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# US EPA AIR AND WATER UPDATE

IOGCC Virtual Annual Business Meeting  
Environment and Safety Committee - July 15, 2020

# OUTLINE

- New Source Review (NSR)
- Title V Program Updates
- Navigable Waters Protection Rule Update

# NSR PROGRAM UPDATES

## **Plantwide Applicability Limit (PAL) Guidance, Final Guidance Summer 2020**

- Guidance addresses elements of the PAL regulations that stakeholders have identified as sources of perceived risk/disincentive

## **Begin Actual Construction Guidance, Final Guidance Fall 2020**

- Sources cannot legally “begin actual construction” of a major source or major modification without first obtaining a major NSR permit
- Guidance would explore potential flexibilities under the existing regulatory language to allow certain non-emitting activities to be undertaken prior to obtaining a permit.

# NSR PROGRAM UPDATES

## Reclassification of Major Sources as Area Sources Under Section 112 of the Clean Air Act (Major MACT to Area, MM2A), Final Rule Fall 2020

- Withdraws 1995 memo “Once In Always In” (OIAI) policy and reclassification issues covered
- Addresses when a major source subject to a Maximum Achievable Control Technology (MACT) standard may be reclassified as an area source and no longer subject to MACT requirement

## Project Emissions Accounting Under the New Source Review Preconstruction Permitting Program, Final Rule Fall 2020

- Proposed revisions to clarify that both emissions increases and decreases resulting from a project are to be accounted for under Step I of the NSR applicability process.

# NSR PROGRAM UPDATES

## Exclusions from Ambient Air, Final Policy issued 12/10/19

- Limited change to the way EPA applies regulatory definition of ambient air
- Change replaces specific concept of a fence or other physical barriers with *measures, which may include physical barriers, that are effective in deterring or precluding access to the land by the general public*

## Treatment of Biogenic CO<sub>2</sub> in Air Permitting, Proposed Rule Summer 2020

- 2018 EPA policy statement: Forthcoming regulatory actions will treat biogenic CO<sub>2</sub> resulting from the combustion of biomass from managed forests as stationary sources for energy production as carbon neutral.

# TITLE V PROGRAM UPDATE

## Revisions to the Petition Provisions of the Title V Permitting Program, Final Rule 2/5/20

Three main changes:

1. How to submit a petition (*where* to send it)
2. Mandatory content for petitions (tell us *what* the problem is, on *which* permit)
3. Requires permitting authorities to respond in writing to significant comments, and provide the response with the proposed permit to EPA for 45-day review,
  - Permitting authorities determine what is significant, but EPA gave guidance in final rule on what we potentially consider significant
  - We have spelled out how this works with “concurrent” review in a State like Arkansas



# PERMITTING OVERSIGHT HIGHLIGHTS



# NSR AND TITLE V PERMITTING OVERSIGHT AND TITLE V PETITION HIGHLIGHTS

## **Common NSR and Title V Permitting Challenges:**

- Emission and operational permitting limitations for synthetic minor air permits.
- Ensuring practicably enforceable emission limitations for all operational scenarios.
- Applicability of regulatory standard in permitting administrative record.

## **Anticipated Title V Petition Trends:**

- Increased focus on wood pellet manufacturing
- Incorporation by reference in permitting terms and conditions
- Monitoring for synthetic minor limits
- Monitoring to determine that a limit does NOT apply

## **Title V Petition – NSR Interface**

- Pacific Corp Hunter Order (10/16/17) and Big River Steel Order (10/31/17)
- Exxonmobil Baytown Petition Appeal, U.S. Court of Appeals, Fifth Circuit Decision (5/29/20)



# PSD LONG- RANGE TRANSPORT ASSESSMENTS AND ALTERNATIVE MODEL USAGE

## Revisions to the *Guideline on Air Quality Models* (40 CFR Part 51, Appendix W), Final Rule effective 5/22/17

- Included the removal of CALPUFF as a preferred model in appendix A for long-range transport (LRT) assessments.
- CALPUFF now considered an alternative model if chosen for a LRT assessment of NAAQS and/or PSD increment impacts.
  - Alternative models require approval by the EPA Regional Office. Regional Office approval includes consultation with the EPA's Model Clearinghouse.
- 2017 Appendix revisions also included the codification of a screening approach to address long-range transport.
  - Use of CALPUFF in screening approach does not require alternative model approval.

