# APPENDIX C

**Navigable Waters Protection Rule – Public Comment Summary Document, Section 2; January 22, 2020**

# The Navigable Waters Protection Rule – Public Comment Summary Document

*See the Introductory Section of the Response to Comments (RTC) Document for a discussion of the Environmental Protection Agency and the Department of the Army's (hereafter, the agencies) comment response process and organization of the thirteen sections. While the majority of public comments on legal arguments and the agencies' responses are included in RTC Section 1 Legal Arguments, some topic sections also include brief discussions of legal arguments raised by commenters and may cross-reference Section 1 for further discussion.*

## Traditional Navigable Waters and Territorial Seas

### 2.1. General

Some commenters stated that it is important for the agencies to clarify the scope of traditional navigable waters since they are the basis for all Clean Water Act (CWA) jurisdiction. A few commenters stated that the definition of traditional navigable waters is more important because there is no longer a separate category for interstate waters to serve a basis for the jurisdiction of other waters. A few commenters stated that the agencies should focus on tying CWA jurisdiction to only those waters that affect traditional navigable waters.

A few commenters stated that jurisdictional waters under the CWA should include interstate waters that are navigable-in-fact and currently used or susceptible to use in interstate or foreign commerce and include the territorial seas. One commenter stated that there should be no jurisdiction over isolated ponds and other features that are not navigable, cannot be made navigable, and contribute no flow to a navigable water. One commenter stated that water features that are not navigable-in-fact should not be considered jurisdictional and the *Rapanos* plurality opinion should be adopted.

One commenter stated that the agencies' proposed definition of "traditional navigable waters" narrowly focused on large rivers and lakes and paid little attention to the nation's other wetland resources that serve as the origin of many of these larger waterbodies.

Some commenters requested clarification on which specific waters will be traditional navigable waters through more dialogue, coordination, and consultation with state counterparts. One commenter suggested that the agencies limit the definition of traditional navigable waters to a list of such waters proposed by each state, subject to public comment. The commenter stated that this process will end any uncertainty about what is or is not a traditional navigable water. One commenter stated that the agencies do not know which waters are included in the traditional navigable waters category and therefore cannot know whether any waters connected to them are jurisdictional. Another stated that the category was well understood, its application guided by a developed body of case law, and that the existing regulatory text is clear, concise, predictable, and well understood by the public.

A few commenters stated CWA jurisdiction is not limited to traditional navigable waters; waters that are not traditionally navigable are still subject to jurisdiction if they fall into one of the other jurisdictional categories. One commenter stated the rule text should make clear that waters subject to jurisdiction under paragraphs (2) through (6) of the proposal are separate categories from the waters subject to paragraph (1).

Some commenters questioned whether the proposed rule would result in any changes to past traditional navigable water determinations.

**Agency Response**

**The agencies agree that traditional navigable waters and the territorial seas are foundational to the scope of "waters of the United States," as the jurisdictional status of other categories of water relies on a surface water connection to either. The agencies are making no substantive changes to the longstanding categories of traditional navigable waters and the territorial seas in the definition of "waters of the United States" other than combining them into a single category.**

**While interstate waters are no longer a standalone jurisdictional category, any interstate waters that meet the terms of paragraph (a)(1) waters are traditional navigable waters and are jurisdictional. Other interstate waters may also be jurisdictional under paragraphs (a)(2) through (4) of the final rule. For additional discussion of interstate waters, see the preamble to the final rule in Section III.C and the agencies' response to comments on interstate waters in Section 3.**

**The agencies agree that CWA jurisdiction is not limited to traditional navigable waters; waters that are not traditionally navigable are jurisdictional if they satisfy the conditions codified in one of the other jurisdictional categories. The agencies believe the regulatory text is clear that the waters in paragraph (a)(1) of the final rule are separate from the other jurisdictional categories and are making no changes to further clarify that. The agencies note that a water may be a paragraph (a)(1) water and also meet the definition of another category of jurisdictional waters, such as "tributary" or "lakes, ponds and impoundments of jurisdictional waters."**

