CENTER FOR BIOLOGICAL DIVERSITY ● CENTER FOR FOOD SAFETY TURTLE ISLAND RESTORATION NETWORK ● WATERKEEPER ALLIANCE ● HUMBOLDT BAYKEEPER ● LAKE WORTH WATERKEEPER ● MISSOURI CONFLUENCE WATERKEEPER ● RUSSIAN RIVERKEEPER ● MONTEREY COASTKEEPER ● RIO GRANDE WATERKEEPER ● SNAKE RIVER WATERKEEPER ● SOUND RIVERS ● UPPER MISSOURI WATERKEEPER

Via Electronic and Certified Mail

February 13, 2020

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Lieutenant General Todd T. Semonite
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Re: Formal Notice of Intent to Sue for Violations of the Endangered Species Act; 2020 Revised Regulatory Definition of "Water of the United States"

On behalf of the Center for Biological Diversity, Waterkeeper Alliance, Center for Food Safety, Turtle Island Restoration Network, Humboldt Baykeeper – A Project of Northcoast Environmental Center, Lake Worth Waterkeeper, Missouri Confluence Waterkeeper, Monterey Coastkeeper – A Program of the Otter Project, WildEarth Guardians (Rio Grande Waterkeeper), Russian Riverkeeper, Snake River Waterkeeper, Sound Rivers, and Upper Missouri Waterkeeper ("Conservation Groups"), we ask that you take immediate action to remedy ongoing violations of the Endangered Species Act ("ESA" or "Act") by the U.S. Environmental Protection Agency ("EPA") and U.S. Army Corps of Engineers ("Corps") (collectively "EPA") in issuing on January 23, 2020 a revised regulatory definition and final rule defining the scope of waters federally protected under the Clean Water Act (hereinafter "2020 Dirty Water Rule").

EPA is violating Section 7(a)(2) of the ESA by taking an action that "may affect" ESA-listed species without having first engaged in mandatory consultation under the ESA.[1] Moreover, any implementation of the 2020 Dirty Water Rule prior to the conclusion of consultation activities constitutes a violation of Section 7(d) of the Act, which prohibits the "irretrievable commitment of resources" pending the completion of consultation.[2] These requirements obligate EPA to consult under the ESA prior to taking any action that it funds, authorizes, or carries out so that it may affirmatively "insure" that the action "is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification" of designated critical habitat.[3]

[1] 16 U.S.C. § 1536(a)(2).
[2] 16 U.S.C. § 1536(d).
[3] 16 U.S.C. § 1536(a)(2).

Pursuant to Section 11(g) of the Act, EPA has sixty days from the postmark of this letter to come into compliance with its ESA consultation obligations.[4] If it does not remedy these ongoing violations within that time period, Conservation Groups intend to initiate litigation in federal court to resolve the matter.

NOTICED ACTION

On January 23, 2020, EPA finalized a rule amending the regulatory definition of "waters of the United States," as that term is used in the Clean Water Act ("CWA").[5] The rule, termed by EPA "The Navigable Waters Protection Rule," is currently available on EPA's website at https://www.epa.gov/sites/production/files/2020-01/documents/navigable_waters_protection_rule_prepbulication.pdf, and will be published in the Federal Register under docket number EPA-HQ-OW-2018-0149.

On October 22, 2019, prior to finalizing the 2020 Dirty Water Rule, EPA published a final rule in the Federal Register repealing a prior rule ("2019 Repeal Rule") that had in 2015 amended the regulatory definition of "waters of the United States" to define the scope of waters protected under the Clean Water Act ("2015 Clean Water Rule").[6] The 2019 Repeal Rule purported to "restore[s] the regulatory text that existed prior to the 2015 Rule," and was also taken without lawful compliance of the ESA's legal obligations.[7] Conservation Groups provided notice to EPA on December 17, 2019 of their intent to sue EPA for violations of the ESA in issuing the 2019 Repeal Rule.[8] Conservation Groups hereby incorporate that notice letter by reference into today's notice letter and in so doing provide notice under the ESA regarding violations by EPA in issuing both final agency actions.

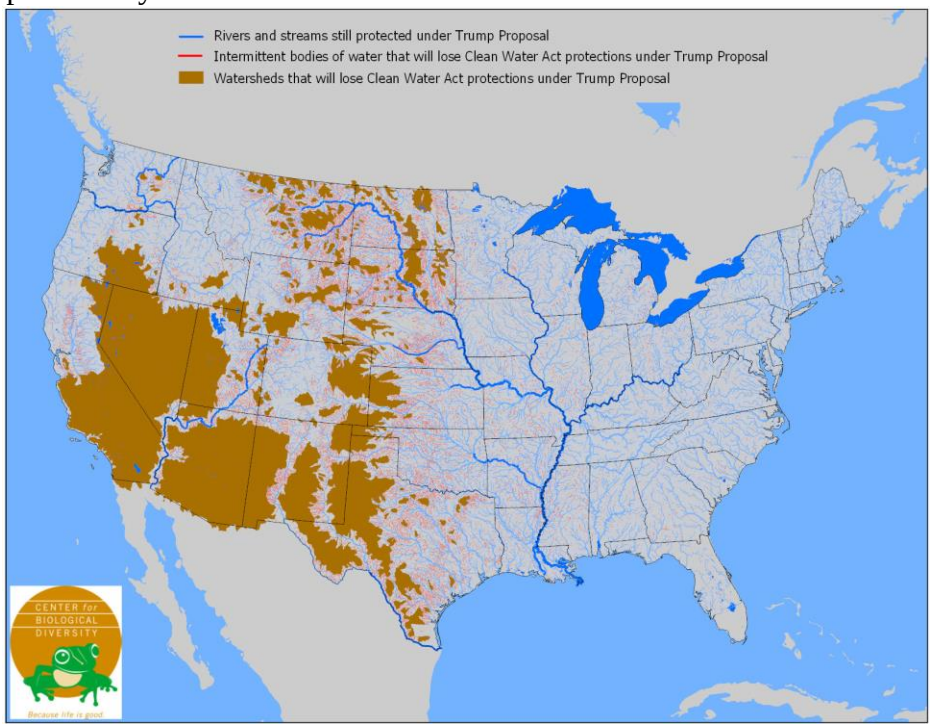
INTRODUCTION

In the 2020 Dirty Water Rule, EPA is constricting its interpretation of the definition of "waters of the United States" to categorically *exclude* ephemeral waters, all groundwater, groundwater recharge structures, and non-adjacent wetlands (as broadly defined in the rule), as well as other waterbodies that don't meet the agencies' narrowed definition of "waters of the United States." As detailed in Conservation Groups' public comments to EPA on the rule, under this narrow interpretation, millions of acres of rivers, streams, lakes, wetlands, impoundments, and other waterbodies will now be excluded from CWA jurisdictional protections.[9] These waters directly and indirectly provide and support habitat for breeding, feeding, or sheltering for a large number

[4] 16 U.S.C. §1540(g)(2)(A)(i).
[5] 33 U.S.C. 1362(7).
[6] *Definition of "Waters of the United States"—Recodification of Pre-Existing Rules*, 84 Fed. Reg. 56,626 (Oct. 22, 2019); *Clean Water Rule: Definition of "Waters of the United States,"* 80 Fed. Reg. 37,054 (June 29, 2015).
[7] *Definition of "Waters of the United States"—Recodification of Pre-Existing Rules*, 84 Fed. Reg. 56,626 (October 22, 2019).
[8] *See* Att. A.
[9] *See* Comments from Center for Biological Diversity at https://www.regulations.gov, docket number EPA-hq-OW-2018-0149-5076 (Apr. 15, 2019); Comments from Waterkeeper Alliance *et al*. at https://www.regulations.gov, docket number EPA-HQ-OW-2018-0149-11318 and EPA-HQ-OW-2018-0149-11319.

of endangered and threatened species across the nation, as further detailed below. This includes, but is not limited to, species in the arid West—an area that lost a vast majority of its CWA protections as a result of the rule. Yet, despite the significant anticipated effects from such a widespread reduction of CWA jurisdictional protections to aquatic ecosystems and the many threatened or endangered species that depend upon them, EPA did not even attempt to identify, quantify, or otherwise consider the adverse impacts to these species prior to finalizing the rulemaking—*e.g.*, it did not make a "no effect" determination. By finalizing the 2020 Dirty Water Rule without first coming into compliance with the substantive and procedural requirements of the ESA, EPA has failed to ensure that its actions will not jeopardize the continued existence of already imperiled species and is undermining the fundamental purpose of the ESA of "provid[ing] a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved[.]"[10]

For example, the 2020 Dirty Water Rule removes protections from all non-adjacent wetlands nationwide, which provide crucial habitat for dozens, if not hundreds, of federally-listed threatened and endangered species.[11] Streams and rivers across the country are also losing protections under the 2020 Dirty Water Rule. Using documents leaked by EPA career staff and our own analysis, the Conservation Groups estimate that the impacts from the 2020 Dirty Water Rule will be particularly severe in the western United States.[12]



[10] 16 U.S.C. § 1531(b); *see also Thomas v. Peterson*, 753 F. 2d 754 (9th Cir. 1985) ("If anything, the strict substantive provisions of the ESA justify more stringent enforcement of its procedural requirements, because the procedural requirements are designed to ensure compliance with the substantive provisions.").
[11] *See, e.g.*, 2020 Dirty Water Rule Pre-Publication Version at 31, 235 ("Some commenters recommended including as waters of the United States specific waters based solely on ecological importance, such as prairie potholes . . . . As noted above, under the final rule's definition, ecological connections alone are not a basis for including physically isolated wetlands within the phrase 'the waters of the United States.'").
[12] *See* Att. B.

In analyzing the 2020 Dirty Water Rule, Conservation Groups have been able to ascertain—although not comprehensively—that at a minimum the following listed species will be adversely affected and may even be jeopardized by the rule, due to both the direct and indirect loss of protections for broad classes of waters and the cumulative impacts upon downstream waters:

> Alameda whipsnake, Arroyo toad, Ash Meadows Amargosa pupfish, Beautiful shiner, Big Spring spinedace, Bonytail chub, Borax Lake chub, Bull Trout, California red-legged frog, California tiger Salamander (Central California DPS), California tiger Salamander (Santa Barbara County DPS), Casey's June Beetle, Chiricahua leopard frog, Coachella Valley fringe-toed lizard, Colorado pikeminnow, Conservancy fairy shrimp, Dakota skipper, Desert dace, Diminutive Amphipod, Gila chub, Hiko White River springfish, Huachuca water-umbel, Humpback chub, Least Bell's vireo, Little Colorado spinedace, Little Kern golden trout, Loach minnow, Longhorn fairy shrimp, Lost River sucker, Modoc Sucker, Mountain yellow-legged frog (Northern DPS), Mountain yellow-legged frog (Southern California DPS), New Mexican ridge-nosed rattlesnake, New Mexico meadow jumping mouse, Oregon spotted frog, Owens tui chub, Phantom Springsnail, Poweshiek skipperling, Quino checkerspot butterfly, Railroad Valley springfish, Razorback sucker, Riverside fairy shrimp, San Bernardino springsnail, San Diego fairy shrimp, Santa Ana sucker, Sharpnose shiner, Shortnose sucker, Sierra Nevada Yellow-legged Frog, Smalleye Shiner, Southwestern willow flycatcher, yellow-billed cuckoo, desert pupfish, Huachuca water umbel, northern Mexican garter snake, Spikedace, Three Forks springsnail, vernal pool fairy shrimp, vernal pool tadpole shrimp, Virgin River chub, Warner sucker, White River spinedace, White River springfish, woundfin, Yaqui catfish, Yaqui chub, Yosemite toad, Zuni bluehead sucker, river winter-run Chinook salmon, the Snake River fall-run Chinook salmon, the Snake River spring/summer run Chinook salmon, the Upper Columbia River spring-run Chinook salmon, the Upper Willamette River Chinook salmon, the Central California coast Coho salmon, the Lower Columbia River Coho salmon, the Oregon coast Coho salmon, the South Oregon and North California coasts Coho salmon, the Ozette Lake Sockeye salmon, the Snake River Sockeye salmon, the California Central Valley steelhead, the Central California coast steelhead, the Lower Columbia steelhead, the Middle Columbia steelhead, the Northern California steelhead, the Puget Sound steelhead, the Snake River Basin steelhead, the South-Central California coast steelhead, the Southern California steelhead, Hood Canal summer-run chum salmon, Southern Resident DPS of Orca, the Upper Columbia River steelhead, the Upper Willamette River steelhead, West Indian Manatee, Rio Grande chub, Rio Grande cutthroat trout, Rio Grande sucker, Rio Grande silvery minnow, Pecos sunflower, Jemez Mountains salamander, Ozark hellbender, eastern Hellbender DPS, sea otter, tidewater goby, eulachon, longfin smelt, Southern DPS of Pacific smelt, Southern DPS of green sturgeon, shortnose sturgeon, Carolina DPS of Atlantic sturgeon, Chesapeake Bay DPS of Atlantic sturgeon, Gulf of Maine DPS of Atlantic sturgeon, New York Bight DPS of Atlantic sturgeon, and South Atlantic DPS of Atlantic sturgeon.

To make matters worse, EPA finalized the rule despite concerns raised by its own Scientific Advisory Board ("SAB") that the 2020 Dirty Water Rule is unsupported by, and contrary to, sound science.[13] The SAB, comprised of 41 scientists (many of whom were appointed by Trump administration officials), is responsible for evaluating the scientific integrity of the agency's regulations. In its letter, SAB determined that the 2020 Dirty Water Rule (at that point not finalized) "decreases protections for our Nation's waters;" "neglects established science pertaining specifically to the connectively of ground water to wetlands and adjacent major bodies of water by failing to acknowledge watershed systems;" provides "no scientific justification" for excluding groundwater and other bodies of water; "departs from established science . . . in the exclusion of adjacent wetlands that do not abut or have a direct hydrologic surface connection to otherwise jurisdictional waters;" and that aspects of the rule "conflict with . . . the objectives of the [CWA]."[14]

As summarized and then supported in greater detail in a recent complaint to EPA's Office of Inspector General from Public Employees for Environmental Responsibility ("PEER") and former and current federal employees:

> The final Rule contradicts the overwhelming scientific consensus on the connectivity of wetlands and waters, and the impacts that ephemeral streams and so-called "geographically isolated" wetlands have on downstream navigable waters. Moreover, the EPA employees who directed the writing of the final Rule failed to consult properly with regional experts, and did not allow these experts to voice their dissenting opinions formally. Finally, these EPA employee failed to disclose the potentially adverse impacts the final Rule will have on human health and the environment and exaggerated the uncertainties associated with these impacts.[15]

By ignoring "overwhelming scientific consensus" and removing such a significant portion of otherwise jurisdictional rivers, streams, lakes, wetlands, and other waterways from the CWA's definition of "waters of the United States," EPA has removed from itself and citizens any meaningful ability to protect federal waterways from discharges of untreated toxic, biological, chemical, and radiological pollutants; from being dredged and filled with impunity; and from being afforded the most fundamental human health and ecological safeguards of the CWA—the prohibition of unauthorized discharges pursuant to 33 U.S.C. § 1311(a).

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[13] *See* Draft Letter from EPA SAB to Andrew Wheeler, Subject: Commentary on the Proposed Rule Defining the Scope of Waters Federally Regulated Under the Clean Water Act, EPA-SAB-20-xxx (Oct. 16, 2019), https://yosemite.epa.gov/sab/sabproduct.nsf/ea5d9a9b55cc319285256cbd005a472e/5939af1252ddadfb852584e10053d472/$FILE/WOTUS%20SAB%20Draft%20Commentary_10_16_19_.pdf [hereinafter "SAB Commentary"] (Att. C).

[14] *Id*. at 1-3.

[15] Complaint, PEER, *et al*., to Charles J. Sheehan, Acting Inspector General, Office of Inspector General regarding *Violation of the U.S. Environmental Protection Agency's (EPA's) Scientific Integrity Policy by Andrew Wheeler, David Ross, Matt Leopold, David Fotoui, Owen McDonough, Dennis Lee Forsgren, and Anna Wildeman*, at 1 (Jan. 18, 2020), https://www.peer.org/wp-content/uploads/2020/01/1_19_20_WOTUS_scientific_Integrity_Complaint_IG.pdf (Att. D).

Stripping these waterways of CWA protections will result in individual waterways—including endangered and threatened species' habitats—being destroyed and will lead to direct degradation of species environments, cumulative downstream impacts to water bodies that will harm endangered species due to diminished water quality, and could harm or even kill any number of federally listed and protected species.

Take waterways in the State of Arizona for example. As a result of the 2020 Dirty Water Rule, at least 93 percent of the state's stream miles are expected to lose protections under the CWA.[16] In addition, approximately 99 percent of the state's lake are expected to lose CWA protection. Further, 98 percent of the state's CWA National Pollutant Discharge Elimination System ("NPDES") permits[17] deal with point-source pollution discharges into waterways that are no longer considered jurisdictional under the 2020 Dirty Water Rule. As a result, those point-source dischargers, regardless of the types of pollution they are discharging, will no longer need to maintain CWA NPDES permits or the pollution limits and accountability that those permits entail. These changes will affect endangered and threatened species in Arizona, and harm (and potentially fully destroy) the critical habitats on which those species rely.

The ESA was enacted "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved [and] a program for the conservation of such endangered species and threatened species. . . ."[18] EPA's discretionary policy decision to deny CWA protection to countless acres of wetlands, rivers, and streams, as well as other water bodies through the 2020 Dirty Water Rule is exactly the type of discretionary policy choice that is subject to the ESA's consultation requirement. The Dirty Water Rule, which is nationwide in its scope, will directly, indirectly, and cumulatively impact endangered species and their habitats, and is likely to adversely affect endangered species across the Nation. EPA is, therefore, in violation of the ESA for failing to comply with Section 7 of the Act in finalizing the rule.

LEGAL BACKGROUND

Section 2(c) of the ESA establishes "that all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this [Act]."[19] The ESA defines "conservation" to mean "the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this Act are no longer necessary."[20] As the Supreme Court has unequivocally summarized, the ESA's "language, history, and structure" make clear and "beyond doubt" that "Congress intended endangered species to be afforded the highest of priorities" and endangered species should be given "priority over the 'primary missions' of federal agencies."[21] Simply put, "[t]he plain intent of Congress in

[16] Ariel Wittenberg, *A 'Gap in Protection': Ariz. Looks for a Plan B under WOTUS, E&E News* (Jan. 28, 2020), https://www.eenews.net/stories/1062202283 (Att. E).
[17] In Arizona these permits are generally referred to as "AZPDES permits."
[18] 16 U.S.C. §§ 1531-1544; *id.* § 1531(b).
[19] 16 U.S.C. § 1531(c)(1).
[20] *Id.* § 1532(3).
[21] *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 174-75 (1978).

enacting this statute was to halt and reverse the trend toward species extinction, *whatever the cost*."[22]

To fulfill the substantive purposes of the ESA, each federal agency is required under Section 7 of the Act to engage in consultation with the U.S. Fish and Wildlife Service ("FWS") and/or the National Marine Fisheries Service ("NMFS" or, collectively, the "Services") to "insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species . . . determined . . . to be critical."[23] The obligation to "insure" against a likelihood of jeopardy or adverse modification requires the agency to give the benefit of the doubt to endangered species and to place the burden of risk and uncertainty on the agency taking the proposed action.[24]

EPA's duty to engage in the Section 7 consultation process prior to taking any action that "may affect" a threatened or endangered species or their habitats is firmly established by the unambiguous text of the ESA.[25] Section 7 consultation is required for every *discretionary* agency action that "may affect listed species or critical habitat."[26] Agency "action" is broadly defined in the ESA's implementing regulations to include "(a) actions intended to conserve listed species or their habitat; (b) *the promulgation of regulations*; (c) the granting of licenses, contracts, leases, easements, rights-of-way, permits, or grants-in-aid; or (d) actions directly or indirectly causing modifications to the land, water, or air."[27] The Services' joint regulations further, clearly require programmatic consultations on federal, nationwide rulemakings that impact listed species. [28]

At the completion of consultation, the Services are required to issue a Biological Opinion that determines if the agency action is likely to jeopardize any affected species. If so, the Biological Opinion must specify "Reasonable and Prudent Alternatives" that will avoid jeopardy and allow the agency to proceed with the action. The Services may also "suggest modifications" to the action, called "Reasonable and Prudent Measures," during the course of consultation to "avoid the likelihood of adverse effects" to the listed species even when not necessary to avoid jeopardy.[29] Only where the action agency determines that its action will have "no effect" on listed species or designated critical habitat is the consultation obligation lifted.[30]

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[22] *Id*. at 184 (emphasis added).
[23] 16 U.S.C. § 1536(a)(2).
[24] *See Sierra Club v. Marsh*, 816 F.2d 1376, 1385 (9th Cir. 1987).
[25] *See, e.g., Tenn. Valley Auth.*, 437 U.S. at 188 (In describing the "broad sweep" of the statute's authority, the Court established that "[i]n passing the Endangered Species Act of 1973, Congress was also aware of certain instances in which exceptions to the statute's broad sweep would be necessary. Thus, § 10, [. . .] creates a number of limited 'hardship exemptions,' none of which would even remotely apply to the Tellico Project. In fact, there are no exemptions in the Endangered Species Act for federal agencies, meaning that under the maxim *expressio unius est exclusio alterius,* we must presume that these were the only 'hardship cases' Congress intended to exempt").
[26] *See Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644 (2007); 50 C.F.R. § 402.14(a).
[27] *Id.* § 402.02 (emphasis added); *see also Pacific Rivers Council v. Thomas*, 30 F.3d 1050, 1054-55 (9th Cir. 1994); *Conner v. Burford*, 848 F.2d 1441, 1453 (9th Cir. 1988); *National Wildlife Fed'n v. FEMA*, 345 F. Supp. 3d 1151, 1169 (W.D. Wash. 2004).
[28] *See, e.g.*, Interagency Cooperation – Endangered Species Act of 1973, as Amended; Incidental Take Statements, 80 Fed. Reg. 26,832 (May 11, 2015).
[29] 50 C.F.R. § 402.13.
[30] 50 C.F.R. § 402.14(a).

Section 7(d) of the ESA provides that after federal agencies initiate consultation on an action under the Act, the agencies "shall not make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would not violate subsection (a)(2) of this section."[31] The purpose of Section 7(d) is to maintain the environmental status quo pending the completion of consultation. Section 7(d) prohibitions remain in effect throughout the consultation period and until the federal agency has satisfied its obligations under Section 7(a)(2) that the action will not result in jeopardy to the species or adverse modification of its critical habitat.

Finally, Section 7(a)(1) of the ESA provides that all federal agencies "shall in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of [listed] species."[32] Thus, the ESA imposes on all federal agencies affirmative obligations to conserve threatened and endangered species.[33] Under these unambiguous terms and in light of the facts of the current rulemaking, the ESA requires that EPA consult with the Services and prepare a Biological Opinion prior to taking action on the 2020 Dirty Water Rule.

ENDANGERED SPECIES ACT VIOLATIONS

I. Failure to Insure No Jeopardy; Failure to Insure Against Destruction or Adverse Modification of Critical Habitat

a. The 2020 Dirty Water Rule "May Affect" Endangered and Threatened Species and their habitats, and Requires Consultation under the ESA

EPA's duty to engage in the Section 7 consultation process prior to taking any action that "may affect" a threatened or endangered species or their habitats is firmly established by the unambiguous text of the ESA. Under Section 7 and its implementing regulations, each federal agency must insure that *any action* authorized, funded, or carried out by the agency—including discretionary rulemaking activities—is not likely to jeopardize the continued existence of any threatened or endangered species or result in the destruction or adverse modification of the critical habitat of such species.[34]

As the Supreme Court explained in *Tennessee Valley Authority v. Hill*, the language of Section 7 "admits of no exception."[35] Indeed, Congress was well aware of the "broad sweep" of Section 7

[31] 16 U.S.C. § 1536(d); *see also Nat. Res. Def. Council v. Houston*, 146 F.3d 1118, 1128 n.6 (9th Cir. 1998); *Marsh*, 816 F.2d at 1389.
[32] 16 U.S.C. § 1536(a)(1).
[33] *Pyramid Lake Paiute Tribe v. U.S. Dept of Navy*, 898 F.2d 1410, 1416-17 (9th Cir.1990); *Carson-Truckee Water Conservancy Dist. v. Clark*, 741 F.2d 257, 261-62 & n. 3 (9th Cir.1984).
[34] 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(a).
[35] *See Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 188 (1978) ("In passing the Endangered Species Act of 1973, Congress was also aware of certain instances in which exceptions to the statute's broad sweep would be necessary. Thus, § 10, [] creates a number of limited 'hardship exemptions,' none of which would even remotely apply to the

because it reflects Congress' intent to give endangered species priority over the primary missions of federal agencies like the EPA.[36] In sum, "[t]he plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, *whatever the cost*. This is reflected not only in the stated policies of the Act, but in literally every section of the statute."[37]

That requirement applies here. Agency "action" under the ESA is broadly defined to include, among other things, "all activities or programs of any kind" that "directly or indirectly caus[e] modifications to the land, water, or air."[38] By definition, the 2020 Dirty Water Rule will result in modifications to waters and the protections that are afforded, thereby impairing water quality and impacting wetland-dependent species (among other species dependent on rivers, streams, lakes and other waters); this exceeds the "relatively low" consultation threshold set out in the ESA.[39]

Congress made the "may affect" threshold "relatively low" to ensure that "actions that have *any chance* of affecting listed species or critical habitat—even if it is later determined that the actions are 'not likely' to do so—require at least some consultation under the ESA."[40] According to the Fish and Wildlife Consultation handbook, "may affect" is met whenever "a proposed action may pose *any* effects on listed species or designated critical habitat."[41] This analysis includes an examination of both the direct effects of the action as well as its indirect effects, including effects resulting from the proposed action which are later in time, but are still reasonably certain to occur."[42] Consultation is still required even if the effects of the action are "beneficial, benign, adverse or of an undetermined character."[43] Thus, an agency must consult in every situation except those where its actions will have "no effect" on listed species.

Here, the 2020 Dirty Water Rule will result in decreased protections for waterways, including rivers, streams, lakes, wetlands, and other waters, across the nation under the CWA. As a result, fewer waters will be protected and more waters can be expected to be destroyed—waters that are essential for the health and continuation of endangered and threatened species.

b. The 2020 Dirty Water Rule was a Discretionary Action by EPA Subject to ESA Consultation Obligations

EPA's choice to severely curtail the jurisdictional definition of "waters of the United States" through the 2020 Dirty Water Rule was just that: a discretionary choice. While the Supreme

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Tellico Project. In fact, there are no exemptions in the Endangered Species Act for federal agencies, meaning that under the maxim *expressio unius est exclusio alterius,* we must presume that these were the only 'hardship cases' Congress intended to exempt.").

[36] *Id*. at 141.

[37] *Id*. at 184.

[38] 50 C.F.R. § 402.02; *see also Connor v. Burford*, 848 F. 2d 1441, 1453 (9th Cir. 1988) ("We interpret the term 'agency action' broadly."); *North Slope Borough v. Andrus*, 642 F. 2d 589 (D.C. Cir. 1980).

[39] *Cal. ex rel. Lockyer v. U.S. Dep't of Agric*., 575 F.3d 999, 1018 (9th Cir. 2009).

[40] *Karuk Tribe of Cal. v. U.S. Forest Serv.*, 681 F.3d 1006, 1028 (9th Cir. 2012) (emphasis added).

[41] U.S. Fish & Wildlife Serv. and Nat'l Marine Fisheries Serv., Endangered Species Consultation Handbook at xvi (Mar. 1998) (emphasis in original).

[42] 50 C.F.R. § 402.02.

[43] *Karuk Tribe of Cal. v. U.S. Forest Serv.*, 681 F.3d 1006, 1028 (9th Cir. 2012); *see also Swan View Coal. v. Weber*, 52 F. Supp. 3d 1133, 1145 (D. Mont. 2014).

Court in *National Ass'n of Home Builders v. Defenders of Wildlife* identified a narrow exception to the Section 7 consultation requirement when the federal agency has no statutory discretion to act, that exception does not apply here.[44]

In *Home Builders*, the Court held that Section 402(b) of the CWA does not require ESA consultations because EPA action under Section 402(b) is nondiscretionary: once a state has "met nine specified criteria" under the law, EPA "shall approve" and transfer the NPDES permitting authority to the state.[45] That holding is inapplicable to this rulemaking, which is not similar to *Home Builders* as a matter of law or in fact.

First, EPA has consistently demonstrated through its multiple rulemakings that it possesses substantial discretion to administratively review and amend the jurisdictional scope of the CWA as it relates to the definition of jurisdictional waters of the United States. Indeed, because the CWA does not command EPA to promulgate a particular set of regulations setting forth either the general limits or specific exemptions to define the scope of "waters of the United States" that are protectable under the law, its decision to do so in the 2020 Dirty Water Rule represents a clear discretionary action by EPA.

Indeed, as David Ross, EPA's Assistant Administrator for the Office of Water, conceded in an interview on December 11, 2018, the 2020 Dirty Water Rule:

> is a legal call . . . we took a look at Supreme Court precedent and also *made some policy decisions on where to draw the line* that were informed by science.[46]

The 2020 Dirty Water Rule also clearly provides in the preamble "[t]o develop this revised definition of 'waters of the United States,' the agencies looked to the text and structure of the CWA, as informed by its legislative history and Supreme Court guidance, and took into account the agencies' expertise, *policy choices*, and scientific principles."[47] Indeed, EPA itself agrees, arguing within its own preamble that, "[i]n defining the term 'waters of the United States' under the CWA, Congress gave the agencies discretion to articulate reasonable limits on the meaning of that term[.]"[48]

By making a discretionary policy decision to narrow the scope of the "waters of the United States" through a rulemaking, EPA must—just like every other federal agency—consult if the 2020 Dirty Water Rule's direct or indirect effects cross the "may affect" threshold of the ESA. Case law reinforces the proposition that a regulation that may affect endangered species must be

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[44] *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644 (2007); 50 C.F.R. § 402.14(a).
[45] *Id*. at 650.
[46] Ariel Wittenberg, *Legal Analysis, Not Science, Drives WOTUS Stream Protections*, E&E News (Dec. 11, 2018), https://www.eenews.net/eenewspm/stories/1060109359/ (Att. F).
[47] 2020 Dirty Water Rule Pre-Publication Version at 9 (emphasis added); *see also id*. at 101 ("The final rule therefore is also based on the text, structure, and legislative history of the CWA, the reasoned policy choices of the executive branch agencies authorized by Congress to implement the Act, and the agencies' technical and scientific expertise administering the CWA over nearly five decades."); *id*. at 183 ("The agencies have considered the full range of comments and have finalized a rule *that balances* these diverse viewpoints.") (emphasis added).
[48] *Id*. at 297.

the subject of consultation.[49] Because the 2020 Dirty Water Rule will almost certainly result in adverse effects on endangered species and their critical habitats as it is implemented in the future, consultations must occur with the Services.

EPA's failure to follow the procedural and substantive requirements of the ESA, therefore, clearly violates the law.

II. Irreversible or Irretrievable Commitment of Resources

Section 7(d) of the ESA prohibits a federal agency from "mak[ing] any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would not violate subsection (a)(2) of this section."[50] By failing to consult with the Services, EPA has guaranteed that some wetlands and other waters will be degraded or destroyed without the possibility that a reasonable and prudent measure could ever be implemented to protect a listed species or its critical habitat because the Agencies have improperly foreclosed the possibility of consultations in the rule. Accordingly, EPA is also in violation of Section 7(d) of the ESA.

CONCLUSION

As the above makes clear, by failing to initiate and complete consultation with the Services regarding the effects of the 2020 Dirty Water Rule on listed species and their critical habitat, and by failing to ensure against jeopardy, EPA is in violation of the Endangered Species Act. EPA's finalization of the rule without consultation constitutes ongoing violations of the Act.[51] To remedy these violations, EPA must vacate its action finalizing the rule and immediately initiate consultation. To do otherwise places the agency in ongoing violation of Sections 7(a)(2) and 7(d) of the Act.

If the Environmental Protection Agency and U.S. Army Corps of Engineers do not act within 60 days to correct the violations described in this letter, we will pursue litigation. If you would like to discuss this matter, please contact us.

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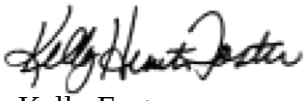
[49] *See, e.g., W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 495 (9th Cir. 2010); *Nat'l Parks Conservation Ass'n v. Jewell*, 62 F.Supp.3d 7 (D.D.C. 2014); *Citizens for Better Forestry v. U.S. Dep't of Agriculture*., 481 F.Supp.2d 1059 (N.D. Cal 2007); *Washington Toxics Coal. v. U.S. Dep't of Interior*, 457 F.Supp.2d 1158 (W.D. Wash. 2006).
[50] 16 U.S.C. § 1536(d).
[51] 16 U.S.C. §1536.



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ATTACHMENT A

Conservation Group's Dec. 17, 2019 Formal Notice of Intent to Sue for Violations of the Endangered Species Act; Repeal of the 2015 Clean Water Rule

CENTER FOR BIOLOGICAL DIVERSITY ● CENTER FOR FOOD SAFETY TURTLE ISLAND RESTORATION NETWORK ● WATERKEEPER ALLIANCE ● HUMBOLDT BAYKEEPER ● RUSSIAN RIVERKEEPER ● MONTEREY COASTKEEPER ● SNAKE RIVER WATERKEEPER ● UPPER MISSOURI WATERKEEPER

Via Electronic and Certified Mail

December 17, 2019

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Re: Formal Notice of Intent to Sue for Violations of the Endangered Species Act; Repeal of the 2015 Clean Water Rule

On behalf of the Center for Biological Diversity, Waterkeeper Alliance, Center for Food Safety, Turtle Island Restoration Network, Humboldt Baykeeper, Russian Riverkeeper, Monterey Coastkeeper – A Program of the Otter Project, Snake River Waterkeeper, and Upper Missouri Waterkeeper ("Conservation Groups"), we hereby provide notice, pursuant to Section 11(g) of the Endangered Species Act ("ESA" or "Act"), 16 U.S.C. §1540(g)(2)(A)(i), of our intent to sue the Environmental Protection Agency and U.S. Army Corps of Engineers for violations of the ESA.

On October 22, 2019, the Environmental Protection Agency and U.S. Army Corps of Engineers (collectively, "EPA") published a final rule in the Federal Register that repeals the 2015 Clean Water Rule: Definition of "Waters of the United States" ("2015 Clean Water Rule")[1] and purports to "restore[s] the regulatory text that existed prior to the 2015 Rule."[2] That rulemaking, hereinafter referred to as the "Repeal Rule," was taken without lawful compliance of the legal obligations of the Endangered Species Act. Indeed, in the Response to Comments document prepared in support of its action, EPA specifically identifies that it knowingly chose *not* to fulfill its requirements under the Act in taking this action.[3]

Specifically, EPA is in violation of Sections 7(a)(2) and 7(d) of the ESA for failing to carry out mandatory ESA consultation requirements in finalizing the Repeal Rule.[4] These requirements obligate EPA to consult prior to taking any action that it funds, authorizes, or carries out so that it may affirmatively "insure" that the action "is not likely to jeopardize the continued existence of

[1] *Clean Water Rule: Definition of "Waters of the United States",* 80 Fed. Reg. 37,054 (June 29, 2015).
[2] *Definition of "Waters of the United States"—Recodification of Pre-Existing Rules*, 84 Fed. Reg. 56,626 (October 22, 2019).
[3] *See* Attachment A.
[4] 16 U.S.C. § 1536(a)(2), (d).

any endangered species or threatened species or result in the destruction or adverse modification" of designated critical habitat.[5]

If EPA does not act to remedy these violations within 60 days, Conservation Groups will initiate litigation in federal court to resolve the matter.

INTRODUCTION

As detailed in our comments,[6] EPA intends to narrowly interpret and apply the re-codified definition using undisclosed policies, guidance and legal theories that will eliminate Clean Water Act ("CWA") jurisdiction over rivers, streams, lakes, wetlands, and other waters that are protected under both the pre-2015 definition and the 2015 Clean Water Rule. These waters provide habitat for numerous endangered species across the nation, and the loss of CWA jurisdiction will have an impact on those species. EPA did not quantify or evaluate those impacts in this rulemaking. Given the Repeal Rule's far-reaching impacts for these aquatic ecosystems, and the many threatened or endangered species that depend upon them, EPA is required to ensure that the Rule will not jeopardize the continued existence of any such species and to engage in interagency consultation under section 7(a)(2) of the ESA.

For example, the 2015 Clean Water Rule extended protections to several categories of wetlands, including prairie potholes, Carolina and Delmarva bays, pocosins, western vernal pools in California, and Texas coastal prairie wetlands. These wetlands provide vital habitat for federally listed threatened and endangered species. Prairie potholes, for example, provide important stop-over habitat for endangered whooping cranes during their spring and fall migrations, and summer breeding habitat for Northern Great Plains piping plovers. Similarly, vernal pools in California are essential for the survival and recovery of five species of fairy shrimp.

As a result of EPA's repeal of the 2015 Clean Water Rule, these categories of wetlands will no longer receive the automatic protections afforded them through the 2015 Rule or the protections afforded them under the pre-2015 regulatory definition. Stripping these wetlands of their protected status will result in individual wetlands—including endangered and threatened species wetland habitats—being destroyed. Directly and cumulatively, the loss of such wetlands will degrade and destroy habitat for endangered species, and could harm or even kill any number of federally listed and protected species. Furthermore, the cumulative downstream impacts to water bodies will harm endangered species due to diminished water quality for streams and rivers.

The ESA was enacted to provide a "means whereby the ecosystems upon which endangered species and threatened species depend may be conserved…[and] a program for the conservation of such endangered species and threatened species."[7] EPA's discretionary policy decision to deny countless acres of wetlands, streams and other waters protection under the CWA through the Repeal Rule is exactly the type of discretionary policy choice that is subject to the ESA's

[5] 16 U.S.C. § 1536(a)(2).
[6] See Waterkeeper Alliance et al, Comments at https://www.regulations.gov/document?D=EPA-HQ-OW-2017-0203-12850 and EPA-HQ-OW-2017-0203-13681.
[7] 16 U.S.C. §§ 1531-1544; *id*. § 1531(b).

consultation requirement. The Repeal Rule, which is nationwide in its scope, will directly, indirectly, and cumulatively impact endangered species and their habitats, and is likely to adversely affect endangered species across the nation. EPA is, therefore, in violation of the ESA for failing to comply with Section 7 of the Act in finalizing the Repeal Rule.

LEGAL BACKGROUND

Section 2(c) of the ESA establishes that it is "the policy of Congress that all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this Act."[8] The ESA defines "conservation" to mean "the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this Act are no longer necessary."[9] The Supreme Court has unequivocally stated that the Act's "language, history, and structure" made clear "beyond a doubt" that "Congress intended endangered species to be afforded the highest of priorities" and endangered species should be given "priority over the 'primary missions' of federal agencies."[10] Simply put, "the plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, *whatever the cost*."[11]

To fulfill the substantive purposes of the ESA, each federal agency is required to engage in consultation with the Services to "insure that any action authorized, funded, or carried out by such agency…is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the adverse modification of habitat of such species… determined… to be critical…."[12] Section 7 consultations are required for "any action [that] *may affect* listed species or critical habitat."[13] Agency "action" is broadly defined in the ESA's implementing regulations to include "(a) actions intended to conserve listed species or their habitat; (b) *the promulgation of regulations*; (c) the granting of licenses, contracts, leases, easements, rights-of-way, permits, or grants-in-aid; or (d) actions directly or indirectly causing modifications to the land, water, or air."[14]

The ESA vests primary responsibility for administering and enforcing the statute with the Secretaries of Commerce and Interior, who have delegated this responsibility to the National Marine Fisheries Service ("NMFS") and the Fish & Wildlife Service ("FWS") (collectively, "the Services").[15] At the completion of consultation, the Services are required to issue a Biological Opinion that determines if the agency action is likely to jeopardize any affected species. If so, the Biological Opinion must specify "Reasonable and Prudent Alternatives" that will avoid jeopardy and allow the agency to proceed with the action. The Services may also "suggest modifications" to the action, called "Reasonable and Prudent Measures," during the course of

[8] 16 U.S.C. § 1531(c)(1).
[9] 16 U.S.C. § 1532(3).
[10] *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 174 (1978).
[11] *Id*. (emphasis added).
[12] 16 U.S.C. § 1536(a)(2).
[13] 50 C.F.R. § 402.14; s*ee also Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644 (2007).
[14] 50 C.F.R. § 402.02 (emphasis added).
[15] 50 C.F.R. § 402.01(b).

consultation to "avoid the likelihood of adverse effects" to the listed species even when not necessary to avoid jeopardy.[16] Only where the action agency determines that its action will have "no effect" on listed species or designated critical habitat is the consultation obligation lifted.[17]

Section 7(d) of the ESA provides that after federal agencies initiate consultation on an action under the Act, the agencies "shall not make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would not violate subsection (a)(2) of this section."[18] The purpose of Section 7(d) is to maintain the environmental status quo pending the completion of consultation. Section 7(d) prohibitions remain in effect throughout the consultation period and until the federal agency has satisfied its obligations under Section 7(a)(2) that the action will not result in jeopardy to the species or adverse modification of its critical habitat.

Finally, Section 7(a)(1) of the ESA provides that all federal agencies "shall in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of [listed] species."[19] Thus, the ESA imposes on all federal agencies affirmative obligations to conserve threatened and endangered species.[20]

ENDANGERED SPECIES ACT VIOLATIONS

I. Failure to Insure No Jeopardy; Failure to Insure Against Destruction or Adverse Modification of Critical Habitat

EPA's duty to engage in the Section 7 consultation process prior to taking any action that "may affect" a threatened or endangered species or their habitats is firmly established by the unambiguous text of the ESA. Under Section 7 and its implementing regulations, each federal agency must insure that *any action* authorized, funded, or carried out by the agency—including discretionary rulemaking activities—is not likely to jeopardize the continued existence of any threatened or endangered species or result in the destruction or adverse modification of the critical habitat of such species.[21]

As the Supreme Court explained in *Tennessee Valley Authority v. Hill*, the language of Section 7 "admits of no exception" and Congress was well aware of the "broad sweep" of Section 7.[22]

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[16] 50 C.F.R. § 402.13.
[17] 50 C.F.R. § 402.14(a).
[18] 16 U.S.C. § 1536(d).
[19] 16 U.S.C. § 1536(a)(1).
[20] *Pyramid Lake Paiute Tribe v. U.S. Dept of Navy*, 898 F.2d 1410, 1416-17 (9th Cir.1990); *Carson-Truckee Water Conservancy Dist. v. Clark*, 741 F.2d 257, 261-62 & n. 3 (9th Cir.1984).
[21] 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(a).
[22] *See Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 188 (1978) ("In passing the Endangered Species Act of 1973, Congress was also aware of certain instances in which exceptions to the statute's broad sweep would be necessary. Thus, § 10, [] creates a number of limited 'hardship exemptions,' none of which would even remotely apply to the Tellico Project. In fact, there are no exemptions in the Endangered Species Act for federal agencies, meaning that

"The plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, *whatever the cost*. This is reflected not only in the stated policies of the Act, but in literally every section of the statute."[23] In short, in passing the ESA, Congress intended to give endangered species priority over the primary missions of federal agencies like the EPA.[24]

That requirement applies here. Agency "action" under the ESA is broadly defined to include "all activities or programs of any kind" that "directly or indirectly cause modifications to the land, water, or air."[25] Agency actions, among other things, includes "actions directly or *indirectly* causing modifications to the land, water, or air."[26] Almost by definition, the Repeal Rule will result in modifications to waters and the protections that they afford, which will change water quality and impact wetland-dependent species (among others); this exceeds the "relatively low" consultation threshold set out in the ESA.[27]

Congress made the "may affect" threshold "relatively low" to ensure that "actions that have *any chance* of affecting listed species or critical habitat—even if it is later determined that the actions are 'not likely' to do so—require at least some consultation under the ESA."[28] According to the Fish and Wildlife Consultation handbook, "may affect" is met whenever "a proposed action may pose **any** effects on listed species or designated critical habitat."[29] This analysis includes an examination of both the direct effects of the action as well as its indirect effects, which are defined as "those effects that are caused by or will result from the proposed action and are later in time, but are still reasonably certain to occur."[30] Consultation is still required even if the effects of the action are "beneficial, benign, adverse or of an undetermined character."[31] Thus, an action agency must consult in every situation except those where its actions will have "no effect" on listed species.

Here, the Repeal Rule will result in a decrease in positive jurisdictional determinations in many rivers, streams, lakes, wetlands, and other waters across the nation under the CWA, meaning that fewer waters will be protected and more waters can be expected to be destroyed—waters that are essential for the health and continuation of endangered and threatened species.

For example, the 2015 Clean Water Rule extended protections to several categories of wetlands including prairie potholes, Carolina and Delmarva bays, pocosins, western vernal pools in California, and Texas coastal prairie wetlands. These wetlands provide vital habitat for federally

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under the maxim *expressio unius est exclusio alterius,* we must presume that these were the only 'hardship cases' Congress intended to exempt.").

[23] *Id*. at 184.

[24] *Id*. at 141.

[25] 50 C.F.R. § 402.02; *see also Connor v. Burford*, 848 F. 2d 1441, 1453 (9th Cir. 1988) ("We interpret the term 'agency action' broadly."); *North Slope Borough v. Andrus*, 642 F. 2d 589 (D.C. Cir. 1980).

[26] *Id*.

[27] *Cal. ex rel. Lockyer v. U.S. Dep't of Agric*., 575 F.3d 999, 1018 (9th Cir. 2009).

[28] *Karuk Tribe of Cal. v. U.S. Forest Serv.*, 681 F.3d 1006, 1028 (9th Cir. 2012) (emphasis added).

[29] U.S. Fish & Wildlife Serv. and Nat'l Marine Fisheries Serv., Endangered Species Consultation Handbook at xvi (Mar. 1998) (emphasis in original).

[30] 50 C.F.R. § 402.02.

[31] *Karuk Tribe of Cal. v. U.S. Forest Serv.*, 681 F.3d 1006, 1028 (9th Cir. 2012); *see also Swan View Coal. v. Weber*, 52 F. Supp. 3d 1133, 1145 (D. Mont. 2014).

listed threatened and endangered species. Prairie potholes, for example, provide important stop-over habitat for endangered whooping cranes during their spring and fall migrations, and summer breeding habitat for Northern Great Plains piping plovers. Vernal pools in California are essential for the survival and recovery of five listed species of fairy shrimp. By repealing the 2015 Clean Water Rule and replacing it with vague, arbitrary and undisclosed interpretations of the prior regulatory definition, these categories of wetlands will no longer receive the categorical protections provided by the 2015 Rule or the full protections afforded by the pre-2015 definition—meaning that individual wetlands could be polluted or destroyed without following the requirements of the CWA. Cumulatively, the loss of wetlands will degrade and destroy habitat for endangered species in downstream water bodies, harming or even killing individuals from numerous listed species, such as listed salmon, steelhead, sturgeon and bull trout.

EPA's position that it does not have to consult because the Repeal Rule returns the CWA waters of the United States regulatory text back to the pre-2015 "status quo" is contrary to reality and the plain language and purpose of the ESA. First, EPA is not actually returning to the pre-2015 regulatory definition, but rather to a wholly new, narrow interpretation of the pre-2015 definition that will eliminate long-standing protections for rivers, streams, lakes, wetlands and other waters.[32] Second, EPA's action in repealing protections for categories of wetlands and other waters will have significant real-world impacts on those waters and the specific endangered and threatened species that rely on them; at a minimum, this action clearly meets the low threshold consultation standard of "may affect." Because of that, EPA is required to consult with the expert wildlife Services to determine what effects the Repeal Rule will have on endangered species. EPA's failure to follow the procedural and substantive requirements of the ESA, therefore, clearly violates the law.

II. Irreversible or Irretrievable Commitment of Resources

Section 7(d) of the ESA prohibits a federal agency from "mak[ing] any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would not violate subsection (a)(2) of this section."[33] By failing to consult with the Services, EPA has guaranteed that some wetlands and other waters will be degraded or destroyed without the possibility that a reasonable and prudent measure could ever be implemented to protect a listed species or its critical habitat because the Agencies have improperly foreclosed the possibility of consultations in the Rule. Accordingly, EPA is also in violation of Section 7(d) of the ESA.

[32] See Waterkeeper et al. Comments, *supra* note 6.
[33] 16 U.S.C. § 1536(d).

CONCLUSION

As the above makes clear, by failing to initiate and complete consultation with the Services regarding the effects of the Repeal Rule on listed species and their critical habitat, and by failing to ensure against jeopardy, the EPA is in violation of the Endangered Species Act. EPA's finalization of the Repeal Rule without consultation constitutes ongoing violations of the Act.[34] To remedy these violations, EPA must vacate its action finalizing the Repeal Rule and immediately initiate consultation. To do otherwise places the agency in ongoing violation of Sections 7(a)(2) and 7(d) of the Act.

If the Environmental Protection Agency and U.S. Army Corps of Engineers do not act within 60 days to correct the violations described in this letter, we will pursue litigation. If you would like to discuss this matter, please contact us.

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[34] 16 U.S.C. §1536.

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APPENDIX A

Response to Comments, Repeal Rule

Response to Comments for Definition of "Waters of the United States"—Recodification of Pre-Existing Rules

U.S. Environmental Protection Agency

and

Department of the Army

September 5, 2019

Definition of "Waters of the United States"—Recodification of Pre-Existing Rules
Response to Comments Document

INTRODUCTION

On February 28, 2017, the President issued Executive Order 13778, entitled "Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the 'Waters of the United States' Rule." Section 1 of the Executive Order states that "[i]t is in the national interest to ensure the Nation's navigable waters are kept free from pollution, while at the same time promoting economic growth, minimizing regulatory uncertainty, and showing due regard for the roles of the Congress and the States under the Constitution." The Executive Order directs the Environmental Protection Agency and the Department of the Army ("the agencies") to review the 2015 rule defining "waters of the United States" ("2015 Rule") under the Clean Water Act (CWA) for consistency with the policy outlined in Section 1 of the Order and to issue a proposed rule rescinding or revising the 2015 Rule, as appropriate and consistent with law. The Executive Order also directs the agencies to "consider interpreting the term 'navigable waters' . . . in a manner consistent with" Justice Scalia's plurality opinion in *Rapanos v. United States*, 547 U.S. 715 (2006).

On March 6, 2017, the agencies published a notice of intent to review the 2015 Rule and provide notice of a forthcoming proposed rulemaking consistent with Executive Order 13778. 82 FR 12532. Shortly thereafter, the agencies announced that they would take a two-step approach, the first step of which culminates in today's action. On July 27, 2017, the agencies published a notice of proposed rulemaking (NPRM) that proposed to repeal the 2015 Rule and to recodify the regulatory text that governed prior to the promulgation of the 2015 Rule. 82 FR 34899. The agencies invited comment on the NPRM over a 62-day period. *See* 82 FR 39712 (Aug. 22, 2017) (extending comment period on NPRM). On July 12, 2018, the agencies published a supplemental notice of proposed rulemaking (SNPRM) to clarify, supplement, and seek additional comment on the NPRM. 83 FR 32227. The agencies invited comment on the SNPRM over a 30-day period.

In developing this final rule, the agencies reviewed approximately 690,000 comments received on the NPRM and approximately 80,000 comments received on the SNPRM from a broad spectrum of interested parties. With the NPRM and SNPRM the agencies sought comment on all issues relevant to the agencies' consideration of the proposed repeal of the 2015 Rule and recodification of the prior regulations, including the agencies' reasons and legal rationale for the proposal. In addition, the public could comment on all aspects of the NPRM, the economic analysis for the NPRM, and the SNPRM.

To prepare this document, the agencies reviewed and summarized the comments received on both *Federal Register* notices and grouped the comment summaries according to a set of topics. The agencies then developed summary responses and individual responses for the comments in each topic. In this document, the agencies' responses appear in **bold text**.

The responses presented in this document are intended to augment the discussion of key comments in the preamble or to address comments not otherwise addressed in the preamble. Although portions of the preamble to the final rule are paraphrased in this document where useful to add clarity to responses, the preamble itself is the definitive statement of the rationale for the final rule. In many instances, particular responses presented in the Response to Comments Document include cross-references to responses on related issues that are located either in the preamble to the final rule, the economic analysis for the final rule, or elsewhere in the Response to Comments Document. The Response to Comments Document, together with the preamble to the final rule, the economic analysis for the final rule, and the rest of the administrative record should be considered collectively as the agencies' response to all of the significant comments submitted on the proposed rule.

Section 1 GENERAL COMMENTS ON THE PROPOSED RULE

1.0 Agencies' Summary Response

This section contains summaries of general comments on the agencies' proposed rule to repeal the 2015 Rule and to restore the pre-existing regulations. This summary response applies to all comments summarized in this section. As appropriate, the agencies have provided more specific responses below each comment summary.

As explained in the preamble to the final rule, the agencies are repealing the 2015 Rule for four primary reasons. First, the agencies conclude that the 2015 Rule did not implement the legal limits on the scope of the agencies' authority under the CWA as intended by Congress and reflected in Supreme Court cases, including Justice Kennedy's articulation of the significant nexus test in *Rapanos*. Second, the agencies conclude that in promulgating the 2015 Rule the agencies failed to adequately consider and accord due weight to the policy of the Congress in CWA section 101(b) to "recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution" and "to plan the development and use . . . of land and water resources." 33 U.S.C. 1251(b). Third, the agencies repeal the 2015 Rule to avoid interpretations of the CWA that push the envelope of their constitutional and statutory authority absent a clear statement from Congress authorizing the encroachment of federal jurisdiction over traditional State land-use planning authority. Lastly, the agencies conclude that the 2015 Rule's distance-based limitations suffered from certain procedural errors and a lack of adequate record support. The agencies find that these reasons, collectively and individually, warrant repealing the 2015 Rule. The agencies find that it is appropriate to restore the pre-existing regulations while the agencies consider public comments on the proposed revised definition of "waters of the United States." *See* 84 FR 4154 (Feb. 14, 2019). Given the longstanding nature of the pre-2015 Rule regulatory framework, its track record of implementation and related case law, and its familiarity to regulators, the regulated community and other stakeholders, the agencies conclude that this final rule to codify the prior regulations will provide greater regulatory certainty and nationwide consistency pending any final action on that separate rulemaking.

The agencies received approximately 770,000 public comments on this rulemaking and carefully reviewed those comments in deciding whether to finalize this rule. Some of these comments included suggestions regarding a revised definition of "waters of the United States." The agencies appreciate these suggestions and considered these comments, along with other public recommendations, in developing the February 2019 proposed revised definition of "waters of the United States." *See* 84 FR 4155, 4163. The agencies also considered alternatives to recodifying the pre-2015 Rule regulations, including comments suggesting that EPA revise the definition of "waters of the United States," in this rulemaking.

1.1 Support for the Proposed Rule

1.1.1 Support for the proposed rule due to legal and other substantive concerns with the 2015 Rule

Many commenters supported the proposed rule because they claim that the 2015 Rule exceeded the agencies' statutory authority, violated the U.S. Constitution, and misinterpreted congressional intent and Supreme Court precedent. Commenters also asserted that the agencies' unlawful expansion of authority negatively affected and impinged on the rights of states and property owners, including

farmers, ranchers, and business owners. Some commenters supported the proposed rule because they believe the 2015 Rule failed to sufficiently consider a state's ability to protect its water resources, including waters outside of CWA jurisdiction.

Numerous commenters also supported the proposed rule due to concerns that the 2015 Rule was overbroad and failed to provide regulatory certainty. A few commenters noted that the 2015 Rule failed to account for regional variations and expressed concern that federal agencies lack understanding about local conditions. Other commenters claimed that repealing the 2015 Rule and recodifying the pre-existing regulatory text would provide regulatory certainty, maintain the status quo, and reflect court decisions from the U.S. District Courts for the Southern District of Georgia and District of North Dakota, which held that challengers to the 2015 Rule were likely to succeed on the merits of their challenges.

Agencies' Response: See the Agencies' Summary Response in Section 1.0 and the agencies' response to comments in Section 2, Section 3, Section 4, and Section 5.

1.1.2 Support for the proposed rule as an interim step

Multiple commenters supported the proposed rule as an interim solution and noted that although the pre-existing regulatory text was imperfect, it would preserve the status quo and provide interim relief until a new regulatory definition of "waters of the United States" is developed.

Agencies' Response: See the Agencies' Summary Response in Section 1.0 and the agencies' response to comments in Section 2.

1.1.3 Miscellaneous support for the proposed rule

Several commenters supported the proposed rule because they believe that the 2015 Rule imposed an undue burden on businesses and that the uncertainty surrounding the status of the 2015 Rule complicates business decisions. Similarly, some commenters expressed support for repealing the 2015 Rule because they believe the rule would impose greater regulatory burdens on farmers and ranchers by expanding federal CWA jurisdiction and requiring case-specific significant nexus determinations for some waters. Some commenters supported the proposed rule because the 2015 Rule imposed enforceability, financial, and legal costs that may be avoided through repeal. Commenters also expressed concern over potential permitting delays under the 2015 Rule. A few commenters noted that several courts have signaled that there are serious misgivings with the 2015 Rule and asserted that the agencies have an obligation to avoid using public funds on a futile effort to defend an unlawful rule.

Multiple commenters supported the proposed rule because they assert that the 2015 Rule did not rely on sound science or important stakeholder input. Commenters supported the agencies' supplemental notice of proposed rulemaking (SNPRM), *see* 83 FR 32227 (July 12, 2018), because it provided an opportunity for parties to comment and explained the agencies' rulemaking rationale. One commenter expressly supported recodifying the prior regulations so that a regulatory definition of "waters of the United States" is in place following the repeal of the 2015 Rule, and another noted that repealing the 2015 Rule would continue the status quo that has existed in some states since the Sixth Circuit's nationwide stay. A few commenters asserted that their support for rescission of the 2015 Rule depends on the agencies developing a new rule justified by science, the statute, and case law.

<u>Agencies' Response</u>: See the Agencies' Summary Response in Section 1.0 and the agencies' response to comments in Section 6, Section 9, and Section 10.

1.2 Opposition to the Proposed Rule

1.2.1 Opposition to the proposed rule due to legal concerns with the proposed rule

Many commenters argued that the proposed rescission of the 2015 Rule is based on a legal test rejected by the majority of the Supreme Court justices and contradicts the law and science underpinning the statute's success thus far. Commenters suggested that the 2015 Rule is based upon well-established legal interpretations of the CWA and closely tracks Justice Kennedy's "significant nexus" standard from *Rapanos v. United States*, 547 U.S. 715 (2006). A number of these commenters also suggested that the SNPRM mischaracterizes Supreme Court precedent. Other commenters asserted that current legal challenges to the 2015 Rule should proceed, allowing court rulings to clarify which portions of the 2015 Rule are invalid and which are legal.

A number of commenters asserted that the proposed rule is arbitrary and capricious. Some of these commenters argued that the bases for rescission described in the initial notice of proposed rulemaking (NPRM), *see* 82 FR 34899 (July 27, 2017), and the SNPRM are inconsistent, contradictory, not supported by evidence, and are an insufficient basis for rescinding a rule that the commenters asserted underwent an extensive four-year rulemaking process and is well-grounded in science and law. Commenters further asserted that the agencies must demonstrate that the proposed action is a permissible construction of the CWA.

Other commenters suggested that ignoring the widespread support and public engagement process the 2015 Rule underwent might constitute arbitrary and capricious action. Commenters noted the robust public and stakeholder review process of the 2015 Rule, which evidenced broad support at listening sessions and in a majority of public comments. Commenters also asserted that the 2015 Rule received widespread support across stakeholder groups and had bipartisan support in Congress. Many commenters expressed concern that the public review process for the proposed rule has been rushed and is not as thorough or transparent as the 2015 Rule's rulemaking process. One tribal commenter asserted that the agencies are rolling back clean water protections and expressed concern that the agencies are moving too quickly to do so.

A few commenters asserted that the change in policy represented by the proposed rescission is based on false or misleading information, such as the idea that the 2015 Rule cost hundreds of jobs or that it would regulate puddles, despite (according to the commenters) no evidence of the veracity of the first claim and clear evidence that puddles are not regulated under the 2015 Rule. One commenter offered examples of former EPA Administrator Scott Pruitt making alleged false claims during speeches to the American Farm Bureau Federation, where the commenter indicated Pruitt stated that puddles are covered under the 2015 Rule, the 2015 Rule is confusing to landowners, and 97 percent of Iowa would contain jurisdictional waters under the 2015 Rule. Other commenters expressed concern that the SNPRM misrepresents the 2015 Rule's impact on the scope of federal CWA jurisdiction.

Many commenters stated that rescinding the 2015 Rule would not comport with congressional intent behind the CWA, noting that the intent was to extend application of the CWA to the fullest extent allowed by the U.S. Constitution, and that the 2015 Rule clarified the statute's jurisdiction without expanding it. Commenters also expressed concern that the repeal would roll back progress made toward

achieving the goals of the statute. A few of these commenters stated that the 2015 Rule was adopted, in part, to address the pre-existing regulations' failure to achieve CWA objectives. Another commenter asserted that the proposed rule would amount to fewer water resources being protected, even though those resources still flow and could empty pollutants into protected streams, thus violating the original intent of the CWA. This commenter questioned why jurisdiction should be narrowed, rather than broadened.

> **Agencies' Response: Regarding comments asserting that current legal challenges to the 2015 Rule should proceed, the agencies take no position in this action as to whether these challenges should proceed; the agencies considered but did not give weight to this factor. See also the Agencies' Summary Response in Section 1.0 and the agencies' response to comments in Section 3, Section 4, Section 5, Section 9, and Section 10.**

1.2.2 Opposition to the proposed rule due to concerns with the pre-2015 Rule regulatory regime

Commenters opposed to rescinding the 2015 Rule argued that replacing the 2015 Rule with the pre-existing regulatory text will increase regulatory uncertainty, leading to more time, money, frustration, and litigation. Some of these commenters expect the proposed rule will lengthen the time needed to resolve the regulatory definition. Other commenters expressed concern that codifying the pre-2015 Rule regulations will increase inconsistencies resulting from case-by-case significant nexus determinations. Some commenters noted that the 2015 Rule is consistent with the Supreme Court's rulings in *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985), *SWANCC*, and *Rapanos*, while the Supreme Court has at least twice called into question the pre-existing regulatory text. A few commenters asserted that the pre-existing regulations do not reflect the refinements on the scope of the agencies' authority over adjacent wetlands and other waters that arose from the *Riverside Bayview* and *Rapanos* decisions.

> **Agencies' Response: See the Agencies' Summary Response in Section 1.0 and the agencies' response to comments in Section 2, Section 4, Section 8, and Section 10.**

1.2.3 Opposition to the proposed rule due to support for the 2015 Rule

Many commenters objected to the agencies' proposed rescission, arguing that the 2015 Rule appropriately extended CWA protection to waters that are important for multiple uses. These commenters argued that a repeal of the 2015 Rule would put millions of wetland acres and stream miles at risk and would cripple federal and state clean water initiatives for the foreseeable future, particularly for small streams and wetlands that provide flood control, drinking water protections, essential habitat, and support for a robust outdoor recreation economy. Another commenter stated that it is important to retain high federal standards for shared national waters and places a high priority on protecting natural resources that cross state and tribal boundaries and are not intimately connected with navigable waters—such as ephemeral streams, floodplains, headwater wetlands, bogs and others—as the commenter stated that they provide green space, wildlife habitat, groundwater recharge, flood attenuation, support residents and businesses, and buffer changes in rainfall patterns and intensity resulting from climate change.

Several commenters opposed repealing the 2015 Rule due to concerns that it would result in a lack of federal protections for non-abutting adjacent wetlands and the important functions such waters provide, including serving as habitat for fish and wildlife, providing flood protection, filtering pollutants,

and recharging groundwater supplies, among others. Some commenters expressed general support for covering isolated wetlands.

Additionally, several commenters expressed concern that repealing the 2015 Rule would prevent appropriate control over industrial polluters and public and private companies that the commenters allege seek to pollute waters for monetary gain without concern for negative effects. Other commenters claimed that repealing the 2015 Rule would favor land developers at the expense of congressional intent of the statute, putting water features at risk, including those that provide significant ecosystem services like drinking water protections, flood control/stormwater absorption, carbon storage, water and air pollution removal, local climate regulation, wildlife habitat, viewsheds, and recreation. A few commenters suggested that the 2015 Rule supports innovative green infrastructure and other sustainability and climate-resilient community initiatives.

One commenter referenced support for the 2015 Rule found in a national poll and asserted that many individuals want the federal government to strengthen or maintain current CWA standards. Another commenter stated that in nationwide polling, 83 percent of hunters and anglers supported full implementation of the 2015 Rule. One commenter asserted that the agencies' policy change is politically motivated, while another characterized the repeal as reckless.

Some commenters argued that the agencies should retain the 2015 Rule because it is supported by scientific evidence and that an extensively peer-reviewed scientific report prepared by the EPA found that the physical, chemical, and biological integrity of water bodies depend on hydrologically connected water bodies. One commenter noted that good environmental policy is founded on accurate and defensible scientific data, while other commenters asserted that any new proposed rule should rely on a rigorous hydrological analysis similar to the report the agencies prepared for the 2015 Rule. One commenter submitted their comment on the 2014 proposed rule, *see* 79 FR 22188 (Apr. 21, 2014), expressing their support for the proposed rule. A few commenters asserted that the 2015 Rule was the product of significant scientific analysis and disregarding it would be a waste of valuable resources. Many commenters are concerned that going through another rulemaking after such an extensive rulemaking for the 2015 Rule would waste public funds or is unnecessary.

> **<u>Agencies' Response</u>: The agencies recognize the importance and economic benefits of protecting water resources and do not dispute that streams, wetlands, and other waters serve a variety of important functions for protection of water quality. The agencies conclude, however, that in establishing the limits of federal regulatory authority under the CWA in the 2015 Rule, the agencies placed too much emphasis on the information and conclusions of the Connectivity Report at the expense of the limits on federal CWA jurisdiction reflected in the statutory text and decisions of the Supreme Court. Science informs the agencies' interpretation of the definition of "waters of the United States," but science cannot control where to draw the line between federal and state waters, as those are legal distinctions that have been established within the overall framework and construct of the CWA. The definition of "waters of the United States" must be grounded in a legal analysis of the limits on CWA jurisdiction reflected in the statute and Supreme Court case law. The agencies are precluded from exceeding their authority under the CWA based on scientific, policy, or other reasons. See also the Agencies' Summary Response in Section 1.0 and the agencies' response to comments in Section 6 and Section 9.**

1.2.4 Miscellaneous opposition to the proposed rule

A few commenters asserted that the proposed rulemaking is an effort by the agencies to remove the scientific record that supports the 2015 Rule from consideration in a future rulemaking and to avoid a Supreme Court ruling on the 2015 Rule's validity. This would, according to the commenter, foreclose more robust public deliberations on which waters should be jurisdictional under the Act and allow the agencies to avoid addressing why the agencies' proposed revised definition of "waters of the United States" is substantively preferable to the 2015 Rule. One commenter noted that Executive Order 13778, which directed the agencies to review and, as appropriate, revise or repeal the 2015 Rule, was premature and should have awaited judicial rulings on the 2015 Rule. Finally, some commenters expressed opposition to the proposed rule because they alleged that the agencies did not provide information about the substance of a replacement rule.

A commenter asserted that the proposed rule would negatively affect tribal enforcement of the CWA and noted that the 2015 Rule supported tribal enforcement efforts and protected a reservation's scarce water supplies.

One commenter argued that EPA's action would not codify "the current legal status quo" because the 2015 Rule is the true status quo.

> **<u>Agencies' Response</u>: See the Agencies' Summary Response in Section 1.0 and the agencies' response to comments in Section 2, Section 5, Section 6, and Section 10.**

1.3 <u>Alternatives</u>

Some commenters asserted that the agencies did not adequately consider or address the merits of alternatives to the proposed rule, as required under the Administrative Procedure Act (APA). Commenters suggested four categories of alternatives to the agencies' proposal to repeal the 2015 Rule and recodify the pre-existing regulations, including (1) revising the 2015 Rule; (2) repealing the 2015 Rule and then maintaining or revising the pre-2015 Rule regulatory regime; (3) repealing the 2015 Rule but not recodifying the pre-2015 Rule regulations; and (4) pursuing alternative actions to rulemaking.

Revise the 2015 Rule. A number of commenters suggested that the agencies focus on revising or repealing specific portions of the 2015 Rule, including changes to address the agencies' concerns with the rule that were identified in the SNPRM. One commenter asserted that revising the 2015 Rule would be less confusing than the agencies' two-step rulemaking process and suggested that the agencies make only necessary, fact-based revisions to the 2015 Rule. Another commenter recommended using available information to revise the 2015 Rule, making it less complicated and burdensome. A different commenter suggested that the agencies revise only those portions of the rule that require necessary and constructive clarification, adding that the agencies should examine approved jurisdictional determinations issued under the 2015 Rule to identify areas for improvement. One commenter suggested that the agencies develop a process under the 2015 Rule for entities to challenge categorical assertions of jurisdiction. Another commenter suggested the agencies repeal the portions of the 2015 Rule that address tributaries and adjacent wetlands, develop interim guidance based on the *Rapanos* plurality opinion, and then develop a new rule addressing tributaries and adjacent wetlands.

Revise or maintain the pre-2015 Rule regulatory regime. Some commenters suggested that the agencies repeal the 2015 Rule, reinstate the pre-existing regulations, and then focus on correcting issues

with the pre-existing regulations through a new rulemaking, such as by revising the regulations to be consistent with the agencies' practice under the post-*SWANCC* and post-*Rapanos* guidance. Other commenters suggested that the agencies recodify the pre-existing regulations and continue to implement those regulations consistent with Supreme Court case law and as informed by applicable agency guidance rather than proposing a revised definition of "waters of the United States" in a subsequent rulemaking. One of these commenters asserted that the pre-2015 Rule regulations appropriately balance protecting sources of drinking water, streamlining infrastructure and permitting, and adhering to cooperative federalism. Another commenter supported maintaining the pre-existing regulations, asserting that a subsequent rulemaking would not be worth the investment of time and effort to gain limited clarity. A different commenter asserted that the agencies can successfully implement the CWA pursuant to the pre-existing regulations and suggested that maintaining the pre-2015 Rule regulatory regime would maintain a decades-old working relationship between state and federal agencies.

Repeal the 2015 Rule but do not reinstate the pre-2015 Rule regulatory regime. Some commenters supported rescinding the 2015 Rule but did not support restoring the pre-2015 Rule regulatory regime. One commenter stated that the pre-2015 Rule regulatory regime is the result of regulatory creep through guidance and permit decisions that have expanded federal jurisdiction. This commenter suggested that the agencies revert to the original and fundamental concepts of the CWA and allow the states to regulate.

Pursue alternatives to rulemaking. Several commenters recommended focusing on non-rulemaking efforts. One commenter suggested the agencies work with states and tribes to make administration of CWA section 404 permitting programs more efficient by directing resources to state assumption and general permits, rather than investing resources in jurisdictional determination rulemakings. The commenter asserted that this approach would also highlight cooperative federalism opportunities. Similarly, one commenter recommended that instead of repealing the 2015 Rule, the agencies consider streamlining permits through the use of general permits and region-specific field guidance; this commenter suggested that the agencies did not need to reduce the scope of federal CWA jurisdiction to achieve permitting efficiencies. Another commenter suggested that the agencies develop improved technical tools and guidance to assist the public and regulators with implementing the 2015 Rule instead of repealing and replacing the rule. One commenter suggested that the agencies issue a legal or policy memorandum preserving the 2015 Rule's exclusions for water recycling and stormwater management operations until the agencies finalize a replacement rule that codifies such exclusions. Other commenters representing agricultural interests suggested that the agencies incentivize environmental practices instead of issuing new regulations.

> **<u>Agencies' Response</u>: After thoroughly considering comments received on the NPRM and SNPRM regarding alternatives to this action, the agencies conclude that repealing the 2015 Rule and restoring the pre-2015 Rule regulatory regime is the most effective and efficient way to remedy the fundamental and systemic flaws of the 2015 Rule, achieve the objectives of the Act, and provide regulatory certainty as the agencies consider public comments on a proposed revised definition of "waters of the United States." *See* 84 FR 4154.**
>
> **Under the APA, a reviewing court will "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). In promulgating a rule to repeal existing regulations, agencies must address and consider alternative ways of achieving the relevant**

statute's objectives and must provide adequate reasons for abandoning those alternatives. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 48 (1983). Agencies are not required, however, to consider "all policy alternatives in reaching [a] decision." *Id.* at 50-51. Indeed, an agency rulemaking "cannot be found wanting simply because the agency failed to include every alternative device and thought conceivable by the mind of man . . . regardless of how uncommon or unknown that alternative may have been." *Id.* (quoting *Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 551 (1978)).

The agencies considered alternatives to the final rule throughout the rulemaking process. In the preamble to the NPRM, the agencies explained that they considered alternatives to the proposed action, including simply withdrawing or staying the 2015 Rule, but did not identify any alternatives that would provide stability as effectively and efficiently as the proposed action pending the conclusion of the agencies' two-step rulemaking process. *See* 82 FR 34899, 34903 (July 27, 2017). Similarly, in the preamble to the SNPRM, the agencies explained that they considered several alternatives to the proposed action, including revising specific elements of the 2015 Rule, issuing revised implementation guidance, and further extending the applicability date of the 2015 Rule. *See* 83 FR 32227, 32249 (July 12, 2018). The agencies then requested comments on "whether any of these alternative approaches would fully address and ameliorate potential deficiencies in and litigation risk associated with the 2015 Rule." *Id.* The agencies also requested comment on "whether this proposal is the best and most efficient approach to address the potential deficiencies [with the 2015 Rule] identified in this notice and to provide the predictability and regulatory certainty that alternative approaches may not provide." *Id.*

The agencies find that revising select provisions in the 2015 Rule would not resolve the fundamental flaws underlying the 2015 Rule and would result in the 2015 Rule remaining in place beyond the effective date of this final rule. As described in the preamble to this final rule, the agencies conclude that the 2015 Rule did not implement the legal limits on the scope of the agencies' authority under the CWA as intended by Congress and reflected in Supreme Court cases, including Justice Kennedy's articulation of the significant nexus test in *Rapanos*, did not adequately consider and accord due weight to the policy of Congress in CWA section 101(b), pushed the envelope of the agencies' constitutional and statutory authority absent a clear statement from Congress, and included distance-based limitations that suffered from procedural errors and a lack of adequate record support. Conducting rulemaking to revise specific provisions in the 2015 Rule would not remedy these fundamental flaws that permeate the rule. The agencies are considering specific definitional changes in their separate rulemaking on a proposed revised definition of "waters of the United States." The agencies find that it is preferable to repeal the 2015 Rule and recodify the pre-existing regulations, informed by applicable agency guidance documents and consistent with Supreme Court decisions and longstanding agency practice, than to leave in place a rule that exceeds the agencies' statutory authority—especially a rule of this magnitude—pending a separate rulemaking process.

Similarly, the agencies find that repealing the 2015 Rule, reinstating the pre-2015 Rule regulatory regime, and either maintaining that regime or using it as a basis for further rulemaking, would provide less regulatory certainty than the agencies' current two-step rulemaking approach. The agencies find that reinstating the longstanding and familiar pre-2015 Rule regulatory regime will provide regulatory certainty in this interim period, but they

also acknowledge that the pre-existing regulations pose certain implementation difficulties. The agencies thus find that it is preferable to restore the "familiar, if imperfect" pre-existing regulations in this final rule and consider revising the definition of "waters of the United States" in a separate action. *See In re EPA & Dep't of Def. Final Rule*, 803 F.3d 804, 808 (6th Cir. 2015). If the agencies do not finalize a new definition of "waters of the United States" as part of their two-step rulemaking process or if a new definition is overturned by a court in the future, it is appropriate for the pre-2015 Rule regulatory regime to remain in place because, as implemented, it adheres more closely than the 2015 Rule to the limits imposed by the Act and is longstanding and familiar. The agencies conclude that it is appropriate to codify the pre-existing regulations in today's action as the agencies proceed with a separate rulemaking to consider a definition of "waters of the United States" that better effectuates the language, structure, and purposes of the Act.

The agencies also find that repealing the 2015 Rule without restoring the pre-2015 Rule regulatory regime would not provide regulatory certainty to the same extent as the agencies' two-step rulemaking approach. The pre-2015 Rule regulatory regime is imperfect, but it is longstanding and familiar. As described in Section IV of the final rule preamble and in Section 2 of this response to comment document, restoring the pre-2015 Rule regime provides regulatory certainty while the agencies reconsider the proper scope of federal CWA jurisdiction in the agencies' separate rulemaking process.

Finally, the agencies find that relying solely on non-regulatory actions to clarify the definition of "waters of the United States" would not provide sufficient regulatory certainty. The agencies considered revising current guidance, issuing new guidance, and developing improved technical tools to assist agency staff, states, tribes, and the regulated community in implementing the 2015 Rule. The agencies find, however, that adopting these non-regulatory alternatives in lieu of regulatory action would provide less regulatory certainty than the agencies' two-step rulemaking approach and would not remedy the fundamental flaws that permeate the 2015 Rule. In the proposed rulemaking to establish a revised definition of "waters of the United States," however, the agencies are considering additional ways to improve implementation of the definition of "waters of the United States," in addition to revising the regulatory definition. *See* 84 FR 4198–4200.

See also the agencies' response to comments in Section 5 and Section 8.

1.4 Pre-2015 Rule Regulatory Regime

1.4.1 General opposition to the regime the agencies intend to implement

Some commenters noted that the pre-existing regulations were problematic, inconsistently implemented, and caused permitting delays. Other commenters asserted that the pre-existing regulations have inadequately and inconsistently protected the waters of the U.S. and illustrated this point with examples, such as the Lower Raritan Watershed in New Jersey has lost 3,461 acres of forested wetlands, 2,891 acres of emergent wetlands, 1,086 acres of agricultural wetlands, and 593 acres of disturbed wetlands since 1990. One commenter noted that the previous regulatory definition failed to adequately address ephemeral streams and waterbodies on tribal lands.

Some commenters noted issues with the 2008 guidance, including that it was contrary to sound science, created a burdensome process, did not rely on publicly available information, and was not published in the *Federal Register* for public comment. One commenter claimed that the 2008 guidance is unlawful because it misinterprets the Supreme Court's decision in *Rapanos*. Another commenter asserted that the agencies should not adopt the pre-2015 Rule regulations because those regulations are inconsistent with the Supreme Court's holdings in *SWANCC* and *Rapanos*.

> **Agencies' Response: See Agencies' Summary Response in Section 1.0 and the agencies' response to comments in Section 2, Section 6, Section 8, and Section 10.**

1.4.2 Confusion about the regulatory scheme the agencies intend to implement

A few commenters stated that the agencies should clarify that a return to the pre-2015 Rule regulations does not mean a return to the 2008 *Rapanos* guidance.

Several commenters asserted that the limitations on the scope of federal CWA authority articulated in the SNPRM suggests that the agencies would apply the 2008 guidance and pre-existing regulations differently than the agencies had been applying the guidance and regulations prior to the 2015 Rule. As support, commenters cited to language from the SNPRM revealing inconsistencies between the legal principles discussed in the SNPRM and the pre-2015 Rule regulatory regime, including: (1) the SNPRM states that adjacent wetlands can only be covered "if the wetlands are in close proximity to the tributaries, such as in the transitional zone between open waters and dry land," 83 FR at 32237, yet the 2008 guidance does not require close proximity for an adjacent wetland to be protected; and (2) the SNPRM questions whether ephemeral streams fall within the scope of the Act, yet the pre-2015 Rule regulatory regime allows for coverage of ephemeral streams that possess the requisite significant nexus. The commenters suggested that the inconsistencies between the legal principles articulated in the SNPRM and the pre-2015 Rule regulatory regime undermine the agencies' claim that the proposed rule will provide regulatory certainty because it seems to these commenters that the agencies intend to narrow the pre-2015 Rule regulatory framework rather than merely reinstate it.

> **Agencies' Response: The agencies intend to implement the pre-existing regulations consistent with the familiar pre-2015 Rule regulatory framework. As such, under this final rule, the agencies will continue to implement those regulations as informed by applicable agency guidance documents and consistent with Supreme Court decisions and longstanding agency practice,[1] as the agencies have been implementing those pre-existing regulations in those states subject to preliminary injunctions against the 2015 Rule. The agencies are considering the proper scope of federal CWA jurisdiction, consistent with the legal principles articulated in**

[1] *See*, e.g., Joint Memorandum, 68 FR 1991, 1995 (Jan. 15, 2003) (providing clarifying guidance regarding the U.S. Supreme Court's decision in *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001)), *available at* https://www.epa.gov/sites/production/files/2016-04/documents/swancc_guidance_jan_03.pdf; U.S. EPA & U.S. Army Corps of Engineers, Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States & Carabell v. United States* (Dec. 2, 2008), *available at* https://www.epa.gov/sites/production/files/2016-02/documents/cwa_jurisdiction_following_rapanos120208.pdf; U.S. Army Corps of Engineers Jurisdictional Determination Form Instructional Guidebook, *available at* https://www.usace.army.mil/Missions/Civil-Works/Regulatory-Program-and-Permits/Related-Resources/CWA-Guidance/.

the SNPRM, in the proposed revised definition of "waters of the United States." *See* 84 FR 4154 (Feb. 14, 2019).

See also Agencies' Summary Response in Section 1.0 and the agencies' response to comments in Section 2 and Section 10.

1.4.3 Miscellaneous comments on the regime the agencies intend to implement

A few commenters stated that the 2008 guidance adequately addressed and is consistent with the *Rapanos* decision.

Agencies' Response: The agencies agree and intend to implement the pre-existing regulations as informed by the relevant guidance.

Section 2 REGULATORY CERTAINTY

2.0 Agencies' Summary Response

This section contains summaries of comments on the agencies' proposed rule that address regulatory certainty. This summary response applies to all comments summarized in this section. As appropriate, the agencies have provided more specific responses below each comment summary.