# THE NAVIGABLE WATERS PROTECTION RULE: DEFINITION OF “WATERS OF THE UNITED STATES”

# “WATERS OF THE UNITED STATES” AND THE CLEAN WATER ACT

- “Waters of the United States” (WOTUS) is a threshold term in the Clean Water Act and establishes the scope of federal jurisdiction under the Act.
- Clean Water Act regulatory programs address “navigable waters,” defined in the statute as “the waters of the United States including the territorial seas.”
- The Clean Water Act does not define WOTUS; Congress left further clarification to the agencies.
- The EPA and the Department of the Army have defined WOTUS by regulation since the 1970s.

# KEY OVERALL CHANGES UNDER NWPR

## Key changes from the 2019 Rule:

- Four categories of jurisdictional waters and twelve categories of excluded waters/features.
- No standalone interstate waters category.
- No case-specific significant nexus analysis.
- Key changes for:
  - Tributary
  - Adjacent wetlands
  - Ditches
  - Lakes, Ponds and Impoundments
  - New definitions

## (A)(I) TERRITORIAL SEAS AND TRADITIONAL NAVIGABLE WATERS (TNW):

The territorial seas, and waters 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.

### Key changes from the 2019 Rule:

- Combines the categories of traditional navigable waters and territorial seas.
- No substantive changes to definition of TNW.



*Traditional navigable waters include those waters used for interstate commerce, like Lake Winnebago in Wisconsin.*

## (A)(2) TRIBUTARIES:

- Contributes surface water flow to an (a)(1) water in a typical year, either directly or through one or more (a)(2)-(4) waters. A tributary must be **perennial or intermittent** in a typical year.
- Does not lose its jurisdictional status if it **contributes surface water flow** to a downstream jurisdictional water in a typical year through a channelized non-jurisdictional surface water feature (e.g., an ephemeral stream).
- The alteration or relocation of a tributary does not modify its jurisdictional status as long as it continues to satisfy the flow conditions of the definition.



*Tributaries include those perennial or intermittent streams that flow in response to snowpack melt, like Hayes Creek in Colorado that contributes surface flow to the Crystal River.*

# KEY DEFINITIONS IN THE FINAL RULE

## ■ **Perennial:**

- The term *perennial* means surface water flowing continuously year-round.

## ■ **Intermittent:**

- The term *intermittent* means surface water flowing continuously during certain times of the year and more than in direct response to precipitation (e.g., seasonally when the groundwater table is elevated or when snowpack melts).

## ■ **Ephemeral:**

- The term *ephemeral* means surface water flowing or pooling only in direct response to precipitation (e.g., rain or snow fall).

## ■ **Snowpack:**

- The term *snowpack* means layers of snow that accumulate over extended periods of time in certain geographic regions or at high elevation (e.g., in northern climes or mountainous regions).

## DEFINITION OF “TYPICAL YEAR”

The term *typical year* means: “when precipitation and other climatic variables are within the normal periodic range (e.g., seasonally, annually) for the geographic area of the applicable aquatic resource based on a rolling thirty-year period.”

“Typical year” is a key concept for establishing jurisdiction based on surface water flow between a relatively permanent body of water (*i.e.*, a perennial or intermittent surface water channel, a standing body of open water) and TNWs, and between wetlands and other jurisdictional waters.

Application of the typical year concept ensures that the hydrologic flows and surface water connections necessary to establish jurisdiction are characterized based on normal climatic conditions (*i.e.*, neither too wet or too dry).



## (A)(3) LAKES AND PONDS, AND IMPOUNDMENTS OF JURISDICTIONAL WATERS:

- The term means **standing bodies of open water** that contribute surface water flow to an (a)(1) water in a typical year either directly or through one or more (a)(2)-(4) waters.
- Does not lose its jurisdictional status if it **contributes surface water flow** to a downstream jurisdictional water in a typical year through a channelized non-jurisdictional surface water feature (e.g., an ephemeral stream).
- A lake, pond, or impoundment is also jurisdictional if it is **inundated by flooding** from an (a)(1)-(3) water in a typical year.



*Lakes, ponds, and impoundments of jurisdictional waters include open bodies of surface water that contribute surface flow to a traditional navigable water, like Christian Pond in Wyoming.*