**In the final rule, the agencies are not establishing a process for coordination or consultation with states of the kind requested by commenters, nor are they limiting traditional navigable waters to those identified by the states as suggested by one commenter. However, the agencies are committed to providing more information to states and the public about the jurisdictional status of waters, including traditional navigable waters. For example, the agencies have initiated the development of state-of-the-art geospatial data tools through federal, state, and tribal partnerships with the goal of providing an enhanced, publicly-accessible platform for critical CWA information, such as the location of federally jurisdictional waters, the applicability of state and tribal water quality standards, permitted facility locations, impaired waters, and other significant features.**

**The agencies agree with commenters that stated that the existing regulatory text is clear, concise, predictable, and well understood by the public; however, the agencies acknowledge that implementing paragraph (a)(1) of the final rule will be a case-specific analysis, as it has always been. This case-specific analysis of traditional navigable waters requires the application of relevant portions of EPA and Corps regulations, prior determinations by the Corps and by the federal courts, and case law. As the agencies implement the final rule, they will continue to look to existing 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 interpretive questions to be reviewed by senior legal staff at each of the agencies' respective headquarters.**

**Because the agencies are making no substantive changes, the final rule does not result in any changes to past traditional navigable water determinations. See Final Rule Preamble Section III.A on**

**traditional navigable waters and the agencies' response to comments on geospatial datasets of waters of the United States in Section 12.**

## 2.2. Support Continuing Existing Definition of Traditional Navigable Waters

Many commenters expressed support for the agencies' decision to retain the existing regulatory text for traditional navigable waters, stating that the existing text is clear, concise, predictable, and well understood by the public. Some commenters stated that retaining the existing definition will ensure that there is no basis to withdraw jurisdiction of any waters that have been included in the traditional navigable waters category, which will ensure clarity and consistency. Some commenters suggested clarifying that any nonnavigable wetlands subject to the ebb and flow of the tide are traditional navigable waters. Some commenters stated that the proposed definition of "traditional navigable waters and territorial seas" is too narrow and may eliminate CWA jurisdiction over portions of tidal waters that are not necessarily accessible for navigation but are still hydraulically connected to navigable waters.

Another commenter suggested that the agencies have not disclosed their alternative approach to defining traditional navigable waters or provided any reasoned basis for changing the definition.

One commenter supported the existing regulatory text but stated that the agencies should include non-ephemeral CWA section 303(d) impaired waters that cross interstate boundaries in the traditional navigable waters definition. The commenter stated that surface waterbodies in the arid West that cross interstate boundaries may not fall within the proposed "traditional navigable waters" definition and assuring restoration of those waters is warranted.

**Agency Response**

**The agencies did not propose any substantive changes to the existing regulatory text for traditional navigable waters and are not making any substantive changes to the paragraph (a)(1) text in the final rule. The agencies are retaining existing guidance on traditional navigable waters to help inform implementation of this provision with additional clarification in the preamble to the final rule in response to comments. See the preamble to the final rule in Section III.B for a detailed discussion of applicable case law and the agencies' interpretation of "traditional navigable waters."**

**Federal courts have long held that waters subject to the ebb and flow of the tide are subject to the federal power to regulate navigation. See, e.g., *The Steam-Boat Thomas Jefferson*, 23 U.S. 428, 429 (1825), *overruled on other grounds by The Genesee Chief*, 53 U.S. 443 (1851) *as noted in The Hine*, 71 U.S. 555, 563 (1866). Paragraph (a)(1) of the final rule retains longstanding regulatory text and includes "all waters which are subject to the ebb and flow of the tide," including tidal wetlands. As explained in the preamble to the final rule in Section III.B, 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 agencies disagree with the commenter's suggestion that a water's impaired status should inform whether it falls within the category of "traditional navigable waters." As described in Section 2.1 above, implementation of this section of the regulation is case-specific and to determine whether a waterbody is a traditional navigable water, the agencies will apply EPA and the Corps regulations,**