As explained in the preamble to the final rule, the agencies are repealing the 2015 Rule for four primary reasons. First, the agencies conclude that the 2015 Rule did not implement the legal limits on the scope of the agencies' authority under the CWA as intended by Congress and reflected in Supreme Court cases, including Justice Kennedy's articulation of the significant nexus test in *Rapanos*. Second, the agencies conclude that in promulgating the 2015 Rule the agencies failed to adequately consider and accord due weight to the policy of the Congress in CWA section 101(b) to "recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution" and "to plan the development and use . . . of land and water resources." 33 U.S.C. 1251(b). Third, the agencies repeal the 2015 Rule to avoid interpretations of the CWA that push the envelope of their constitutional and statutory authority absent a clear statement from Congress authorizing the encroachment of federal jurisdiction over traditional State land-use planning authority. Lastly, the agencies conclude that the 2015 Rule's distance-based limitations suffered from certain procedural errors and a lack of adequate record support. The agencies find that these reasons, collectively and individually, warrant repealing the 2015 Rule. The agencies find that it is appropriate to restore the pre-existing regulations while the agencies consider public comments on the proposed revised definition of "waters of the United States." *See* 84 FR 4154 (Feb. 14, 2019). Given the longstanding nature of the pre-2015 Rule regulatory framework, its track record of implementation and related case law, and its familiarity to regulators, the regulated community and other stakeholders, the agencies conclude that this final rule to codify the prior regulations will provide greater regulatory certainty and nationwide consistency pending any final action on that separate rulemaking.

This final rule returns implementation of the definition of "waters of the United States" under the CWA to the regulatory regime that existed for many years before the agencies issued the 2015 Rule and that is still in effect in more than half of the states at the time of this final rule. The agencies have maintained separate regulations defining the statutory term "waters of the United States," but the text of the regulations have been virtually identical since the Corps' and the EPA's 1986 and 1988

rulemakings, respectively. *See* 51 FR 41206 (Nov. 13, 1986) (revising Corps regulations to align more closely with EPA regulations defining "waters of the United States"); 53 FR 20764 (June 6, 1988) (including language from the preamble to the Corps' 1986 regulations to provide "clarity and consistency" regarding the EPA's regulatory definition of "waters of the United States"). Following the promulgation of the 2015 Rule, the agencies have continued to implement those pre-existing regulations (commonly referred to as the "1986 regulations") in a shifting patchwork of states subject to district court injunctions against the 2015 Rule. Notably, after the effective date of the 2015 Rule, the agencies continued to implement the pre-existing regulations nationwide from October 9, 2015 to August 16, 2018 pursuant to the U.S. Court of Appeals for the Sixth Circuit's decision staying the 2015 Rule nationwide and the agencies final rule establishing an applicability date of February 6, 2020 for the 2015 Rule. *In re EPA & Dep't of Def. Final Rule*, 803 F.3d 804 (6th Cir. 2015); 83 FR 5200 (Feb. 6, 2018). In response to court orders regarding the agencies' "waters of the United States" rulemakings, the EPA has maintained a webpage with a map reflecting which regulatory regime is applicable in each state (https://www.epa.gov/wotus-rule/definition-waters-united-states-rule-status-and-litigation-update).

For over 30 years, challenges to the agencies' application of the 1986 regulations have yielded a body of case law that has helped to define the scope of the agencies' CWA authority and shaped the agencies' approach to implementing the pre-2015 Rule regulations. In particular, the U.S. Supreme Court's decisions in *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001) (*SWANCC*) and *Rapanos v. United States*, 547 U.S. 715 (2006) inform the agencies' implementation of the 1986 regulations. After those decisions, the agencies issued interpretive guidance in 2003 and 2008 that is now longstanding and familiar.[2] As such, though the text of the 1986 regulations has remained largely unchanged,[3] the agencies have refined their application of the 1986 regulatory text through guidance informed by Supreme Court decisions and the agencies' significant technical experience implementing the Act pursuant to those pre-existing regulations.

Because the agencies have been applying the 1986 regulations consistent with the Supreme Court's decisions in *SWANCC* and *Rapanos* and informed by the agencies' corresponding guidance for over a decade, the agencies, our co-regulators, and the regulated community are familiar with the pre-2015 Rule regulatory regime and have amassed experience operating under those pre-existing regulations. Agency staff, in particular, have developed technical expertise in implementing the 1986 regulations. For example, between June 2007 and August 2019, the Corps issued 220,169 approved jurisdictional determinations under the pre-2015 Rule regulatory regime.[4]

The agencies acknowledge that in issuing the 2015 Rule, the agencies intended to "make the process of identifying waters protected under the CWA easier to understand." 80 FR 37054, 37057 (June 29, 2015). Yet, as explained in the preamble to the final rule, the agencies find that the 2015 Rule did not

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[2] Joint Memorandum, 68 FR 1991, 1995 (Jan. 15, 2003) (providing clarifying guidance regarding the *SWANCC* decision); U.S. EPA & U.S. Army Corps of Engineers, Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States & Carabell v. United States* (Dec. 2, 2008) [hereinafter 2008 *Rapanos* Guidance], *available at* https://www.epa.gov/sites/production/files/2016-02/documents/cwa_jurisdiction_following_rapanos120208.pdf.

[3] In 1993, the agencies added an exclusion for prior converted cropland to the definition of "waters of the United States," *see* 58 FR 45008 (Aug. 25, 1993).

[4] Data from the U.S. Army Corps of Engineers' Operation and Maintenance Business Information Link, Regulatory Module (ORM2) database, from June 2007 to January 2019. Publicly available data from the ORM2 database are *available at* https://permits.ops.usace.army.mil/orm-public.

implement the legal limits on the scope of the agencies' authority under the CWA as intended by Congress and reflected in Supreme Court cases, including Justice Kennedy's articulation of the significant nexus test in *Rapanos*, did not adequately consider and accord due weight to the policy of Congress in CWA section 101(b), pushed the envelope of the agencies' constitutional and statutory authority absent a clear statement from Congress, and included distance-based limitations that suffered from procedural errors and a lack of adequate record support. The agencies have concluded that, as a result of those fundamental issues, the 2015 Rule must be repealed. At the same time, the agencies recognize that the pre-existing regulations pose certain implementation challenges, particularly because significant nexus analyses are required for certain waters. Following the Supreme Court's decisions in *SWANCC* and *Rapanos*, which the agencies note did not vacate or remand the 1986 regulations, the agencies published a guidebook to assist district staff in issuing approved jurisdictional determinations.[5] In particular, the guidebook outlines procedures and documentation used to support significant nexus determinations. This guidebook has been and continues to be publicly available and will continue to serve as a resource in issuing jurisdictional determinations under this final rule.

In the agencies' proposed revised definition of "waters of the United States," the agencies seek to establish a clear and implementable definition that better effectuates the language, structure, and purposes of the CWA. *See* 84 FR 4174. Pending any final action on that proposed rulemaking, the agencies find that this final rule will provide greater certainty by reinstating nationwide a longstanding regulatory framework that is familiar to and well-understood by the agencies, states, tribes, local governments, regulated entities, and the public.

The agencies find that this final rule will also provide regulatory certainty by re-establishing a definition of "waters of the United States" that is applicable nationwide. For periods of time over the last four years, the agencies have been applying different regulatory regimes throughout the country as the result of preliminary injunctions against the 2015 Rule. By reinstating the 1986 definition of "waters of the United States" nationwide, this final rule will alleviate inconsistencies, confusion, and uncertainty arising from the agencies' application of two different regulatory regimes across the country.

The agencies recognize that this final rule may itself be subject to legal challenges, and that this gives rise to the possibility of a return to the application of different regulatory definitions in different states. Yet, the agencies cannot predict the outcome of any future challenges, and the possibility of courts enjoining this rule should not preclude the agencies from taking this final action. At this time, due to preliminary injunctions against the 2015 Rule, it is only by finalizing this rule to codify the pre-existing regulations that the agencies can return to implementing a uniform definition of "waters of the United States" nationwide.

With this final rule, the regulations defining "waters of the United States" will be those portions of 33 CFR part 328 and 40 CFR parts 110, 112, 116, 117, 122, 230, 232, 300, 302, and 401 as they existed immediately prior to the 2015 Rule's amendments. The agencies will continue to implement those regulations as informed by applicable agency guidance documents and consistent with Supreme Court decisions and longstanding agency practice. Given the longstanding nature of the pre-2015 Rule

[5] U.S. Army Corps of Engineers Jurisdictional Determination (JD) Form Instructional Guidebook, *available at* https://www.usace.army.mil/Missions/Civil-Works/Regulatory-Program-and-Permits/Related-Resources/CWA-Guidance/.

regulatory framework, its track record of implementation and related case law, and its familiarity to regulators, the regulated community and other stakeholders, this final rule to recodify the 1986 regulations will provide greater regulatory certainty and nationwide consistency while the agencies consider public comments on the proposed revised definition of "waters of the United States." *See* 84 FR 4154 (Feb. 14, 2019).

2.1 Regulatory Certainty under the 2015 Rule

Many commenters asserted generally that the 2015 Rule failed to achieve its stated objectives of increasing predictability and consistency under the CWA, instead inappropriately expanding federal jurisdiction and creating confusion and uncertainty for agency staff, regulated entities, states, tribes, local governments, and the public. Some commenters stated that the 2015 Rule changed the definition of longstanding terms or phrases and broadened the scope of federal jurisdiction to include waters that previously did not fall within the scope of the CWA, which the commenters asserted contributes to regulatory uncertainty and invites litigation. Another commenter stated that uncertainty arises from the 2015 Rule's "one-size-fits-all" approach. Commenters suggested that this confusion and uncertainty regarding which waters are covered under the 2015 Rule can have significant consequences given the CWA's substantial criminal and civil penalties for discharging into jurisdictional waters without a permit.

Commenters expressed concern that the agencies' definitions and explanations of key terms in the 2015 Rule lacked clarity and precision. As examples, commenters pointed to the 2015 Rule's definitions and explanations of terms such as "adjacent," "neighboring," "floodplain," "tributary," "ordinary high water mark," and "impoundments," among others. Commenters also criticized the 2015 Rule's definition of "significant nexus" and terms used within that definition such as "similarly situated" and "in the region" as being confusing and vague, which the commenters suggested could lead to subjective and potentially arbitrary jurisdictional determinations and enforcement. As support, some of these commenters cited a U.S. Army Corps of Engineers memorandum expressing concerns regarding how to interpret "similarly situated" and "more than speculative or insubstantial." Commenters also found other aspects of the 2015 Rule to be unclear, including the rule's exclusions and the rule's application to ditches, drainage and irrigation systems, detention ponds, and other features. A number of these commenters expressed concern that such uncertainty would make it difficult for farmers to know whether their property contains a jurisdictional "water of the United States." Several commenters expressed confusion regarding the 2015 Rule's reliance on the concept of the "100-year floodplain," and one commenter asserted that the 2015 Rule does not clearly distinguish between erosional features and tributaries.

Many of these commenters expressed concern that the lack of clarity in the 2015 Rule's defined terms would leave the scope of CWA jurisdiction to the best professional judgment of regulators, which the commenters suggested would result in confusion, inconsistent application of the 2015 Rule, and extensive case-by-case litigation. Inconsistent implementation, some commenters noted, could also hamper long-term investment decisions. Commenters also asserted that confusion about the scope of the 2015 Rule would have adverse consequences for specific industries, especially agriculture and livestock. A few commenters stated that the 2015 Rule's lack of clarity is inconsistent with Executive Order 13778's objectives of promoting economic growth and minimizing regulatory uncertainty.

Other commenters asserted that the 2015 Rule provides increased regulatory certainty compared to the application of the pre-existing regulatory regime; these commenters argued that the proposed rule to repeal the 2015 Rule and recodify the pre-existing regulations would thus increase regulatory uncertainty. Some of these commenters stated that, by providing definitions and clear categories of

waters that are covered by the CWA, waters that are excluded, and waters that would be subject to case-by-case analysis, the 2015 Rule increased clarity over the case-by-case approach of the pre-existing text as interpreted after *Rapanos*. A number of commenters asserted that federal CWA jurisdiction would thus be more predictable and easier to understand under the 2015 Rule. Further, several commenters asserted that the clarity provided by the 2015 Rule would benefit states and make the permitting process more efficient for the regulated community. Some commenters stated that greater regulatory certainty under the 2015 Rule would reduce the risk of litigation and that ultimately fewer jurisdictional determinations would be contested. One commenter suggested that regulatory certainty under the 2015 Rule allowed economic activity to proceed without the threat of disruption.

Some commenters expressed skepticism regarding the credibility of claims that the 2015 Rule causes uncertainty; some of these commenters noted that the 2015 Rule had been in effect for only a few weeks and asserted that this was not a sufficient amount of time for the rule to create uncertainty. One commenter stated that assertions that the 2015 Rule is unclear or confusing are a pretext and are merely a litigation position taken by those who seek to challenge the 2015 Rule. Other commenters stated that, while the litigation over the 2015 Rule raises the question of whether or not the rule will be upheld or vacated by the courts, it does not logically follow that the text of the 2015 Rule is ambiguous. Another commenter suggested that the agencies' position in the supplemental notice of proposed rulemaking (SNPRM), *see* 83 FR 32227 (July 12, 2018), is inconsistent in that the agencies assert both that the 2015 Rule creates too much uncertainty and that there is too much certainty to the extent the 2015 Rule asserts categorical jurisdiction over certain types of waters. Other commenters suggested that regulatory certainty is not a sufficient rationale for repealing the 2015 Rule and codifying the pre-existing regulations.

> **Agencies' Response: See Agencies' Summary Response in Section 2.0. The agencies recognize that some commenters found the 2015 Rule to be unclear while others found that the rule provided clarity. Regardless, the agencies are repealing the 2015 Rule and recodifying the 1986 regulations because, among other reasons, the agencies have concluded that the 2015 Rule exceeds the agencies' statutory authority. As of the time of this final rule, the 2015 Rule is in effect in fewer than half of the States (i.e., those states and territories in which there is no order preliminarily enjoining the 2015 Rule), while the pre-2015 regulations and associated guidance are being implemented in a significant majority of the country by land area. With this final rule, the 2015 Rule will be repealed and the 1986 regulations will go into effect, allowing for a uniform regulatory regime nationwide.**

2.2 Impact of Litigation over 2015 Rule on Regulatory Certainty

A number of commenters asserted that the litigation over the 2015 Rule in multiple jurisdictions exacerbates unpredictability and creates the potential for inconsistent assertion of CWA jurisdiction because the 2015 Rule could be in effect in some jurisdictions but not others. Commenters noted that the application of different standards for determining CWA coverage across the country would adversely affect members of the regulated community who operate in multiple jurisdictions. Several commenters suggested that uncertainty surrounding the 2015 Rule is also heightened by the fact that every court that considered whether to issue a preliminary injunction against the 2015 Rule at the time the comments were submitted had found that the parties challenging the rule have a likelihood of success on the merits. Commenters also noted that final judicial resolution of the challenges to the 2015 Rule is likely years away, which further contributes to regulatory uncertainty. Many of these commenters

supported replacing the 2015 Rule with the pre-existing regulations as a way to restore uniformity and predictability while the agencies consider a replacement rule.

Other commenters asserted that the ongoing judicial challenges to the 2015 Rule are not an appropriate basis for repeal. Many of these commenters noted that EPA regulations are frequently subject to legal challenges, and one commenter cited to studies showing that approximately 75 percent of EPA's economically significant regulations are challenged. If litigation were an appropriate basis for repeal, some commenters noted, many of EPA's regulations should be rescinded.

Many commenters stated that the agencies' concern regarding litigation over the 2015 Rule leading to different regulatory regimes being in effect in different parts of the country is not a sufficient basis to repeal the 2015 Rule. Some commenters suggested that the agencies' concern is a pretext for their policy decision to repeal the 2015 Rule. A few commenters noted that the agencies appeared to have little difficulty implementing multiple standards in different jurisdictions during the time period prior to the Sixth Circuit's stay, when the 2015 Rule was in effect except for in the 13 states covered by the North Dakota court's preliminary injunction. Other commenters stated that the potential inconsistency across jurisdictions is not boundless or unknowable, would last only until litigation over the 2015 Rule is completed, and would not be permanent.

A few commenters stated that the potential for inconsistent judicial decisions is not a function of the 2015 Rule, but rather a function of the Supreme Court's decision that the regulatory definition of "waters of the United States" must be challenged in the district courts. Accordingly, the commenters noted, any regulatory definition of "waters of the United States" could be the subject of inconsistent district court decisions. On this point, a number of commenters argued that the agencies have failed to consider that the proposed rule and any replacement regulation would generate the same type of potential uncertainties flowing from litigation in multiple courts.

Further, some commenters suggested that the agencies' concern regarding potential inconsistent court decisions is premature, including because no court has yet ruled on the merits of the 2015 Rule. Commenters also stated that to the extent that courts have found a likelihood of challengers' success on the merits in issuing preliminary injunctions against the 2015 Rule, those decisions are preliminary only, and preliminary injunctions frequently are dissolved upon full litigation on the merits. One commenter noted that the preliminary injunction issued in the U.S. District Court for the District of North Dakota was explicitly based on "a handful of documents and deliberative memoranda" rather than the full record.

Finally, several commenters noted that the agencies' efforts to extend the 2015 Rule's applicability date have generated significant litigation, leading to increased uncertainty. Many commenters also raised concerns that the agencies' action to repeal the 2015 Rule will create more uncertainty for the regulated community, as the rescission itself will generate more litigation.

> **<u>Agencies' Response</u>: See Agencies' Summary Response in Section 2.0. As noted above, legal challenges to the 2015 Rule have resulted in court-ordered injunctions blocking the 2015 Rule from going into effect in more than half of the states. These injunctions have resulted in a patchwork regulatory scheme whereby the agencies apply the 2015 Rule in fewer than half the states and the pre-existing regulations in the others. Having different regulatory regimes in effect throughout the country is complicated and inefficient for both the public and the agencies. For example, because many Corps districts span more than one state, some districts**

are charged with implementing more than one regulatory regime. Additionally, because certain watersheds span more than one state, a Corps district may need to implement two different regulatory regimes in the same watershed based on state boundaries. This can present challenges and confusion for both agency staff and the public in the regulatory process. The agencies must also expend resources to inform regional and district staff, state partners, and the public of which regulatory regime applies in each state.

The agencies thus disagree with the commenters that suggested the agencies' concerns regarding litigation over the 2015 Rule are premature or unfounded. The shifting set of preliminary injunctions against the 2015 Rule has had practical impacts on the agencies, our co-regulators, and the regulated community and is a source of uncertainty, as the regulatory regime applicable in states may change if additional injunctions are granted. This final rule will reinstate a definition of "waters of the United States" that can be applied uniformly nationwide, thus alleviating confusion and uncertainty arising from the application of two different regulatory regimes across the country.

2.3 Regulatory Certainty under the Pre-Existing Regulations

Commenters noted that the agencies have been applying the pre-existing regulations as interpreted following the Supreme Court's decision in *Rapanos* since 2006. Consequently, the commenters suggested, both the agencies and the regulated community are familiar with application of the pre-existing regulations as interpreted after *Rapanos*. According to these commenters, returning to the pre-2015 Rule regulatory regime would thereby promote regulatory stability and certainty during the agencies' review of public comments on the proposed revised definition of "waters of the United States." A few commenters added that the pre-existing text is "familiar, if imperfect."

Other commenters asserted that recodifying the pre-existing regulations would not minimize regulatory uncertainty but would instead increase regulatory uncertainty for the agencies, states, and the regulated community by reinstating the prior regulatory regime's uncertain, inconsistent and burdensome case-by-case "significant nexus" test approach. Commenters stated that the case-by-case approach is also resource-intensive and makes enforcement more challenging. Many commenters also noted that, as stated in the preamble to the 2015 Rule, the agencies had developed the 2015 Rule to alleviate the uncertainty and inconsistency caused by the case-specific "significant nexus" test approach under the prior regulatory regime.

Further, many commenters expressed concern that the agencies' proposal to repeal the 2015 Rule and recodify the pre-existing regulations disregards and does not address the substantial uncertainty and confusion that existed under the pre-2015 Rule regulatory regime. A large number of these commenters asserted that the agencies have failed to compare the uncertainty that might be caused by leaving the 2015 Rule in place with the uncertainty that would be caused by its rescission. Some commenters stated that the agencies should demonstrate how reverting to the case-by-case "significant nexus" test approach for certain waters under the prior regulatory regime would increase certainty and stability over the 2015 Rule. Several commenters disagreed with the agencies' suggestions that the pre-existing regulations would be in place temporarily; these commenters noted that the pre-existing regulations could be in effect for an indefinite period of time, including if the agencies do not finalize a replacement rule or if the replacement rule does not survive legal challenges.

Moreover, several commenters suggested that familiarity with the pre-existing regulatory regime does not excuse the agencies from the need to engage in a reasoned decisionmaking process consistent with the Administrative Procedure Act's substantive requirements. A few commenters stated that the agencies' claim of 30 years of experience with the pre-existing regulations is illusory, as the agencies' approach to implementing the regulations changed following *SWANCC* and *Rapanos*.

Finally, some commenters noted that neither the initial notice of proposed rulemaking (NPRM), *see* 82 FR 34899 (July 27, 2017), nor the SNPRM specifically identify the court cases and guidance documents that would inform application of the pre-existing regulations, thereby increasing regulatory uncertainty.

Agencies' Response: See Agencies' Summary Response in Section 2.0. The agencies acknowledge that in issuing the 2015 Rule, the agencies sought to "make the process of identifying waters protected under the CWA easier to understand." 80 FR 37054, 37057 (June 29, 2015). Yet, as explained in the final rule preamble, the agencies find that the 2015 Rule did not implement the legal limits on the scope of the agencies' authority under the CWA as intended by Congress and reflected in Supreme Court cases, including Justice Kennedy's articulation of the significant nexus test in *Rapanos*, did not adequately consider and accord due weight to the policy of Congress in CWA section 101(b), pushed the envelope of the agencies' constitutional and statutory authority absent a clear statement from Congress, and included distance-based limitations that suffered from procedural errors and a lack of adequate record support. For these and other reasons discussed more fully in the preamble, the agencies find that it is appropriate to repeal the 2015 Rule and recodify the pre-existing regulations. Though the agencies and others have criticized the pre-2015 Rule regulatory regime as posing certain implementation challenges, *see* 80 FR 37057, the agencies find that reinstating this regime will provide the agencies, our co-regulators, and the regulated community with a familiar regulatory foundation while the agencies consider public comments on the proposed revised definition of "waters of the United States." In that separate rulemaking, the agencies seek to establish a clear and implementable definition that better effectuates the language, structure, and purposes of the CWA. *See* 84 FR 4174. Thus, at this time, the agencies find that it is preferable to recodify the 1986 regulations than to leave in place a rule that exceeds the agencies' statutory authority—especially a rule of this magnitude—pending the agencies' separate rulemaking process.

The agencies have been applying the 1986 regulations consistent with the Supreme Court's decisions in *SWANCC* and *Rapanos* and as informed by the agencies' corresponding guidance for over a decade. With this final rule, the agencies are recodifying the 1986 regulations and will continue to implement those regulations as informed by applicable agency guidance documents and consistent with Supreme Court decisions and longstanding agency practice.

Under the pre-2015 Rule regulatory regime, significant guidance documents include (1) the agencies' 2003 joint memorandum providing clarifying guidance regarding the Supreme

Court's decision in *SWANCC*;[6] (2) the agencies' 2008 post-*Rapanos* guidance;[7] and (3) the agencies' jurisdictional determination guidebook.[8] The agencies have also issued numerous memoranda, question-and-answer documents, and other guidance explaining and clarifying the pre-2015 Rule regulations.[9] Guidance does not impose legally binding requirements and may not apply to a particular situation depending on the circumstances. In making jurisdictional and permitting decisions, agency staff will consider on a case-by-case basis whether the recommendations or interpretations contained in guidance are appropriate to apply to a particular situation.

2.4 Miscellaneous Comments on Regulatory Certainty

Several commenters asserted that, any confusion or uncertainty, to the extent it exists, is caused by the agencies' multi-step process and long-term intent to replace the 2015 Rule, rather than by the 2015 Rule itself. These commenters suggested that each of the agencies' actions relating to the definition of "waters of the United States" have increased confusion. One commenter asserted that the SNPRM creates confusion and uncertainty by articulating new interpretations of the CWA and related case law, including suggesting for the first time that there is significant commonality between the plurality's opinion and Justice Kennedy's opinion in *Rapanos* despite numerous court decisions and prior agency statements indicating that there is little overlap between the two. One commenter suggested that the agencies are deliberately attempting to sow uncertainty by not providing guidance in the wake of the South Carolina district court's order vacating and enjoining the Applicability Date Rule.

One commenter asserted that replacing the 2015 Rule with a rule that is not grounded in law or science would significantly increase regulatory uncertainty and adversely impact the nation's waters. Another commenter suggested that regulatory uncertainty is likely to increase because the science-based 2015 Rule would be replaced by a public dialogue with 50 states, making it more difficult to identify a national standard. A different commenter stated that confusion over federal CWA jurisdiction following *SWANCC* and *Rapanos* undermines the Act and asserted that this confusion has increased regulatory burden, increased costs, and led to delays in the permitting process.

A few commenters stated that continued publication of the 2015 Rule in the Code of Federal Regulations is misleading and has engendered confusion because, for much of the time that the 2015 Rule has been codified, the rule was stayed by the Sixth Circuit and then subject to the Applicability Date Rule, and therefore not in effect. These commenters expressed support for the agencies' proposal to

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[6] Joint Memorandum, 68 FR 1991, 1995 (Jan. 15, 2003), *available at* https://www.epa.gov/sites/production/files/2016-04/documents/swancc_guidance_jan_03.pdf.

[7] U.S. EPA & U.S. Army Corps of Engineers, Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States & Carabell v. United States* (Dec. 2, 2008), *available at* https://www.epa.gov/sites/production/files/2016-02/documents/cwa_jurisdiction_following_rapanos120208.pdf.

[8] U.S. Army Corps of Engineers Jurisdictional Determination Form Instructional Guidebook, *available at* https://www.usace.army.mil/Missions/Civil-Works/Regulatory-Program-and-Permits/Related-Resources/CWA-Guidance/.

[9] The Corps maintains many of these documents on its public website, *see* https://www.usace.army.mil/Missions/Civil-Works/Regulatory-Program-and-Permits/Related-Resources/CWA-Guidance/. The EPA maintains many of these documents as well; *see* https://www.epa.gov/wotus-rule/about-waters-united-states.

repeal the 2015 Rule as this would remove the 2015 Rule from the Code of Federal Regulations and thus address this cause of uncertainty and confusion.

Several commenters stated that, because the 2015 Rule was in effect for only a short period of time, the regulated community and the public have not relied on it, so its rescission will not cause confusion.

Finally, one commenter recommended that the Code of Federal Regulations include only one definition of "waters of the United States" and that this single definition apply to all uses of the term throughout Title 33 and Title 40 of the code. The commenter suggested that the definition appearing in multiple sections of the Code of Federal Regulations has caused confusion.

Agencies' Response: In promulgating the Applicability Date Rule, the agencies sought to maintain a uniform approach to implementing the CWA nationwide pending the agencies' two-step rulemaking process to review and revise the definition of "waters of the United States" consistent with Executive Order 13778. Specifically, the agencies found that "[h]aving different regulatory regimes in effect throughout the country would be complicated and inefficient for both the public and the agencies." 83 FR 5200, 5202 (Feb. 6, 2018). Yet, a confusing and shifting patchwork regulatory scheme re-emerged following the U.S. District Court for the District of South Carolina decision enjoining the Applicability Date Rule nationwide. To address some of the regulatory uncertainty resulting from that court's decision, the EPA developed a webpage that features a map reflecting which rules are in effect in which states (https://www.epa.gov/wotus-rule/definition-waters-united-states-rule-status-and-litigation-update). The agencies have been and continue to be committed to working closely with states, tribes, and stakeholders to provide updated information on an ongoing basis regarding the status of the regulatory definition of "waters of the United States."

The agencies agree with commenters that repealing the 2015 Rule, and thus removing the rule from the Code of Federal Regulations, will alleviate confusion regarding the applicability of that rule.

With this final rule, the regulations defining "waters of the United States" will be those portions of 33 CFR part 328 and 40 CFR parts 110, 112, 116, 117, 122, 230, 232, 300, 302, and 401 as they existed immediately prior to the 2015 Rule's amendments. In the agencies' rulemaking on a proposed revised definition of "waters of the United States," the agencies requested comment on whether the definition should be codified in just two places in the Code of Federal Regulations for the sake of simplicity, rather than in the eleven locations in which it currently appears. 84 FR 4198. Following this alternate approach, the agencies would retain one definition in Title 33 of the Code of Federal Regulations, which implements the Corps' statutory authority, and one in Title 40, which generally implements EPA's statutory authority. The agencies are considering comments on any potential impacts this alternate approach could have on program implementation as part of that separate rulemaking.

See also Agencies' Summary Response in Section 2.0.

Section 3 CHANGE IN SCOPE OF JURISDICTION UNDER 2015 RULE

3.0 Agencies' Summary Response

This section contains summaries of comments on the agencies' proposed rule regarding the potential change in scope of CWA jurisdiction under the 2015 Rule. This summary response applies to all comments summarized in this section. As appropriate, the agencies have provided more specific responses below each comment summary.

In the supplemental notice of proposed rulemaking (SNPRM), the agencies expressed concern that the 2015 Rule may have had "more than a marginal impact on CWA jurisdictional determinations" and requested comment on "whether the [2015 Rule] could expand overall CWA positive jurisdictional determinations by a material amount inconsistent with the findings and conclusions that justified the 2015 Rule." 83 FR 32227, 32244, 32247 (July 12, 2018). In considering the extent of the change in scope of CWA jurisdiction under the 2015 Rule, the agencies reviewed and discussed in the SNPRM information such as the findings in the final economic analysis for the 2015 Rule,[10] six examples of approved jurisdictional determinations made by the Corps under the pre-2015 Rule regulations and evaluated by EPA in light of the 2015 Rule text, the differences between the river and stream miles reflected in CWA section 305(b) reports and the river and stream miles depicted in draft maps that EPA submitted to Congress in 2014, and other specific examples of the estimated change in CWA jurisdiction in individual states. The agencies provided and requested comment on this information in re-evaluating the 2015 Rule and its potential impact on the overall scope of CWA jurisdiction. In this final rule, the agencies are not relying on this information as a basis for repealing the 2015 Rule and recodifying the prior regulations. The basis for this final rule is presented in Section III.C of the final rule preamble and includes the agencies' conclusions that the 2015 did not implement the legal limits on the scope of the agencies' authority under the CWA as intended by Congress and reflected in Supreme Court cases, including Justice Kennedy's articulation of the significant nexus test in *Rapanos*, did not adequately consider and accord due weight to the policy of Congress in CWA section 101(b), pushed the envelope of the agencies' constitutional and statutory authority absent a clear statement from Congress, and included distance-based limitations that suffered from procedural errors and a lack of adequate record support.

The agencies note that the purpose of estimating the potential change in the scope of CWA jurisdiction in the economic analysis for the 2015 Rule was to provide the public with information on potential changes to the costs and benefits of various CWA programs under the rule; the agencies did not rely on this information in deciding how to define "waters of the United States." The agencies' estimate of the change in jurisdictional scope facilitated an analysis of the economic impacts of the 2015 Rule pursuant to Executive Order 12866 (Regulatory Planning and Review) and Executive Order 13563 (Improving Regulation and Regulatory Review). Consistent with those executive orders, the agencies must conduct a cost-benefit analysis for rules that are "economically significant," which includes rules expected to have an annual effect on the economy of $100 million or more, such as the 2015 Rule.

[10] U.S. EPA and Department of the Army, Economic Analysis of the EPA-Army Clean Water Rule (May 20, 2015) (Docket ID: EPA-HQ-OW-2011-0880-20866), *available at* https://www.regulations.gov/document?D=EPA-HQ-OW-2011-0880-20866.

This final rule to repeal the 2015 Rule and recodify the pre-existing regulations is also considered an economically significant rule as some of the scenarios analyzed in the economic analysis for this final rule exceed $100 million. As such, the agencies have prepared an economic analysis for this final rule for informational purposes. The economic analysis for this final rule fulfills the requirements of Executive Orders 12866 and 13563. The agencies' decision to repeal the 2015 Rule and to recodify the pre-existing regulations is not based on the information in that economic analysis.

As discussed in the preamble to this final rule and the economic analysis for the final rule, the agencies have concluded that significant flaws in the 2015 Rule's economic analysis led to likely overestimates of the costs and benefits associated with the 2015 Rule as well as possible underestimates of the jurisdictional expansion in some states. Overestimates were due in part to not factoring existing state programs into the quantitative analysis. For a more detailed discussion of these issues, see the Economic Analysis for the Final Rule: Definition of "Waters of the United States"—Recodification of Pre-Existing Rules.

See also the agencies' response to comments in Section 1, Section 2, Section 4, Section 7, Section 9, and Section 10.

3.1 General Comments

Multiple commenters suggested that the agencies did not provide a rational basis in the SNPRM to support a finding that the estimate of the change in scope of CWA jurisdiction in the 2015 Rule's economic analysis was inaccurate. Commenters asserted that the agencies had not presented any new or alternative data or reasonable estimates to support an argument that the 2015 Rule had more than a marginal impact on CWA jurisdiction, nor had the agencies explained why the methodology used in the 2015 Rule's economic analysis was flawed or proposed an alternative methodology. Some commenters expressed concern that the agencies had not provided verifiable examples that the 2015 Rule expanded jurisdiction.

Further, some commenters asserted that the change in jurisdiction over "other waters" under the 2015 Rule could not be used to support a finding that the 2015 Rule expanded the overall scope of CWA jurisdiction. Several commenters stated that the agencies had not explained whether a change in jurisdiction over "other waters" is more relevant or should be given more weight than a change in jurisdiction over other categories of waters. Other commenters suggested that the agencies could not rely on arguments of jurisdictional expansion given certain statements made in litigation before the Sixth Circuit and the statement in the SNPRM that "the regulatory changes in the 2015 Rule did not materially impact" the extent of stream and wetland jurisdiction outside of the "other waters" category.

Additionally, a number of commenters criticized the SNPRM's discussion of the impact of the 2015 Rule on CWA jurisdiction. Multiple commenters suggested that the SNPRM misrepresented the statistical changes in jurisdiction under the 2015 Rule. Some commenters suggested that the SNPRM appeared to accept as fact that 100 percent of the jurisdictional determinations (JDs) for streams would become positive under the 2015 Rule, even though this was a conservative assumption in the economic analysis. Commenters also suggested that the SNPRM's discussion of the percentage increases in positive JDs for each state under the 2015 Rule was misleading; as an example, one commenter noted that an estimated 57 percent increase in positive JDs for streams in Wyoming was due to only four streams becoming jurisdictional.

Some commenters generally disagreed that the 2015 Rule expanded CWA jurisdiction or regulated waters not historically subject to jurisdiction. These commenters stated that jurisdiction under the 2015 Rule was narrower than under the pre-existing regulations, particularly given the 2015 Rule's exclusions. Another commenter asserted that the agencies must explain the reversal in their position on the estimates of the 2015 Rule's potential increase in JDs.

Other commenters believed that the 2015 Rule had expanded federal CWA jurisdiction, including extending jurisdiction to cover waters previously regulated solely at the state level. A number of commenters asserted that the scope of federal CWA jurisdictional under the 2015 Rule was too broad and went beyond the traditional limits of the agencies' regulatory authority as reflected in the statute, previous regulations, and case law. Several commenters stated that the 2015 Rule extended federal CWA jurisdiction beyond navigable waters into uplands that hold water on a limited, intermittent basis, including almost every puddle, ditch, and pond. One of these commenters referenced NHD data showing areas where farmland is covered by ephemeral drainages, suggesting that such features would be jurisdictional under the 2015 Rule. One commenter suggested that the agencies improperly relied on Justice Kennedy's *Rapanos* opinion to justify the 2015 Rule's aggregate approach to significant nexus, resulting in virtually all waterbodies being subject to federal regulation. Another commenter similarly suggested that the agencies relied on Justice Kennedy's *Rapanos* concurrence to develop an expansive definition of "waters of the United States."

Moreover, several commenters suggested that the 2015 Rule's definition of "tributary" significantly expanded jurisdiction over features in the arid west as compared to the pre-2015 Rule regulatory regime because the rule could cover ephemeral washes, arroyos, and other arid erosional channels with a bed, bank, and ordinary high water mark, even if such features were separated from downstream waters by miles of discontinuous and dry streambeds; these commenters asserted that such features generally were not subject to jurisdiction under the prior regulatory regime. Several other commenters stated that the 2015 Rule was overbroad by asserting jurisdiction over all waters located within certain distance limits of (a)(5) tributaries, including ephemeral features, drains, ditches, and isolated waters remote from any traditional navigable water. Another commenter stated that the 2015 Rule's distance limitations appear to have expanded the assertion of CWA jurisdiction on and within airports.

Agencies' Response: See Agencies' Summary Response in Section 3.0.

3.2 Jurisdictional Determination Examples

3.2.1 Jurisdictional determination examples provided in the SNPRM

Multiple commenters suggested that the agencies "cherry-picked" certain data to support the argument that the 2015 Rule was overbroad, including the specific JD examples provided in the SNPRM, which the commenters noted represented six out of almost two hundred examples. These commenters argued that such an approach is inconsistent with the standard for reasoned decisionmaking under the Administrative Procedure Act, including the requirement that agencies consider relevant factors. Some commenters suggested that by selecting these specific examples, the agencies ignored that the data, taken as a whole, would suggest that repealing the 2015 Rule would significantly reduce the scope of CWA jurisdiction and deteriorate water quality. One commenter asserted that a sample of six cannot be statistically significant, and another commenter suggested that the agencies could not rely on the JD examples in the case studies to evaluate the change in scope of CWA jurisdiction under the 2015 Rule because the examples had not been randomly selected.

Several commenters challenged the agencies' statements in the SNPRM regarding the JD examples, arguing that these examples failed to show that the 2015 Rule would expand CWA jurisdiction beyond the estimates provided in the 2015 Rule's economic analysis because it was unclear whether the features at issue in the case studies, with one exception, would actually have been found jurisdictional under the 2015 Rule. Specifically, commenters asserted that other than Case Study A (which commenters suggested was consistent with the 2015 Rule), none of the other JD examples involved features that would be categorically jurisdictional under the 2015 Rule. According to the commenters, the remaining examples would require case-specific significant nexus determinations under the 2015 Rule, and the commenters found that the agencies had not provided an adequate explanation or sufficient data to support a conclusion that such features possess the requisite significant nexus according to that rule.

One commenter suggested that determining the jurisdictional status of the features at issue in the case studies is best left to experts such as wetland scientists. The commenter added that the features should be considered jurisdictional if protecting the resources identified in the case studies would further the goals of the CWA.

Agencies' Response: See Agencies' Summary Response in Section 3.0.

3.2.2 Jurisdictional determination examples provided by commenters

One commenter provided an example of ephemeral drainages located near two copper mines that the Army Corps concluded in 2013 were not jurisdictional "waters of the United States" because they lacked a significant nexus with the nearest traditional navigable water. This commenter expressed concern that such features would be found categorically jurisdictional under the 2015 Rule's definition of "tributary" because the commenter suggested there was evidence that each feature had a bed, bank, and ordinary high water mark.

Agencies' Response: See Agencies' Summary Response in Section 3.0.

3.3 CWA Section 305(b) Reports and National Hydrography Data Maps

A number of commenters suggested that the agencies could not rely on the difference in stream miles presented in CWA section 305(b) reports and a map EPA submitted to Congress in 2013 to support an argument related to an increase in CWA jurisdiction under the 2015 Rule. Commenters asserted that the map submitted to Congress represented national hydrography data, not the scope of CWA jurisdiction, such that any difference in estimated stream miles between the map and section 305(b) reports would not necessarily correlate to changes in jurisdiction. Commenters also asserted that differences in stream miles were due to differences in resolution, not expanded jurisdiction. Finally, commenters suggested that the waters featured in a state's section 305(b) report may not reflect "waters of the United States"; for example, Kansas identifies "classified streams" in its 305(b) report, but "classified streams" and "waters of the United States" are not synonymous.

One commenter expressed concern regarding the statement in the SNPRM that the agencies are "not aware of any data that estimates with any reasonable certainty or predictability the exact baseline miles and area of waters covered by the 1986 regulation and preexisting agency practice or data that accurately forecasts of the additional waters subject to jurisdiction under the 2015 Rule." This

commenter argued that the agencies could not repeal the 2015 Rule without this information because they would be replacing the rule with an unknown jurisdictional regime.

> **Agencies' Response: See Agencies' Summary Response in Section 3.0. The agencies disagree with the suggestion that they cannot repeal the 2015 Rule without exact information about the waters covered under the pre-2015 Rule regulations and the waters subject to jurisdiction under the 2015 Rule. As explained in the final rule preamble, the agencies find, among other flaws, that the 2015 Rule exceeded the agencies' statutory authority. Because the agencies may not exceed the authority of the statutes they are charged with administering, *see* 5 U.S.C. § 706(2)(C), the agencies are repealing the 2015 Rule and codifying the prior regulations, thereby reinstating nationwide a longstanding regulatory framework that is familiar to and better understood by the agencies, states, tribes, local governments, regulated entities, and the public while the agencies consider public comments on the proposed revised definition of "waters of the United States." *See* 84 FR 4154 (Feb. 14, 2019). The agencies note that they are not aware of any map or dataset that accurately or with any precision portrays the scope of CWA jurisdiction at any point in the history of this complex regulatory program.[11]**

3.4 Miscellaneous Comments

A few commenters criticized the SNPRM's discussion of Kansas's comment on the 2014 proposed rule, including because the commenters believed the agencies mischaracterized the content of Kansas's letter and had adequately responded to Kansas's comment in the record for the 2015 Rule. Another commenter asserted that states' claims that the 2015 Rule would result in a 131 percent increase in overall CWA jurisdiction and a 460 percent increase in the number of waters found jurisdictional in Kansas are not verifiable.

Commenters also criticized the SNPRM's discussion of the potential change in scope of jurisdiction over ephemeral waters. These commenters suggested that the agencies failed to consider their responses in the response to comments document for the 2015 Rule regarding coverage of ephemeral waters and asserted that by failing to consider and discuss the rationale in the 2015 Rule for covering ephemeral

[11] It is the agencies' longstanding position that "no national or statewide maps have been prepared by any agency, including EPA, showing the scope of waters subject to the Clean Water Act . . . To develop maps of jurisdictional waters requires site-specific knowledge of the physical features of water bodies, and *these data are not available*[.]" Letter from Nancy Stoner, Acting Assistant Administrator, EPA Office of Water, to Lamar Smith, Chairman, Committee on Science, Space, and Technology, U.S. House of Representatives (July 28, 2014) (emphasis added), *available at* https://web.archive.org/web/20180919173837/https://science.house.gov/sites/republicans.science.house.gov/files/documents/epa_releases_maps_letter.pdf). *See also* Letter from Nancy Stoner, Deputy Assistant Administrator, EPA Office of Water, to Lamar Smith, Chairman, Committee on Science, Space, and Technology, U.S. House of Representatives (August 6, 2014), *available at* https://web.archive.org/web/20180919173837/https://science.house.gov/sites/republicans.science.house.gov/files/documents/epa_releases_maps_letter.pdf) (collectively "Nancy Stoner letters"); U.S. EPA, *Mapping the Truth*, THE EPA BLOG (Aug. 28, 2014), https://blog.epa.gov/2014/08/28/mapping-the-truth/ ("While these [U.S. Geological Survey and Fish & Wildlife Service] maps are useful tools for water resource managers, they cannot be used to determine Clean Water Act jurisdiction – now or ever.") In response to references made in the SNPRM for this final rule regarding differences in stream miles reported in state CWA section 305(b) reports and those depicted on USGS National Hydrography Dataset (NHD) maps, some commenters referenced the Nancy Stoner letters to stress that comparing changes in CWA jurisdiction based on existing maps is not feasible. The agencies agree with these comments and are not relying on comparisons of 305(b)-reported waters and NHD-mapped waters to support this final rule.

streams, the agencies had failed to consider an important aspect of the problem consistent with the Administrative Procedure Act.

One commenter asserted that the agencies have attempted to expand their federal CWA jurisdiction through guidance and permit decisions.

Agencies' Response: See Agencies' Summary Response in Section 3.0.

Section 4 LEGAL CONCERNS WITH THE 2015 RULE

4.0 Overview of Comments on Legal Issues

This section contains summaries of comments on legal issues concerning the 2015 Rule, including whether the 2015 Rule is consistent with the CWA and relevant Supreme Court precedent. The agencies' responses are provided below each comment summary. Comments on the rulemaking process for the proposed rule, including whether this rulemaking complies with the Administrative Procedure Act (APA), are summarized and addressed in Section 10.

The agencies received many comments discussing the legality of the 2015 Rule, including whether the 2015 Rule is consistent with the CWA, the U.S. Constitution, and Supreme Court precedent.

Some commenters expressed the view that the 2015 Rule is inconsistent with the CWA, congressional intent, and Supreme Court precedent. Several commenters also argued that the 2015 Rule exceeds Congress' authority under the Commerce Clause. Multiple commenters cited to court decisions staying implementation of the 2015 Rule as support for the argument that the 2015 Rule is contrary to the CWA, not a logical outgrowth of the proposal, arbitrary and capricious, and not supported by record evidence. Several commenters asked the agencies to proceed with repealing the 2015 Rule rather than to wait for a court to vacate the rule. A few commenters referenced legal concerns raised by the Corps before the 2015 Rule was finalized, including the concern that the rule would be unlikely to survive judicial review and is inconsistent with the Supreme Court's decisions in *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs* (*SWANCC*), 531 U.S. 159 (2001), and *Rapanos v. United States and Carabell v. United States*, 547 U.S. 715 (2006). Some commenters claimed that the 2015 Rule is unconstitutionally vague and implicates serious due process questions.

Other commenters asserted that the 2015 Rule is consistent with the CWA and Supreme Court precedent, including *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985), *SWANCC*, and Justice Kennedy's concurring opinion in *Rapanos*. Many of these commenters suggested that the 2015 Rule is supported by science, the agencies' expertise, and the law and does not raise constitutional concerns. Some commenters stated that the 2015 Rule is consistent with the agencies' 2003 joint memorandum providing clarifying guidance regarding the Supreme Court's decision in *SWANCC*[12] and the agencies' 2008 post-*Rapanos* guidance.[13]

[12] *See* Joint Memorandum, 68 FR 1991, 1995 (Jan. 15, 2003), *available at* https://www.epa.gov/sites/production/files/2016-04/documents/swancc_guidance_jan_03.pdf.

[13] U.S. EPA & U.S. Army Corps of Engineers, Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States & Carabell v. United States* (Dec. 2, 2008), *available at* https://www.epa.gov/sites/production/files/2016-02/documents/cwa_jurisdiction_following_rapanos120208.pdf.

In addition, multiple commenters suggested that the agencies' rationale for this rulemaking to repeal the 2015 Rule and restore the pre-existing regulations rests upon a selective and biased reading of the principal Supreme Court cases addressing jurisdiction under the CWA. Many of these commenters also suggested that the agencies failed to adequately explain or provide sufficient support for the legal concerns discussed in the proposal.

> **Agencies' Response: As explained in the preamble to the final rule, the agencies are repealing the 2015 Rule for four primary reasons. First, the agencies conclude that the 2015 Rule did not implement the legal limits on the scope of the agencies' authority under the CWA as intended by Congress and reflected in Supreme Court cases, including Justice Kennedy's articulation of the significant nexus test in *Rapanos*. Second, the agencies conclude that in promulgating the 2015 Rule the agencies failed to adequately consider and accord due weight to the policy of the Congress in CWA section 101(b) to "recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution" and "to plan the development and use . . . of land and water resources." 33 U.S.C. 1251(b). Third, the agencies repeal the 2015 Rule to avoid interpretations of the CWA that push the envelope of their constitutional and statutory authority absent a clear statement from Congress authorizing the encroachment of federal jurisdiction over traditional State land-use planning authority. Lastly, the agencies conclude that the 2015 Rule's distance-based limitations suffered from certain procedural errors and a lack of adequate record support. The agencies find that these reasons, collectively and individually, warrant repealing the 2015 Rule. The agencies find that it is appropriate to restore the pre-existing regulations while the agencies consider public comments on the proposed revised definition of "waters of the United States." *See* 84 FR 4154 (Feb. 14, 2019). Given the longstanding nature of the pre-2015 Rule regulatory framework, its track record of implementation and related case law, and its familiarity to regulators, the regulated community and other stakeholders, the agencies conclude that this final rule to codify the prior regulations will provide greater regulatory certainty and nationwide consistency pending any final action on that separate rulemaking.**
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> **For the agencies' response to comments on specific legal issues related to the 2015 Rule, see the remainder of Section 4. For the agencies' response to comments on APA issues such as whether the agencies provided a reasoned explanation for the proposed rule, see Section 10.**

4.1 2015 Rule's Significant Nexus Standard

4.1.1 General comments

A number of commenters asserted that the 2015 Rule's significant nexus standard is not consistent with the significant nexus test articulated in Justice Kennedy's concurring opinion in *Rapanos*. Commenters stated that the 2015 Rule's significant nexus standard is too broad and captures waters that Justice Kennedy suggested would fall outside the scope of federal CWA jurisdiction, such as features that are remote from navigable waters and carry "only minor water volumes" toward navigable waters, citing *Rapanos*, 547 U.S. at 779–82 (Kennedy, J., concurring). Some of these commenters suggested that the 2015 Rule expands federal jurisdiction to cover waters that do not actually possess a significant nexus to traditional navigable waters. One commenter asserted generally that the 2015 Rule's expansion in federal CWA jurisdiction based on the rule's significant nexus standard did not respect constitutional or congressional limits.

Further, some commenters suggested that the 2015 Rule inappropriately extended the significant nexus test beyond wetlands, noting that Justice Kennedy articulated the significant nexus test in addressing the jurisdictional status of wetlands, not waters. As support for this argument, some commenters cited to *Rapanos*, 547 U.S. at 780 (Kennedy, J., concurring), and *S.F. Baykeeper v. Cargill Salt Division*, 481 F.3d 700, 707 (9th Cir. 2007). A few commenters contended that the 2015 Rule's categorical approach to a finding of significant nexus for certain features is inconsistent with Justice Kennedy's statement that the Corps must establish a significant nexus on a "case-by-case basis."

Other commenters asserted that the 2015 Rule is consistent with Justice Kennedy's significant nexus standard. Some of these commenters argued that Supreme Court precedent and the Connectivity Report provide support for the 2015 Rule's categorical approach to a finding of significant nexus for some waters, citing cases including *Rapanos*, 547 U.S. at 780–81 (Kennedy, J., concurring), and *Riverside Bayview*, 474 U.S. at 135 n.9. One commenter stated that Justice Kennedy's *Rapanos* opinion calls for an inquiry into the ecological functions performed by the kinds of waters being evaluated and asserted that the agencies properly applied this standard to case-specific waters under the 2015 Rule.

Some commenters suggested that the agencies did not provide adequate support for departing from the 2015 Rule's interpretation of significant nexus. A few of these commenters asserted that the agencies also failed to assess whether the 2015 Rule or the pre-existing regulatory regime is more consistent with Justice Kennedy's significant nexus standard. Another commenter asserted that the SNPRM mischaracterized Justice Kennedy's significant nexus standard as "a test intended to limit federal jurisdiction" instead of one to "avoid unreasonable applications" of the CWA.

> **<u>Agencies' Response</u>: As discussed in Section III.C.1 of the preamble to the final rule, the agencies now conclude that the 2015 Rule exceeded the agencies' authority under the CWA by adopting a definition of "significant nexus" that was inconsistent with the limiting nature of the significant nexus standard articulated in Justice Kennedy's concurring opinion in *Rapanos*, resulting in a definition of "waters of the United States" that exceeded the scope of federal jurisdiction under the Act. The SNPRM identified multiple issues with the 2015 Rule's significant nexus standard in support of this conclusion, including the breadth of the agencies' interpretation of "similarly situated lands in the region" in the 2015 Rule as compared to the 2008 *Rapanos* Guidance, as well as the 2015 Rule's categorical assertion of jurisdiction over certain features that the agencies noted were "at a minimum" in significant tension with the limits on federal CWA jurisdiction reflected in Justice Kennedy's opinion. 83 FR 32240–42. The agencies thus disagree with commenters' suggestions that the proposal did not provide adequate support for the agencies' concerns with the 2015 Rule's significant nexus standard or that the agencies failed to consider the differences between the 2015 Rule and the prior regulatory regime. The agencies also disagree that the SNPRM mischaracterized Justice Kennedy's significant nexus standard. The agencies maintain that Justice Kennedy articulated the significant nexus standard to limit federal jurisdiction under the CWA to avoid "problematic" or "unreasonable" applications of the statute arising from the breadth of the Corps' then-existing standard for tributaries, as evidenced by the discussion in his concurrence. *See Rapanos*, 547 U.S. at 782–83 (Kennedy, J., concurring).**
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> **See also the agencies' response to comments in Section 6; Final Rule Preamble Section III.C.1.**

4.1.2 Reliance on Connectivity Report

A number of commenters expressed the view that the agencies relied too heavily on scientific principles in interpreting "significant nexus" in the 2015 Rule and did not adequately consider the legal constraints on federal jurisdiction inherent in the CWA's statutory text and Supreme Court precedent. Commenters noted that the Connectivity Report did not provide the agencies with any "bright lines" as to where federal CWA jurisdiction begins and ends and did not provide any guidance on how to apply Justice Kennedy's significant nexus test to a waterbody. One commenter suggested that the 2015 Rule's science-based definition of "significant nexus" could hamper the agencies' ability to resolve circumstances where application of the rule conflicts with another federal law.

Other commenters asserted that the agencies appropriately relied on the Connectivity Report and the Science Advisory Board's review of its findings in developing the 2015 Rule's significant nexus standard. Several commenters argued that the 2015 Rule's reliance on the Connectivity Report was particularly appropriate given Justice Kennedy's reference to the statutory objective in CWA section 101(a) in defining significant nexus, *see Rapanos*, 547 U.S. at 779–81 (Kennedy, J., concurring), and the complex hydrological component of Justice Kennedy's significant nexus test. Another commenter asserted that scientific findings can help the agencies clarify the statute, congressional intent, and case law.

Additionally, some commenters disagreed with the SNPRM's characterization of the agencies' reliance on the Connectivity Report in developing the 2015 Rule, noting that the agencies relied on statutory language, case law, and the agencies' expertise—not just the Connectivity Report—to set jurisdictional lines under the 2015 Rule. A few of these commenters asserted that the agencies failed to explain why the 2015 Rule's reliance on science was unlawful.

> **<u>Agencies' Response</u>: The agencies agree with those commenters who suggested that in developing the 2015 Rule, including the rule's definition of "significant nexus," the agencies placed too much emphasis on the information and conclusions of the Connectivity Report at the expense of the limits on federal jurisdiction reflected in the CWA's statutory text and the decisions of the Supreme Court. In particular, the agencies find that the 2015 Rule's interpretation of the phrase "similarly situated lands in the region," which was based in part on the conclusions of the Connectivity Report, significantly expanded the scope of aggregation that determined jurisdiction in a significant nexus analysis. As explained in Section III.C.1 of the preamble to the final rule, the agencies find that the application of an overly broad significant nexus standard in the 2015 Rule resulted in a regulatory definition of "waters of the United States" that did not comport with Justice Kennedy's understanding of the limits of federal CWA jurisdiction and exceeded the agencies' statutory authority.**
>
> **While the agencies agree that science can inform the agencies' interpretation of the definition of "waters of the United States," the agencies maintain that science cannot be dispositive in interpreting the statutory reach of "waters of the United States." The definition of "waters of the United States" must be grounded in a legal analysis of the limits on CWA jurisdiction that Congress intended by use of the term "navigable waters," and a faithful understanding and application of the limits expressed in Supreme Court opinions interpreting that term.**
>
> **The agencies disagree with the suggestion that the SNPRM did not adequately explain the agencies' concerns with the 2015 Rule's reliance on science. *See* 83 FR 32227, 32240–42 (July 12, 2018).**

See also the agencies' response to comments in Section 6.

4.1.3 "Similarly situated lands in the region"

Multiple commenters expressed concern regarding the 2015 Rule's interpretation of the phrase "similarly situated lands in the region." Some commenters stated that the 2015 Rule's approach to "similarly situated" is inconsistent with Justice Kennedy's opinion because Justice Kennedy addressed aggregation of *wetlands*, not streams, in assessing significant nexus. Another commenter stated that Justice Kennedy expressly rejected the idea of aggregating streams. Further, some commenters suggested that the 2015 Rule's approach of aggregating the contributions of all streams or all wetlands within an entire watershed impermissibly lowers the bar for establishing a significant nexus, particularly because Justice Kennedy stated that the Corps must establish a significant nexus on a "case-by-case basis."

A few commenters stated that the 2015 Rule's approach to aggregating "similarly situated" waters is unsupported by science and contrary to the objective of the CWA. One commenter stated that the 2015 Rule's approach to aggregating similarly situated waters is inappropriate because Congress did not envision the CWA applying to any land feature that could possibly hold water. Commenters also argued that the 2015 Rule's interpretation of "in the region" as encompassing an entire watershed relied on the scientific literature without regard for the limits on federal jurisdiction reflected in the CWA and relevant case law.

Other commenters asserted that the 2015 Rule's interpretation of "similarly situated lands in the region" is consistent with Justice Kennedy's significant nexus standard and is supported by the 2015 Rule's administrative and scientific record. Commenters stated that both the 2015 Rule and Justice Kennedy's *Rapanos* opinion allow the agencies to consider the cumulative impact of geographically dispersed waters in evaluating significant nexus. One commenter suggested that the 2015 Rule's approach to "similarly situated" is consistent with Justice Kennedy's significant nexus standard because the agencies considered how waters aggregated at a watershed scale have a connection to and impact downstream traditional navigable waters. Another commenter asserted that there is no reason to interpret "similarly situated" as geographically limited and noted that the 2015 Rule's watershed approach aligns with Justice Kennedy's remarks on broad geographic water quality effects.

With respect to the 2015 Rule's (a)(7) and (a)(8) categories of waters subject to case-specific significant nexus determinations, one commenter stated that the 2015 Rule applies "in the region" with specificity and limits aggregation to only those "similarly situated" waters with similar form and ecological function, and only those that are located within a specific watershed that drains to the nearest primary water.[14] Another commenter explained that the 2015 Rule's distance-based thresholds placed limits on the extent of waters that can be found jurisdictional based on a case-specific significant nexus determination and that these distance limitations address legal or practical concerns that the 2015 Rule's interpretation of "similarly situated" might be overly expansive.

In addition, several commenters expressed support for the 2015 Rule's approach to "similarly situated" as compared to the approach taken in the agencies' 2008 *Rapanos* Guidance. According to these commenters, the 2008 *Rapanos* Guidance unlawfully narrows the significant nexus test because it does not provide for consideration of the cumulative impact of similarly situated waters in determining

[14] Under the 2015 Rule, a ''primary'' water is a category (1) through (3) ''jurisdictional by rule'' water.

whether such waters are jurisdictional. One commenter explained that the 2008 *Rapanos* Guidance defines "in the region" to mean "immediate proximity" and thus fails to recognize waters within a watershed that collectively influence the integrity of downstream traditional navigable waters. This commenter suggested that the 2015 Rule's watershed-based approach to "similarly situated lands in the region" is the only way to provide the regional analysis required by Justice Kennedy.

Finally, some commenters contended that the agencies failed to explain in the SNPRM how the 2015 Rule's approach to "similarly situated" is inconsistent with Justice Kennedy's *Rapanos* concurrence. One commenter suggested that the agencies' concerns about the 2015 Rule's interpretation of "similarly situated" cannot serve as a rational basis for this rulemaking because the agencies did not sufficiently address this issue in the SNPRM.

Agencies' Response: Justice Kennedy articulated the significant nexus standard to limit federal jurisdiction under the CWA to avoid "problematic" or "unreasonable" applications of the statute. As explained in Section III.C of the preamble to the final rule, the 2015 Rule's interpretation of the phrase "similarly situated lands in the region" to potentially encompass all wetlands or all streams in a watershed that drains to the nearest primary water ultimately expanded the potential jurisdictional purview of the federal government to include the vast majority of the nation's waters. The agencies now conclude that such a result was inconsistent with the application of Justice Kennedy's significant nexus test as a limiting standard.

The agencies disagree with the suggestion that there is no reason to interpret "similarly situated" as geographically limited. Justice Kennedy articulated the significant nexus standard in *Rapanos* to limit federal jurisdiction under the CWA to avoid an "unreasonable" assertion of jurisdiction arising from the breadth of the Corps' then-existing standard for tributaries. As evidenced by the discussion in his concurrence, Justice Kennedy intended his significant nexus standard to be a limiting test, cabining the potential overreach of federal CWA jurisdiction. As noted above, the agencies now conclude that interpreting "similarly situated lands in the region" to potentially encompass all wetlands or all streams in a watershed that drains to the nearest primary water was inconsistent with the application of Justice Kennedy's significant nexus test as a limiting standard.

The agencies also disagree with the suggestion that the SNPRM did not adequately explain the agencies' concern that the 2015 Rule's interpretation of "similarly situated" is inconsistent with Justice Kennedy's concurrence in *Rapanos*. *See*, *e.g.*, 83 FR 32240 ("[I]t is reasonable to presume that . . . the Justice did not mean 'similarly situated' to be synonymous with 'all' waters in a region."); *see also id*. ("[U]nder the agencies' 2008 guidance, 'where evaluating significant nexus for an adjacent wetland, the agencies will consider the flow characteristics and functions performed by the tributary to which the wetland is adjacent along with the functions performed by the wetland and all other wetlands adjacent to that tributary. *This approach reflects the agencies' interpretation of Justice Kennedy's term 'similarly situated' to include all wetlands adjacent to the same tributary*. . . . 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).' *The 2015 Rule departed from this interpretation of 'similarly situated' wetlands in a 'region,'* including applying it to other waters, not only wetlands, that were not already categorically jurisdictional as tributaries or adjacent waters.") (emphasis added) (internal citations omitted). The agencies also solicited comment in the SNPRM on "whether the agencies'

justification for the 2015 Rule's interpretation of 'similarly situated' with reference to an entire watershed for purposes of waters not categorically jurisdictional relied on the scientific literature without due regard for the restraints imposed by the statute and case law, and whether this interpretation of Justice Kennedy's significant nexus standard is a reason, at a minimum because of the legal risk it creates, to repeal the 2015 Rule." *Id*.

See also the agencies' response to comments in Section 4.1.1, Section 4.1.2, and Section 6; Final Rule Preamble Section III.C.1.

4.1.4 Biological functions

Some commenters argued that the 2015 Rule's reliance on biological functions such as life cycle dependent aquatic habitat to support a finding of significant nexus is inconsistent with the Supreme Court's holding in *SWANCC*. Commenters noted that in *SWANCC*, the Court rejected the Corps' assertion of jurisdiction over waters based on their use as habitat for migratory birds, finding that this application of the CWA raised "significant constitutional questions." These commenters asserted that following *SWANCC*, the agencies cannot rely on biological factors alone to support a finding of CWA jurisdiction. A few commenters suggested that the 2015 Rule essentially revives the Migratory Bird Rule because it allows the agencies to assert CWA jurisdiction based solely on biological factors. Another commenter suggested that the agencies' reliance on biological functions alone to establish a significant nexus fails to give sufficient meaning to the word "navigable." Further, some commenters referenced the U.S. District Court for the Southern District of Georgia's finding that the 2015 Rule "will likely fail for the same reason that the rule in *SWANCC* failed" because it "asserts that, standing alone, a significant 'biological effect' – including an effect on 'life cycle dependent aquatic habitat[s]' – would place a water within the CWA's jurisdiction." *Georgia v. Pruitt*, 326 F. Supp. 3d 1356, 1365 (S.D. Ga. 2018).

Other commenters disagreed with the suggestion that the use of biological functions is inconsistent with Supreme Court precedent. These commenters argued that the Supreme Court's ruling in *SWANCC* was limited to the Migratory Bird Rule and did not invalidate other potential grounds for asserting CWA jurisdiction. Some commenters noted Justice Kennedy found that "[t]he required nexus must be assessed in terms of the statute's goals and purposes" and that this includes biological integrity, quoting *Rapanos*, 547 US at 779 (Kennedy, J., concurring). In addition, some commenters asserted that the agencies misinterpreted Justice Kennedy's statement that "environmental concerns provide no reason to disregard limits in the statutory text," *id*. at 778, and argued that this statement does not stand for the proposition that the agencies cannot rely on biological functions alone to make a finding of significant nexus. Rather, some commenters noted that Justice Kennedy found that an "ecological judgment about the relationship between waters and their adjacent wetlands provides an adequate basis for a legal judgment that adjacent wetlands may be defined as waters of the United States," *see id.* at 766–67 (Kennedy, J., concurring) (quoting *SWANCC*, 474 U.S. at 134).

A few commenters suggested that the agencies cannot repeal the 2015 Rule on the basis that it improperly relies on consideration of biological functions because the agencies' proposed replacement—the prior regulatory regime—also allows for consideration of biological functions in determining significant nexus. Further, some commenters noted that the preamble to the 2015 Rule explicitly provided that non-aquatic species and species such as non-resident migratory birds do not demonstrate a life cycle dependency on the identified aquatic resources and are not evidence of biological connectivity for purposes of the 2015 Rule.

<u>Agencies' Response</u>: The agencies recognize the importance of the objective in CWA section 101(a), including the objective to "restore and maintain the . . . biological integrity of the Nation's waters." The agencies also recognize that in setting the jurisdictional limits of the Act, the agencies must remain within the confines of the Act's text and the Supreme Court's interpretations of the outer bounds of jurisdiction.

In *Riverside Bayview*, the Supreme Court found that the agencies may regulate wetlands adjacent to navigable-in-fact waters given the Corps' "ecological judgment" about the relationship between such waters. 474 U.S. at 139. The Court later held in *SWANCC* that the agencies could not assert federal jurisdiction over the isolated ponds and mudflats at issue in that case based on their use by migratory birds. 531 U.S. at 174. The *SWANCC* Court also concluded that "the text of the statute will not allow" the Corps to regulate "ponds that are not adjacent to open water." *Id*. at 168.

Under the 2015 Rule, the agencies could assert jurisdiction when, for example, a water significantly affects "aquatic habitats through wind- and animal-mediated dispersal" of "[a]nimals and other organisms." 80 FR 37054, 37072 (June 29, 2015). The agencies find that relying on such factors as an independent basis for asserting jurisdiction is inconsistent with the Supreme Court's holding in *SWANCC*. As the *SWANCC* Court held that the use of isolated ponds by migratory birds themselves was an insufficient basis upon which to establish jurisdiction, the agencies conclude that the seeds and critters clinging to their feathers cannot constitute a "significant nexus." *See also Rapanos*, 547 U.S. at 741–42 (Scalia, J., plurality) ("*SWANCC* found such ecological consideration irrelevant to the question whether physically isolated waters come within the Corps' jurisdiction.").

This final rule is intended to be the first step in a comprehensive, two-step rulemaking process. Yet, regardless of whether the agencies finalize a new definition, the agencies conclude that restoring the pre-existing regulations is appropriate because, as implemented, those regulations adhere more closely than the 2015 Rule to the jurisdictional limits reflected in the statute and case law. In the agencies' proposed revised definition of "waters of the United States," the agencies are reconsidering the proper scope of federal CWA jurisdiction and seek to establish a definition that better effectuates the language, structure, and purposes of the CWA.

See also the agencies' response to comments in Section 4.1.1, Section 4.1.2, Section 4.1.3, Section 4.6.1, and Section 6; Final Rule Preamble Section III.C.

4.1.5 Miscellaneous

Several commenters criticized the 2015 Rule as misapplying Justice Kennedy's significant nexus test because the 2015 Rule "interprets the CWA to cover those waters that require protection in order to restore and maintain the chemical, physical, or biological integrity" of downstream waters, 80 FR 37055, whereas Justice Kennedy (relying on the statutory objective in CWA section 101(a)) defined significant nexus in terms of the "chemical, physical, and biological integrity" of downstream waters. *See Rapanos*, 547 U.S. at 779–80 (Kennedy, J., concurring). These commenters stated that the agencies' substitution of the conjunctive "and" for the disjunctive "or" resulted in a broader test for determining CWA jurisdiction than that articulated by Justice Kennedy. One commenter asserted that the 2015 Rule's significant nexus standard failed to give meaning to the term "significant." A few other commenters

suggested that the 2015 Rule's reliance on Justice Kennedy's significant nexus test is improper because the phrase "significant nexus" does not stem from the CWA, the Act's legislative history, or the agencies' regulations.

> **Agencies' Response: As explained in Section III.C.1 of the preamble to the final rule, the agencies find that the 2015 Rule adopted an inappropriately expansive interpretation of the significant nexus standard, resulting in a regulatory definition of "waters of the United States" that did not comport with Justice Kennedy's understanding of the limits of federal CWA jurisdiction and exceeded the agencies' statutory authority. Further, the agencies agree with commenters that in developing the 2015 Rule's significant nexus standard, the agencies focused too heavily on the *nexus* component of the significant nexus test to define the scope of CWA jurisdiction without appropriate regard to the *significance* of that nexus.**
>
> **In response to comments questioning the 2015 Rule's reliance on Justice Kennedy's *Rapanos* opinion, the agencies note that they are not taking a position in this rulemaking regarding whether Justice Kennedy's concurring opinion in *Rapanos* is or should be the controlling authority regarding the scope of federal jurisdiction under the CWA. The agencies used Justice Kennedy's significant nexus standard as the touchstone for the 2015 Rule, and for the reasons described in the preamble to this final rule, the agencies are repealing the 2015 Rule because it exceeded the scope of authority described in that standard. The agencies requested comment regarding whether Justice Kennedy's concurring opinion is or should be controlling as part of the rulemaking on a proposed revised definition of "waters of the United States." *See* 84 FR 4154, 4167, 4177 (Feb. 14, 2019). The agencies are evaluating comments submitted in response to that request and need not take positions on those questions to support or resolve the issues raised in this rulemaking.**

4.2 2015 Rule's Definition of "Tributary"

4.2.1 General comments

A number of commenters expressed concern with the agencies' categorical assertion of jurisdiction over features meeting the 2015 Rule's definition of "tributary." Commenters suggested that the 2015 Rule's "tributary" definition was too broad, allowing the agencies to assert *per se* jurisdiction over features with remote proximity and tenuous connections to traditional navigable waters, contrary to the limits of CWA authority recognized in Justice Kennedy's *Rapanos* opinion and other Supreme Court precedent. One commenter stated that the 2015 Rule exceeds the Commerce Clause because the commenter believed the rule's "tributary" definition could cover most of the nation's land area. Another commenter suggested that the 2015 Rule's categorical assertion of jurisdiction over features meeting the "tributary" definition raises due process concerns since the commenter believed that the agencies would not conduct further site-specific analyses in support of such categorical assertions of jurisdiction.

Multiple commenters contended that the 2015 Rule's definition of "tributary" swept in usually dry channels that may carry only the "[t]he merest trickle" to navigable waters, which the commenters viewed as contrary to congressional intent and inconsistent with jurisdictional limitations articulated by the Supreme Court in *SWANCC* and *Rapanos*. Some commenters suggested that this approach was especially in tension with Justice Kennedy's finding in *Rapanos* that a "[m]ere hydrologic connection should not suffice in all cases." 547 U.S. at 784 (Kennedy, J., concurring). Commenters also asserted that the 2015 Rule improperly relied on the assumption that any tributary, regardless of size or flow, is

important to maintaining the chemical, physical, or biological integrity of traditional navigable waters. Some commenters noted that the 2015 Rule's "tributary" definition encompasses features lacking the "ordinary presence of water" required by the *Rapanos* plurality. *Id*. at 734 (Scalia, J., plurality).

Other commenters found that the agencies properly relied on the 2015 Rule's scientific record to conclude that features meeting the rule's definition of "tributary" possess a significant nexus to downstream waters. One commenter objected to the SNPRM's suggestion that the 2015 Rule's definition of "tributary" failed to adequately focus on the volume, duration, and frequency of flow, noting that both the preamble and the text of the 2015 Rule describe the definition of "tributary" as relying on factors related to the volume, duration, and frequency of flow. Additionally, several commenters criticized the SNPRM as mischaracterizing the 2015 Rule and the rule's approach to tributaries specifically, asserting that the agencies improperly ignored the rule's limitations.

> **<u>Agencies' Response</u>: The 2015 Rule defined "tributary" as a water that contributes flow, either directly or through another water, to a primary water and that is characterized by the presence of the "physical indicators" of a bed and banks and an ordinary high water mark. In developing the 2015 Rule's "tributary" definition, the agencies coupled the 2015 Rule's expansive definition of "significant nexus" with the findings of the Connectivity Report and concluded that all features satisfying the "tributary" definition could be considered "similarly situated" and thus assessed together in a significant nexus analysis. Under this aggregate approach, the agencies found that all (a)(5) "tributaries" could be considered categorically jurisdictional because any covered tributary, either alone or when considered in combination with other covered tributaries in the watershed, had a significant nexus to primary waters. 80 FR 37058.**
>
> **For the reasons discussed in Section III.C.1.b.ii of the preamble to the final rule, the agencies now conclude that the 2015 Rule's "tributary" definition exceeded the jurisdictional limits envisioned in Justice Kennedy's significant nexus standard. The agencies' concerns regarding the breadth of the 2015 Rule's "tributary" definition are echoed in the U.S. District Court for the Southern District of Georgia's remand order. *Georgia v. Wheeler*, No. 2:15-cv-00079 (S.D. Ga. Aug. 21, 2019). There, the court found that the categorical assertion of jurisdiction over features meeting the 2015 Rule's "tributary" standard "is an impermissible construction of the CWA," as it could cover waters that lack the requisite significant nexus, particularly in the Arid West. *Id.* slip. op. at 36–42.**

4.2.2 Ordinary high water mark

Many commenters criticized the agencies' use of the ordinary high water mark (OHWM) in the 2015 Rule's "tributary" definition. Some of these commenters asserted that the OHWM is an unreliable indicator that an upstream water possesses a significant nexus. As support, some commenters cited to Justice Kennedy's statements in *Rapanos* that the OHWM was too uncertain and attenuated to serve as the "determinative measure" for whether waters adjacent to nonnavigable tributaries possess a significant nexus to downstream navigable waters. A few commenters also criticized inclusion of the OHWM in the 2015 Rule's definition of "tributary" because the *Rapanos* plurality found that this factor could impermissibly extend jurisdiction, citing *Rapanos*, 547 U.S. at 725 (Scalia, J., plurality).

Some commenters argued that the OHWM may be unrelated to flow in arid regions, citing to a 2006 Army Corps report, "Distribution of Ordinary High Water Mark (OHWM) indicators and their reliability in

identifying the limits of 'Waters of the United States' in arid Southwestern channels", in which the Corps found "no direct correlation" between OHWM indicators and future water flow in arid regions. Commenters also asserted that many of the OHWM physical indicators can occur wherever land may have water flowing across it, regardless of frequency or duration.

Additionally, commenters stated that the agencies' use of the OHWM in the 2015 Rule is problematic because features used to define OHWM—such as "changes in the character of soil" and "presence of litter and debris"—are ambiguous and could be subjectively or arbitrarily applied, leading to significant regulatory uncertainty. Commenters expressed a similar concern regarding the 2015 Rule's grant of authority to EPA and Corps staff to rely on whatever "other . . . means" they deem "appropriate" in deciding whether an OHWM is present. These commenters suggested that such a loose standard would lead to inconsistent jurisdictional determinations and deprives regulated entities of their right to fair notice of unlawful conduct pursuant to the Fifth Amendment of the U.S. Constitution.

Other commenters asserted that the agencies' concerns in the SNPRM regarding the breadth of the 2015 Rule's "tributary" definition ignore that the 2015 Rule requires both an OHWM and a bed and banks, which the commenters stated is an additional indicator of flow.

> **Agencies' Response: The agencies acknowledge the concerns raised by commenters about the use of physical indicators as central components of the 2015 Rule's "tributary" definition. With this final rule, the agencies are restoring the more familiar pre-2015 regulatory regime, as implemented, and are considering a revised definition of "waters of the United States" as part of a separate rulemaking. *See* 84 FR 4154.**
>
> **See the agencies' response to comments in Section 4.2.1; Final Rule Preamble Section III.C.1.b.ii.**

4.3 2015 Rule's Definition of "Adjacent" Waters

Multiple commenters asserted that the 2015 Rule's approach to "adjacent" waters is inconsistent with Supreme Court case law. In particular, commenters argued that the 2015 Rule's definition of "adjacent" waters could cover waters adjacent to remote tributaries, which the commenters viewed as the same type of waters that Justice Kennedy suggested would fall outside the scope of CWA jurisdiction in *Rapanos*, particularly in light of Justice Kennedy's criticism of the OHWM as too uncertain to be the "determinative measure" for identifying adjacent wetlands as categorically jurisdictional. Commenters stated that the 2015 Rule's definition of "adjacent" could cover isolated or remote features that might link to navigable waters, if at all, only during once-in-a-century rainstorms and argued that such features do not possess a significant nexus to navigable waters.

Some commenters suggested that the 2015 Rule's coverage of "adjacent" waters based on their location in the floodplain and distance from other jurisdictional waters ignores the Supreme Court's finding in *Riverside Bayview* that adjacent wetlands are those wetlands that are "inseparably bound up with the 'waters of the United States' and not meaningfully distinguishable from them," citing 474 U.S. at 134–35 & n.9. Similarly, commenters asserted that the 2015 Rule's "adjacent" waters definition conflicts with the *Rapanos* plurality's holding that "only those wetlands with a continuous surface connection to bodies that are 'waters of the United States' in their own right, so that there is no clear demarcation between the two, are 'adjacent' to such waters and covered by the Act," as well as the plurality's finding that "[w]etlands with only an intermittent, physically remote hydrologic connection to 'waters of the

United States' do not implicate the boundary-drawing problem of *Riverside Bayview*, and thus lack the necessary connection to covered waters," *see* 547 U.S. at 742 (Scalia, J., plurality).

Other commenters claimed that the distance limitations used in the "adjacent" waters definition would allow for coverage of isolated waters and thus conflicts with the Court's opinion in *SWANCC*, where the Court declined to extend CWA jurisdiction to certain nonnavigable, isolated, intrastate ponds and mudflats. One commenter stated that the use of distance thresholds instead of site-specific evidence to cover adjacent waters is contrary to the Seventh Circuit's holding in *Orchard Hill Bldg. Co. v. U.S. Army Corps of Eng'rs*, 893 F.3d 1017 (7th Cir. 2018), in which the court rejected the 2008 *Rapanos* Guidance upon which the commenter claimed that the 2015 Rule is based. A few commenters suggested that the 2015 Rule's approach to adjacent waters conflicts with a Ninth Circuit case in which the court rejected jurisdiction over an isolated pond located within 125 feet of a navigable tributary of the San Francisco Bay, *see S.F. Baykeeper*, 481 F.3d at 708.

Additionally, some commenters suggested that applying the concept of adjacency to non-wetlands is inconsistent with case law. Another commenter stated that the 2015 Rule's approach to adjacent waters is improper because the agencies departed from the plain meaning of the word "adjacent."

Other commenters asserted that the 2015 Rule's approach to adjacent waters is consistent with applicable case law. These commenters argued that the 2015 Rule's definition of "adjacent" waters is consistent with Justice Kennedy's significant nexus test and addresses Justice Kennedy's concerns about covering remote waters because the rule's scientific record supports a finding that waters meeting the "adjacent" waters definition possess a significant nexus to downstream navigable-in-fact waters. Some commenters added that in addition to science, the agencies provided strong support based on their expertise and the law for concluding that waters identified as "neighboring" have a significant nexus to traditional navigable waters, interstate waters, or the territorial seas, citing 80 FR 37080–86. Another commenter referenced Justice Kennedy's statement that adjacency may include wetlands separated from tributaries in some circumstances.

> **<u>Agencies' Response</u>: In establishing the limits of federal regulatory authority under the CWA in the 2015 Rule, including the scope of the "adjacent" waters definition, the agencies find that they placed too much emphasis on the information and conclusions of the Connectivity Report at the expense of the limits on federal jurisdiction reflected in the statutory text and decisions of the Supreme Court. In doing so the agencies focused too heavily on the nexus component of the significant nexus test to define the scope of CWA jurisdiction without appropriate regard to the significance of that nexus. The agencies now conclude that the 2015 Rule's definition of "adjacent" did not comport with the limits on federal CWA jurisdiction reflected in Justice Kennedy's concurring opinion in *Rapanos*, including because the adjacent waters category was tied to a "tributary" definition that was too broad to serve as the "determinative measure" of whether adjacent waters possess the requisite significant nexus. *See* 547 U.S. at 781; *Georgia v. Wheeler*, No. 2:15-cv-00079, slip. op. at 43–46 (S.D. Ga. Aug. 21, 2019) (finding that the 2015 Rule's "adjacent" waters definition relied on an impermissibly broad "tributary" standard). The 2015 Rule's "adjacent" waters provision would allow federal jurisdiction to reach certain isolated ponds and certain physically remote wetlands that "do not implicate the boundary-drawing problem of *Riverside Bayview*," thereby asserting federal control over some features that "lack the necessary connection to covered waters . . . described as a 'significant nexus' in *SWANCC*[.]" 547 U.S. at 742 (Scalia, J., plurality).**

The agencies also share commenters' concerns regarding the 2015 Rule's categorical approach to adjacent waters, including the rule's categorical coverage of all waters and wetlands located within the 100-year floodplain and within 1,500 feet of the OHWM of a primary water, jurisdictional impoundment, or tributary. The agencies now conclude that a once in a 100-year hydrologic connection between otherwise physically disconnected waters, which satisfied the definition of "neighboring" and thus "adjacent" in the 2015 Rule, is too insubstantial to justify a categorical finding of a "significant nexus" with navigable-in-fact waters consistent with Justice Kennedy's concurrence in *Rapanos*. *See Georgia v. Wheeler*, No. 2:15-cv-00079, slip. op. at 49-50 (S.D. Ga. Aug. 21, 2019) (finding that the 2015 Rule failed to show that the majority of waters within the 100-year floodplain have a significant nexus to navigable waters).

As described in Section III.C.4 of the final rule preamble, the agencies also conclude that the 2015 Rule's distance-based limitations suffered from certain procedural errors and a lack of adequate record support. The agencies' conclusion is consistent with the holdings of the U.S. District Courts for the Southern District of Texas and the Southern District of Georgia, which found that the rule suffered from certain procedural (both courts) and substantive (Southern District of Georgia) errors and issued orders remanding the 2015 Rule back to the agencies. *Texas v. EPA,* No. 3:15-cv-162, 2019 WL 2272464 (S.D. Tex. May 28, 2019); *Georgia v. Wheeler*, No. 15-cv-079 (S.D. Ga. Aug. 21, 2019). By repealing the 2015 Rule for the reasons stated in the final rule preamble, the agencies are also remedying the procedural defects underlying the 2015 Rule and certain substantive deficiencies identified by these courts.

