. What Are the Agencies Finalizing?

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

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

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

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

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

### 2. Summary of Final Rule Rationale and Public Comment

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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