**prior determinations by the Corps and by the federal courts, and case law. The agencies will determine whether a particular waterbody is a traditional navigable water based on application of those considerations to the specific facts in each case. For further discussion on waters crossing interstate boundaries, see Final Rule Preamble Section III.C and the agencies' response to comments on interstate waters in Section 3.**

## 2.3. Concerns Over Continuing Existing Definition of Traditional Navigable Waters

Many commenters expressed concern regarding the agencies' decision to retain the existing regulatory text for traditional navigable waters. These commenters stated that the existing definition of traditional navigable waters has always been too broad and the agencies should narrow the scope of traditional navigable waters in the final rule. One commenter stated that there is no way to know in what manner, if any, waters were used to transport goods for commerce. Another commenter stated that the agencies should amend the definition to reflect that historic use alone is insufficient to demonstrate navigability.

A few commenters stated that the agencies should remove "may be susceptible to use in interstate commerce" from the definition. One of these commenters stated that it is improper to base CWA jurisdiction on whether a waterway could be available for navigation if some unknown set of undescribed eventualities takes place at some uncertain future time. One commenter stated that the agencies should define "susceptible to use" to mean that the waters could be used for transporting goods in interstate or foreign commerce, with or without modifications such as dredging, through improvement of existing navigation structures, or by removal or alteration of manmade structures such as bridges or causeways. This commenter stated that defining "susceptible to use" will also effectively address traditional navigable waters that are no longer navigable-in-fact.

Some commenters suggested that past use in commerce should only be considered when the water's navigability can be restored, and waters should lose their traditional navigable water status if it is clear that the water will no longer convey sufficient volumes of water for commerce. Some commenters stated that past use should be removed from the definition.

**<u>Agency Response</u>**

**The agencies did not propose to make any substantive changes to the longstanding category of traditional navigable waters and are not making substantive changes to the definition in the final rule. The agencies disagree that the existing text of the regulation is too broad. The agencies are not removing "may be susceptible to use in interstate commerce" from paragraph (a)(1), as that is a criterion established by the Supreme Court. The agencies are also not defining "susceptible to use" in the final rule; that is a standard established by the Supreme Court and best understood through the decisions of the federal courts. The agencies note, however, that 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 the water was, is, or actually could be used for that purpose. See Final Rule Preamble Section III.B for further discussion.**

**The agencies are also not defining or limiting by regulation past or historical use for purposes of traditional navigable waters because the Supreme Court has established the general standard for navigable-in-fact determinations under the Commerce Clause as encompassing waters that were "once navigable but are no longer," *PPL Montana, LLC v. Montana*, 565 U.S. 576, 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*, 311 U.S. 377, 409 (1940)). With respect to the commenter concerned that there is no way to know in what manner, if any, waters were historically used to transport goods for commerce, the factual information to support a traditional navigable water determination is a case-specific matter and has long been used by the agencies for CWA determinations and by the Corps for Rivers and Harbors Act determinations.**

## 2.4. Combining the Territorial Seas with Traditional Navigable Waters

Most commenters agreed with the inclusion of territorial seas in the jurisdictional category of "traditional navigable waters" and stated that it streamlines and simplifies the definition. Commenters stated that including territorial seas makes practical sense since the jurisdictional status of other categories of water rely on their connection to either a traditional navigable water or a territorial sea. One commenter stated that while it is difficult to imagine that territorial seas would not fall within the traditional navigable waters category, the commenter did not see any benefit to removing "traditional navigable waters" from the definition and does not support any new or modified exclusions to this category without further public review.