See also Final Rule Preamble Section III.C and the agencies' response to comments in Section 4.4.

4.4 2015 Rule's Distance Limitations

A number of commenters expressed concerns with the distance limitations used in the 2015 Rule's definition of "neighboring" within the adjacent waters category and in the (a)(8) category of waters subject to case-specific significant nexus analyses. Commenters stated that the 2015 Rule's assertion of jurisdiction over waters within certain distances of other waters has no support in the statute or the 2015 Rule's administrative record. To illustrate their concerns with the 2015 Rule's distance limitations, some commenters cited to cases where courts found that parties challenging the 2015 Rule—including the rule's distance limitations—would likely succeed, including *In re EPA & Dep't of Def. Final Rule*, 803 F.3d 804 (6th Cir. 2015), where the court found that the agencies did not identify "specific scientific support substantiating the reasonableness of the bright-line standards." Though some commenters asserted that the 2015 Rule's distance limitations were arbitrary, other commenters suggested that the distance thresholds furthered the CWA's objective, satisfied the significant nexus test, were supported by scientific evidence, and represented a permissible exercise of agency experience and expertise; as support, one of these commenters cited to *Emily's List v. Fed. Election Comm'n*, 581 F.3d 1, 22 n.20 (D.C. Cir. 2009).

Commenters also argued that the 2015 Rule's distance limitations were not a logical outgrowth of the proposal, stating that the public did not have an opportunity to comment on the distance limitations and could not have anticipated that they would appear in the final rule. As support, several commenters cited to the North Dakota District Court's preliminary injunction against the 2015 Rule wherein the court stated that the distance limitations were likely not a logical outgrowth of the proposal.

Other commenters suggested that the 2015 Rule was the logical outgrowth of the 2014 proposal. Some commenters stated that the agencies provided adequate notice of the use of distance limitations in the definition of "neighboring," noting that the agencies sought input on distance thresholds and received comments on potential distance limitations for the definition of "neighboring," citing to 79 FR 22188, 22192–93, 22207, 22250–51, 22261 (Apr. 21, 2014).

> **Agencies' Response: As discussed in Section III.C.4 of the final rule preamble, the agencies find that the distance-based limitations in the 2015 Rule were not a logical outgrowth of the proposed rule and were not supported by an adequate record. The agencies recognize that the federal government, in prior briefing in litigation over the 2015 Rule, defended the procedural steps the agencies took to develop and support the 2015 Rule. Having considered all of the public comments, relevant litigation positions, and the decisions of the U.S. District Courts for the Southern District of Texas and the Southern District of Georgia on related arguments, the agencies now agree with the reasoning of those courts and conclude that the proposal for the 2015 Rule did not provide adequate notice of the specific distance-based limitations that appeared for the first time in the final rule and that the final rule did not contain sufficient record support for the specific distance-based limitations. The distance-based limitations were a central aspect of the 2015 Rule, and necessary for the rule to accomplish its goal of increasing consistency and predictability. As such, the agencies conclude that the procedural errors and lack of adequate record support associated with the distance-based limitations in the final rule are a sufficient basis, standing alone, to warrant repeal of the 2015 Rule. By repealing the 2015 Rule for the reasons stated in the final rule preamble, the agencies are also remedying the procedural defects underlying the 2015 Rule and certain substantive deficiencies identified by these courts.**
>
> **See also Final Rule Preamble Section III.C.4 and the agencies' response to comments in Section 4.10.1 and Section 4.10.2.**

4.5 Federal-State Balance and CWA Section 101(b)

Multiple commenters expressed concern that the 2015 Rule created an imbalance in federal-state authority that is inconsistent with Congress' stated policy in CWA section 101(b) "to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution" and "to plan the development and use (including restoration, preservation, and enhancement) of land and water resources." 33 U.S.C. § 1251(b). One commenter asserted that section 101(b) must be read as a directive for the agencies to work with the states through CWA programs and to respect the role of states in addressing pollution and land and water use planning; another commenter stated that the 2015 Rule failed to acknowledge states' role in protecting these resources. A different commenter asserted that section 101(b), together with the CWA's application to "navigable waters," expressly reserves states' authority over land and water resources. Several commenters stated that in *SWANCC*, the Supreme Court specifically interpreted the balance of state and federal authority and determined that the goals set forth in CWA section 101(a), as limited by CWA section 101(b), are achieved when the waters that are regulated have a "significant nexus" to traditional navigable waters. Another commenter suggested that given the policy directive in CWA section 101(b) to preserve traditional state authority over land and water resources, not all water is a "water of the United States" even if it eventually flows into a navigable-in-fact water.

Many commenters asserted that the 2015 Rule is inconsistent with the CWA because it allows the federal government to dictate land use decisions and thus fails to preserve the states' "quintessential" authority over the development of land and water resources. These commenters asserted that the 2015 Rule draws the wrong line between federal and state or local control over water supply and flood control infrastructure. One commenter stated specifically that the 2015 Rule's coverage of certain features in the 100-year floodplain interferes with states' authority over planning and development of land and water resources and could hinder water supply operations. Several commenters asserted that the 2015 Rule interferes with states' discretion to decide which aquatic resources should not be regulated. As support for the position that states should have primary authority over water pollution control, many commenters referenced statements in *SWANCC* and in the plurality's and Justice Kennedy's opinions in *Rapanos*. One of these commenters also cited *Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30, 44 (1944). In addition, some commenters suggested that properly understood, the CWA embodies the concept of cooperative federalism, with the federal government working in tandem with state and local governments, thereby making expansive federal jurisdiction unnecessary.

In support of the position that the 2015 Rule did not strike the appropriate federal-state balance, a few commenters noted that the agencies' economic analysis for the 2015 Rule assumed that 100 percent of streams would be covered under the rule, leaving no streams subject to solely state regulation. Another commenter asserted that the uncertainty under the 2015 Rule as to where federal jurisdiction ends and solely state jurisdiction begins results in an "all-federal" approach. Some commenters suggested that the 2015 Rule's coverage of isolated waters infringes on states' traditional authority over land and water resources.

Conversely, many commenters asserted that CWA section 101(b) does not provide an adequate basis for repealing the 2015 Rule. These commenters asserted that CWA section 101(b)'s policy statement in favor of state authority and responsibility does not supersede the congressional objective of restoring and maintaining the physical, chemical, and biological integrity of the nation's waters as expressed in CWA section 101(a). A few commenters noted that most courts cite to CWA section 101(a) and comparatively few courts have cited to CWA section 101(b).

Some commenters stated that the CWA establishes a state-federal partnership that is biased toward, not away from, a strong federal component. Several commenters noted that it was states' failure to protect water quality prior to 1972 (when states had primary authority over water pollution control) that caused Congress to enact the Federal Water Pollution Control Act of 1972, giving the federal government broad authority over water pollution. Commenters asserted that CWA section 101(b) should not be considered in isolation from the text, structure, and legislative history of the CWA as a whole. Commenters explained that applying the whole-text cannon of statutory construction, the CWA creates a water pollution control program that clearly contemplates the federal government occupying the primary role. Further, commenters noted that the CWA calls on the federal government to establish national standards and for the states to implement those national standards through delegated programs and that, even where states are authorized to implement portions of the CWA, the federal government retains an oversight role. Commenters cited to CWA sections 303, 401, and 402 as examples of shared federal-state responsibility.

Additionally, some commenters asserted that the import of CWA section 101(b) is Congress' policy that states implement the CWA and have authority to add conditions that are more stringent than federal standards. Several of these commenters asserted that their interpretation of section 101(b) is supported

by CWA section 510 and that the SNPRM misconstrues section 510 by taking portions of it out of context without regard for its well-established meaning within the overall structure of the CWA. Other commenters suggested that the SNPRM emphasizes the first sentence of CWA section 101(b) but disregards the second sentence, which focuses on the policy of Congress that states manage the construction grant program and implement the CWA section 402 and section 404 permit programs.

One commenter asserted that the agencies have not developed a rationale based on CWA section 101(b) to support their proposed action, and instead, appear to believe only that if they consider section 101(b) long enough, there might be a basis for rescission. This commenter noted that the APA does not support an "act-first, develop rationale later" approach. Other commenters pointed out that the agencies, while questioning whether the 2015 Rule is consistent with CWA section 101(b), do not articulate what limits CWA section 101(b) might impose. A different commenter asserted that it was unclear whether the agencies are relying on CWA section 101(b) as a basis for the proposed rule. This commenter also suggested that CWA section 101(b) is not relevant to a rule that retains the status quo.

Relatedly, some commenters asserted that the agencies failed to articulate in the proposed rule how the 2015 Rule improperly interfered with the federal-state balance. For example, a few commenters stated that the agencies have failed to explain how subjecting some waters to the 2015 Rule's case-specific significant nexus determination is inconsistent with CWA section 101(b). Another commenter asserted that the proposed rule does not refute the agencies' previous conclusion that the 2015 Rule does not interfere with the federal-state balance.

> **<u>Agencies' Response</u>: As explained in Section III.C.2 of the final rule preamble, the agencies conclude that the 2015 Rule did not adequately consider and accord due weight to the policy of Congress in CWA section 101(b). Congress provided a major role for the states in implementing the CWA and achieving the Act's objective in section 101(a) to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." At the same time, Congress recognized in CWA section 101(b) the importance of preserving states' independent and traditional authority over their own land and water resources, which includes the authority to regulate certain waters as the state deems appropriate, without mandates from the federal government. The court in *Georgia v. Wheeler* also recognized the important balance between States and the Federal government that Congress prescribed in the CWA, explaining that "[w]hile the CWA allows the federal government to regulate certain waters for the purposes of protecting the chemical, physical, and biological integrity of the nation's waters, Congress also included within that statute a provision which states that the policy of Congress is to 'recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources.'" *Georgia v. Wheeler*, No. 2:15-cv-00079, slip. op. at 57-58 (S.D. Ga. Aug. 21, 2019) (internal citation omitted).**
>
> **While the 2015 Rule acknowledged the language contained in section 101(b) and recognized the vital role states and tribes play in the implementation and enforcement of the Act, 80 FR 37059, the rule did not appropriately recognize the important policy of section 101(b) to preserve the traditional power of states to regulate land and water resources within their borders outside the context of assuming federal Clean Water Act regulatory programs to regulate federal waters within their borders, or the utility and independent significance of the Act's non-regulatory programs. In fact, the agencies in the 2015 Rule failed to adequately**

acknowledge the meaning of perhaps the most important verb in 101(b), the direction to "preserve" existing state authority. That is, Congress recognized existing state authorities at the time it enacted the 1972 CWA amendments and directed the agencies to preserve and protect those authorities, which includes the authority to regulate certain waters as the states deem appropriate, without mandates from the federal government. Similarly, though the 2015 Rule recognized that "States and federally-recognized tribes, consistent with the CWA, retain full authority to implement their own programs to more broadly and more fully protect the waters in their jurisdiction," *id*. at 37060, the agencies did not include a discussion in the 2015 Rule preamble of the meaning and importance of section 101(b) in guiding the choices the agencies make in setting the outer bounds of CWA jurisdiction.

In addition, the agencies agree with commenters' concerns that the 2015 Rule did not strike the appropriate federal-state balance. As the Supreme Court has explained, the "Clean Water Act anticipates a *partnership* between the States and the Federal Government, animated by a *shared* objective: 'to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.'" *Arkansas v. Oklahoma*, 503 U.S. 91, 101 (1992) (emphasis added). Yet in finalizing the 2015 Rule, the agencies believed the rule's definition of "waters of the United States" covered all waters necessary for regulation under the CWA in order to meet the objective of the Act in section 101(a), and in turn neglected to incorporate the policy of the Congress in section 101(b). As a result, the 2015 Rule asserted expansive federal jurisdiction over waters more properly left solely to state control. The agencies now conclude that the 2015 Rule did not fully recognize the "partnership between the States and the Federal Government" in meeting the "shared objective" of the Act. The agencies' conclusion is consistent with the court's holding in *Georgia v. Wheeler* that the 2015 Rule inappropriately encroached on traditional state power. The court in that case found that the 2015 Rule increased the scope of federal jurisdiction "to a significant degree" and that this "significant increase in jurisdiction takes land and water falling traditionally under the states' authority and transfers them to federal authority." *Georgia v. Wheeler*, No. 2:15-cv-00079, slip. op. at 60 (S.D. Ga. Aug. 21, 2019) (footnote omitted).

The agencies recognize the importance of the objective in section 101(a) of the Act to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." The agencies find that they must balance their pursuit of this objective with the policy directive from Congress in section 101(b). As the Supreme Court has explained, "an administrative agency's power to regulate in the public interest must always be grounded in a valid grant of authority from Congress," and "in [its] anxiety to effectuate the congressional purpose," an agency "must take care not to extend the scope of the statute beyond the point where Congress indicated it would stop." *See FDA v. Brown & Williamson Tobacco Corp*., 529 U.S. 120, 161 (2000) (citations omitted). Additionally, "no legislation pursues its purposes at all costs." *Rodriguez v. United States*, 480 U.S. 522, 525-526 (1987).

In reaching this decision, the agencies are not concluding in this rulemaking that section 101(b) of the Act establishes a precise line between waters that are subject to federal and state regulation, on the one hand, and subject to state regulation only, on the other. Instead, the agencies find that the 2015 Rule failed to adequately consider and accord due weight to the policy directive in CWA section 101(b) and, as a result, asserted jurisdiction over certain waters that are more appropriately left solely in the jurisdiction of states.

Finally, the agencies disagree that the proposal failed to adequately explain how the 2015 Rule may have altered the federal-state balance in contravention of CWA section 101(b). The agencies explained that they were considering whether the 2015 Rule was consistent with the policy in section 101(b) of the CWA and requested comment on this issue. 83 FR 32246–48. After considering comments received on the proposal, the agencies find that the 2015 Rule did not adequately consider and accord due weight to section 101(b) of the Act.

See also Final Rule Preamble Section III.C.2.

4.6 Constitutional Issues

4.6.1 Giving sufficient effect to the term "navigable"

A number of commenters stated that in adopting a rule to define the "waters of the United States," the agencies must give full effect to the term "navigable." Commenters stated that the Supreme Court has found that the CWA's use of "navigable" indicates that Congress intended to exercise its traditional Commerce Clause power over navigable waters in promulgating the Act and that as such, the term "navigable" must be given some effect, citing *Riverside Bayview*, 474 U.S. at 133; *SWANCC*, 531 U.S. at 172; *Rapanos*, 547 U.S. at 734–35 (Scalia, J., plurality), 778–79 (Kennedy, J., concurring). One commenter asserted that neither the CWA nor other statutes in Title 33 indicate that a statute's objectives should be considered in determining the meaning of "navigable waters."

Many commenters expressed concern that the 2015 Rule does not give sufficient meaning to the term "navigable" under the CWA and that the rule is thus inconsistent with the Act and relevant Supreme Court precedent. Commenters contended that the 2015 Rule does not give sufficient effect to the term "navigable" because, among other reasons, the rule asserts categorical jurisdiction over certain types of waters regardless of navigability; covers waters that have no relationship to navigable waters or interstate commerce, such as isolated wetlands; and covers waters that are not navigable-in-fact and cannot reasonably be so made, such as ephemeral streams.

A few commenters noted that the 2015 Rule's interpretation of "waters of the United States" ignores the ordinary and traditional meaning of the term "navigable" as well as relevant regulations and statutes such as the Rivers and Harbors Act. One commenter stated that only Congress has authority to alter the navigability requirement. Further, while one commenter criticized the 2015 Rule's coverage of all "interstate waters" and asserted that the 2015 Rule ignores the word "navigable" and replaces it with the word "interstate," other commenters suggested that asserting jurisdiction over interstate waters does not conflict with the Act.

Some commenters referenced the U.S. District Court for the Southern District of Georgia's finding in *Georgia v. Pruitt*, 326 F. Supp. 3d 1356 (S.D. Ga. 2018) that the plaintiffs in that case are likely to succeed on their claims that the 2015 Rule is arbitrary and capricious under the APA because the rule asserts jurisdiction over remote and intermittent waters without evidence that such waters have a nexus with any navigable-in-fact waters. One commenter expressed concern that under the 2015 Rule, federal CWA jurisdiction could be based on the movement of animals or insects rather than the movement of pollutants and the potential for those pollutants to impact navigable waters.

Other commenters suggested that the 2015 Rule gives sufficient effect to the term "navigable" and is consistent with Supreme Court case law. Some of these commenters argued that the administrative

record demonstrates that the 2015 Rule is consistent with Justice Kennedy's interpretation of "navigable waters" as including waters "likely to play an important role in the integrity of an aquatic system comprising navigable waters as traditionally understood," citing *Rapanos*, 547 U.S. at 781 (Kennedy, J., concurring).

Commenters also asserted that the definition of "waters of the United States" is not limited to the traditional understanding of "navigable waters" or to a finding of navigability, noting that the Supreme Court has consistently held that the CWA applies to waters other than rivers and lakes that are navigable-in-fact. One commenter cited to the Supreme Court's statement in *Riverside Bayview* that "navigable" as used in the CWA is of "limited import." The same commenter also referenced the Court's discussion in *Riverside Bayview* that Congress previously rejected legislation "specifically designed to supplant" the Corps' interpretation of the Act as applying to adjacent wetlands. 474 U.S. at 137.

Further, several commenters asserted that the term "navigable" was not intended to constrain the reach and jurisdiction of the CWA to protect against pollution in the nation's waters and, to reflect the goals and purpose of the CWA, the term "navigable" should be interpreted broadly. One commenter referenced a case in which the court rejected the Corps' attempt to constrain its jurisdiction under the CWA to match its jurisdiction under navigational laws such as the Rivers and Harbors Act of 1899. The commenter noted that the court found that the CWA calls for a wider sweep of federal jurisdiction to address pollutants in the nation's waters. Another commenter stated that a broad interpretation of the term "navigable" is supported by statements from members of both the U.S. Senate and U.S. House of Representatives, who stated that their intent was for the CWA to apply as broadly as possible and to ensure that waters are protected in a full, comprehensive way.

> **<u>Agencies' Response</u>: The agencies agree with those commenters who asserted that the 2015 Rule did not give the word "navigable" within the phrase "navigable waters" sufficient effect. The CWA grants the agencies jurisdiction over "navigable waters," 33 U.S.C. § 1311(a), defined as "the waters of the United States." *Id*. § 1362(7). "Congress' separate definitional use of the phrase 'waters of the United States' [does not] constitute[] a basis for reading the term 'navigable waters' out of the statute." *SWANCC*, 531 U.S. at 172. Indeed, navigability was "what Congress had in mind as its authority for enacting the CWA." *Id*. The agencies recognize, as several commenters did, that Congress intended to assert federal authority over more than just waters traditionally understood as navigable; however, Congress rooted that authority in "its commerce power over navigation." *Id*. at 168 n.3. Therefore, there must necessarily be a limit to that authority and to what waters are subject to federal jurisdiction. *See*, *e.g*., *Rapanos*, 547 U.S. at 779 (Kennedy, J., concurring); *see also id*. at 734 (Scalia, J., plurality).**
>
> **As discussed in Section III.C.1.c of the final rule preamble, the agencies now find that in defining "tributary," "adjacent," "neighboring," and "significant nexus" broadly so as to sweep within federal jurisdiction many ephemeral features, dry channels, remote ditches, and certain isolated ponds and wetlands that, like the isolated ponds and mudflats at issue in *SWANCC*, "bear[] no evident connection to navigable-in-fact waters," *Rapanos*, 547 U.S. at 779 (Kennedy, J., concurring), the 2015 Rule did not give sufficient effect to the term "navigable" in the CWA. As the Court stated in *SWANCC*, "[w]e said in *Riverside Bayview Homes* that the word 'navigable' in the statute was of 'limited import,' . . . But it is one thing to give a word limited effect and quite another to give it no effect whatever." *SWANCC*, 531 U.S. at 172.**
>
> **See also the agencies' response to comments in Section 4.7.1.**

4.6.2 Constitutional avoidance

A number of commenters argued that the 2015 Rule's broad assertion of jurisdiction is incompatible with the Supreme Court's holding in *SWANCC*, 531 U.S. at 174, that the CWA must be read to avoid federalism and constitutional questions. Commenters asserted that the extent of federal jurisdiction asserted under the 2015 Rule raises serious constitutional questions akin to those raised by the Corps' assertion of jurisdiction under the Migratory Bird Rule and, as such, is permissible only if the CWA contains a "clear indication that Congress intended that result," citing *SWANCC*, 531 U.S. at 172–73. These commenters argued that the CWA lacks the requisite clear statement and that the agencies should thus find that the 2015 Rule exceeds the agencies' statutory authority, consistent with the canon of constitutional avoidance.

Commenters also asserted that the 2015 Rule improperly altered the federal-state balance without the requisite clear statement from Congress, including because the 2015 Rule allowed the federal government to assert jurisdiction over features such as nonnavigable, isolated, intrastate waters and ephemeral streams. Commenters argued that this assertion of federal CWA jurisdiction raises significant constitutional questions and impinges on states' traditional authority over land and water use, arguing that the CWA must be interpreted in a way that avoids such questions of federal authority. In support of this argument, one commenter asserted that CWA section 101(g) provides the opposite of a clear statement, and another argued that Congress did not intend for federal CWA authority to exceed state authority because Congress did not occupy the field and prohibit state activity as it did in the Agricultural Adjustment Act of 1938, citing *Wickard v. Filburn*, 317 U.S. 111, 124 (1924). Other commenters noted that groundwater and nonpoint source pollution regulation are core sovereign functions of the states.

Several commenters noted that Congress must "speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance,'" citing *Utility Air Reg. Grp. v. EPA*, 134 S. Ct. 2427, 2444 (2014) (quoting *Brown & Williamson Tobacco Corp*., 529 U.S. at 133). One of the commenters cited *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 65 (1989) for the argument that infringing upon traditional state authority requires a clear grant of authority from Congress.

In contrast, a number of other commenters asserted that the 2015 Rule avoids constitutional problems because the rule requires that jurisdictional waters possess a significant nexus with navigable waters and is thus rooted in the Commerce Clause authority. These commenters stated that Justice Kennedy's significant nexus test places an appropriate outer limit on federal CWA jurisdiction such that waters with little connection to downstream navigable waters do not fall within the scope of the Act.

> **<u>Agencies' Response</u>: As discussed in Section III.C.3 of the final rule preamble, the agencies now find that the 2015 Rule raised significant questions of Commerce Clause authority and encroached on traditional state land-use regulation without a clear statement from Congress. As commenters noted, the Supreme Court has stated that "[w]here an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result." *SWANCC*, 531 U.S. at 172–73. The Court has further stated that this is particularly true "where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power." *Id*. at 173. The Supreme Court in *SWANCC* found no clear statement from Congress that it had intended to permit federal encroachment on traditional state power and construed the CWA to avoid the significant constitutional questions related to the scope of federal authority**

authorized therein. *Id*. at 174. As discussed in the final rule preamble, and as several commenters noted, the 2015 Rule extended federal jurisdiction to waters similar to those at issue in *SWANCC*. As a result, the agencies conclude that, like the application of the federal rule giving rise to the *SWANCC* decision, the 2015 Rule pressed the outer bounds of Congress' Commerce Clause authority and encroached on traditional state land use planning authority without a clear statement from Congress. The agencies' conclusion is consistent with the court's holding in *Georgia v. Wheeler*. There, the court found that "like the majority in *SWANCC* and the plurality in *Rapanos* concluded, the [2015] Rule's vast expansion of jurisdiction over waters and land traditionally within the states' regulatory authority cannot stand absent a clear statement from Congress in the CWA. Since no such statement has been made, the [2015 Rule] is unlawful under the CWA." *Georgia v. Wheeler*, No. 2:15-cv-00079, slip. op. at 60 (S.D. Ga. Aug. 21, 2019). Given the absence of a "clear indication" that Congress intended to invoke the outer limits of its power, *see* 531 U.S. at 172–73, the agencies are repealing the 2015 Rule to avoid interpretations of the CWA that push the envelope of their constitutional and statutory authority, consistent with principles of constitutional avoidance.

See also the agencies' response to comments in Section 4.6.3.

4.6.3 Commerce Clause

Multiple commenters noted that federal CWA jurisdiction may extend only as far as Congress' Commerce Clause authority and argued that the 2015 Rule exceeds federal authority under the Commerce Clause, citing cases including *United States v. Lopez*, 514 U.S. 549 (1995) and *United States v. Morrison*, 529 U.S. 598 (2000). Some commenters expressed concern that the 2015 Rule exceeds Congress' Commerce Clause authority by expanding federal CWA jurisdiction to water features that are far removed from channels of interstate commerce and that do not have even a remote effect on interstate commerce, such as isolated or ephemeral waters. One commenter added that there is no rational basis to conclude that isolated waters bear a significant relationship to interstate commerce. Another commenter questioned whether asserting federal CWA jurisdiction over *intrastate* waters is a permissible exercise of Commerce Clause authority.

Some commenters suggested that federal CWA jurisdiction is limited to waters that have a substantial effect on interstate commerce. One commenter stated that the 2015 Rule cannot be justified as one covering activities that substantially affect interstate commerce because (1) that argument was rejected in *SWANCC*; (2) the 2015 Rule does not satisfy the factors in *Lopez*, 514 U.S. at 557, and (3) the 2015 Rule's effect on interstate commerce is so attenuated as to "effectually obliterate the distinction between what is national and what is local."

Another commenter argued that the 2015 Rule exceeds Congress' Commerce Clause authority by aggregating de minimis effects on interstate commerce. Citing *Lopez*, 514 U.S at 559 and *Morrison*, 529 U.S. at 617, the commenter noted that the Supreme Court has held that, without more, the de minimis effects of an intrastate non-economic activity cannot be aggregated to produce a cumulative significant effect. The commenter also discussed the Fifth Circuit's opinion in *GDF Realty Investments, Ltd. v. Norton*, 326 F.3d 622, 640–41 (5th Cir. 2003), where the court held that because the Endangered Species Act is economic in nature, de minimus intrastate effects on interstate commerce could be aggregated to produce the required significant economic effect. The commenter argued that though the CWA is a comprehensive regulatory scheme, a definition of "tributary" is not essential to that regulatory

scheme and, therefore, aggregation of de minimis intrastate effects to produce a significant effect is improper.

Other commenters expressed Commerce Clause concerns over the possibility that the 2015 Rule covers waters that are not navigable-in-fact and have only speculative or tangential, if any, connections to navigable-in-fact waters, including ephemeral features that might flow just once every 100 years and remote features. Similarly, some commenters expressed concern that the 2015 Rule covers nonnavigable interstate waters and asserts jurisdiction over other waters based on their relationship to those nonnavigable interstate waters.

Conversely, a number of commenters argued that the 2015 Rule is consistent with the Commerce Clause because the commenters believed that the rule is consistent with Justice Kennedy's significant nexus standard. Commenters asserted that the significant nexus test "prevents problematic applications of the statute," explaining that Justice Kennedy found that though the significant nexus test "may not align perfectly with the traditional extent of federal authority," it would "not raise federalism or Commerce Clause concerns" because "in most cases regulation of wetlands that are adjacent to tributaries and possess a significant nexus with navigable waters will raise no serious constitutional or federalism difficulty," citing *Rapanos*, 547 U.S. at 782–83 (Kennedy, J., concurring). Some commenters suggested that the scientific record demonstrates that the 2015 Rule is consistent with the significant nexus standard and is thus within Congress' Commerce Clause authority.

A few commenters asserted that the agencies have not adequately explained how the 2015 Rule violates the Commerce Clause and so cannot rely on this argument as a rational basis for repeal. As an example, one of the commenters noted that the agencies have not demonstrated that pollutant discharges to waters covered under the 2015 Rule do *not* impact interstate commerce.

Other commenters criticized the agencies' statement in the SNPRM that "[t]hough the agencies have previously said that the 2015 Rule is consistent with the Commerce Clause and the CWA, the agencies are in the process of considering whether it is more appropriate to draw a jurisdictional line that ensures that the agencies regulate well within our constitutional and statutory bounds," *see* 83 FR 32249 n.74. The commenters claimed that the agencies must regulate to those statutory and constitutional bounds and that those bounds extend well beyond the limitations on federal CWA jurisdiction articulated in the SNPRM. Some commenters argued that neither *SWANCC* nor *Rapanos* limit or establish the outer bounds of the Commerce Clause authority for purposes of the CWA.

One commenter noted that water is itself an article in commerce and a necessary and vital component of commercial activities and asserted that water pollution has a significant impact on commerce and can have a substantial commercial effect. The commenter provided examples of the financial impact of water pollution on drinking water treatment and commercial activities such as tourism, fishing, and boating. The commenter suggested that even where water pollution does not cross state lines, regulation of sources of pollution would still be permissible under the Commerce Clause because "where a general regulatory statute bears a substantial relation to commerce, the de minimis character of individual instances arising under that statute is of no consequence," citing *Lopez*, 514 U.S. at 558 (internal quotation marks omitted) (emphasis omitted).

Finally, multiple commenters stated that it is well-established that federal environmental regulation is permissible under the Commerce Clause, citing cases including *Allied Local & Reg'l Mfrs. Caucus v. EPA*,

215 F.3d 61, 83 (D.C. Cir. 2000) and *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 282 (1981).

Agencies' Response: Congress' authority to regulate "navigable waters" derives from its power to regulate the "channels of interstate commerce" under the Commerce Clause. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824); *see also Lopez*, 514 U.S. at 558–59. The Supreme Court explained in *SWANCC* that the term "navigable" indicates "what Congress had in mind as its authority for enacting the Clean Water Act: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made." 531 U.S. at 172. The Court further explained that nothing in the legislative history of the Act provides any indication that "Congress intended to exert anything more than its commerce power over navigation." *Id*. at 168 n.3.

As discussed in Section III.C.3 of the final rule preamble, the agencies now conclude that, like the application of the federal rule giving rise to the *SWANCC* decision, the 2015 Rule pressed the outer bounds of Congress' Commerce Clause authority and encroached on traditional state land use planning authority without a clear statement from Congress, including because the 2015 Rule extended federal jurisdiction to waters similar to those at issue in *SWANCC*. The agencies' conclusion is consistent with the court's holding in *Georgia v. Wheeler*. There, the court found that "like the majority in *SWANCC* and the plurality in *Rapanos* concluded, the [2015] Rule's vast expansion of jurisdiction over waters and land traditionally within the states' regulatory authority cannot stand absent a clear statement from Congress in the CWA. Since no such statement has been made, the [2015 Rule] is unlawful under the CWA." *Georgia v. Wheeler*, No. 2:15-cv-00079, slip. op. at 60 (S.D. Ga. Aug. 21, 2019). Given the absence of a "clear indication" that Congress intended to invoke the outer limits of its power, *see* 531 U.S. at 172–73, the agencies are repealing the 2015 Rule to avoid interpretations of the CWA that push the envelope of their constitutional and statutory authority, consistent with principles of constitutional avoidance.

Though some commenters asserted that the 2015 Rule is consistent with Justice Kennedy's significant nexus standard and therefore consistent with the Commerce Clause, the agencies find that the 2015 Rule adopted an inappropriately expansive interpretation of the significant nexus standard, resulting in a regulatory definition of "waters of the United States" that did not comport with Justice Kennedy's understanding of the limits of federal CWA jurisdiction.

See also the agencies' response to comments in Section 4.1, Section 4.6.2, and Section 4.6.3.

4.6.4 Due Process Clause

Some commenters asserted that the 2015 Rule is unconstitutionally vague and violates the Due Process Clause. Commenters argued that the 2015 Rule fails to give the public (especially landowners) fair notice of which discharges may be deemed unlawful, including because the commenters believe that the rule's terms are not clearly defined. Some of these commenters cited to specific aspects of the 2015 Rule that they believe are too vague, unclear, or complicated for the regulated community to apply, such as the definition of "tributary." As support for these arguments, commenters cited to case law including *FCC v. Fox Television Stations, Inc*., 132 S. Ct. 2307, 2317 (2012); *Gentile v. State Bar*, 501 U.S. 1030, 1051 (1991); *Kolender v. Lawson*, 461 U.S. 352, 358 (1983); *Atlas Copco, Inc. v. EPA*, 642 F.2d 458, 465 (D.C. Cir. 1979); *South Terminal Corp. v. EPA*, 504 F.2d 646, 670 (1st Cir. 1974).

Commenters also argued that the 2015 Rule violates the Due Process Clause because the rule's reliance on vague or unclear terms could give the agencies broad, subjective discretion to determine which features are jurisdictional "waters" and which are not. For example, commenters claimed that the 2015 Rule's definitions of "significant nexus" and "tributary" (particularly the OHWM requirement in the "tributary" definition) are vague and could give rise to subjective interpretation and arbitrary enforcement. One commenter stated that "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application[] violates the first essential of due process of law," citing *Fox Television*, 567 U.S. at 253 (quoting *Connally v. Gen. Constr. Co*., 269 U.S. 385, 391 (1926)). Some commenters emphasized the importance of providing fair and predictable notice of the limits of federal CWA jurisdiction given the Act's substantial criminal and civil penalties.

Relatedly, some commenters suggested that it was difficult for landowners to know if their property contains a water that would be jurisdictional under the 2015 Rule's categories of waters subject to case-specific significant nexus determinations. Multiple commenters expressed concern that landowners do not possess or have access to the technical, scientific, or financial resources that may be required to determine whether a water feature is jurisdictional under the 2015 Rule, including tools such as remote sensing, historical maps, and satellite imaging.

Specifically, some commenters criticized the agencies' stated approach under the 2015 Rule for determining whether a water feature is located within the 100-year floodplain, referencing the discussion at 80 FR 37081. Commenters stated that even where the Federal Emergency Management Agency (FEMA) has generated a floodplain map, landowners may not know whether agency staff will rely on those maps or decide that the maps are inaccurate or outdated. Commenters further stated that where agency staff decide that FEMA maps are not accurate, landowners will need to figure out what "available tools" regulators may use to determine the 100-year floodplain for purposes of assessing jurisdiction in that area. The commenters argued that this approach does not put landowners on notice of when waters on their property may be considered jurisdictional as either "adjacent" waters or as case-specific waters.

Other commenters suggested that the 2015 Rule provides adequate notice of which waters are subject to federal CWA jurisdiction. These commenters asserted that the 2015 Rule provides clear definitions of which waters are jurisdictional, which waters are not jurisdictional, and which waters are subject to case-specific significant nexus determinations, without the use of subjective or ambiguous terms. One commenter stated that the 2015 Rule delineates precise standards designed to preclude arbitrary enforcement of the CWA.

> **<u>Agencies' Response</u>: The agencies recognize that certain aspects of the 2015 Rule, such as the nature of the 2015 Rule's significant nexus inquiry for (a)(7) and (a)(8) waters, could have made it difficult for private property owners to know whether their lands are subject to federal CWA jurisdiction. As described in Section III.C of the final rule preamble, under the 2015 Rule, a significant nexus inquiry for (a)(7) and (a)(8) waters may be inconclusive until *all* similarly situated waters across the entire single point of entry watershed are analyzed and it is determined that such features do not have a significant nexus, when considered in combination, to the nearest downstream primary water. The agencies are concerned that the potential requirement for an analysis of all broadly defined "similarly situated waters in the region" until the agencies can determine that a feature does not possess a significant nexus to a primary water "raise[s] troubling questions regarding the Government's power to cast doubt**

on the full use and enjoyment of private property throughout the Nation." *Hawkes*, 136 S. Ct. 1807, 1812, 1816–17 (Kennedy, J., concurring). As a result, the agencies are concerned that the 2015 Rule potentially leaves "people in the dark," *Sessions v. Dimaya*, No. 15-1498, 2018 U.S. LEXIS 2497, at *39, *42–43 (S. Ct. Apr. 17, 2018) (Gorsuch, J., concurring in part and concurring in judgment), about the jurisdictional status of individual isolated ponds and wetlands within their property boundaries until every last similarly situated feature within the watershed boundary is analyzed by the federal government. The agencies find that these concerns provide further support for the agencies' decision to repeal the 2015 Rule. The agencies also find that this final rule will address commenters' concerns regarding the clarity of the 2015 Rule by reinstating a longstanding regulatory framework that is familiar to and well-understood by the agencies, states, tribes, local governments, regulated entities, and the public.

See also the agencies' response to comments in Section 2.

4.6.5 Tenth Amendment

Multiple commenters asserted that the 2015 Rule impinges upon powers reserved to the states under the Tenth Amendment of the U.S. Constitution. These commenters explained that the Tenth Amendment provides that powers not delegated to the United States federal government are reserved to the states and argued that the 2015 Rule expands federal authority too far by extending federal jurisdiction to intrastate waters and land use, thereby forcing states to comply with CWA requirements (such as section 401 certifications, water quality standards, and section 402 permits) in waters that are reserved to the states. One commenter asserted specifically that the 2015 Rule's approach to prairie potholes as a similarly situated category of water subject to case-specific significant nexus analyses unlawfully expanded the scope of federal CWA jurisdiction because prairie potholes are often remote features with little to no connection to navigable waters and are thus the type of local land and water feature that more properly belongs under state regulatory authority under the Tenth Amendment.

<u>Agencies' Response</u>: As discussed in the preamble to the final rule, the agencies now find that in promulgating the 2015 Rule, the agencies failed to adequately consider and accord due weight to the policy directive from Congress in section 101(b) of the Act and, as a result, asserted jurisdiction over certain waters that are more appropriately left solely in the jurisdiction of states. The agencies also find that the 2015 Rule pushed the envelope of the agencies' constitutional and statutory authority without the requisite clear statement from Congress. For these and other reasons discussed more fully in the preamble, the agencies find that it is appropriate to repeal the 2015 Rule and to restore the pre-existing regulations.

4.6.6 Miscellaneous

A few commenters stated that the 2015 Rule is a regulatory taking that violates the Fifth Amendment. One of the commenters asserted that the prior regulatory regime also amounts to a regulatory taking and so must also be replaced.

<u>Agencies' Response</u>: An agency's determination of jurisdiction does not constitute a taking. *See*, *e.g.*, *Riverside Bayview*, 474 U.S. at 126–27 ("[T]he mere assertion of regulatory jurisdiction by a governmental body does not constitute a regulatory taking." (citing *Hodel*, 452 U.S. at 293–97)). Regardless, for the reasons discussed in the final rule preamble, the

agencies are repealing the 2015 Rule and restoring the pre-existing regulations. The agencies are reconsidering the proper scope of federal CWA jurisdiction in the separate rulemaking on a proposed revised definition of "waters of the United States." 84 FR 4174 (Feb. 14, 2019).

4.7 Statutory Issues

4.7.1 General comments

Multiple commenters claimed that a broad assertion of federal jurisdiction is necessary to achieve the CWA's goals. In support of this argument, commenters cited to statements from the Act's legislative history and case law. Commenters asserted that legislative history shows that Congress intended the "term 'navigable waters' be given the broadest possible constitutional interpretation," *see* Conf. Rep. No. 92-1236 (Sept. 28, 1972), *reprinted in* 1972 U.S.C.C.A.N. 3776, 3821. Commenters also cited to *NRDC v. Callaway*, 392 F. Supp. 685 (D.D.C. 1975), where the court found that Congress intended to assert "federal jurisdiction over the nation's waters to the maximum extent permissible under the Commerce Clause of the Constitution." Additionally, some commenters cited to the Supreme Court's statement in *Riverside Bayview* that "[p]rotection of aquatic ecosystems, Congress recognized, demanded broad federal authority to control pollution, for '[w]ater moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source,'" 474 U.S. at 132–33 (citation omitted), and the Court's finding in *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 492 (1987) that the CWA establishes "an all-encompassing program of water pollution regulation" that "applies to all point sources and virtually all bodies of water." According to the commenters, the agencies sought to implement Congress' desire for broad federal authority by interpreting "waters of the United States" under the 2015 Rule to include waters such as intrastate rivers and intermittent and ephemeral streams, thereby protecting the entire aquatic system rather than focusing solely on traditional navigable waters. One commenter asserted that the CWA does not limit the geographic scope of "waters of the United States." Another commenter stated that the CWA mandates protection of the nation's important waters, and protecting those waters requires protecting the wetlands and streams that flow into them.

Agencies' Response: Though the Supreme Court has found that Congress intended to assert federal authority over more than just waters traditionally understood as navigable, there is necessarily a limit to that authority. *SWANCC*, 531 U.S. at 168 n.3, 172. In particular, "the word 'navigable' in the Act must be given some effect." *See id*.; *Rapanos*, 547 U.S. at 779 (Kennedy, J., concurring). As discussed in Section III.C.1 of the preamble to the final rule, the agencies now conclude that the 2015 Rule did not implement the legal limits on the scope of the agencies' authority under the CWA as intended by Congress and reflected in Supreme Court cases, including that the 2015 Rule did not give the word "navigable" within the phrase "navigable waters" sufficient effect.

See also the agencies' response to comments in Section 4.6.1.

4.7.2 CWA section 101(a)

Multiple commenters suggested that the agencies' rationale for repealing the 2015 Rule is contrary to the CWA's primary objective in section 101(a) to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." Commenters expressed concern that the agencies did not adequately consider the proposed rule's impacts on this primary objective of the CWA and asserted that the agencies must consider whether the 2015 Rule or the pre-existing regulatory regime is more

consistent with the CWA's purpose, history, and text. Some commenters argued that the agencies "entirely failed to consider" water quality impacts in proposing to repeal the 2015 Rule and, as such, the proposed rule is arbitrary and capricious, citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Several commenters suggested that rescinding the 2015 Rule would result in backsliding and render it scientifically impossible to meet the CWA's goals of restoring and maintaining the chemical, physical, and biological integrity of the nation's waters. A few commenters stated that the proposed rule is arbitrary and capricious because it undermines this objective of the CWA.

Some commenters also expressed concern that the agencies are relying on certain factors to the exclusion of the CWA's objectives and do not explain how those factors, such as regulatory certainty, will achieve the Act's overarching purpose of clean water. A few commenters noted that unlike the policies articulated in Executive Order 13778, which directs the agencies to review the 2015 Rule, the CWA is not focused on promoting economic growth or minimizing regulatory uncertainty. One commenter noted that the Executive Order's goals of promoting economic growth, minimizing uncertainty, and showing due regard for the roles of Congress and the states are not consistent with CWA section 101(a).

In contrast, one commenter suggested that the agencies misinterpreted CWA section 101(a) in the 2015 Rule and failed to recognize that the fundamental purpose of the Act is to address water quality issues. This commenter stated that the agencies interpreted the phrase "biological integrity" to mean the integrity of the birds, mammals, fish, and insects that may reside for all or part of their lives in water, not the integrity of the water itself. The commenter claimed that this approach ignores the Act's focus on water pollution. Another commenter argued that the 2015 Rule is contrary to CWA section 101(a) because it asserts jurisdiction over waters that affect the "chemical, physical or biological integrity" of a primary water, whereas CWA section 101(a) refers to "chemical, physical and biological integrity."

> **<u>Agencies' Response</u>: The agencies disagree that this rulemaking is contrary to the objective in CWA section 101(a). The CWA's objective to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters," 33 U.S.C. § 1251(a), must be implemented in a manner consistent with Congress' policy directives to, among other things, "recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution" and "to plan the development and use . . . of land and water resources," *id*. § 1251(b). Re-evaluating the best means of balancing these statutory priorities, as called for in Executive Order 13778, is well within the scope of authority that Congress has delegated to the agencies under the CWA. As described in Section III.C.2 of the final rule preamble, the agencies now find that the 2015 Rule did not adequately consider and accord due weight to CWA section 101(b). The 2015 Rule acknowledged the language contained in section 101(b) and the vital role states and tribes play in the implementation and enforcement of the Act, 80 FR 37059, but it did not appropriately recognize the important policy of 101(b) to preserve the traditional power of states to regulate land and water resources within their borders or the utility and independent significance of the Act's non-regulatory programs. The agencies now conclude that, at a minimum, the 2015 Rule's case-specific significant nexus provisions stretched the bounds of federal jurisdiction to cover certain waters that more appropriately reside in the sole jurisdiction of states. *See, e.g.*, *Rodriguez v. United States*, 480 U.S. 522, 525-526 (1987) ("[N]o legislation pursues its purposes at all costs."). By repealing the 2015 Rule, the agencies seek to restore the more appropriate balancing of CWA sections 101(a) and 101(b) that is better reflected in the pre-2015 Rule regulatory regime as compared to the 2015 Rule. The agencies have applied the pre-existing regulations for many years to achieve the**

CWA's objective of restoring and maintaining the chemical, physical, and biological integrity of the nation's waters. With this final rule, the agencies will continue to implement those pre-existing regulations, as informed by applicable agency guidance documents and consistent with Supreme Court decisions and longstanding agency practice, in continued pursuit of that statutory objective.

See also the agencies' response to comments in Section 4.5; Final Rule Preamble Section III.

4.7.3 CWA section 101(g)

Several commenters asserted that the 2015 Rule is inconsistent with the longstanding principle in CWA section 101(g) that the Act must not be interpreted to interfere with states' authority to manage water quantity within their borders. One commenter asserted that CWA section 101(g) precludes the agencies from relying upon effects on water supply as a basis for asserting CWA jurisdiction. Another commenter noted that the prior appropriation doctrine governs water rights in many states and that state water rights have been recognized by Congress and the Supreme Court.

Other commenters asserted that the 2015 Rule is not inconsistent with CWA section 101(g). These commenters argued that federal permitting authority and state authority to shape strategies and pursue projects that develop land and water resources are not mutually exclusive; in other words, the fact that a waterbody may be subject to federal permitting authority does not deprive the states of their ability to pursue development projects.

<u>Agencies' Response</u>: As described in the final rule preamble, the agencies find that the 2015 Rule did not implement the legal limits on the scope of the agencies' authority under the CWA as intended by Congress and reflected in Supreme Court cases, including Justice Kennedy's articulation of the significant nexus test in *Rapanos*, did not adequately consider and accord due weight to the policy of Congress in CWA section 101(b), pushed the envelope of the agencies' constitutional and statutory authority absent a clear statement from Congress, and included distance-based limitations that suffered from procedural errors and a lack of adequate record support. The agencies have concluded that, as a result of those fundamental issues, the 2015 Rule must be repealed, which resolves concerns raised by commenters.

4.7.4 Miscellaneous

Several commenters asserted generally that the 2015 Rule exceeds the agencies' authority under the CWA by extending federal jurisdiction to lands where water flows infrequently or only after rain. One commenter suggested that entire watersheds, such as certain examples in California, could be considered jurisdictional under the 2015 Rule and that this result is contrary to congressional intent. Another commenter expressed concern that the 2015 Rule takes a "land is waters" approach to federal jurisdiction, which the commenter asserted is incompatible with *Rapanos* and Congress' intent, evident in the CWA section 404(f) permitting exemptions, to exempt crop land regulation.

A few commenters suggested that Congress, not the agencies, should determine the scope of federal CWA jurisdiction. A couple commenters asserted that the agencies do not have "inherent authority" to promulgate their own regulatory definition because Congress has already defined "navigable waters" in the CWA and did not delegate the authority to define that term to the agencies; moreover, the courts

have interpreted "navigable waters." One of these commenters argued that the agencies do not have authority to define jurisdiction more narrowly than as defined by the statute.

Another commenter stated that repealing the 2015 Rule would violate CWA section 101(a)(7) because the commenter believes the 2015 Rule better targets the regulation of nonpoint sources.

> **Agencies' Response: The agencies disagree that they lack authority to promulgate a regulatory definition of "waters of the United States." It is well-established that the agencies enjoy discretion in interpreting the phrase "waters of the United States" to set the jurisdictional limits of the Act. *See Rapanos*, 547 U.S. at 758 (Roberts, C.J., concurring); *see also Nat'l Ass'n of Mfrs. v. Dep't of Defense*, 138 S. Ct. 617, 625 (2018) (recounting the Supreme Court's review of the agencies' interpretation of the statutory phrase "waters of the United States").**
>
> **Regarding the comment on CWA section 101(a)(7), the agencies note that non-regulatory programs under the CWA, such as the section 319 nonpoint source management program, are intended to assist states and eligible tribes in addressing nonpoint sources of pollution. Pollution from nonpoint sources is not directly addressed through this rulemaking on the definition of "waters of the United States," but as part of this action, the agencies recognize the policy direction from Congress to respect the roles and responsibilities of the Federal government and States in implementing the full suite of regulatory and non-regulatory programs in the CWA. *See, e.g., Hibbs v. Winn*, 542 U.S. 88, 101 (2004) ("A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant."). The dozens of non-regulatory grant, research, nonpoint source, groundwater, and watershed planning programs that were intended by Congress to assist the states in controlling pollution in all of the nation's waters, not just its navigable waters.**

4.8 Supreme Court Precedent

4.8.1 General comments

Multiple commenters asserted that the 2015 Rule is inconsistent with the relevant Supreme Court precedent, particularly the Court's holdings in *SWANCC* and *Rapanos*. Many of these commenters suggested that the Supreme Court's rulings limit jurisdiction more narrowly than the scope of jurisdiction under the 2015 Rule. Several commenters asserted that the 2015 Rule is inconsistent with *Rapanos* and *SWANCC* because the Court clearly intended to limit, rather than expand, federal jurisdiction in those cases. Further, some commenters suggested that the legal rationale supporting the 2015 Rule depends upon a selective and biased or misplaced reading of Supreme Court case law.

Other commenters asserted that the 2015 Rule adequately addresses the issues raised in *Rapanos* and *SWANCC* regarding the limits of the agencies' CWA authority and is consistent with Supreme Court precedent, particularly Justice Kennedy's concurrence in *Rapanos*. One commenter noted that Congress intended the CWA to have a very broad scope and suggested that neither *SWANCC* nor *Rapanos* requires the agencies to retreat from that broad scope. Another commenter asserted that the NPRM mischaracterizes *Riverside Bayview* as a case in which the Court deferred to the Corps when instead it should be described as a case in which the Court recognized broad authority under the CWA.

Some commenters expressed the view that the 2015 Rule's coverage of ephemeral features, specifically, is inconsistent with the holdings of *Rapanos* and *SWANCC*. A few commenters asserted that in promulgating the 2015 Rule, the agencies did not adequately explain how ephemeral features possess a significant nexus to downstream waters. Conversely, other commenters argued that the 2015 Rule's coverage of both ephemeral and intermittent features is consistent with Justice Kennedy's opinion in *Rapanos* because science demonstrates that such waters significantly affect downstream waters. Some of these commenters stated that Justice Kennedy's *Rapanos* opinion indicates support for coverage of ephemeral or infrequently-flowing streams.

> **Agencies' Response: Though the Supreme Court has found that Congress intended to assert federal authority over more than just waters traditionally understood as navigable, there is necessarily a limit to that authority. *SWANCC*, 531 U.S. at 168 n.3, 172. As discussed in Section III.C of the preamble to the final rule, the agencies now conclude that the 2015 Rule did not implement the legal limits on the scope of the agencies' authority under the CWA as reflected in Supreme Court cases, including Justice Kennedy's articulation of the significant nexus test in *Rapanos*, and that the 2015 Rule did not give the word "navigable" within the phrase "navigable waters" sufficient effect. For these and other reasons discussed more fully in the preamble, the agencies find that it is appropriate to repeal the 2015 Rule and to restore the pre-existing regulations.**

4.8.2 Comments on SWANCC

Multiple commenters asserted generally that the 2015 Rule is inconsistent with the Supreme Court's holding in *SWANCC*. Some of these commenters argued that, given the Court's broad statements about isolated waters in the opinion, *SWANCC* stands for the proposition that the agencies do not have authority to regulate isolated waters. Commenters also stated that the holding in *SWANCC* is not limited to the specific isolated water features at issue before the Court or the Migratory Bird Rule. These commenters argued that the 2015 Rule is thus inconsistent with *SWANCC* because the commenters believe that the 2015 Rule allows the agencies to assert jurisdiction over isolated waters. A number of commenters generally expressed concern with extending federal CWA jurisdiction to remote or isolated waters, and some of these commenters suggested that the 2015 Rule's coverage of such features exceeds the agencies' statutory authority.

Other commenters argued that Justice Kennedy's characterization of *SWANCC* in his *Rapanos* concurrence reveals that isolated waters are not categorically outside the scope of the CWA. According to the commenters, Justice Kennedy's statement that the waters in *SWANCC* were understood to "bear[] no evident connection to navigable-in-fact waters" suggests that if those same waters had an evident connection—e.g., one that could be established by applying the significant nexus analysis—CWA jurisdiction would be appropriate. One commenter stated that the agencies misunderstood Justice Kennedy's discussion of the waters at issue in *SWANCC* and ignored his statement that such waters would be jurisdictional if they met the significant nexus test. Commenters also noted that Justice Kennedy recognized the importance of protecting water features (such as wetlands) separated by land from another waterway, citing to Justice Kennedy's statement in *Rapanos* that if such a wetland is destroyed, "floodwater, impurities, or runoff that would have been stored or contained in the wetlands" could instead "flow out to major waterways." In this instance, the commenters explained, the very absence of a hydrological connection makes protection of the wetland critical, citing to Justice Kennedy's statement that "[g]iven the role wetlands play in pollutant filtering, flood control, and runoff

storage, it may well be the absence of hydrological connection (in the sense of interchange of waters) that shows the wetlands' significance for the aquatic system," *see Rapanos*, 547 U.S. at 786.

Finally, one commenter stated that in *SWANCC*, the Supreme Court explicitly reversed the lower court's holding that the CWA reaches as many waters as the Commerce Clause allows. Another commenter stated that the *SWANCC* Court incorrectly conflated the Commerce Clause, the source of authority for the CWA, with the U.S. Constitution's protection of state autonomy.

> **Agencies' Response: Because the 2015 Rule permitted federal jurisdiction over certain physically disconnected waters and wetlands like those at issue in *SWANCC*—either categorically as "adjacent" waters or on a case-specific basis according to an expanded significant nexus test—the agencies now conclude for this and other reasons discussed more fully in the final rule preamble that the 2015 Rule exceeded the agencies' statutory authority as interpreted in *SWANCC* and Justice Kennedy's concurrence in *Rapanos*.**
>
> **The agencies have solicited comment on the proper scope and interpretation of the *SWANCC* decision as part of the rulemaking on a proposed revised definition of "waters of the United States." *See* 84 FR 4165.**

4.8.3 Comments on Rapanos

Multiple commenters asserted that the 2015 Rule is inconsistent with Justice Kennedy's *Rapanos* opinion. These commenters claimed that the 2015 Rule's broad definitions of terms such as "tributary," "adjacent," and "significant nexus" expand coverage beyond both the plurality and concurring opinions in *Rapanos*. One commenter cited to *Orchard Hill Bldg. Co. v. U.S. Army Corps of Engineers*, 893 F.3d 1017 (7th Cir. 2018) as support for the argument that the 2015 Rule went beyond the jurisdictional boundaries articulated in Justice Kennedy's concurrence. The commenter explained that in *Orchard Hill*, the Seventh Circuit held that (1) determining whether a wetland is jurisdictional requires site-specific evidence that the wetland in question possesses the requisite significant nexus; (2) mere adjacency to a tributary is not sufficient to establish a significant nexus between a wetland and a traditional navigable water; and (3) a significant nexus determination requires an on-the-ground examination of the characteristics of wetlands to determine whether they are similarly situated.

Some commenters stated that the 2015 Rule is also inconsistent with the *Rapanos* plurality opinion. Several commenters suggested that the definition of "waters of the United States" should be informed by the plurality opinion in *Rapanos* rather than Justice Kennedy's significant nexus test. Other commenters criticized the legal rationale underlying the *Rapanos* plurality opinion. One of these commenters claimed that the plurality's test for CWA jurisdiction is "absurd" because it would give the agencies authority to regulate a constant trickle but not a major seasonal water flow, even though a large seasonal water flow would likely have a greater impact on water quality than a small continuous trickle. Another commenter noted that the plurality provides no linguistic or legal support—other than citing to a dictionary—for their textual argument regarding the determiner "the" and the plural word "waters" in the phrase "the waters of the United States." Moreover, a few commenters criticized the *Rapanos* plurality opinion for failing to account for science in determining what constitutes a "water of the United States."

One commenter expressed support for the 2015 Rule because the commenter believes the rule is consistent with both the plurality's and Justice Kennedy's opinions in *Rapanos* and appropriately

provides for jurisdictional delineations based on connectivity science. Another commenter suggested that Justice Kennedy's concurring opinion in *Rapanos* does not limit the geographic scope of "waters of the United States."

> **Agencies' Response: As discussed in the preamble to the final rule, the agencies conclude that the 2015 Rule did not implement the legal limits on the scope of the agencies' authority under the CWA as reflected in Supreme Court cases, including Justice Kennedy's concurring opinion in *Rapanos*. In the agencies' proposed revised definition of "waters of the United States," the agencies are considering the proper scope of federal CWA jurisdiction and seek to establish a clear and implementable definition that better effectuates the language, structure, and purposes of the CWA.**
>
> **See also the agencies' response to comments in Section 4.1, Section 4.2, and Section 4.3.**

*4.8.4 Test for CWA jurisdiction post-*Rapanos

Some commenters argued that the 2015 Rule's reliance on Justice Kennedy's significant nexus test was improper under *Marks v. United States*, 430 U.S. 188 (1977) because Justice Kennedy's opinion did not have support from a majority of Supreme Court Justices. A few of these commenters asserted that the appropriate test for CWA jurisdiction should derive from the intersection between the plurality's and Justice Kennedy's opinions. One commenter believed that there is little intersection between the opinions of the *Rapanos* plurality and Justice Kennedy (citing *United States v. Cundiff*, 555 F.3d 200 (6th Cir. 2009)); this commenter suggested that there were other approaches compatible with *Marks*, including asserting jurisdiction over waters that satisfy *both* the plurality's and Justice Kennedy's tests or treating the Court's opinions as simply persuasive. Another commenter stated that, consistent with *Marks*, only a water meeting both the plurality's and Justice Kennedy's tests is jurisdictional under the Act, citing *King v. Palmer*, 950 F.2d 771, 781 (D.C. Cir. 1991). In contrast, one commenter argued that *Marks* does not support the approach that a water meeting either the plurality's or Justice Kennedy's test can be found jurisdictional.

A number of commenters claimed that under *Marks*, the *Rapanos* plurality's opinion is the controlling test for CWA jurisdiction since it is a logical subset of Justice Kennedy's reasoning, citing *King*, 950 F.2d at 781 and *Planned Parenthood of Se. Pa. v. Casey*, 947 F.2d 682, 693 (3d Cir. 1991). One of the commenters argued that the *Rapanos* plurality's opinion is clearly narrower than Justice Kennedy's opinion because Justice Kennedy criticizes the plurality's interpretation of "navigable waters" as being too narrow.

Other commenters noted that all of the U.S. Circuit Courts that have addressed the scope of CWA jurisdiction following *Rapanos* have applied Justice Kennedy's significant nexus test or a broader application of jurisdiction, including the U.S. Courts of Appeals for the First, Third, Fourth, Fifth, Sixth, Seventh, Ninth, and Eleventh Circuits. In contrast, the commenters stated that no court has held that the *Rapanos* plurality opinion is the only test for CWA jurisdiction. One commenter asserted that the significant nexus test is the proper test for CWA jurisdiction after *Rapanos* because a majority of Justices agreed that the CWA applies to upstream waters that "serve important water quality roles" for downstream, navigable waters. Conversely, another commenter noted that the *Rapanos* plurality's opinion was rejected by a majority of the Supreme Court Justices.

Agencies' Response: The agencies are not taking a position in this rulemaking regarding whether Justice Kennedy's concurring opinion in *Rapanos* is or should be the controlling authority regarding the scope of federal jurisdiction under the CWA. The agencies used Justice Kennedy's significant nexus standard as the touchstone for the 2015 Rule, and for the reasons described in this final rule preamble, the agencies are repealing the 2015 Rule because it exceeded the scope of authority described in that standard. Although not central to the agencies' decision to repeal the 2015 Rule, the agencies also conclude that many of their concerns with the 2015 Rule would be present equally or even more pronounced if Justice Scalia's plurality opinion in *Rapanos* controlled. The agencies requested comment regarding whether Justice Kennedy's concurring opinion is or should be controlling as part of the rulemaking on a proposed revised definition of "waters of the United States." See 84 FR 4167, 4177. The agencies are evaluating comments submitted in response to that request and need not take positions on those questions to support or resolve the issues raised in this rulemaking.

4.9 Comments on SNPRM's Discussion of CWA and Supreme Court Precedent

4.9.1 *Commonalities between plurality's and Justice Kennedy's opinions in* Rapanos

Several commenters agreed that some aspects of the *Rapanos* plurality's and Justice Kennedy's opinions align regarding the limits of federal CWA jurisdiction. These commenters provided examples of points of agreement between the opinions, including that the term "navigable" must be given some effect; Congress intended to regulate at least some waters that are not navigable in the traditional sense; the Corps' prior definition of "tributary" was too broad; federal CWA jurisdiction does not reach all wetlands; and nonnavigable waters must have a substantial relationship with traditional navigable waters to be jurisdictional.

Other commenters disagreed that the plurality's and Justice Kennedy's opinions share important commonalities. These commenters asserted that the two opinions have disparate rationales that cannot be reconciled, emphasizing Justice Kennedy's statement that "the plurality's opinion is inconsistent with the [CWA's] text, structure, and purpose," *Rapanos*, 547 U.S. at 776 (Kennedy, J., concurring). Commenters suggested that the agencies' position is inconsistent with that of federal courts, none of which have suggested that Justice Kennedy's and the plurality's opinions are similar. To the contrary, the commenters noted that federal courts have predominantly held that where a water does not meet the plurality's test, it may be found jurisdictional if it meets Justice Kennedy's test, citing to *United States v. Gerke Excavating, Inc.*, 464 F.3d 723, 724–25 (7th Cir. 2006); *United States v. Robison*, 505 F.3d 1208, 1222 (11th Cir. 2007); *United States v. Moses*, 496 F.3d 984, 989–91 (9th Cir. 2007); *N. Cal. River Watch v. City of Healdsburg*, 496 F.3d 993, 999–1000 (9th Cir. 2007); *United States v. Bailey*, 571 F.3d 791, 798–800 (8th Cir. 2009); *United States v. Cundiff*, 555 F.3d 200, 210–13 (6th Cir. 2009); *United States v. Lucas*, 516 F.3d 316, 325–27 (5th Cir. 2008); *United States v. Donovan*, 661 F.3d 174, 183–84 (3d Cir. 2011); *Precon Dev. Corp. v. U.S. Army Corps of Eng'rs*, 633 F.3d 278, 289 (4th Cir. 2011); and *Deerfield Plantation Phase II-B Prop. Owners Ass'n, Inc. v. U.S. Army Corps of Eng'rs, Charleston Dist*., 501 F. App'x 268, 275 (4th Cir. 2012). Commenters expressed concern that the agencies now seek to disregard important differences between the two opinions.

A number of commenters criticized the agencies' interpretation of Supreme Court case law as discussed in the SNPRM and suggested that the agencies were mischaracterizing Supreme Court precedent.

Several commenters noted that the interpretation of Supreme Court precedent expressed in the SNPRM conflicts with over a decade of legal briefs filed by the United States.

> **Agencies' Response: While the agencies acknowledge that the plurality and Justice Kennedy viewed the question of federal CWA jurisdiction differently, the agencies find that there are sufficient commonalities between these opinions to help instruct the agencies on where to draw the line between federal and state waters. Wherever that line most appropriately resides, the agencies conclude that the 2015 Rule exceeded the limits of federal authority articulated by both Justice Kennedy and the plurality in *Rapanos*. With this final rule, the agencies are restoring the more familiar line as established in the pre-2015 regulatory regime, as implemented, and are considering a revised definition as part of a separate rulemaking. *See* 84 FR 4154.**
>
> **The agencies note that their legal interpretations are not "instantly carved in stone"; quite the contrary, the agencies "must consider varying interpretations and the wisdom of [their] policy on a continuing basis, . . . for example, in response to . . . a change in administrations." *Nat'l Cable & Telecommc'ns Ass'n v. Brand X Internet Servs*., 545 U.S. 967, 981–82 (2005) (internal quotation marks omitted) (quoting *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 863–64 (1984)) (citing *State Farm*, 463 U.S. at 59 (Rehnquist, J., concurring in part and dissenting in part)). Indeed, "agencies are free to change their existing policies as long as they provide a reasoned explanation for the change." *See Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016) (citations omitted). Consistent with the APA and applicable case law, the agencies have provided ample justification for their change in position with respect to the 2015 Rule, as reflected in the preamble to the final rule. The agencies have carefully analyzed their statutory and constitutional authority, along with relevant case law, and have provided a detailed explanation of their reasons for deciding to repeal the 2015 Rule and restore the pre-existing regulations.**

4.9.2 "Nation's waters" and "navigable waters"

A number of commenters disagreed that the CWA distinguishes between the "nation's waters" and a subset of those waters known as the "navigable waters." Many of these commenters stated that the agencies' interpretation is not supported by the text or structure of the Act. Some commenters asserted that the agencies' interpretation is based on selectively quoting from and mischaracterizing CWA sections 105, 106, 108, and 118. Other commenters argued that the two terms are synonymous under the Act.

Relatedly, some commenters disagreed that the CWA's technical assistance and grants constitute an independent non-regulatory program for non-jurisdictional waters. One commenter specifically disputed that the term "navigable waters" is narrowed by the watershed restoration grants program, asserting that nothing suggests that Congress intended the primary tools of the CWA (i.e., the permitting program) to apply more narrowly than watershed restoration grants. Commenters also asserted that the Great Lakes, Long Island Sound, and the Chesapeake Bay, among other waters and their watersheds, are "waters of the United States."

> **Agencies' Response: Fundamental principles of statutory interpretation support the agencies' recognition of a distinction between "nation's waters" and "navigable waters." As the Supreme Court has observed, "[w]e assume that Congress used two terms because it intended**

each term to have a particular, nonsuperfluous meaning." *Bailey v. United States*, 516 U.S. 137, 146 (1995) (recognizing the canon of statutory construction against superfluity). Further, "the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Brown & Williamson Tobacco Corp.*, 529 U.S. at 133 (internal quotation marks and citation omitted); *see also United Savings Ass'n v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 ("Statutory construction . . . is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme—because the same terminology is used elsewhere in a context that makes its meaning clear[.]" (citation omitted)). Here, the non-regulatory sections of the CWA reveal Congress' intent to restore and maintain the integrity of the nation's waters using federal assistance to support state, tribal, and local partnerships to control pollution in the nation's waters in addition to a federal regulatory prohibition on the discharge of pollutants into the navigable waters. If Congress had intended for these distinct phrases to have exactly the same meaning, it is reasonable to conclude that Congress would have simply used the same terminology.

See also Final Rule Preamble Section III.

4.10 Rulemaking Process for the 2015 Rule

4.10.1 General comments

The agencies received numerous comments regarding the rulemaking process for the 2015 Rule and whether the agencies complied with procedural and substantive requirements under various federal laws in issuing the 2015 Rule. Some commenters asserted that the agencies should repeal the 2015 Rule because in their view the 2015 Rule did not comply with the APA's procedural or substantive requirements. Some commenters argued that the 2015 Rule was not supported by the administrative record or the result of reasoned decision-making consistent with the Supreme Court's holding in *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009). A few commenters alleged that the agencies had a closed mind to the outcome of the rulemaking, and one commenter argued that the agencies had violated the APA because the 2015 Rule was based on selectively applied data. As support, some of these commenters cited opinions from courts that have issued preliminary injunctions against the 2015 Rule, including *Georgia v. Pruitt*, 326 F. Supp. 3d 1356 (S.D. Ga. 2018) and *North Dakota v. EPA*, 127 F. Supp. 3d 1047 (D.N.D. 2015).

Several commenters asserted that the agencies did not prepare required analyses of the 2015 Rule under the Regulatory Flexibility Act or the Unfunded Mandates Reform Act and that the Corps had violated the National Environmental Policy Act. Commenters also asserted that the agencies failed to comply with a host of executive orders in promulgating the 2015 Rule, particularly Executive Order 12866 (regulatory planning and review) and Executive Order 13132 (federalism consultation).

One commenter argued that the data used in the 2015 Rule did not follow section 515 of the Treasury and General Government Appropriations Act or related guidance, citing to regulations governing the use of data that is not publicly available.

Some commenters expressed support for repealing the 2015 Rule due to concerns surrounding the agencies' social media campaign in developing the 2015 Rule; as support, some of these commenters noted that the Government Accountability Office had issued a report concluding that the agencies had

violated federal law prohibiting agency lobbying and propaganda campaigns. One commenter stated that the social media campaign demonstrates that the agencies did not genuinely seek out and consider public input in developing the 2015 Rule.

Relatedly, some commenters suggested that the agencies did not conduct sufficient stakeholder outreach or adequately keep the public informed and engaged throughout the rulemaking process for the 2015 Rule. One of these commenters asserted that the Corps in particular should have engaged more with stakeholders to better understand the impact of the 2015 Rule and how to improve implementation of the rule. Another commenter claimed that the agencies failed to honestly represent and openly disclose the adverse impacts of the 2015 Rule. Other commenters expressed support for the rulemaking process for the 2015 Rule. These commenters suggested that the rulemaking process for the 2015 Rule was comprehensive, transparent, and effectively engaged the public, including through a lengthy comment period and over 400 stakeholder meetings. Some of these commenters indicated that the extensive record supporting the 2015 Rule demonstrates that the agencies balanced a myriad of considerations in developing the final rule.

> **Agencies' Response: While commenters suggested a variety of reasons to repeal the 2015 Rule, as explained in the preamble to the final rule, the agencies are repealing the 2015 Rule for four primary reasons. First, the agencies conclude that the 2015 Rule did not implement the legal limits on the scope of the agencies' authority under the CWA as intended by Congress and reflected in Supreme Court cases, including Justice Kennedy's articulation of the significant nexus test in *Rapanos*. Second, the agencies conclude that in promulgating the 2015 Rule the agencies failed to adequately consider and accord due weight to the policy of the Congress in CWA section 101(b) to "recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution" and "to plan the development and use . . . of land and water resources." 33 U.S.C. 1251(b). Third, the agencies repeal the 2015 Rule to avoid interpretations of the CWA that push the envelope of their constitutional and statutory authority absent a clear statement from Congress authorizing the encroachment of federal jurisdiction over traditional State land-use planning authority. Lastly, the agencies conclude that the 2015 Rule's distance-based limitations suffered from certain procedural errors and a lack of adequate record support. The agencies find that these reasons, collectively and individually, warrant repealing the 2015 Rule. The agencies find that it is appropriate to restore the pre-existing regulations while the agencies consider public comments on the proposed revised definition of "waters of the United States." *See* 84 FR 4154 (Feb. 14, 2019).**

4.10.2 Procedural requirements under the Administrative Procedure Act

Many commenters expressed concern that the agencies did not comply with the APA's notice and comment requirements in issuing the 2015 Rule, including because the public did not have an opportunity to comment on the final version of the Connectivity Report before the 2015 Rule was finalized or the Science Advisory Board's review of the Connectivity Report, despite the fact that the report played a critical role in the rule's "significant nexus" standard. One commenter cited *Am. Radio Relay League v. FCC*, 524 F.3d 227 (D.C. Cir. 2008) in support of the argument that the agencies violated the APA by failing to provide for public comment on the final Connectivity Report. A few commenters stated that the 2015 Rule expanded the CWA's jurisdiction to previously unregulated waters and argued

that the agencies did not provide a sufficient opportunity for public comment on this expansion. Further, some commenters asserted that the agencies did not meaningfully respond to or consider certain comments on the 2014 proposed rule; one of these commenters argued that the agencies' failure to respond provides an appropriate basis for rescission.

Commenters also argued that the 2015 Rule was not a "logical outgrowth" of the 2014 proposed rule. Some of these commenters cited to the Southern District of Georgia's order issuing a preliminary injunction against the 2015 Rule, where the court found that the challengers in that case are likely to succeed on the argument that the 2015 Rule was not a logical outgrowth of the proposal "in significant ways," including because "the proposed rule made no mention of exempting waters on farmland only from the 'adjacent waters' category," *see Georgia v. Pruitt*, 326 F. Supp. 3d 1356, 1366 (S.D. Ga. 2018).

Other commenters suggested that the agencies provided adequate notice and a meaningful opportunity to comment on the 2015 Rule, including because the draft Connectivity Report and Technical Support Document were available for review during the public comment period, *see* 79 FR 22188, and the SAB's deliberations and review of the Connectivity Report were publicly available and open to public participation throughout the rulemaking process. Therefore, the commenters claimed, nothing in the finalization of these documents deprived stakeholders of their ability to understand and comment on the issues at play in the proposal.

Some commenters asserted that the agencies have no rational basis to repeal the 2015 Rule on the grounds that potential procedural deficiencies limited effective public participation in the development of the 2015 Rule.

> **<u>Agencies' Response</u>: As discussed in Section III.C.4 of the final rule preamble, the agencies find that the distance-based limitations in the 2015 Rule were not a logical outgrowth of the proposed rule and were not supported by an adequate record. The agencies recognize that the federal government, in prior briefing in litigation over the 2015 Rule, defended the procedural steps the agencies took to develop and support the 2015 Rule. Having considered all of the public comments, relevant litigation positions, and the decisions of the U.S. District Courts for the Southern District of Texas and the Southern District of Georgia on related arguments, the agencies now agree with the reasoning of those courts and conclude that the proposal for the 2015 Rule did not provide adequate notice of the specific distance-based limitations that appeared for the first time in the final rule and that the final rule did not contain sufficient record support for the specific distance-based limitations. The distance-based limitations were a central aspect of the 2015 Rule, and necessary for the rule to accomplish its goal of increasing consistency and predictability. As such, the agencies conclude that the procedural errors and lack of adequate record support associated with the distance-based limitations in the final rule are a sufficient basis, standing alone, to warrant repeal of the 2015 Rule. By repealing the 2015 Rule for the reasons stated in the final rule preamble, the agencies are also remedying the procedural defects underlying the 2015 Rule and certain substantive deficiencies identified by these courts.**
>
> **See also Final Rule Preamble Section III.C.4 and the agencies' response to comments in Section 4.4 and Section 4.10.1.**

4.10.3 Regulatory Flexibility Act

Some commenters suggested that the agencies did not prepare a sufficient analysis for the 2015 Rule under the Regulatory Flexibility Act (RFA), including because the 2015 Rule failed to explain why the rule would not impact small businesses and ignored the Small Business Administration's (SBA) recommendation to conduct a full RFA analysis. One commenter asserted that the EPA should have convened a panel under the Small Business Regulatory Enforcement Fairness Act. Another commenter expressed support for repealing the 2015 Rule, noting that SBA had sent the agencies a letter expressing concerns that the 2015 Rule's RFA analysis was improperly certified.

Multiple commenters asserted that the 2015 Rule would have a significant impact on small businesses, contrary to the agencies' findings in support of the 2015 Rule. In particular, the SBA argued that the 2015 Rule would impose new significant direct costs on small entities and that the only way to correct this deficiency was to withdraw the rule and conduct a full RFA analysis. Other commenters noted that the 2015 Rule's increase in jurisdiction would increase costs and permitting requirements for farmers and other small business owners. One commenter noted that the agencies received adequate evidence to suggest the rule would have a significant impact, including testimony on May 29, 2014, to the House Small Business Committee. Another commenter asserted that their analysis revealed that the 2015 Rule would significantly impact local governments.

> **Agencies' Response: The agencies are repealing the 2015 Rule for the reasons described in the preamble to the final rule. For the agencies' RFA analysis for this final rule, see Section IV of the Economic Analysis for the Final Rule: Definition of "Waters of the United States"—Recodification of Pre-Existing Rules.**

4.10.4 Unfunded Mandates Reform Act

A few commenters, including comments on the 2014 proposed rule and the SNPRM, suggested that the agencies did not properly consider the Unfunded Mandates Reform Act (UMRA) when developing the 2015 Rule. The commenters stated that the 2015 Rule would create a significant regulatory and financial burden, resulting in an unfunded mandate for state and local governments. One commenter noted that populations of less than 25,000 people live in over half the counties of the U.S. (according to the National Association of Counties). This commenter argued that some of the most significant permitting and enforcement impacts of the 2015 Rule would occur in these counties, as they are responsible for the construction and maintenance of 45 percent of roads and associated roadside ditches in 43 states. The commenter further reasoned that since the 2015 Rule does not create new federal funding for state or local governments, the rule contains unfunded federal mandates. Another commenter suggested that the agencies work with stakeholders to evaluate the 2015 Rule in a manner consistent with the UMRA.

> **Agencies' Response: The agencies are repealing the 2015 Rule for the reasons described in the preamble to the final rule. Neither the 2015 Rule nor this final rule contain an unfunded mandate under the regulatory provisions of Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. §§ 1531-1538), and do not significantly or uniquely affect small governments.**

4.11 Miscellaneous Comments on Legal Issues

Some commenters noted that all of the courts that had weighed in on the merits of the 2015 Rule at the time their comments were submitted had found it likely to be unlawful for numerous reasons and have

thus enjoined the rule to avoid the concerns associated with implementing an illegal rule. Commenters asserted that these judicial decisions strongly support the agencies' proposed repeal of the 2015 Rule.

One commenter suggested that the 2015 Rule is akin to legislation crafted by unelected, Executive Branch bureaucrats. Another commenter asserted that the 2015 Rule resurrects the Oberstar Bill, which was defeated in Congress and therefore should not be used as a basis for regulation.

Another commenter argued that the 2015 Rule improperly ignores a traditional limit placed on federal regulatory authority, the continuous highway requirement, and assumes that the word "traditional" refers to all navigable-in-fact waters. This commenter also stated that the 2015 Rule improperly allows minimal recreational use to serve as conclusive evidence of navigability.

A different commenter suggested that the 2015 Rule's categorical assertion of jurisdiction over some waters eliminated the opportunity for the agencies to assess whether and to what extent the mandates of the CWA conflict with the Federal Aviation Law on a case-specific basis.

One commenter asserted that the agencies' proposal to recodify the pre-2015 Rule regulations is facially invalid because the Supreme Court has held that certain provisions of the prior regulations are overbroad.

Some commenters asserted that the proposed rule will directly benefit the President and the Trump Organization, in violation of the Emoluments Clause, because repealing the 2015 Rule will result in the President's golf courses no longer being subject to CWA regulations. Commenters stated that the Trump Organization owns twelve golf courses across the country and would have to expend significant resources to comply with the 2015 Rule. A commenter stated that the agencies should thus conduct an analysis of the applicability of the 2015 Rule to each of the President's properties to then calculate the benefits that its rescission would likely produce. The commenter further stated that if the agencies proceed with this rulemaking, the agencies must specify that the 2015 Rule continues to apply to the President's properties for life, or during his tenure in office, or that an independent commission be established to oversee application of the regulatory definition to his properties.

> **<u>Agencies' Response</u>: The agencies agree that the court rulings issued thus far against the 2015 Rule corroborate the agencies' concerns regarding the scope and legal basis of the rule. As explained in the preamble to the final rule, the agencies conclude that the 2015 Rule did not implement the legal limits on the scope of the agencies' authority under the CWA as intended by Congress and reflected in Supreme Court cases, including Justice Kennedy's articulation of the significant nexus test in *Rapanos*, did not adequately consider and accord due weight to the policy of Congress in CWA section 101(b), pushed the envelope of the agencies' constitutional and statutory authority absent a clear statement from Congress, and included distance-based limitations that suffered from procedural errors and a lack of adequate record support. For these and other reasons discussed more fully in the preamble, the agencies find that it is appropriate to repeal the 2015 Rule and to restore the pre-existing regulations. By repealing the 2015 Rule for the reasons stated in the final rule preamble, the agencies are addressing some commenters' concerns regarding the 2015 Rule.**
>
> **This final rule is not facially invalid. The agencies have been applying the pre-2015 Rule regulations consistent with the Supreme Court's decisions in *SWANCC* and *Rapanos* and informed by the agencies' corresponding guidance for over a decade. Those decisions did not vacate or remand the prior regulations but instead have helped to define the scope of the**

agencies' CWA authority and shaped the agencies' approach to implementing those pre-existing regulations.

Moreover, this rulemaking to repeal the 2015 Rule and restore the pre-existing regulations is not a violation of either the Foreign or Domestic Emoluments Clause. The agencies find that the commenter has not demonstrated that there would be any change in the jurisdictional status of any portion of the Trump Organization's golf courses, and the commenter has likewise not shown how the Emoluments Clauses are implicated. The Foreign Emoluments Clause prohibits acceptance of any "Emolument, Office, or Title . . . from [a foreign government]," U.S. Const. art. I, § 9, cl. 8, and the Domestic Emoluments Clause prohibits acceptance of "any other Emolument" "for [the President's] Services" "from [a domestic government]," *id.* art. II, § 1, cl. 7. The commenter does not explain or demonstrate how the proposed rule would violate these clauses.

Section 5 STATE, TRIBAL, AND LOCAL GOVERNMENTS

5.0 Agencies' Summary Response

This section contains summaries of comments on the agencies' proposed rule regarding state, tribal, and local government issues. This summary response applies to all comments summarized in this section. As appropriate, the agencies have provided more specific responses below each comment summary.

Congress envisioned a major role for the states in implementing the CWA, carefully balancing the traditional power of states to regulate land and water resources within their borders with the need for a national water quality regulation. *See* 33 U.S.C. § 1251(b) (providing that ''[i]t is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution" and "to plan the development and use . . . of land and water resources"); *see also Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs* (*SWANCC*), 531 U.S. 159, 174 (2001) (recognizing "States' traditional and primary power over land and water use").

Under this statutory scheme, the states are primarily responsible for developing water quality standards for "waters of the United States" within their borders and for reporting on the condition of those waters to the EPA every two years. 33 U.S.C. §§ 1313, 1315. States must also develop total maximum daily loads (TMDLs) for waters that are not meeting established water quality standards and must submit those TMDLs to the EPA for approval. *Id*. § 1313(d). In addition, states have authority under CWA section 401 to issue water quality certifications or waive certification for every federal permit or license issued within their borders that may result in a discharge to navigable waters. These same regulatory authorities can be assumed by eligible Indian tribes under section 518 of the CWA, which authorizes EPA to treat eligible Indian tribes with reservations in a manner similar to states for a variety of purposes, including administering each of the principal CWA regulatory programs. *Id*. § 1377(e). At this time, 47 states administer portions of the CWA section 402 permit program for those "waters of the United States" within their boundaries, and two states (Michigan and New Jersey) administer the section 404 permit program. At present, no tribes administer the section 402 or 404 permit programs.