## (A)(4) ADJACENT WETLANDS:

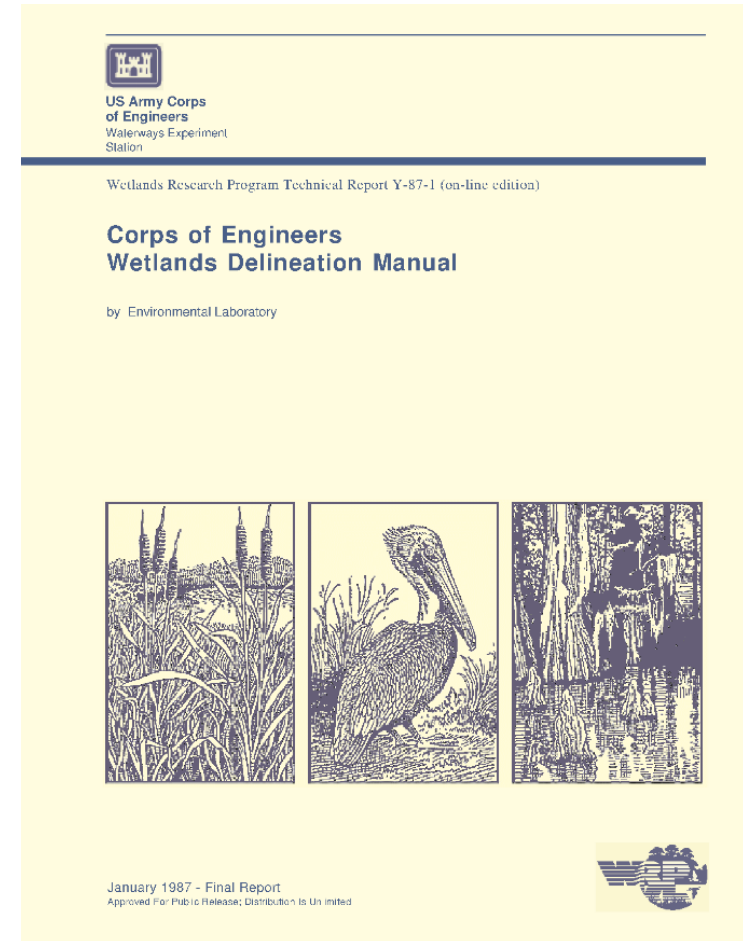
- The term means wetlands that:
  - abut, meaning to touch at least at one point or side of, a paragraph (a)(1)-(3) water;
  - are inundated by flooding from a paragraph (a)(1)-(3) water in a typical year;
  - are physically separated from a paragraph (a)(1)-(3) water only by a natural berm, bank, dune, or similar natural feature; or
  - are physically separated from a paragraph (a)(1)-(3) water only by an artificial dike, barrier, or similar artificial structure so long as that structure allows for a direct hydrologic surface connection in a typical year through a culvert, flood or tide gate, pump, or similar artificial feature.



*Adjacent wetlands include wetlands with manmade structures that allow for a direct hydrologic surface connection to an (a)(1)-(3) water in a typical year, like these wetlands in the Mississippi river Delta region of Louisiana.*

# DELINEATING WETLANDS

- The final rule retains the longstanding regulatory definition of “wetlands.”
- The agencies will continue to use existing resources, methods, and practices to verify the presence of wetlands and to delineate wetland boundaries (e.g., the Corps’ 1987 Wetland Delineation Manual).
- The delineated boundary of a wetland remains constant, even though certain wetland indicators may not be present year-round due to normal seasonal or annual variability.
- A complex of wetlands with a continuous physical surface connection is delineated as one wetland.



# WATERS/FEATURES EXCLUDED FROM FINAL WOTUS DEFINITION [33 CFR 328.3(B)]

- 1) Waters not listed as WOTUS
- 2) Groundwater
- 3) Ephemeral features
- 4) Diffuse stormwater run-off
- 5) Ditches not identified as WOTUS
- 6) Prior converted cropland (PCC)
- 7) Artificially irrigated areas
- 8) Artificial lakes and ponds
- 9) Water-filled depressions incidental to mining or construction activity
- 10) Stormwater control features
- 11) Groundwater recharge, water reuse, and wastewater recycling structures
- 12) Waste treatment systems

## NEXT STEPS

- The Navigable Waters Protection Rule became effective June 22, 2020
- New tools are being developed and will be publicly available for download on the EPA's website in the near future:
  - Antecedent Precipitation Tool (APT)
  - Regionally-specific SDAMs will be released over time
- The agencies are working on some joint memorandums to facilitate implementation of the final rule.
- Following this webinar series, the agencies are interested in hearing suggestions for other training/guidance from states and tribes.



# QUESTIONS AND ANSWERS



## For Further Information

- Visit <https://www.epa.gov/nwpr> for more information about the final rule, including the pre-publication copy, supporting analyses, and fact sheets.
- Additional questions may be directed to the EPA at: [CWAwotus@epa.gov](mailto:CWAwotus@epa.gov) or to the Corps at: [USACE\\_CWA\\_Rule@usace.army.mil](mailto:USACE_CWA_Rule@usace.army.mil)