Some commenters stated that the definition of territorial seas should be kept separate from the definition of traditional navigable waters. A few commenters expressed concern that the proposed rule implies that waters of the United States include only the portions of the territorial seas that are navigable and capable of use in interstate or foreign commerce, but the CWA definition of navigable waters makes clear that all of the territorial seas, including portions of the territorial seas that cannot be used in interstate or foreign commerce, such as those that are too shallow or frozen to an uncuttable depth, are considered waters of the United States. One commenter stated that traditional navigable waters and territorial seas should be kept separate to clarify the separation of freshwater and saline/brackish waters to spare future water rights legal cases.

**Agency Response**

**In the 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 subject agreed with the proposal to combine the territorial seas and traditional navigable waters into one paragraph of the regulation, stating that it streamlines and simplifies the definition of "waters of the United States," and makes practical sense since the jurisdictional status of other categories of water relies on their connection to either a traditional navigable water or the territorial seas.**

**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 does not include "territorial seas" within the definition of "traditional navigable waters"; rather they are two stand-alone categories of jurisdictional waters combined in a single paragraph in the final rule. For further discussion, see Final Rule Preamble Section III.B.**

## 2.5. Definition of Territorial Seas

A few commenters stated that the agencies should include the definition of "territorial seas" in the final rule to increase clarity. A few commenters stated that the regulatory definition of territorial seas should state that the extent of jurisdiction is three nautical miles, not three statutory miles, to further increase the clarity in the definition and ensure that it is consistent in terms of units with other definitions.

In contrast, a few commenters stated that the agencies should not include a definition of territorial seas in the final rule. These commenters stated that territorial seas is already defined in the CWA and adding a definition would only cause confusion. One commenter stated that traditional navigable waters and territorial seas are currently defined in 33 CFR part 329 and within case law as referenced within section III (A) of the proposed rule preamble and that there is potential that through further amendments to "waters of the United States," these definitions could be in conflict with other federal laws, such as Rivers and Harbors Act sections 9 and 10.

**Agency Response**

**The agencies agree with commenters that stated that the agencies should not include a definition of "territorial seas" in the final rule. 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.' In light of the statutory definition, the agencies are not repeating that definition or providing any further interpretation in the final rule.**

**For the purpose of applying the term "miles" in the CWA definition of "territorial seas," the agencies' intention is not to disturb the Corps' regulation in 33 CFR 328.4. The distances reflected by three geographic miles and three nautical miles are the same, thus the EPA applies either or both. For simplicity's sake *vis a vis* the states (at least on the Atlantic and Pacific coasts), the EPA's use of the three geographic mile distance (based on the term used in the Submerged Lands Act) makes the seaward limit at the ocean surface consistent with the seaward limit of states' interests in the underlying submerged lands. The agencies are aware that whenever the United States has proclaimed its maritime zones for international law purposes (for example, with respect to the territorial seas, the contiguous zone, and the Exclusive Economic Zone), it has always used either the geographic mile (initially in 1783 and in later some other cases) or the nautical mile to specify the relevant the metric. The agencies are not aware of an instance when the United States has used the statute mile to describe distances on water as it has terrestrially. This also is not EPA's current practice.**

## 2.6. *Daniel Ball* and Transporting Commerce

Many commenters stated that the definition of traditional navigable waters should be based on the two-part test for jurisdiction under the River and Harbors Act that was established by the Supreme Court in *The Daniel Ball, Economy Light & Power Co. v. United States*, and *United States v. Appalachian Elec. Power Co.* A few commenters stated that relying on these cases is appropriate because the Supreme Court referred to them in both *SWANCC* and *Rapanos. Solid Waste Agency v. United States Army Corps of Engineers, 531 U.S.159 (2001) ("SWANCC")*; and *Rapanos v. United States,* 547 U.S. 715, 731 (2006). Some of these commenters stated that navigability-in-fact alone should not be sufficient to classify a water as a traditional navigable water. Many commenters suggested revisions to the proposed

definition of traditional navigable waters to require "transport of commerce" instead of "use in commerce." These commenters stated this revised definition would better align with Congress' authority to regulate navigable waters, which is based on the ability of those waters to actually transport goods in commerce. A few commenters stated that requiring "transport of commerce" would clarify that waters used in the production of goods, such as irrigation of crops or watering of livestock, are not traditional navigable waters even though they have been used to produce goods in interstate commerce.