Outside of CWA-authorized programs, states and tribes with Indian country[15] lands may implement, establish, or modify their own programs under state or tribal law to regulate "waters of the state" or "waters of the tribe"[16] (i.e., those waters that fall outside the jurisdictional scope of the CWA). Where authorized by state or tribal law, states and tribes may establish more protective standards or limits than the federal CWA to manage such waters and may choose to address special concerns related to the protection of water quality and other aquatic resources within their borders, such as wetlands. This final rule does not affect or diminish state or tribal authorities to establish protections for their aquatic resources, and nothing in the CWA prohibits states or tribes from determining what kinds of aquatic resources to regulate under state or tribal law to protect the interests of their citizens.

On February 28, 2017, the President issued Executive Order 13778, entitled "Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the 'Waters of the United States' Rule." Section 1 of the Executive Order states that "[i]t is in the national interest to ensure the Nation's navigable waters are kept free from pollution, while at the same time promoting economic growth, minimizing regulatory uncertainty, and showing due regard for the roles of the Congress and the States under the Constitution." Executive Order 13778 directed the agencies to review the 2015 Rule for consistency with the policy outlined in Section 1 and to issue a proposed rule rescinding or revising the 2015 Rule as appropriate and consistent with law.

For the reasons articulated in the preamble to the final rule, the agencies find that it is appropriate to repeal the 2015 Rule and to restore the pre-existing regulations while the agencies consider public comments on the proposed revised definition of "waters of the United States." *See* 84 FR 4154 (Feb. 14, 2019). The agencies will implement those pre-existing regulations as informed by applicable agency guidance documents and consistent with Supreme Court decisions and longstanding agency practice, as they did for many years prior to the 2015 Rule and as they have continued to do in those States subject to court orders staying implementation of the 2015 Rule. As explained in the preamble to the final rule, the agencies find, among other things, that the 2015 Rule exceeded the agencies' statutory authority and that in promulgating the 2015 Rule, the agencies did not adequately consider and accord due weight to the policy directive from Congress in section 101(b) of the Act to "recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution" and "to plan the development and use . . . of land and water resources." The agencies have now concluded that as a result, the 2015 Rule asserted jurisdiction over certain waters that are more appropriately left solely in the jurisdiction of states and altered federal, state, tribal, and local government relationships in implementing CWA programs. The agencies further conclude that the 2015 Rule pushed the envelope of the agencies' constitutional and statutory authority absent a clear statement from Congress authorizing the encroachment of federal jurisdiction over traditional State land-use planning authority.

With this final rule, the agencies are repealing the 2015 Rule and codifying the prior regulations, thereby reinstating nationwide a longstanding regulatory framework that is familiar to and better

[15] The term Indian country is defined in 18 U.S.C. § 1151 as all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation; all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state; and all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same. Consistent with the statutory definition, lands held by the federal government in trust for Indian tribes that exist outside of formal reservations are Indian country.

[16] Some tribes have used the term "reservation waters" rather than "waters of the tribe."

understood by the agencies, states, tribes, local governments, regulated entities, and the public pending any final action on the separate rulemaking on the proposed revised definition of "waters of the United States." *See* 84 FR 4154 (Feb. 14, 2019). Further, by repealing the 2015 Rule and recodifying the pre-existing regulations, this final rule returns the relationship between the federal government, states, and tribes to the longstanding and familiar distribution of power and responsibilities that existed under the CWA for many years prior to the 2015 Rule. Ensuring that states and tribes retain authority over their land and water resources pursuant to CWA sections 101(b), 510, and 518 also helps carry out the overall objective of the CWA and ensures that the agencies are giving full effect and consideration to the entire structure and function of the Act.

See also Final Rule Preamble Section III; Economic Analysis for the Final Rule: Definition of "Waters of the United States"—Recodification of Pre-Existing Rules; and the agencies' response to comments in Section 4.

5.1 Comments on State and Local Government Issues

5.1.1 Federalism consultation under Executive Order 13132

Multiple commenters asserted that the agencies did not adequately engage in federalism consultation in issuing the 2015 Rule and disagreed with the agencies' finding that the 2015 Rule does not have federalism implications. One commenter asserted that the agencies' failure to adequately engage state and local entities contributed to the 2015 Rule's flaws. Relatedly, a few commenters stated that the agencies did not sufficiently address adverse comments submitted by many states (including Arizona, Florida, Iowa, Kansas, Pennsylvania, Tennessee and Wisconsin) on the 2014 proposed rule (79 FR 22263, April 21, 2014). A number of commenters supported repealing the 2015 Rule as a vehicle to allow the agencies to better undertake federalism consultation and receive state input.

> **Agencies' Response: In 2015, the agencies concluded that, under the technical requirements of Executive Order 13132, the 2015 Rule did not have federalism implications as defined in Executive Order 13132 and thus the requirements of the executive order did not apply to the 2015 Rule. The agencies are not basing their repeal on the technical requirements of Executive Order 13132; rather, for the reasons articulated in the preamble to the final rule, the agencies find that it is appropriate to repeal the 2015 Rule and to restore the pre-existing regulations. See also the Agencies' Summary Response in Section 5.0.**

5.1.2 State water pollution control programs

Multiple commenters asserted that states are in the best position to regulate waters, because states can choose to regulate in ways that are compatible with each state's unique hydrology, uses, and existing laws. Some commenters suggested that states can implement water quality protections more sensibly and effectively than the federal government and, moreover, that state regulation is more effective when the federal government respects states' legal authority over their waters. For example, one commenter asserted that broad federal CWA jurisdiction would interfere with Pennsylvania's efforts to work with communities to regulate water resources. A few commenters argued that states should have exclusive authority over intrastate waters; other commenters suggested that there is no reason for waters to receive both state and federal protection. One commenter stated that states should be the sole regulators of water quality because state agencies are generally more well-funded and staffed than EPA.

Relatedly, several commenters stated that the 2015 Rule does not sufficiently recognize the important role of state and local governments, who better understand local conditions and therefore are in a better position to regulate water resources. A few commenters referenced state efforts to adopt water management programs that are based on sound science and local information and that provide for both environmental protection and responsible economic growth within the state.

Other commenters expressed concern regarding the adequacy of existing state water quality protections. Several commenters asserted that wetlands protections are limited or nonexistent at the state level, noting that less than half of the states have regulatory programs to protect wetlands outside of the CWA's requirements, and only two states have assumed the CWA section 404 program.

> **Agencies' Response: See the Agencies' Summary Response in Section 5.0. Throughout the agencies' two-step rulemaking process, the agencies have heard from a number of states about their familiarity with waters within their borders. Several states have suggested that the agencies consider states' knowledge and increase the role of states and tribes in identifying those waters that are "waters of the United States." To that end, the agencies are considering how to create a framework that would authorize interested states, tribes, and federal agencies to develop for the agencies' approval geospatial datasets representing "waters of the United States" within their respective borders. The agencies solicited comment on this issue in the February 2019 proposed revised definition of "waters of the United States" and are continuing to consider potential approaches to implementing the Act that would better leverage the geographic knowledge of states, tribes, and federal land management agencies. *See* 84 FR 4198–4200.**
>
> **The agencies have also worked to better account for existing state programs in this rulemaking and have incorporated state programs into the scenarios estimating avoided costs and forgone benefits due to the final rule. The agencies' summaries of existing state programs are available in Appendix A of the economic analysis for this final rule.**
>
> **As explained in Section III of the final rule preamble, the agencies find that the 2015 Rule exceeded the agencies' statutory authority and asserted jurisdiction over certain waters that are more appropriately left solely in the jurisdiction of states. With this final rule, the agencies are repealing the 2015 Rule and recodifying the pre-existing regulations. The agencies note that nothing in this final rule prohibits states from establishing their own programs under state law to regulate waters beyond the scope of the federal CWA or from enacting more stringent standards to protect and manage such waters.**
>
> **See also the agencies' response to comments in Section 6.4.**

5.1.3 Impact of change in scope of CWA jurisdiction on state water quality protections

A number of commenters criticized the agencies' assumption in promulgating the 2015 Rule that waters outside the scope of federal CWA jurisdiction are unprotected and that expanding federal CWA jurisdiction necessarily leads to greater environmental protection. Commenters explained that many states provide water quality protections that are at least as stringent as or more stringent than federal law, including Alaska, Arizona, Kansas, Montana, Nebraska, North Dakota, Oklahoma, South Dakota and Virginia. Other commenters referenced programs in states such as Nevada, North Dakota and Wisconsin

that protect all "waters of the state." In those states, the commenters suggested, existing water quality protections would not be impacted by a change in the scope of federal CWA jurisdiction.

Other commenters expressed concern that states will not fill regulatory gaps in water quality protection in response to a reduction in federal CWA jurisdiction. These commenters disagreed with the assumption in the proposed rule's economic analysis that most states would respond to rescission of the 2015 Rule by continuing to regulate as "waters of the state" those waters that are no longer considered "waters of the United States." As support, many commenters explained that 36 states have at least one state law provision that establishes the scope of federal CWA jurisdiction as a ceiling on state regulation—either by limiting states' ability to regulate waters outside of federal jurisdiction or by prohibiting state regulation that is more stringent than federal regulation. Commenters provided specific examples of these types of provisions from states including Arizona, Iowa, New York and Montana. Commenters also noted that states did not expand their programs to fill regulatory gaps following the Supreme Court's decision in *Rapanos*.

Further, some commenters questioned whether states have sufficient resources to fill regulatory gaps in federal CWA jurisdiction, particularly downstream states that may be unable to compensate for a lack of upstream regulations. Commenters also suggested that some states may be unwilling to fill regulatory gaps. As an example, commenters noted that states opposed to the 2015 Rule are unlikely to adopt laws that provide the same degree of water quality protection.

Finally, a few commenters suggested that the goals of the CWA cannot be met where states do not fill regulatory gaps in water quality protection.

> **<u>Agencies' Response</u>: See the Agencies' Summary Response in Section 5.0. As explained in the preamble to this final rule, the agencies have made changes to the methods used to estimate the costs and benefits of this rulemaking after assessing input provided through filings in litigation against the 2015 Rule and in comments submitted in response to the initial notice of proposed rulemaking (NPRM), *see* 82 FR 34899 (July 27, 2017). In part, the economic analysis for this final rule responds to the concerns raised by commenters by incorporating a more nuanced characterization of existing state programs and possible state responses to a change in CWA jurisdiction.**
>
> **To better understand how states already regulate waters within their borders, the economic analysis for this final rule describes existing state authorities and programs based on information available to the agencies at this time. The agencies have found that approximately half of states regulate at least some waters beyond the scope of CWA requirements, while some states have laws that constrain a state's authority to regulate more broadly than the federal "floor" set by the CWA.**
>
> **Throughout the history of the CWA, court decisions and agency actions have re-interpreted the scope of "waters of the United States." In response to changes in the jurisdictional scope of the CWA, some states have adjusted their state laws and regulations. Some states have adjusted their laws to cover waters consistent with the scope of CWA jurisdiction based on requirements in their own laws that they cannot be more stringent than federal regulations. Other states have increased regulatory requirements to address aquatic resources no longer regulated under the CWA. For example, following the Supreme Court's decision in *SWANCC*, two states passed laws protecting isolated waters within their states. In that same year,**

several other states issued new regulations or reinterpreted their existing regulations to also extend coverage to isolated waters. The agencies recognize that these specific actions are not indicative of how all states would respond to a change in the scope of CWA jurisdiction and that the actions of states following any revision of the "waters of the United States" definition is difficult to predict. Any future effects will vary from state to state based on a state's independent legal authority to regulate aquatic resources beyond the scope of the CWA.

In addition, as described in more detail in the economic analysis for the final rule, fiscal federalism recognizes that states, being closer to their water resources, are better positioned to make decisions about allocating their resources toward higher priority waters. Depending on whether a newly characterized non-jurisdictional water is highly or lowly valued, states may choose to protect it or not protect it.

Further, in response to concerns related to whether states have sufficient resources to fill regulatory gaps in federal CWA jurisdiction, the agencies note that both states and eligible tribes can seek financial assistance under CWA programs such as the section 106 grant program, which provides funding to build and sustain effective water quality programs to help meet the objective of the CWA. Already, these funds support programs of the state or tribe regardless of whether the programs address waters that are jurisdictional. Thus, state and tribal program funding through 106 grants would continue to be unaffected by the scope of federal CWA jurisdiction.

5.1.4 Impacts on state resources

Multiple commenters expressed concern that, to the extent the 2015 Rule expanded jurisdiction, it increased the burden on state resources in the form of increased times for processing permits, increased effort to identify jurisdictional waters (especially given various ambiguities in the 2015 Rule), and increased number of actions triggering compliance with federal statutes such as the National Environmental Policy Act, Endangered Species Act and National Historic Preservation Act. One commenter noted that there could also be an increased cost to states associated with implementing CWA section 401. Some commenters asserted that the 2015 Rule would increase state costs related to designating uses, developing water quality standards, and developing total maximum daily loads (TMDLs) for a broader scope of waters. In contrast, other commenters stated that the 2015 Rule would reduce the burden on states that have assumed the CWA section 402 and/or 404 programs by providing clear categories of waters that are jurisdictional or excluded, thus reducing the number of waters that must be analyzed on a case-by-case basis.

Moreover, some commenters suggested that reducing federal CWA jurisdiction in upstream waters would increase costs for downstream states receiving increased quantities of water and pollutant loads. Several commenters also suggested that reducing federal jurisdiction could harm states that depend on federal loans and grants to fund their water protection programs. One commenter observed that in states where EPA, rather than the state, implements the NPDES program, the scope of water pollution prevention under the NPDES program depends heavily on the scope of federal jurisdiction and the stringency of federal water pollution control standards.

<u>Agencies' Response</u>: See the Agencies' Summary Response in Section 5.0. In the economic analysis for the 2015 Rule, the agencies found that there could be an incremental increase in section 402 permits depending on the change in scope of CWA jurisdiction under the 2015

Rule relative to how the prior rule was implemented, see Economic Analysis of the EPA-Army Clean Water Rule, docket EPA-HQ-OW-2011-0880. Since then, as discussed in the preamble to this final rule, the agencies have concluded that significant flaws in the 2015 Rule's economic analysis led to likely overestimates of the costs and benefits associated with the 2015 Rule as well as possible underestimates of impacts in jurisdictional expansion in some states due to not factoring existing state programs into the quantified analysis. Nevertheless, the agencies acknowledge that a revised definition of "waters of the United States" that results in an incremental increase in CWA section 402 permits could increase state workload for the 47 state-authorized NPDES programs. An increase in the scope of CWA jurisdiction could also increase state workload associated with issuing section 401 certifications. Further, a revised definition of "waters of the United States" that increases the number of activities or projects that require a CWA section 402 or 404 permit could also increase the number of actions that require compliance with other federal laws.

This final rule avoids potentially increased burden on state resources by returning the relationship between the federal government and the states to the longstanding and familiar distribution of power and responsibilities that existed for many years under the pre-2015 Rule regulations. In a separate rulemaking, the agencies are considering public comments on a proposed revised definition of "waters of the United States" that seeks to better effectuate the language, structure, and purposes of the CWA, including the policy directive in CWA section 101(b) to preserve and protect states' primary authority over land and water resources within their borders. *See* 84 FR 4154 (Feb. 14, 2019).

Regarding the potential burden on state resources related to implementing the pre-2015 Rule regulations, the agencies note that the 2015 Rule has never been in effect in all 50 states and that the agencies, states, tribes, and the regulated public are familiar with the longstanding pre-2015 Rule regulations.

See also the agencies' response to comments in Section 5.1.3, Section 8, and Section 9 .

5.1.5 Accounting for regional variations

Several commenters asserted that the 2015 Rule takes a "one-size-fits-all" approach that does not account for regional variations in hydrology, geology, climate, soils and rainfall. These commenters stated that the 2015 Rule is thus inconsistent with the CWA's cooperative federalism framework, which the commenters suggested is meant to recognize differences at the state level. Another commenter asserted that the federal-centric nature of the 2015 Rule impedes the development of partnerships between state regulators and the regulated community to address water pollution.

<u>Agencies' Response</u>: See the Agencies' Summary Response in Section 5.0. As the Supreme Court has explained, the CWA "anticipates a partnership between the States and the Federal Government, animated by a shared objective: 'to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.'" *Arkansas v. Oklahoma*, 503 U.S. 91, 101 (1992). As discussed in the preamble to the final rule, the agencies now find that in promulgating the 2015 Rule, the agencies did not adequately consider and accord due weight to the policy directive from Congress in section 101(b) of the Act to "recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution" and "to plan the development and use . . . of land and water resources." The

agencies have proposed a revised definition of "waters of the United States," *see* 84 FR 4154 (Feb. 14, 2019), that seeks to clarify federal authority under the CWA and better effectuate the language, structure, and purposes of the Act, including the policy directive in CWA section 101(b) to preserve and protect states' primary authority over land and water resources within their borders. In that separate rulemaking, the agencies have also solicited comments on how to account for regional variation.

See also the agencies' response to comments in Section 4.5.

5.1.6 Uniform water quality regulations across the states

A few commenters asserted that a clear and broad scope of federal CWA jurisdiction would promote efficiency and provide a helpful regulatory "floor" or backstop for water quality. While one commenter suggested that a clear scope of federal CWA jurisdiction could level the playing field between states competing to attract businesses or other opportunities, another commenter noted that the need for businesses to comply with different regulations in different states can increase costs.

Other commenters asserted that clear and broad federal CWA jurisdiction provides protections for waters in downstream states and is especially important for downstream drinking water and flood control. One commenter asserted that, while the CWA empowers states to prevent, reduce, and eliminate pollution, it does not empower states to pollute waterways that may affect downstream, traditional navigable waters.

Further, some commenters noted that aquatic features such as streams and wetlands do not stop at state lines and argued that a clear and broad scope of federal jurisdiction is necessary to promote consistent regulation of interstate waters. Another commenter stated that it makes little sense to regulate similar aquatic resources differently in different locations and expressed concern that doing so would adversely affect overall water quality.

<u>Agencies' Response</u>: The CWA balances the traditional power of states to regulate land and water resources within their borders with the need for federal water quality regulation to protect the waters of the United States. By recodifying the pre-2015 Rule regulations, this final rule re-establishes the uniform federal scope of jurisdiction that existed for many years prior to the 2015 Rule, thereby providing greater regulatory certainty while the agencies consider public comments on a proposed revised definition of "waters of the United States" that seeks to better effectuate the language, structure, and purposes of the CWA. *See* 84 FR 4154 (Feb. 14, 2019). The agencies are considering the proper scope of federal CWA jurisdiction as part of that separate rulemaking process. In addition, the agencies note that nothing in this final rule prohibits states from establishing their own programs under state law to regulate waters beyond the jurisdictional scope of the federal CWA or from enacting more stringent standards to protect and manage such waters. See also the Agencies' Summary Response in Section 5.0 and the agencies' response to comments in Section 4.5.

5.1.7 Specific aquatic resources

Many commenters contended that the 2015 Rule would extend CWA jurisdiction to various aquatic features that the commenters suggested should fall within the exclusive jurisdiction of the states, including: wholly intrastate isolated waters; roadside ditches; ephemeral channels; arroyos; industrial

ponds; municipal separate storm sewer systems (MS4s); Louisiana's coastal waters; upstream tributaries that lack a direct connection to navigable waters; waters having only a biological connection to navigable waters; water recycling facilities; drains and wasteways that terminate into a sink; and wetlands that lack a surface connection to a traditional navigable water and were created incidentally as a result of irrigation or other anthropogenic activity located within a watershed.

Several commenters asserted that states should have the ability to choose not to regulate certain aquatic resources. One commenter stated that the fact that the agencies may disagree with a state's decision not to regulate a water that is not otherwise properly within the scope of "waters of the United States" should not be used to boot-strap the expansion of federal authority over such waters.

In addition, some commenters suggested that the 2015 Rule's extension of federal jurisdiction to waters based, in part, on their location within the 100-year floodplain of a jurisdictional water expands federal jurisdiction to waters historically regulated by the states. In contrast, other commenters asserted that extending federal jurisdiction to waters within the 100-year floodplain will not interfere with state regulatory efforts. Some commenters asserted that the argument that the 2015 Rule conflicts with floodplain management is unsupported. These commenters further suggested that the agencies cannot rely on the argument that the 2015 Rule conflicts with state or local law as a basis to repeal the 2015 Rule unless the agencies develop and take public comment on a more robust rationale.

> **<u>Agencies' Response</u>: See the Agencies' Summary Response in Section 5.0. As discussed in the preamble to the final rule, the agencies find that the 2015 Rule asserted jurisdiction over certain waters that are more appropriately left solely in the jurisdiction of states.**
>
> **For the reasons articulated in the preamble to the final rule, the agencies find that it is appropriate to repeal the 2015 Rule and to restore the pre-existing regulations while a new proposed definition of "waters of the United States" is under consideration. Given the longstanding nature of the pre-2015 Rule regulatory framework, its track record of implementation and related case law, and its familiarity to regulators, the regulated community, and other stakeholders, the agencies conclude that this final rule to codify the prior regulations will provide greater regulatory certainty and nationwide consistency while the agencies consider public comments on the proposed revised definition of "waters of the United States." *See* 84 FR 4154 (Feb. 14, 2019). In that separate rulemaking, the agencies have requested comment on the proposed categorical inclusion of certain waters and exclusions from the definition, as well as whether the proposed revised definition strikes the proper balance between federal jurisdiction and states' authority to regulate their aquatic resources.**

5.1.8 Miscellaneous

A few commenters asserted that opponents of the 2015 Rule are simply seeking decreased regulation and are using states' rights as a pretext for their opposition. One commenter stated that the mere fact that the 2015 Rule would expand federal jurisdiction is not a sufficient basis for rescission, and another noted that any change to the definition that determines the jurisdictional scope of the CWA (regardless of whether that change expands or contracts federal jurisdiction) necessarily changes the federal-state balance. A different commenter expressed the view that the SNPRM is not neutral and discusses the federal-state balance in a leading and inconsistent way. Some commenters asserted that many states may prefer a more expansive interpretation of federal jurisdiction, referencing an amicus brief filed on behalf of more than 30 state attorneys general in *Rapanos* in support of an expansive interpretation of

federal jurisdiction and the fact that briefs filed by several state attorneys general in litigation over the 2015 Rule quote from those *Rapanos* briefs.

Some commenters noted that the 2015 Rule did not provide exemptions for green infrastructure and storm sewer maintenance and suggested that the 2015 Rule inhibited the ability of conservation districts to conserve water and impinged on state government rights to manage water resources.

> **Agencies' Response: See the Agencies' Summary Response in Section 5.0. As explained in Section III of the final rule preamble, the agencies now conclude that the 2015 Rule adopted an inappropriately expansive interpretation of Justice Kennedy's significant nexus standard. This overly broad interpretation of the significant nexus standard served as a fundamental basis of the 2015 Rule and informed the development of the definitions of categorically jurisdictional and case-specific waters under the rule, resulting in a definition of "waters of the United States" that did not comport with the limits on federal CWA jurisdiction intended by Congress and reflected in Supreme Court cases, including Justice Kennedy's articulation of the significant nexus standard in *Rapanos*.**
>
> **The agencies received approximately 770,000 public comments on this rulemaking, including comments representing a variety of state agencies and interests. The agencies carefully reviewed those comments in deciding whether to finalize this rule and have concluded, among other things, that the 2015 Rule failed to adequately consider and accord due weight to the policy directive in CWA section 101(b), which resulted in the assertion of jurisdiction over certain waters that are more appropriately left solely in the jurisdiction of states. Ensuring that states and tribes retain authority over their land and water resources pursuant to CWA sections 101(b), 510, and 518 helps carry out the overall objective of the CWA and ensures that the agencies are giving full effect and consideration to the entire structure and function of the Act.**

5.2 Comments on Tribal Issues

5.2.1 Tribal treaty rights

Many commenters raised concerns that the proposed changes to the definition of "waters of the United States" would affect tribal treaty rights such as tribal reserved water rights and hunting and fishing rights, as well as tribal rights in ceded territories to hunt, fish, trap, and gather in a manner that meets their subsistence, economic, cultural, medicinal, and spiritual needs. Some commenters suggested that the federal government's treaty obligations require it to provide water resources with the greatest federal protection possible. Several commenters listed specific treaties and case law citations to support their assertions that the federal government must protect their treaty rights.

In particular, many commenters expressed concern that the proposed rule would reduce the scope of CWA jurisdiction and thus reduce the number of wetlands, headwaters, and other waters subject to CWA protections, especially waters upstream from tribal reservations. Commenters asserted that by decreasing the reach of the CWA's protections, including permitting and other requirements—both within and upstream of tribal waters—the proposed rule could undermine federal protections for tribal treaty rights and resources.

More specifically, commenters asserted that the proposed rule could reduce water quality and adversely impact natural and cultural resources important to tribes as part of treaty rights, subsistence activities, or cultural activities. Some commenters stated that by exacerbating pollution, the proposed rule would cause fish declines and negatively impact cultural uses, recreational uses, and other designated uses of waters. Commenters suggested that such impacts could cause great harm to tribes, tribal rights, and tribal interests, noting that the tribal way of life and tribal treaty rights require access to clean, healthy, and abundant natural resources, which in turn require clean water to thrive. Commenters also cited the importance of their treaty-protected right to fish for ceremonial, communal, and everyday consumption, including for subsistence.

Additionally, some commenters asserted that the agencies failed to describe how the proposed rule would affect the treaty rights of tribes. Several commenters stated that any proposed rulemaking or other agency actions involving the definition of "waters of the United States" must include consideration of, and protection against, adverse impacts to tribal treaty rights and the natural resources subject to those rights, and that additional information is needed to understand potential impacts to treaty rights.

> **Agencies' Response: The agencies recognize that tribal treaty rights constitute federal law. However, treaty rights do not expand Congress' grant of authority to the agencies in the CWA. As explained in the final rule preamble, the agencies find that the 2015 Rule exceeded the agencies' statutory authority. Because the agencies may not exceed the authority of the statutes they are charged with administering, *see* 5 U.S.C. § 706(2)(C), the agencies are repealing the 2015 Rule and codifying the prior regulations, thereby reinstating nationwide a longstanding regulatory framework that is familiar to and better understood by the agencies, states, tribes, local governments, regulated entities, and the public while the agencies consider public comments on the proposed revised definition of "waters of the United States." *See* 84 FR 4154 (Feb. 14, 2019). By restoring the pre-2015 Rule regulations, this rulemaking returns the relationship between the federal government and tribes to the longstanding and familiar distribution of power and responsibilities that existed under the CWA for many years prior to the 2015 Rule.**
>
> **See also the Agencies' Summary Response in Section 5.0 and the agencies' response to comments in Section 6.**

5.2.2 Federal trust responsibility

Many commenters expressed concerns about the federal trust responsibility, which in their view is triggered any time the federal government takes an action where tribal trust interests are at stake. Some commenters asserted that this trust responsibility requires agencies to act in the best interests of tribes and that agencies may not take any actions that will adversely impact tribal resources. One commenter stated that the federal government has a trust responsibility to ensure that their tribe continues to have access to clean water, land, and air across their traditional lands, in perpetuity.

Several commenters raised concerns that the agencies are not meeting the federal trust responsibility with the proposed rulemaking effort. For example, some commenters stated that the proposed rule would impede the government's ability to exercise the federal trust responsibility by adversely affecting streams, rivers, and culturally significant plants, fish, and animals used by tribal members for cultural and subsistence uses. Commenters also asserted that limiting federal CWA jurisdiction will also affect tribal interests within ceded territories and will decrease CWA protections in waters upstream of their

reservation, which the commenters view as a breach of the federal government's trust obligations. Another commenter asserted that the proposed rule would hamper the agencies' ability to exercise the federal trust responsibility to safeguard tribal resources by reducing CWA jurisdiction over a significant portion of the nation's waterways, thereby leaving them more vulnerable to pollution and degradation.

A number of commenters asserted that the agencies should conduct the rulemaking in a manner consistent with the federal trust responsibility and consult with federally recognized tribes that will be affected by the proposed rule. In addition, some commenters suggested that the agencies conduct analyses of the federal government's ability to fulfill their trust responsibilities to all tribes.

> **Agencies' Response: Consistent with the federal trust responsibility, the agencies are committed to maintaining their longstanding work with federally-recognized Indian tribes on a government-to-government basis. The agencies recognize the federal government's trust responsibility to federally-recognized Indian tribes that arises from Indian treaties, statutes, executive orders, and the historical relations between the United States and Indian tribes. The agencies also recognize that they may not exceed the authority of the statutes they are charged with administering. *See* 5 U.S.C. § 706(2)(C). With this final rule, the agencies are repealing the 2015 Rule and restoring the prior regulations defining "waters of the United States" because they have concluded that the 2015 Rule exceeded their statutory authority under the CWA. The agencies are reconsidering the proper scope of federal CWA jurisdiction in a separate rulemaking on a proposed revised definition of "waters of the United States" and have consulted with tribal officials, as appropriate and consistent with the federal trust responsibility, as part of that rulemaking process. As part of the tribal consultation process for the proposed revised definition, some tribes also commented on this rulemaking to repeal the 2015 Rule and restore the pre-existing regulations, including in letters to the agencies and during outreach and consultations meetings.**
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> **See also the Agencies' Summary Response in Section 5.0 and the agencies' response to comments in Section 6 and Section 10.**

5.2.3 Tribal sovereignty

A few commenters expressed concern that a rollback of current regulations would have a long-lasting effect on tribal communities and would undermine the advances made in restoring sovereign authority to tribal nations. Commenters noted that any changes to the definition of "waters of the United States" should promote tribal sovereignty and self-determination and uphold the principles of self-determination that were included in the EPA's *Revised Interpretation of Clean Water Act Tribal Provision* (81 FR 30183, May 16, 2016). One commenter stated that a reduction in the number of waterbodies that tribes may assume regulatory jurisdiction over under the CWA would be a *de facto* reduction in tribal sovereignty and governmental powers, noting that EPA has described water quality regulation as a "core governmental function, whose exercise is critical to self-government."

Other commenters suggested that the 2015 Rule had a negative impact on tribal sovereignty. One of these commenters wrote in support of the agencies' two-step rulemaking process and stated that Alaska Natives' rights to self-determination and states' roles in protecting their water resources were jeopardized by the 2015 Rule's expansive definition of "waters of the United States." Another commenter stated that the 2015 Rule expanded the scope of federal CWA jurisdiction beyond the agencies' statutory and constitutional limits, thereby harming the sovereign interests of the tribe,

particularly its sovereign right to control the use and development of its reservation and natural resources.

> **Agencies' Response: See the Agencies' Summary Response in Section 5.0. As explained in the preamble to the final rule, the agencies find that the 2015 Rule exceeded the agencies' statutory authority. The agencies may not exceed the authority of the statutes they are charged with administering. *See* 5 U.S.C. § 706(2)(C) (prohibiting agency actions "in excess of statutory jurisdiction, authority, or limitations"). By repealing the 2015 Rule and recodifying the pre-2015 Rule regulations, this final rule returns the relationship between the federal government, states, and tribes to the longstanding and familiar distribution of power and responsibilities that existed under the CWA for many years prior to the 2015 Rule. Ensuring that states and tribes retain authority over their land and water resources pursuant to CWA sections 101(b), 510, and 518 helps carry out the overall objective of the CWA and ensures that the agencies are giving full effect and consideration to the entire structure and function of the Act.**

5.2.4 Importance of water to tribes

Multiple commenters expressed the importance of water to their tribes, stating that clean water is fundamental to life and noting the importance of water to the spiritual, cultural, medicinal, and subsistence practices that underlie the tribal way of life. For example, commenters stated that they regard water as "the first medicine" and as the blood of their mother, the earth, and that actions affecting natural resources must protect seven generations hence. Other commenters addressed the importance of fish to the food web; tribal relationships with wetland species—including wild rice (a species of cultural significance), cranberries, and blueberries; the importance of headwaters and spring sites to plants and animals in light of climate change; and the importance of such headwaters for the recovery of salmon and bull trout. Another commenter noted the prominent role of water in the tribe's theology and religious ceremonies, including the sweat lodge sacrament, and was concerned about impacts from upstream contamination. One commenter added that the agencies have ignored tribal expert knowledge on hydrology.

A number of these commenters suggested that repealing the 2015 Rule does not align with tribal priorities to protect tribal waters and natural resources. For example, one commenter stated that any federal administrative actions should strive to increase healthy fish populations and asserted that the proposed rule would exacerbate fish declines.

> **Agencies' Response: With this final rule, the agencies are taking this action to reverse federal encroachment on waters that are outside the scope of the CWA, thereby restoring the relationship between the federal government, states, and tribes to the longstanding and familiar distribution of power and responsibilities that existed under the CWA for many years prior to the 2015 Rule. This final rule does not alter the ability or authority of states and tribes to regulate and protect waters in their respective boundaries under state and tribal law more stringently than does the federal government.**
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> **See also the Agencies' Summary Response in Section 5.0 and the agencies' response to comments in Section 6.**

Section 6 SCIENCE

6.0 Agencies' Summary Response

This section contains summaries of comments on the agencies' proposed rule that are related to science, including comments regarding connectivity science and water quality. This summary response applies to all comments summarized in this section. As appropriate, the agencies have provided more specific responses below each comment summary.

As part of the rulemaking effort leading up to the promulgation of the 2015 Rule, the EPA's Office of Research and Development prepared a report entitled *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence* (Connectivity Report). The report reviewed over 1,200 peer-reviewed publications and summarized scientific understanding about the connectivity of and mechanisms by which streams and wetlands affect the physical, chemical, and biological integrity of downstream waters. The objectives of the Connectivity Report were (1) to provide a context for considering the evidence of connections between downstream waters and their tributary waters, and (2) to summarize current understanding about these connections, the factors that influence them, and the mechanisms by which the connections affect the function or condition of downstream waters.

The term "connectivity" is defined in the report as the degree to which components of a watershed are joined and interact by transport mechanisms that function across multiple spatial and temporal scales. Connectivity is determined by the characteristics of both the physical landscape and the biota of the specific system. The Connectivity Report found strong evidence supporting the central roles of the physical, chemical, and biological connectivity of streams, wetlands, and open waters—encompassing varying degrees of both connection and isolation—in maintaining the structure and function of downstream waters, including rivers, lakes, estuaries, and oceans. The report further found that "the degree of connectivity among aquatic components varies along a continuum from highly connected to highly isolated," and that "[v]ariation in the degree of connectivity is critical to the integrity and sustainability of downstream waters."[17]

Before the Connectivity Report was finalized, the EPA released a draft version of it in September 2013. The draft Connectivity Report was reviewed by the EPA's Science Advisory Board (SAB), a public advisory group tasked with providing scientific information and advice to the EPA. In October 2014, the SAB completed its peer review of the draft Connectivity Report. While the SAB found that "[t]he literature review provides strong scientific support for the conclusion that ephemeral, intermittent, and perennial streams exert a strong influence on the character and functioning of downstream waters and that tributary streams are connected to downstream waters," the SAB also stressed that "the EPA should recognize that there is a gradient of connectivity."[18] The SAB recommended that "the interpretation of connectivity be revised to reflect a gradient approach that recognizes variation in the

[17] U.S. EPA. Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence (Final Report) at 1-4, 1-18 (Jan. 2015). EPA/600/R-14/475F.

[18] Science Advisory Board, US. EPA. Review of the EPA Water Body Connectivity Report at 3 (Oct. 17, 2014) EPA - SAB-15-001.

frequency, duration, magnitude, predictability, and consequences of physical, chemical, and biological connections."[19]

In establishing the 2015 Rule's definition of "waters of the United States," the agencies relied on the Connectivity Report extensively. *See* 80 FR 37057 ("The Science Report provides much of the technical basis for this rule."). At the same time, the agencies acknowledged that "science does not provide bright line boundaries with respect to where 'water ends' for purposes of the CWA." *See* 80 FR 37054, 37060 (June 29, 2015). The SAB also recognized the limitations of the Connectivity Report in its review, observing that "[t]he Report is a science, not policy, document that was written to summarize the current understanding of connectivity or isolation of streams and wetlands relative to large water bodies such as rivers, lakes, estuaries, and oceans."[20]

The agencies now conclude that in establishing the limits of federal regulatory authority under the CWA in the 2015 Rule, the agencies placed too much emphasis on the information and conclusions of the Connectivity Report at the expense of the limits on federal jurisdiction reflected in the statutory text and decisions of the Supreme Court (see Section III.C of the final rule preamble) notwithstanding the admonitions described above. The agencies have considered the Connectivity Report as part of this rulemaking. The Connectivity Report continues to inform agency actions, including certain aspects of the agencies' proposed revised definition of "waters of the United States." *See* 84 FR 4154, 4176 (Feb. 14, 2019). However, the agencies find that in setting jurisdictional boundaries under the 2015 Rule, the agencies relied on the Connectivity Report and connectivity science without due regard for the requirements and restraints imposed by the statute and case law. Though science can inform the agencies' interpretation of the definition of "waters of the United States," science cannot dictate where to draw the line between federal and state waters, as those are legal distinctions that have been established within the overall framework and construct of the CWA. The definition of "waters of the United States" must be grounded in a legal analysis of the limits on CWA jurisdiction reflected in the statute and Supreme Court case law.

As explained in the preamble to the final rule, the agencies find that the 2015 Rule did not implement the legal limits on the scope of the agencies' authority under the CWA as intended by Congress and reflected in Supreme Court cases, including Justice Kennedy's articulation of the significant nexus test in *Rapanos*, did not adequately consider and accord due weight to the policy of Congress in CWA section 101(b), pushed the envelope of the agencies' constitutional and statutory authority absent a clear statement from Congress, and included distance-based limitations that suffered from procedural errors and a lack of adequate record support. For these and other reasons discussed more fully in the preamble, the agencies find that it is appropriate to repeal the 2015 Rule and recodify the pre-existing regulations.

6.1 General Comments on Science in "Waters of the United States" Rulemakings

Many commenters expressed opposition to the proposed rule and support for the 2015 Rule because the commenters believe the 2015 Rule is based on sound science. These commenters view science as critical to defining the scope of CWA jurisdiction and criticized the proposed rule for lacking a scientific basis. Some reasoned that given the extensive scientific record supporting the 2015 Rule, any revisions to the rule should also be rooted in science. In addition, some commenters asserted that lack of

[19] *Id.* at 2.
[20] *Id*. at 2.

scientific support for repealing the 2015 Rule will likely trigger costly and time-consuming court challenges and contribute to regulatory uncertainty, instability and costs to both private and public sectors.

Numerous commenters noted that the 2015 Rule was based on the Connectivity Report and referenced the SAB's findings on connectivity and the contributions of upstream waters and other waters to the chemical, physical and biological integrity of downstream waters. These commenters expressed support for relying on the conclusions of the Connectivity Report as the scientific basis for the 2015 Rule.

Other commenters stated that defining the scope of CWA jurisdiction requires the agencies to make legal and policy judgments and that scientific documents, such as the Connectivity Report, do not provide the agencies with bright lines to help draw jurisdictional boundaries under the CWA. One commenter asserted that the Connectivity Report should not have any legal significance because it is a scientific document. A few commenters argued that the Connectivity Report enabled the agencies to establish chemical, biological and physical ties between all water features and thus assert jurisdictional authority over a broad range of categories of waters and geographic features.

Further, some commenters suggested that the Connectivity Report and other scientific studies do not support the 2015 Rule's assertion of CWA jurisdiction. A few commenters asserted that the 2015 Rule mischaracterized the Connectivity Report's findings and failed to explain the legal significance of connectivity in the context of determining the proper scope of CWA jurisdiction. One commenter suggested that the studies relied on by the agencies, including the Connectivity Report, suffer from scientific flaws and do not support the lines drawn between jurisdictional and non-jurisdictional waters in the 2015 Rule. Another commenter argued that the 2015 Rule does not adequately reflect the Corps' expertise because the Corps did not play a sufficient role in the analysis of the 2015 Rule. This commenter also argued that the EPA relied only on scientific studies that supported a desire to expand jurisdiction, and that the outcome of the rulemaking process was predetermined. Another commenter claimed that the 2015 Rule is inconsistent with the SAB's findings.

> **Agencies' Response: See the Agencies' Summary Response in Section 6.0; regarding the impact of this final rule on regulatory certainty, see the agencies' response to comments in Section 2.**

6.2 Connectivity Science

6.2.1 General comments on connectivity science

Many commenters noted that the chemical, physical, and biological quality of major downstream rivers is directly associated with the health and condition of upstream waters. As a result, the contribution of individual waters is incremental and cumulative across entire watersheds and the quality and integrity of waters depends on an interconnected system of streams, wetlands, floodplains, riparian habitats, and associated aquatic and terrestrial biota.

Commenters explained that scientific literature strongly supports the conclusion that contributions of individual streams, wetlands, and groundwater is cumulative across entire watersheds and that their effects on downstream waters should be evaluated within the context of other streams and wetlands in that watershed. Others noted that the degree of connectivity and downstream effects of connections varies widely and is being modeled with increasing complexity and accuracy. Yet, a major challenge for

scientists, according to some commenters, is linking the small-scale physical drivers with their larger-scale fluvial and geomorphic context and ecological consequences. Another commenter emphasized the need for better integration of science and management, from testing effectiveness of stream restoration and riparian buffers to reevaluating the definition of "waters of the United States" and clarifying the agencies' regulatory authority under the CWA.

One commenter stated that quantifying the hydrologic connectivity of geographically isolated wetlands to other surface water systems (including streams, rivers, lakes, and other navigable waters) and the processes governing hydrologic connectivity of these wetlands at a variety of watershed scales has become an important topic for the scientific and decision-making communities. This commenter explained that developments in the related disciplines of remote sensing, hillslope and wetland hydrology, empirical modeling, and tracer studies will assist in advancing current mechanistic modeling approaches to more accurately elucidate connectivity of isolated wetlands to other surface waters and the effects of these wetlands on downstream systems at the watershed scale.

Some commenters suggested that the agencies address the effective limits of connectivity and the practical limits of the criterion in question. Several of these commenters noted that connectivity is not a binary concept and recommended that the agencies rely on a connectivity gradient.

Finally, several commenters asserted that scientific evidence of connectivity and wetland/stream function is essential in applying Justice Kennedy's significant nexus test.

Agencies' Response: See the Agencies' Summary Response in Section 6.0.

6.2.2 Support for using connectivity science to inform or expand scope of CWA jurisdiction

Some commenters argued that maintaining the quality of traditional navigable waters cannot be accomplished without protecting all upstream waters because of the intrinsic connectivity of the entire watershed system. Conversely, one commenter asserted that the water quality of navigable waters would not be improved by regulating the water quality of nonnavigable waters. Other commenters supported extending CWA protections to all headwaters, floodplains, and wetlands given the relationship between upstream and downstream water quality; one of these commenters emphasized that water is a public good and a basic human right. Another commenter asserted that science supports protecting more rather than less waterbodies. A few commenters also suggested that scientific evidence provides irrefutable support for the relationships between upstream and downstream aquatic ecosystems, and that this relationship is at odds with the plurality's opinion in *Rapanos*.

Agencies' Response: Science cannot be dispositive in interpreting the statutory reach of "waters of the United States." The definition of "waters of the United States" must be grounded in a legal analysis of the limits on CWA jurisdiction that Congress intended by use of the term "navigable waters," and a faithful understanding and application of the limits expressed in Supreme Court opinions interpreting that term. The Connectivity Report "is a technical review of peer-reviewed scientific literature, it neither considers nor sets forth legal standards for CWA jurisdiction, nor does it establish EPA policy."[21] The conclusions in the report, while they may inform the agencies' policy decisions, cannot be dispositive in

[21] U.S. EPA. Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence at ES-1 (Jan. 2015). EPA/600/R-14/475F.

interpreting the statutory reach of "waters of the United States." The definition of "waters of the United States" must be grounded in a legal analysis of the limits on CWA jurisdiction reflected in the statute and Supreme Court case law. See also the Agencies' Summary Response in Section 6.0.

6.3 Connectivity Report

Numerous commenters directly referenced the Connectivity Report as a key scientific document that compiles knowledge on the connectivity and isolation of waters. Many commenters characterized it as a state-of-the-art science report that analyzed more than 1,200 peer-reviewed studies assessing connections between small streams, non-tidal wetlands, and other upstream waters along with larger downstream waters such as lakes, rivers, and estuaries. Commenters also referenced the report in discussing the connectivity of wetlands to downstream waters and the numerous functions wetlands provide that benefit downstream water integrity, *see* 80 FR 37063.

Several commenters characterized the Connectivity Report as an unparalleled compilation of connectivity science and stated that the SAB's review of the Connectivity Report affirmed it as state-of-the-art science. Commenters noted that recent studies continue to validate the findings of the Connectivity Report, including the significance of streams to the hydrology of downstream waters and entire watersheds. One commenter asserted that hunters and anglers strongly supported the Connectivity Report given its technical and scientific nature.

Multiple commenters asserted that the proposed rule failed to explain why the agencies seem to now be rejecting the Connectivity Report. Commenters noted that the agencies have not demonstrated that the report is flawed and have not introduced any new science challenging the Connectivity Report's findings. Another commenter suggested that CWA section 101(b) and the Administrative Procedure Act's requirements do not provide support for rejecting the report's scientific findings.

Other commenters voiced concerns with the Connectivity Report, including because the report did not explain the significance of connectivity between small streams and navigable waters. One commenter asserted that the Connectivity Report incorrectly assessed connectivity and significant nexus in the southwest because it relied on a case study (the San Pedro case study) that the commenter claims is unrepresentative of river systems in the west. Another commenter expressed concern that the Connectivity Report could allow the agencies to assert categorical jurisdiction over ephemeral and intermittent streams based on a low connection gradient, rather than require the agencies to identify a significant nexus to downstream navigable waters for each nonnavigable tributary. A different commenter asserted that the Connectivity Report did not provide support for the 2015 Rule because it focused on water quantity and biological connections rather than water quality, which the commenter views as determinative of CWA jurisdiction.

Agencies' Response: The agencies recognize that the Connectivity Report summarizes the current scientific understanding about the connectivity and mechanisms by which streams and wetlands affect the physical, chemical, and biological integrity of downstream waters and that connections occur along a gradient. However, the agencies find that in setting jurisdictional boundaries under the 2015 Rule, the agencies relied on the Connectivity Report without due regard for the restraints imposed by the statute and case law. See also the Agencies' Summary Response in Section 6.0.

6.4 Water Quality

6.4.1 General comments on water quality

Some commenters suggested that the United States has been unsuccessful in reducing water pollution and expressed concern that many streams, lakes and wetlands are impaired. Commenters referenced EPA's summary of states' reported water quality data, and one commenter referenced the prior administration's statements that over 60 percent of streams and millions of acres of wetlands lack adequate safeguards from degradation and should be protected under the CWA.

The agencies also received numerous comments on the chemical, physical, and biological processes that influence water quality and the relationship between upstream and downstream water quality. Some commenters stated that water quality problems in navigable waters are the result of contamination across landscapes, including from intermittent streams. One commenter noted that though waterways in semi-arid environments flow seasonally or intermittently, the pollution from these waterways ultimately flows into navigable waters. Multiple commenters expressed concern over discharges from agricultural operations, which some of these commenters asserted are largely unregulated despite contributing significantly to water pollution issues (such as, for example, toxic algae blooms and dead zones caused by excess fertilizer runoff or other high nutrient pollution). Yet, other commenters stated that some agricultural producers are committed to improving efficiency and efficacy of nutrient management to help address water quality problems, such as by reducing sediment erosion and thereby reducing phosphorous runoff.

In addition, some commenters addressed the impact of the relationship between groundwater, wetlands, and streams on water quality. Commenters noted that groundwater can share a direct hydrologic connection to streams and that discharges from groundwater to streams can influence benthic productivity. One commenter suggested that linkages between wetlands, groundwater, and navigable waters within a variety of wetland categories and across a diversity of landscapes and regions indicate that adjacency and significant nexus should be interpreted from a functional perspective to protect water quality consistent with the CWA.

Moreover, some commenters suggested that protecting wetlands is critical to protecting the water quality of navigable waters. Other commenters explained that isolated waters may be connected to traditional navigable waters via groundwater, with one commenter noting that "so-called isolated wetlands" are rarely isolated from navigable waters from a water quality perspective.

One commenter expressed concern that the 2015 Rule would unnecessarily increase CWA permitting requirements in the arid southwest without a measured benefit to water quality; this commenter recommended that the agencies conduct a study to gather field evidence regarding how the 2015 Rule's definitions translate into improved water quality protections.

> **Agencies' Response: As noted in the preamble to this final rule, Congress established a regulatory and non-regulatory framework that together are intended to achieve the objective and goals of the CWA. For the subset of the nation's waters identified as "navigable waters," defined as "the waters of the United States," Congress created a regulatory permitting program designed to address the discharge of pollutants into those waters specifically. To address pollution more broadly, Congress crafted the non-regulatory statutory framework to provide technical and financial assistance to the states to prevent, reduce, and eliminate**

pollution in the nation's waters generally. For example, section 105 of the Act, "Grants for research and development," authorizes EPA "to make grants to any State, municipality, or intermunicipal or interstate agency for the purpose of assisting in the development of any project which will demonstrate a new or improved method of preventing, reducing, and eliminating the discharge into *any waters* of pollutants from sewers which carry storm water or both storm water and pollutants." 33 U.S.C. § 1255(a)(1) (emphasis added). Section 105 also authorizes EPA "to make grants to any State or States or interstate agency to demonstrate, *in river basins or portions thereof*, advanced treatment and environmental enhancement techniques to control pollution from all sources . . . including nonpoint sources, . . . [and] . . . to carry out the purposes of section 301 of this Act . . . for research and demonstration projects for prevention of pollution of *any waters* by industry including, but not limited to, the prevention, reduction, and elimination of the discharge of pollutants." *Id*. § 1255(b)-(c) (emphasis added); *see also id*. § 1256(a) (authorizing EPA to issue "grants to States and to interstate agencies to assist them in administering programs for the prevention, reduction, and elimination of pollution").

The agencies acknowledge the commenters' concerns regarding the impacts of nutrient runoff. Given the framework described above and in the preamble to the final rule, however, excess nutrients in surface waters from nonpoint sources are addressed under the CWA through non-regulatory programs, such as the section 106 grant program and section 319 nonpoint source management program. These programs are intended to assist states and eligible tribes in addressing nonpoint sources of pollution, and the EPA continues to work with co-regulators to implement nutrient reduction strategies.

See also the Agencies' Summary Response in Section 6.0 and the agencies' response to comments in Section 6.4.2; regarding the impact of the 2015 Rule on CWA permitting requirements, see the agencies' response to comments in Section 8 and Section 9.

6.4.2 Impact of proposed rule on water quality

Numerous commenters stated that the agencies have provided no evidence regarding how the proposed rule would impact water quality and asserted that the proposed rule would adversely impact water quality. Commenters cited past and current water pollution issues in Arizona, California, Florida, Maryland, Montana, Nevada, New York, Ohio, Oregon, Pennsylvania, Wisconsin and the Great Lakes States. Moreover, some commenters suggested that the pre-2015 Rule regulatory regime did not adequately protect water quality. One commenter suggested that a case-by-case approach to federal CWA jurisdiction does not properly value the sum effect of interactions between waters and ignores the landscape context of interacting aquatic ecosystems. A few commenters asserted that the proposed rule needs to be based on rigorous hydrological analysis.

Some commenters suggested that repealing the 2015 Rule would be contrary to well-established science that ephemeral and intermittent waters perform important functions and significantly affect downstream navigable waters. Some of these commenters specifically expressed concern that removing federal CWA protections for intermittent, ephemeral, and other headwater streams would impact individuals receiving drinking water from public water systems that rely at least in part on those waters. Commenters cited a 2009 EPA study to support the claim that such waters directly impact the drinking water sources of 117 million people. Several commenters discussed the ecological importance of ephemeral and intermittent streams in the arid west, Michigan, Alabama and other regions. One

commenter specifically noted that in New Mexico, ephemeral and intermittent waters are critical to vertebrates and species of cultural importance to Pueblo Tribes. In contrast, one commenter asserted that science demonstrates that ephemeral waters are less important biologically relative to intermittent and perennial waters.

Commenters also expressed concern that repealing the 2015 Rule would leave downstream waters vulnerable to pollution from mining operations, animal feeding operations, and other activities. For example, commenters noted that repealing the 2015 Rule would remove federal CWA protections for 60 percent of headwater streams in Tennessee and 55 percent of the Delaware River watershed in Pennsylvania. A few commenters argued that repealing the 2015 Rule would put Arizona's waters at greater risk of degradation because state law bars regulating beyond the jurisdictional reach of the CWA; as a result, withdrawal of federal jurisdiction over intermittent or ephemeral streams would render the vast majority of Arizona's waters without any water quality protection.

Other commenters suggested that there is no scientific evidence that federal CWA protections lead to improved water quality; these commenters argued that drinking water meets potable water standards, which is its primary beneficial use, and that any environmental benefits of federal CWA protection do not outweigh the accompanying increased regulatory burden.

> **<u>Agencies' Response</u>: One of the CWA's goals is to attain "water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water." 33 U.S.C. § 1251(a)(2). Having been enacted with the objective of restoring and maintaining the chemical, physical, and biological integrity of the nation's waters, the CWA serves to protect water quality, aquatic resources and associated ecosystem services. This final rule does not alter the CWA's underlying goals. This final rule repeals the 2015 Rule because it exceeded the agencies' statutory authority and codifies the prior regulations, thereby reinstating nationwide a longstanding regulatory framework that is familiar to and better understood by the agencies, states, tribes, local governments, regulated entities, and the public while the agencies consider public comments on the proposed revised definition of "waters of the United States."** ***See*** **84 FR 4154 (Feb. 14, 2019).**
>
> **Further, this final rule does not impact or diminish state and tribal authorities to establish protections for their aquatic resources, and nothing in the CWA prohibits states or tribes from determining what kinds of aquatic resources to regulate under state or tribal law to protect the interests of their citizens. Indeed, where authorized by state or tribal law, states and tribes may establish more protective standards or limits than the CWA to manage waters subject to CWA jurisdiction or waters that fall beyond the jurisdictional scope of the Act and may choose to address special concerns related to the protection of water quality and other aquatic resources within their borders. Many states and tribes, for example, regulate groundwater, and some others protect isolated wetlands that are outside the jurisdiction of the CWA.**
>
> **Finally, the agencies note that significant flaws in the 2015 Rule's economic analysis led to likely overestimates of the costs and benefits associated with the 2015 Rule as well as possible underestimates of impacts in jurisdictional expansion in some states. Overestimates were due in part to not factoring existing state programs into the quantified analysis. For a more detailed discussion of these issues, see the Economic Analysis for the Final Rule: Definition of**

"Waters of the United States"—Recodification of Pre-Existing Rules and the agencies' response to comments in Section 9.0.

See also the Agencies' Summary Response in Section 6.0.

6.5 Ecosystem Services

6.5.1 General comments on ecosystem services

Numerous commenters discussed studies documenting the wide variety and importance of stream ecosystem services, and many of these commenters argued that weakening federal CWA protections would adversely impact stream ecosystem services.

Commenters also emphasized the importance of ecosystem services provided by wetlands. Commenters explained how wetlands play a significant role in flood control by capturing stormwater runoff and releasing it over an extended period of time through either surface or groundwater discharges. Commenters noted that floods are the most economically significant natural hazard and have a significant adverse impact on public health and welfare. Some commenters asserted that the connection between geographically isolated wetlands and navigable waters reduces the risk of flood hazards and the erosion of stream banks and thus benefits the chemical, physical and biological integrity of downstream waters.

Commenters also asserted that wetlands provide other ecosystem services such as wildlife habitat, water quality control, bioremediation and carbon sequestration, and some commenters cited to specific case studies demonstrating the importance of wetlands to maintaining water quality. Commenters explained that wetlands (including geographically isolated wetlands) can reduce the amount of carbon, nitrogen, phosphorous, sediment and other pollutants that reach downstream aquatic systems, thereby helping to maintain the physical, chemical, and biological integrity of the nation's waters.

Some commenters highlighted specific wetland types and regions that have experienced significant wetland loss and asserted that degradation or loss of wetlands adversely impacts water quality and other ecosystem functions. Commenters noted that the most recent national wetlands status and trends report (Dahl, 2011)[22] found that since 2004 the rate of wetland loss had increased by 140 percent over the previous report period; some of these commenters suggested that the acceleration of wetland loss is likely at least partially attributable to the jurisdictional confusion and withdrawal of CWA protections by the agencies in the wake of *SWANCC* and *Rapanos*.

Multiple commenters also cited to scientific literature that the commenters argued demonstrate that wetlands possess a significant nexus to downstream navigable waters. These commenters suggested that there is an adequate scientific basis to determine that prairie pothole wetlands, coastal depressional wetlands (such as Carolina and Delmarva Bays), vernal pools, pocosins and other subcategories of "other waters" should be considered "waters of the United States" without case-by-case significant nexus analyses.

[22] Dahl, T.E. 2011. Status and trends of wetlands in the conterminous United States 2004 to 2009. Washington, DC: U.S. Department of the Interior, Fish and Wildlife Service, *available at* http://www.fws.gov/wetlands/Status-And-Trends-2009/index.html

Another commenter explained that some avian species that spend significant time daily on saltwater habitats are dependent upon the presence of regional freshwater wetlands for purposes of osmoregulation. Examples include black ducks in the northeast and mid-Atlantic coast and Chesapeake Bay, California gulls, white ibises, and diverse waterfowl of the Great Salt Lake. Commenters noted that both increased and reduced water flow volumes can directly impact fish and wildlife habitat.

> **Agencies' Response: See the Agencies' Summary Response in Section 6.0 and the agencies' response to comments in Section 6.4.2 and Section 9.0, as well as the Economic Analysis for the Final Rule: Definition of "Waters of the United States"—Recodification of Pre-Existing Rules.**

6.5.2 Impact of proposed rule on ecosystem functions and services

Multiple commenters argued that repealing the 2015 Rule would adversely impact aquatic ecosystems and riparian and wetland habitats. Commenters noted that wetlands cover roughly 110 million acres in the continental U.S. and provide habitat for hundreds of species. Some commenters claimed that repealing the 2015 Rule would limit federal CWA jurisdiction over streams and surrounding wetlands, and that food webs dependent on those streams would deteriorate from resulting pollution and fill, which would ultimately impact sensitive bird and bat species. A number of commenters specifically expressed concern that repealing the 2015 Rule would reduce federal CWA jurisdiction over ephemeral streams and thus impact the many species that depend on such waters, including threatened, endangered, and other sensitive species.

Other commenters asserted that repealing the 2015 Rule would significantly impact streams and wetlands critical to protecting various types of salmon and restoring national habitats of importance such as the Everglades, Mississippi Flyway, Puget Sound, New York/New Jersey Harbor Estuary, the Great Lakes and natural habitats within U.S. national parks.

> **Agencies' Response: See the Agencies' Summary Response in Section 6.0 and the agencies' response to comments in Section 6.4.2 and Section 9.0, as well as the Economic Analysis for the Final Rule: Definition of "Waters of the United States"—Recodification of Pre-Existing Rules.**

6.6 Miscellaneous Comments

A commenter supported development of a national, standardized and consistently applied geographic database with accompanying mapping features.

> **Agencies' Response: Many stakeholders have commented that geospatial tools and maps could help increase certainty and transparency regarding the data and methods used to determine which waters are jurisdictional and which waters are not. The agencies note that they are not aware of any map or dataset that accurately or with any precision portrays the scope of CWA jurisdiction at any point in the history of this complex regulatory program. In the revised definition of "waters of the United States" proposed in February 2019, the agencies solicited comment on how to authorize interested states, tribes, and federal agencies to develop geospatial datasets of "waters of the United States" within their respective borders for approval by the agencies. 84 FR 4154, 4198–4200 (Feb. 14, 2019).**

Section 7 JURISDICTIONAL AND NON-JURISDICTIONAL WATERS

7.0 Agencies' Summary Response

This section contains summaries of comments on the agencies' proposed rule that relate to categories of jurisdictional and non-jurisdictional waters. This summary response applies to all comments summarized in this section. As appropriate, the agencies have provided more specific responses below each comment summary. Comments on legal issues concerning the 2015 Rule, including whether the 2015 Rule is consistent with the CWA and relevant Supreme Court precedent, are summarized and addressed in Section 4.

As explained in the final rule preamble, the agencies find that the 2015 Rule did not implement the legal limits on the scope of the agencies' authority under the CWA as intended by Congress and reflected in Supreme Court cases, including Justice Kennedy's articulation of the significant nexus test in *Rapanos*, did not adequately consider and accord due weight to the policy of Congress in CWA section 101(b), pushed the envelope of the agencies' constitutional and statutory authority absent a clear statement from Congress, and included distance-based limitations that suffered from procedural errors and a lack of adequate record support. In part, the agencies find that in establishing the limits of federal regulatory authority under the CWA in the 2015 Rule, the agencies placed too much emphasis on the information and conclusions of the Connectivity Report at the expense of the limits on federal jurisdiction reflected in the statutory text and decisions of the Supreme Court. Though science may inform the agencies' interpretation of the definition of "waters of the United States," science cannot control where to draw the line between federal and state waters, as those are legal distinctions that have been established within the overall framework and construct of the CWA.

With this final rule, the agencies are repealing the 2015 Rule and restoring the pre-2015 Rule regulations. The agencies will continue to implement those regulations as informed by applicable agency guidance documents and consistent with Supreme Court decisions and longstanding agency practice. Under the pre-2015 Rule regulatory regime, significant guidance documents include (1) the agencies' 2003 joint memorandum providing clarifying guidance regarding the Supreme Court's decision in *SWANCC*;[23] (2) the agencies' 2008 post-*Rapanos* Guidance;[24] and (3) the agencies' jurisdictional determination guidebook.[25] The agencies have also issued numerous memoranda, question-and-answer documents, and other guidance explaining and clarifying the pre-2015 Rule regulations.[26] Guidance does not impose legally binding requirements and may not apply to a

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[23] Joint Memorandum, 68 FR 1991, 1995 (Jan. 15, 2003), *available at* https://www.epa.gov/sites/production/files/2016-04/documents/swancc_guidance_jan_03.pdf.

[24] U.S. EPA & U.S. Army Corps of Engineers, Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States & Carabell v. United States* (Dec. 2, 2008) ("2008 *Rapanos* Guidance"), *available at* https://www.epa.gov/sites/production/files/2016-02/documents/cwa_jurisdiction_following_rapanos120208.pdf.

[25] U.S. Army Corps of Engineers Jurisdictional Determination Form Instructional Guidebook, *available at* https://www.usace.army.mil/Missions/Civil-Works/Regulatory-Program-and-Permits/Related-Resources/CWA-Guidance/.

[26] The Corps maintains many of these documents on its public website, *see* https://www.usace.army.mil/Missions/Civil-Works/Regulatory-Program-and-Permits/Related-Resources/CWA-Guidance/. The EPA maintains many of these documents as well; *see* https://www.epa.gov/wotus-rule/about-waters-united-states.

particular situation depending on the circumstances. In making jurisdictional and permitting decisions, agency staff will consider on a case-by-case basis whether the recommendations or interpretations contained in guidance are appropriate to apply to a particular situation.

The agencies recognize that the pre-existing regulations pose certain implementation challenges, particularly because significant nexus analyses are required for certain waters. Following the Supreme Court's decisions in *SWANCC* and *Rapanos*, the agencies published a guidebook to assist district staff in issuing approved jurisdictional determinations.[27] In particular, the guidebook outlines procedures and documentation used to support significant nexus determinations. This guidebook has been and continues to be publicly available and will continue to serve as a resource in issuing jurisdictional determinations under this final rule.

In the agencies' proposed revised definition of "waters of the United States," the agencies seek to establish a clear and implementable definition that better effectuates the language, structure, and purposes of the CWA and will address issues related to specific types of waters in that rulemaking. *See* 84 FR 4174 (Feb. 14, 2019). Pending any final action on that proposed rulemaking, the agencies find that this final rule will provide greater certainty by reinstating a longstanding regulatory framework that is familiar to and well-understood by the agencies, states, tribes, local governments, regulated entities, and the public. This final rule will also provide regulatory certainty by establishing a uniform definition of "waters of the United States" nationwide, thereby addressing any inconsistencies, confusion, and uncertainty arising from the application of two different regulatory regimes across the country due to court orders staying implementation of the 2015 Rule. Moreover, by repealing the 2015 Rule for the reasons stated in the final rule preamble, the agencies are addressing commenters' concerns regarding the 2015 Rule that are summarized in this section.

See also the agencies' response to comments in Section 2, Section 3, Section 5, Section 6, Section 8, and Section 9, as well as the Economic Analysis for the Final Rule: Definition of "Waters of the United States"—Recodification of Pre-Existing Rules.

7.1 Overview of Comments on Jurisdictional and Non-Jurisdictional Waters

Many commenters expressed concerns with the 2015 Rule's approach to one or more categories of jurisdictional waters, including traditional navigable waters (TNWs), interstate waters, territorial seas, impoundments, tributaries, adjacent waters, "other waters", and ditches. Commenters also expressed concerns with the 2015 Rule's exclusions from the definition of "waters of the United States." While some commenters argued that the 2015 Rule's approach to certain categories of waters reduced federal jurisdiction and was not protective enough, others asserted that the 2015 Rule unlawfully expanded federal jurisdiction, lacked clarity, and caused regulatory uncertainty. A number of these commenters also discussed impacts from the 2015 Rule's approach to certain categories of waters on state and local governments, farmers, small business owners, landowners, and others.

Conversely, many other commenters expressed support for the 2015 Rule's approach to one or more categories of jurisdictional waters, including traditional navigable waters, interstate waters, territorial seas, impoundments, tributaries, adjacent waters, "other waters", and ditches. Some commenters also expressed support for the 2015 Rule's exclusions. In general, most of these commenters asserted that the 2015 Rule's approach to certain categories of waters was legally and scientifically sound and was

[27] *See supra* note 21.

necessary to ensure adequate protection of important aquatic resources. Some commenters argued that the 2015 Rule provided greater clarity than the pre-existing regulatory framework. Many of these commenters expressed concerns regarding the impacts of repealing the 2015 Rule on tribal, state, and local governments, as well as on local economies and the general public.

> **Agencies' Response: See Agencies' Summary Response in Section 7.0 and the agencies' response to comments in Section 2, Section 4, Section 6, Section 8, and Section 9; see also Section I.C of the Economic Analysis for the Final Rule: Definition of "Waters of the United States"—Recodification of Pre-Existing Rules.**

7.2 Traditional Navigable Waters, Interstate Waters, Territorial Seas, and Impoundments

7.2.1 General comments

Some commenters suggested that statutory language and case law supports extending CWA jurisdiction to TNWs, interstate waters, and the territorial seas and asserted that the agencies should determine the jurisdictional status of other waters based on their impact to these waters. One commenter added that repealing the 2015 Rule should not undermine the agencies' assertion of jurisdiction over these types of waters.

> **Agencies' Response: The agencies will continue the regulation of TNWs and "the territorial seas" as "waters of the United States" under the final rule. Further, this final rule defines "waters of the United States" to include interstate waters, including interstate wetlands. Under the final rule and as consistent with the agencies' pre-2015 Rule practice, interstate waters are "waters of the United States" even if they are not navigable for purposes of federal regulation as a TNW and do not connect to such waters. This final rule treats TNWs, territorial seas, and interstate waters the same as under the 2015 Rule.**

7.2.2 Traditional navigable waters

A few commenters who resubmitted their comments on the 2014 proposed rule expressed support for the agencies' approach to TNWs, which the commenters asserted is supported by the statute and case law. A couple of these commenters stated that susceptibility for future use may properly be based on capacity for use and future use of waterborne recreation, noting that this interpretation is supported by case law and provides important protections for the local recreation-based economies of many rural communities. A few other commenters stated that the agencies should pursue a public process for determining TNWs and publish the results of such a process to help clarify jurisdiction.

Several commenters recommended alternative ways to determine navigability. One commenter noted that under the equal-footing doctrine, "navigability" is to be determined at the time of statehood. Citing *PPL Montana, LLC v. Montana*, 565 U.S. 576 (2012), the commenter asserted that "navigability" should concern a river's usefulness for trade and travel and should be based on the natural and ordinary condition of such water. One commenter suggested that determining whether a water can be used for sailing would be the simplest and clearest way to determine navigability and would result in the assertion of jurisdiction over waters that can be used for sailing and waters that directly feed such waters. Another commenter asserted that many states already use navigability tests for other purposes and can use those tests to assist in making findings of navigability under the Act.

<u>Agencies' Response</u>: See the Agencies' Summary Response in Section 7.0; Section I.C.1 of the Economic Analysis for the Final Rule: Definition of "Waters of the United States"—Recodification of Pre-Existing Rules. This final rule has no effect on which waters would be regulated as TNWs under the CWA.

7.2.3 Interstate waters

Some commenters stated that asserting jurisdiction over interstate waters is consistent with the CWA and its legislative history, and one commenter added that this approach is not new and does not expand CWA jurisdiction. This commenter also asserted that determining the jurisdictional status of tributaries, adjacent wetlands, and other waters based on their effects on interstate waters is well-supported by law and policy. Other commenters stated that, based on the language in the CWA, the Commerce Clause, legislative intent, and relevant case law, there is no legal basis to assert jurisdiction over all interstate waters. Further, the commenters argued that basing CWA jurisdiction on an interstate test exceeds the agencies' authority by resulting in the assertion of jurisdiction over water bodies that have little or no connection to navigable waters. Some of these commenters also stated that if the agencies do not have authority to regulate interstate waters regardless of navigability, then they also lack the authority to regulate tributaries of such waters based on the significant nexus test.

Multiple commenters noted that many waterbodies in the contiguous United States cross international, state, or tribal nation borders either directly or through connectivity and suggested that federal regulation of such waters is thus necessary to fully protect the water quality of downstream states. A couple of these commenters also suggested that small businesses and local economies could be negatively impacted by activities in adjacent states if interstate waters lack protection under the CWA. One commenter resubmitted their comment on the 2014 proposed rule recommending that waters that flow across international borders be designated as jurisdictional interstate waters.

Several commenters stated that it was unclear under the 2015 Rule what types of features constitute interstate waters (such as international waters and waters that cross tribal borders) and whether an interstate water without a connection to a navigable water could be considered jurisdictional.

<u>Agencies' Response</u>: See the Agencies' Summary Response in Section 7.0; Section I.C.2 of the Economic Analysis for the Final Rule: Definition of "Waters of the United States"—Recodification of Pre-Existing Rules. This final rule defines "waters of the United States" to include interstate waters, including interstate wetlands. The agencies recognize that the U.S. District Court for the Southern District of Georgia recently held that the 2015 Rule's assertion of jurisdiction over all interstate waters was not a permissible construction of the Act. *Georgia v. Wheeler,* No. 2:15-cv-079, slip. op. at 34 (S.D. Ga. Aug. 21, 2019). The agencies' solicited comment on the extent of their authority over interstate waters in the separate rulemaking on a proposed revised definition of "waters of the United States." 84 FR 4174, 4172 (Feb. 14, 2019).

7.2.4 Impoundments

Multiple commenters supported including impoundments of jurisdictional waters within the definition of "waters of the United States." One of these commenters noted that protecting impoundments of jurisdictional waters is particularly important in the arid west, where seasonal and annual hydrographs are highly variable and water storage is required to support consumptive uses by cities and farms. Other

commenters argued that asserting jurisdiction over impoundments without regard to navigability or connection to a TNW would result in coverage of isolated, disconnected, and remote waters that are outside the scope of the CWA. A couple of these commenters stated that the 2015 Rule's approach to impoundments could result in the assertion of CWA jurisdiction cover stock ponds, farm ponds, industrial ponds, as well as livestock water tanks and erosion control dams, which the commenters suggested could cause economic hardship. Some commenters expressed concern that the 2015 Rule asserted jurisdiction over impoundments but did not provide a definition of the term.

> **Agencies' Response: See the Agencies' Summary Response in Section 7.0; Section I.C.4 of the Economic Analysis for the Final Rule: Definition of "Waters of the United States"—Recodification of Pre-Existing Rules. Under this final rule and consistent with the agencies' pre-2015 Rule practice, impoundments of jurisdictional waters remain jurisdictional.**

7.3 Tributaries

7.3.1 General comments

A number of commenters suggested that the 2015 Rule's definition of "tributary" was impermissibly broad, and a couple commenters argued that definition was not supported by science. Commenters stated that the 2015 Rule's "tributary" definition covered previously unregulated features, including features that do not have any connection to downstream TNWs and are dry most of the year. Some of these commenters asserted that the definition of "tributary" gave the agencies authority to control land use. Another commenter stated that many water conveyance and delivery systems would be subject to permitting requirements as "tributaries" under the 2015 Rule. One commenter suggested that the 2015 Rule's "tributary" definition is not suited for arid environments, where intermittent and ephemeral channels may lack flow for months or years at a time and chemical connectivity may not be apparent due to water moving quickly across the landscape. Further, a few commenters expressed concern that the 2015 Rule's definition of "tributary" would limit the statutory exemptions for agricultural activities.

One commenter expressed confusion over the 2015 Rule's requirement that a tributary be a feature that "contributes flow," stating that it was unclear whether or not the "one molecule of water" test would satisfy the requirement for contributing flow. A few commenters asked whether "contributes flow" refers to surface flow only, or subsurface flow as well. Another commenter asserted that the rule's requirement that a tributary contribute flow "through another water" was too vague and could impermissibly expand CWA jurisdiction. One commenter suggested that the agencies should have defined "bed and banks" to provide more clarity. Several commenters specifically objected to the agencies' ability under the 2015 Rule to rely on historical information or remote sensing to identify features meeting the rule's "tributary" definition.

Additionally, several commenters opposed the 2015 Rule's "tributary" definition because the commenters objected to disqualifying wetlands, lakes, and ponds that function as tributaries but that do not have a bed and bank and ordinary high water mark. A few of these commenters suggested that the agencies should clarify that such features meet the definition of "tributary" so long as they contribute flow. Another commenter requested clarification as to whether natural or man-made breaks are jurisdictional under the 2015 Rule's "tributary" definition.

Other commenters expressed support for the 2015 Rule's "tributary" definition, including because the commenters believed that the definition provided clarity and was supported by science and the

legislative intent of the CWA. One commenter asserted that significant case law supports the regulation of man-made and man-altered waters as tributaries. Many of the commenters expressed concern that a reduction in federal CWA jurisdiction over tributaries would harm downstream waters.

> **Agencies' Response: See the Agencies' Summary Response in Section 7.0; Section I.C.5 of the Economic Analysis for the Final Rule: Definition of "Waters of the United States"—Recodification of Pre-Existing Rules. As explained in Section III.C of the final rule preamble, the agencies conclude that the 2015 Rule adopted an inappropriately expansive interpretation of Justice Kennedy's significant nexus standard, resulting in the categorical assertion of jurisdiction over an overly broad class of "tributaries" that exceeded the jurisdictional limits reflected in Justice Kennedy's concurring opinion in *Rapanos*. The agencies' concerns regarding the breadth of the 2015 Rule's "tributary" definition are echoed in the U.S. District Court for the Southern District of Georgia's remand order. *Georgia v. Wheeler*, No. 2:15-cv-00079 (S.D. Ga. Aug. 21, 2019). There, the court found that the categorical assertion of jurisdiction over features meeting the 2015 Rule's "tributary" standard "is an impermissible construction of the CWA," as it could cover waters that lack the requisite significant nexus, particularly in the Arid West. *Id.* slip. op. at 36–42. For the agencies' response to comments on legal concerns with the 2015 Rule's definition of "tributary," see Section 4.2.**

7.3.2 Categorical assertion of jurisdiction over features meeting 2015 Rule's "tributary" definition

Multiple commenters expressed concern over the agencies' finding in the 2015 Rule that all features meeting the rule's definition of "tributary" are categorically jurisdictional. Some commenters stated that the rule's categorical approach was not appropriate because it did not account for the variability of streams across the landscape; for example, one of these commenters criticized the 2015 Rule's assumption that ephemeral washes contribute flow or have a physical connection, let alone a significant nexus, to TNWs. Commenters also stated that the 2015 Rule's categorical approach to tributaries could expand CWA jurisdiction and was not supported by either the plurality's or Justice Kennedy's opinion in *Rapanos*.

Other commenters expressed support for the 2015 Rule's categorical approach to tributaries, arguing that this approach is essential to the protection of downstream waters. A number of these commenters expressed support specifically for the rule's coverage of intermittent and ephemeral streams, asserting that such streams provide important functions and that the protection of these streams is critical to the overall health of aquatic resources, particularly in arid environments. A few commenters noted that modern water development has changed the character of tributaries in the arid west, transforming these waters from perennial to intermittent or ephemeral, and from intermittent or ephemeral to perennial, in order to supply water to some of the nation's largest metropolitan areas. These commenters asserted that the protection of both permanent and temporary streams is thus essential.

> **Agencies' Response: See the Agencies' Summary Response in Section 7.0 and the agencies' response to comments in Section 7.3.1 and Section 7.3.5. For the agencies' response to comments regarding regional variation, see Section 5.1.5.**

7.3.3 Ordinary high water mark

Several commenters stated that the use of the ordinary high water mark (OHWM) in the 2015 Rule's "tributary" definition helped provide clarity and delineate the scope of waters covered by the definition. Some commenters asserted that scientific evidence in the 2015 Rule's administrative record supports finding that an OHWM and a bed and banks provide sufficient physical evidence to ensure that features falling within the "tributary" definition have the adequate volume, frequency, and duration of flow to establish a significant nexus with downstream waters.

Other commenters opposed the 2015 Rule's use of the OHWM, asserting that the OHWM is too imprecise and ambiguous of a measure to provide regulatory predictability, consistency, and clarity. In particular, commenters criticized the reliability of the OHWM in different climatic and geographic regions, especially the arid west. As support, some commenters referenced U.S. Army Engineer Research and Development Center publications and presentations that discussed variability in the indicators and practices used for identifying OHWMs across the country. Commenters also expressed concern that many of the OHWM physical indicators can occur wherever land may have water flowing across it, regardless of frequency or duration, which could result in the potential regulation of ditches, washes, arroyos, gullies, rills, and other similar features.

A few commenters found the 2015 Rule's discussion of discontinuous OHWM indicators to be problematic for landowners, stating that it was unclear how far they would have to search to determine if there was a jurisdictional water on their property. One commenter believed that allowing for a discontinuous OHWM and bed and bank impermissibly expanded the scope of CWA jurisdiction.

> **Agencies' Response: The agencies acknowledge the comments raised regarding the use of physical indicators as central components of the 2015 Rule's "tributary" definition. With this final rule, the agencies are restoring the more familiar pre-2015 regulatory regime, as implemented, and are considering a revised definition of "waters of the United States" as part of a separate rulemaking. *See* 84 FR 4154.**
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> **See the Agencies' Summary Response in Section 7.0 and the agencies' response to comments in Section 7.3.1. For the agencies' response to comments regarding whether the 2015 Rule provides fair notice of jurisdictional features, see Section 4.6.4.**

7.3.4 Protection of headwaters

Many commenters expressed concern that repealing the 2015 Rule would reduce protections for headwater streams, which the commenters suggested could significantly impact downstream ecological processes and water quality. Commenters stated that headwater streams provide many important values and functions, including serving as habitat for fish and wildlife and supporting biological diversity; providing opportunities for outdoor recreation; and acting as sources of drinking water to downstream communities. A number of commenters emphasized the importance of addressing pollution at the source, with some commenters providing specific examples of impacts to downstream waters from pollutants in upstream headwaters, such as the dead zone in the Gulf of Mexico.

> **Agencies' Response: See the Agencies' Summary Response in Section 7.0. As explained in the preamble to the final rule, the agencies find that the 2015 Rule did not implement the legal limits on the scope of the agencies' authority under the CWA as intended by Congress and**

reflected in Supreme Court cases, including Justice Kennedy's articulation of the significant nexus test in *Rapanos*, did not adequately consider and accord due weight to the policy of Congress in CWA section 101(b), pushed the envelope of the agencies' constitutional and statutory authority absent a clear statement from Congress, and included distance-based limitations that suffered from procedural errors and a lack of adequate record support. For these and other reasons discussed more fully in the preamble, the agencies find that it is appropriate to repeal the 2015 Rule and to restore the pre-existing regulations. The agencies recognize the importance of protecting water resources and as a general matter do not dispute the important role of headwaters in supporting outdoor recreation and ecosystem services such as providing habitat and promoting biodiversity, among other values and functions.

See also the agencies' response to comments in Section 6, Section 7.3.1, and Section 9.

7.3.5 Protection of intermittent and ephemeral streams

Many commenters expressed support for the 2015 Rule's coverage of intermittent and ephemeral streams under the definition of "tributary," asserting that the protection of intermittent and ephemeral streams is critical to ensuring the overall physical, chemical, and biological integrity of the nation's waters and particularly in the arid west, where intermittent and ephemeral streams are a predominant water feature. Commenters noted that intermittent and ephemeral streams make up a large percentage of the overall stream network, comprising nearly 60 percent of all stream miles in the continental United States and a considerably higher percentage of stream miles in arid states. A few commenters noted that between 70 and 90 percent of stream miles are classified as intermittent or ephemeral in arid states such as Arizona, Colorado, and Utah. Many of the commenters expressed concern that repealing the 2015 Rule would reduce CWA protections for such waters and thus negatively impact water quality, with multiple commenters from western states suggesting that they may experience potentially significant impacts to water quality given the large percentage of intermittent and ephemeral streams in their states.

Commenters asserted that scientific research demonstrates the importance of intermittent and ephemeral streams to downstream water quality. Commenters also stated that impacts to intermittent and ephemeral streams can affect drinking water sources, with one commenter estimating that more than 280,000 people in New Mexico receive drinking water from sources that rely at least in part on ephemeral, intermittent, or headwater streams. In addition, commenters noted the importance of intermittent and ephemeral streams to aquatic species, including threatened and endangered species, some of which rely on these waters for habitat. With respect to ephemeral streams specifically, commenters noted that despite being dry during certain times of the year, these streams can contribute a considerable amount of flow during remaining times of the year and can have a disproportionately large impact on the water quality of receiving bodies of water.

Other commenters expressed concern regarding the 2015 Rule's coverage of intermittent and ephemeral features. Some of these commenters suggested that the 2015 Rule's assertion of jurisdiction over ephemeral features raised Commerce Clause concerns and did not give sufficient effect to the term "navigable." A few commenters stated that the 2015 Rule's coverage of intermittent and ephemeral natural and man-made structures would result in almost every acre of farmland becoming jurisdictional.