Some commenters stated that requiring "transport of commerce" would appropriately prevent waters that do not flow year-round or only support non-commercial boats from being considered traditional navigable waters. These commenters stated that traditional navigable waters should not include waters that have seasonal or ephemeral flow. A few commenters suggested that the agencies should add a requirement that traditional navigable waters should only be considered "susceptible to use" in commerce in either their "natural state" or with "reasonable improvement." A few commenters stated that traditional navigable waters should be required to form a continuous highway of commerce that is used to transport goods. One commenter suggested adding the requirement that waters subject to the ebb and flow of the tide must be navigable-in-fact and used to transport commercial goods.

Many commenters stated that the proposed definition for traditional navigable waters inappropriately allows for recreational use to be a basis for a traditional navigable water determination. These commenters suggested that the agencies explicitly state that recreational use is not a sufficient basis for a traditional navigable water determination. One commenter stated considering recreational use in a traditional navigable water determination potentially allows waters that are non-jurisdictional to be become jurisdictional solely through the building of a nearby highway that make previously inaccessible waters accessible to out-of-state visitors.

A few commenters stated that the definition of traditional navigable waters should not be changed to focus on transport of commerce, as it would improperly narrow the definition. These commenters stated that the provision in CWA section 101 regarding "an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water," shows that the definition of traditional navigable waters should continue to be interpreted as broadly as possible to include waters that are used or are susceptible to being used in commerce, including recreational uses. One commenter stated that the definition of traditional navigable waters should be revised to explicitly include recreational uses.

**Agency Response**

**The agencies did not propose to make any substantive changes to the longstanding category of traditional navigable waters in the regulation and are not making any substantive changes in the final rule. The longstanding regulation is based on and supported by *The Daniel Ball, Economy Light & Power Co. v. United States*, *United States v. Appalachian Elec. Power Co.,* subsequent relevant decisions by the Supreme Court, and the statute under which the regulation was promulgated and its Congressional purpose. For a detailed discussion of the historical development of the test for navigability articulated in *The Daniel Ball* and its progeny and its relationship to the final rule and the agencies' treatment of traditional navigable waters, see the preamble to the final rule in Section II.E and Section III.B.**

**Given the wide applicability of *The Daniel Ball* test, the Supreme Court has cautioned "that the test for navigability is not applied in the same way in [different] types of cases[,]" referring, for example, to cases arising under the Federal Power Act, the CWA, and title disputes. *PPL Montana*, 565 U.S. at 592; see also *Appalachian Electric Power*, 311 U.S. at 404 ("The legal concept of navigability embraces both public and private interests. It is not to be determined by a formula which fits every type of stream under all circumstances and at all times."). The Supreme Court in *Kaiser Aetna* rejected the notion "that the concept of 'navigable waters of the United States' has a fixed meaning that remains unchanged in whatever context it is being applied." *Kaiser Aetna v. United States*, 444 U.S. 164, 170 (1979). Instead, the Court cautioned that "any reliance upon judicial precedent must be predicated upon careful appraisal of the *purpose* for which the concept of 'navigability' was invoked in a particular case." *Id*. at 171 (internal quotations omitted) (emphasis in original). As further explained by the Supreme Court: "The *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. It has been used as well to determine questions of title to water beds under the equal-footing doctrine. It should be noted, however, that the test for navigability is not applied in the same way in these distinct types of cases." *PPL Montana*, 565 U.S. at 592 (internal citations and quotations omitted).**

**Given this cautionary guidance from the Supreme Court, the agencies have declined to adopt the recommendation from commenters to integrate the phrase "transport of commerce" into the final rule's traditional navigable waters jurisdictional category. In the agencies' view, the Supreme Court has 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. As described in the preamble to the final rule 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 did not propose to limit the scope of traditional navigable waters for purposes of the CWA only to waters covered by section 10 of the Rivers and Harbors Act (RHA), and the agencies 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. See Final Rule Preamble Section III.B for additional discussion.**

**As described in the preamble to the final rule in Section III.B, the capacity to float a boat in a water that is near an interstate highway is not sufficient to make a traditional navigable water determination under the paragraph (a)(1) standard. Such an interpretation is inconsistent with the applicable case law, including the cases discussed in Appendix D to the Jurisdictional Determination Form Instructional Guidebook. Federal cases also make clear that traditional navigable waters need not be navigable all year round, and that navigability determinations do not apply only to a water's natural state. The key is whether the water has supported commercial navigation, does support commercial navigation, or can support commercial navigation through reasonable improvement. Similarly, in response to commenters who raised the issue of recreational use, the threshold tests for jurisdiction over traditional navigable waters require evidence of past, current, or potential future use of the water for commercial activity. Use of waters by recreational craft may in some circumstances provide evidence of susceptibility to use, but that alone does not satisfy the legal threshold for a traditional**

**navigable water determination; evidence is also required to demonstrate that the use (past, current, or potential future use) is commercial in nature.**

**Beyond the general requirement of navigability for commercial purposes, the agencies decline to establish by rule specific activity-based categorical tests, because traditional navigable water determinations are based on a number of considerations and the factual information available about a particular waterbody. In some instances, the evidence is clear. For example, a lake with a water-dependent manufacturing facility connected by rail that delivers raw materials to the facility from out of state is more likely to be a traditional navigable water, whereas an isolated pond or small stream along which hikers walk trails but do not engage in water-based commercial activity is less likely to be a traditional navigable water. In other situations, the agencies will need to evaluate the available evidence of historic use (moving logs to market), current use (small harbor), or potential future use (deepening a small channel) to make the determination. The multiple commercial uses of surface waters therefore make it difficult to categorically establish jurisdiction over traditional navigable waters based on specific activities. See Final Rule Preamble Section III.B for further discussion on the agencies' interpretation and implementation of the "traditional navigable waters" category in paragraph (a)(1) of the final rule.**

## 2.7. Implementation

A few commenters stated that the agencies should create a map of traditional navigable waters, since the proposed rule relies on those waters as a basis to assert jurisdiction over all other categories of waters. These commenters stated that mapping traditional navigable waters will improve the efficiency, consistency, and accuracy of traditional navigable water, significant nexus, and CWA jurisdictional determinations.

One commenter stated that traditional navigable water jurisdictional determinations are inconsistent because the Corps does not consistently make these determinations based on the most inclusive information available, and in many cases, the Corps will turn to their navigability studies completed under the Rivers and Harbors Act. This commenter asserted that these studies are often outdated and rely excessively on Rivers and Harbors Act section 10 waters for traditional navigable water determinations, which would lead to missing many traditional navigable waters. The commenter stated that, to improve the accuracy and consistency of traditional navigable water determinations, the agencies should require the Corps to consider information from third parties in making traditional navigable water determinations and ensure that such information is given equal weight as the Corps' navigability studies.

One commenter requested clarification on how the agencies would approach traditional navigable water determinations on major river courses in their entirety and stated that not all of the major river courses in Arizona have been fully evaluated to determine their traditional navigable water status. A few commenters also highlighted the uncertainty surrounding the traditional navigable water status of waters in Nevada, stating that the Corps needs to be more open about traditional navigable water determinations.

Some commenters requested clarification on how to interpret degree of navigability and prior use. One commenter requested clarification and guidance on how to determine if a water is susceptible to interstate or foreign commerce based on current or future use and who makes that determination.