Finally, while some commenters stated that the 2015 Rule clarified confusion following *Rapanos* as to the jurisdictional status of intermittent and ephemeral streams, others suggested that further clarification is needed regarding the scope of CWA jurisdiction over intermittent and ephemeral streams. One commenter asserted that it is difficult to identify ephemeral features as streams because the character of ephemeral waters changes seasonally and over time depending upon precipitation.

> **Agencies' Response: See the Agencies' Summary Response in Section 7.0. As explained in the preamble to the final rule, the agencies find that the 2015 Rule did not implement the legal limits on the scope of the agencies' authority under the CWA as intended by Congress and reflected in Supreme Court cases, including Justice Kennedy's articulation of the significant nexus test in *Rapanos*, did not adequately consider and accord due weight to the policy of Congress in CWA section 101(b), pushed the envelope of the agencies' constitutional and statutory authority absent a clear statement from Congress, and included distance-based limitations that suffered from procedural errors and a lack of adequate record support. For these and other reasons discussed more fully in the preamble, the agencies find that it is appropriate to repeal the 2015 Rule and to restore the pre-existing regulations. The agencies agree that intermittent and ephemeral streams can play a role in supporting ecosystem services. The agencies also recognize that streams, wetlands, and other waters serve a variety of important functions for protection of water quality.**
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> **For the agencies' response to comments on giving sufficient effect to the term "navigable" and the Commerce Clause, see Section 4.6.1 and Section 4.6.3, respectively. See also the agencies' response to comments in Section 6, Section 7.3.1, and Section 9.**

7.4 Adjacent Waters

7.4.1 General comments

A number of commenters supported the 2015 Rule's definition of "adjacent waters," asserting that it provided increased clarity and was scientifically and legally sound, with some commenters expressing support specifically for the rule's definition of "neighboring" and for the rule's change from "adjacent wetlands" to "adjacent waters." Many of these commenters opposed repealing the 2015 Rule, including because the commenters asserted that the 2015 Rule's definition of "adjacent waters" protects important features such as wetlands and waters located in floodplains and riparian zones, which the commenters stated have been scientifically shown to significantly influence the water quality of tributaries and downstream waters. A few commenters expressed support for the distance limitations contained in the definition of "neighboring."

Other commenters opposed the 2015 Rule's definition of "adjacent" waters, asserting that it was too broad and exceeded the agencies' statutory authority. Some commenters asserted that the 2015 Rule's expansive definition of "adjacent" waters would have unintended consequences on local governments, impacting their efforts to manage water resources and hamper existing stormwater programs, restoration projects, and other infrastructure and activities. Another commenter stated that including the entirety of floodplain land as "adjacent" waters would adversely impact river bottom farmers.

Several commenters stated that the change from "adjacent wetlands" to "adjacent waters" caused uncertainty, and some commenters suggested that this change expanded the definition of "waters of the United States" to cover features that were not previously jurisdictional. Some commenters noted

that the 2015 Rule's broad definition of "tributary" contributed to the breadth of waters that could meet the "adjacent waters" definition.

Moreover, multiple commenters expressed concern that under the 2015 Rule's definition of "neighboring," certain water features would become jurisdictional simply because they were located near other "waters of the United States," regardless of whether those features were separated from jurisdictional "waters of the United States" by berms, roads, dikes, levees or other similar manmade or natural barriers or structures. Some commenters asserted that the definition's distance thresholds, including the use of the 100-year floodplain as a jurisdictional boundary, were arbitrary, expansive, and lacked scientific support.

In contrast, some commenters opposed the 2015 Rule's definition of "adjacent waters" because they believed the definition's distance limitations impermissibly narrowed the scope of jurisdiction, noting that the rule's distance limits resulted in the exclusion of some waters that were previously found to be jurisdictional. Some of these commenters argued that science supports defining adjacency based on functional relationships, not physical proximity. Other commenters stated that the definition of "adjacent" should include only those waters that are abutting or directly connected to jurisdictional waters via a continuous surface connection.

> **<u>Agencies' Response</u>: See the Agencies' Summary Response in Section 7.0; Section I.C.8 of the Economic Analysis for the Final Rule: Definition of "Waters of the United States"—Recodification of Pre-Existing Rules. As explained in Section III.C of the final rule preamble, the agencies now conclude that the 2015 Rule's definition of "adjacent waters" did not comport with the limits on federal CWA jurisdiction reflected in Justice Kennedy's concurring opinion in *Rapanos*, including because the adjacent waters category was tied to a "tributary" definition that was too broad to serve as the "determinative measure" of whether adjacent wetlands possess the requisite significant nexus. *See* 547 U.S. at 781; *Georgia v. Wheeler*, No. 2:15-cv-00079, slip. op. at 43–46 (S.D. Ga. Aug. 21, 2019) (finding that the 2015 Rule's "adjacent" waters definition relied on an impermissibly broad "tributary" standard and thus "could include 'remote' waters . . . that have only a 'speculative or insubstantial' effect on the quality of navigable in fact waters," contrary to Justice Kennedy's significant nexus standard (quoting *Rapanos*, 547 U.S. at 778-81 (Kennedy, J., concurring)). The 2015 Rule's "adjacent" waters provision allowed federal jurisdiction to reach certain isolated ponds and certain physically remote wetlands that "do not implicate the boundary-drawing problem of *Riverside Bayview*," thereby asserting federal control over some features that "lack the necessary connection to covered waters . . . described as a 'significant nexus' in *SWANCC*[.]" *See* 547 U.S. at 742 (Scalia, J., plurality).**
>
> **As discussed in Section III.C.4 of the final rule preamble, the agencies also find that the distance-based limitations in the 2015 Rule, including the distance-based limitations in the definition of "neighboring," were not a logical outgrowth of the proposed rule and were not supported by an adequate record. The agencies recognize that the federal government, in prior briefing in litigation over the 2015 Rule, defended the procedural steps the agencies took to develop and support the 2015 Rule. Having considered all of the public comments, relevant litigation positions, and the decisions of the U.S. District Courts for the Southern District of Texas and the Southern District of Georgia on related arguments, the agencies now agree with the reasoning of those courts and conclude that the proposal for the 2015 Rule did not provide adequate notice of the specific distance-based limitations that appeared for the first**

time in the final rule and that the final rule did not contain sufficient record support for the specific distance-based limitations. See also Final Rule Preamble Section III.C.4 and the agencies' response to comments in Section 4.3, Section 4.4, Section 4.10.1, and Section 6.

7.4.2 Categorical assertion of jurisdiction over features meeting 2015 Rule's "adjacent waters" definition

Some commenters supported the 2015 Rule's categorical assertion of jurisdiction over waters meeting the "adjacent" definition, asserting that such an approach was supported by scientific evidence and consistent with Supreme Court case law. Other commenters stated that adjacent waters should be evaluated on a case-specific basis instead of being jurisdictional by rule.

Many commenters suggested that the rule's categorical approach would result in coverage of waters not properly within federal CWA jurisdiction, such as isolated or remote waters adjacent to ephemeral drains or ditches. For example, some commenters suggested that a water located within the 100-year floodplain of a navigable water is so rarely connected to that navigable water that it cannot be said to significantly affect the chemical, physical, and biological integrity of that water.

<u>Agencies' Response</u>: See the Agencies' Summary Response in Section 7.0 and the agencies' response to comments in Section 7.4.1. The agencies acknowledge commenters' concerns regarding the 2015 Rule's categorical approach to adjacent waters, including the rule's categorical coverage of all waters and wetlands located within the 100-year floodplain and within 1,500 feet of the ordinary high water mark of a primary water,[28] jurisdictional impoundment, or tributary. As discussed in Section III.C of the final rule preamble, the agencies now conclude that a once in a 100-year hydrologic connection between otherwise physically disconnected waters, which satisfied the definition of "neighboring" and thus "adjacent" in the 2015 Rule, is too insubstantial to justify a *categorical* finding of a "significant nexus" with navigable-in-fact waters consistent with Justice Kennedy's concurrence in *Rapanos*. *See also Georgia v. Wheeler*, No. 2:15-cv-00079, slip. op. at 49-50 (S.D. Ga. Aug. 21, 2019) (finding that the 2015 Rule failed to show that the majority of waters within the 100-year floodplain have a significant nexus to navigable waters).

7.4.3 Use of 100-year floodplain as a jurisdictional boundary

Many commenters expressed concerns with the 2015 Rule's use of the 100-year floodplain in the definition of adjacent waters and as an element of the (a)(8) category of waters subject to case-specific significant nexus analyses. Some commenters specifically opposed the agencies' interpretation of "100-year floodplain" in the 2015 Rule, describing it as arbitrary, ill-defined, impractical, vague, and inconsistent.

Commenters suggested that making jurisdictional determinations based on a water's location in the 100-year floodplain would be time-consuming and difficult, including because Federal Emergency Management Agency Flood Zone Maps are unavailable or outdated in many places nationwide. Some commenters stated that relying on the discretion of individual agency field staff to determine the boundary of the 100-year floodplain would result in inconsistent determinations nationwide.

[28] Under the 2015 Rule, a ''primary'' water is a category (1) through (3) ''jurisdictional by rule'' water.

Other commenters expressed support for the use of the 100-year floodplain as a jurisdictional boundary, and one of these commenters described it as a science-based approach.

> **Agencies' Response: As discussed in Section III.C.4 of the final rule preamble, the agencies find that the distance-based limitations in the 2015 Rule, including the 100-year floodplain limitation in (a)(6) and (a)(8), were not a logical outgrowth of the proposed rule and were not supported by an adequate record. In the record for the 2015 Rule, the agencies included information supporting the conclusion that certain waters within a floodplain or riparian area have a connection to downstream waters. *See, e.g.,* 2015 TSD at 104; *id*. at 350. The agencies attempted to substantiate the addition of the 100-year floodplain interval on these general scientific conclusions and their desire to "add the clarity and predictability that some commenters requested" to the definition of "neighboring." 2015 TSD at 300. However, upon review of the record supporting the distance limitations in the 2015 Rule, the agencies now conclude that the record did not include adequate support for the specific floodplain interval—the *100-year* floodplain—included in the final rule, even though the agencies understood that "identifying the 100-year floodplain is an important aspect of establishing jurisdiction under the rule." 80 FR 37081. Additionally, the agencies conclusion is consistent with the holdings of the U.S. District Courts for the Southern District of Texas and the Southern District of Georgia that the 2015 Rule suffered from certain procedural (both courts) and substantive (Southern District of Georgia) errors. *Texas v. EPA*, No. 3:15-cv-162, 2019 WL 2272464 (S.D. Tex. May 28, 2019); *Georgia v. Wheeler*, No. 2:15-cv-079, 2019 WL 3949922 (S.D. Ga. Aug. 21, 2019).**
>
> **See also the Agencies' Summary Response in Section 7.0 and the agencies' response to comments in Section 7.4.1 and Section 7.4.2.**

7.4.4 Use of subsurface hydrologic connection to establish jurisdiction

A few commenters opposed the 2015 Rule's approach to adjacent waters because the rule provided that waters could be found jurisdictional as "adjacent" based on shallow subsurface hydrologic connections. One of these commenters stated that a continuous surface connection between a wetland and a jurisdictional water is required for a wetland to fall under federal CWA jurisdiction.

Other commenters asserted that wetlands do not require a continuous surface connection to other jurisdictional waters to be included in the scope of federal CWA jurisdiction and that subsurface connections are sufficient. Several of these commenters noted that wetlands are often supported by water movement that occurs below the surface, including connections to larger streams, and argued that excluding such wetlands from jurisdiction because one of their key components is not visible above the ground would be arbitrary and not based in science.

> **Agencies' Response: See the Agencies' Summary Response in Section 7.0 and the agencies' response to comments in Section 7.4.1. Consistent with the pre-2015 Rule regulatory regime, a wetland may be considered adjacent and potentially jurisdictional under this final rule if it has an unbroken surface or shallow sub-surface connection to jurisdictional waters.[29]**

[29] 2008 *Rapanos* Guidance at 5.

7.5 2015 Rule's Case-Specific Categories of Waters

7.5.1 General comments

Some commenters expressed concern that the case-specific significant nexus determinations required for the 2015 Rule's (a)(7) and (a)(8) waters would be slow, resource-intensive, and lead to inconsistent results; one of these commenters asserted that significant nexus is a complex, subjective, and imprecise standard. Commenters also expressed concern that the case-specific determinations would create uncertainty for the regulated community and impermissibly expand federal CWA jurisdiction. Another commenter suggested that landowners would need to undertake complex and costly watershed studies to determine the jurisdictional status of waters on their property.

A few commenters suggested that the agencies did not provide sufficient information about how the case-specific determinations would be conducted and noted that such determinations should be consistent. Another commenter believed the agencies would rely on information related to the migration of aquatic species and insects to support significant nexus determinations. Other commenters expressed support for the 2015 Rule's approach to case-specific significant nexus determinations.

One commenter suggested that the 2015 Rule's approach to "other waters" under the case-specific category was too ambiguous and could result in the regulation of roadside ditches with no seasonal or continuous flow. Another commenter noted that the 2015 Rule removed the pre-existing "other waters" provision, which the commenter suggested would result in intrastate, nonnavigable, geographically isolated wetlands, lakes, and ponds no longer being covered under the CWA.

> **Agencies' Response: See the Agencies' Summary Response in Section 7.0; Section I.C.9 of the Economic Analysis for the Final Rule: Definition of "Waters of the United States"—Recodification of Pre-Existing Rules. As discussed in Section III.C of the final rule preamble, the agencies conclude that the 2015 Rule's categories of (a)(7) and (a)(8) waters exceeded the agencies' statutory authority. Given the agencies' conclusion that the categorical assertion of jurisdiction over features meeting the 2015 Rule's definitions of "tributary" and "adjacent" contravened the limits of federal jurisdiction reflected in Justice Kennedy's opinion, it follows that the 2015 Rule's (a)(7) and (a)(8) categories—which apply to certain waters located *outside* the scope of those jurisdictional-by-rule categories—similarly exceeded the scope of the agencies' statutory authority. *See Georgia v. Wheeler*, No. 2:15-cv-00079, slip. op. at 53 (S.D. Ga. Aug. 21, 2019) (finding that the 2015 Rule's (a)(8) provision would "extend federal jurisdiction beyond the limits allowed under the CWA"). Similarly, as discussed in Section III.C.4 of the final rule preamble, the agencies find that the distance-based limitations in the 2015 Rule, including the distance-based limits in case-by-case significant nexus provisions in the 2015 Rule, were not a logical outgrowth of the proposed rule and were not supported by an adequate record.**

7.5.2 Similarly situated subcategories of waters under the 2015 Rule's (a)(7) provision

A number of commenters agreed with the agencies' finding in the 2015 Rule that certain subcategories of waters (prairie potholes, Delmarva and Carolina Bays, pocosins, western vernal pools in California, and Texas coastal prairie wetlands) could be considered "similarly situated" for purposes of case-specific significant nexus analyses under the rule's (a)(7) provision. One commenter noted that the Southern Environmental Law Center commissioned a study examining the connectivity of coastal plain

depressional wetlands to other covered waters, which concluded that there are biological, physical, and chemical connections between many coastal depressional wetlands and nearby navigable waters.

Other commenters suggested that these features are beyond the scope of the CWA because the impact of such waters on downstream navigable waters is too speculative. A few commenters suggested that the 2015 Rule's (a)(7) provision would allow the agencies to assert jurisdiction over all prairie potholes or other subcategories of waters deemed similarly situated. One commenter stated that asserting federal CWA jurisdiction over prairie potholes is problematic given their variable nature.

While some commenters objected to the 2015 Rule's approach to aggregating these waters for purposes of a significant nexus analysis, other commenters argued that this approach was appropriate because these waters perform similar functions across large landscapes and need to be considered together to demonstrate their significant nexus to downstream waters. One commenter suggested that combining adjoining watersheds in a significant nexus analysis, where the watersheds exhibit strong similarities, would lead to greater administrative efficiency.

Agencies' Response: See the Agencies' Summary Response in Section 7.0 and the agencies' response to comments in Section 7.5.1.

7.6 Ditches

7.6.1 General comments

A number of commenters expressed support for the 2015 Rule's approach to regulating some ditches as "tributaries." Some commenters viewed the 2015 Rule's approach as scientifically sound, suggesting that ditches connected to streams become part of the tributary network and so should be jurisdictional. In contrast, one commenter expressed concern that regulating ditches could reduce water quality protections because water flowing from a jurisdictional ditch would be considered a water transfer rather than a discharge subject to section 402 permitting requirements.

Other commenters opposed the 2015 Rule's approach to ditches. Some of these commenters suggested that determining whether or not ditches are jurisdictional would be more burdensome under the 2015 Rule than the pre-existing regulatory regime, particularly due to the need to determine whether a ditch "contributes flow" consistent with the rule's "tributary" definition. While some commenters stated that the 2015 Rule provided greater clarity on which ditches may be considered jurisdictional as "tributaries," others suggested that ditches would be regulated inconsistently across the country.

Further, many commenters suggested that the 2015 Rule would increase regulation over ditches compared to the agencies' approach under the pre-existing regulatory text and 2008 *Rapanos* Guidance. Some commenters asserted that the 2015 Rule's definition of "tributary" was so broad that it could result in virtually any ditch, including predominantly dry ditches or drainages, falling within federal CWA jurisdiction. Several commenters suggested that the 2015 Rule's approach to ditches would result in the regulation of waters beyond what Congress intended in the CWA and contrary to Justice Kennedy's opinion in *Rapanos*. These commenters suggested that the 2015 Rule would cover ditches remote from any navigable-in-fact water and carrying only minor water volumes toward it, as well as ditches with intermittent or ephemeral flow with little or no connection to downstream navigable waters. A few commenters expressed the view that wetlands established in ditches solely due to the presence of drainage waters cannot be "waters of the United States."

Commenters asserted that the 2015 Rule would increase regulatory burden on farmers, small businesses, local governments, and others by subjecting ditches to CWA requirements such as the Act's section 402 and section 404 permitting programs, water quality standards, and pollution clean-up plans and oil spill prevention measures. One commenter stated that requiring ditches to meet water quality standards would eliminate any designated mixing zones associated with the previous receiving stream and require that water quality standards be met prior to the discharge point without a mixing zone, which would present a significant and unnecessary burden on the regulated community. Some commenters cited to language in the preamble to the 2015 Rule suggesting that a ditch could be considered both a point source and a "water of the United States" and asserted that this potentially duplicative regulation under CWA sections 402 and 404 was inconsistent with the Act.

> **Agencies' Response: See the Agencies' Summary Response in Section 7.0 and the agencies' response to comments in Section 7.3; Section I.C.6 of the Economic Analysis for the Final Rule: Definition of "Waters of the United States"—Recodification of Pre-Existing Rules. Ditches are not explicitly excluded in rule text in this final rule; however, ditches (including roadside ditches) excavated wholly in and draining only upland and that do not carry a relatively permanent flow of water are generally not jurisdictional under the final rule.**
>
> **For the agencies' response to comments on legal concerns with the 2015 Rule's definition of "tributary," see Section 4.2. For the agencies' response to comments on the 2015 Rule's impact on CWA section 402 and 404 permitting programs, see Section 8.1 and Section 9.**

7.6.2 2015 Rule's exclusions for ditches

Multiple commenters asserted that the 2015 Rule's exclusions for ditches were unclear and open to subjective interpretation, creating significant uncertainty about the status of ditches. Some commenters asserted that applying the 2015 Rule's ditch exclusions is challenging given the rule's reliance on historical imagery or maps to demonstrate whether or not ditches are excavated within or relocated tributaries and the use of past conditions to assert jurisdiction.

Many commenters suggested that the 2015 Rule's exclusions for ditches were so narrow that most ditches would be considered jurisdictional tributaries, including stormwater management ditches and roadside ditches. Another commenter asserted that the 2015 Rule's exclusions would have especially limited utility in the arid west, where ditches are often used to move water to fields for irrigation purposes or to municipal intakes and sometimes eventually return flows back to a stream. One commenter suggested that this would prompt facilities to install costly treatment systems or pumps and pipes to move water instead of using ditches. A few commenters expressed concern that all ditches not otherwise subject to the 2015 Rule's exclusions would be jurisdictional "tributaries," whereas the commenters viewed the prior regulatory regime as providing a more general or broad approach to excluding ditches. Conversely, one commenter stated that the 2015 Rule's exclusions for ditches were based on a comprehensive analysis and reflected a balanced approach to meeting stakeholder interests.

> **Agencies' Response: See the Agencies' Summary Response in Section 7.0 and the agencies' response to comments in Section 7.6.1; See also Section I.C.6 of the Economic Analysis for the Final Rule: Definition of "Waters of the United States"—Recodification of Pre-Existing Rules.**

7.6.3 Statutory exemptions for drainage and irrigation ditches

Some commenters suggested that the 2015 Rule's regulation of ditches under the definition of "tributary" undermined the statutory exemptions found in CWA section 404(f) for drainage ditch maintenance and irrigation ditch construction and maintenance or otherwise expressed confusion as to whether the 404(f) permitting exemptions would continue to apply. Many commenters stated that the 2015 Rule would result in additional expense and reduced productivity for farmers and others who manage and maintain drainage or irrigation ditches on their lands and would generally undermine private property rights. One commenter asserted that federal regulation of ditches could also impede flood and mosquito control, as well as levee maintenance. Other commenters stated that the statutory exemptions for maintaining ditches are too narrow and are applied inconsistently.

> **Agencies' Response: See the Agencies' Summary Response in Section 7.0. This final rule does not alter requirements for permits for discharges of dredged or fill material into "waters of the United States," the longstanding exemptions under CWA section 404(f) for activities such as construction and maintenance of irrigation ditches and the maintenance of drainage ditches, or requirements for discharge permits under CWA section 402.**

7.7 Exclusions and Non-Jurisdictional Waters

7.7.1 General comments

Some commenters expressed opposition to the exclusions in the 2015 Rule, asserting that the exclusions narrowed the historic scope of CWA jurisdiction, weakened CWA protections, and were based more on stakeholder concerns rather than science. Other commenters supported the 2015 Rule's broad set of specific exclusions, including because the 2015 Rule maintained exclusions benefitting farmers and ranchers, such as the exclusion for prior converted cropland.

One commenter noted that non-jurisdictional waters such as non-wetland swales, gullies, rills, and specific types of ditches could still serve as a surface hydrologic connection for purposes of a significant nexus analysis. The commenter also noted that non-jurisdictional features could function as point sources such that discharges from those features to jurisdictional waters would be subject to CWA permitting requirements.

The agencies also received many comments regarding specific exclusions under the 2015 Rule. A number of commenters expressed support for the 2015 Rule's exclusion for "erosional features" but suggested that the agencies needed to provide more clarity as to what features would fall within that exclusion. One commenter expressed concern over the 2015 Rule's definition of excluded "puddles," particularly how to determine at what point a puddle becomes a jurisdictional depressional wetland. Another commenter stated that the 2015 Rule's exclusion for artificial reflecting or swimming pools created significant uncertainty about the status of other artificial pools, such as concrete tanks and secondary containment structures. A different commenter expressed concern that artificial lakes and ponds used as settling basins and falling within the 2015 Rule's exclusion could take on wetland characteristics and would not be protected from discharges. One commenter noted that the 2015 Rule's exclusion for small ornamental waters created significant uncertainty about the status of large ornamental waters or ornamental waters that are not primarily aesthetic, such as waters that both capture stormwater and are ornamental. Other comments regarding specific exclusions are summarized below.

<u>Agencies' Response</u>: See the Agencies' Summary Response in Section 7.0. For a discussion of waters excluded from the definition of "waters of the United States" under this final rule, see Section I.C.10 of the Economic Analysis for the Final Rule: Definition of "Waters of the United States"—Recodification of Pre-Existing Rules.

7.7.2 Groundwater

Many commenters expressed support for the 2015 Rule's groundwater exclusion and suggested that the agencies clarify the exclusion. Several commenters noted that regulation of groundwater is not included in the CWA and suggested that regulation over groundwater should be reserved to the states. One commenter suggested removing the Connectivity Report's discussion of groundwater to avoid any misunderstandings about the jurisdictional status of groundwater. Another commenter expressed concern that the 2015 Rule excludes groundwater but allows the agencies to assert jurisdiction over surface water bodies based on groundwater connections, stating that it is unclear why an upstream waterbody may be federally regulated because of a connection to a downstream waterbody when the hydrologic connection itself—the groundwater—is not federally jurisdictional.

In contrast, a few commenters that supported excluding groundwater also suggested that it would be appropriate for the agencies to consider groundwater in the context of documenting significant nexus. One of these commenters stated that excluding groundwater is consistent with case law and any change in the jurisdictional status of groundwater must come from Congress, not the agencies.

Other commenters argued against excluding groundwater from the definition of "waters of the United States," suggesting that groundwater plays a critical role in ecosystems.

<u>Agencies' Response</u>: See the Agencies' Summary Response in Section 7.0. Though groundwater is not specifically excluded in the regulatory text of the final rule, the agencies have never interpreted "waters of the United States" to include groundwater. Therefore, it is not considered a "water of the United States" under implementation of the final rule.

7.7.3 Waste treatment systems

Several commenters expressed support for the waste treatment system exclusion, noting that waste treatment systems could not serve their intended purpose if they were regulated as "waters of the United States." Another commenter suggested that the agencies lack statutory authority for the waste treatment system exclusion, arguing that the agencies do not have authority to convert "waters of the United States" into waste treatment systems. Further, one commenter asserted that the public did not have an adequate opportunity to comment on the waste treatment system exclusion following EPA's 1980 suspension of language limiting the exclusion to manmade bodies of water; the commenter also expressed concern that the public was not given an opportunity to comment on the exclusion or the suspension of the limiting language in the 2015 Rule or in this final rule.

<u>Agencies' Response</u>: See the Agencies' Summary Response in Section 7.0. Waste treatment systems have been excluded from the definition of "waters of the United States" since 1979. The 2015 Rule did not reopen or make any substantive changes to the waste treatment system exclusion. See also Section I.C.10 of the Economic Analysis for the Final Rule: Definition of "Waters of the United States"—Recodification of Pre-Existing Rules.

7.7.4 Water-filled depressions created incidental to construction activity

Some commenters stated that the 2015 Rule's exclusion for depressions created incidental to construction activity caused significant uncertainty about the status of other depressions that could collect water, such as tire ruts, created incidental to activities other than construction. Commenters asked whether depressions commonly created in the course of construction, such as borrow pits, retention basins, architectural landscaping, diversion of storm water run-off, and creation of water storage features would be excluded if they were created in the course of constructing something other than a structure or a facility. One commenter suggested that lined gravel pits should be excluded.

> **Agencies' Response: See the Agencies' Summary Response in Section 7.0. The 1986 and 1988 preamble language that will be used to implement the final rule includes in the waters that are generally non-jurisdictional the category of water-filled depressions created in dry land incidental to construction activity and pits excavated in dry land for the purpose of obtaining fill, sand, or gravel. Such waters are generally non-jurisdictional under the pre-2015 regulations, as implemented, unless and until the construction or excavation operation is abandoned and the resulting body of water meets the definition of "waters of the United States."**

7.8 Exemptions

One commenter opposed the CWA's statutory provisions exempting certain farming, ranching, and silviculture activities from section 404 permitting requirements, asserting that failing to protect waters from these activities would undermine and limit progress on improving water quality due to the cumulative extent and rate of growth of these practices. Other commenters expressed support for these statutory permitting exemptions. One commenter suggested that EPA and the Corps recognize farming practices and conservation efforts deemed appropriate by other federal agencies as exempt activities. Another commenter suggested that if drainage features are jurisdictional, this could create challenges for applying the statutory exemption for agricultural stormwater runoff to nearby agricultural land.

A number of commenters stated that the 2015 Rule did not impact these statutory permitting exemptions. Several other commenters suggested that the 2015 Rule would impose permitting requirements on common farming, silvicultural, and agricultural practices, which some of the commenters asserted would unlawfully conflict with statutory exemptions intended to avoid federal permitting requirements for such activities. Further, a few commenters noted that activities subject to the CWA's section 404 permitting exemptions are not exempted from the Act's section 402 permitting requirements; these commenters expressed concern that an expansion of jurisdiction in the 2015 Rule could thus subject certain activities, particularly activities on farms, to new permitting requirements.

> **Agencies' Response: See the Agencies' Summary Response in Section 7.0. Nothing in this final rule changes the exemptions identified in CWA section 404(f) or current agency implementation of the exemptions.[30]**

[30] For more information about the CWA section 404(f) exemptions, see the agencies' Memorandum: Clean Water Act Section 404 Regulatory Program and Agricultural Activities (1990), *available at* https://www.epa.gov/cwa-404/memorandum-clean-water-act-section-404-regulatory-program-and-agricultural-activities.

Section 8 IMPLEMENTATION

8.0 General Comments on Impact of Repealing the 2015 Rule

This section contains summaries of comments on the agencies' proposed rule that are related to implementing CWA programs. The agencies' responses are provided below each comment summary.

8.0.1 Regulatory uncertainty under prior regulatory regime

A number of commenters expressed concern that repealing the 2015 Rule and returning to the pre-2015 Rule regulatory regime would increase rather than reduce uncertainty and confusion. As support, some commenters pointed to issues associated with implementing the 2003 *SWANCC* and 2008 *Rapanos* guidance.[31] Commenters noted problems such as inconsistency in significant nexus determinations across Corps districts, delays in wetland delineations, and various state and local wetland regulations and policies, all of which contribute to the financial and permitting burden on businesses and communities and perpetuate confusion and inconsistency. A few commenters also cited examples of how existing guidance is flawed and resulted in "bad calls" in the field regarding CWA jurisdiction. Some commenters expressed support for the 2015 Rule because the commenters believe the rule clarified which waters are jurisdictional and which are not; these commenters asserted that returning to the prior regulatory regime would be a step backwards towards greater regulatory uncertainty.

> **Agencies' Response: For the reasons articulated in the preamble to the final rule, the agencies find that the 2015 Rule did not implement the legal limits on the scope of the agencies' authority under the CWA as intended by Congress and reflected in Supreme Court cases, including Justice Kennedy's articulation of the significant nexus test in *Rapanos*, did not adequately consider and accord due weight to the policy of Congress in CWA section 101(b), pushed the envelope of the agencies' constitutional and statutory authority absent a clear statement from Congress, and included distance-based limitations that suffered from procedural errors and a lack of adequate record support. The agencies have concluded that, as a result of those fundamental issues, the 2015 Rule must be repealed.**
>
> **At the same time, the agencies acknowledge that the pre-existing regulations have posed certain implementation difficulties, particularly because significant nexus analyses are required for certain waters. Following the Supreme Court's decisions in *SWANCC* and *Rapanos*, the agencies published a guidebook to assist district staff in issuing approved jurisdictional determinations (JDs).[32] The guidebook outlines procedures for documenting the basis for jurisdiction, including significant nexus determinations. This guidebook has been and**

[31] Joint Memorandum, 68 FR 1991, 1995 (Jan. 15, 2003) (providing clarifying guidance regarding the U.S. Supreme Court's decision in *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001)), *available at* https://www.epa.gov/sites/production/files/2016-04/documents/swancc_guidance_jan_03.pdf; U.S. EPA & U.S. Army Corps of Engineers, Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States & Carabell v. United States* (Dec. 2, 2008), *available at* https://www.epa.gov/sites/production/files/2016-02/documents/cwa_jurisdiction_following_rapanos120208.pdf.

[32] U.S. Army Corps of Engineers Jurisdictional Determination (JD) Form Instructional Guidebook, *available at* https://www.usace.army.mil/Missions/Civil-Works/Regulatory-Program-and-Permits/Related-Resources/CWA-Guidance/.

continues to be publicly available and will continue to serve as a resource in issuing JDs under this final rule.

The agencies also note that this final rule does not alter the Corps' administrative appeal process regulations, *available at* 33 CFR Part 331. Consistent with those regulations, an affected party (as defined in the regulations) can request an appeal of an approved JD, permit denial, or a declined proffered individual permit so long as the action in question meets the criteria for appeal.

In the agencies' proposed revised definition of "waters of the United States," the agencies seek to establish a clear and implementable definition that better effectuates the language, structure, and purposes of the CWA. *See* 84 FR 4154, 4174 (Feb. 14, 2019). Pending any final action on that proposed rulemaking, the agencies find that this final rule will promote regulatory certainty by reinstating a longstanding regulatory framework that is familiar to and well-understood by regulators, the regulated community, and the public.

See also Final Rule Preamble Section IV and the agencies' response to comments in Section 2, Section 5.0, Section 8.2, and Section 9.

8.0.2 Loss of protections for waters under prior regulatory regime

Some commenters expressed concern that returning to the pre-2015 Rule regulatory regime would potentially result in the loss of federal CWA protections for many waters nationwide. For example, commenters noted that discharges to streams and wetlands that no longer fall within the definition of "waters of the United States" would not require permits. Some commenters felt that the 2003 *SWANCC* and 2008 *Rapanos* guidance placed millions of wetland acres and tens of thousands of stream miles at risk of pollution and destruction by potentially treating intermittent and ephemeral streams and their adjacent wetlands, along with "isolated waters," as non-jurisdictional. Further, given the inter-relationship between waters, commenters stated that returning to implementation of the 2003 and 2008 guidance would put all the nation's waters at risk by retreating from the comprehensive protections needed to achieve the CWA's goals.

<u>Agencies' Response</u>: One of the CWA's goals is to attain "water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water." 33 U.S.C. § 1251(a)(2). Having been enacted with the objective of restoring and maintaining the chemical, physical, and biological integrity of our nation's waters, the CWA serves to protect water quality, aquatic resources, and associated ecosystem services. Congress established a regulatory and non-regulatory framework that together are intended to meet the objective and goals of the CWA. For the subset of the nation's waters identified as "navigable waters," defined as "the waters of the United States," *id*. § 1362(7), Congress created a regulatory permitting program designed to address the discharge of pollutants into those waters specifically. To address pollution more broadly, Congress crafted the non-regulatory statutory framework to provide technical and financial assistance to the states to prevent, reduce, and eliminate pollution in the nation's waters generally. For example, under the section 106 grant program, states and eligible tribes can seek funding to build and sustain effective water quality programs to help meet the objective of the CWA.

The agencies are repealing the 2015 Rule because, among other reasons, it exceeded the agencies' statutory authority. Since promulgation of the 2015 Rule, the agencies have continued to implement the pre-2015 Rule regulations in a shifting patchwork of states due to court orders staying implementation of the 2015 Rule. With this final rule, the agencies will restore the pre-2015 Rule regulatory regime nationwide and will continue to implement those pre-existing regulations as informed by applicable agency guidance documents and consistent with Supreme Court decisions and longstanding agency practice while the agencies consider public comments on the proposed revised definition of "waters of the United States." *See* 84 FR 4154 (Feb. 14, 2019).

Consistent with that prior regulatory regime, the agencies will assert jurisdiction over traditional navigable waters (TNWs), wetlands adjacent to TNWs, nonnavigable tributaries of TNWs that are relatively permanent where the tributaries typically flow year-round or have continuous flow at least seasonally (e.g., typically three months), and wetlands that directly abut such tributaries. Additionally, the agencies will decide jurisdiction over the following waters based on a fact-specific analysis to determine whether they have a significant nexus with a TNW: non-navigable tributaries that are not relatively permanent; wetlands adjacent to non-navigable tributaries that are not relatively permanent; and wetlands adjacent to but that do not directly abut a relatively permanent non-navigable tributary. A significant nexus exists if a tributary (described in the 2008 *Rapanos* Guidance as "the entire reach of the stream that is of the same order (i.e., from the point of confluence, where two lower order streams meet to form the tributary, downstream to the point such tributary enters a higher order stream)", itself or together with the functions performed by all the wetlands adjacent to that tributary, has more than a speculative or an insubstantial effect on the chemical, physical, and biological integrity of a TNW.[33] Some intermittent tributaries could be determined jurisdictional with a supporting case-specific significant nexus determination either as a seasonal relatively permanent water (RPW) or as a non-RPW. Some ephemeral tributaries also could be determined jurisdictional as a non-RPW with a case-specific significant nexus determination.

Further, this final rule does not affect or diminish state or tribal authorities to establish protections for their aquatic resources, and nothing in the CWA prohibits states or tribes from determining what kinds of aquatic resources to regulate under state or tribal law to protect the interests of their citizens. Where authorized by state or tribal law, states and tribes may establish their own programs to regulate those waters that fall outside the jurisdictional scope of the CWA. States and tribes may establish more protective standards or limits than the federal CWA to manage such waters and may choose to address special concerns related to the protection of water quality and other aquatic resources within their borders, such as wetlands.

See also the agencies' response to comments in Section 3 and Section 6, as well as the Economic Analysis for the Final Rule: Definition of "Waters of the United States"—Recodification of Pre-Existing Rules.

[33] According to the *Rapanos* Guidance at 10 n.35, "Consistent with Justice Kennedy's instruction, EPA and the Corps will apply the significant nexus standard in a manner that restores and maintains any of these three attributes of traditional navigable waters."

8.0.3 Impact of repealing the 2015 Rule on enforcement

Several commenters asserted that uncertainty associated with the pre-existing regulatory regime has had a negative impact on enforcement and will likely continue to do so. One commenter noted that according to a 2009 EPA Office of Inspector General (OIG) report, enforcement activities decreased after the Supreme Court's ruling in *Rapanos*, with enforcement efforts shifting away from small streams located high in the watershed, where jurisdictional uncertainty is highest. A different commenter suggested that an increase in the amount of potentially jurisdictional waters would lead to an increase in the number of inconsistent enforcement actions.

> **Agencies' Response: This final rule repeals the 2015 Rule and recodifies the pre-existing regulations. Neither the 2015 Rule nor the pre-existing regulations has any effect on the agencies' enforcement regulations. *See*, e.g., 33 CFR Part 326 (the Corps' enforcement regulations). The agencies will continue to regulate the waters of the United States by, among other things, discouraging unauthorized activities and using available enforcement resources to maintain the integrity of the agencies' CWA programs. The agencies retain discretionary authority regarding enforcement and will continue to pursue enforcement actions while also making the most effective use of available resources.**
>
> **The 2009 EPA OIG report did not evaluate the impacts of the *Rapanos* decision on CWA enforcement. Rather, the report compiles comments documented by the OIG during its evaluation of the effectiveness of EPA's identification of CWA section 404 violations. The OIG did not "analyze . . . or draw any conclusions from" the comments contained in the report.[34] Nevertheless, the agencies acknowledge that the pre-existing regulations have posed certain implementation difficulties. In the agencies' proposed revised definition of "waters of the United States," the agencies seek to establish a clear and implementable definition that better effectuates the language, structure, and purposes of the CWA. *See* 84 FR 4154, 4174 (Feb. 14, 2019). Pending any final action on that proposed rulemaking, the agencies find that this final rule will promote regulatory certainty by reinstating a longstanding regulatory framework that is familiar to and well-understood by regulators, the regulated community, and the public.**

8.1 CWA Permit Programs

8.1.1 2015 Rule's impact on CWA section 402 permit programs

A number of commenters expressed concerns regarding the impact of the 2015 Rule on the CWA's section 402 permitting program for discharges into waters of the United States (otherwise known as the National Pollutant Discharge Elimination System or NPDES permitting program), with many commenters noting that an increase in jurisdictional waters would increase the number of waterbodies subject to the Act's section 402 permitting requirements. Multiple commenters expressed concern that the 2015 Rule expanded the definition of "waters of the United States" and would thus significantly burden many

[34] U.S. EPA Office of Inspector General, Congressionally Requested Report on Comments Related to Effects of Jurisdictional Uncertainty on Clean Water Act Implementation (Apr. 30, 2009), *available at* https://www.epa.gov/sites/production/files/2015-11/documents/20090430-09-n-0149.pdf.

individuals and businesses by requiring them to obtain a section 402 permit for the discharge of any pollutant if their property contains waters meeting the 2015 Rule's regulatory definition.

Specifically, some commenters suggested that under the 2015 Rule, CWA section 402 permits would be required for discharges to agricultural or stormwater ditches; stormwater retention ponds, fire retention ponds, or other impoundments; and low areas that contain water for a short period of time. Local government commenters asserted that they would be subject to additional permitting for routine maintenance of stormwater conveyance systems or roadside ditches, such as for spraying herbicides. A commenter reiterated a concern from their 2014 comment letter that the 2015 Rule would increase section 402 permitting requirements and would require local governments to divert scarce resources from water quality improvement projects and to implement revisions to zoning and other land use regulations. Moreover, many commenters expressed concern regarding how the 2015 Rule might affect NPDES permit requirements for pesticide or herbicide applications on farms or near water.

Commenters representing developers, utilities, airlines, and golf courses, among others, also expressed concern regarding potentially increased section 402 permitting requirements for each of their sectors under the 2015 Rule. Homebuilder and development representatives commented that the need for additional permits can cause delays, increase costs, and result in project re-design and mitigation. Electric utility representatives suggested that under the 2015 Rule, they would need to obtain additional permits for spraying herbicides to maintain rights-of-way in newly jurisdictional waters. One commenter expressed concern that routine golf course management activities would require a section 402 permit if almost all waterbodies on a golf course were considered "waters of the United States." A few commenters stated that reservoirs could be subject to additional 402 permit requirements under the 2015 Rule, which the commenters suggested could impact water supply. Finally, an airline industry representative reiterated their 2014 comment that, while airports already have section 402 permits, some airports could be subject to additional permitting if the definition of "waters of the United States" were to include the complex drainage basins located upstream on some airport sites.

> **<u>Agencies' Response</u>: In the economic analysis for the 2015 Rule, the agencies found that there could be an incremental increase in 402 permits depending on the change in scope of CWA jurisdiction under the 2015 Rule. *See* Economic Analysis of the EPA-Army Clean Water Rule, docket EPA-HQ-OW-2011-0880. Since then, as discussed in the preamble to this final rule and the economic analysis for the final rule, the agencies have concluded that significant flaws in the 2015 Rule's economic analysis led to likely overestimates of the costs and benefits associated with the 2015 Rule as well as possible underestimates of impacts in jurisdictional expansion in some states. Overestimates were due in part to not factoring existing state programs into the quantified analysis. Nevertheless, the agencies acknowledge that the 2015 Rule could result in an incremental increase in CWA section 402 permits and therefore could increase the burden on states with authorized NPDES programs and regulated entities. This final rule to recodify the pre-2015 Rule regulations will provide greater regulatory certainty while the agencies consider public comments received on the proposed revised definition of "waters of the United States." *See* 84 FR 4154 (Feb. 14, 2019).**
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> **See also the agencies' response to comments in Section 3, Section 5, and Section 9, as well as the Economic Analysis for the Final Rule: Definition of "Waters of the United States"—Recodification of Pre-Existing Rules.**

8.1.2 2015 Rule's impact on CWA section 404 permit programs

Various industry commenters expressed concerns that expanded federal CWA jurisdiction would increase what the commenters described as already-burdensome section 404 permitting requirements and costs. One commenter asserted that the section 404 permit process is time-consuming and costly, which results in increased costs to the public for construction of homes, schools, businesses, etc. One commenter specifically expressed concern regarding requiring section 404 permits for industrial ditches.

In addition, business commenters, including members of the concrete, rock, gravel, and glass manufacturing industries, expressed concern over uncertainty regarding whether 404 permits would be required under the 2015 Rule and potential permit delays. Another commenter asserted that golf course maintenance such as moving soil, planting trees, and erosion protection would require 404 permits under the 2015 Rule. Electric utilities stated concerns that remote features crossed by transmission lines would become jurisdictional under the 2015 Rule, triggering additional CWA section 404 permitting for dredged and fill activities, increased use of individual rather than general permits, and expanded potential citizen suit and agency enforcement liability.

Commenters cited various other impacts that would result from expanded federal CWA jurisdiction under the 2015 Rule. One commenter stated that landowners would be required to obtain 404 permits to drain land, or to implement conservation practices on their farm, resulting in additional time and costs. Another commenter asserted there would be impacts to farming and ranching if 404 permits were required for washes in the arid desert that are dry most of the year. One commenter claimed that conservation districts would need additional 404 permits, and another asserted that inappropriate application of 404 permits to flood infrastructure could hinder maintenance and affect public safety.

Finally, some commenters asserted generally that obtaining CWA section 404 permits for individual ditch maintenance projects is inefficient, costly, time consuming, and prevents the timely maintenance of ditch infrastructure that is important to the safety and economies of cities and counties. One commenter stated that counties and local governments must act quickly following natural disasters to remove wreckage and trash from ditches and other infrastructure that may be considered jurisdictional, and that permitting delays and other obstacles to receiving emergency waivers for removing debris in jurisdictional ditches following such disasters can endanger public health.

> **<u>Agencies' Response</u>: In the economic analysis for the 2015 Rule, the agencies found that an incremental increase in assertion of CWA jurisdiction could produce subsequent costs of compliance with the section 404 program as well as increased benefits. *See* Economic Analysis of the EPA-Army Clean Water Rule, docket EPA-HQ-OW-2011-0880. Costs to regulated entities can include costs resulting throughout the permit application process, and associated compliance costs such as wetlands mitigation, stream mitigation, and project re-design and relocation expenses. At the time, the agencies found that ecological benefits would accrue from those permitted losses being offset through compensatory mitigation. Since then, as discussed in the preamble to this final rule, the agencies have concluded that significant flaws in the 2015 Rule's economic analysis led to likely overestimates of the costs and benefits associated with the 2015 Rule as well as possible underestimates of jurisdictional expansion in some states.**
>
> **This final rule to recodify the pre-2015 Rule regulations will provide greater regulatory certainty while the agencies consider public comments received on the proposed revised**

definition of "waters of the United States." *See* 84 FR 4154 (Feb. 14, 2019). Further, this final rule does not alter requirements for permits for discharges of dredged or fill material into "waters of the United States" or the longstanding exemptions under CWA section 404(f) for activities such as construction and maintenance of irrigation ditches and the maintenance of drainage ditches. This final rule also does not change the use of general permits when appropriate and applicable. Under this final rule, the agencies will continue to process section 404 permit applications in accordance with the applicable regulations.

See also the agencies' response to comments in Section 3, Section 5, Section 8.0.3, and Section 9, as well as the Economic Analysis for the Final Rule: Definition of "Waters of the United States"—Recodification of Pre-Existing Rules.

8.1.3 Section 404 assumption

Some commenters expressed concern that rescinding the 2015 Rule would negatively impact state assumption of section 404 permitting programs as there would be little left for states to assume. A commenter asserted that, if the scope of federal jurisdiction is rolled back, the states would have increased responsibility for protection of other public waters and would lose avenues to coordinate with federal programs such as via the Coastal Zone Management Act and CWA section 401. Another commenter noted that many states currently find it too costly to assume responsibility for the 404 program without federal funding.

<u>Agencies' Response</u>: For the reasons articulated in the preamble to the final rule, the agencies find that it is appropriate to repeal the 2015 Rule and to restore the pre-existing regulations. This final rule does not alter requirements related to state assumption of 404 permitting pursuant to section 404(g) of the CWA, but the agencies acknowledge that a change in the definition of "waters of the United States" may change the scope of waters subject to CWA jurisdiction and thus may change the extent of waters for which states may assume 404 permitting responsibilities under the Act. However, this final rule does not preclude a state or tribe from administering its own permit program to manage discharges of dredged or fill material into waters that are beyond the jurisdictional scope of the CWA. Indeed, states and tribes may implement, establish, or modify their own programs under state or tribal law to regulate discharges of dredged or fill material into "waters of the state" or "waters of the tribe" and, where authorized by state or tribal law, states and tribes may establish more protective standards or limits than the federal CWA.

While the agencies acknowledge that many states and tribes rely on section 401 certification as their primary tool for ensuring that federal permits or licenses do not cause unacceptable water quality impacts and sufficiently protect aquatic resources, the applicability of section 401 is limited in scope to those situations involving a federal permit or license that may result in a discharge to "waters of the United States," and section 401 does not dictate the particular scope of CWA jurisdiction.

General comments regarding costs associated with state assumption of the CWA's 404 program are outside the scope of this rulemaking.

See also the agencies' response to comments in Section 3, Section 5, and Section 9.

8.1.4 2015 Rule's impacts on other CWA programs and requirements under other federal statutes

A number of commenters expressed concern regarding the 2015 Rule's impact on regulatory requirements under other CWA programs and other federal statutes. Several commenters reiterated concerns expressed in their comments on the 2014 proposed rule that expanding CWA jurisdiction would increase the regulatory burden under CWA sections 303, 311, 316, 319, 401, 402, and 404; these commenters disagreed with the agencies' conclusion at the time that the rule would have few effects on these programs. Another commenter reiterated a concern from their comment on the 2014 proposal that total maximum daily loads (TMDLs) would be applied to newly jurisdictional waters and increase the workload of municipal separate storm sewer system permittees. One commenter questioned whether the 2015 Rule's definition of "tributary" would lead to more impaired waters listings for ephemeral and intermittent streams, more TMDLs, and more restrictions in stormwater permits.

A number of commenters asserted that the 2015 Rule's expanded jurisdiction would not only lead to additional CWA permitting requirements but would also trigger requirements under other federal or state statutes, including the Endangered Species Act (ESA), National Environmental Policy Act, and National Historic Preservation Act.

Regarding the ESA, commenters expressed concern that the scope of federal CWA jurisdiction under the 2015 Rule could increase the need for ESA consultation in a number of different contexts where federal CWA permits would now be required, such as for constructing and maintaining municipal water infrastructure systems. One commenter suggested that the 2015 Rule's assertion of jurisdiction over certain waters based on their location in the 100-year floodplain may trigger ESA certification requirements for local governments that participate in the National Flood Insurance Program. Further, another commenter noted that expanded CWA jurisdiction, and thus an expanded hook for application of the ESA, could complicate EPA's pesticide product registration process.

Moreover, some commenters expressed concern that the 2015 Rule overlaps with the Federal Insecticide, Fungicide, and Rodenticide Act. One commenter asserted that the 2015 Rule overlaps with pesticide labeling requirements and questioned which agency would handle label enforcement actions.

In addition, a couple commenters asserted that the 2015 Rule would negatively impact the implementation of other regulations. One commenter suggested that additional regulatory burden under the 2015 Rule would deter fuel retailers from participating in the Renewable Fuel Standard program. Another commenter asserted that the rule would conflict with reclamation regulations at 43 CFR § 3809 and create an additional regulatory burden in the permitting process.

> **<u>Agencies' Response</u>: In the economic analysis for the 2015 Rule, the agencies found that there could be an incremental increase in section 402 permits depending on the change in scope of CWA jurisdiction under the 2015 Rule. *See* Economic Analysis of the EPA-Army Clean Water Rule, docket EPA-HQ-OW-2011-0880. Similarly, the agencies found that an incremental increase in assertion of CWA jurisdiction could produce subsequent costs of compliance with the section 404 program as well as increased benefits. An increase in the scope of CWA jurisdiction could also increase state workload associated with issuing section 401 certifications. Further, a revised definition of "waters of the United States" that increases the number of activities or projects that require a CWA section 402 or 404 permit could also increase the number of actions that require compliance with other federal laws. The agencies**

specifically note that while these programs would be impacted, the magnitude of impact is less than that estimated in the 2015 Rule for a variety of reasons, including taking state water quality protections existing prior to the 2015 Rule into account, as discussed in the agencies' response to comments in Section 3 and Section 9.

Regarding the section 319 grant program, the agencies find that the authorizing language and the range of programmatic activities are sufficiently broad, and the grants have previously applied to support programs that address both jurisdictional and non-jurisdictional waters under the 2015 Rule's definition of "waters of the United States."

For the reasons articulated in the preamble to the final rule, the agencies find that it is appropriate to repeal the 2015 Rule and to restore the pre-existing regulations. In doing so, this final rule addresses commenters' concerns about the scope and impact of the 2015 Rule and any associated regulatory burdens.

See also the agencies' response to comments in Section 3, Section 5, and Section 9.

8.2 Jurisdictional Determinations (JDs)

8.2.1 2015 Rule's impact on JDs

Many commenters suggested that the 2015 Rule provided increased clarity and certainty to the JD process under the CWA and thus supported maintaining the 2015 Rule. Some commenters asserted that the 2015 Rule would improve permitting time by reducing the need for case-specific JDs based on a "significant nexus" analysis. Commenters also stated that the Supreme Court's decisions in *SWANCC* and *Rapanos* caused inconsistencies in JDs and confusion among the regulated community, resulting in many waters not being sufficiently protected.

Other commenters favored repealing the 2015 Rule due to concerns that the rule creates an extremely difficult process to follow for determining whether a feature is a "water of the United States." A number of commenters stated that key terms and definitions in the 2015 Rule lack clarity, leaving many terms open to interpretation and increasing uncertainty as to how JDs would be made. Some commenters also felt that the definition of "significant nexus" under the 2015 Rule is too broad and sets a vague, subjective threshold for determining jurisdiction, further contributing to uncertainty as to whether permits might be required.

In addition, several commenters expressed concern that maps and aerial photos could be misinterpreted in the process of developing JDs under the 2015 Rule, leading to inconsistent JDs and increased regulatory uncertainty. Another commenter expressed concern with potential discrepancies between remote tools and field conditions, such as the use of desktop tools in lieu of site verification, and automatic JDs based on historical conditions.

Agencies' Response: For the reasons articulated in the preamble to the final rule, the agencies find that it is appropriate to repeal the 2015 Rule and to restore the pre-existing regulations. The agencies find that the 2015 Rule did not implement the legal limits on the scope of the agencies' authority under the CWA as intended by Congress and reflected in Supreme Court cases, including Justice Kennedy's articulation of the significant nexus test in *Rapanos*, did not adequately consider and accord due weight to the policy of Congress in CWA section 101(b),

pushed the envelope of the agencies' constitutional and statutory authority absent a clear statement from Congress, and included distance-based limitations that suffered from procedural errors and a lack of adequate record support. With this final rule, the agencies are recodifying the prior regulations, thereby reinstating a longstanding regulatory framework that is familiar to and better understood by the agencies, states, tribes, local governments, regulated entities, and the public, while the agencies consider public comments on the proposed revised definition of "waters of the United States." *See* 84 FR 4154 (Feb. 14, 2019).

Under this final rule, the agencies will continue to implement the pre-existing regulations as informed by applicable agency guidance documents and consistent with Supreme Court decisions and longstanding agency practice. Following the Supreme Court's decisions in *SWANCC* and *Rapanos*, the agencies published a guidebook to assist district staff in issuing approved JDs.[35] The guidebook outlines procedures for documenting the basis for jurisdiction, including significant nexus determinations. Consistent with the agencies' prior regulatory regime, a significant nexus exists if a tributary (described in the 2008 *Rapanos* Guidance as "the entire reach of the stream that is of the same order (i.e., from the point of confluence, where two lower order streams meet to form the tributary, downstream to the point such tributary enters a higher order stream)," in combination with all of its adjacent wetlands, has more than a speculative or an insubstantial effect on the chemical, physical, and/or biological, integrity of a TNW. This guidebook has been and continues to be publicly available and will continue to serve as a resource in issuing JDs under this final rule.

Under this final rule, the agencies will continue to utilize approved JDs and preliminary JDs, as necessary, and will undertake the process of determining jurisdiction in accordance with longstanding practice.

See also the agencies' response to comments in Section 2, Section 6, and Section 8.0.2.

8.2.2 JDs under the pre-existing regulatory regime

Several commenters expressed concern regarding the case-specific approach to JDs under the 2008 *Rapanos* guidance. A commenter suggested that inconsistent JDs are the result of individual staff interpretations of the relevant guidance documents. This commenter also felt that such case-specific determinations were often skewed towards an overly broad interpretation of jurisdiction. Another commenter stated that the case-by-case approach is time consuming and inefficient, and that permit applicants need predictability. A different commenter noted that after *Rapanos*, the case-specific "significant nexus" evaluation delayed decision-making to the point where many 404 permit applicants waived a formal delineation of "waters of the United States" and used a verified preliminary jurisdictional delineation instead. One commenter suggested that issuing JDs on a case-specific basis would maintain federal CWA jurisdiction over many waters significant to the nation's aquatic system.

[35] U.S. Army Corps of Engineers Jurisdictional Determination (JD) Form Instructional Guidebook, *available at* https://www.usace.army.mil/Missions/Civil-Works/Regulatory-Program-and-Permits/Related-Resources/CWA-Guidance/.

Additionally, a few commenters stated that they identified inconsistent practice and statements from the agencies with regards to whether and how subsurface and groundwater connections can be used as part of the tributary network under the pre-existing regulations.

> **<u>Agencies' Response</u>: See the agencies' response to comments in Section 8.2.1. The agencies acknowledge that in issuing the 2015 Rule, the agencies intended to "make the process of identifying waters protected under the CWA easier to understand." 80 FR 37054, 37057 (June 29, 2015). Yet, as explained in Section III.C of the final rule preamble, the agencies find that the 2015 Rule did not implement the legal limits on the scope of the agencies' authority under the CWA as intended by Congress and reflected in Supreme Court cases, including Justice Kennedy's articulation of the significant nexus test in *Rapanos*, did not adequately consider and accord due weight to the policy of Congress in CWA section 101(b), pushed the envelope of the agencies' constitutional and statutory authority absent a clear statement from Congress, and included distance-based limitations that suffered from procedural errors and a lack of adequate record support. The agencies have concluded that, as a result of those fundamental issues, the 2015 Rule must be repealed. At the same time, the agencies recognize that the pre-existing regulations pose certain implementation challenges, particularly because significant nexus analyses are required for certain waters. As noted above, after the Supreme Court's decisions in *SWANCC* and *Rapanos*, the agencies released a guidebook that instructs Corps district staff on the procedures and documenting practices to support an approved JD. That guidebook is still in effect for approved JDs completed under the pre-2015 Rule regulations and will continue to serve as a resource in issuing JDs under this final rule. The Corps strives to be as consistent as possible when making JDs, including by providing training for its staff specific to JDs.**
>
> **JDs are generally issued only when they are requested. As such, each JD is intrinsically case-specific. Consistent with longstanding practice, where the agencies conduct a case-specific significant nexus analysis, the Corps must collect adequate information relative to the significant nexus standard in order to produce an accurate determination based on a sound technical record. Yet, many approved JDs do not require a case-specific significant nexus determination (e.g., on-site wetlands that directly abut a perennial relatively permanent water). Where a requestor or permit applicant determines that it is in their best interest to do so, they may request a preliminary JD in order to obtain the Corps' permit authorization more expeditiously.**

8.2.3 Recommendations for improving the jurisdictional determination process

One commenter requested that the agencies rely on only the 1987 U.S. Army Corps of Engineers Wetland Delineation Manual and not the 2010 supplement for wetland delineations, as the 2010 supplement did not go through a formal notice and comment process. In a re-submitted comment on the 2014 proposed rule, another commenter requested that guidance documents specifying procedures for determining physical, chemical, and biological connectivity of landscape features be distributed for public review and comment before the agencies finalized the 2014 proposal.

Some commenters requested that entities that have received a JD based on the 2015 Rule should be given the opportunity to have such determinations reexamined. Other commenters recommended that any preliminary jurisdictional determination (PJD) or approved jurisdictional determination (AJD) remain valid when this final rule goes into effect.

Several commenters expressed concern regarding delays in permitting and encouraged the agencies to prioritize timely JDs, regardless of how the agencies define "waters of the United States." One commenter suggested that providing consistent and transparent guidelines for JDs would streamline permitting and reduce burdens on regulated entities. A commenter recommended that there be a clear process for appealing JDs. Another commenter expressed concern about having to seek permits from multiple agencies and would like to see a bundled permitting process. Several commenters requested that there be "easily recognizable jurisdictions," such as by implementing a GIS-based classification system to make the JD process more transparent. One commenter suggested a watershed modeling approach to determining jurisdiction by examining the influence of runoff from a tributary or wetland on a jurisdictional downstream water.

Agencies' Response: See the agencies' response to comments in Sections 8.2.1 and 8.2.2. This final rule repeals the 2015 Rule and recodifies the pre-existing regulations defining "waters of the United States." As such, this rule has no effect on the 1987 U.S. Army Corps of Engineers Wetland Delineation Manual or other guidance. Under this final rule, the agencies will continue to implement the pre-existing regulations as informed by applicable agency guidance documents and consistent with Supreme Court decisions and longstanding agency practice. Further, the agencies will continue to utilize the 1987 U.S. Army Corps of Engineers Wetland Delineation Manual and other appropriate guidance for identifying and delineating wetlands on a site, as appropriate.

The agencies recognize that AJDs issued under the 2015 Rule could potentially be affected by this final rule. An AJD is a document issued by the Corps stating the presence or absence of "waters of the United States" on a parcel. See 33 CFR 331.2. As a matter of policy, AJDs are valid for a period of five years from the date of issuance unless new information warrants revision before the expiration date or a District Engineer identifies specific geographic areas with rapidly changing environmental conditions that merit re-verification on a more frequent basis. See U.S. Army Corps of Engineers, Regulatory Guidance Letter No. 05–02, § 1(a), p. 1 (June 2005) (RGL 05-02). Additionally, the possessor of a valid AJD may request the Corps reassess a parcel and grant a new AJD before the five-year expiration date. An AJD constitutes final agency action pursuant to the agencies' definition of "waters of the United States" at the time of its issuance, *see U.S. Army Corps of Eng'rs v. Hawkes Co.*, 136 S. Ct. 1807, 1814 (2016), and therefore, this final rule does not invalidate an AJD that was issued under the 2015 Rule. As such, an AJD issued under the 2015 Rule will remain valid until its expiration date unless one of the criteria for revision is met under RGL 05-02, or the recipient of such an AJD requests a new AJD be issued under the pre-2015 Rule regulations and guidance pursuant to this final rule. PJDs, however, are merely advisory in nature, make no legally binding determination of jurisdiction, and have no expiration date. *See* 33 CFR 331.2; *see also* U.S. Army Corps of Engineers, Regulatory Guidance Letter No. 16–01 (October 2016). As such, PJDs are unaffected by this final rule because they do not definitively state whether there are "waters of the United States" on a parcel. *See Hawkes*, 136 S. Ct. at 1812. However, as with AJDs, a recipient of a PJD issued under the 2015 Rule may request a new PJD be issued under the pre-2015 Rule regulations and guidance, if they so choose.

In addition, this final rule does not alter the Corps' administrative appeal process regulations, *available at* 33 CFR Part 331. The appeal process regulations articulate what actions are appealable (which includes AJDs), when those actions are appealable, the criteria for appeal, how to file an appeal, the appeal process, and the final appeal decision.

The Corps strives to be as consistent as possible when making JDs and will continue to work with requestors and permit applicants to determine the best and most efficient course of action for issuing timely decisions. In the agencies' proposed revised definition of "waters of the United States," the agencies seek to establish a clear and implementable definition that better effectuates the language, structure, and purposes of the CWA. *See* 84 FR 4154, 4174 (Feb. 14, 2019). Several states have suggested that the agencies consider states' knowledge and increase the role of states and tribes in identifying those waters that are "waters of the United States." To that end, the agencies are considering how to create a framework that would authorize interested states, tribes, and federal agencies to develop for the agencies' approval geospatial datasets representing "waters of the United States" within their respective borders. The agencies solicited comment on this issue in the February 2019 proposed revised definition of "waters of the United States" and are continuing to consider potential approaches to implementing the Act that would better leverage the geographic knowledge of states, tribes, and federal land management agencies. *See* 84 FR 4198–4200. At this time, the agencies are not aware of any map or dataset that accurately or with any precision portrays the scope of CWA jurisdiction at any point in the history of this complex regulatory program.

See also the agencies' response to comments in Section 10.1.2.

8.3 Miscellaneous Comments on Implementation under the 2015 Rule

A number of commenters from the agricultural community asserted that the 2015 Rule would impose burdensome requirements, including increased costs and time delays associated with complying with new CWA permitting requirements, and would create legal risk and uncertainty regarding land use. Many of these commenters expressed the view that the 2015 Rule extended federal CWA jurisdiction to a wide variety of features related to agricultural production, including farm ditches, ephemeral drainages, agricultural ponds, swales, and isolated wetlands found in or near farms and ranches. One commenter objected to the unclear scope of the rule's "normal farming exemption." Another commenter believed that the agencies would require permits under the 2015 Rule for many ordinary farming and ranching practices. A few commenters asserted that the 2015 Rule would discourage farmers from adopting nutrient and soil conservation practices, such as grass waterways, due to the risk of litigation from citizen suits and because, among other reasons, the term "lawfully constructed" is unclear. Another commenter had specific concerns regarding the rule's impacts on growing rice crops. Other commenters expressed confusion regarding application of the 2015 Rule's exclusions for farming and ranching.

Commenters from other sectors also raised concerns regarding the 2015 Rule's impacts on their industry, including forestry, mining, and electric utilities. A forestry industry representative suggested that it would be difficult to implement a national approach to jurisdiction given nationwide differences in precipitation and stream characteristics and thus a regional approach is warranted. A mining industry commenter claimed that the 2015 Rule threatened to disrupt not just new mine permitting, but also the safe, daily operation of existing mine sites. Electric power industry representatives asserted that the 2015 Rule would create substantial uncertainty and potential liability to the industry through the rule's use of broad and ambiguous terms. One commenter expressed concern as to how the 2015 Rule would apply to internal components of waste treatment plants.

Commenters also argued that expanded federal CWA jurisdiction under the 2015 Rule would increase the regulatory burden on pesticide applicators, citing *Nat'l Cotton Council v. EPA*, 553 F.3d 927 (6th Cir. 2009), where the court held that NPDES permits are required for pesticide applications in, on, or near "waters of the United States." Relatedly, one commenter asserted that extension of federal jurisdiction under the 2015 Rule to nonnavigable and certain minor waters would adversely impact public and private pest control operators.

Commenters expressed other concerns regarding expanded jurisdiction and vague definitions under the 2015 Rule. For example, commenters noted concerns with allowing for aggregation of features within a watershed with some link to navigable waters, potentially regulating an entire watershed. Commenters were also concerned that the 2015 Rule does not require a surface connection to establish jurisdiction.

A few commenters noted that any change to the definition of "waters of the United States" may require a related adjustment in the location, type, or design of discharge control measures for mining projects in order to meet related CWA section 402 and 404 permitting requirements. Another commenter suggested that regardless of the regulatory definition, it is important that CWA permitting requirements not interfere with or hinder maintenance activities on facilities used for water delivery, noting that maintenance activities must sometimes be undertaken very quickly to ensure uninterrupted water supplies.

One commenter reiterated various concerns from their comment on the 2014 proposal regarding expanded CWA jurisdiction, such as the inclusion of vernal pools and isolated waters, and the potential for stormwater from a field at an industrial complex that enters a ditch through sheet flow to be considered jurisdictional. The commenter also expressed concern regarding the Prairie Pothole Region, which the commenter noted experiences wide climactic swings that lead to variability of water levels and would thus result in more uncertainty under the agencies' 2014 proposal.

> **Agencies' Response: For the reasons articulated in the preamble to the final rule, the agencies find that it is appropriate to repeal the 2015 Rule and recodify the pre-existing regulations. The agencies find that the 2015 Rule did not implement the legal limits on the scope of the agencies' authority under the CWA as intended by Congress and reflected in Supreme Court cases, including Justice Kennedy's articulation of the significant nexus test in *Rapanos*, did not adequately consider and accord due weight to the policy of Congress in CWA section 101(b), pushed the envelope of the agencies' constitutional and statutory authority absent a clear statement from Congress, and included distance-based limitations that suffered from procedural errors and a lack of adequate record support. The agencies are considering the proper scope of federal CWA jurisdiction in the proposed rule to revise the definition of "waters of the United States." *See* 84 FR 4154 (Feb. 14, 2019).**
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> **See also the agencies' response to comments in Section 2, Section 3, Section 5.1.5 and 5.1.6, Section 8.1, and Section 9.**

Section 9 COSTS AND BENEFITS

9.0 Agencies' Summary Response

This section contains summaries of comments on the agencies' proposed rule regarding costs and benefits associated with repealing the 2015 Rule and recodifying the pre-existing regulations. This

summary response applies to all comments summarized in this section. As appropriate, the agencies have provided more specific responses below each comment summary.

The agencies prepared an economic analysis (EA) for the 2015 Rule ("2015 EA"), the 2017 proposed rule to repeal the 2015 Rule and recodify the pre-existing regulations ("2017 EA"), and for this final rule ("final rule EA") for informational purposes and in compliance with Executive Orders 12866 and 13563. The final rule EA considered the potential changes to the costs and benefits of various CWA programs that could result from a change in the number of positive jurisdictional determinations when repealing the 2015 Rule and recodifying the pre-existing regulations. The agencies note that the policy decision to repeal the 2015 Rule and recodify the pre-existing regulations was not based on this economic analysis. As explained in the final rule preamble, the agencies find that the 2015 Rule did not implement the legal limits on the scope of the agencies' authority under the CWA as intended by Congress and reflected in Supreme Court cases, including Justice Kennedy's articulation of the significant nexus test in *Rapanos*, did not adequately consider and accord due weight to the policy of Congress in CWA section 101(b), pushed the envelope of the agencies' constitutional and statutory authority absent a clear statement from Congress, and included distance-based limitations that suffered from procedural errors and a lack of adequate record support. For these and other reasons discussed more fully in the preamble to this final rule, the agencies find that repealing the 2015 Rule and recodifying the pre-2015 Rule regulations will provide greater regulatory certainty and nationwide consistency while the agencies consider public comments on a proposed revised definition of "waters of the United States." *See* 84 FR 4154 (Feb. 14, 2019).

In developing the EA for the final rule, the agencies have made a number of enhancements and corrections to the methodologies supporting the 2015 EA and the 2017 EA. As a result of these changes, the economic analysis for this final rule explores in greater depth the role the states play in regulating their water resources, corrects and updates the wetland valuation methodology, and more clearly acknowledges the uncertainties in the agencies' calculations. In addition, the agencies acknowledge that they faced data limitations in quantifying some cost savings and forgone benefits associated with this final rule, and these limitations are discussed qualitatively in the final rule EA.

The final economic welfare implications of this final rule will be a function of the amount, type, and location of water resources that change CWA jurisdictional status, the level of water resource regulation undertaken by individual states and tribes before and in response to the change in the definition of "waters of the United States," and the responses of regulated entities to the final rule. To address the role of states in regulating their water resources, the agencies assessed current state programs based on available information and reviewed economic literature on environmental federalism, the local provision of public goods, and federalism more broadly. This information is discussed more fully in the EA for the final rule and served as a guide for developing different scenarios to estimate cost savings and forgone benefits associated with the final rule. This analysis is an improvement from the 2015 EA and the 2017 EA because it factors in how states may already be regulating waters that would not be jurisdictional under this final rule. Further, by incorporating a more nuanced characterization of existing state programs and possible state responses to a change in CWA jurisdiction, the final rule EA responds to some commenters' concerns that the agencies did not adequately consider the role of states in regulating their waters.

Because the wetlands valuation analysis for the 2015 Rule did not follow a number of the best practices for benefit transfer, it was deemed too uncertain to be included in the 2017 EA. A number of commenters criticized the agencies for removing the quantified wetland benefits and discussing them

only qualitatively. In the final rule EA, which discusses this analysis in depth, the agencies have improved upon the 2015 analysis by utilizing a meta-analysis of wetland valuation studies that combines and synthesizes the results from multiple valuation studies to estimate a new transfer function. Meta-analyses have the advantage of drawing information on willingness to pay (WTP) from a large number of disparate sources in order to control for a relatively large number of variables that influence WTP. Because meta-analyses can control for the confounding attributes of the underlying studies in a theoretically consistent way, it is sometimes possible to make use of a larger number of studies than would be considered for a unit or function transfer. Based on the improvements to the wetland valuation analysis, the agencies were able to provide for monetized forgone benefits in the final rule EA.

A change in the definition of "waters of the United States" may have a variety of effects that the agencies were unable to quantify given the uncertainty around how states may or may not choose to regulate beyond "waters of the United States," how regulated entities will respond, where new activities will occur, how water quality may be affected by these activities, the fact that the agencies are not aware of any map or dataset that accurately or with any precision portrays the scope of CWA jurisdiction at any point in the history of this complex regulatory program, and other uncertainties. The agencies acknowledge and do not dispute the importance of water resources to human health, ecosystem services such as flood storage and habitat, fisheries, and recreational uses and the businesses that support these activities, among others.

9.1 Baseline

The agencies received few comments on the appropriate baseline for analysis. One commenter advocated using the 2015 Rule as the appropriate baseline. Another commenter supported using the 2015 Rule as the analytic baseline but expressed concern over conducting separate economic analyses for this rulemaking and the rulemaking on a proposed revised definition of "waters of the United States." The commenter asserted that the rationality and transparency problems created by the failure to monetize forgone benefits of the proposed repeal are compounded by this two-step process. Specifically, the commenter asserted that the forgone benefits at each individual step will only be part of the total forgone benefits of the two-step process. The commenter argued that splitting the forgone benefits into two smaller portions makes it easier for decisionmakers and the public to discount the significance of those benefits and that this is especially true for unmonetized effects. The commenter recommended that the agencies remedy this problem by presenting the costs and benefits of the entire proposed two-step repeal-and-replace process as compared to the status quo of the 2015 Rule.

The commenter further stated that, using the 2015 Rule as a baseline, any of the shifts now contemplated by the agencies—including the proposed repeal as well as further reductions in the level of protections for wetlands—almost certainly have forgone benefits that vastly outweigh the anticipated cost savings. Unless the agencies can explain why, relative to the 2015 Rule, the cost savings from either the proposed repeal or future revisions justify the forgone benefits, the commenter wrote that the agencies should not move forward with the proposed recodification.

> **Agencies' Response: Using the 2015 Rule as the baseline is appropriate as it represents an economic and environmental state without the proposed rule but with the existing regulations or conditions. This baseline is needed to determine the incremental impacts of the proposed regulation or the policy options, avoiding the double counting of benefits and costs by assuming full compliance with the existing rules. While the 2015 Rule has not been**

implemented nationwide, final rules are typically included in the baseline according to the EPA's Guidelines for Preparing Economic Analyses and OMB's Circular A-4.[36] Thus, the 2015 Rule constitutes the baseline. The costs and benefits of the 2015 Rule are therefore the starting point to assess avoided costs along with forgone benefits of the final rule.

The agencies made several significant corrections and improvements, as discussed in the final rule EA, primarily to account for potential state responses and to update the wetlands benefits, as well as to acknowledge uncertainties in the analysis more clearly. These corrections should address some concerns about the use of the 2015 EA as the baseline for comparison against the final rule.

The agencies are implementing Executive Order 13778 in two steps and find that it is appropriate to evaluate the costs and benefits for these two actions separately. Each action has been subject to public notice and comment and reviewed by the Office of Management and Budget. Most importantly, the agencies are not only estimating benefits but also estimating the costs in two stages. Thus, both benefits and costs will be estimated in a comparable manner. Regarding the suggestion that the agencies not proceed with the proposed recodification unless the cost savings exceed the forgone benefits, the agencies note that while an analysis of costs and benefits informs the agencies' decision-making, the agencies' decision to finalize this rulemaking is based on the scope of the agencies' statutory authority and not on a cost-benefit analysis.

9.2 Role of States

Commenters agree that the agencies should reach out to states and tribes to better understand the economic effects of repealing the 2015 Rule, but they disagreed about likely findings and about whether and how states currently, or will in the future, regulate waters that are not currently or may not be considered "waters of the United States" under the proposed rule. Some commenters noted that the 2015 EA ignored the fact that state and local regulations already protect waters, either through independent state and local regulations or through assumed or authorized CWA programs. Some believed that the repeal of the 2015 Rule would result in significant transferred costs; others believed it would result in large overall benefit to states, who could presumably choose to regulate as cost-effectively as possible. Others pointed out that while 47 states have sought and obtained authorization to administer the CWA section 402 National Pollutant Discharge Elimination System permit program, only two states have been authorized to administer the CWA section 404 dredged and fill permit programs. A commenter also challenged the agencies' assumption that states would regulate wetlands, asserting that there was substantial evidence that the states would not regulate wetlands if the 2015 Rule was repealed.

A few commenters identified the cost of implementing state regulatory programs as a significant barrier. To support their conclusion, they cited a 2015 Montana study (*see* http://leg.mt.gov/content/Committees/Interim/2015-2016/Water-Policy/Meetings/July-2016/SJ2DRAFTreport.pdf). One commenter noted that the 2017 EA failed to include the costs

[36] EPA, Guidelines for Preparing Economic Analysis, December 17, 2010; Office of Management and Budget, Circular A-4, September 17, 2003 (this document was updated later on).

associated with setting up state-level programs in the 27 states that lack their own dredged and fill programs and rely on federal agencies.

Others indicated that the significant overlap between the 2015 Rule and state programs, and the broad scope of the 2015 Rule, would place a huge burden on states. For example, some commenters expressed concern that more waters would be subject to CWA water quality standards and total maximum daily loads under the 2015 Rule and that this would be extremely costly for both the states and localities to implement. These commenters argued that the effects on state nonpoint-source control programs could be equally dramatic, without a significant funding source to pay for the proposed changes.

Agencies' Response: The agencies agree that states, tribes, and local governments play an important role in managing aquatic resources across the country and implementing CWA programs. Outside of CWA-authorized programs, states may implement, establish, or modify their own programs under state law to regulate "waters of the state" which may extend further than "waters of the United States." The potential effects of this final rule, therefore, will vary based on a state's independent legal authority and programs under state law to regulate aquatic resources.

Recodifying the pre-existing definition of "waters of the United States" will reduce the number of aquatic resources subject to federal jurisdiction and will allow states greater flexibility in addressing these aquatic resources. As discussed in the final rule EA, states could respond to changes in CWA jurisdiction in a number of possible ways. States may respond by maintaining the same or more stringent level of regulation over those aquatic resources than the previous federal requirement, or by reducing the permitting and regulatory requirements over these resources. States may be more or less stringent in their programs depending on a variety of factors, which include their constituents' preferences and the types of resources located within their boundaries.

The 2015 EA and the 2017 EA did not quantify the effects of differences in potential state behavior and regulatory actions in response to a change in CWA jurisdiction. Both analyses implicitly assumed that states adjust regulatory regimes to match the federal jurisdictional level whenever there is a change in federal jurisdiction. The final rule EA responds to concerns raised by commenters by incorporating a more nuanced characterization of possible state responses and evaluating a series of scenarios that quantify the sensitivity of the costs and benefits to varying assumptions on state response. These changes in analytic approach built on the agencies' detailed review of state and tribal programs and the literature on environmental federalism, as described more fully in the final rule EA and the state snapshots presented in Appendix A of the EA.

In the scenarios detailed in the final rule EA, the agencies acknowledge that if states do make regulatory changes to maintain the previous 2015 Rule baseline level of CWA jurisdiction, then those states will likely incur some transition costs in the short-run, and some of the cost of running programs will be transferred from the federal government to the states. Costs to develop and implement equivalent state programs are uncertain and could be more or less than the costs incurred by the federal government. To the degree that these costs are greater than those incurred by the federal government, then the cost savings from the final rule may be overstated.

Though the states' responses and associated state costs are difficult to predict, the agencies believe that the revised analysis provides a reasonable estimate of the costs and benefits under a range of probable assumptions that are responsive to the comments.

See also the Agencies' Summary Response in Section 9.0 and the agencies' response to comments in Section 5 and Section 8.

9.3 Wetland Valuation and Benefits

9.3.1 Removal of wetland benefits

Multiple commenters expressed concern over the agencies' removal of wetland benefits in the 2017 EA and challenged the basis for removal, including study age, the potential for newer methodological approaches, and validity difficulties. Commenters also asserted that the agencies misled the public by ignoring or misrepresenting evidence on wetland benefits, not discussing the latest knowledge about valuation studies, and being selective in choosing certain aspects of the 2015 EA to retain for the 2017 EA. A number of commenters stated that the 2017 EA assigned zero value to wetland benefits only to support the proposed rule and make the costs of the 2015 Rule look higher. One commenter opposing rescission stated that "the appropriate response to remaining uncertainty cannot be deleting wet-land-mitigation benefits." Another commenter asserted that the 2015 EA, although it lacked accuracy, was relatively correct, but the 2017 EA provided a false impression that the benefits of wetlands are so insignificant that they can be excluded. One commenter stated that removing wetland benefits was inconsistent with best practices for cost-benefit analyses and expressed concern that it may affect the agencies' credibility in conducting other cost-benefit analyses.

One commenter stated that although the wetland benefits from the 2015 Rule may be "misapplied" in some circumstances, the costs to protect wetlands are "the cost of doing business," and the proposed rule justified repeal by removing wetland protection annual benefits.

Other commenters asserted that, in repealing the 2015 Rule, the agencies ignored the Office of Management and Budget, Council on Environmental Quality, and Office of Science and Technology Policy memo, which directs the agencies to incorporate or consider ecosystem services (M-16-01, October 7, 2015). Commenters also refuted the agencies' assertion that studies used in the 2015 economic analysis are outdated and that recent studies were not available. A number of commenters identified specific studies regarding the value of services provided by wetlands, including studies published between 2005 and 2012. Several commenters also stated that, to be valid, the economic analysis must price the ecosystem services provided by the waters that would be lost under the proposed rule as compared to rules currently in effect.

Several commenters suggested other data sources that could be used to estimate wetland value, including post-hurricane studies about the benefits of wetlands in flood protection, studies that value wetlands in terms of their contribution to housing prices, a study on the value of wetlands in water treatment, and future cost reduction from growing mitigation banks. A commenter also mentioned a willingness to pay study for large scale restoration of coastal wetlands in Louisiana.

Multiple commenters asserted that the agencies should not simply remove benefits from the analysis, but rather do a thorough review and, if necessary, collect new data on the potential benefits of wetlands protected by the 2015 Rule, before contemplating any changes to the 2015 Rule. Others suggested that

the agencies conduct an alternative analysis using existing data, carry out a new analysis, or use all the data from the 2015 EA.

> **Agencies' Response: The agencies find that the methodology used to estimate wetlands benefits from the 2015 Rule was not appropriate due to a variety of factors, including reliance on inappropriate studies and questionable benefit transfer methods. Accordingly, the agencies developed a more appropriate methodology to estimate the forgone wetland benefits that could arise as a result of this final rule. The agencies revised their approach to estimating forgone benefits from the loss of wetland acres for the purpose of incorporating both more recent wetland valuation studies and advances in meta-analysis and benefit transfer approaches to synthesize information from the existing body of literature.**
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> **The agencies' revised approach, which is discussed in detail in the final rule EA, relies on metadata drawn from primary stated preference studies, conducted in the United States, that estimate WTP for changes in the acreage of wetlands that support a variety of ecosystem services including wildlife support, recreational uses (such as water fowl hunting), flood risk, and nonuse values. The initial set of studies included 24 candidates as recent as 2016 to provide data for the wetland meta-analysis. Based on a detailed review of the candidate studies, the agencies excluded seven studies that did not provide a clear link between estimated WTP and wetland acreage (baseline and/or change) from the final meta-data. The final meta-data includes 38 observations from 17 studies. The agencies relied on recent advances in meta-regression modeling and computation of predicted benefits to identify the most promising specification of meta-function to generate the value of forgone benefits. See also Memorandum entitled "Notes on inclusion of source studies and data preparation for wetlands meta-data" in the docket for this final rule (ICF, 2018)).[37]**
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> **See also the Agencies' Summary Response in Section 9.0 and the agencies' response to comments in Section 6.**

9.3.2 Willingness to pay and public opinion on wetland values

A number of commenters disagreed with the agencies' assertions regarding problems with the WTP studies for the 2015 EA. In response to the agencies' assertions that the public perceptions and willingness to pay for nature protection could have changed over the last 30 years (since 1987) and thus introduced uncertainty in wetland benefits, commenters asserted that multiple studies have demonstrated that the public values wetlands and cited various willingness to pay studies, and one commenter stated that various public opinion surveys suggest that the public increasingly cares about wetlands.

In response to the agencies' claim that there have been tremendous advances in valuation methodologies during the last 30 years, some commenters pointed out that the standardized estimates

[37] Besedin, Elena and Moeltner, Klaus (ICF). Memorandum to Todd Doley and Steve Whitlock, U.S. Environmental Protection Agency, "Notes on inclusion of source studies and data preparation for wetlands meta-data," December 10, 2018, (Docket ID: EPA-HW-0W-2018-0159), *available at* https://www.regulations.gov/document?D=EPA-HQ-OW-2018-0149-0053.

used in the 2015 EA only span 14 years and that as most were done during the 30-year time period, they must have included some of the methodological advances. One commenter identified recent EA studies.

> **Agencies' Response: The agencies agree that multiple wetland valuation studies exist that demonstrate public WTP for wetland protection. However, not every wetland valuation study may qualify as a benefit transfer candidate, in particular for unit value transfer. The 2015 EA relied on estimates of WTP for wetland preservation or expansion from ten studies, most of which were state or local studies. These studies were used to create a single, national WTP per acre per household values for emergent wetlands and another single, national WTP value for forested/shrub wetlands. For the final rule and the proposed rule revising the definition of "waters of the United States," the agencies conducted careful reviews of those ten studies and concluded that five of the ten do not satisfy study selection criteria for standard unit value benefit transfer. As described in EPA's Guidelines for Preparing Economic Analyses (U.S. EPA 2010), benefit transfer candidates should have similar (1) definitions of the environmental commodity being valued (including considerations like scale and the presence of substitutes); (2) baselines and extent of environmental changes; and (3) characteristics of affected populations. The agencies summarized the results of their reviews and reasons for excluding these studies from the re-analysis of forgone benefits in the final rule EA.**
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> **The agencies retained five studies from the 2015 analysis that clearly satisfied benefit transfer selection criteria for a unit value transfer: Blomquist and Whitehead (1998), Whitehead and Blomquist (1991), Loomis et al. (1991), Poor (1999), and Mullarkey and Bishop (1999). The agencies used these studies together with more recent studies identified through a comprehensive review of the literature to develop alternative benefit transfer approaches, including a revised unit transfer approach and a meta-function model.**

9.3.3 Valuation methodology and validity

Multiple commenters challenged the agencies' assertion that the studies in the 2015 EA were uncertain because of potential changes in wetland valuation methodologies. One commenter asserted that the agencies failed to explain or illustrate the advances in statistical and economic methods referred to in the 2017 EA. Another commenter noted that the decision to remove wetland benefits based on changing methodological approaches was inconsistent with best practices in current economic literature, which require documentation that the studies did not use methods meeting contemporary standards or that estimates could not reflect uncertainty. One commenter argued that the 2017 EA did not follow OMB or EPA guidance on dealing with uncertainty, which state that agencies should give a range of costs-benefits instead of giving a single point value or stating the costs and/or benefits are non-quantifiable.

A few commenters stated that the concerns regarding the number of studies and age in the 2015 EA were applied only to benefits and that a sensitivity analysis should have been conducted to justify a negative net benefit. Multiple commenters disagreed with the agencies' removal of wetland benefit studies based on study age. A few commenters observed that the agencies did not uniformly apply the study age exclusion criteria given that the agencies allowed studies of similar ages for analyses of impacts on various CWA programs. One commenter asserted that if the study age exclusion were applied uniformly, it would imply that benefits could not be quantified for any water-quality effect, which would be inconsistent with decades of research on the economic benefits of water-quality improvements.

One commenter identified alternative valuation methodologies that the agencies could use. Another commenter challenged the assertion that the 2015 EA lacked accuracy, noting that since the 2015 analysis, the Corps has improved data quality and availability through quality assurance efforts on 404 program data.

A few commenters supported the agencies' approach to wetland benefit studies and data. One commenter asserted that the studies used to estimate wetland mitigation benefits in the 2015 EA were outdated and many were not published in peer-reviewed journals and so may not represent individual preference for expanding jurisdiction. Another commenter agreed with the agencies' findings on the shortcomings of the 2015 EA.

> **Agencies' Response: The agencies acknowledge that a more detailed explanation of methodological advances in resource valuation literature and their bearing on the robustness of the WTP estimates in more recent studies versus older studies would be helpful. The agencies note that a detailed discussion of the evolution in stated preference research is out of scope of the economic analysis documentation. The stated preference research has been evolving rapidly in the last three decades following the Exxon Valdez Natural Resource Damage Assessment and the NOAA Panel Report on Contingent Valuation (Arrow et al. 1993), leading to thorough investigation of stated preference validity, emergence of choice experiments, and use of web-based survey administration that allows for more detailed presentation of background information and valuation scenarios (Johnston et al. 2018). Multiple books and articles have been written to summarize advances and best stated preference research practices in the past two decades. Johnston et al. (2017)[38] and Johnston et al. (2018)[39] provides an overview of the stated preference research history as well as guidance on best contemporary practices in stated preference research.**
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> **The agencies, however, disagree with the comments stating that all outdated studies or studies not published in peer reviewed journals are not reliable sources regarding public preferences for wetland protection. Some of these studies may provide valid information on public preferences for wetland protection. However, a thorough review and evaluation of each study's methodology and results is needed to ensure that a candidate study adheres to the best stated preference research practices and also meets study selection criteria for benefit transfer outlined in EPA's Guidelines for Preparing Economic Analyses (U.S. EPA 2010). The final rule EA does not use the study age exclusion uniformly across different resource valuation studies. Instead, each set of studies was evaluated with respect to its applicability to a given policy question, environmental change, geographic scope and resource and population characteristics as well as validity of the study's results. The agencies selected existing resource valuation studies and methods for designing benefit analysis based on the best contemporary practices for stated preference research (e.g., Johnston et al. 2017) and benefit transfer (e.g., Johnston et al. 2018).**

[38] Johnston, R.J. Kevin J. Boyle, Wiktor (Vic) Adamowicz, Jeff Bennett, Roy Brouwer, Trudy Ann Cameron, W. Michael Hanemann, Nick Hanley, Mandy Ryan, Riccardo Scarpa, Roger Tourangeau, Christian A. Vossler. Contemporary Guidance for Stated Preference Studies. JAERE, volume 4, number 2., 2017.

[39] Johnston, R.J., John Rolfe. and Ewa Zawojska, 2018. Benefit Transfer of Environmental and Resource Values: Progress, Prospects and Challenges. International Review of Environmental and Resource Economics, 2018, 12: 177–266.

Following the best practices in current economic literature, the agencies summarized results of their reviews and reasons for excluding some wetland valuation studies from the analysis in the EA for the final rule. For detailed discussion of potential biases of the 2015 EA and the 2017 EA, see the final rule EA. The agencies substantially revised the analysis prepared for the 2017 proposal based on new data and improved methodologies, as discussed the EA for the final rule. In addition, the agencies conducted sensitivity analyses with respect to various assumptions used in the re-analysis prepared for this final rule, including implementation of the several scenarios of state responses to a change in the jurisdictional scope of the CWA.

9.4 Cost of Repeal and Forgone Benefits

Several commenters cited concerns with the agencies' 2017 EA. Commenters opposed to repealing the 2015 Rule asserted that the agencies failed to provide a sound economic analysis of the impact of this rulemaking. Multiple commenters expressed concerns that the 2017 EA did not account for the costs of repeal, including costs that would be passed on to local, state, tribal and federal governments and taxpayers. Commenters stated that costs would stem from providing additional water and drinking water treatment, establishing state 404 programs, improving flood infrastructure, increased flood damage, and economic impacts on industrial, agriculture, recreational, and habitat uses, among others. A commenter asserted that the agencies must include this information in a cost-benefit analysis to determine whether the proposed repeal is justified. One commenter stated that the proposal lacks any analysis of the impact of repeal on bodies of water across the recreational economy, property values of property protected by wetlands, and drinking water supplies. Several commenters asserted that a cost-benefit analysis must fully address the long-term costs from reducing federal CWA jurisdiction. One commenter argued that to "produce the cost-benefit analysis for the proposal to repeal the [2015 Rule], the agencies simply flipped the columns of the 2015 Rule's analysis: The costs became the benefits (i.e., the 'avoided costs'), and the benefits became the costs (i.e., the 'forgone benefits')." The commenter also stated that the agencies' approach is "tantamount to admitting that the proposal would make society worse off."

A number of commenters asserted that the 2017 EA did not accurately capture benefits of the 2015 Rule. For example, a commenter asserted that estimates in the 2017 EA regarding wetland loss were too low, and that, short of updated WTP studies, the agencies should have characterized the estimates as placeholders representing conservative, low-end values. The commenters who addressed forgone benefits agreed that the repeal would reduce environmental benefits. They pointed to potential reductions in water quality; hypoxia problems in the Gulf of Mexico and Chesapeake Bay that impoverish fishermen and their families; efforts to address water pollution that had been harming three generations in Cano Marin Pena, Puerto Rico; and case law that speaks to the arbitrary and capricious nature of ignoring important categories of costs (here, forgone benefits from repealing the 2015 Rule and recodifying the pre-existing regulations).

Many commenters opposed to repeal of the 2015 Rule expressed concern that repeal presented a threat to the economic benefits to human health and the environment that derive from clean water—including hunting and fishing, reduced drinking water treatment costs, groundwater recharge, and flood and pollution mitigation benefits provided by wetlands. Some also cited vulnerability of downstream waters from upstream actions. A few commenters included summary level statistics regarding jobs or expenditures in water-quality-dependent economic sectors for specific states including South Carolina, Alaska, Maryland, Michigan, Montana, Florida, Washington, Oregon, and New Jersey.

Some commenters in support of repealing the 2015 Rule noted that CWA jurisdiction has a direct impact on the costs of planning, financing, permitting, constructing, and operating industrial facilities and infrastructure projects. Commenters cited potential impacts of CWA jurisdiction on specific industries, including aggregate and other mining, ready mix concrete, construction, and coal refuse sites. These commenters expressed concerns that the 2015 Rule dampened job creation and economic growth, added to permitting delays and expenses, and created regulatory confusion and financial risks for the mining industry. One commenter felt that the 2015 Rule upset the balance between protecting the nation's water resources and allowing citizens to develop their own land.

Agencies' Response: While the economic analysis of costs and benefits provides information about the potential effects associated with repealing the 2015 Rule and restoring the pre-existing regulations, the agencies are not relying on this information as a basis for this final action. As explained in the preamble to the final rule, the agencies find that the 2015 Rule did not implement the legal limits on the scope of the agencies' authority under the CWA as intended by Congress and reflected in Supreme Court cases, including Justice Kennedy's articulation of the significant nexus test in *Rapanos*, did not adequately consider and accord due weight to the policy of Congress in CWA section 101(b), pushed the envelope of the agencies' constitutional and statutory authority absent a clear statement from Congress, and included distance-based limitations that suffered from procedural errors and a lack of adequate record support. For these and other reasons discussed more fully in the preamble, the agencies find that it is appropriate to repeal the 2015 Rule and to restore the pre-existing regulations while the agencies consider public comments on the proposed revised definition of "waters of the United States." *See* 84 FR 4154 (Feb. 14, 2019).

The agencies deemed wetlands benefits too uncertain to monetize in the 2017 proposal. Instead, wetlands benefits were described qualitatively (see Section 3.1 of the Economic Analysis for the 2017 Proposal). For further detail about the rationale for that omission, see the 2017 EA. Subsequently, the agencies modified the economic analysis for the final rule to explicitly include the dollar value of wetlands.

Ideally, cost-benefit analysis would also account for a wide range of costs and benefits associated with economic impacts on various industries and ecosystem services provided by water resources. The agencies were unable to explicitly quantify changes in costs associated with drinking water treatment, flood damages, economic impacts on affected industries and agriculture as well as recreational uses of the affected resources due to significant limitations of available data. Specific data limitations and uncertainties are described in detail in the final rule EA. The agencies note that the estimated value of forgone wetland benefits that could arise as a result of the repeal of the 2015 Rule accounts for the lost value of ecosystem services provided by wetlands, including reduction in flood risk, recreational use, and species habitat. The meta-regression function used in estimating forgone benefits of lost wetland acres includes explanatory variables that explicitly account for a range of ecosystem services provided by wetlands, including regulating, cultural, and provisioning services. Because all studies included in the meta-data valued species habitat function provided by wetlands, this function is included in the value of lost wetland acres by default.

In addition, the agencies utilized the 2015 EA as a starting point to assess potential economic impacts on various industries subject to the CWA section 311, 402, and 404 programs. Any

cost savings associated with no longer needing a permit or to meet other federal requirements is discussed in the final rule EA.

See also Agencies' Summary Response in Section 9.0 and the agencies' response to comments in Section 8.

9.5 Benefits of Aquatic Resources

Multiple commenters discussed the various benefits of aquatic resource protection, including recreational opportunities, drinking water, wildlife habitat, water quality benefits, flood protection, navigation, fisheries, cultural services, and ecosystem services. A number of commenters described a variety of important functions served by streams, wetlands, and adjacent waters such as serving as foraging, breeding, spawning, and nursery habitat for organisms; trapping or reducing the release of excess nutrients and contaminants to downstream waters; flood control; and recharging groundwater.

A few commenters also discussed the economic benefits of improved upstream water quality. Some commenters were concerned that downstream locations will be disproportionately impacted if protection of upstream waters is reduced. Commenters asserted that public agencies will have to invest in expensive infrastructure to address water quality.

Multiple commenters described the benefits of wetlands for water quality, including filtering urban and agricultural runoff, and asserted that repeal of the 2015 Rule would put 20 million acres of wetlands potentially at risk with increased costs to address nonpoint source runoff from unregulated dredge and fill activities.

Multiple commenters discussed the economic importance of healthy streams and wetlands for recreation. Commenters were concerned that repeal of the 2015 Rule would threaten wetlands important to the recreational economy. To stress the importance of clean waters, a commenter reported that there is an $887 billion outdoor recreational economy. Several commenters opposed to the repeal of the 2015 Rule cited the importance of clean water to tourism, recreation, and fisheries. One commenter stated that the CWA contributes to strong local economies and generates millions of jobs in these sectors. The commenter cited an American Sportfishing Association report that anglers generated over $201 billion in economic activity in 2009 and over 1.5 million jobs. Another commenter stated that along the coast, tourism generates over $100 billion a year. Commenters were concerned about job losses and loss of protection for clean waters if the 2015 Rule were repealed.

A few commenters also cited the potential negative impact of reduced federal jurisdiction on recreation, including increased costs for maintenance due to an increase in unregulated dredge and fill activities.

Multiple commenters discussed the economic importance of healthy streams and wetlands for flood prevention. Many commenters discussed the role of wetlands in attenuating flooding from hurricanes, and several commenters cited studies that found coastal wetlands reduced property damage during Hurricanes Sandy and Andrew. One commenter specifically mentioned the importance of wetlands in protecting industrial infrastructure, such as coastal oil and gas transmission lines, from storm surges. A few commenters were concerned reduced federal CWA protection would result in increased costs from flooding due to an increase in unregulated dredge and fill activities. A commenter also asserted that reduced federal protection would contribute to increased human health threats and property damage.

Multiple commenters discussed the importance of healthy streams and wetlands for drinking water. A few commenters noted that streams and wetlands are important for groundwater supplies, which can serve as sources of water during drought and are important to communities that use private water wells. Commenters were also concerned that reduced federal jurisdiction would threaten drinking water sources and increase the cost of drinking water treatment.

One commenter asserted that reduced federal protection in wetlands and streams would shift costs from the federal government to states, local governments, and ultimately taxpayers. Another commenter cited examples of cost-savings and benefits from investing in green infrastructure to demonstrate the cost-saving potential of water protection over water treatment. One commenter asserted that the costs of protecting streams and wetlands significantly outweighs the costs of restoring them after damage has been done.

Commenters provided many examples of the importance of wetlands in their particular state. Commenters also provided statistics on the economic value of sport fishing, commercial fishing, hunting, birding, and other recreation in their states, including commenters in the states of Alaska, Connecticut, Delaware, Florida, Georgia, Massachusetts, Maryland, Maine, Michigan, Mississippi, Montana, New York, Tennessee, South Carolina, and Washington, among others. Several commenters described investments in improving water quality and stream restoration in their state, noting that such investment has generated economic growth in surrounding neighborhoods. These commenters were concerned that repealing the 2015 Rule would jeopardize these efforts. One commenter noted that many rural communities depend on the outdoor recreational economy. A few commenters discussed their concern regarding pollution from upstream of the Chesapeake Bay that threatens commercial fishing and tourism industries.

A few commenters cited the economic importance of salmon. A commenter expressed concern over the potential loss of protection over critical salmon habitat, which would result in a loss of a source of food for many local residents. Another commenter asserted that repealing protections for waters necessary to protect federally listed endangered and threatened salmon species would offset state and federal efforts at restoration and tribal treaty rights.

Multiple commenters discussed the habitat benefits provided by streams and wetlands, including serving as nursery habitat for commercially important fish, crab, shrimp, and oysters important to the nation's economy. A few commenters noted the importance of intermittent and ephemeral streams for salmon, citing research showing how the connected systems of small headwater streams and wetlands affect the productivity of juvenile salmon. Commenters also discussed the importance of isolated wetlands as habitat for endangered species, and several commenters noted that millions of migratory water birds depend on waters protected under the 2015 Rule, such as prairie potholes. Commenters asserted that increased pollution in wetlands and smaller waterways would negatively impact birds and their associated benefits.

> **<u>Agencies' Response</u>: The agencies recognize the importance and economic benefits of protecting water resources. The agencies agree that streams, wetlands, and other waters serve a variety of important functions for protection of water quality. Certain waterbodies, such as isolated wetlands, and ephemeral and intermittent streams, may also play an important role in supporting ecosystem services. However, the agencies are unable to quantify the costs and benefits associated with changes in jurisdiction for certain features, such as some ephemeral streams, due to a lack of information on the extent of such**

waterbodies nationwide and because some waterbodies were not jurisdictional under the pre-2015 Rule regulatory regime. The agencies note that they are not aware of any map or dataset that accurately or with any precision portrays the scope of CWA jurisdiction at any point in the history of this complex regulatory program. The agencies also note that the waters of concern to some commenters, including salmon nursery streams, may continue to be regulated as "waters of the state."

The agencies agree that investing in green infrastructure may provide a variety of benefits, including protection of drinking water sources and therefore potential savings to public utilities from avoided treatment; nothing in this final rule is intended to discourage green infrastructure practices.

The potential effects of this rule will vary based on a state's or tribe's independent legal authority and programs under its own state or tribal law to regulate aquatic resources. States and tribes could maintain the same or a more stringent level of regulation over those resources than the previous federal requirements or reduce the permitting and regulatory requirements over these resources based on how they prioritize their water resources.

The agencies recognize that more than one-third of the United States' threatened and endangered species live only in wetlands, and nearly half use wetlands at some point in their lifecycle (U.S. EPA, 2017).[40] Wetlands and other aquatic resources designated as critical habitats will remain subject to the Endangered Species Act (ESA) section 9(a)(1)(B), which makes it unlawful for any person to "take" any fish or wildlife species listed as threatened or endangered under the ESA. This provision applies regardless of a water's jurisdictional status under the CWA. Activities in wetlands and other aquatic resources may thus require engagement with the Fish and Wildlife Service or the National Marine Fisheries Service, which could lead to project modification or mitigation requirements. This final rule does not affect these requirements.

In analyzing this final rule, the agencies revised the methodology used to estimate the forgone benefits. The estimated value of forgone wetland benefits that could arise as a result of the repeal of the 2015 Rule accounts for the lost value of ecosystem services provided by wetlands, including reduction in flood risk, recreational use, and species habitat and is described in the final rule EA.

Additionally, the agencies do not expect the function or scope of state-funded water quality protection programs, such as the Drinking Water State Revolving Fund and the Clean Water State Revolving Fund, to be affected by the final rule (see U.S. EPA 2018).[41] The Drinking Water State Revolving Fund supports source water protection programs by helping utilities address upstream source water degradation, providing loans for source water and wellhead protection measures, and supporting state personnel who manage these programs. The Clean Water State Revolving Fund supports projects to maintain or improve publicly owned

[40] U.S. Environmental Protection Agency (U.S. EPA). 2017. Why are wetlands important? Updated 27 Feb 2017, *available at* https://www.epa.gov/wetlands/why-are-wetlands-important.

[41] U.S. Environmental Protection Agency and U.S. Department of the Army. December 11, 2018. Resource and Programmatic Assessment for the Proposed Revised Definition of "Waters of the United States" (Docket ID No. EPA-HQ-OW-2018-0149), *available at* https://www.regulations.gov/document?D=EPA-HQ-OW-2018-0149-0005.

treatment works, combined sewer overflows, projects to reduce nonpoint source pollution, and implement green infrastructure practices.

Furthermore, the agencies agree that investments in improving water quality and stream restoration in states promote economic growth in surrounding neighborhoods. Financial assistance programs that are directly or indirectly related to "waters of the United States" are unlikely to be affected by changes in the scope of this definition. For instance, the Section 106 grant program, which assists states, interstate agencies, and eligible tribes in administering programs for the prevention, reduction, and elimination of pollution, has a sufficiently broad programmatic scope that the agencies do not anticipate any potential effects of changes in jurisdiction from a grant-allocation perspective (see U.S. EPA 2018). Other CWA financial assistance programs, such as the Section 319 Nonpoint Source Management Program, the Section 320 National Estuary Program, and the Section 104(b)(3) Authorized Grant Programs, are similarly unaffected by the final rule (see U.S. EPA 2018).

The agencies also recognize the importance of salmon and other game fish to various state, tribal, and local economies and recognize that clean water is important for the recreation, tourism, and fisheries sectors and that these sectors generate millions of direct and indirect jobs. Various statistics presented in public comments cannot be incorporated directly in the cost-benefits analysis, however, because they do not represent an incremental change which could be attributed to the final rule. Additionally, employment and tourism expenditures presented in various reports or studies are not the direct result of the 2015 Rule. Further, as described above, many of these waters would continue to be covered as "waters of the United States" or regulated as "waters of the state."

See also Agencies' Summary Response in Section 9.0 and the agencies' response to comments in Section 5, Section 6, and Section 7.

9.6 Distribution of Avoided Costs

Some comments on the avoided costs of the proposed repeal focused on the underlying 2015 EA suggesting that the 2015 EA was flawed because it ignored the costs of additional permit applications, costs of mitigation, and delays in the permit application process. Others noted that the 2015 Rule would provide cost savings in terms of reduced costs to treat drinking water. A few commenters supporting repeal asserted that the 2015 Rule would negatively impact job creation in the construction industry and that the 2015 Rule was "job-killing." One commenter suggested that there is no evidence that the 2015 Rule has impacted jobs.

Multiple commenters supported rescinding the 2015 Rule because it would result in substantial cost savings. Commenters generally felt that these higher costs adversely affected community investments in infrastructure and industries. Commenters expressed concern that the scope of CWA jurisdiction under the 2015 Rule, including the rule's coverage of ditches and dry washes or ephemeral features, would have economic impacts on small entities; development projects; the oil and gas industry; agriculture, including dairy farmers; highway projects; water rights; flood control and drainage projects and facilities; drinking water supply; glass container industry; stormwater runoff management approaches, including municipal separate storm sewer systems; water districts; energy infrastructure, including electric utilities, construction, transmission and distribution infrastructure of renewable and non-renewable facilities; aggregates and cement; and airports and the aviation industry. Several commenters suggested

that the 2015 Rule would negatively affect state and local government budgets for education, police and fire protection, and road and bridge maintenance. A few commenters expressed concern that the 2015 Rule would especially impact Alaska due to the state's already high cost of doing business and limited mitigation options on public lands.

Other comments focused on the 2017 EA, many questioning the discussion of avoided costs and highlighting actual costs of repealing the 2015 Rule. Some commenters believed water pollution would increase following repeal and that the costs would not be borne by the polluters but by society, arguing that polluters would not be prosecuted in areas where jurisdictional proof is too difficult. Thus, a result of the proposal would impose a direct and indirect tax on the public due to the cost of addressing pollution; the cost to society of cleaning up Superfund sites is one example of such a "tax." Another commenter criticized the 2017 EA for making no mention of magnitude or any empirical evidence to justify its assertion of weaker labor markets.

One commenter asserted that the cost of a state's expanded program should not be included in the analysis. The commenter suggested that the following should be measured: reduced cost to the state from duplicative permitting and staff resources; reduced cost and time for the regulated public to work exclusively with the state; reduced cost to local government; reduced cost to the federal agencies; and reduced cost of litigation due to fewer decisions/jurisdictional determinations.

One commenter indicated that repealing the 2015 Rule would mostly benefit the higher-income population through reduced returns to capital. In addition, the commenter stated that the 2017 EA predicted that the 2015 Rule would cause a rise in unemployment and lower wages, and therefore, lead to worse health among lower-income Americans. The commenter asserted that the opposite would take place because people living in places with unclean water sources are more prone to illness, and a healthier workforce would create more jobs and possibly attract more businesses.

> **<u>Agencies' Response</u>: The agencies note that the 2015 EA included the cost of additional permit applications and mitigation. Thus, repeal of the 2015 Rule will avoid these costs to businesses and the consumers of the final product or services. However, the 2015 EA did not determine the cost on the basis of each permit application and mitigation. As discussed in the response to comments in Section 9.2, states have the option to regulate beyond the bounds of the CWA. The final rule EA shows that most states have regulatory regimes extending beyond federal CWA jurisdiction in the regulation of waters in some way. Many waters will continue to be regulated by states. As discussed more fully in the final rule EA, the agencies have revised the analyses in the 2015 EA and the 2017 EA to better reflect existing state programs, which has the result of reducing both avoided costs and forgone benefits of this final rule. The agencies believe that the revised analysis provides a reasonable estimate of the costs and benefits under a range of probable assumptions that are responsive to the comments.**
>
> **As a result of the final rule, local, state, and federal agencies could potentially save costs based on fewer jurisdictional determinations and permitting actions, and permittees could avoid expending resources on duplicative federal and state permits. As discussed in the economic analysis for the final rule, the agencies do not have data that fully or accurately depicts the jurisdictional extent of waters under the 2015 Rule or the pre-2015 Rule regulatory regime. Indeed, the agencies note that they are not aware of any map or dataset that accurately or with any precision portrays the scope of CWA jurisdiction at any point in the history of this complex regulatory program.**

The agencies have extensive experience in enforcing the pre-2015 Rule regulatory regime and disagree with the commenters who argued that polluters would not pay if jurisdiction is too difficult to prove. The agencies believe that the commenter who criticizes the 2017 analysis by asserting that the labor market was weak in 2017 is mistaken. The labor market was in fact strong in 2017 and reached full employment in 2019. The 2015 Rule and its repeal are unlikely to result in any noticeable or significant employment effects at the macro level.

The agencies disagree with the commenter who stated that rescinding the 2015 Rule would primarily benefit the higher income population. In fact, other population groups would also be better off with the increased supply of property for development, as housing sites, for example. Moreover, the agencies do not believe that the repeal of the 2015 Rule will necessarily result in increased exposure to unclean water sources, because as described in greater detail in the final rule EA, states and tribes may already regulate some of these water and are free to regulate those waters, and other federal and state programs work in conjunction with federal and state water quality programs to protect water supply.

See also the agencies' response to comments in Section 5 and Section 8.

9.7 Impacts on Landowners and Businesses

A number of commenters from various sectors favored rescission of the 2015 Rule because they believed the 2015 Rule would impose extra costs due to additional permit requirements. Commenters included individuals or businesses representing farming, ranching, forest management, concrete aggregate mining, homebuilders, golf course operations, and municipal water supply, among others. Municipal water providers stated that infrastructure projects would be jeopardized because of the need for extra chemical treatment. Several commenters stated that overly-broad implementation of the CWA threatens farmers' and ranchers' abilities to continue to utilize their lands for food and fiber production. Another farmer was concerned that the 2015 Rule prevented him from applying hog manure to assist with 100 percent no-till farmland. Several commenters suggested that the 2015 Rule eroded the property rights of landowners.

A few commenters opposed to rescission noted the benefits of improved water quality to the agriculture sector and generally the enjoyment of clean water. One commenter disagreed that there would be higher costs for ranching and farming under the 2015 Rule because the 2015 Rule made exclusions permanent for their activities. Another commenter stated that the 2015 Rule would not impact some farmers because they are already subject to state regulations.

One commenter expressed the need for clarity and practical application of the definition of "waters of the United States" which will reduce permitting time and costs for both regulatory agencies and permit applicants. One commenter felt that the 2015 Rule upset the balance between protecting the nation's water resources and allowing citizens to develop their own land. Another commenter asserted that the fines for violating the 2015 Rule could cost thousands of dollars per day, which are omitted from the cost estimates.

One commenter noted that the agencies did not include the future cost reduction in the 2015 EA from growing mitigation banks, which can cut permit times from two years to 6 months, reducing interest on restoration cost for 18 months. Another commenter stated that the change in jurisdiction resulting from the final rule will impact the mitigation banks developed to generate credits to offset wetland impacts.

Agencies' Response: The agencies estimate that the repeal of the 2015 Rule and recodification of the pre-existing regulations will provide for cost savings to various industry sectors subject to regulation under the CWA. Although the agencies were not able to monetize the permitting time cost due to data limitations, they did use a certain percentage of the total 404 permitting cost at the state level to reach the aggregate national cost savings.

The agencies estimated the costs and benefits of the 2015 Rule assuming full compliance according to the Guidelines for Preparing Economic Analyses (2010), while justifiably avoiding costing out activities that are hypothetical or speculative. The agencies included the cost of mitigation but did not factor in reduction in permit time because it is not possible to forecast the number of mitigation banks in the future and their impact with any reasonable degree of certainty. Because the final rule is returning to the definition of longstanding practice, mitigation banks are not expected to experience significant losses, particularly when compared with the cost savings in other industries. In states that may choose to expand jurisdiction beyond the scope of federal requirements, the change in jurisdictional scope resulting from a return to the pre-2015 Rule regulatory regime would have no cost or benefit implications.

Any fines that would have been imposed under the 2015 Rule will not occur following the final rule. The final rule is also intended to create certainty and therefore may address concerns related to litigation over the definition in the 2015 Rule. Finally, because the rule would return federal jurisdiction to the pre-2015 Rule regulatory regime, it will return the status of the property rights of landowners to what it was before the 2015 Rule, thus addressing concerns that the 2015 Rule eroded property rights or infringed upon the rights of property owners to use their land.

See also the agencies' response to comments in Section 8.

9.8 Tribal and Environmental Justice Impacts

Several commenters asserted that a narrower definition than the 2015 Rule would undermine efforts to protect or restore waters that provide healthy foods and other cultural benefits for tribes. Commenters noted that wild-caught fish are the main source of omega-3 fatty acids for mothers and children, and also serve as a source of income for tribal families. Commenters expressed concern that enforcement will be unpredictable due to uncertainty in jurisdiction and that a narrower definition would adversely affect numerous CWA programs within and upstream of tribal waters, as well as their drinking water supply.

Another commenter asked that EPA consider impacts to tribally-owned land and ensure exemptions that allow development on that land without compensatory mitigation fees.

A number of commenters opposed to rescission discussed forgone benefits as falling disproportionately on low income communities. Commenters also expressed concern that adverse impacts are borne unequally among states and cited impacts on downstream states. Conversely, one commenter expressed concern that the 2015 Rule has adverse effects on public health, asserting that local communities and consumers pay the cost of federal compliance and that this dynamic is especially acute and problematic for economically disadvantaged populations.

Agencies' Response: States and tribes may elect to implement their water quality protection programs more broadly than the scope of federal regulations, interpreting "waters of the state" or "waters of the tribe" as exceeding the scope of "waters of the United States." Any future effects of this final rule will vary based on a state's or tribe's independent legal authority to regulate aquatic resources beyond the jurisdictional scope of the CWA.

Although low-income households have lower willingness to pay in absolute terms, they have higher willingness to pay as a percentage of income compared to higher-income households for environmental goods. The 2017 EA presented an explanation on the theoretical level of the adverse impacts on the low-income segment of the population or communities of the 2015 Rule (see 2017 EA, pages 13-14, 16-18).

See also the Agencies' Summary Response in Section 9.0 and the agencies' response to comments in Section 5.

9.9 Small Entities

Multiple commenters expressed concerns over the costs of the 2015 Rule to small entities. Several commenters, including the federal Small Business Administration (SBA) Office of Advocacy asserted the agencies failed to comply with the Regulatory Flexibility Act. Some commenters felt that the definition of "waters of the United States" potentially has a significant impact on a substantial number of small entities and that the rule would be improved through additional consultations with small entities. Particularly, commenters raised concerns (reflecting support for or against the 2015 Rule) related to not including the lack of full compliance costs for CWA programs; costs to manufacturers relying on water as a process input; small businesses with infrastructure in or near floodplains; costs associated with limits or prohibitions on development on private property; gas industry; mining in Alaska; compliance costs for electric cooperatives; potential fines for small businesses unaware that a permit is required; and impacts on private mitigation banks due to reduced regulatory protection for streams and wetlands.

A number of other commenters expressed support for the 2015 Rule from a small business perspective. One commenter asserted that an American Sustainable Business Council poll found that 80 percent of small business owners said they supported the proposed 2015 Rule. Commenters from the craft brewing and sport fishing industries cited the importance of clean water to their businesses. One commenter was concerned that discharges into upstream waters would put responsible downstream companies at a significant disadvantage.

Agencies' Response: Overall, the agencies find that the small entity impacts of the final rule are neither significant nor substantial due to the lack of any cost increases for those entities that must comply with regulations under the CWA section 311, 402, and 404 programs. Potential impacts to the mitigation banking sector would not be the direct result of these businesses complying with the final rule, rather they would be the indirect result of other entities coming into compliance with the final rule. Similarly, potential impacts to small localities, organizations, and businesses due to changes in ecosystem services are indirect effects. In addition, states may already address waters that would be affected by a return to pre-2015 Rule regulatory regime, thereby reducing forgone benefits and costs savings.

For the agencies' Regulatory Flexibility Act analysis, see Section IV of the final rule EA. See also the agencies' response to comments in Section 8.

9.10 Other Concerns with the 2015 EA

A few commenters cited their comments on the 2014 proposed rule that using CWA section 404 permit applications from 2009-2010 as baseline data leads to flawed and misleading results. The commenters questioned the approach taken in the 2015 EA to estimate jurisdictional changes taken from section 404 data and then applied to the other CWA program data and noted that the applicability of the potential impacts to the CWA section 404 permit program to other CWA programs does not fully address the cost implications for other CWA programs.

Commenters supporting the repeal of the 2015 Rule cited a number of concerns regarding the 2015 EA, including:

- The percent change in positive jurisdictional determinations was based on a "questionable methodology."
- The analysis ignores the time, money, and effort required to secure a permit. One commenter cited a 2002 study, which found that it takes an average of 788 days and $271,596 to obtain an individual CWA section 404 permit and 313 days and $28,915 for a "streamlined" nationwide permit. [David Sunding and David Zilberman. The Economics of Environmental Regulation by Licensing: An Assessment of Recent Changes to the Wetland Permitting Program, 42(1) Nat. Resources J. 60 (2002).].
- The analysis neglected to include costs beyond section 404 program costs. These may include costs of compliance with other federal requirements such as section 402 permitting, including stormwater and industrial point source permits; section 311 oil spill prevention; water quality standards under sections 401, 303, 304, and 305; and the Endangered Species Act and the National Environmental Policy Act. Compliance with section 402 requirements can involve the purchase of costly treatment technologies and infrastructure changes, and CWA violations can result in fines of tens of thousands of dollars per day.
- The agencies failed to quantify the burden on state and local governments (and the federal government) from the expansion of CWA jurisdiction under the 2015 Rule, including impacts on state and county highway departments, flood control agencies, local governments with municipal separate storm sewer systems, and economic development agencies.
- The agencies failed to quantify the burden on regulators from increased CWA jurisdiction in the 2015 Rule.
- Increase in litigation and associated costs. The lack of clarity regarding jurisdictional waters is likely to result in increased litigation.

Some commenters cited various limitations in the 2015 EA, and several commenters argued that the agencies have not provided adequate evidence to address the cost savings and forgone benefits associated with a decrease in jurisdiction. Another commenter noted that nothing about the 2015 EA supports a conclusion that the 2015 Rule was overbroad. Other commenters favoring repeal asserted that the 2015 EA was based on faulty assumptions and that the EA underestimated costs and overestimated benefits. One commenter claimed that the agencies failed to address valid concerns about the replicability, data, and scope of the 2015 EA and that the final EA did not account for the proposed rule's impact on all CWA programs that rely on the definition of "waters of the United States."

One commenter cited a report by Professor David Sunding that found the EPA database "used to estimate economic implications for incremental expansion of jurisdiction does not track information on

these new terms and categories of jurisdiction."[42] Another commenter stated that the 2015 Rule "failed to provide a reasonable assessment of the proposed rule's costs and benefits." A commenter stated the EPA failed to identify which plants had compliance costs, which were small businesses, and what revenues were available to absorb these additional costs.

> **Agencies' Response: As discussed previously, the agencies revised the quantitative estimates of the 2015 Rule, updating the estimates of costs and benefits, particularly by incorporating the regulatory regimes of the states. The final rule EA presents various scenarios of state behavior in regulating waters beyond those jurisdictional under the CWA. States and tribes can respond by maintaining an equivalent level of regulation over those resources or allowing those resources to be managed without permitting and regulation, or in a less stringent way so that the result is between the two bounding cases. The final rule EA revised benefit estimates as well, which are discussed above and in the final rule EA. The agencies have responded to commenters by carefully revising the avoided cost and forgone benefits of the final rule.**
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> **The agencies acknowledge the commenters' reference to a report by Professor David Sunding, which noted that the database used for the 2014 proposed rule EA and 2015 EA did not track information about new terms and categories of jurisdictions. The agencies do not have data to determine which sites would be jurisdictional in the future, nor do the agencies have comprehensive data to identify all "waters of the United States" under the final rule nor under the 2015 Rule. The agencies note that they are not aware of any map or dataset that accurately or with any precision portrays the scope of CWA jurisdiction at any point in the history of this complex regulatory program. The agencies can only estimate the average impacts at the national or macro-level, not at the micro-level on a plant-by-plant, site-by-site, or entity-by-entity basis.**
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> **See also the Agencies' Summary Response in Section 9.0 and the agencies' response to comments in Section 5 and Section 8.**

Section 10 RULEMAKING PROCESS

10.0 Overview of Comments on Rulemaking Process

This section contains summaries of comments on the agencies' proposed rule that are related to implementing CWA programs. The agencies' responses are provided below each comment summary.

The agencies received many comments about the rulemaking process for the proposed rule, particularly regarding whether the rulemaking complies with the APA. Some commenters stated that the rulemaking is fully consistent with the requirements of the APA and is not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. These commenters found that the agencies are acting well within their authority under the APA and the Clean Water Act (CWA) to repeal an existing regulation (citing 5 U.S.C. §§ 551(5), 553(e), 559 and 33 U.S.C. § 1361(a)) and stated that the proposed rule is consistent with Executive Order 13778. Commenters also suggested that the agencies have provided a reasoned explanation for the proposed rule consistent with *FCC v. Fox Television Stations,*

[42] *See* http://2bece72nsw461mtqvm1bba91-wpengine.netdna-ssl.com/wp-content/uploads/2014/05/WOTUS-Economic-Report-FINAL.pdf.

Inc., 566 U.S. 502, 515 (2009). Several commenters asserted that the agencies have authority to repeal the 2015 Rule based on changed statutory interpretations or policy judgments and that the agencies need not point to any new scientific evidence or changed factual circumstances to support the repeal.

Other commenters stated that the agencies' rulemaking is arbitrary, capricious, and not in accordance with the law. These commenters claimed that the agencies have violated the APA by failing to provide adequate notice of or a meaningful opportunity to comment on the proposed rule, and because the agencies have failed to provide a reasoned explanation in support of the proposal. Commenters also argued that the agencies' rulemaking is arbitrary and capricious because it runs counter to the evidence before them, citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Some commenters suggested that a change in administrations is insufficient, in and of itself, to support the agencies' proposed rule. Another commenter suggested that changed circumstances—such as advances in scientific understanding of climate change and its impacts—support strengthening environmental and human health protections under the 2015 Rule rather than repealing it.

In addition, some commenters stated that the agencies did not provide sufficient economic, regulatory, small business, and federalism impact analyses and did not comply with key executive orders.

> **<u>Agencies' Response</u>: On February 28, 2017, the President issued Executive Order 13778, entitled "Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the 'Waters of the United States' Rule." Section 1 of the Executive Order states that "[i]t is in the national interest to ensure the Nation's navigable waters are kept free from pollution, while at the same time promoting economic growth, minimizing regulatory uncertainty, and showing due regard for the roles of the Congress and the States under the Constitution." The Executive Order directs EPA and the Department of the Army to review the 2015 Rule for consistency with the policy outlined in Section 1 and to issue a proposed rule rescinding or revising the 2015 Rule as appropriate and consistent with law. The Executive Order also directs the agencies to "consider interpreting the term 'navigable waters' . . . in a manner consistent with" Justice Scalia's plurality opinion in *Rapanos v. United States*, 547 U.S. 715 (2006).**
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> **On March 6, 2017, the agencies published a notice of intent to review the 2015 Rule and to provide notice of a forthcoming proposed rulemaking consistent with Executive Order 13778. 82 FR 12532. Shortly thereafter, the agencies announced that they would implement the Executive Order in a two-step approach. On July 27, 2017, the agencies published a notice of proposed rulemaking (NPRM) that proposed to repeal the 2015 Rule and to recodify the regulatory text that governed prior to the promulgation of the 2015 Rule. 82 FR 34899. The agencies invited comment on the NPRM over a 62-day period. On July 12, 2018, the agencies published a supplemental notice of proposed rulemaking (SNPRM) to clarify, supplement, and seek additional comment on the NPRM. 83 FR 32227. The agencies invited comment on the SNPRM over a 30-day period. In total, the agencies received approximately 690,000 comments on the NPRM and approximately 80,000 comments on the SNPRM.**
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> **This rulemaking complies with all statutory requirements and applicable executive orders and is well within the agencies' authority. The agencies have broad authority to revise or repeal existing regulations, including regulations promulgated under the CWA. *See* 5 U.S.C. § 551(5) (defining "rule making" under the APA as the "agency process for formulating, amending, or repealing a rule"); 33 U.S.C. § 1361(a) (providing the Administrator with authority to**

"prescribe such regulations as are necessary to carry out the functions under [the CWA]"). Further, the agencies' interpretation of the statutes they administer, such as the CWA, are not "instantly carved in stone"; quite the contrary, the agencies "must consider varying interpretations and the wisdom of [their] policy on a continuing basis, . . . for example, in response to . . . a change in administrations." *Nat'l Cable & Telecommc'ns Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981–82 (2005) (internal quotation marks omitted) (quoting *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 863–64 (1984)) (citing *State Farm*, 463 U.S. at 59 (Rehnquist, J., concurring in part and dissenting in part)). Indeed, "agencies are free to change their existing policies as long as they provide a reasoned explanation for the change." *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016) (citations omitted). As such, a revised rulemaking based "on a reevaluation of which policy would be better in light of the facts" is "well within an agency's discretion," and "[a] change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency's reappraisal" of its regulations and programs. *Nat'l Ass'n of Home Builders v. EPA* (*NAHB*), 682 F.3d 1032, 1038, 1043 (D.C. Cir. 2012).

Consistent with the APA and applicable case law, the agencies have provided ample justification for their change in position. As reflected in the preamble to the final rule, the agencies have carefully analyzed their statutory and constitutional authority, along with relevant case law, and have provided a detailed explanation of their reasons for deciding to repeal the 2015 Rule and restore the pre-existing regulations.

Regarding the comment that advances in scientific understanding of climate change supports strengthening protections under the 2015 Rule rather than repealing it, the agencies note that science cannot dictate where to draw the line between federal and state waters. Though science may inform the agencies' interpretation of the definition of "waters of the United States," the definition must be grounded in a legal analysis of the limits on CWA jurisdiction reflected in the statute and Supreme Court case law.

For the agencies' response to comments regarding the APA's procedural and substantive requirements, see Section 10.2 and Section 10.3, respectively. For the agencies' response to comments regarding other statutory requirements and executive orders, see Section 10.5, Section 10.6, and Section 10.7.

10.1 Rulemaking Process for the Final Rule

10.1.1 Two-step rulemaking process

A number of commenters expressed support for the agencies' two-step process to repeal and replace the 2015 Rule and stated that it is an appropriate approach to achieving the goals articulated in Executive Order 13778. Several commenters suggested that the two-step process promotes the policies in Executive Order 13778 by maintaining water quality protections while removing regulatory uncertainty, promoting economic growth, and taking an initial step toward developing a rule that reestablishes the proper level of deference to the states. Some commenters expressed concern with the pre-2015 Rule regulatory regime but stated that repealing the 2015 Rule is a necessary interim step until the agencies promulgate a new definition of "waters of the United States." Another commenter urged the agencies to accelerate the rulemaking process.

Other commenters expressed opposition to the two-step rulemaking process. One commenter suggested that the two-step rulemaking process obscures the overall impact of the rulemakings. Some commenters indicated that the two-step process would lead to greater regulatory uncertainty and asked the agencies to undertake a single rulemaking to repeal and replace the 2015 Rule. One commenter asserted that a two-step process unnecessarily delays needed revisions to the definition of "waters of the United States." A few commenters questioned whether the agencies' two-step process is consistent with Executive Order 13778, which the commenters viewed as calling for a single regulation. Another commenter suggested that the agencies' proposal to repeal the 2015 Rule is inconsistent with Executive Order 13778's discussion of environmental protection and stated that the agencies should carefully consider the information received throughout the rulemaking process in deciding whether to finalize the proposed rule.

One commenter questioned whether Executive Order 13778 requires a zero-discharge policy due to its language stating that "it is in the national interest to ensure that the Nation's waters are kept free from pollution." The commenter asserted that a zero-discharge policy would be consistent with CWA section 101(a)(1) and responsive to the Executive Order and asked what the cost of such a policy would be.

Finally, some commenters expressed concern that the agencies are taking action to repeal the 2015 Rule before disclosing what will ultimately replace the rule and without engaging in a full public process.

> **<u>Agencies' Response</u>: See agencies' response to comments in Section 10.0. As explained in the preamble to the final rule, the agencies find that the 2015 Rule did not implement the legal limits on the scope of the agencies' authority under the CWA as intended by Congress and reflected in Supreme Court cases, including Justice Kennedy's articulation of the significant nexus test in *Rapanos*, did not adequately consider and accord due weight to the policy of Congress in CWA section 101(b), pushed the envelope of the agencies' constitutional and statutory authority absent a clear statement from Congress, and included distance-based limitations that suffered from procedural errors and a lack of adequate record support. For these and other reasons discussed more fully in the preamble, the agencies find that it is appropriate to repeal the 2015 Rule and recodify the pre-existing regulations. The agencies are considering the proper scope of federal CWA jurisdiction in the separate rulemaking on a proposed revised definition of "waters of the United States." 84 FR 4174 (Feb. 14, 2019). Pending any final action on that proposed rulemaking, the agencies find that this final rule will provide greater certainty by reinstating a longstanding regulatory framework that is familiar to and well-understood by the agencies, states, tribes, local governments, regulated entities, and the public. This final rule will also provide regulatory certainty by establishing a uniform definition of "waters of the United States" nationwide, thereby addressing any inconsistencies, confusion, and uncertainty arising from the application of two different regulatory regimes across the country.**
>
> **This final rule is the first step in a comprehensive, two-step process intended to review and revise the definition of "waters of the United States" consistent with Executive Order 13778. The agencies disagree that a two-step rulemaking process obscures the overall impact of the rulemakings and address this issue in the response to comments in Section 9.1.**
>
> **Further, the agencies do not believe that a zero-discharge policy would be responsive to Executive Order 13778, as such a policy would not be consistent with the express direction in**

Executive Order 13778 that the agencies review the 2015 Rule and issue a proposed rule rescinding or revising the 2015 Rule as appropriate and consistent with law.

See also the agencies' response to comments in Section 2.

10.1.2 Stakeholder engagement

Many commenters suggested generally that stakeholder engagement is essential to the development of effective and appropriate regulations and encouraged the agencies to engage with stakeholders and the public in substantive information and policy discussions. Commenters also stated that the agencies should work with local stakeholders to understand potential impacts and concerns related to rulemakings defining "waters of the United States."

A number of commenters suggested that the agencies have not provided adequate opportunities for stakeholder engagement on this rulemaking. Some of these commenters stated that public outreach on the new proposed definition of "waters of the United States" does not cure this deficiency. Many commenters noted that the 2015 Rule was the product of extensive public engagement and suggested that, in repealing the 2015 Rule, the agencies must engage in a thoughtful and inclusive process that considers the impacts of this rulemaking on various stakeholders. Some commenters compared the agencies' approach to stakeholder engagement for this rulemaking to that of the 2015 Rule, noting that the agencies received over one million comments on the 2015 Rule over a period of 200 days and held over 400 meetings across the country in developing the 2015 Rule. Another commenter asserted that the agencies appear to favor some stakeholder opinions over others and expressed concern that this undermines the rulemaking process.

Agencies' Response: The agencies recognize the value of public involvement in the development of regulations and have been committed to engaging stakeholders throughout the two-step rulemaking process to review and revise the definition of "waters of the United States." Since the agencies announced their two-step rulemaking approach in 2017, they regularly provided information about the proposal to repeal the 2015 Rule and recodify the pre-existing regulations when giving presentations or in meetings with states, tribes, and stakeholders. On this rulemaking, stakeholders and other interested parties had the opportunity to submit views over the course of two comment periods. The agencies first invited comment over a 62-day period on the NPRM to repeal the 2015 Rule and recodify the pre-existing regulations. The agencies then published a SNPRM clarifying, supplementing, and seeking additional comment on the proposed action over a 30-day period. Altogether, the agencies received approximately 770,000 public comments on this rulemaking from a broad spectrum of commenters, and the agencies reviewed and considered these comments in deciding to finalize this rule. The agencies understand that the scope of CWA jurisdiction is an issue of great national importance and appreciate feedback and engagement from all stakeholders.

10.2 Procedural Requirements under the Administrative Procedure Act

10.2.1 Length of comment period

Multiple commenters asserted that the agencies violated the APA because the length of the comment period did not provide a meaningful opportunity to comment on the proposal. The majority of these

commenters argued that the 30-day comment period on the SNPRM was too short, though some commenters also argued that the comment period on the NPRM was deficient. Commenters stated that 30 days was an unreasonable and inadequate amount of time to comment because the SNPRM was long, detailed, involved issues of national importance, set forth the agencies' rationale for repealing the 2015 Rule, and requested comment on numerous aspects of that rationale. Some commenters noted that the agencies requested comment on the estimated impact and lawfulness of the 2015 Rule compared to the pre-2015 Rule regulatory regime and asserted that effectively commenting on these issues would require assessing the case studies discussed in the SNPRM and reviewing the 540 jurisdictional determination that the agencies have made under the 2015 Rule. The commenters stated that such an assessment would be time consuming and warrants a longer comment period.

Some commenters referenced statements in the NPRM about the importance and complicated nature of the proposed rule and suggested that such statements demonstrate the need for a longer comment period. Commenters also compared the 30-day comment period for the SNPRM to the 207-day comment period for the 2014 proposal and the 60-day minimum recommended in Executive Order 12866.

In contrast, other commenters suggested that the agencies provided adequate time for public comment on the proposed rule consistent with the APA's procedural requirements, especially following the 60-day opportunity to comment on the NPRM.

> **<u>Agencies' Response</u>: The APA requires agencies to "give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation." 5 U.S.C. § 553(c). The APA does not specify a minimum number of days for accepting comments on a proposed rule. Agencies must, however, provide the public with a "meaningful opportunity" to comment on a proposed rule. *Rural Cellular Ass'n v. FCC*, 588 F.3d 1095, 1101 (D.C. Cir. 2009). For the reasons described below, the agencies satisfied the APA requirement to provide the public with a meaningful opportunity to comment on the proposed rule.**
>
> **As an initial matter, the agencies note that though the length of the comment period may be a factor in determining whether the public was afforded a meaningful opportunity to comment, it is not determinative. Nonetheless, the agencies provided a reasonable length of time for interested parties to comment on the proposed rule. On July 27, 2017, the agencies published a NPRM describing the agencies' proposal to repeal the 2015 Rule and to recodify the pre-existing regulations. 82 FR 34899. The agencies invited comment on the NPRM over a 62-day period. On July 12, 2018, the agencies published a SNPRM to clarify, supplement, and seek additional comment on the proposed action over a 30-day period. 83 FR 32227. Courts have found that 30-day comment periods are sufficient to satisfy the requirements of the APA. *See, e.g., Conn. Light & Power Co. v. Nuclear Reg. Comm'n*, 673 F.2d 525, 534 (D.C. Cir. 1983); *Nat'l Lifeline Ass'n v. FCC*, 915 F.3d 19, 34 (D.C. Cir. 2019) ("When substantial rule changes are proposed, a 30-day comment period is generally the shortest time period sufficient for interested persons to meaningfully review a proposed rule and provide informed comment."). The comment period on the NPRM is also consistent with the 60-day comment period recommended in Executive Order 12866.**
>
> **Contrary to commenters' contentions, neither the length nor complexity of the NPRM or SNPRM mandated a longer comment period for the proposed rule. Both the NPRM and**

SNPRM are substantially shorter than many of the agencies' other rulemakings, comprising a total of 11 pages and 26 pages in the *Federal Register*, respectively. Moreover, although the agencies requested comment on multiple aspects of the proposed rule, these requests for comment did not necessitate a longer comment period. Indeed, during the time allotted, numerous individuals and entities submitted comments discussing the agencies' legal rationale and potential impacts under the 2015 Rule, among other issues. Ultimately, the agencies received approximately 770,000 comments on the proposed rulemaking, including approximately 80,000 comments on the SNPRM, many of which provided a thoughtful and comprehensive analysis of issues relevant to the proposed rule.

10.2.2 Notice of proposed rule

Multiple commenters asserted that the agencies violated the APA by failing to provide adequate notice of the proposed rule and thereby deprived the public of a meaningful opportunity to comment.

Some of these commenters asserted that the agencies did not sufficiently describe the rule they were proposing. Commenters noted that though the agencies proposed to recodify the pre-2015 Rule regulations, the agencies also stated that they would implement those regulations as informed by "applicable" guidance documents, "relevant" memoranda and regulatory guidance letters, and consistent with Supreme Court precedent, "applicable" case law, and "longstanding agency practice." The commenters suggested that referencing a vague list of outside documents and proposing to reinstate the "status quo" did not provide adequate notice of the rule the agencies are proposing to enforce and apply. Relatedly, a few commenters stated that the agencies did not give adequate notice that regulated entities would be subject to different regulatory requirements if the proposal were finalized. Commenters suggested that the agencies must clearly explain the implications of a proposed rule to provide the public with a fair opportunity to comment.

Commenters also claimed that they did not have adequate notice of the proposed rule because commenters were unsure how the positions or interpretations expressed in the SNPRM relate to the scope of CWA jurisdiction that the agencies intend to implement under the proposed rule. Relatedly, some commenters suggested it was difficult to understand and thus comment on the rationale for the proposed rule due to the many theories, questions, and new positions and interpretations described in the SNPRM. A few commenters asserted that the SNPRM's reliance on solicitations of comment rather than definitive statements denied the public of a meaningful opportunity to comment.

Moreover, several commenters asserted that the agencies failed to provide a meaningful opportunity to comment on the substance of the 2015 Rule because the agencies mischaracterized the rule and its underlying record. Some commenters expressed concern that the agencies did not solicit comment on the substance of either the 2015 Rule or the pre-existing regulations in the NPRM and argued that the agencies' failure to solicit or consider comments on these issues violates the APA. Other comments argued that the agencies had not provided a meaningful opportunity to comment because the proposal did not contain the data or materials the agencies intended to rely on in making a final decision.

Other commenters suggested that the agencies provided adequate notice of the nature of the proposed rule and a meaningful opportunity to comment.

<u>Agencies' Response</u>: The agencies provided adequate notice of the proposed rule consistent with the APA. The APA requires that a notice of proposed rulemaking include either the terms

or substance of the proposed rule or a description of the subjects and issues involved. 5 U.S.C. § 553(b)(3). Courts have explained that a notice of proposed rulemaking must "'adequately frame the subjects for discussion' . . . so that the notice 'affords exposure to diverse public comment, fairness to affected parties, and an opportunity to develop evidence in the record.'" *Nat'l Rest. Ass'n v. Solis*, 870 F. Supp. 2d 42, 52 (D.D.C. 2012) (quoting *Conn. Light & Power Co.*, 673 F.2d at 533; *Nat'l Mining Ass'n v. Mine Safety & Health Admin.*, 116 F.3d 520, 531 (D.C. Cir. 1997)).

The NPRM and SNPRM clearly and consistently described the proposed action in this rulemaking. The NPRM explained that the agencies were proposing to "rescind the 2015 Clean Water Rule and replace it with a recodification of the regulatory text that governed the legal regime prior to the 2015 Clean Water Rule." 82 FR 34899, 34901-02 (July 27, 2017). The SNPRM similarly explained that the proposed rule "would permanently repeal the 2015 Rule[,] . . . and restore the regulations as they existed prior to the amendments in the 2015 Rule." 83 FR 32227, 32231, 32250 (July 12, 2018).

The NPRM and SNPRM also clearly and consistently explained that if the proposed rule were finalized, the agencies would implement the pre-2015 Rule regulations as informed by applicable agency guidance documents and consistent with Supreme Court decisions and longstanding agency practice. *See*, *e.g.*, 82 FR 34899, 34901–02 (referencing "the 2003 and 2008 guidance documents" as examples of applicable guidance documents); 83 FR 32227, 32250. Under the pre-2015 Rule regulatory regime, significant guidance documents include (1) the agencies' 2003 joint memorandum providing clarifying guidance regarding the Supreme Court's decision in *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs* (*SWANCC*), 531 U.S. 159 (2001);[43] (2) the agencies' 2008 post-*Rapanos* guidance;[44] and (3) the agencies' jurisdictional determination guidebook.[45] The agencies have also issued numerous memoranda, question-and-answer documents, and other guidance explaining and clarifying the pre-2015 Rule regulations.[46]

The agencies thus clearly proposed to implement the familiar pre-2015 Rule regulatory regime that was in effect for many years and that is currently in effect in more than half of the states. The agencies have been applying the pre-existing regulations consistent with the Supreme Court's decisions in *SWANCC* and *Rapanos* and informed by the agencies' corresponding guidance for over a decade. The agencies, their co-regulators, and the regulated community

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[43] Joint Memorandum, 68 FR 1991, 1995 (Jan. 15, 2003), *available at* https://www.epa.gov/sites/production/files/2016-04/documents/swancc_guidance_jan_03.pdf.

[44] U.S. EPA & U.S. Army Corps of Engineers, Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States & Carabell v. United States* (Dec. 2, 2008), *available at* https://www.epa.gov/sites/production/files/2016-02/documents/cwa_jurisdiction_following_rapanos120208.pdf.

[45] U.S. Army Corps of Engineers Jurisdictional Determination Form Instructional Guidebook, *available at* https://www.usace.army.mil/Missions/Civil-Works/Regulatory-Program-and-Permits/Related-Resources/CWA-Guidance/.

[46] The Corps maintains many of these documents on its public website, *see* https://www.usace.army.mil/Missions/Civil-Works/Regulatory-Program-and-Permits/Related-Resources/CWA-Guidance/. The EPA maintains many of these documents as well; *see* https://www.epa.gov/wotus-rule/about-waters-united-states.

are thus familiar with the pre-2015 Rule regulatory regime and have amassed significant experience operating under those pre-existing regulations.

In addition to providing adequate notice of the proposed rule, the agencies clearly explained their rationale for the proposed rule. In the SNPRM, the agencies explained their concerns with the 2015 Rule and why returning to the pre-2015 Rule regulatory regime would provide greater regulatory certainty. *See*, *e.g.*, 83 FR 32240–42 (explaining the agencies' concern that the 2015 Rule may have exceeded the agencies' authority under the CWA); *id*. at 32247–48 (explaining the agencies' concern that the 2015 Rule may have readjusted the federal-state balance in a manner contrary to the congressional policy in CWA section 101(b)); *id*. at 32241, 32243, 32249 (expressing the agencies' concern with the distance-based limitations in the 2015 Rule); *id*. at 32238–40 (explaining that returning to the proposed rule would provide greater regulatory certainty). The agencies also clearly identified the issues they were considering in deciding whether to finalize the proposed rule and requested comment on those issues. *See*, *e.g.*, 83 FR 32241 ("The agencies solicit comment on whether the agencies' justification for the 2015 Rule's interpretation of 'similarly situated' . . . relied on the scientific literature without due regard for the restraints imposed by the statute and case law."); *id*. at 32248 ("The agencies seek comment on . . . whether the 2015 Rule readjusts the federal-state balance in a manner contrary to the congressionally determined policy in CWA section 101(b)."); *see e.g.*, *id.* at 32241 ("As discussed, the 2015 Rule included distance-based limitations that were not specified in the proposal. In light of this, the agencies also solicit comment on whether these distance-based limitations mitigated or affected the agencies' change in interpretation of similarly situated waters in the 2015 Rule."). As the agencies must maintain an open mind prior to taking final action on a proposal, this discussion appropriately included some tentative findings. These tentative findings, along with the agencies' discussion and characterization of the 2015 Rule, did not obscure the proposed action or the agencies' rationale for proposing to repeal the 2015 Rule and restore the prior regulations.

Contrary to some commenters' suggestions, the agencies have also satisfied the APA's notice-and-comment requirements with respect to the 2015 Rule and pre-existing regulations. With the NPRM and SNPRM the agencies sought comment on all issues relevant to the agencies' consideration of the proposed repeal of the 2015 Rule and recodification of the prior regulations, including the agencies' reasons and legal rationale for the proposal. Regarding the agencies' consideration and solicitation of comments on the merits of the pre-existing regulatory regime, see the agencies' response to comments in Section 10.3.2.

Finally, the agencies note that they received approximately 690,000 comments on the NPRM and approximately 80,000 comments on the SNPRM. Many commenters provided a thoughtful and comprehensive analysis of issues relevant to the proposed rule, including the agencies' legal rationale for the proposed rule and issues related to implementation of the pre-2015 Rule regulatory regime. These "insightful comments may be reflective of notice and may be adduced as evidence of its adequacy." *Horsehead Res. Dev. Co. v. Browner*, 16 F.3d 1246, 1268 (D.C. Cir. 1994).

10.2.3 Notice and comment on pre-2015 Rule regulatory regime

A number of commenters stated that neither the 2003 *SWANCC* guidance nor the 2008 *Rapanos* guidance were subject to public notice and comment before becoming effective. Many of these

commenters suggested that the agencies must propose the guidance for notice and comment if the agencies' jurisdictional determinations or implementation under the final rule would be "in practice constrained" by these guidance documents. Other commenters argued that the agencies must subject the entire prior regulatory regime, including any guidance documents used to implement the pre-existing regulations, to public notice and comment. Some commenters asserted that recodifying the pre-2015 Rule regulations but relying on guidance, court decisions, and a new policy direction—instead of the regulatory text itself—would violate the APA.

One commenter asserted that the agencies' proposal to reinstate the prior regulatory text consistent with guidance documents indicates that the agencies believe the pre-2015 Rule regulatory text either should not or cannot be enforced as written. Another commenter stated that proposing a rule that the agencies believe is at least in part unwise or potentially illegal is patently arbitrary and capricious, noting that "an agency's action must be upheld, if at all, on the basis articulated by the agency itself," *State Farm*, 463 U.S. at 50. A commenter also asserted that the SNPRM's discussion of the 2008 *Rapanos* guidance casts doubt on whether the agencies consider the guidance to be legal and whether the agencies have any intention of implementing or enforcing it.

> **Agencies' Response: As explained in the NPRM and SNPRM, the agencies proposed to repeal the 2015 Rule and to restore the regulatory text that existed prior to the 2015 Rule. The agencies also stated that if the proposed rule were finalized, the agencies would continue to implement the pre-2015 Rule regulations as informed by applicable agency guidance documents and consistent with Supreme Court decisions and longstanding agency practice. As such, with this final rule, the agencies will implement the familiar pre-2015 Rule regulatory regime that was in effect for many years and that is currently in effect in more than half of the states.**
>
> **The agencies have implemented the prior regulatory text as informed by guidance and case law for many years and continue to find it appropriate to do so. Indeed, for over 30 years, challenges to the agencies' application of the pre-existing regulations have yielded a well-developed body of case law that has helped to define the scope of the agencies' CWA authority and shaped the agencies' approach to implementing the pre-2015 Rule regulations. In particular, the U.S. Supreme Court's decisions in *SWANCC* and *Rapanos*, which the agencies note did not vacate or remand the prior regulations, inform the agencies' implementation of the pre-2015 Rule regulations. The agencies determined that they could respond to these decisions opining on the meaning of "waters of the United States" and clarify the agencies' interpretation of that term by issuing guidance documents instead of revising the regulatory text. As such, following those decisions, the agencies issued interpretive guidance in 2003 and 2008 that is now longstanding and familiar.[47]**
>
> **In returning to the pre-2015 Rule regulatory regime, the agencies note that nothing has changed that would require the agencies to put the applicable guidance documents through notice-and-comment rulemaking. Guidance does not impose legally binding requirements and may not apply to a particular situation depending on the circumstances. In making jurisdictional and permitting decisions, agency staff will consider on a case-by-case basis whether the recommendations or interpretations contained in guidance are appropriate to apply to a particular situation. These guidance documents do not carry the force of law. They**

[47] See supra notes 32–34.

were not required to go through the APA's notice and comment procedures when the agencies first issued them, and they are not required to go through those procedures now.

Further, the agencies did offer for public comment the 2008 memorandum providing guidance to EPA regions and U.S. Army Corps of Engineers districts on implementing the *Rapanos* decision. On June 8, 2007, the agencies published in the *Federal Register* an initial version of this guidance. 72 FR 31824. The guidance was immediately effective but the agencies requested comment on early experience with implementing the guidance. *Id*. The agencies explained that they would either reissue, revise, or suspend the guidance after carefully considering the public comments received and field experience with implementing the guidance. *Id*. at 31825. After considering public comments received on the initial guidance document, the agencies revised and reissued the document on December 2, 2008. *See* U.S. EPA & U.S. Army Corps of Engineers, Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States & Carabell v. United States* (Dec. 2, 2008), *available at* https://www.epa.gov/sites/production/files/2016-02/documents/cwa_jurisdiction_following_rapanos120208.pdf.

The agencies are considering the proper scope of federal CWA jurisdiction in the proposed revised definition of "waters of the United States." *See* 84 FR 4154 (Feb. 14, 2019). Pending any final action on that proposed rulemaking, the agencies find that this final rule will provide greater certainty by reinstating a longstanding regulatory framework that is familiar to and well-understood by the agencies, states, tribes, local governments, regulated entities, and the public.

10.3 Substantive Requirements under the Administrative Procedure Act

10.3.1 General comments on rationale for the proposed rule

Many commenters stated that the agencies are required to "examine the relevant data and articulate a satisfactory explanation" for their actions, including a "rational connection between the facts found and the choice made," citing the Supreme Court's decisions in *Fox*, 556 U.S. at 515; *State Farm*, 463 U.S. at 43; *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962). Some commenters asserted that the agencies need not demonstrate that the reasons for a new policy are better than the reasons for the old one because "it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency believes it to be better, which the conscious change of course adequately indicates," citing *Fox*, 556 U.S. at 515.

A number of commenters asserted that the agencies have provided a reasoned explanation to repeal the 2015 Rule, including because the 2015 Rule is inconsistent with the agencies' statutory authority and Supreme Court precedent. Many of these commenters found that the agencies provided good reasons for the change in policy, such as a desire to balance the objectives, goals, and policies of the CWA. One commenter added that the agencies' rulemaking is not only reasonable but is also based on substantial evidence provided in the current rulemaking, past rulemakings, and guidance documents that support the pre-2015 regulatory regime.

Other commenters stated that the agencies have failed to provide a reasoned explanation for the proposed rule, have not provided a rational connection between the facts found and the choice made, or have otherwise failed to meet the legal requirements for revising existing regulations as articulated

by the Supreme Court and lower courts (*see*, *e.g.*, *Fox*, 556 U.S. at 515–16; *State Farm*, 463 U.S. at 43; *Encino Motorcars*, 136 S. Ct. at 2125–27). Several of these commenters asserted that the agencies have not provided a reasoned explanation for the proposed rule because the commenters believe the agencies have failed to adequately address the relevant Supreme Court case law and the administrative record of the 2015 Rule. Commenters also suggested that the proposed rule is arbitrary and capricious because the agencies have not provided a reasoned explanation for changing their longstanding interpretation of the CWA and cases interpreting it.

Other commenters suggested that the agencies have not provided a reasoned explanation for the proposal because the SNPRM contains questions, theories, and tentative or equivocal statements about the legality of the 2015 Rule that are too conclusory to constitute an adequate rationale. Commenters also argued that this rulemaking is flawed because the SNPRM proposes conclusions and appears to ask commenters to supply the supporting rationale. Several commenters asserted that the agencies do not have an adequate record to support repealing the 2015 Rule in light of the extensive record upon which the 2015 Rule was based.

Moreover, one commenter stated that the agencies have not articulated any compelling reasons as to why repealing the 2015 Rule is warranted at this time and serves the public interest. Other commenters asserted that the agencies cannot rely on Executive Order 13778 as an independent basis for the proposed rule. One commenter argued that while it is legally acceptable in certain circumstances for the agencies to make policy shifts, it is not permissible for the agencies to reinterpret an entire statute and attempt to narrow its scope contrary to longstanding interpretations in order to achieve extraneous policy goals that are contrary to the objective and goals of that statute.

Another commenter argued that the proposal lacked a rational basis because the agencies did not evaluate other options for addressing regulatory uncertainty. This commenter suggested that the agencies failed to consider modifying the 2015 Rule as an alternative to repeal, and that this constitutes an "artificial narrowing of options" that "is antithetical to reasoned decisionmaking," citing *Int'l Ladies' Garment Workers' Union v. Donovan*, 722 F.2d 795, 817 (D.C. Cir. 1983).

Finally, some commenters disagreed with the agencies' characterization of the proposed rule in the NPRM as codifying the status quo, noting that the 2015 Rule, not the prior definition, is currently codified in the Code of Federal Regulations. One commenter stated that the NPRM admits that the proposal would change the legal status quo "by converting the Sixth Circuit's temporary stay into a permanent repeal." This commenter argued that because the agencies have failed to acknowledge that the proposed rule would change the status quo, the agencies have failed to satisfy the APA, citing *see Fox*, 556 U.S. at 515. Another commenter argued that issuing a rule to maintain the status quo when that status quo hinges on an order that "could be altered at any time by factors beyond the control of the agencies" is arbitrary, capricious, and an abuse of the agencies' discretion. Further, one commenter suggested that the agencies are seeking to usurp the role of the courts by extending the Sixth Circuit's stay of the 2015 Rule indefinitely through administrative action.

> **<u>Agencies' Response</u>: Consistent with the APA and applicable case law, the agencies have provided a reasoned explanation for this rulemaking. The Supreme Court has found that "agencies are free to change their existing policies as long as they provide a reasoned explanation for the change." *See Encino Motorcars*, 136 S. Ct. at 2125 (citations omitted). As reflected in the preamble to this final rule and this response to comments document, the agencies have carefully analyzed their statutory and constitutional authority, along with**

relevant case law, and have provided a detailed and rational explanation of their reasons for deciding to repeal the 2015 Rule and restore the pre-existing regulations.

Specifically, as explained in the preamble to the final rule, the agencies are repealing the 2015 Rule for four primary reasons. First, the agencies conclude that the 2015 Rule did not implement the legal limits on the scope of the agencies' authority under the CWA as intended by Congress and reflected in Supreme Court cases, including Justice Kennedy's articulation of the significant nexus test in *Rapanos*. Second, the agencies conclude that in promulgating the 2015 Rule the agencies failed to adequately consider and accord due weight to the policy of the Congress in CWA section 101(b) to "recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution" and "to plan the development and use . . . of land and water resources." 33 U.S.C. 1251(b). Third, the agencies repeal the 2015 Rule to avoid interpretations of the CWA that push the envelope of their constitutional and statutory authority absent a clear statement from Congress authorizing the encroachment of federal jurisdiction over traditional State land-use planning authority. Lastly, the agencies conclude that the 2015 Rule's distance-based limitations suffered from certain procedural errors and a lack of adequate record support. The agencies find that these reasons, collectively and individually, warrant repealing the 2015 Rule. For these and other reasons discussed more fully in the preamble, the agencies have decided that repealing the 2015 Rule and restoring the pre-existing regulations is warranted and appropriate at this time.

The agencies disagree that the proposal did not adequately address the relevant Supreme Court case law or provide a reasoned explanation for the views expressed therein. The SNPRM provided a comprehensive summary of the opinions in *Riverside Bayview*, *SWANCC*, and *Rapanos* and identified important legal principles that emerge from those opinions as well as the CWA's statutory framework. 83 FR 32234–37. The agencies then applied those legal principles in evaluating the bounds of their statutory authority and whether the 2015 Rule adhered to the limits on federal CWA jurisdiction intended by Congress and reflected in Supreme Court precedent. 83 FR 32240–42, 32247–49. The agencies sought comment on all aspects of the legal rationale for the proposed rule and received and considered many comments addressing these issues.

The agencies also disagree with the suggestion that statements in the SNPRM were too conclusory to constitute an adequate rationale. The SNPRM clearly identified the issues the agencies were considering in deciding whether to finalize the proposed rule and the agencies solicited, received, and considered many comments on those issues. *See*, *e.g.*, 83 FR 32240–42, 32247–48. Tentative statements regarding the legality of the 2015 Rule were wholly appropriate in the context of a proposed rule and are consistent with the requirement that the agencies maintain an open mind prior to taking final action on a proposal.

The agencies acknowledge that the applicability of the 2015 Rule has changed since the publication of the NPRM and SNPRM. Though the 2015 Rule has never been in effect nationwide, the applicability of the rule has remained in flux due to a shifting set of preliminary injunctions barring implementation of the rule in different states across the country. Indeed, over the past year alone, the number of states subject to the 2015 Rule has changed multiple times. Regardless of whether commenters agree with the agencies'

characterization of the proposed rule in the NPRM and SNPRM as recodifying the "status quo," as discussed above, the agencies have provided ample justification for this rulemaking.

With respect to whether the agencies adequately addressed the administrative record of the 2015 Rule, see the agencies' response to comments in Section 10.3.3 and Section 10.3.4. Regarding the agencies' consideration of alternatives to the proposed rule, see the agencies' response to comments in Section 1.3. See also the agencies' response to comments in Section 10.0.

10.3.2 Merits of pre-2015 Rule regulatory regime

A number of commenters argued that the agencies have not provided a reasoned explanation for the proposed rule because the agencies failed to compare the relative merits of the 2015 Rule with the pre-2015 Rule regulatory regime. These commenters asserted that the agencies must consider the substance of the pre-2015 Rule regulatory regime and the implications of reinstating that regime, and that the agencies' failure to do so violates the APA. Commenters also asserted that the agencies must explain why the pre-2015 Rule regulatory regime is substantively preferable to the 2015 Rule. Many of these commenters suggested that the agencies have failed to provide "good reasons" for the new policy as required by the Supreme Court in *Fox*, 556 U.S. at 515–16. Commenters also argued that the agencies have a duty to solicit comment on and consider the merits of the rule they intend to put in place, asserting that failure to do so deprives the public of a meaningful opportunity to comment. As support for this argument, some of the commenters cited to *N. Carolina Growers' Ass'n, Inc. v. United Farm Workers*, 702 F.3d 755 (4th Cir. 2012).

Some commenters expressed concern that the agencies have not addressed the substantive merits of the pre-2015 Rule regulatory regime because the commenters note that this regime could be in effect for many years. These commenters stated that the agencies have failed to consider the possibility that recodifying the pre-existing regulations will not be temporary, especially because the agencies cannot prejudge the outcome of a separate rulemaking proposing a new definition of "waters of the United States." Commenters argued that the agencies must comply with the APA's standards for both the withdrawal of the 2015 Rule and the recodification of the prior definition and further asserted that the agencies cannot avoid the APA's substantive rulemaking requirements by characterizing the rule as a temporary action. Some commenters added that case law indicates that even a temporary action must be justified on the merits. One commenter argued that the agencies' reliance in the NPRM on *P&V Enterprises v. U.S. Army Corps of Eng'rs*, 516 F.3d 1021,1023–24 (D.C. Cir. 2008) is inapplicable because that case concerned an advanced notice of proposed rulemaking rather than a proposal for a final agency action, which requires a "reasoned analysis for the change," *see Fox*, 556 U.S. at 514.

A few commenters suggested that it is clear that the agencies have failed to consider the relative merits of the 2015 Rule and the pre-2015 Rule regulatory regime, and thus lack a rational basis for the proposal, because some of the agencies' critiques of the 2015 Rule—such as coverage of ephemeral streams and the use of biological factors to determine significant nexus—apply equally to the pre-existing regime. Another commenter added that it is irrational to recodify regulations that suffer from the same problem of potentially overbroad application.

<u>Agencies' Response</u>: The agencies have provided defensible and clear reasons for this final rule. As discussed in Section III.C.1 of the preamble to the final rule, the agencies find that the 2015 Rule did not implement the legal limits on the scope of the agencies' authority under the

CWA as intended by Congress and reflected in Supreme Court cases, including Justice Kennedy's articulation of the significant nexus test in *Rapanos*, did not adequately consider and accord due weight to the policy of Congress in CWA section 101(b), pushed the envelope of the agencies' constitutional and statutory authority absent a clear statement from Congress, and included distance-based limitations that suffered from procedural errors and a lack of adequate record support. The agencies find that these fundamental flaws permeated the 2015 Rule, resulting in a definition of "waters of the United States" that covered waters outside the scope of the agencies' statutory authority. Because the agencies find that the 2015 Rule is unlawful, the agencies have a well-supported reason for taking this final action to repeal the 2015 Rule and to restore the prior, lawful regulatory regime. *See* 5 U.S.C. § 706(2)(C) (prohibiting agency actions "in excess of statutory jurisdiction, authority, or limitations"); *see also Fox*, 556 U.S. at 515 (finding that agencies "need not demonstrate . . . that the reasons for [a] new policy are *better* than the reasons for the old one; it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better, which the conscious change of course adequately indicates" (emphasis in original)).

The agencies have also clearly explained why returning to the pre-2015 Rule regulatory regime would provide greater regulatory certainty and is preferable to the 2015 Rule. *See* Section IV of the preamble to the final rule; 83 FR 32238–40. Notably, the agencies conclude that while the prior regulatory regime may be "imperfect," *see In re EPA & Dep't of Def. Final Rule*, 803 F.3d 804, 808 (6th Cir. 2015), recodifying the pre-existing regulations and returning to the longstanding and familiar pre-2015 Rule regulatory framework is the most effective and efficient way to remedy the fundamental and systemic flaws of the 2015 Rule, achieve the objective of the Act while implementing its policies, and provide regulatory certainty as the agencies consider public comments on a proposed revised definition of "waters of the United States." *See* 84 FR 4154.

Though this final rule is intended to be the first step in a comprehensive, two-step rulemaking process, the agencies acknowledge that they cannot prejudge the outcome of the separate rulemaking on a proposed revised definition of "waters of the United States." Regardless of whether the agencies finalize a new definition, the agencies conclude that restoring the pre-existing regulations is appropriate because, as implemented, those regulations adhere more closely than the 2015 Rule to the jurisdictional limits under the Act. In the agencies' proposed revised definition of "waters of the United States," the agencies are further considering the proper scope of federal CWA jurisdiction and seek to establish a clear and implementable definition that better effectuates the language, structure, and purposes of the CWA.

Finally, the agencies disagree that they have not satisfied the APA's notice-and-comment requirements with respect to the pre-existing regulations. The agencies solicited comment on whether to recodify the pre-2015 Rule regulations and requested comment on whether doing so would provide for greater regulatory certainty. *See* 83 FR 32231 ("The agencies are issuing this SNPRM and are inviting all interested persons to comment on whether the agencies should repeal the 2015 Rule and recodify the regulations currently being implemented by the agencies."); *id*. at 32240 ("For this reason, as between the 2015 Rule and the 1986 regulations, the 1986 regulations (as informed by applicable Supreme Court precedent and the agencies' guidance) would appear to provide for greater regulatory predictability, consistency, and certainty, and the agencies seek public comment on this issue."). The agencies also asked for

comments on "any other issues that may be relevant to the agencies' consideration of whether to repeal the 2015 Rule." *Id*. at 32248. These broad solicitations of comment gave interested parties an opportunity to comment on issues related to the merits of the pre-2015 Rule regulatory regime. Indeed, the agencies received many comments on the merits of the prior regulatory regime, which the agencies considered in deciding to finalize the proposed rule.

See also the agencies' response to comments in Section 10.1.1 and Section 10.3.1.

10.3.3 Prior statements and findings regarding the 2015 Rule and pre-2015 Rule regulatory regime

Some commenters claimed that the agencies' proposal to repeal the 2015 Rule and codify the pre-existing regulations is arbitrary and capricious because the agencies have not addressed prior findings about either regulatory regime that appear to be inconsistent with the agencies' rationale for the proposal. Commenters argued that a "reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy" and that a "more detailed justification" is needed when the "new policy rests upon factual findings that contradict those which underlay [an agency's] prior policy," citing *Fox*, 556 U.S. at 515–16, and *Organized Village of Kake v. U.S. Dep't of Agric.*, 795 F.3d 956, 970–71 (9th Cir. 2015) (en banc) (Christen, J., concurring). Many of the commenters stated that the agencies must explain why they are reversing or ignoring their prior administrative findings and conclusions, as well as the positions that the agencies have taken in court. One commenter suggested that Executive Order 13778 cannot supply a "reasoned explanation" for the agencies' change in interpretation.