One commenter suggested that the format of any reported findings in a traditional navigable water determination should document the chemical and biological importance of waterbodies in determining a traditional navigable water.

Some commenters expressed concern about past traditional navigable water determinations that they believe to be incorrect and asked the agencies to revise these past determinations.

**Agency Response**

**The agencies note that implementation of this section of the regulation is case-specific. To determine whether a waterbody constitutes a traditional navigable water, some relevant considerations include EPA and Corps regulations, prior determinations by the Corps and by the federal courts, and case law. The agencies will determine whether a particular waterbody is a traditional navigable water based on application of those considerations to the specific facts in each case.**

**In addition, the agencies are in the initial stages of developing state-of-the-art geospatial data tools through federal, state, and tribal partnerships to provide an enhanced, publicly-accessible platform for critical CWA information, such as the location of federally jurisdictional waters, the applicability of state and tribal water quality standards, permitted facility locations, impaired waters, and other significant features. See Final Rule Preamble Section IV for further discussion regarding geospatial data tools.**

**It is true that not all traditional navigable waters have been identified by the agencies, including in Arizona and Nevada. The Corps makes determinations regarding the status of traditional navigable waters when needed, for example to make approved jurisdictional determinations. When making traditional navigable water determinations, the agencies do not make findings about the chemical and biological importance of the waterbody, as those considerations are not relevant information under the agencies' regulations or applicable Supreme Court decisions. The agencies agree that traditional navigable waters determinations should be informed by all available relevant information, including but not limited to previous Rivers and Harbors Act Section 10 determinations.**

**In response to the concern expressed by some commenters regarding past traditional navigable water determinations, the agencies observe that approved jurisdictional determinations for particular sites can be reviewed upon request, and an affected party may administratively appeal or seek judicial review of approved jurisdictional determinations. See 33 CFR 331.2, 331.5. To the extent that a reviewable approved jurisdictional determination relied upon an earlier traditional navigable water determination, an affected party could seek administrative or judicial review of that jurisdictional issue. The agencies have provided additional clarification about traditional navigable waters in the preamble to the final rule in Section III.B.**

## 2.8. Appendix D to the Corps Jurisdictional Determination Form Instructional Guidebook

A few commenters stated that the agencies should retain Appendix D of the agencies' *Rapanos* Guidance because changing the agencies' current approach to traditional navigable water determinations would cause confusion and the proposed rule does not provide enough information on any possible alternative approaches to the current process. One commenter stated that the agencies have not provided the public with a reasoned basis for making any changes to Appendix D.

Many commenters stated that Appendix D should be revised or rescinded. These commenters stated that Appendix D adopts a view of navigable waters that is broader than the traditional, historical understanding, and there is no support for it in either the case law or the statutory language. These commenters also stated that Appendix D causes confusion and results in too many traditional navigable water determinations that are not tied to the transport of interstate commerce. One commenter stated that Appendix D should be rescinded because it relies on multiple cases that do not meet the two-part test from *The Daniel Ball*.

**Agency Response**

**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. Appendix D resides as an attachment to the Jurisdictional Determination Form Instructional Guidebook that was published in 2007 concurrently with the 2007 *Rapanos* Guidance.**

**Because the agencies have not modified the definition of "traditional navigable waters," the agencies are retaining Appendix D to the Corps Jurisdictional Determination Form Instructional Guidebook with additional clarification in the preamble to the final rule to help inform implementation of that provision of the final rule. The agencies note that implementation of this section of the regulation is case-specific. To determine whether a waterbody constitutes traditional navigable water, some relevant considerations include EPA and Corps regulations, prior determinations by the Corps and by the federal courts, and case law. The agencies will determine whether a particular waterbody is a traditional navigable water based on application of those considerations to the specific facts in each case. For additional discussion, see Final Rule Preamble Section III.B.**