In particular, a number of commenters stated that the agencies have not adequately addressed their prior statements expressing concern about the regulatory uncertainty associated with implementation of the pre-2015 Rule regulations, such as statements made in the preamble to the 2015 Rule. Commenters suggested that the agencies must explain why the pre-2015 Rule regulatory regime, in light of the agencies' prior statements criticizing those regulations, is the preferable approach to defining "waters of the United States." One commenter criticized the agencies for proposing to codify the very regulations that instigated the development of the 2015 Rule.

Additionally, some commenters claimed that the proposed rule ignores or does not repudiate the legal analysis supporting the 2015 Rule. Specifically, some commenters asserted that there is no record or basis contained in the proposed rule to refute the agencies' prior conclusions that the 2015 Rule is consistent with Supreme Court precedent. One of these commenters stated that the agencies must explain why they have changed their view of what constitutes a "significant nexus."

A few commenters observed that the SNPRM references comments received on the 2014 proposed rule and noted that the agencies do not evaluate the validity of such comments or address the agencies' prior responses. The commenters asserted that the agencies have thus not "considered an important aspect of the problem," demonstrated awareness of their prior position, or provided a rationale to justify departing from that prior position, citing *State Farm*, 463 U.S. at 43, and *Fox*, 556 U.S. at 515–16.

Other commenters stated that the agencies' authority to rescind the 2015 Rule is not restricted by the record established during that rulemaking and further suggested that the agencies are not required to rebut or abandon all of the findings that supported the 2015 Rule. These commenters asserted that the

administrative record for the 2015 Rule does not dictate a particular definition of "waters of the United States," the manner in which the agencies are to resolve ambiguities in statutory text, or where the agencies are to draw the line between federal and state jurisdiction.

Agencies' Response: The agencies acknowledge that in issuing the 2015 Rule, the agencies intended to "make the process of identifying waters protected under the CWA easier to understand." 80 FR 37054, 37057 (June 29, 2015). The agencies also recognize that the federal government, in prior briefing, has defended the 2015 Rule. *See*, *e.g.*, Brief for Respondents, *In re EPA*, No. 15-3571 (6th Cir. Jan. 13, 2017). Yet, as noted in the SNPRM, since publishing the 2015 Rule the agencies have received information through filings in litigation against the 2015 Rule, court decisions in such litigation, and in comments submitted in this rulemaking concerning the extent of federal CWA jurisdiction asserted under the 2015 Rule. 83 FR 32238–39, 32242. Upon further reflection, including a thoughtful review of the public comments received in response to the NPRM and SNPRM and a careful analysis of the agencies' statutory and constitutional authority, as well as court rulings interpreting the agencies' CWA authority and others arising from litigation challenging the 2015 Rule, the agencies now conclude that the 2015 Rule did not implement the legal limits on the scope of the agencies' authority under the CWA as intended by Congress and reflected in Supreme Court cases, including Justice Kennedy's articulation of the significant nexus test in *Rapanos*, did not adequately consider and accord due weight to the policy of Congress in CWA section 101(b), pushed the envelope of the agencies' constitutional and statutory authority absent a clear statement from Congress, and included distance-based limitations that suffered from procedural errors and a lack of adequate record support.

In particular, having reconsidered the relevant Supreme Court opinions and statutory text, the agencies conclude that the interpretation of the significant nexus standard adopted in the 2015 Rule was overly expansive and did not comport with or respect the limits of jurisdiction reflected in the CWA and decisions of the Supreme Court. Ultimately, the agencies' application of this broad significant nexus standard in developing the jurisdictional-by-rule and case-specific categories under the 2015 Rule resulted in a definition of "waters of the United States" that covered waters outside the jurisdictional scope of the Act. For this reason and the others discussed in the preamble to the final rule, the agencies find that the 2015 Rule must be repealed.

The agencies disagree that they have not adequately addressed prior statements regarding the pre-2015 Rule regulatory regime. The agencies recognize that the pre-existing regulations pose certain implementation challenges and acknowledged criticisms of the prior regulatory regime in the SNPRM. *See* 83 FR 32240, 32250. In the agencies' proposed revised definition of "waters of the United States," the agencies seek to establish a clear and implementable definition that better effectuates the language, structure, and purposes of the CWA. *See* 84 FR 4174. Pending any final action on that proposed rulemaking, the agencies find that this final rule will provide greater certainty by reinstating nationwide a longstanding regulatory framework that is familiar to and well-understood by the agencies, states, tribes, local governments, regulated entities, and the public. See also the agencies' response to comments regarding the prior regulatory regime in Section 2, Section 8, and Section 10.3.2, as well as Section IV and Section V of the final rule preamble.

The agencies also disagree that they have not adequately addressed or refuted their prior legal analysis supporting the 2015 Rule. The agencies identified and explained their concerns with the legality of the 2015 Rule in the SNPRM (*see*, *e.g.*, 83 FR 32240–41) and the preamble to this final rule provides a detailed explanation of the agencies' conclusion that the 2015 Rule—contrary to the agencies' prior findings—is unlawful (see Section III.C of the final rule preamble). The agencies have provided ample justification for their change in position.

10.3.4 Prior statements and findings related to science and the Connectivity Report

Many commenters expressed concern that the agencies' proposed rule is arbitrary and capricious because it does not address or consider the science underlying the 2015 Rule, including the Connectivity Report. These commenters stated the agencies have not examined the "relevant data," i.e., the record supporting the 2015 Rule and any other scientific data relevant to determining which waters are within the jurisdiction of the CWA. Commenters also stated that the agencies must explain why they have changed their position with respect to the science supporting the 2015 Rule, and that ignoring or countermanding these prior factual findings without a reasoned explanation violates the APA, citing *Fox*, 556 U.S. at 537. Some of these commenters asserted that the 2015 Rule should not be rescinded because the Connectivity Report on which it relies was peer-reviewed by the Science Advisory Board (SAB) and the agencies have provided no explanation for ignoring the SAB's affirmation of the scientific basis underlying the rule. Other commenters deemed the lack of scientific justification for the proposed rule to be arbitrary and capricious, including because the agencies have not produced a new scientific record to support the agencies' decision to no longer rely on the Connectivity Report.

One commenter argued that the APA and background principles of administrative law require reasoned decision-making grounded in relevant evidence, and that the CWA, given its focus on water quality, anticipates that the science related to water quality will be central to agency decision-making. The commenter stated that suggesting the agencies' erred in promulgating the 2015 Rule because they relied too heavily on science thus reveals a fundamental misunderstanding of the agencies' legal responsibilities. A few commenters, referencing the suggestion in the SNPRM that the 2015 Rule relied too heavily on the scientific record, criticized the agencies for failing to explain how an alternative approach would better serve the CWA's objective. Relatedly, several commenters suggested that the record for the proposed rule does not invalidate the agencies' prior findings that the 2015 Rule is consistent with the agencies' technical expertise and experience and is necessary to meet the objective of the CWA based on peer-reviewed science.

Other commenters argued that the Connectivity Report does not constrain the agencies' discretion to repeal the 2015 Rule. These commenters explained that the Connectivity Report did not draw jurisdictional lines but rather concluded that all waters are connected and that connectivity exists on a gradient. The commenters asserted that the agencies are free to draw different conclusions about the legal limits of CWA jurisdiction based on legal and policy considerations, as well as the agencies' expertise and experience. Another commenter added that the agencies, acting within their authority to reconsider the definition of "waters of the United States," may rely on the scientific findings within the Connectivity Report, as well as other information included in the record, to reach a different result on where the boundaries of federal CWA jurisdiction should lie.

Many commenters stated that CWA jurisdiction should not be based solely on science and that interpreting the proper scope of the agencies' jurisdiction under the CWA requires consideration of multiple factors and sources of information including science, the text of the statute, case law,

legislative materials, and policy considerations. These commenters suggested that the agencies do not need to produce additional scientific information to refute the findings of the Connectivity Report because science is not the only relevant factor to determining the agencies' CWA jurisdiction.

Agencies' Response: In issuing the 2015 Rule, the agencies explained that "science does not provide a precise point along the continuum at which waters provide only speculative or insubstantial functions to downstream waters." 80 FR 37090. The SAB also acknowledged that the Connectivity Report "is a science, not policy, document."[48] The agencies now conclude, however, that in establishing the limits of federal regulatory authority under the CWA in the 2015 Rule, the agencies placed too much emphasis on the information and conclusions of the Connectivity Report at the expense of the limits on federal jurisdiction reflected in the statutory text and decisions of the Supreme Court. Though science may inform the agencies' definition of "waters of the United States," the agencies maintain that science cannot be a dispositive factor establishing the line between federal and state waters, as those are legal distinctions that have been established within the overall framework and construct of the CWA. The definition of "waters of the United States" must be grounded in a legal analysis of the limits on CWA jurisdiction reflected in the statute and Supreme Court case law.

The agencies have considered the Connectivity Report as part of this rulemaking. The Connectivity Report continues to inform agency actions, including certain aspects of the agencies' proposed revised definition of "waters of the United States." *See* 84 FR 4154, 4176 (Feb. 14, 2019). Yet, the agencies find that in setting jurisdictional boundaries under the 2015 Rule, the agencies relied on the Connectivity Report without due regard for the restraints imposed by the statute and case law.

For the foregoing reasons, the agencies agree with those commenters that find that the agencies' discretion to repeal the 2015 Rule is not constrained by the Connectivity Report. The agencies disagree with the suggestion that the agencies must develop a new scientific record to support a rulemaking to repeal the 2015 Rule. "The APA imposes no general obligation on agencies to produce empirical evidence. Rather, an agency has to justify its rule with a reasoned explanation." *Stilwell v. Office of Thrift Supervision*, 569 F.3d 514, 519 (D.C. Cir. 2009). As discussed throughout the agencies' response to comments in Section 10.3, the agencies have provided a reasoned explanation for this final rule.

Finally, the agencies acknowledge that the 2015 Rule was based in part on the agencies' "technical expertise and practical experience in implementing the CWA during a period of over 40 years." *See* 80 FR 37054–57. With this final rule, the agencies will continue to rely on this technical expertise and decades of experience to implement the pre-2015 Rule regulatory regime and make jurisdictional determinations consistent with that regulatory framework.

See also the agencies' response to comments in Section 6.

[48] Science Advisory Board, U.S. EPA. Review of the EPA Water Body Connectivity Report at 2 (Oct. 17, 2014) EPA-SAB-15-001.

10.4 Closed Mind

Several commenters stated that the agencies violated the APA and the Due Process Clause because they have predetermined the outcome of the proposed rule. In particular, commenters argued that former EPA Administrator Scott Pruitt had an unalterably closed mind about the agency's approach to the proposed rule. In support of this position, commenters asserted that Mr. Pruitt had a long-held opposition to and actively advocacy against the 2015 Rule. Commenters noted that Mr. Pruitt challenged the 2015 Rule in his past role as Attorney General of Oklahoma; mischaracterized the 2015 Rule in statements made at conferences and in a number of other public appearances; provided congressional testimony that disparaged the 2015 Rule; and allegedly directed his staff to change portions of the economic analysis for this proposed rule by deleting the economic benefits derived from wetlands. Commenters suggested that the following examples also indicate that the former administrator had a closed mind: (1) on his Twitter account, Mr. Pruitt stated that he sued EPA so many times because the agency exceeded its statutory and constitutional authority; (2) Mr. Pruitt appeared in a promotional video for the National Cattlemen's Beef Association explaining his strong opposition to the 2015 Rule; (3) Mr. Pruitt asserted during the comment period for the proposed rule that the 2015 Rule was an overreach; and (4) Mr. Pruitt held up a sign advocating that the agencies ditch the 2015 Rule at a meeting with the Iowa Farm Bureau.

Another commenter stated that in signing Executive Order 13778, President Trump appeared to prejudge the outcome of the proposed rule by making false claims about the 2015 Rule, displaying antipathy for the 2015 Rule, and stating that the executive order paved the way for eliminating the 2015 Rule. Other commenters also provided examples of statements from President Trump that the commenters claimed were false or otherwise mischaracterized the 2015 Rule, including statements that the 2015 Rule regulates "nearly every puddle" and "every ditch." A different commenter noted that the agencies spent four years, reviewed over 1,200 scientific studies, collected over 1,000,000 public comments, drafted over 6,000 pages of responses, and held over 400 public meetings as part of the rulemaking process for the 2015 Rule, while President Trump announced a plan to rescind the 2015 Rule within two months of taking office.

Other commenters asserted that though Executive Order 13778 itself did not prejudge the outcome of the proposed rule and merely instructed the agencies to consider whether to replace the 2015 Rule, the agencies prejudged the outcome of this rulemaking. Some of these commenters suggested that the NPRM and SNPRM represent a post-hoc rationalization of the agencies' pre-determined plan to withdraw the 2015 Rule. As evidence, one commenter pointed to the disconnect between the text of Executive Order 13778, which directed the agencies to "consider" revising or repealing the 2015 Rule, and the notice of intent to withdraw the 2015 Rule signed eight minutes later by former Administrator Pruitt. Some commenters asserted that the rationale presented in the SNPRM was one-sided, selective, and misleading, thereby demonstrating the agencies' unalterably closed mind on the proposed rule. Another commenter noted that the case study examples of jurisdictional determinations were added to the SNPRM after it was submitted to the Office of Management and Budget (OMB) for interagency review; this commenter suggested that the case studies were provided as a pretext to justify the proposal rather than to legitimately evaluate the change in scope of CWA jurisdiction under the 2015 Rule.

Commenters also stated that the agencies' decision to proceed with a separate rulemaking on a proposed revised definition of "waters of the United States" demonstrates that the agencies have an unalterably closed mind about their approach to the proposed rule. As support, commenters noted that

the agencies solicited views on a proposed revised definition before publishing the NPRM for this action and held stakeholder meetings, including early state consultation, on a proposed revised definition before completing this rulemaking to repeal the 2015 Rule. Commenters suggested that these actions demonstrate the agencies' lack of meaningful consideration of public comments submitted on this rulemaking. Some commenters added that Mr. Pruitt's resignation did not cure the agencies' closed mind issue because Mr. Pruitt signed the SNPRM and it reflects his very public views on the 2015 Rule.

Agencies' Response: To satisfy the APA's notice and comment requirements, agencies must provide a "meaningful opportunity" for comment and "remain sufficiently open minded." *Rural Cellular Ass'n*, 588 F.3d at 1101. An agency demonstrates the requisite open mind where it engages in a thoughtful review and consideration of comments, as the agencies have done here. *See Mortgage Inv'rs Corp. v. Gober*, 220 F.3d 1375, 1378–79 (Fed. Cir. 2000).

Former Administrator Pruitt's involvement in this rulemaking does not indicate that the agencies had a "closed mind." Though former Administrator Pruitt signed the NPRM and SNPRM, he is no longer the EPA Administrator and he did not influence the agencies' decision to proceed with and finalize the proposed rule. Further, his earlier involvement in the rulemaking was appropriate and does not demonstrate that the agencies had a closed mind. An administrator is "presumed to be objective and `capable of judging a particular controversy fairly on the basis of its own circumstances.'" *United Steelworkers of Am. v. Marshall*, 647 F.2d 1189, 1208 (D.C. Cir. 1980). This presumption is not overcome where an administrator has "taken a public position," "expressed strong views," or held "an underlying philosophy with respect to an issue." *Id*. Indeed, "[t]he legitimate functions of a policymaker . . . demand an interchange and discussion about important issues." *Ass'n of Nat'l Advertisers v. Fed. Trade Comm'n*, 627 F.2d 1151, 1168 (D.C. Cir. 1979). For this reason, "discussion of policy or advocacy on a legal question . . . is not sufficient to disqualify an administrator" in the rulemaking context. *Id*. at 1171; *see also id*. at 1174 ("We would eviscerate the proper evolution of policymaking were we to disqualify every administrator who has opinions on the correct course of his agency's future action."). Here, neither former Administrator Pruitt's statements nor his participation in earlier proceedings related to the 2015 Rule required his recusal. *See* 647 F.2d at 1208–09. Contrary to some commenters' suggestions, former Administrator Pruitt expressed support for broad public comment to help the agencies make an informed decision.

The agencies' rulemaking on a proposed revised definition of "waters of the United States" does not indicate that the agencies had a closed mind on the issues presented in this rulemaking. That separate rulemaking did not presuppose that this rulemaking to repeal the 2015 Rule and restore the prior regulations would be finalized or finalized in the same manner in which it was proposed. Rather, the economic analysis for the agencies' February 2019 proposal considered the impacts of the proposed revised definition relative to both the pre-2015 Rule regulatory regime and the 2015 Rule, which leaves space for the agencies to decide whether to finalize the proposed rule to repeal the 2015 Rule and recodify the pre-existing regulations. *See Economic Analysis for the Proposed Revised Definition of "Waters of the United States"* (Docket ID No. EPA-HQ-OW-2018-0149). Further, the agencies' proposed revised definition is just that—a proposed rule. The agencies are not bound to finalize that rulemaking as it was proposed or to finalize it at all.

The agencies' discussion in the SNPRM of their concerns with the 2015 Rule and their reasons for the proposed action also does not indicate that the agencies had a closed mind on the issues presented in this rulemaking. Agencies satisfy the requirement to keep an open mind in the rulemaking process when they afford interested persons an opportunity to participate in the rulemaking through submission of written data, views, or arguments and consider the data and views that interested parties submit. *Gober*, 220 F.3d at 1378–79 (citing *Advocates for Highway & Auto Safety v. Fed. Highway Admin.*, 28 F.3d 1288, 1293 (D.C. Cir. 1994) ("A review of comments submitted and the responses made persuades us that the agency approached the post-promulgation comments with the requisite open mind.")). The agencies also note that failure to revise or change a rule in response to comments is not indicative of a closed mind. *Advocates for Highway & Auto Safety*, 28 F.3d at 1292–93. The agencies in the SNPRM described in detail their rationale for the proposed action and requested comment on multiple aspects of the proposal. In response to the proposed rule, the agencies received approximately 770,000 comments from a diverse group of commenters, including environmental groups, agricultural interests, resource extraction companies, states, tribes, local governments, and individual citizens. These commenters offered a broad range of perspectives on the agencies' proposed rule and rationale for the proposed rule. The agencies considered each of these comments and the various perspectives they provided in developing the final rule.

Further, the agencies' decision to issue the proposed rule shortly after a new administration came into office does not indicate that the agencies had a closed mind on the issues presented in this rulemaking. Agencies may review or repeal regulations based on changes in circumstance, or changes in statutory interpretation or policy judgments. *See*, *e.g.*, *Fox*, 556 U.S. at 514–15; *Ctr. for Sci. in Pub. Interest v. Dep't of Treasury*, 797 F.2d 995, 998–99 & n.1 (D.C. Cir. 1986). The agencies' interpretation of the statutes they administer, such as the CWA, are not "instantly carved in stone"; quite the contrary, the agencies "must consider varying interpretations and the wisdom of [their] policy on a continuing basis, . . . for example, in response to . . . a change in administrations." *Brand X*, 545 U.S. at 981–82 (internal quotation marks omitted) (quoting *Chevron*, 467 U.S. at 863–64) (citing *State Farm*, 463 U.S. at 59 (Rehnquist, J., concurring in part and dissenting in part)). The Supreme Court and lower courts have acknowledged an agency's ability to repeal regulations promulgated by a prior administration based on changes in agency policy where "the agency adequately explains the reasons for a reversal of policy." *See Brand X*, 545 U.S. at 981. A revised rulemaking based "on a reevaluation of which policy would be better in light of the facts" is "well within an agency's discretion," and "[a] change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency's reappraisal" of its regulations and programs. *NAHB*, 682 F.3d at 1038, 1043.

Executive Order 12866 requires federal agencies to submit certain regulatory actions to OMB for review before publishing those actions in the *Federal Register*. Changes made to the proposed rule during the OMB review process do not indicate that the agencies had a closed mind in this rulemaking; those changes are part of the standard federal agency rulemaking process. Further, these changes demonstrate the agencies' thoughtful consideration of input from other federal agencies and the White House.

10.5 Statutory and Executive Order Reviews

10.5.1 Executive Order 12866: Regulatory Planning and Review

A few commenters suggested that the proposed rule is not consistent with Executive Order 12866. One commenter asserted that the proposed rule was not written in plain language or easy to understand, as suggested by Executive Order 12866. Another commenter stated that the proposed rule fails to address important aspects of Executive Order 12866, such as market failures, asymmetric information, and negative externalities.

> **Agencies' Response: The agencies have fully complied with Executive Order 12866. As required under the executive order, the agencies submitted the NPRM and SNPRM to OMB for review and conducted an analysis of costs and benefits of the rule. This analysis is contained in the Economic Analysis for the Final Rule: Definition of "Waters of the United States"—Recodification of Pre-Existing Rules. The agencies' decision to repeal the 2015 Rule and to recodify the pre-existing regulations is not based on the information in that economic analysis; the basis for this final rule is presented in Section III.C of the final rule preamble.**

10.5.2 Regulatory Flexibility Act

> **Agencies' Response: See Section 9 for the comments related to and the agencies' response to comments on the proposed rule's compliance with the Regulatory Flexibility Act.**

10.5.3 Executive Order 13132: Federalism

Multiple commenters emphasized that the agencies need to adhere to the requirements of Executive Order 13132. These commenters expressed support for extensive consultation throughout the rulemaking process with state and local governments on regulations that will have substantial direct compliance costs. One commenter requested that the agencies consult with states throughout the rulemaking process and continue to consult with states after finalizing the rule. Another commenter recommended a multiphase, rather than one-time, federalism consultation process; an ad hoc, subject-specific advisory committee under the authority of the Federal Advisory Committee Act; and an Alternative Dispute Resolution negotiated rulemaking with all stakeholders, to allow problems to be addressed and consensus to be reached.

Some commenters suggested that this rulemaking was not consistent with Executive Order 13132. One commenter stated that the agencies' consultation process was flawed because the agencies requested comments from the Local Government Advisory Committee and others in a manner that constrained comments to the agencies' predetermined approach to repeal the 2015 Rule. The commenter asserted that this outreach did not constitute adequate federalism consultation with state and local governments under Executive Order 13132.

> **Agencies' Response: Executive Order 13132 requires the agencies to develop an accountable process to ensure "meaningful and timely input by state and local officials in the development of regulatory policies that have federalism implications." "Policies that have federalism implications" pursuant to the executive order include regulations that have "substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government."**

This final rule does not have federalism implications as specified in Executive Order 13132 because it returns the relationship between the federal government and the states to the longstanding and familiar distribution of power and responsibilities that existed under the CWA for many years prior to the 2015 Rule. Thus, the requirements of Executive Order 13132 do not apply to this action.

Although the agencies were not required to conduct a federalism consultation for this rulemaking, the agencies did inform states and local governments about the NPRM and the SNPRM, and the agencies continued to engage with and provide updates to states and local governments throughout the rulemaking process, including in numerous stakeholder outreach meetings (see EPA-HQ-OW-2017-0203-0004 and EPA-HQ-OW-2017-0203-15163). Further, some states and local governments commented on this rulemaking in the federalism consultation process for the proposed revised definition of "waters of the United States" (81 FR 4154, Feb. 14, 2019), which took place while the agencies were also engaged in the rulemaking process for this final rule. Given this overlap in timing, the agencies have included the federalism consultation letters in the docket for this rulemaking (EPA-HQ-OW-2017-0203) and the docket for the proposed rule to revise the definition of "waters of the United States." Those letters may also be found on the EPA's website at https://www.epa.gov/wotus-rule/federalism-consultation.

10.5.4 Executive Order 13175: Consultation and Coordination with Indian Tribal Governments

A number of tribal commenters asserted that the agencies have not satisfied the requirement for government-to-government consultation for the proposed rule and that consultation has not been consistent with longstanding law, the agencies' consultation policies, or Executive Order 13175. Many of the commenters criticized the agencies' determination that the proposed rule did not trigger Executive Order 13175, and several commenters noted that soliciting comment letters and convening a national tribal webinar do not satisfy the requirement for government-to-government consultation. One commenter stated that the proposed rule would impact water quality protections and that the agencies thus failed to fulfill their obligation to consult with tribal governments regarding the effects of the proposal. Further, some commenters asserted that the lack of consultation renders any decision on the proposal arbitrary and capricious.

Commenters suggested that substantial consultation is needed throughout the rulemaking process to provide for meaningful input by tribal communities that would be affected by the proposed rule. Some tribes urged the agencies to provide a meaningful opportunity for a more complete and balanced government-to-government consultation before taking a final action on the proposed rule. Some of these commenters added that they are not able to provide more detailed comments and input until information is adequately exchanged through a government-to-government process.

Several tribal commenters requested formal consultation on the rulemaking in their comment on the proposed rule. Several tribes also provided suggestions for conducting formal government-to-government consultation, including providing all pertinent information concerning impacts to a tribe's rights in a timely manner; agreeing on consultation timelines; consulting only with authorized tribal government representatives; making an effort to conduct tribal consultation at the seat of tribal government or elsewhere on the reservation; ensuring that federal representatives have decision-making authority; and confirming in writing that an agency has considered tribal comments and

concerns. Some commenters also stated that consultation must occur face-to-face with tribal elected officials.

> **Agencies' Response: Executive Order 13175 requires the agencies to develop an accountable process to ensure "meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications." This final rule does not have tribal implications as specified in Executive Order 13175. The executive order provides that "'policies that have tribal implications' refers to regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes." This final rule will not have substantial direct effects on tribal governments, on the relationship between the federal government and Indian tribes, or on the distribution of power and responsibilities between the federal government and Indian tribes because it returns the relationship between the federal government and the tribes to the longstanding and familiar distribution of power and responsibilities that existed under the CWA for many years prior to the 2015 Rule. Thus, consultation under Executive Order 13175 is not required.**
>
> **Although the agencies were not required to conduct tribal consultation under Executive Order 13175 for this rulemaking, the agencies did inform tribes about the NPRM and the SNPRM, and the agencies continued to engage with and provide updates to tribes throughout the rulemaking process, including in numerous stakeholder outreach meetings (see EPA-HQ-OW-2017-0203-0004 and EPA-HQ-OW-2017-0203-15163). Further, some tribes commented on this rulemaking in the tribal consultation process for the proposed revised definition of "waters of the United States," (81 FR 4154, Feb. 14, 2019), which took place while the agencies were also engaged in the rulemaking process for this final rule. Given this overlap in timing, the agencies have included the tribal consultation letters in the docket for this rulemaking (EPA-HQ-OW-2017-0203) and the docket for the proposed rule to revise the definition of "waters of the United States." Those letters may also be found on the EPA's website at https://www.epa.gov/wotus-rule/tribal-consultation.**

10.5.5 Executive Order 13045: Protection of Children from Environmental Health and Safety Risks

A few commenters addressed Executive Order 13045, suggesting that the agencies should evaluate potential adverse impacts on children from repealing the 2015 Rule. The commenters noted that contaminated water can cause a variety of health problems, especially for children, and questioned whether children are more susceptible to water pollutants due to their lower body mass or since children are more apt to swim or participate in recreational activities in community waters. One commenter also referenced the impact of polluted water on the children of Flint, Michigan.

> **Agencies' Response: Executive Order 13045 applies to any rule that: (1) is determined to be "economically significant" as defined under Executive Order 12866, and (2) concerns an environmental health or safety risk that an agency has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, the agency must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the agency. This rule is not subject to Executive Order**

13045 because it does not involve decisions intended to mitigate environmental health or safety risks.

10.5.6 Executive Order 13211: Actions Concerning Regulations that Significantly Affect Energy Supply, Distribution or Use

One commenter suggested that the agencies should prepare an analysis for the proposed rule under Executive Order 13211.

Agencies' Response: This rule is not subject to Executive Order 13211 because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy.

10.5.7 Executive Order 12898: Federal Actions to Address Environmental Justice in Minority and Low-Income Populations

Some commenters suggested that the proposed rule is not consistent with Executive Order 12898 or EPA's environmental justice policies. Commenters asserted that repealing the 2015 Rule would adversely impact environmental justice communities, especially communities with limited access to clean water, due to increased risks from unpermitted or unregulated water pollution. For this reason, commenters argued, the agencies should have prepared an environmental justice analysis.

Another commenter suggested that neither the 2015 Rule nor the proposed repeal has any environmental effects, and therefore neither has any adverse effects on environmental justice communities or any other population.

Agencies' Response: This final rule repealing the 2015 Rule and recodifying the pre-existing regulations will restore the longstanding regulatory framework that was in place nationwide for many years prior to the promulgation of the 2015 Rule and that is currently in effect in more than half of the states due to preliminary injunctions against the 2015 Rule. Further, this final rule is a definitional rule that itself imposes no direct impacts on environmental or public health for communities at large. The agencies therefore believe that this action does not have disproportionately high and adverse human health or environmental effects on minority, low-income populations, and/or indigenous peoples, as specified in Executive Order 12898.

10.6 National Environmental Policy Act

Some commenters asserted that the agencies must prepare an environmental analysis under the National Environmental Policy Act (NEPA) because the proposed rule is a federal action that will "significantly affect the quality of the human environment." One commenter stated that there is no indication that the agencies conducted the required analysis, citing *Robertson v. Methow Valley Citizens*, 490 U.S. 332, 350–54 (1989) and *Del. Riverkeeper Network v. FERC*, 753 F.3d 1304, 1313 (D.C. Cir. 2014).

Conversely, a different commenter asserted that repealing the 2015 Rule and recodifying the pre-existing regulations would not trigger the need to prepare an environmental analysis under NEPA because codifying the agencies' current practice would not have a significant environmental impact.

Agencies' Response: This final rule is not subject to the requirements of NEPA. Generally, the CWA exempts actions of the EPA Administrator from NEPA obligations. 33 U.S.C. § 1371(c)(1)

(providing that, with two exceptions not relevant here, "no action of the [EPA] Administrator taken pursuant to [the CWA] shall be deemed a major Federal action significantly affecting the quality of the human environment within the meaning of [NEPA]"). As the Senate Conference Report advised: ''If the actions of the Administrator under [the CWA] were subject to the requirements of NEPA, administration of the Act would be greatly impeded.'' S. Conf. Rep. No. 92-1236, *reprinted in* 1972 U.S.C.C.A.N. 3776, 3827.

The statutory exemption applies here despite the fact that the EPA is promulgating this rule jointly with the Department of the Army. Nothing in the CWA's exemption from NEPA limits it to actions taken by the EPA alone. *See*, *e.g.*, *Murray Energy Corp. v. U.S. Dep't of Def.*, 817 F.3d 261, 273 (6th Cir. 2016) ("That the [2015 Rule] was promulgated jointly by the EPA Administrator and the Secretary of the Army does not defeat the fact that it represents action, in substantial part, of the Administrator."); *see also Municipality of Anchorage v. United States*, 980 F.2d 1320, 1328–29 (9th Cir. 1992) (holding that an action "does not cease to be 'action of the Administrator' merely because it was adopted and negotiated in conjunction with the Secretary of the Army and the Corps"). In *Municipality of Anchorage*, the Ninth Circuit found that a Memorandum of Agreement between EPA and the Corps providing guidance for administration of the section 404 permitting program was exempt from NEPA under 33 U.S.C. § 1371(c). 980 F.2d at 1329. This rule concerns the jurisdictional scope of the entire Act, implicating the many CWA programs administrated only by the EPA (the EPA shares its CWA authority with the Army only with respect to section 404, 33 U.S.C. § 1344). The EPA has the ultimate authority to determine the scope of CWA jurisdiction, see Administrative Authority to Construe section 404 of the Federal Water Pollution Control Act, 43 Opp. Att'y Gen. 197 (1979), and this final rule is an "action of the Administrator." *Murray Energy*, 817 F.3d at 273.

10.7 Endangered Species Act

A few commenters suggested that the agencies must undertake consultation under section 7(a)(2) of the Endangered Species Act (ESA) for the proposed rule because repealing the 2015 Rule will impact threatened and endangered species by reducing the scope of waters protected under the CWA. One commenter cited the following cases to support the assertion that the proposed rule must undergo consultation prior to finalization: *W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 495 (9th Cir. 2010); *Nat'l Parks Conservation Ass'n v. Jewell*, 62 F. Supp. 3d 7, 12 (D.D.C. 2014); *Citizens for Better Forestry v. U.S. Dep't of Agriculture*, 481 F. Supp. 2d 1059 1095–97 (N.D. Cal. 2007); *Wash. Toxics Coal. v. U.S. Dep't of Interior*, 457 F. Supp. 2d 1158, 1182–95 (W.D. Wash. 2006).

Another commenter asserted that the proposed rule would not trigger the ESA's section 7 consultation requirement because recodifying the pre-existing regulations would not affect any endangered or threatened species or designated critical habitats.

Agencies' Response: Consultation under section 7(a)(2) of the ESA applies when an agency exercises power under its enabling act to authorize, fund, or carry out an action that may affect listed species or designated critical habitat. 16 U.S.C. § 1536(a)(2); 50 CFR § 402.14(a). The consultation requirement also applies only if the agency has discretion under its enabling legislation to modify the proposed action for the benefit of listed species. *See* 50 CFR § 402.03. For the reasons discussed below, this rulemaking does not trigger consultation under section 7(a)(2) of the ESA.

This final rule to repeal the 2015 Rule and restore the prior regulations does not authorize any activity that could affect a listed species or designated critical habitat. This action is a definitional rule that addresses the scope of the agencies' regulatory jurisdiction as established by the CWA, which is limited to the "waters of the United States," 33 U.S.C. § 1362(7). Defining the term "waters of the United States" in the CWA does not implicate section 7(a)(2) of the ESA. Section 7(a)(2) serves as a check on affirmative action that an agency takes or authorizes under its enabling act, but "does not expand the powers conferred on an agency by its enabling act." *Platte River Whooping Crane Critical Habitat Maintenance Trust v. FERC*, 962 F.2d 27, 33–34 (D.C. Cir. 1992). The bounds of the agencies' regulatory jurisdiction under the CWA are set by the CWA alone, and cannot be expanded or modified by the results of a consultation under section 7(a)(2). That provision does not grant the agencies authority to classify areas as "waters of the United States" under the CWA. Because the agencies lack authority "to consider the protection of threatened or endangered species as an end in itself" in determining the bounds of their CWA jurisdiction, ESA consultation would serve no purpose and is not required. *See Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 671 (2007). Further, because the agencies determined that the 2015 Rule exceeded their statutory authority, the agencies had no discretion to leave the 2015 Rule in place to benefit listed species.

Moreover, the relationship between this final rule and any potential effects from future third-party activities is too attenuated to establish legal causality. Indeed, any harm to listed species or designated critical habitat resulting from future activities in non-jurisdictional waters would result from the activities themselves, not this final rule. The potentially harmful effects of future third-party projects are also too speculative and hypothetical to be meaningfully analyzed in a consultation on this rulemaking, and the consequences of such projects would depend on a host of factors unrelated to this final rule, including the nature of the proposed activity and the applicability of other federal, state, and local laws. As such, those future third-party projects—not this final rule—would be the appropriate actions triggering consultation under the ESA, to the extent that section 7 were found to apply to those actions.

Section 11 MISCELLANEOUS COMMENTS

This section contains a series of comments submitted in response to the agencies' proposed rule that are outside the scope of this rulemaking. The agencies are not providing responses to these comments.

One commenter resubmitted comments on the 2014 proposed rule asking for clarification as to whether or how the 1987 Wetland Delineation Manual would play a role in the method used to define a wetland under that proposal.

One commenter asserted that impacts due to fracking and pipelines impact soil and groundwater, referencing EPA studies and studies in New York and Pennsylvania. Another commenter asserted that fracking, concentrated animal feeding operations, and illegal waste dumping are threats to clean water.

One commenter expressed opposition to section 108(a) of the Energy and Water appropriations bill, which the commenter asserted would allow the agencies to repeal the 2015 Rule without adhering to

the proper rulemaking procedures or considering science-based input and the economic benefits of protecting waterways.

One commenter questioned whether the President has upheld CWA section 101(c) and asked what actions the President has taken to ensure that Canada and Mexico are eliminating the discharge of pollutants into their waters. The commenter also asked whether there are any pollutants in toxic quantities entering into America's waterways.

A few commenters suggested that the agencies review and possibly expand nationwide permits for activities by the total spectrum of water solution providers to assure that best practices to protect jurisdictional waters can be accomplished for common types of projects.

One commenter discussed the importance of water regulations in the context of protecting the health of communities living within three miles, one mile, and within closer distances to Superfund sites. The commenter cited EPA statistics using census data, where for example the EPA found that approximately 53 million people live within three miles of a Superfund remedial site. Another commenter noted that Superfund sites provide examples of the hazards associated with the pollution of waters that are not proximate to navigable-in-fact waters, citing to examples in Arkansas, Indiana, Michigan, and Rhode Island.

One commenter suggested that the agencies end actions that allow mission creep, work with state and local governments to develop permitting and implement sound land and water use practices, and connect with the American public rather than a select group of environmental organizations.

One commenter suggested that all federal land use and water management plans and policies should strictly comply with and conform to state water management plans and policies.

One commenter suggested that the EPA adopt an adaptive management and watershed-based approach to protecting water quality. The commenter stated that improving coordination between the EPA's laboratories and enforcement offices could help the agency implement such an approach.

One commenter stated that the definitions for point source and nonpoint source need to be clearer in terms of naturally occurring weather events.

One commenter asserted that navigable waters as defined in 33 CFR part 329 are quantifiable, unlike the waters covered by the 2015 Rule's definition, which the commenter stated would change continually.

APPENDIX B

2015 Notice of Intent to Sue

CENTER FOR BIOLOGICAL DIVERSITY ● CENTER FOR FOOD SAFETY
TURTLE ISLAND RESTORATION NETWORK ● WATERKEEPER ALLIANCE
HUMBOLDT BAYKEEPER● RUSSIAN RIVERKEEPER ● MONTEREY COASTKEEPER
SNAKE RIVER WATERKEEPER ● UPPER MISSOURI WATERKEEPER

August 5, 2015

Sent via Email and Certified Mail/Return Receipt Requested

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Lieutenant General Thomas P. Bostick
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Re: Formal Notice of Intent to Sue: Violations of the Endangered Species Act Regarding Final Definition of "Waters of the United States"

On behalf of the Center for Biological Diversity, Center for Food Safety, Turtle Island Restoration Network, Waterkeeper Alliance, Humboldt Baykeeper – a program of the Northcoast Environmental Center, Russian Riverkeeper, Monterey Coastkeeper – a program of the Otter Project, Upper Missouri Waterkeeper, and Snake River Waterkeeper, we hereby provide notice, pursuant to Section 11(g) of the Endangered Species Act ("ESA"), 16 U.S.C. §1540(g)(2)(A)(i), of our intent to sue the Environmental Protection Agency ("EPA") and Army Corps of Engineers ("Army Corps") for violations of the ESA.

EPA and the Army Corps (the "Agencies") have violated Section 7(a)(2) and Section 7(d) of the ESA in connection with their promulgation of a new, final regulation that purports to define the "waters of the United States" under the Clean Water Act ("CWA")[1], without first consulting with the Fish and Wildlife Service ("FWS") and National Marine Fisheries Service ("NMFS") (collectively "the Services") to prepare a Biological Opinion; and have violated the ESA by failing to ensure that the Rule will not likely jeopardize endangered or threatened species, and by failing to ensure that the Rule will not destroy or adversely modify such species' critical habitat. The Rule, which is nationwide in its scope, will directly, indirectly, and cumulatively impact endangered species and therefore easily crosses the "may affect" threshold – and indeed, the Rule will adversely affect endangered aquatic species.

The threats that the Rule poses to listed species are the result of discrete, discretionary policy choices that the Agencies made to arbitrarily constrain the reach of our nation's waters. Most notably, the Rule (1) limits, without any scientific justification, those waters which may be

[1] *Clean Water Rule: Definition of "Waters of the United States",* 80 Fed. Reg. 37,054 (June 29, 2015) (hereafter "Rule").

subject to a "significant nexus" analysis; (2) narrowly and arbitrarily restricts which waters can be deemed to be "tributaries" and which can be deemed to be "adjacent" to other regulated waters; and (3) categorically exempts several types of the nation's waters – such as certain types of ditches and all sources of groundwater – from the regulatory definition of "waters of the United States," regardless of their habitat value and/or their relationship with other waters that are clearly covered under the CWA. The net effect of these changes is that the Rule excludes from CWA protection many types of waters that provide habitat for endangered species, such as waters that are more than 4,000 feet from the nearest tributary, and ditches with intermittent flow and ephemeral features in arid areas. Furthermore, the areas removed from CWA protection in many instances have significant effects on downstream waters within a watershed that are also habitat for endangered and threatened species. Due to these provisions, the Rule "is narrower than that under the existing regulation," "[f]ewer waters will be defined as 'waters of the United States'" under the Rule, and the Rule will "reduc[e] the instances in which permitting authorities, including the states and tribes with authorized section 402 and 404 CWA permitting programs, would need to make jurisdictional determinations on a case-specific basis."[2] We believe that many of these changes are precluded by the CWA itself. By the Agencies' own admission, none of these choices are required by the CWA, but they instead represent, at most, discretionary policy choices.[3]

Many of the nation's waters that were previously protected by the CWA are habitats for endangered species. For example, salmon and steelhead in the Pacific Northwest, such as coho salmon (*Oncorhyncus kisutch*) and Chinook salmon (*Oncorhyncus tshawytscha*), regularly use and require certain types of ditches, included ditches with intermittent and ephemeral flow, during their life cycle. Small wetlands are important habitat for amphibians and reptiles including the Oregon spotted frog (*Rana pretiosa*), Houston toad (*Bufo houstonensis*), Wyoming toad (*Bufo baxteri*), California red-legged frog (*Rana draytonii*), California tiger salamander (*Ambystoma californiense*), desert slender salamander (*Batrachoseps major aridus*) reticulated flatwoods salamander (*Ambystoma bishopi*), frosted flatwoods salamander (*Ambystoma cingulatum*), bog turtle (*Glyptemys muhlenbergii*), and other species that prefer small, neighboring wetlands and ponds which will receive less protection under the Rule. Vernal pool fairy shrimp (*Branchinecta lynchi*) are found in both California and Oregon, yet inexplicably, the Rule categorically only allows for the protection of vernal pools in California.

In addition, cumulative impacts resulting from fewer protected "other waters" will likely mean more pollution and degraded water quality for endangered freshwater, anadromous, and marine species. Yet, EPA and Army Corps have chosen to enact a Rule that will reduce the protective reach of the CWA to such habitats – eliminating the application of both the CWA's water quality standards and its source-specific controls over both chemical pollutants and the discharge of dredged or fill material – without consulting with the Services regarding these policy choices. Consequently, the Services never considered the impacts of the specific

[2] *Id*.

[3] As the Agencies acknowledge in the final Rule, "the agencies' interpretive task in this rule—determining which waters have a 'significant nexus'—requires scientific and policy judgment, as well as legal interpretation" as "waters fall along a gradient of chemical, physical, and biological connection to traditional navigable waters," and therefore "it is the agencies' task to determine where along that gradient to draw lines of jurisdiction under the CWA. *Id*.

proposal, and now endangered species are left in the lurch. The Endangered Species Act is designed to ensure that species will not go extinct due to such regulatory choices. By failing to comply with Section 7, the Agencies have run afoul of the ESA's "institutionalized caution."[4]

The Rule also reduces the Clean Water Act's protective coverage far below the scope established by the Supreme Court by categorically reducing covered waters and expanding exemptions for certain water features. In past agency practice, the EPA and Army Corps have consistently retained the authority to conduct case-specific assessments of whether particular waterbodies are "waters of the United States" even if they do not fit into the specific categories of covered waters. The Rule eliminates the Agencies' ability to make such case-by-case assessments if a particular waterbody does not fit within the specific categories that are enumerated by the Rule. As such, it fails to meet the purposes and goals of the CWA.

LEGAL BACKGROUND

A. The Endangered Species Act

The ESA was enacted to provide a "means whereby the ecosystems upon which endangered species and threatened species depend may be conserved…[and] a program for the conservation of such endangered species and threatened species…."[5] The ESA vests primary responsibility for administering and enforcing the statute with the Secretaries of Commerce and Interior, who have delegated this responsibility to the NMFS and the FWS respectively.[6]

Section 2(c) of the ESA establishes that it is "the policy of Congress that all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this Act."[7] The ESA defines "conservation" to mean "the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this Act are no longer necessary."[8]

To fulfill the substantive purposes of the ESA, each federal agency is required to engage in consultation with FWS and/or NMFS to "insure that any action authorized, funded, or carried out by such agency…is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the adverse modification of habitat of such species… determined… to be critical…."[9] Section 7 "consultation" is required for "any action [that] may affect listed species or critical habitat."[10] Agency "action" is broadly defined in the ESA's implementing regulations to include "(a) actions intended to conserve listed species or their habitat; (b) *the promulgation of regulations*; (c) the granting of licenses, contracts, leases,

[4] *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 194 (1978).
[5] 16 U.S.C. §§ 1531-1544; 16 U.S.C. § 1531(b).
[6] 50 C.F.R. § 402.01(b).
[7] 16 U.S.C. § 1531(c)(1).
[8] *Id*. § 1532(3).
[9] *Id*. § 1536(a)(2).
[10] 50 C.F.R. § 402.14.

easements, rights-of-way, permits, or grants-in-aid; or (d) actions directly or indirectly causing modifications to the land, water, or air."[11]

At the completion of consultation, FWS or NMFS issues a Biological Opinion that determines if the agency action is likely to jeopardize the species. If so, the opinion must specify reasonable and prudent alternatives that will avoid jeopardy and allow the agency to proceed with the action. FWS and NMFS may also "suggest modifications" to the action (called reasonable and prudent measures) during the course of consultation to "avoid the likelihood of adverse effects" to the listed species even when not necessary to avoid jeopardy.[12]

Section 7(d) of the ESA provides that once a federal agency initiates consultation on an action under the ESA, the agency, as well as any applicant for a federal permit, "shall not make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would not violate subsection (a)(2) of this section."[13] The purpose of Section 7(d) is to maintain the environmental status quo pending the completion of consultation. Section 7(d) prohibitions remain in effect throughout the consultation period and until the federal agency has satisfied its obligations under Section 7(a)(2) that the action will not result in jeopardy to the species or adverse modification of its critical habitat.

B. The Clean Water Act

The objective of the Clean Water Act is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.[14] Section 301 of the CWA makes the "discharge of any pollutant" by any person unlawful without a permit granted under Section 402 or Section 404 of the CWA.[15] The CWA defines the "discharge of a pollutant" as the "addition of any pollutant to navigable waters from any point source."[16] In turn "navigable waters" is defined as the "waters of the United States, including the territorial seas."[17]

EPA and the Army Corps have long had regulations in place defining the "waters of the United States" to include not just waters that are actually navigable, but also tributaries of such waters, interstate waters and their tributaries, non-navigable intrastate waters whose use or misuse could affect interstate commerce, as well as all adjacent freshwater wetlands.[18] In *United States v. Riverside Bayview Homes*, the Supreme Court unanimously concluded that adjacent wetlands are "inseparably bound up" with waters of the United States and upheld their protection under the CWA.[19] In *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* ("*SWANCC*"), the Court held that "isolated" waters could not be protected under the

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[11] *Id*. § 402.02 (emphasis added).
[12] 50 C.F.R. § 402.13.
[13] 16 U.S.C. § 1536(d).
[14] 33 U.S.C. § 1301(a).
[15] 33 U.S.C. § 1311(a).
[16] 33 U.S.C. § 1362(12).
[17] 33 U.S.C. § 1362(7).
[18] *See, e.g., Permits for Activities in Navigable Waters or Ocean Waters*, 40 Fed. Reg. 31320 (Jul. 25, 1975) (originally codified at 33 C.F.R. Part 209).
[19] 474 U.S. 121 (1985).

scope of the CWA where the sole basis for asserting jurisdiction was the mere usage of those waters by migratory birds.[20]

In *Rapanos v. United States*, the Supreme Court wrestled with the scope of protection under the CWA for wetlands adjacent to non-navigable tributaries.[21] Four Justices concluded that "waters of the United States" only covered wetlands that have a surface connection to "relatively permanent, standing or continuously flowing bodies of water."[22] Justice Kennedy, writing for himself, concluded that tributaries and wetlands are protected by the CWA where they possess a "significant nexus" to navigable waters. According to Justice Kennedy, wetlands possesses a "significant nexus" when they, either alone or in combination with similarly-situated wetlands, "significantly affect the chemical, physical, and biological integrity of other covered waters."[23] With regard to wetlands that are adjacent to non-navigable tributaries, Justice Kennedy concluded that, in the absence of a more fully-developed rulemaking record, EPA and the Army Corps could, on a case-by-case basis, establish a significant nexus by demonstrating that a wetland performed "critical functions related to the integrity of other waters – functions such as pollutant trapping, flood control, and runoff storage."[24] The four dissenting Justices in *Rapanos* would have concluded that a wetland is protected by the CWA if it meets either the plurality or Justice Kennedy's test for jurisdiction.

As EPA and the Army Corps recognize, the net effect of *Rapanos* is that a given water may qualify as "a water of the United States" at least in all situations in which Justice Kennedy's "significant nexus" requirement is met. Indeed, every Court of Appeals that has considered the issue has found this to be true.[25] Thus, as the Agencies concede, they at least had the discretion to assert jurisdiction over many of the waters they have excluded under the Rule. Indeed, we believe they had a legal obligation to do so.

FACTUAL BACKGROUND

On April 21, 2014, EPA and Army Corps published a proposed rule defining the "waters of the United States."[26] The Agencies made clear throughout the preamble to the proposed rule

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[20] 531 U.S. 159 (2001).
[21] 547 U.S. 715 (2006).
[22] *Id*. at 739.
[23] *Id*. at 780.
[24] *Id*.
[25] *See United States v. Gerke Excavating, Inc*., 464 F.3d 723 (7th Cir. 2006); *N. Cal. River Watch v. City of Healdsburg*, 496 F.3d 993 (9th Cir. 2007); and *United States v. Robison*, 505 F.3d 1208 (11th Cir. 2007) (all determining that jurisdiction should exist in situations in which Justice Kennedy's test is met); *United States v. Johnson*, 467 F.3d 56 (1st Cir. 2006), *United States v. Donovan*, 661 F.3d 174, 182–183 (3d Cir. 2011) and *United States v. Bailey*, 571 F.3d 791 (8th Cir. 2009) (all determining that courts should find CWA jurisdiction in cases in which *either* Justice Kennedy or the plurality would find that jurisdiction is satisfied.); and *United States v. Cundiff*, 555 F.3d 200, 210 (6th Cir. 2009) (declining to decide which test was controlling under *Marks* because government jurisdiction over the relevant wetlands was proper under either Justice Kennedy's or the plurality's test). Importantly, none of these Circuits has deemed the plurality opinion in *Rapanos* to have *any* significance, in terms of limiting jurisdiction, in situations in which Justice Kennedy's test is met.
[26] *Definition of "Waters of the United States" Under the Clean Water Act, Proposed Rule* (hereafter "Proposed Rule"), 79 Fed. Reg. 22,188 (Apr. 21, 2014).

that they have many choices and options in deciding how to demarcate the jurisdictional reach of the CWA:

> The agencies considered multiple options for determining how best to balance the science and the policy options available to address "other waters." Those options ranged from establishing jurisdiction over all "other waters" with a nexus to traditionally navigable waters, interstate waters, or the territorial seas, with the agencies determining categorically the nexus to be significant, to declining to assert jurisdiction over any "other waters."[27]
>
> Options could include asserting jurisdiction over all waters connected through a shallow subsurface hydrologic connection or confined surface hydrologic connection regardless of distance; asserting jurisdiction over adjacent waters only if they are located in the floodplain or riparian zone of a jurisdictional water; considering only confined surface connections but not shallow subsurface connections for purposes of determining adjacency; or establishing specific geographic limits for using shallow subsurface or confined surface hydrological connections as a basis for determining adjacency, including, for example, distance limitations based on ratios compared to the bank-to-bank width of the water to which the water is adjacent.[28]
>
> The agencies therefore request comment on whether there are other reasonable options for providing clarity for jurisdiction over [adjacent] waters with these types of connections.[29]
>
> The agencies seek comment on specific options for establishing additional precision in the definition of "neighboring" [waters]… .[30]

Several of the changes between the Proposed Rule and the final Rule illustrate the discretionary nature of this rulemaking, and also highlight specific areas where ESA-protected species could be adversely affected by narrowing the jurisdiction of the CWA. Perhaps most significantly, between the proposed and final Rule, EPA and Army Corps made substantial changes to which waters are eligible for a "significant nexus" analysis. The Agencies proposed that all waters that were not otherwise covered under the Rule would potentially be eligible for protection if a significant nexus was found. In making a significant nexus determination, EPA and Army Corps could analyze the water "alone or in combination with other similarly situated waters in the region" to determine if the wetland affects the chemical, physical, or biological integrity of either a traditional navigable water, an interstate water, or the territorial seas.[31] For the past ten years since *Rapanos*, this has been the analytical process that EPA and Army Corps have used to assess "other waters." The Proposed Rule thus maintained much of the status quo regarding assessing jurisdiction of other waters under the CWA.

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[27] *Id*. at 22,198.
[28] *Id*. at 22,208.
[29] *Id*.
[30] *Id*. at 22,209.
[31] 79 Fed. Reg. at 22,193.

In the final Rule, however, EPA and Army Corps decided (without an opportunity for public comment) that, as a general matter, the only waters eligible for case-specific significant nexus determinations will be those that are either within the 100-year floodplain of a traditional navigable water, an interstate water or a territorial sea, or within 4000 feet of either the high tide line or the ordinary high water mark of a traditional navigable water, an interstate water, a territorial sea, an impoundment of regulated waters, or a tributary.[32] Thus, even if a wetland possessed extraordinary ecological value and did in fact contribute to the chemical, physical, and biological integrity of downstream waters, if that wetland was over 4000 feet from a tributary, it would not be eligible for any protection under the CWA.

Additionally, in the Proposed Rule, EPA and Army Corps defined "neighboring" and "riparian area" regarding adjacent waters protected under the CWA. Waters within riparian areas were proposed to encompass areas where "surface or subsurface hydrology directly influence the ecological processes and plant and animal community structure in that area."[33] Under these proposed definitions, waters within riparian areas could be protected regardless of their distance from the tributary or river that the riparian area was adjacent to so long as the water was within a riparian area.

But in the final Rule, the Agencies abandoned this approach, deleted the definition of "riparian area" and instead defined "neighboring" as those waters (1) within 100 feet of the ordinary high water mark of an otherwise covered water, (2) within both the 100-year floodplain and less than 1,500 feet of a such a water, or (3) within either 1,500 feet of the high tide line of a traditional navigable water or the ordinary high water mark of the Great Lakes.[34] Thus, even if a riparian area extends a mile or more from a water body, some wetlands or other waters within the riparian area would not be protected as adjacent waters regardless of the biological importance of the ecological processes, the plant or animal communities supported by those other waters, or their chemical, physical or biological influence on navigable waterways.

And as a third example, in the Proposed Rule, the Agencies excluded two types of ditches from jurisdiction under the CWA, including "ditches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow;" and "ditches that do not contribute flow, either directly or through another water" to (1) navigable waters used in interstate commerce, (2) interstate waters, (3) the territorial sea, or (4) impoundments of these three types of waters.[35] These exclusions tracked both Agencies' past practice.[36]

However, the final Rule expanded the exclusion for ditches, exempting ditches with ephemeral and intermittent flow unless the ditches were excavated from or relocated an existing tributary.[37] Furthermore, it now appears possible for a covered tributary to drain into a non-jurisdictional water, such as a ditch with intermittent flow, which in turn drains back into a

[32] 80 Fed. Reg. at 37,059.
[33] *Id*. at 22,199.
[34] 80 Fed. Reg. at 37,058.
[35] 79 Fed. Reg. at 22,193.
[36] *Id*. at 22,203.
[37] *Id*. at 37,059.

jurisdictional water further downstream. The Agencies this, stating in the definition of "tributary" that a tributary "does not lose its status as a tributary if it contributes flow through a water of the United States that does not meet the definition of tributary *or through a non-jurisdictional water to a water*" that is protected by the CWA.[38] The biological consequences of a tributary being upstream of a non-jurisdictional water are unknown, given that discharges of pollutants into the non-jurisdictional water downstream would not be regulated under the CWA. Because activities in or around excluded waters can still substantial biological, physical and chemical impacts on jurisdictional waterways downstream and upstream, the Agencies should have considered those consequences to endangered species.

ESA VIOLATIONS

I. Failure to Insure No Jeopardy, And No Destruction or Adverse Modification of Critical Habitat

Consultation under Section 7 of the Endangered Species Act is required whenever a discretionary agency action "may affect" any listed species or its critical habitat.[39] The Clean Water Act does not command EPA or the Army Corps to promulgate regulations setting forth either the general limits or the specific exemptions contained in this new definition of the "waters of the United States." Just like every agency, EPA and Army Corps must consult when they develop regulations, if those regulations cross the "may affect" threshold of the ESA. As noted above, the Services have consistently concluded that agency rulemakings fall within the broad scope of Section 7(a)(2) of the ESA which covers "any action authorized, funded, or carried out by such agency." Many judicial holdings reinforce the proposition that a regulation that may affect endangered species must be the subject of consultation.[40] Because the Rule will likely have effects on endangered species and their critical habitats as it is implemented in the future, consultations should have occurred with the Services.

The EPA and Army Corps' collective decision – through a rulemaking – to exempt categories of waters and draw lines excluding a subset of potentially covered waters from jurisdiction based on policy concerns is a discretionary agency action, and is therefore subject to the consultation requirement of the ESA.

Again, perhaps the most damaging decision in this regard was the Agencies' decision to preclude any application of the significant nexus test for most waters beyond 4,000 feet from any traditional navigable water, interstate water, territorial sea, impounded water, or tributary. The following scenario illustrates this. Wetland A is 3999 feet away from a tributary and possesses a significant nexus – thus, under the Rule it would be protected by the CWA. Wetland B is in all

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[38] 80 Fed. Reg. at 37,016.

[39] 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(a) ("Each Federal agency shall review its actions at the earliest possible time to determine whether any action may affect listed species or critical habitat. If such a determination is made, formal consultation is required…"); *Wash. Toxics Coal. v. EPA*, 413 F.3d 1024, 1032 (9th Cir. 2005); *Defenders of Wildlife v. Administration*, 882 F.2d 1294 (8th Cir. 1989).

[40] *See*, *e.g.*, *W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 495 (9th Cir. 2010); *Nat'l Parks Conservation Ass'n v. Jewell*, 62 F.Supp.3d 7 (D.D.C. 2014); *Citizens for Better Forestry v. U.S. Dep't of Agriculture*., 481 F.Supp.2d 1059 (N.D. Cal 2007); *Washington Toxics Coal. v. U.S. Dep't of Interior*, 457 F.Supp.2d 1158 (W.D. Was. 2006).

other ways identical to Wetland A except it is 4001 feet away from the same tributary – under the Rule, it would not be protected by the CWA and consequently, would be subject to being destroyed or receiving discharges that eventually find their way into jurisdictional waters. Even if Wetland B were the single most important wetland to downstream, covered waters — in terms of the critical functions of pollutant trapping, sediment control, and run-off storage — it would be categorically excluded from protection under the CWA.

Indeed, the loss of Wetland B, because it is not protected by the CWA, could have practical impacts on downstream waters. If such waters were occupied by endangered species, such as the bog turtle, the Houston toad, or the reticulated flatwoods salamander, the relevant species would likely be harmed. Similarly, if Wetland B were within designated critical habitat for an endangered species, the loss of the wetland could even more directly harm the relevant species. The cumulative impact of losing potentially 10% of all wetlands in the United States could have profound impacts on hundreds of endangered freshwater, anadromous, and marine species.[41] By failing to consult, the biological consequences of the Rule are unknown.

By proposing to cover all waters that meet the significant nexus test, the Agencies acknowledged that they have at least the discretion to regulate waters such as Wetland B where they have such a nexus with otherwise covered waters. Section 7 requires that all federal agencies utilize their authorities to conserve endangered species, ensure against jeopardy, and avoid actions that adversely modify or destroy critical habitat. By precluding any application of the significant nexus test for waters beyond 4,000 feet, the Rule precludes EPA and the Corps from doing anything on a case-specific basis to protect waters such as Wetland B. Before disclaiming such jurisdiction, the Agencies at a minimum had a duty to consult with the Services regarding the potential effects of their discretionary action.[42]

The Agencies desired to provide "a practical and implementable rule" and to draw "reasonable boundaries in order to protect the waters that most clearly have a significant nexus while minimizing uncertainty." But the Agencies cannot do so without engaging the Services first, through the consultation process, to *inform* that decision and to comply with their affirmative duties under Section 7(a)(2) of the ESA.[43] Had EPA and Army Corps complied with

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[41] Annie Synder, Obama admin OK'd controversial rule over experts' objections, Greenwire, July 27, 2015, http://www.eenews.net/greenwire/stories/1060022487 (Detailing concerns of the Army Corps that changes to the final version of the rule would significantly limit the reach of the Clean Water Act, potentially leaving as much as 10 percent of water bodies no longer protected from pollution). *See* Appendix.

[42] We believe that the Agencies have a statutory obligation under the Clean Water Act to protect all waters meeting the significant nexus test. We refer to the Agencies' action here as "discretionary" only to acknowledge – as they do – that they have *at least* the discretion to regulate these waters.

[43] Notably, in the Army Corps' *Finding of No Significant Impact* (FONSI) completed pursuant to the National Environmental Policy Act regarding the Rule, the Army Corps stated the following with respect to other waters beyond 4000 feet:

> [In] the agencies experience the vast majority of wetlands with a significant nexus are located within the 4,000 foot boundary. It is anticipated that the incremental decrease in jurisdictional determinations for wetlands outside the 100 year floodplain or 4,000 feet of the high tide line or ordinary high water mark of jurisdictional waters would correspondingly be small. *It is also speculative and hypothetical as to what the environmental consequences would be* for such waters beyond the 100-year floodplain or 4,000 feet if they are not subject to the Section 404 permitting process. The consequences would

Section 7(a)(2), the Services would have analyzed the consequences for endangered species of EPA's and the Corps' decision to disclaim jurisdiction over waters more than 4,000 feet from other covered waters. This is what Congress intended.

Additional discretionary choices by the EPA and Army Corps constitute violations of the ESA consultation requirement by failing to insure against jeopardy or adverse modification of critical habitat. These include the following:

- The exclusion of ditches with ephemeral and intermittent flow that are not a relocated tributary or excavated in a tributary;
- The exclusion of gullies, rills, and ephemeral features such as ephemeral streams that do not have a bed and banks and ordinary high water mark;
- The exclusion of all groundwater, regardless of its impact on nearby surface waters;
- The exclusion of wastewater treatment systems;
- The exclusion of "waters being used for established farming, ranching, and silviculture activities" from being deemed to be "adjacent," thus rendering them subject to protection solely via the significant nexus assessment process;
- The decision to limit "neighboring" waters to those features within 100 feet of the ordinary high water mark, the waters within the 100-year floodplain and not more than 1500 feet from a covered water, or waters within 1500 feet of the Great Lakes; and
- The exclusion of tributaries that do not possess a bed, banks, and ordinary high water mark.

II. Irreversible or Irretrievable Commitment of Resources

Section 7(d) of the ESA prohibits a federal agency from "mak[ing] any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would not violate subsection (a)(2) of this section."[44] By failing to consult with the Services, the EPA and Army Corps have all but guaranteed that some wetlands and other waters will be degraded or destroyed without the possibility that a reasonable and prudent measure could ever be implemented to protect a listed species or its critical habitat because the Agencies have improperly foreclosed the possibility of consultations in the Rule. Accordingly, the Agencies are in violation of Section 7(d) of the ESA.

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depend on other factors not related to this rule, such as the nature of any activity proposed for such waters and the waters affected, and any other requirements (e.g., *Section 9 of the Endangered Species Act*, or state and local law) that may be applicable.

See U.S. ARMY CORPS OF ENGINEERS, FINDING OF NO SIGNIFICANT IMPACT: ADOPTION OF THE CLEAN WATER RULE: DEFINITION OF WATERS OF THE UNITED STATES (May 26, 2015) at 23 (emphasis added).

[44] 16 U.S.C. § 1536(d).

CONCLUSION

If the EPA and Army Corps do not act within 60 days to correct the violations described in this letter, we will pursue litigation against the Agencies. If you have any questions, or would like to discuss this matter, please contact us.

Sincerely,

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APPENDIX

DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS
441 G STREET, NW
WASHINGTON, D.C. 20314-1000

REPLY TO
ATTENTION OF

CECW-CEO

27 April, 2015

MEMORANDUM FOR Assistant Secretary of the Army for Civil Works

SUBJECT: Draft Final Rule on Definition of "Waters of the United States"

1. As we have discussed throughout the rule-making process for "Waters of the United States" over the last several months, the Corps of Engineers has serious concerns about certain aspects of the draft final rule. On 3 April 2015, the Environmental Protection Agency delivered the draft final rule to the Office of Management and Budget to initiate the inter-agency review process by our federal partners. Once we obtained a copy of the draft final rule, I asked USACE legal and regulatory staff to review it to ascertain the extent to which Corps' concerns had been incorporated, and to conduct an analysis of the legal technical impacts of its language. That just-completed review reveals that the draft final rule continues to depart significantly from the version provided for public comment, and that the Corps' recommendations related to our most serious concerns have gone unaddressed. Specifically, the current draft final rule contradicts long-standing and well-established legal principles underlying Clean Water Act (CWA) Section 404 regulations and regulatory practices, especially the decisive *Rapanos* Supreme Court decision. The rule's contradictions with legal principles generate multiple legal and technical consequences that, in the view of the Corps, would be fatal to the rule in its current form.

2. The preamble to the proposed rule and the draft preamble to the draft final rule state that the rulemaking has been a joint endeavor of the EPA and the Corps, and that both agencies have jointly made significant findings, reached important conclusions, and stand behind the final rule. Those statements are not accurate with respect to the draft final rule, as the process followed to develop it greatly limited Corps input – a practice that has continued thus far in the inter-agency review process. Within these circumstances however, I believe that the Corps has done all that it could do to assist and support the rulemaking. The critical fact remains that the most important concerns regarding the defensibility and implementability of the draft final rule remain unaddressed, although we continue to believe, as we have previously explained, that a relatively few simple "fixes" that the Corps has offered would resolve the problems with the draft final rule.

3. The analysis of and concerns with the draft final rule developed by the Corps professional staff are respectfully forwarded for your consideration. I have reviewed all of the attached documents and have concluded that unless the draft final rule is changed to adopt the Corps' proposed "fixes," or some reasonably close variant of them, then under the National Environmental Policy Act, the Corps would need to prepare an Environmental Impact Statement (EIS) to address the significant adverse effects on the human environment that would result from the adoption of the rule in its current form. Thank you for your consideration of the Corps' serious concerns and recommendations on this issue.

Building Strong!

JOHN W. PEABODY
Major General, U.S. Army
Deputy Commanding General
for Civil and Emergency Operations

Table of Contents

DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS
441 G STREET, NW
WASHINGTON, DC 20314-1000

REPLY TO
ATTENTION OF

CECC-E

APR 24 2015

MEMORANDUM FOR Deputy Commanding General for Civil and Emergency Operations, U.S. Army Corps of Engineers (ATTN: MG John W. Peabody)

THROUGH the Chief Counsel, U.S. Army Corps of Engineers (ATTN: David R. Cooper)

SUBJECT: Legal Analysis of Draft Final Rule on Definition of "Waters of the United States"

This memorandum responds to your request for a legal analysis of the draft final rule regarding the definition of the "waters of the United States" (WOUS) subject to Clean Water Act (CWA) jurisdiction, which the Environmental Protection Agency (EPA) submitted to the Office of Management and Budget (OMB) for inter-agency clearance on April 1, 2015.

Summary

The draft final rule regarding the definition of WOUS contains several serious flaws. If the rule is promulgated as final without correcting those flaws, it will be legally vulnerable, difficult to defend in court, difficult for the Corps to explain or justify, and challenging for the Corps to implement. The Corps has identified every serious area of concern in the draft final rule to both the Department of the Army (DA) and the EPA, and Corps legal and regulatory staff has provided numerous edits or "fixes" to rule language to correct those errors. However, to date, the fixes have not been adopted so the flaws remain.

The fundamental problem reflected in every one of the flaws described below is that the proposed rule that was published on April 21, 2014, is based on sound principles of science and law, but many provisions of the draft final rule have abandoned those principles and introduced indefensible provisions into the rule. The following is a summary of the most serious flaws in the draft final rule; the proposed fixes are shown in track changes in the attached "Revised Draft Final Rule," which was provided most recently to DA and EPA on April 16, 2015.

Legal Standard

EPA and Corps staff agree with our colleagues at the U.S. Department of Justice that the final rule will survive the expected legal challenges that it will face in the federal courts only if the courts conclude that the rule complies with the test for CWA jurisdiction provided by Justice Kennedy in the *Rapanos* decision. The following is the essence of Justice Kennedy's test: a water body (such as a wetland) is subject to CWA jurisdiction if it has a significant nexus with navigable waters. The term "significant nexus" means that a water, including wetlands, either alone or in combination with other similarly situated waters in the region, significantly affects the chemical, physical, or biological integrity of the downstream navigable waters. For an effect to be significant, it must be more than speculative or insubstantial.

Loss of CWA Jurisdiction

The draft final rule excludes from jurisdiction of the CWA large areas of lakes, ponds, and similar water bodies that are important components of the tributary system of the navigable waters and that the Federal government has been regulating as jurisdictional from 1975 to the present moment. Those water bodies are important to the physical, chemical, and biological integrity of the entire tributary system of the navigable waters and to the navigable waters themselves. However, those lakes, ponds, and wetlands would lose all federal CWA protection under the draft final rule merely because they happen to lay outside and beyond a distance of 4000 feet from a stream's ordinary high water mark (OHWM) or high tide line (HTL). The 4000-feet cut-off line (or "bright-line rule") for jurisdiction has no basis in science or law, and thus is "arbitrary." The Corps believes that the 4000-feet limit on jurisdiction would cause significant adverse environmental effects as a result of the loss of jurisdiction over a substantial amount of jurisdictional "waters," based on the Corps' experience in implementing the CWA Section 404 program and performing the majority of jurisdictional determinations under the CWA.

The arbitrary nature of the 4000-feet cutoff of jurisdiction is demonstrated by the fact that EPA staff engaged in drafting the rule told Corps staff during a conference call in March 2015 that EPA was going to cut off CWA jurisdiction at a distance of 5000 feet from the OHWM/HTL of traditional navigable waters, interstate waters, territorial seas, impoundments, or tributaries. Then, three days later, EPA staff changed its position and decided to cut off CWA jurisdiction at the narrower 4000-feet limit from an OHWM/HTL. EPA staff has never provided any scientific support or justification for either a 5000-feet or 4000-feet cut-off. Both distances are arbitrary and either limitation would be very difficult to defend in the federal courts when the final rule is challenged because neither limitation on CWA jurisdiction is supported by science or field-based evidence. It is significant that EPA's Science Advisory Board recommended against using any set distance to establish or limit CWA jurisdiction.

To abandon existing Federal CWA jurisdiction over ecologically important water bodies that significantly affect the biological, physical, and chemical integrity of the downstream waters would lead to significant adverse effects on the environment, because, shorn of CWA protection, those lakes, ponds, and wetlands can be polluted, filled, drained, and degraded at will, with no Federal regulation to prevent, regulate, or mitigate for those destructive activities. Pollutants dumped into no-longer-jurisdictional water bodies would flow downstream to the navigable waters, polluting drinking water supplies and killing or harming fish, shellfish, and wildlife, and harming human populations. Consequently, the abandonment of CWA jurisdiction over important parts of the tributary system of the navigable waters cannot be done without first preparing an environmental impact statement (EIS) to identify precisely what water bodies would lose CWA protection under the final rule and what significant adverse environmental effects would result from that loss of jurisdiction.

In a limited time frame during the development of the draft final rule (roughly the last two months), the Corps' professional staff has documented representative examples of the many lakes, ponds, and wetlands that are part of the tributary system of the navigable waters and that would lose CWA jurisdiction and protection under the draft final rule. This documentation has

been presented to both the Assistant Secretary of the Army (Civil Works) (ASA(CW)), and to EPA decision-makers and technical staff. Thus far, no one has refuted or denied the professional, technical, and well-documented examples of lost jurisdiction under the draft final rule. No one has presented any basis to refute or challenge the Corps' determination that the draft final rule would cause significant adverse effects on the human environment and thus would require an EIS before the final rule could be promulgated in its current form.

During discussions with EPA staff on April 9, 2015, EPA representatives suggested that, although the proposed abandonment of substantial parts of the CWA's long-standing jurisdiction would cause significant adverse effects on the human environment, those adverse effects might be offset by the hope that the final rule will lead to the assertion of CWA jurisdiction over five categories of "isolated" waters under section (a)(7) of the draft final rule. That argument is unpersuasive for at least two reasons:

First, a well-established principle of NEPA law states that a proposed Federal action that would cause significant adverse effects on any part or aspect of the human environment requires an EIS to address those significant adverse effects, even if the Federal agency believes that other aspects of its proposed action would have environmental benefits. For example, the Council on Environmental Quality's (CEQ's) legally binding NEPA regulations state the rule of law regarding how a Federal agency must determine whether its proposed action could cause significant adverse environmental effects as follows:

> "Significantly" as used in NEPA requires considerations of . . . intensity: (b) Intensity. This refers to the severity of the impact. . . . (1) Impacts that may be both beneficial and adverse. A significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial." (40 CFR 1508.27)

Secondly, in section (a)(7) of the draft final rule, EPA has determined that every hydrologically/geographically isolated water in each of the five defined subcategories of isolated waters is "similarly situated" with all other isolated waters in those subcategories in the watershed that drains to the nearest traditional navigable water, interstate water, or territorial sea. Leaving aside the legal, scientific, and technical problems presented by section (a)(7), which are discussed below, section (a)(7) does not assert CWA jurisdiction over any of the isolated water bodies identified in that provision. CWA jurisdiction could be asserted over those isolated water bodies identified in section (a)(7) only if and when the Corps (or possibly EPA as a "special case") was to determine on a case-specific basis that those isolated water bodies have a significant nexus with navigable or interstate waters. Given the fact that, by definition, the vast majority of those isolated water bodies have no hydrologic connection with navigable or interstate waters, it is uncertain whether many, if any, of those isolated waters will pass the "significant nexus" test and be found to be subject to CWA jurisdiction. Even if the Corps or the EPA were to assert that those isolated waters are jurisdictional under the significant nexus test, it is doubtful that the federal courts would uphold such assertions of CWA jurisdiction.

The Corps has questioned what legal authority exists that would enable DA and EPA to abandon CWA jurisdiction over large areas of lakes, ponds, and wetlands that are important parts of the tributary system of the navigable waters, and over which the Corps and EPA have asserted CWA

jurisdiction since 1975. But even if such legal authority exists, at present there is no legally adequate administrative record to support such a move. The proposed rule did not propose any limitation for CWA jurisdiction comparable to the 4000 feet cut-off, which was presented for the first time in the draft final rule. Consequently, the public did not have the opportunity to evaluate that idea or to comment on it during the public comment period and thus the addition of this limitation likely violates the Administrative Procedures Act (APA).

In some ways the proposed abandonment of CWA jurisdiction over many lakes, ponds, and wetlands that are important parts of the tributary system of the navigable waters also has the effect of calling attention to legal and scientific questions regarding other parts of the final rule. For example, the draft final rule asserts CWA jurisdiction *by rule* over every "stream" in the United States, so long as that stream has an identifiable bed, bank, and OHWM. That assertion of jurisdiction over every stream bed has the effect of asserting CWA jurisdiction over many thousands of miles of dry washes and arroyos in the desert Southwest, even though those ephemeral dry washes, arroyos, etc. carry water infrequently and sometimes in small quantities if those features meet the definition of a tributary. The draft final rule's assertion that the dry washes all have a "significant nexus" with navigable waters contrasts sharply with the contradictory position in the rule that large areas of lakes, ponds, and wetlands in the well-watered parts of the USA, which water bodies actually send large amounts of water, sediments, nutrients, and (potentially) pollutants to the navigable waters, would lose CWA jurisdiction under the 4000-feet cutoff.

When these flaws were described to EPA staff during the April 9, 2013 meeting, the response was that the agencies have legal authority to place any limitation that they choose on the extent of CWA jurisdiction, even if that would have the effect of excluding from CWA jurisdiction lakes, ponds, and wetlands that have already been determined by the Corps to have a significant nexus with navigable waters, or that would satisfy that jurisdictional test in any future site-specific jurisdictional determination. Even if that assertion is valid, that sort of abandonment of CWA jurisdiction cannot take place without having first prepared an EIS to analyze and seek public comment on the potentially significant adverse effects on the natural and human environment that would result.

It is easy to fix the draft final rule to avoid the legal necessity of preparing an EIS. The Corps has suggested the necessary fix many times during the last several months. To date, consensus has not been reached to resolve the Corps' continuing concerns. The reason that EPA has given for not adopting the Corps' fixes is that EPA apparently believes that the 4000-feet cut-off of CWA jurisdiction would provide greater clarity (i.e., a "bright line") to the regulated public by limiting the Corps' ability to perform site-specific jurisdictional determinations. The Corps has explained why the EPA's 4000-feet limit would be more difficult to understand, identify, implement, or defend in the federal courts than the Corps' suggested approach, as explained in the technical memorandum accompanying this memorandum.

The Corps' fix is shown in the attached revised draft final rule. If this problem is not fixed, then the Corps must prepare an EIS before the final rule can be promulgated and leaves the rule vulnerable to an APA challenge.

MEMORANDUM FOR DCG-CEO
SUBJECT: Legal Analysis of Draft Final Rule on Definition of WOUS

Definition of "Adjacent"

On the day that the draft final rule was sent to OMB to begin the inter-agency review process, EPA introduced into the rule's definition of "adjacent" a new sentence that would exclude from the final rule's definition of "adjacent waters" large areas wetlands that are used, or have been used, for farming, forestry, or ranching activities. That sentence reads as follows: "Waters subject to established, normal farming, silviculture, and ranching activities (33 U.S.C. Section 1344(f)(1)) are not adjacent." On its face, the sentence is indefensible: it is a textbook example of rulemaking that cannot withstand judicial review. This is true because a wetland is, by definition, "adjacent" to a tributary stream if, as a matter of geographical fact, that wetland is "bordering, contiguous, or neighboring" to the stream, regardless of whether farming, forestry, or ranching activities are taking place on that wetland. That sentence must be removed or modified to retain credibility and legal defensibility for the final rule's definition of "adjacent."

According to the draft preamble to the draft final rule, the intended effect of the new sentence is to require a site-specific "significant nexus" determination before the particular adjacent waters could be determined to be subject to CWA jurisdiction, rather than to declare the waters jurisdictional by rule, as is the case with all other "adjacent" wetlands and other adjacent waters. For many years wetland areas adjacent to rivers and streams have been used for cutting hay or other farming, ranching, or silviculture purposes. All normal farming, ranching, and silviculture activities have been exempted by statute from CWA Section 404 permitting requirements since 1977. The proposed rule that was published in the Federal Register did not propose to exclude from the definition of "adjacent" any categories of adjacent waters based on the activities that occur in those waters, so the public did not have an opportunity to comment on the new definition, again leaving the rule vulnerable to an APA challenge. The last-minute decision to distinguish adjacent farmed waters from other adjacent wetlands is highly problematic, both as a matter of science and for purposes of implementing the final rule.

Nevertheless, if EPA and DA decide that the final rule should implement the idea underlying the sentence quoted above, then at the least the sentence should be revised as follows: "Waters subject to established normal farming, silviculture, or ranching activities (33 U.S.C. Subsection 1344(f)(1)) are not jurisdictional by rule under sub-section (a)(6) of this paragraph as "adjacent waters," but may be determined to be jurisdictional on a case-by-case basis under subsection (a)(8)."

Definition of "Neighboring"

The draft final rule would provide a new definition of the term "neighboring," which would declare "jurisdictional by rule" all wa bod within 1500 f of an C WM F so long as the water body is located within a 100-year flood plain. The 1500-feet limitation is not supported by science or law and thus is legally vulnerable. The Corps has advocated the more scientifically and legally defensible distance of 300 feet for declaring by rule that all neighboring water bodies are jurisdictional, based on the Corps' experience in implementing the CWA Section 404 program and performing the majority of jurisdictional determinations under the CWA. Site-specific significant nexus determinations of jurisdiction are necessary to justify the assertion of CWA jurisdiction over water bodies that lie more than 300 feet from an OHWM or

HTL. The definition of "neighboring" also contains other fixable flaws. The edits are shown and explained in the attached revised draft final rule.

Categories of Isolated Waters

The draft final rule's treatment of five categories of "isolated" waters (i.e., prairie potholes, western vernal pools, Carolina bays and Delmarva bays, Texas coastal prairie wetlands, and pocosins) is problematic. Such isolated waters undoubtedly are ecologically valuable and important, so the policy goal of providing CWA protection for such waters is understandable. However, to be subject to CWA jurisdiction, those isolated water bodies must be demonstrated to have a significant nexus with navigable or interstate waters, which nexus will be difficult to show for isolated waters that are not hydrologically connected to the tributary system of either navigable or interstate waters.

The draft final rule would declare that all isolated waters in each of those five listed categories of isolated waters are "similarly situated," but the Corps has never seen any data or analysis to explain, support, or justify this determination. In essence, section (a)(7) of the draft final rule provides a definition of each of five categories of isolated waters and then asserts that every water that fits into each definition is similar to all other waters that fit into that same definition within any single point of entry watershed. This approach is circular reasoning, making use of a tautology, so that the determinations of "similarly situated" do not have much substance.

Moreover, the determination that all isolated waters in each of the listed five categories of isolated waters are "similarly situated" is in conflict with the draft final rule's definition of "similarly situated," which is embedded in the definition of "significant nexus." The current draft final rule defines the concept of "similarly situated" as follows: "Waters are similarly situated when they function alike and are sufficiently close to function together in affecting downstream waters." This definition requires findings on two matters: the functions of the waters and how close to each other those similar waters are located. However, the current definition for each category of isolated waters in section (a)(7) of the draft final rule is based entirely on the functions of those waters, leaving out the required findings regarding proximity. In other words, the definitions in section (a)(7) for the five categories of isolated waters are not based on any findings that those isolated waters "are sufficiently close together to function together in affecting downstream waters." as required by the definition of "similarly situated." Significantly, EPA's technical staff has demonstrated that in some areas prairie potholes (for example) are located close together and, in other areas, they are spaced far apart. Yet, the assertion that all prairie potholes are "similarly situated" does not account for that discrepancy, which renders section (a)(7) legally vulnerable.

It is also worth noting that section (a)(7) asserts that every example of the five categories of isolated waters identified in that section have essentially the same functions regarding navigable and interstate waters, and the territorial seas, as every other isolated water in that category. But how can that be true, when some of those isolated waters have been hydrologically connected to the tributary system of the navigable waters by drainage ditches, while other isolated waters in that same category have not been so connected, and are truly "isolated?" Their functions would

not necessarily be the same and even if they share some of the same functions, the effects of the functions would be varied such that they would not be functioning "alike."

Functions of Wetlands/Water Bodies Indicating Significant Nexus

The draft final rule presents a limited and exclusive list of nine (9) functions that wetlands and other water bodies perform, which can be evaluated and documented to establish a significant nexus between that wetland or other water body and downstream navigable or interstate waters to establish CWA jurisdiction over that water body. The Corps on numerous occasions has advised EPA that the list of functions is incomplete, based on the Corps' experience and expertise in performing significant nexus evaluations in the nearly eight years since the release of the *Rapanos* guidance. During that period the Corps has made more than 30,800 significant nexus determinations by analyzing the biological, physical, and chemical functions provided by such water bodies. Nevertheless, thus far EPA has not expanded the list or revised the provision to designate EPA's list of functions as representative and non-exclusive. The proposed fix for this problem is presented in the attached revised draft final rule.

Transition to New Rule

The draft final rule does not include an adequate provision for "grandfathering," that is, for transitioning from the existing rule to the new rule. The transition could be difficult and fraught with problems, all of which require careful treatment in a well-conceived provision that has not yet been drafted. The needed provision should consider the various types of authorizations provided under the CWA, the different types of jurisdictional determinations provided to landowners, and various other types of actions related to jurisdictional determinations. Without a well-considered transition provision, implementation of the rule will generate significant legal problems.

Essential Principles in the Proposed Rule

To understand the fundamental legal problems with the draft final rule, all that one needs to do is read the language of the proposed rule and compare it to the very different language of the draft final rule. The comparison reveals that many essential principles that made the proposed rule legally defensible have been abandoned or obscured in the draft final rule. Given the fact that the proposed rule was carefully developed by the EPA and the Corps, and then reviewed and cleared by the EPA, the Corps, DA, the Department of Justice, OMB, and other Federal agencies, the draft final rule's deviation from fundamental legal and scientific principles that were essential components of the proposed rule reveals the basic problems of the draft final rule.

The fundamental legal and scientific principles of the proposed rule are fairly straightforward, elegantly simple, easily understood, based on sound scientific and legal principles, and thus very legally defensible. Those principles included the following:

The proposed rule would assert CWA jurisdiction by rule over all of the natural water bodies that constitute the tributary system of the navigable and interstate waters, subject to a limited number of specified exclusions from CWA jurisdiction. The proposed rule would do that by asserting

CWA jurisdiction by rule over all tributaries of the navigable and interstate waters. Those tributaries are defined in the proposed rule as all water bodies (i.e., rivers, streams, lakes, ponds, wetlands, etc.) that contribute a flow of water (directly or through another water body) to the navigable or interstate waters, plus all other waters that are adjacent to those tributary water bodies. In accordance with the Supreme Court's legally binding, precedential decisions, the proposed rule and its administrative record would establish the reasonable proposition that the natural water bodies that constitute the tributary system of the navigable and interstate waters have a significant nexus with those downstream waters because they provide the water to those downstream navigable and interstate waters, and because pollutants, sediments, etc., flow from the upper parts of the tributary system down to the navigable and interstate waters.

Under the proposed rule, for truly isolated water bodies that have no shallow subsurface or confined surface connection to the tributary system of the navigable or interstate waters, those isolated water bodies could be evaluated on a case-by-case basis in site-specific jurisdictional determinations made by the Corps or EPA to determine whether various "aggregations" of those isolated water bodies might be "similarly situated" and might have a "significant nexus" with navigable or interstate waters, or the territorial seas, and thus might be subject to CWA jurisdiction despite the fact that they have no shallow subsurface or confined surface hydrologic connection to the navigable or interstate waters. Whatever result those specific significant nexus analyses might yield for various aggregations of truly isolated water bodies, at least the legal challenges to those jurisdictional determinations would be independent of, and would not undermine the legal defensibility of, the final rule as a whole.

The basic principles of the proposed rule described above reflect the controlling Federal law and undeniable scientific facts about pollution control and hydrology, and thus are legally sound and defensible. Unfortunately, the draft final rule has departed markedly from the sound legal and scientific principles of the proposed rule, in several important ways, and those basic changes make the draft final rule legally vulnerable.

Change in Definition of "Tributary"

The draft final rule would change the definition of "tributary" to exclude from that important definition all lakes, ponds, and wetlands that are part of the tributary system of the navigable or interstate waters and that send a flow of water into those waters. This change would have the effect of excluding from CWA jurisdiction potentially vast areas of lakes, ponds, and wetlands that are integral parts of the tributary system of the navigable and interstate waters. Those excluded wetlands, lakes, and ponds have been subject to CWA jurisdiction since at least 1975 and are subject to CWA jurisdiction now. Excluding those lakes, ponds, and wetlands from CWA jurisdiction under the draft final rule is not supported by an administrative record or EIS to provide the NEPA compliance for the significant adverse environmental effects that would result from such an action. Also, no notice of such a change was provided in the proposed rule to allow for public comment leaving the rule vulnerable to an APA challenge.

Attempts to remedy the problems that the new definition of tributary causes has led to the addition of several new provisions in the draft final rule, which were not in the proposed rule, and which try to patch the final rule to recapture CWA jurisdiction over some of the lakes,

ponds, and wetlands that the new definition of tributary would abandon. These patches are difficult to understand, explain, implement, or defend in court.

For example, the draft final rule adds new provisions to allow the agencies to assert CWA jurisdiction on a case-by-case basis over lakes, ponds, or wetlands that contribute flow to navigable or interstate waters and that are located no more than 4000 feet from a stream's OHWM/HTL. The same provision excludes from CWA jurisdiction altogether any lake, pond, or wetland that contributes a flow of water to navigable or interstate waters, but that lies more than 4000 feet from that same OHWM/HTL. This 4000-feet bright line rule is not based on any principle of science, hydrology or law, and thus is legally vulnerable. The fundamental fact that the tributary lakes, ponds, or wetlands inside or outside the 4000-feet boundary all contribute the same flow of water, pollutants, sediments, etc., to the navigable or interstate waters is ignored in the draft final rule. This rule is not likely to survive judicial review in the federal courts.

Other examples of problematic patches in the draft final rule that are intended to correct problems created by the new definition of tributary can be found in the revised definition of "neighboring," which asserts that water bodies that lie within 1500 feet of a stream's OHWM or HTL are neighboring to that stream. Once again, the 1500-feet figure is not based on any principle of science or law, and thus is legally vulnerable. Additionally, the federal courts may find that common sense dictates that a water body located 1500 feet from a stream is too far away from that stream to be defined as neighboring and thus adjacent to that stream. The fact that the draft final rule abandons the fundamental legal and scientific principle of the proposed rule that asserted CWA jurisdiction by rule over water bodies that are part of the tributary system of navigable or interstate waters, and substitutes for that principle non-science-based tests based on distances from OHWMs/HTLs, makes the draft final rule legally vulnerable.

Site-Specific JDs for Water Bodies Draining into Jurisdictional Waters

A related example of a serious legal flaw in the draft final rule is the fact that it imposes novel limitations on the ability of the Corps and EPA to make jurisdictional determinations based on case-specific "significant nexus" determinations for any lake, pond, or wetland that contributes a flow of water to navigable or interstate waters, or to the territorial seas. The Corps and EPA can make such case-specific significant nexus determinations now, but not under the draft final rule. No final rule should be promulgated unless this flaw is fixed. The Corps' proposed edit is set forth in the attached revised draft final rule.

Isolated Waters Characterized as "Similarly Situated"

Another example of a provision of the draft final rule that makes the entire rule legally vulnerable is the provision that characterizes literally millions of acres of truly "isolated" waters (i.e., wetlands that have no shallow subsurface or confined surface connection with the tributary systems of the navigable waters or interstate waters) as "similarly situated." In at least three places in the preamble, it is stated that such a determination of "similarly situated" in a final rule would be tantamount to an inevitable future determination that all of those identified aggregations of similarly situated isolated waters do have a significant nexus with navigable or interstate waters, and thus will later be determined to be subject to CWA jurisdiction in future

jurisdictional determinations. That part of the draft final rule creates legal vulnerabilities for the entire rule.

It will be difficult, if not impossible, to persuade the federal courts that the implicit, effective determination that millions of acres of truly isolated waters (which have no shallow subsurface or confined surface connection to the tributary system of the navigable or interstate waters) do in fact have a "significant nexus" with navigable or interstate waters. Consequently, the draft final rule will appear to be inconsistent with the Supreme Court's decisions in *Rapanos* and *SWANCC*. As a result, this assertion of CWA jurisdiction over millions of acres of isolated waters may well be seen by the federal courts as "regulatory over-reach," which undermines the legal and scientific credibility of the rule.

The final rule should address isolated water bodies just as the proposed rule did --by leaving to future case-by-case determinations all findings regarding what isolated waters are similarly situated, which waters should be aggregated in what watersheds, and whether those case-specific aggregations of isolated waters actually have a significant nexus with navigable or interstate waters.

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cc: Revised Draft Final Rule

PART 328 – DEFINITION OF WATERS OF THE UNITED STATES

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

AUTHORITY: The Clean Water Act, 33 U.S.C. 1251 *et seq.*

2. Section 328.3 is amended by removing the introductory text and revising subsections (a), (b) and (c) 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) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters ~~which~~ that are subject to the ebb and flow of the tide;

(2) All interstate waters, including interstate wetlands;

(3) The territorial seas;

(4) All impoundments of waters otherwise identified as waters of the United States under this section;

(5) All tributaries, as defined in paragraph (c)(3) of this section, of waters identified in paragraphs (a)(1) through (3) of this section;

(6) All waters adjacent to a water identified in paragraphs (a)(1) through (5) of this section, including wetlands, ponds, lakes, oxbows, impoundments, and similar waters;

(7) All waters in paragraphs (A) through (E) of this paragraph where they are determined, on a case-specific basis, to have a significant nexus to a water identified in paragraphs (a)(1) through (3) of this section. The waters identified in each paragraph (A) through (E)

of this paragraph are similarly situated and shall be combined, for purposes of a significant nexus analysis, in the watershed that drains to the nearest water identified in paragraphs (a)(1) through (3) of this section. ~~Waters identified in this paragraph shall not be combined with waters identified in paragraph (a)(6) of this section when performing a significant nexus analysis.~~ Waters identified in this paragraph shall be combined only with waters that serve similar functions when performing a significant nexus analysis. Some waters identified in this paragraph are also adjacent (and thus jurisdictional) under paragraph (a)(6). Non-adjacent waters shall not be determined to have a "significant nexus" with navigable or interstate waters merely because they are aggregated with adjacent waters having similar functions. Nevertheless, if all waters with similar functions (both adjacent and non-adjacent) within the same point of entry watershed in the aggregate would have a significant nexus with navigable or interstate waters, then all of those waters with similar functions would be jurisdictional.

If waters identified in this paragraph are also an adjacent water under paragraph (a)(6), they are an adjacent water and no case-specific significant nexus analysis is required.

(A) Prairie potholes. Prairie potholes are a complex of glacially formed wetlands, usually occurring in depressions that lack permanent natural outlets located in the upper mid-west.

(B) Carolina bays and Delmarva bays. Carolina bays and Delmarva bays are ponded, depressional wetlands that occur along the Atlantic coastal plain.

(C) Pocosins. Pocosins are evergreen shrub and tree dominated wetlands found predominantly along the Central Atlantic coastal plain.

Comment [DRC1]: The Corps agrees with EPA that a water under section (a)(7) or (a)(8) cannot be found to be jurisdictional merely by aggregating that waterbody with adjacent waters and asserting that the adjacent waters somehow confer or transmit CWA jurisdiction to or over the isolated waters; that would be an inappropriate form of "bootstrapping" jurisdiction. The proposed insert would forbid that bootstrapping, but would still allow all waterbodies with similar functions within an SPOE watershed to be aggregated and evaluated together during a significant nexus determination. This fix is necessary to avoid the effect of the current language, which would forbid the aggregation of waterbodies that have similar functions and exist side by side in a SPOE watershed, merely because similar waterbodies happen to lie on one side or the other of a line that demarcates adjacency.

(D) Western vernal pools. Western vernal pools are seasonal wetlands located in parts of California and associated with topographic depression, soils with poor drainage, mild, wet winters and hot, dry summers.

Comment [DRC2]: Previous language, "found in southeastern Oregon to northern Baja California," has been replaced with "in parts of California." Why are vernal pools in southeastern Oregon being omitted?

(E) Texas coastal prairie wetlands. Texas coastal prairie wetlands are freshwater wetlands that occur as a mosaic of depressions, ridges, intermound flats, and mima mound wetlands located along the Texas Gulf Coast.

(8) All of the following waters, if they are determined on a case-specific basis to have a significant nexus to a water identified in paragraphs (a)(1) through (3) of this section: (1) All waters located within 4000 feet of the high tide line or ordinary high water mark, or within the 100-year floodplain, whichever is greater, of a water identified in paragraphs (a)(1) through (5) of this section; and (2) waters that contribute a flow of water (either directly or through another water body) to a water identified in paragraphs (a)(1) through (5) of this section. ~~; where they are determined on a case specific basis to have a significant nexus to a water identified in paragraphs (a)(1) through (3) of this section.~~ The entire water is a water of the United States in a portion located within 4000 feet of the high tide line or ordinary high water mark, or is within the 100-year floodplain, or if that water contributes a flow of water to a water identified in paragraphs (a)(1) through (5) of this section. Waters identified in this paragraph shall be combined only with waters that serve similar functions when performing a significant nexus analysis. Some waters identified in this paragraph are also adjacent (and thus jurisdictional) under paragraph (a)(6). Non-adjacent waters shall not be determined to have a "significant nexus" with navigable or i[illegible]nterstate wate[illegible]erely because they are aggregated with adjacent waters having similar f[illegible]ons. Nevertheless, if all waters with similar f[illegible]ons (both adjacent

and non-adjacent) within the same point of entry watershed in the aggregate would have a significant nexus with navigable or interstate waters, then all of those waters with similar functions would be jurisdictional.

~~Waters identified in this paragraph shall not be combined with waters identified in paragraph (a)(6) of this section when performing a significant nexus analysis.~~ If waters identified in this paragraph are also an adjacent water under paragraph (a)(6), they are an adjacent water and no case-specific significant nexus analysis is required.

(b) The following are not "waters of the United States" even where they otherwise meet the terms of paragraphs (a)(1) through (8) of this section.

(1) Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the Clean Water Act.

(2) 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.

(3) The following ditches:

(A) Ephemeral ditches that are not a relocated tributary or excavated in a tributary or other jurisdictional waterbody, and that would not have the effect of draining a jurisdictional waterbody.

(B) Ephemeral and intermittent roadside ditches that drain a Federal, state, tribal, county, or municipal road, and that are not a relocated tributary or excavated in a trib[illegible].

Comment [DRC3]: Same comment as above on no "bootstrapping" under section (a)(7).

Comment [JAM4]: This language ensures that ditches that are constructed within or to drain jurisdictional waters, once constructed, are themselves waters of the U.S. That would have the effect of making the waterbody being drained a jurisdictional "adjacent" water, thereby providing some degree of CWA control over drainage of wetlands.

(C) Ditches that do not flow, either directly or through another water, into a water identified in paragraphs (a)(1) through (3) of this section.

(4) The following features:

(A) Artificially irrigated areas that would revert to dry land should application of water to that area cease;

(B) Artificial lakes and ponds created in dry land and used primarily for uses such as stock watering, irrigation, settling basins, rice growing, or cooling ponds;

(C) Artificial reflecting pools or swimming pools created in dry land;

(D) Small ornamental waters created in dry land;

(E) Water-filled depressions created in dry land incidental to mining or construction activity, including pits excavated for obtaining fill, sand or gravel that fill with water;

(F) Erosional features, including gullies, rills, and other ephemeral features that do not meet the definition of tributary, non-wetland swales, and lawfully constructed grassed waterways; and

(G) Puddles.

(5) Groundwater, including groundwater drained through subsurface drainage systems.

(6) Stormwater control features constructed to convey, treat, or store stormwater that are created in dry land.

(7) Wastewater recycling structures created in dry land: detention and retention basins built for wastewater recycling, groundwater recharge basins, and percolation ponds built for wastewater recycling, and water distributary structures built for wastewater recycling.

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

(1) *Adjacent*. The term *adjacent* means bordering, contiguous, or neighboring a water identified in paragraphs (a)(1) through (5) of this section, including waters separated by constructed dikes or barriers, natural river berms, beach dunes and the like. For purposes of determining adjacency, a waterbody ~~that includes~~ includes, and is considered a single waterbody with, all wetlands ~~within or~~that are bordering, contiguous to, or abutting that waterbody. ~~its ordinary high water mark is considered a single water.~~ Adjacency is not limited to waters located laterally to a water identified in paragraphs (a)(1) through (5) of this section. All waters that connect segments of a water identified in paragraphs (a)(1) through (5) or are located at the head of a water identified in paragraphs (a)(1) through (5) of this section and are bordering, contiguous, or neighboring such waters are adjacent. ~~Waters subject to established, normal farming, silviculture, and ranching activities (33 USC § 1344(f)(1)) are not adjacent.~~

(2) *Neighboring*. The term *neighboring* means:

~~(A) all waters located within 100 feet of the ordinary high water mark of a water identified in paragraphs (a)(1) through (a)(5) of this section. The entire water is neighboring if a portion is located within 100 feet of the ordinary high water mark;~~

(B) all waters located within the 100 year floodplain of a water identified in paragraphs (a)(1) through (5) of this section and not more than ~~1500~~300 feet of the ordinary high water mark of such water. The entire water is neighboring if a portion is located within ~~1500~~300 feet of the ordinary high water mark and within the 100 year floodplain;

Comment [DRC5]: This language would correct a problem presented by the comparable sentance found in the draft final rule submitted to OMB. The problem is that often it is impossible to identify an OHWM for a river, stream, lake, pond, or similar waterbody that has adjacent wetlands, any OHWM is obscured by the wetlands. The current wording would require the Corps or EPA to identify an OHWM where none can be found because of the adjacent wetland.

Comment [JAM6]: Including this language conflates geographic jurisdiction with activity-based exemptions. There is no scientific basis to support the notion that waters subject to specific activities are any more or less "adjacent" than other adjacent waters.

Comment [DRC7]: Per the Corps' prior comments, this language would capture all waterbodies that are separated vertically, which is inappropriate (e.g., wetlands and open waters on bluffs).

(C) all waters located within ~~1500~~300 feet of the high tide line of a water identified in paragraphs (a)(1) or (a)(3) of this section, and all waters within ~~1500~~300 feet of the ordinary high water mark of the Great Lakes. The entire water is neighboring if a portion is located with 1500 feet of the high tide line.

(3) *Tributary* and *tributaries*. The terms *tributary* and *tributaries* ~~each~~ mean a water that contributes flow, either directly or through another water (including an impoundment identified in paragraph (a)(4) of this section), to a water identified in paragraphs (a)(1) through (3) of this section, and that is characterized by the presence of the physical indicators of a bed and banks and an ordinary high water mark. These physical indicators demonstrate there is volume, frequency and duration of flow sufficient to create a bed and banks and an ordinary high water mark, and thus to qualify as a tributary. A tributary can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, canals, and ditches not excluded under paragraph (b) of this section. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if, for any length, there are one or more constructed breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as wetlands along the run of a stream, debris piles, boulder fields, or a stream that flows underground) so long as a bed and banks and an ordinary high water mark can be identified upstream of the break. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if it contributes flow through a water of the United States that does not meet the definition of tributary or through a water excluded under paragraph (b) of this section, directly or through another water, to a water identified in paragraphs (a)(1) through (3) of this section.

(4) *Ditch*: The term *ditch* means a man-made channel whose physical characteristics are often straightened to efficiently convey water from a source to an outlet. Ditches are generally constructed for the purpose of drainage, irrigation, water supply, water management and/or distribution. A ditch may carry flows that are perennial, intermittent, or ephemeral.

(45) *Wetlands*. The term *wetlands* means those 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. Wetlands generally include swamps, marshes, bogs and similar areas.

(~~5~~6) *Significant Nexus*. The term *significant nexus* means that a water, including wetlands, either alone or in combination with other similarly situated waters in the region, significantly affects the chemical, physical, or biological integrity of a water identified in paragraphs (a)(1) through (3) of this section. The term "in the region" means the watershed that drains to the nearest water identified in paragraphs (a)(1) through (3) of this section. For an effect to be significant, it must be more than speculative or insubstantial. Waters are similarly situated when they function alike and are sufficiently close to [waters performing similar functions to ?] function together in affecting downstream waters. For purposes of determining whether or not a water has a significant nexus, the water's effect on downstream (a)(1) through (3) waters shall be assessed by evaluating the aquatic functions identified in paragraphs (A) through (H) of this paragraph. A water has a significant nexus when any single function or combination of functions performed by the water, alone or together with similarly situated waters in the

Comment [JAM8]: This addition has been discussed previously and language provided previously. Many types of ditches are excluded and certain ditches are referred to in the definition of tributary; however, ditches are not defined. A common understanding is necessary for clarity.

Comment [JAM9]: This sentence, in particular, and in combination with the definition overall, does not work effectively for both paragraphs (a)(7) and (a)(8). Additionally, the sentence contains a partially incomplete thought. Waters are similarly situated when they function alike and are sufficiently close to each other? Downstream waters? Each other so it can be ascertained they are functioning as a single landscape unit? The bracketed language is offered to complete the thought.

This must be clarified and it may suggest clarifications as necessary in (a)(7) to make it clear in what sense those waters are "similarly situated" – close to each other? Functioning as a landscape unit?

region, contributes significantly to the chemical, physical, or biological integrity of the nearest water identified in paragraphs (a)(1) through (3) of this section. Functions relevant to the significant nexus evaluation ~~are~~ include, but are not limited to, the following:

(A) sediment and pollutant trapping, transformation, filtering, and transport;

(B) nutrient recycling, trapping, transformation, filtering, and transport;

(C) ~~pollutant trapping, transformation, filtering, and transport;~~

(~~D~~C) retention and/or attenuation of flood waters;

(~~E~~D) runoff storage;

(~~F~~E) contribution of flow;

(~~G~~F) export, trapping, and transformation of organic matter, including food resources;

(~~H~~) ~~export of food resources;~~ or

(~~I~~G) provision of life cycle dependent aquatic habitat (such as foraging, feeding, nesting, breeding, spawning, or rearing as a nursery area) for species located in or dependent on a water identified in paragraphs (a)(1) through (3) of this section;

(H) habitat support for aquatic and wetland plant communities;

(I) groundwater discharge and recharge;

(J) carbon sequestration.

(67) *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 a clear, natural line impressed on the bank, shelving, changes in the character of

Comment [JAM10]: These changes were discussed and provided previously. Edits capture functions provided by Corps districts that are currently being used to demonstrate significant nexus in support of affirmative jurisdictional determinations.

soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.

(78) 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.

DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS
441 G STREET, NW
WASHINGTON, DC 20314-1000

REPLY TO
ATTENTION OF

CECW-CO-R

24 April 2015

MEMORANDUM FOR Deputy Commanding General for Civil and Emergency Operations, U.S. Army Corps of Engineers (ATTN: MG John W. Peabody)

THROUGH the Chief of Operations and Regulatory, U.S. Army Corps of Engineers (ATTN: Edward E. Belk)

SUBJECT: Technical Analysis of Draft Final Rule on Definition of "Waters of the United States"

1. References

a. Title 33 of the Code of Federal Regulations, Part 328, Definition of Waters of the United States (1986 Regulations).

b. 2003 Post-SWANCC Guidance (FR Vol. 68, No. 10, p. 1995) (SWANCC Guidance).

c. 2008 Joint Agency Guidance "Clean Water Act Jurisdiction Following the U.S. Supreme Court Decisions in *Rapanos vs. U.S.* & *Carabell vs. U.S.*" (*Rapanos* Guidance).

d. Draft Final Clean Water Rule: Definition of "Waters of the United States," submitted to the Office of Management and Budget for Interagency Review on 3 April 2015 (draft final rule)

2. This memorandum and its attachments provide a technical analysis of reference d. This technical analysis includes documentation of representative examples of aquatic resources over which the Corps has asserted Clean Water Act (CWA) jurisdiction in accordance with existing regulations and current guidance, but which would no longer be subject to CWA jurisdiction if the current draft of the final rule takes effect. CWA jurisdiction was appropriately asserted by the Corps over every aquatic resource described in these representative examples.

3. The examples included in Appendix A do not represent the only currently jurisdictional aquatic resources in the Nation over which CWA jurisdiction would be lost by adoption of the draft final rule in its present form; what is provided here is only a representative sample based on Approved Jurisdictional Determinations (AJDs) completed by Corps Districts and completed permit actions based on Preliminary Jurisdictional Determinations (PJDs), also completed by Corps Districts. It is important to note that the representative examples included in Appendix A as well as additional others used for discussion purposes were developed in a limited amount of time to facilitate discussion with the Environmental Protection Agency (EPA). It was unknown to the Corps until early February that Army and EPA were contemplating a "bright-line" cut off of CWA jurisdiction either 5,000 or 4,000 linear feet from the Ordinary High Water Mark (OHWM)/High Tide Line (HTL) and a robust interagency discussion of the potential effects of

the "bright-line" on currently jurisdictional water bodies has continued since that time. Throughout those discussions, the Corps has provided representative examples, including those in Appendix A, to factually illustrate its concern. To provide every example, both AJDs and issued permits with no JD or based on a PJD, where jurisdiction currently exists but would be extinguished if the draft final rule is adopted in its final form would take several months of multiple staff members working full time.

4. The examples were extracted from the Corps' existing database, ORM2, which is based entirely on what landowners request from the Corps. We have not undertaken any specific technical analysis of what aquatic resources may or may not be subject to CWA jurisdiction independent of requests for a jurisdictional determination or a permit decision. Therefore, the data discussed and conclusions reached in this memorandum are based on facts, that is, on actual AJDs and permit decisions, and not on assumptions about watershed areas that could contain jurisdictional waters.

5. Based solely on the data entered into ORM2 associated with AJDs, approximately 6.7% of all waters of the U.S. are wetlands that are adjacent to, but not directly abutting, relatively permanent waters/non-relatively permanent waters, and ~3.4% of all waters of the U.S. are wetlands adjacent to traditionally navigable waters, both directly abutting and non-abutting. The Corps' data demonstrate that 98% of the adjacent wetlands that require a significant nexus evaluation are jurisdictional waters under the CWA following the 2008 *Rapanos* Guidance. Thus, approximately 10% of all waters over which the Corps has asserted CWA jurisdiction under its 1986 regulations and current guidance are non-abutting adjacent wetlands. Under those 1986 regulations and current guidance only wetlands can be determined to be jurisdictional because they are adjacent waters. Under the draft final rule, any type of aquatic resource (e.g., lake, pond, oxbow, wetland) can be determined to be jurisdictional because the aquatic resource is adjacent to a jurisdictional tributary.

6. Neither the *Rapanos* Guidance nor the form used to implement that guidance (which is used by the Corps to document AJDs) requires the Corps to indicate the distance that an adjacent wetland is located from the nearest jurisdictional tributary's OHWM or HTL when evaluating whether a significant nexus exists, and in making a jurisdictional determination concerning such waters. Rather, the Guidebook that accompanies the *Rapanos* Guidance indicates that consideration will be given to the distance between a tributary and traditionally navigable water (TNW) such that the effect of the tributary on the TNW is not speculative or insubstantial. The Guidebook further states that, "it is not appropriate to determine significant nexus based solely on any specific threshold of distance (e.g. between a tributary and its adjacent wetland or between a tributary and the TNW).

7. Thus, from the information collected and tracked within the USACE Regulatory Program database, it is not possible to estimate the specific percentage of the approximately 10% of adjacent water bodies that could be lost to CWA jurisdiction as a result of application of the 4,000 linear foot limitation if the draft final rule is finalized. A portion of the approximately 10% of all water bodies that are currently jurisdiction as adjacent, non-abutting wetlands fall outside of 4,000 linear feet of the OHWM/HTL. To verify the exact portion of the 10% of currently jurisdictional waters that would be lost to Federal jurisdiction as a result of adoption of

the draft final rule in its current form, the Corps would need to complete a robust analysis of its data that would yield statistically significant and reliable results. This is precisely the type of research and analysis that would be undertaken in completing an Environmental Impact Statement (EIS).

8. To remove from CWA jurisdiction what is potentially as much as 10% of the currently jurisdictional aquatic resources without the benefit of a detailed analysis, such as one that would be performed as part of an EIS, would present the potential for significant adverse effects on the natural and human environment. In its permit evaluations, the Corps is charged with keeping in perspective the functions and values of any given aquatic resource, recognizing that the functions and values of those resources rely heavily on their geographic location in relation to (as well as their hydrologic connection to) other waters, and to balance the need for the proposed use with the need for conservation of the resource. Nowhere in this process is it considered that important aquatic resources that are traditionally and legitimately part of the tributary system to navigable waters, contributing water to traditionally navigable waters of the U.S., are not within the jurisdiction of the CWA.

9. Additionally, by excluding as much as 10% of currently jurisdictional waters from CWA jurisdiction, the draft final rule is crafted in a manner that will be challenging for the regulated public to understand and for the Corps to implement. These implementation challenges are outlined in Appendix B to this memorandum.

10. I have read the legal analysis of the draft final rule prepared by the Office of the Chief Counsel and I agree with the conclusions of that document. Based on the evidence of the loss of CWA jurisdiction over currently jurisdictional aquatic resources, as illustrated by the representative examples provided in Appendix A, and significant implementation concerns summarized in Appendix B, I recommend the following essential revisions to the draft final rule:

a. Allow case-specific significant nexus determinations for hydrologically isolated water bodies such as prairie potholes, vernal pools, Carolina and Delmarva bays, Texas coastal prairie wetlands, and pocosins, including determinations of whether such water bodies are "similarly situated". In other words, eliminate section (a)(7) and include those water body categories within section (a)(8).

b. Include within section (a)(8) (as waters regarding which a case-specific significant nexus evaluation can be completed to determine CWA jurisdiction) two additional criteria: i.e., waters located within the 100-year floodplain (regardless of distance) and those water bodies that contribute a flow of water to an (a)(1)-(a)(5) water.

c. Reduce the linear foot distance in the definition of neighboring under parts (B) and (C) from 1,500 feet to 300 feet.

d. Make additional edits to the draft final rule to enhance clarity and simplicity as indicated in the attached revised draft final rule previously submitted to EPA staff for their consideration.

11. If the changes recommended above are not adopted, then the draft final rule cannot be promulgated as a final rule without an EIS to evaluate the potential significant adverse effects on the natural and human environment that the final rule as currently written may cause.

12. The point of contact for this memorandum is Ms. Jennifer Moyer at 202-761-4598.

Jennifer A. Moyer

JENNIFER A. MOYER
Chief, Regulatory Program

cc: Revised Draft Final Rule

PART 328 – DEFINITION OF WATERS OF THE UNITED STATES

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

AUTHORITY: The Clean Water Act, 33 U.S.C. 1251 *et seq.*

2. Section 328.3 is amended by removing the introductory text and revising subsections (a). (b) and (c) 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) All waters which are currently used, 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) The territorial seas;

(4) All impoundments of waters otherwise identified as waters of the United States under this section;

(5) All tributaries, as defined in paragraph (c)(3) of this section, of waters identified in paragraphs (a)(1) through (3) of this section;

(6) All waters adjacent to a water identified in paragraphs (a)(1) through (5) of this section, including wetlands, ponds, lakes, oxbows, impoundments, and similar waters;

(7) All waters in paragraphs (A) through (E) of this paragraph where they are determined, on a case-specific basis, to have a significant nexus to a water identified in paragraphs (a)(1) through (3) of this section. The waters identified in each paragraph (A) through (E)

of this paragraph are similarly situated and shall be combined, for purposes of a significant nexus analysis, in the watershed that drains to the nearest water identified in paragraphs (a)(1) through (3) of this section. ~~Waters identified in this paragraph shall not be combined with waters identified in paragraph (a)(6) of this section when performing a significant nexus analysis.~~ Waters identified in this paragraph shall be combined only with waters that serve similar functions when performing a significant nexus analysis. Some waters identified in this paragraph are also adjacent (and thus jurisdictional) under paragraph (a)(6). Non-adjacent waters shall not be determined to have a "significant nexus" with navigable or interstate waters merely because they are aggregated with adjacent waters having similar functions. Nevertheless, if all waters with similar functions (both adjacent and non-adjacent) within the same point of entry watershed in the aggregate would have a significant nexus with navigable or interstate waters, then all of those waters with similar functions would be jurisdictional.

If waters identified in this paragraph are also an adjacent water under paragraph (a)(6), they are an adjacent water and no case-specific significant nexus analysis is required.

(A) Prairie potholes. Prairie potholes are a complex of glacially formed wetlands, usually occurring in depressions that lack permanent natural outlets located in the upper mid-west.

(B) Carolina bays and Delmarva bays. Carolina bays and Delmarva bays are ponded, depressional wetlands that occur along the Atlantic coastal plain.

(C) Pocosins. Pocosins are evergreen shrub and tree dominated wetlands found predominantly along the Central Atlantic coastal plain.

Comment [DRC1]: The Corps agrees with EPA that a water under section (a)(7) or (a)(8) cannot be found to be jurisdictional merely by aggregating that waterbody with adjacent waters and asserting that the adjacent waters somehow confer or transmit CWA jurisdiction to or over the isolated waters; that would be an inappropriate form of "bootstrapping" jurisdiction. The proposed insert would forbid that bootstrapping, but would still allow all waterbodies with similar functions within an SPOE watershed to be aggregated and evaluated together during a significant nexus determination. This fix is necessary to avoid the effect of the current language, which would forbid the aggregation of waterbodies that have similar functions and exist side by side in a SPOE watershed, merely because similar waterbodies happen to lie on one side or the other of a line that demarcates adjacency.

(D) Western vernal pools. Western vernal pools are seasonal wetlands located in parts of California and associated with topographic depression, soils with poor drainage, mild, wet winters and hot, dry summers.

Comment [DRC2]: Previous language, "found in southeastern Oregon to northern Baja California," has been replaced with "in parts of California." Why are vernal pools in southeastern Oregon being omitted?

(E) Texas coastal prairie wetlands. Texas coastal prairie wetlands are freshwater wetlands that occur as a mosaic of depressions, ridges, intermound flats, and mima mound wetlands located along the Texas Gulf Coast.

(8) All of the following waters, if they are determined on a case-specific basis to have a significant nexus to a water identified in paragraphs (a)(1) through (3) of this section: (1) ~~All~~ waters located within 4000 feet of the high tide line or ordinary high water mark, or within the 100-year floodplain, whichever is greater, of a water identified in paragraphs (a)(1) through (5) of this section; and (2) waters that contribute a flow of water (either directly or through another water body) to a water identified in paragraphs (a)(1) through (5) of this section. ~~, where they are determined on a case-specific basis to have a significant nexus to a water identified in paragraphs (a)(1) through (3) of this section.~~ The entire water is a water of the United States if a portion is located within 4000 feet of the high tide line or ordinary high water mark, or is located in the 100-year floodplain, or if that water contributes a flow of water to a water identified in paragraphs (a)(1) through (5) of this section. Waters identified in this paragraph shall be combined only with waters that serve similar functions when performing a significant nexus analysis. Some waters identified in this paragraph are also adjacent (and thus jurisdictional) under paragraph (a)(6). Non-adjacent waters shall not be determined to have a "significant nexus" with navigable or interstate waters merely because they are aggregated with adjacent waters having similar functions. Nevertheless, if all waters with similar functions (both adjacent

and non-adjacent) within the same point of entry watershed in the aggregate would have a significant nexus with navigable or interstate waters, then all of those waters with similar functions would be jurisdictional.

~~Waters identified in this paragraph shall not be combined with waters identified in paragraph (a)(6) of this section when performing a significant nexus analysis.~~ If waters identified in this paragraph are also an adjacent water under paragraph (a)(6), they are an adjacent water and no case-specific significant nexus analysis is required.

(b) The following are not "waters of the United States" even where they otherwise meet the terms of paragraphs (a)(1) through (8) of this section.

(1) Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the Clean Water Act.

(2) 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.

(3) The following ditches:

(A) Ephemeral ditches that are not a relocated tributary or excavated in a tributary or other jurisdictional waterbody, and that would not have the effect of draining a jurisdictional waterbody.

(B) Ephemeral and intermittent roadside ditches that drain a Federal, state, tribal, county, or municipal road, and that are not a relocated tributary or excavated in a tributary.

Comment [DRC3]: Same comment as above on no "bootstrapping" under section (a)(7).

Comment [JAN4]: This language ensures that ditches that are constructed within or to drain jurisdictional waters, once constructed, are themselves waters of the U.S. That would have the effect of making the waterbody being drained a jurisdictional "adjacent" water, thereby providing some degree of CWA control over drainage of wetlands.

(C) Ditches that do not flow, either directly or through another water, into a water identified in paragraphs (a)(1) through (3) of this section.

(4) The following features:

(A) Artificially irrigated areas that would revert to dry land should application of water to that area cease;

(B) Artificial lakes and ponds created in dry land and used primarily for purposes such as stock watering, irrigation, settling basins, rice growing, or cooling ponds;

(C) Artificial reflecting pools or swimming pools created in dry land;

(D) Small ornamental waters created in dry land;

(E) Water-filled depressions created in dry land incidental to mining or construction activity, including pits excavated for obtaining fill, sand, or gravel that fill with water;

(F) Erosional features, including gullies, rills, and other ephemeral features that do not meet the definition of tributary, non-wetland swales, and lawfully constructed grassed waterways; and

(G) Puddles.

(5) Groundwater, including groundwater drained through subsurface drainage systems.

(6) Stormwater control features constructed to convey, treat, or store stormwater that are created in dry land.

(7) Wastewater recycling structures created in dry land: detention and retention basins built for wastewater recycling, groundwater recharge basins, and percolation ponds built for wastewater recycling, and water distributary structures built for wastewater recycling.

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

(1) *Adjacent.* The term *adjacent* means bordering, contiguous, or neighboring a water identified in paragraphs (a)(1) through (5) of this section, including waters separated by constructed dikes or barriers, natural river berms, beach dunes and the like. For purposes of determining adjacency, a waterbody ~~that includes~~ includes, and is considered a single waterbody with, all wetlands ~~within or~~that are bordering, contiguous, or neighboring to, or abutting that waterbody. ~~its ordinary high water mark is considered a single water.~~ Adjacency is not limited to waters located laterally to a water identified in paragraphs (a)(1) through (5) of this section. All waters that connect segments of a water identified in paragraphs (a)(1) through (5) or are located at the head of a water identified in paragraphs (a)(1) through (5) of this section and are bordering, contiguous, or neighboring such water are adjacent. ~~Waters subject to established, normal farming, silviculture, and ranching activities (33 USC § 1344(f)(1)) are not adjacent.~~

(2) *Neighboring.* The term *neighboring* means:

~~(A) all waters located within 100 feet of the ordinary high water mark of a water identified in paragraphs (a)(1) through (a)(5) of this section. The entire water is neighboring if a portion is located within 100 feet of the ordinary high water mark.~~

(B) all waters located within the 100 year floodplain of a water identified in paragraphs (a)(1) through (5) of this section and not more than ~~1500~~300 feet of the ordinary high water mark of such water. The entire water is neighboring if a portion is located within ~~1500~~300 feet of the ordinary high water mark and within t .00 year floodplain;

Comment [DRC5]: This language would correct a problem presented by the comparable sentence found in the draft final rule submitted to OMB. The problem is that often it is impossible to identify an OHWM for a river, stream, lake, pond, or similar waterbody that has adjacent wetlands; any OHWM is obscured by the wetlands. The current wording would require the Corps or EPA to identify an OHWM where none can be found because of the adjacent wetland.

Comment [1AM6]: *Including* this language conflates geographic jurisdiction with activity-based exemptions. There is no scientific basis to support the notion that waters subject to specific activities are any more or less "adjacent" than other adjacent waters.

Comment [DRC7]: Per the Corps' prior comments, this language would capture all waterbodies that are separated vertically, which is inappropriate (e.g., wetlands and open waters on bluffs)

(C) all waters located within ~~1500~~300 feet of the high tide line of a water identified in paragraphs (a)(1) or (a)(3) of this section, and all waters within ~~1500~~300 feet of the ordinary high water mark of the Great Lakes. The entire water is neighboring if a portion is located with 1500 feet of the high tide line.

(3) *Tributary* and *tributaries*. The terms *tributary* and *tributaries* ~~each~~ mean a water that contributes flow, either directly or through another water (including an impoundment identified in paragraph (a)(4) of this section), to a water identified in paragraphs (a)(1) through (3) of this section, and that is characterized by the presence of the physical indicators of a bed and banks and an ordinary high water mark. These physical indicators demonstrate there is volume, frequency and duration of flow sufficient to create a bed and banks and an ordinary high water mark, and thus to qualify as a tributary. A tributary can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, canals, and ditches not excluded under paragraph (b) of this section. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if, for any length, there are one or more constructed breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as wetlands along the run of a stream, debris piles, boulder fields, or a stream that flows underground) so long as a bed and banks and an ordinary high water mark can be identified upstream of the break. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if it contributes flow through a water of the United States that does not meet the definition of tributary or through a water excluded under paragraph (b) of this section, directly or through another water, to a water identified in paragraphs (a)(1) through (3) of this section.

(4) *Ditch*: The term *ditch* means a man-made channel whose physical characteristics are often straightened to efficiently convey water from a source to an outlet. Ditches are generally constructed for the purpose of drainage, irrigation, water supply, water management and/or distribution. A ditch may carry flows that are perennial, intermittent, or ephemeral.

(45) *Wetlands.* The term *wetlands* means those 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. Wetlands generally include swamps, marshes, bogs and similar areas.

(56) *Significant Nexus.* The term *significant nexus* means that a water, including wetlands, either alone or in combination with other similarly situated waters in the region, significantly affects the chemical, physical, or biological integrity of a water identified in paragraphs (a)(1) through (3) of this section. The term "in the region" means the watershed that drains to the nearest water identified in paragraphs (a)(1) through (3) of this section. For an effect to be significant, it must be more than speculative or insubstantial. Waters are similarly situated when they function alike and are sufficiently close to [waters performing similar functions to ?] function together in affecting downstream waters. For purposes of determining whether or not a water has a significant nexus, the water's effect on downstream (a)(1) through (3) waters shall be assessed by evaluating the aquatic functions identified in paragraphs (A) through (HJ) of this paragraph. A water has a significant nexus when any single function or combination of functions performed by the wa alone or together with similarly situat waters in the

Comment [JAM8]: This addition has been discussed previously and language provided previously. Many types of ditches are excluded and certain ditches are referred to in the definition of tributary, however, ditches are not defined. A common understanding is necessary for clarity.

Comment [JAM9]: This sentence, in particular, and in combination with the definition overall, does not work effectively for both paragraphs (a)(7) and (a)(8). Additionally, the sentence contains a partially incomplete thought. Waters are similarly situated when they function alike and are sufficiently close to each other? Downstream waters? Each other so it can be ascertained they are functioning as a single landscape unit? The bracketed language is offered to complete the thought.

This must be clarified and it may suggest clarification is necessary in (a)(7) to make it clear in what sense those waters are "similarly situated" – close to each other? Functioning as a landscape unit?

region, contributes significantly to the chemical, physical, or biological integrity of the nearest water identified in paragraphs (a)(1) through (3) of this section. Functions relevant to the significant nexus evaluation ~~are~~ include, but are not limited to, the following:

(A) sediment and pollutant ~~trapping~~, transformation, filtering, and transport;

(B) nutrient recycling, trapping, transformation, filtering, and transport;

~~(C) pollutant trapping, transformation, filtering, and transport;~~

(DC) retention and/or attenuation of flood waters;

(ED) runoff storage;

(FE) contribution of flow;

(GF) export, trapping, and transformation of organic matter ~~including food resources~~;

~~(H) export of food resources;~~

(HG) provision of life cycle dependent aquatic habitat (such as foraging, feeding, nesting, breeding, spawning, or rearing as a nursery area) for species located in or dependent on a water identified in paragraphs (a)(1) through (3) of this section;

(IH) habitat support for aquatic and wetland plant communities;

(I) groundwater discharge and recharge;

(J) carbon sequestration.

(67) *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 a clear, natural line impressed on the bank, shelving, changes in the character of

Comment [JAM10]: These changes were discussed and provided previously. Edits capture functions provided by Corps districts that are currently being used to demonstrate significant nexus in support of affirmative jurisdictional determinations.

soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.

(78) 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 storms.

DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS
441 G STREET, NW
WASHINGTON, DC 20314-1000

REPLY TO
ATTENTION OF

CECW-CEO

15 May, 2015

MEMORANDUM FOR Assistant Secretary of the Army for Civil Works

JAB 15MAY15

THRU Commanding General and Chief of Engineers, US Army Corps of Engineers

SUBJECT: Economic Analysis and Technical Support Document Concerning the Draft Final Rule on Definition of "Waters of the United States"

1. I am forwarding the attached memorandum summarizing the Corps of Engineers' technical review of the Economic Analysis and Technical Support Document (TSD) produced by the Environmental Protection Agency (EPA), to support the on-going draft final rule on the definition of the "waters of the United States" (WOUS) under the Clean Water Act (CWA). The Corps received these final draft versions for the first time in the last two weeks. These documents were reviewed at my request by some of the Corps' most experienced experts in applying Section 404 of the Clean Water Act, including legal, regulatory, and scientific experts in the Corps Headquarters, Engineer Research and Development Center, and the Institute for Water Resources.

2. The Corps of Engineers' technical review indicates that both documents are flawed in multiple respects. The collective view of the Corps experts is summarized by our Regulatory Chief in the attached memorandum, which highlights the key aspects requiring your awareness, and deserving of your attention. To briefly summarize, our technical review of both documents indicate that the Corps data provided to EPA has been selectively applied out of context, and mixes terminology and disparate data sets. In the Corps' judgment, the documents contain numerous inappropriate assumptions with no connection to the data provided, misapplied data, analytical deficiencies, and logical inconsistencies. As a result, the Corps' review could not find a justifiable basis in the analysis for many of the documents' conclusions. The Corps would be happy to undertake a comprehensive review with the EPA to help improve these supporting documents, which we recognize are critical to the rule-making.

3. With respect to these two documents, the Corps provided the EPA with raw data on the overall numbers of jurisdictional determinations (JDs) made by the Corps for aquatic resources within the span of control of the Corps' regulatory program (i.e., Section 404 of the Clean Water Act), and provided similar raw data for the Technical Support Document. However, the Corps had no role in selecting or analyzing the data that EPA used in drafting either document. As a result, the documents can only be characterized as having been developed by the EPA, and should not identify the Corps as an author, co-author or substantive contributor. To the extent that the term "agencies" includes the Corps of Engineers, any such reference should be removed. Finally, the Corps of Engineers logo should be removed from these two documents. To either

imply or portray USACE as a co-author or contributor to these documents, other than as the provider of raw unanalyzed data, is simply untrue.

4. The Corps of Engineers fully recognizes the importance of this rule-making, and of these documents to underpin the content of the final proposed draft rule. We stand ready to assist the EPA in improving the technical analysis and to develop logically supportable conclusions for these documents, if and when requested.

Building Strong!

JOHN W. PEABODY
Major General, US Army
Deputy Commanding General
for Civil and Emergency Operations

Encl.

DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS
441 G STREET, NW
WASHINGTON, DC 20314-1000

REPLY TO
ATTENTION OF

CECW-CO-R

15 May 15

MEMORANDUM FOR Deputy Commanding General for Civil and Emergency Operations, U.S. Army Corps of Engineers (ATTN: MG John W. Peabody)

THROUGH the Chief of Operations and Regulatory, U.S. Army Corps of Engineers (ATTN: Edward E. Belk)

SUBJECT: Economic Analysis and Technical Support Document Concerning the Draft Final Rule on Definition of "Waters of the United States"

1. References

a. *Draft Final Economic Analysis of the EPA-Army Clean Water Rule*, U.S. Environmental Protection Agency & U.S. Army Corps of Engineers, 27 April 2015

b. *Technical Support Document for the Clean Water Rule: Definition of Waters of the United States*, U.S. Environmental Protection Agency, June 20[illegible]

2. This memorandum responds to your request for a technical analysis of the documents in references a and b. Both documents were prepared by the U.S. Environmental Protection Agency (EPA). With respect to EPA's Economic Analysis, the Corps provided the EPA with raw data on the overall numbers of jurisdictional determinations (JDs) made by the Corps for aquatic resources within the span of control of the Corps' regulatory program, but the Corps had no role in selecting or analyzing the data that EPA elected to use in drafting the attached Economic Analysis document. Similarly, with respect to the Technical Support Document (TSD), Corps data was also used by EPA when crafting the TSD, but the Corps also had no role in actually performing the technical analysis or drafting the TSD.

3. The following paragraphs summarize the Corps Regulatory Program concerns and provide as many examples as possible of what are fundamentally flawed products from a technical aspect. In essence, certain sections of both the Economic Analysis document and the TSD are devoid of any information about how the EPA obtained the results it has presented, rendering the methodology and subsequent results in the documents unverifiable by the Corps.

EPA's Economic Analysis

4. The document includes the EPA's review of Corps JDs from FY 2013 and FY 2014, which the Corps provided to the EPA for the purpose of identifying estimated changes in jurisdiction that would occur as a result of adoption of the draft final rule. However, the attached document fails to identify the actual draft final rule language that EPA applied in performing its review or the methodology used by EPA in applying such language to the Corps' JDs pertaining to isolated

water bodies from FY 2013 and FY 2014. Without an explanation of the methodology or which language was used in this exercise, the Corps cannot verify or provide cogent comments on the results presented by EPA.

5. The document mixes terminology and disparate datasets. For example, stream mitigation costs provided by the Corps appear to have been extrapolated and applied in States where no in-lieu fee program or mitigation bank data exist; there is no explanation of how such data were used or applied to obtain the results presented. Also, the Section 404 data provided by the Corps has been used out of context as if it were applicable to all Clean Water Act (CWA) programs, despite the fact that this data is only meaningful for a specific authority under the CWA (Section 404) and does not represent data under Sections 303, 401, 402, or other programs implemented by EPA and the States for different purposes under the CWA. Compliance costs under Section 404 are presented as representing seventy percent of the draft final rule's total costs and Section 404 benefits representing eighty-seven percent of the draft final rule's total benefits. When presented in this manner, Section 404 costs and benefits appear to far outweigh all other CWA programs combined, which greatly diminish the magnitude of the other, very important CWA programs. Using Section 404 data in this manner and in the absence of data from other programs cannot yield an accurate estimate of the true costs and benefits of those other CWA programs.

6. The document equates aquatic resources with JDs, which are two entirely different data sets. A single JD can provide the determination of jurisdictional status of multiple aquatic resources on a particular site. The revised analysis estimates an increase in the number of section 404 permits, the average impact acreage, and corresponding total impact acreage, and an increase in total permit application costs. However, these changes are driven by using the highest number of individual permits and general permits issued in any one year over the five year period from FY 2009-2014 and average impact acreage for permits issued in FY 2013. It is unclear and not explained in the document why impact data from a single year was used to calculate average impact acreage for permits when a five year period was used to estimate the number of permits.

7. The document also makes certain assumptions that have no analytical basis. For example, to account for aquatic resources that are not captured in the Corps' data (e.g., isolated waters on properties of landowners who do not seek a JD from the Corps), EPA used the data from the Corps and simply doubled the number of isolated waters. Doubling data sets in the absence of analysis or basis for doing so cannot withstand even the most cursory technical review. All assumptions should have a justifiable basis, with reasoned logical analysis to support them.

8. The Economic Analysis grossly overestimates the amount of compensatory mitigation required under section 404 the CWA.

a. EPA assumed that all individual permits (IPs) and half of all general permits (GPs) require compensatory mitigation. The actual values are thirty-one percent and 8 percent, respectively, based on data in the Corps ORM2 database.

b. Mitigation totals used by the EPA represented only permittee-responsible mitigation (i.e. mitigation constructed by the permittee), but the totals are characterized as

representing all types of compensatory mitigation, including mitigation banks and in-lieu fee programs.

c. Mitigation totals used by the EPA also included a range of ratios from all compensatory mitigation sources (establishment, rehabilitation, enhancement, preservation), but EPA assumed a 2:1 ratio for all compensatory mitigation.

d. The mitigation cost data tables used are out of date. No quality checks from the Corps on the data that EPA used were requested or obtained. EPA appears to have placed its own data into tables originally provided by the Corps. This results in a gross misrepresentation of the Corps' raw data.

9. The EPA's use of compensatory mitigation as a benefit is also problematic. Estimated Section 404 benefits described in the document based on compensatory mitigation required for permitted impacts, while costs are based on compliance with a Section 404 permit. Both are based on the same unit impact acreage. As compensatory mitigation is typically greater than compliance (i.e. acres of required mitigation are greater than acres of authorized impact), the overall ratio of costs to benefits cannot change. Compensatory mitigation is provided to offset acreage and functions of aquatic resources lost through authorized impacts from Corps permitting with a programmatic goal of achieving no net loss; thus, it is unclear how this translates to a "benefit." Both should be costs.

10. The document is misleading in its geographic representation of data. Based on the sample set of JDs used for its analysis, in many instances EPA used one JD per state to draw conclusions regarding regional variations of the impacts of the draft final rule, such as the draft final rule section (a)(7) categories of isolated waters (prairie potholes, western vernal pools, Carolina bays and Delmarva bays, Texas coastal prairie wetlands, and pocosins). More specificity is necessary to inform the public on the true expected delta of changes in jurisdiction, either lost or gained, jurisdiction under the draft final rule.

11. Although administrative costs were included in the economic analysis accompany the proposed rule, there was no comparable cost requested or provided in the attached Economic Analysis document to accompany the draft final rule. The document estimates CWA jurisdiction to increase from its estimate of 2.7 percent in the proposed rule to 4.65 percent in this analysis of the draft final rule. Section 404 administrative costs are qualitatively described in this document; however, the cost estimate value is left blank. The Corps was not asked to provide information about the increase in administrative costs that would be expected to result from EPA's calculation of increased jurisdiction. Although the Corps is unable to validate how EPA arrived at its estimate of a 4.65 percent increase in jurisdiction, our preliminary review using EPA's estimate indicates that the Corps' administrative costs may increase by $4 million.

12. Several important aspects of jurisdiction were not considered as part of the analysis in the document, which contribute to its technical weakness. The analysis focused only on estimated increases in jurisdiction, not on potential decreases, thus it was limited in its scope. Some of

these aspects were disclosed as assumptions; however, the absence of robust analysis when that analysis is possible is not technically sound.

a. Significant nexus determinations on all types of aquatic resources (e.g. adjacent wetlands) were not reviewed to inform the estimated change in jurisdiction. Only approved jurisdictional determinations on isolated waters were reviewed.

b. A more extensive review of significant nexus determinations would have allowed for an accurate estimation of predicted changes in jurisdiction regarding adjacent waters and tributaries. The assumption was made that all tributaries would be jurisdictional under the final rule; however, some tributaries that are currently jurisdictional might no longer be jurisdictional under the draft final rule.

c. An assumption was made that all adjacent wetlands would be jurisdictional under the final rule; however, some currently jurisdictional adjacent wetlands may not be considered adjacent under the final rule as a result of the "bright-line" distance thresholds and the prohibition on using shallow subsurface and confined surface flow connections to establish adjacency. More analysis is necessary to quantify potential decreases in jurisdiction of these waters, which may offset the potential increase in jurisdiction predicted in the Economic Analysis.

13. Finally, the statement in the Economic Analysis document that "[t]his action does not have tribal implications as specified in E.O. 13175" is currently inaccurate. Both the expansion of and loss of current jurisdiction over WOUS may have significant effects on tribes and treaty/trust resources. These effects have not been identified and evaluated, and the tribes concerned apparently were not consulted as part of the Economic Analysis.

14. In sum, as stated above, the Corps cannot be identified as an author, co-author or substantive contributor to the EPA's Economic Analysis of the draft final rule defining WOUS. I request that all references to the Corps be removed from the attached document and reference made to the EPA only as the author of the product in all documents associated with the final rule.

EPA's TSD

15. As mentioned above, it appears the EPA used a considerable amount of Corps data in preparing the TSD; no data was requested by or provided to EPA to produce the TSD. The Corps also had no role in performing the analysis or drafting the TSD.

16. In the TSD, the EPA overestimates the number of case-specific significant nexus determinations (SNDs) the agencies have completed since 2008. The TSD states that the agencies have made more than 500,000 JDs since 2008, and of those approximately fifty percent included SNDs. This conflicts with Corps data and estimates and the Corps is unclear how and from what dataset EPA derived the estimate included in the TSD.

a. Corps data show that the Corps completed approximately 424,000 JDs on 710,000 aquatic resources.

b. The Corps estimates that, at the uppermost limit, it has completed SNDs on approximately seventeen percent of the aquatic resources for which JDs have been completed.

c. The seventeen percent includes both preliminary and approved JDs.

d. An even smaller percentage of the seventeen percent were required to be coordinated with EPA (e.g., non-relatively permanent waters, wetlands adjacent but not abutting those waters, etc.)

17. The TSD states that the SNDs are the "key" to the agencies' interpretation of the CWA. However, a policy decision has been made, which conflicts with the TSD. An SND cannot be performed outside 4,000 feet from the ordinary high water mark (OHWM)/high tide line (HTL) of an (a)(1)-(a)(5) water under the draft final rule, which eliminates use of the "key method" in determining jurisdiction for such waters. The 4,000-feet limit arbitrarily cuts off which waters can be determined "similarly situated" under an SND, as (a)(8) waters cannot be aggregated with other waters beyond 4,000 feet even if they are truly "similarly situated," further limiting the use of the "key" factor under the final rule. The 4,000-foot limitation under (a)(8) conflicts with the TSD regarding the importance of connectivity. The Connectivity Report, produced by EPA to support the proposed rule recommended against using linear distance limitations to establish jurisdictional boundaries.

18. The TSD states that the 4,000-foot distance threshold limit for (a)(8) waters "will protect the types of waters that in practice have been determined to have a significant nexus on a case-specific basis." This statement is unfounded. The isolated JDs reviewed for the Economic Analysis by EPA to estimate the change in jurisdiction were originally considered under the 2003 *SWANCC* guidance; therefore, jurisdiction was determined based on whether there was an interstate/foreign commerce connection, the jurisdiction was not analyzed through a SND. None of the isolated JDs resulted in a positive determination of jurisdiction. The EPA did not review any of the agency-coordinated SND JDs and as such could not have estimated how many of the SNDs would include waters that would be covered under (a)(8) of draft the final rule. Approved JDs are not required to indicate the distance from the aquatic resource to the nearest tributary OHWM. Therefore, the potential impacts to jurisdiction as a result of the (a)(8) distance limit cannot be estimated and the Corps cannot corroborate the numbers or conclusions in the TSD.

19. The TSD describes that wetland functions and wetland proximity to downstream waters determine where wetlands occur along the connectivity gradient. The TSD states that the science demonstrates strong evidence supporting the connectivity of waters in varying degrees in maintaining the structure and function of downstream waters. The appropriate conclusion would be that an SND should be performed for all waters not determined adjacent to determine where they fall along the connectivity gradient and whether that nexus is significant. However, under the draft final rule, if the subject water is greater than 4,000 feet from the OHWM/HTL of an (a)(1)-(a)(5) water, even if they are within an area that lies along the connectivity gradient of the tributary and may be providing important functions to the downstream waters, an SND cannot be performed under the draft final rule and the water would be non-jurisdictional. Thus, the TSD contains conclusions that conflict with the language of the final rule

20. The TSD describes that wetlands with channelized surface or regular shallow subsurface connections demonstrate connectivity and provide functions that can be generalized and can affect downstream waters. A shallow subsurface or confined surface connection should be a factor in determining jurisdiction based on the discussion in the TSD. However, such factors are not able to be used under the draft final rule as a factor in an (a)(6) adjacency determination and cannot be used in establishing jurisdiction under a SND for waters beyond 4,000 feet from the OHWM/HTL of an (a)(1)-(a)(5) water. The TSD provides evidence of studies that indicate the "substantial" functions provided by non-floodplain wetlands. The draft final rule forecloses on the ability to do a SND on waters beyond 4,000 feet from the OHWM/HTL of an (a)(1)-(a)(5) water despite the potential presence of such "substantial" functions described by the TSD. This conflicting language serves as a basis for technical conflicts during implementation.

21. The TSD emphasizes that evaluations of individual wetlands should be considered in the context of other wetlands within the same watershed and emphasizes the aggregation of waters in the watershed. The TSD also emphasizes that wetlands complexes can be connected to downstream waters even if individual wetlands are isolated. As such, JDs for wetlands should consider the influence and effect in aggregate of other wetlands within the same watershed. However, the draft final rule does not allow for aggregation of (a)(6) waters when doing an SND for (a)(7) or (a)(8) waters, and does not allow for (a)(8) waters to be aggregated with waters beyond 4,000 feet from the OHWM/HTL of an (a)(1)-(a)(5) water. Caveats should be included regarding policy decisions that restrict and limit SNDs to the arbitrary distances and that limit the types of waters that can be aggregated within a watershed to reflect the situations where "in the region" and "similarly situated" are not allowed under the final rule.

22. The TSD emphasizes that the agencies undertook a very thorough analysis of the complex interactions between upstream waters and wetlands and the downstream rivers to reach the significant nexus conclusions underlying the provisions of the draft final rule. This does not comport with or support the policy decisions made to restrict aggregation and SNDs under the distance limits. Furthermore, the Corps was not part of any type of analysis to reach the conclusions described; therefore, it is inaccurate to reflect that "the agencies" did this work or that it is reflective of the Corps experience and expertise.

23. The TSD does not provide support for the determination of how "significance" will be measured in the SND or what is "more than speculative or insubstantial?" How is that quantified beyond the list of factors to be considered in the definition of the final rule? The TSD also does not provide clarity for how "similarly situated" is defined. The TSD contains clearer and consistent language than the language in the preamble regarding bed/banks and OHWM, as well as the discussion on breaks in those indicators not limiting upstream and downstream reaches of the tributary. There is potential for the language in the TSD to conflict with the language in the preamble; such language on these topics needs to be consistent and clear between the TSD and the preamble.

24. The document does not provide necessary support for the draft final rule language and cannot be used by the field in implementing the final rule. The TSD recognizes that floodplains

of large river systems are much greater than 4,000 feet from the OHWM/HTL of the river. Arguably, it is the expansive floodplains of the larger river systems that provide the important exchange between waters within the floodplain and (a)(1)-(a)(5) waters rather than a linear distance.

25. The Corps provided substantial technical comments on the draft EPA Connectivity Report, which are still valid with respect to the technical validity of the concepts presented in the TSD. Thus, with respect to the TSD, as with the Economic Analysis, the Corps cannot be identified as having been involved in performing the technical analysis or preparation the actual document. It is inaccurate to reflect that the Corps experience and expertise is reflected in the conclusions drawn within the document. All references to the "agencies" or to the Corps should be removed from the TSD and the sole author of the TSD is appropriately EPA.

26. In conclusion, it should be made clear by EPA within each document the sections or subject matter areas for which the Corps provided data, but the documents should not be characterized as anything other than analyses performed solely by the EPA. The Corps should not be identified as an author, co-author or substantive contributor to either document. Additionally, all references to the "agencies" in the documents should be removed as well as references to conclusions drawn based on the agencies' "experience and expertise."

27. The point of contact for this memorandum is Ms. Jennifer Moyer at 202-761-4598

Jennifer A. Moyer

JENNIFER A. MOYER
Chief, Regulatory Program

Review Comments on *Economic Analysis of the EPA-Army Clean Water Rule* (April 27, 2015)

Paul Scodari, CEIWR-GW
May 11, 2015

The comments presented below are limited to the 2015 report estimation of CWA Section 404 permit application costs and compensatory mitigation benefits, and how these calculations changed from the 2014 report that was released for public comment. The comments are organized in two parts that address: 1) major revisions from the 2014 report, and 2) what did not significantly change from the 2014 report.

Major Revisions from 2014 Report

1. Revised estimate of increase in jurisdictional determinations.

   The 2015 report calculates that the rule will result in a 4.65% overall increase in positive jurisdictional determinations, while the 2014 report calculated the increase as 2.7%. The difference is due to different jurisdictional determination datasets used to produce the estimates—the 2015 report used a dataset corresponding to fiscal years 2013-2014, while the 2014 report used a dataset correspond to fiscal years 2009-2010. Use of 2013-2014 data in the 2015 report purports to respond to public comments expressing concern that the 2009-2010 datasets reflected a period of significant economic distress, and thus a relatively low level of Section 404 permitting.

2. Revised estimates of increase in Section 404 permit units, average impact acreage, increase in total impact acreage, and increase in total permit application costs.

   These changes are driven by the revised estimate of increased jurisdictional determinations (4.65%) as well as a different permit datasets to which the revised estimate are applied. The 2014 report based this analysis on the total number of (and average impact acreage for) permits issued in FY2010, while the 2015 report relied on permit data from FY2009-2014. Specifically, the 2015 report used the highest number of individual permits and general permits issued in any one year over this five year period, and average impact acreage for permits issued in FY2013 (it is not clear why year 2013 was chosen to calculate average impact acreage for permits).

   The result of these revisions was to change the estimates of total additional individual and general permits and total additional impact acreage for those permits. For individual permits, the estimated number of added permits increased from 75 to 217, but the average impact acreage fell from 12.81 to 5.94, resulting in a net increase in added impacts due to the rule from 960 to 1290 acres. For general permits, the estimated number of added permits and average impact acreage both roughly doubled, resulting in an increase in added impacts due to the rule from 372 to 1200 acres.

   These revisions, when combined with the unit cost estimates and cost formulas for permit application (which did not change from 2014 report), result in an increase in estimated total annual

permit application costs. From the 2014 report to the 2015 report, the "high" estimate for annual permitting costs increased from $52.9 million to $80.3 million.

3. Representation of USACE views

For the 2014 report, USACE made a point of telling EPA to delineate which sections of the analysis USACE did and did not contribute to, and to characterize the entire report as an EPA analysis. In the 2015 report, by contrast, EPA seems to go out of its way to link report responsibility to USACE. While it is true that USACE cannot run from this rulemaking or this report, some of things in the report that seem overblown might be addressed at the margin. One example is the strange report title. Other examples involve assertions in the narrative about what the "agencies believe." For example, the last sentence of the second full paragraph on page 6 state, "For these and similar reasons, the agencies believe that positive jurisdictional determinations under the final rule will be less than assumed for the purpose of this economic analysis." These statements should be identified, reviewed, and modified as deemed necessary to accurately reflect USACE views.

What Did Not Significantly Change from 2014 Report

1. Section 404 dominates estimated rule costs and benefits

In both the 2014 report and the 2015 report, estimated effects for Section 404 drive the estimates of rule costs and benefits. In the 2015 report, the "high" estimate for all Section 404 compliance costs (sum of permit application and mitigation costs) represents 70% of total rule costs, and estimated Section 404 benefits accounts for 87% of total rule benefits. Note that the 2015 report did not include estimates of increase in USACE costs for administering the Section 404 program; revised estimates apparently were not yet available for inclusion in this draft.

2. Proportionality of estimated Section 404 benefits to costs

In both the 2014 and 2015 reports, estimated Section 404 benefits, which are based on compensatory mitigation for permitted impacts, outweigh estimated Section 404 compliance costs. This is because unit (mitigation) benefits are greater than unit (compliance) costs for a "typical" Section 404 permit, where both are based on unit impact acreage. So even though the 2015 report significantly increased estimated positive jurisdictional determinations and permitted impacts, this did not (could not) change the overall relationship between estimated benefits and costs for Section 404, and thus for the rule as a whole.

3. Section 404 benefits analysis

USACE has always recognized that the Section 404 benefits analysis is meaningless. However, agencies are required by Administrative policy to develop benefits estimates for rulemakings whenever possible. The OMB representative for this rulemaking encouraged and appears comfortable with the benefits transfer approach applied for Section 404 benefits analysis, and from the beginning EPA was intent on including a benefits analysis that would show that rule benefits outweigh costs (even though the CWA

does not require such a showing). There is nothing more to say or do relating to this benefits analysis, however. USACE is just going to have to live with it and leave responsibility for defending it to EPA and OMB.

ATTACHMENT B

Leaked EPA Analysis of 2020 Dirty Water Rule

-----Original Message-----
From: Jensen, Stacey M CIV USARMY CEHQ (US)
Sent: Tuesday, September 05, 2017 1:00 PM
To: 'Goodin, John' <Goodin.John@epa.gov>
Cc: Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>; Moyer, Jennifer A CIV USARMY CEHQ (US) <Jennifer.A.Moyer@usace.army.mil>; Kwok, Rose <Kwok.Rose@epa.gov>
Subject: RE: Two actions

Hi John,

I have provided the graphics you requested (attached) along with some draft "key takeaways." Let me know what you think. I am also putting together a graphic for the visual of the flow relationships; I'll have something shortly.

Stacey M. Jensen
HQUSACE Regulatory Program Manager
441 G Street NW
Washington, DC 20314
(202) 761-5856

-----Original Message-----
From: Goodin, John [mailto:Goodin.John@epa.gov]
Sent: Monday, September 04, 2017 6:08 PM
To: Jensen, Stacey M CIV USARMY CEHQ (US) <Stacey.M.Jensen@usace.army.mil>
Cc: Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>; Moyer, Jennifer A CIV USARMY CEHQ (US) <Jennifer.A.Moyer@usace.army.mil>; Kwok, Rose <Kwok.Rose@epa.gov>
Subject: [EXTERNAL] Two actions

Hi, Stacey-- Mindy and I poured over the totality of the briefing materials for Lamont and the Administrator and made some edits consistent with my last email to the group and Mindy's forthcoming one tonight. Two things that would benefit from your expertise are:

[redacted]

[redacted]

Thanks!
John

(b)(5) deliberative process

CLASSIFICATION: UNCLASSIFIED

CLASSIFICATION: UNCLASSIFIED

Breakdown of Flow Regimes in NHD Streams Nationwide

Both length (miles) and count (number) of streams were the same percentages.

30% of all streams are perennial; **52%** of all streams are intermittent; **18%** of all streams are ephemeral.

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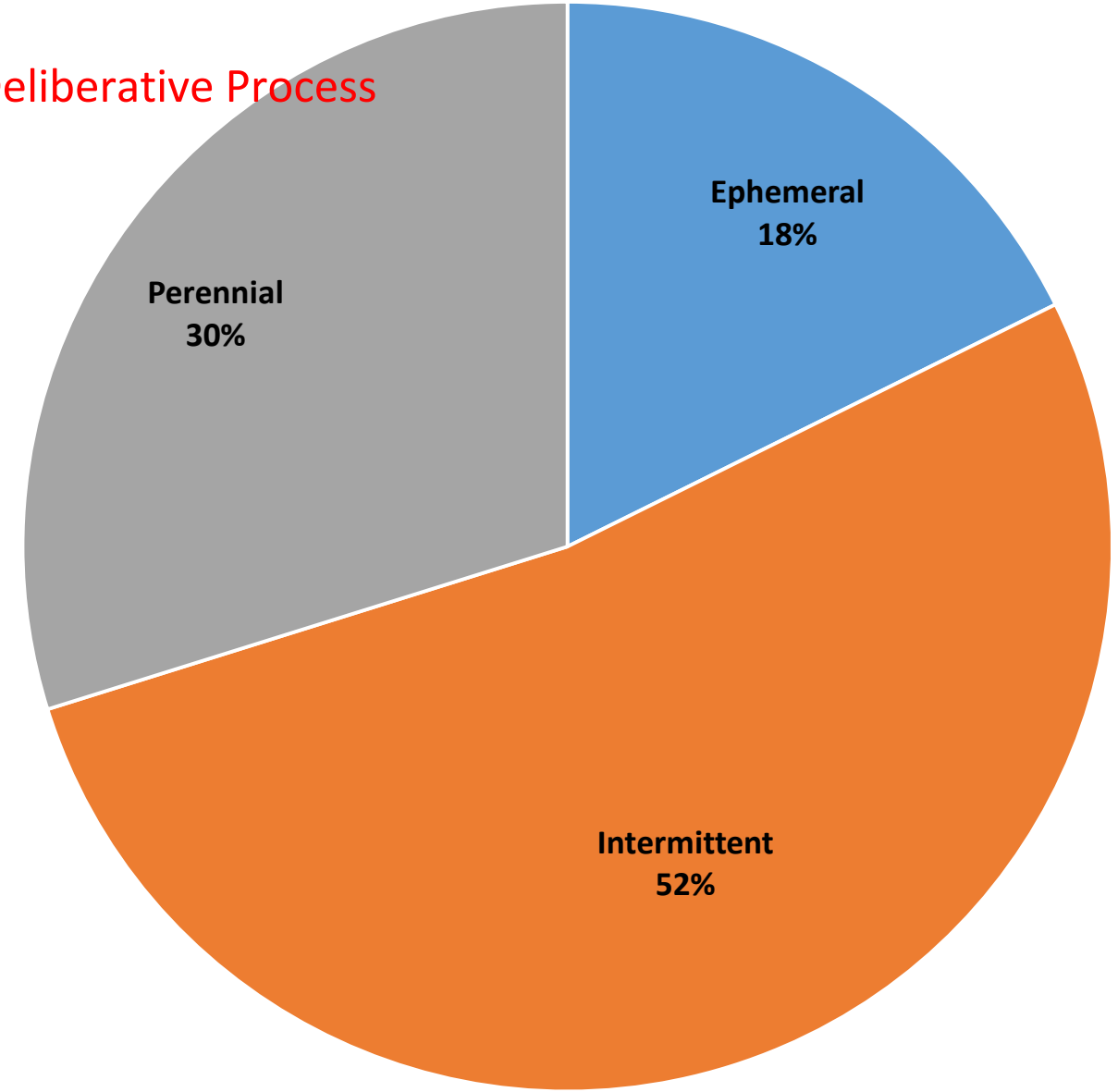

*Note that NHD focused their mapping efforts of ephemeral streams in the Arid West. In the rest of the country, many of the ephemeral streams are classified as intermittent or are not mapped.

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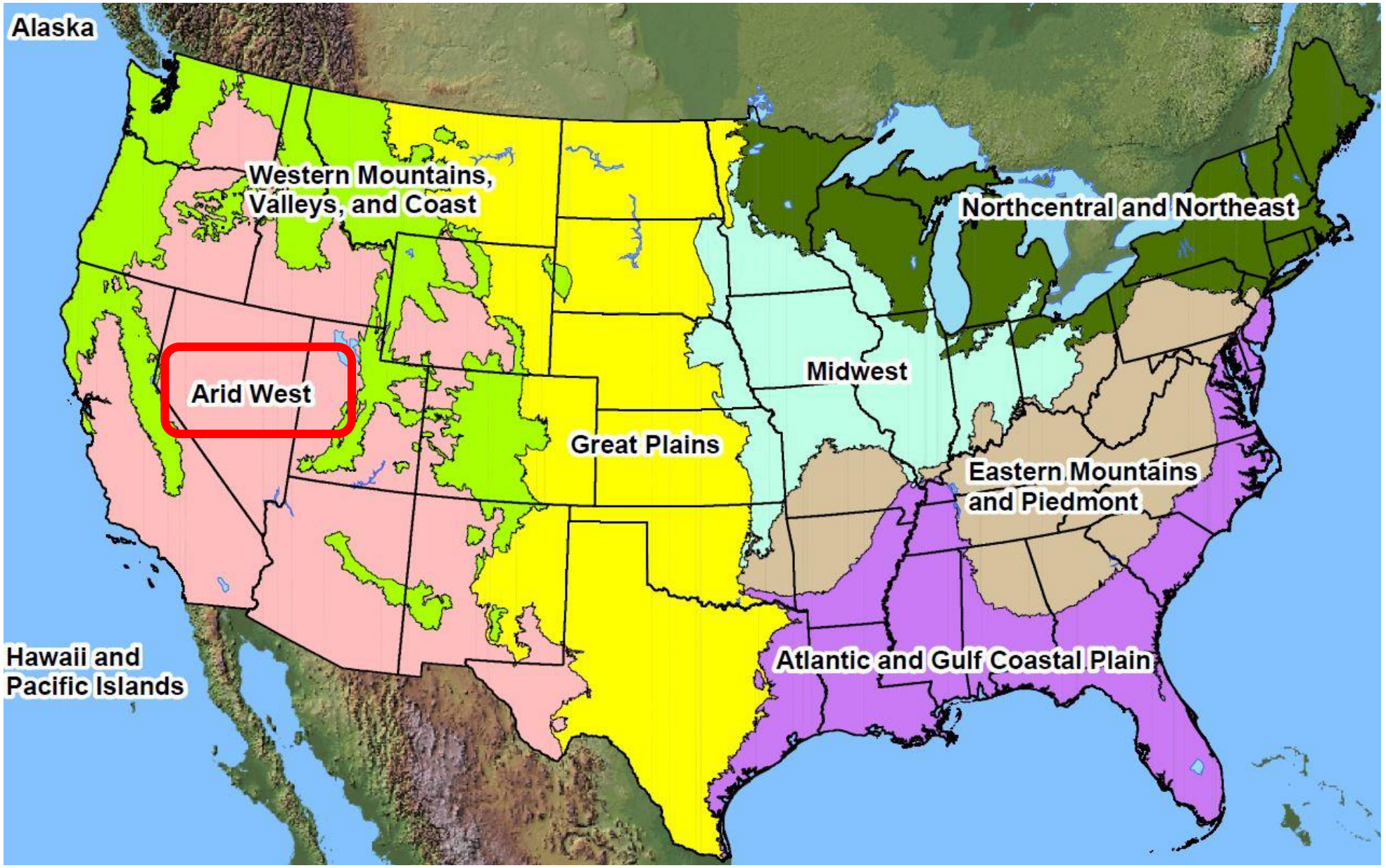
Arid West for NHD analysis included AZ, CA, CO, ID, NV, NM, OR, TX, UT, WA, WY



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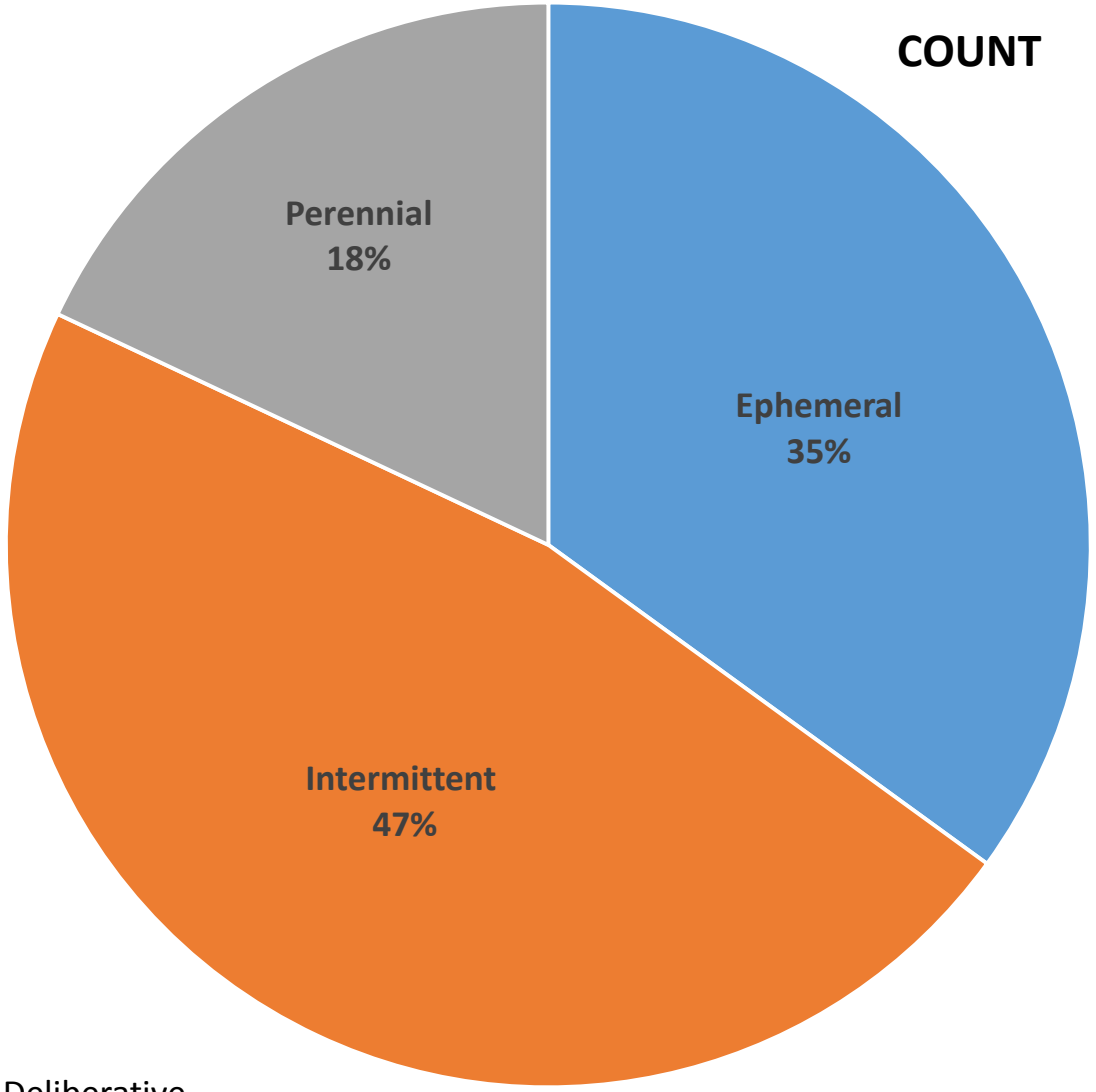
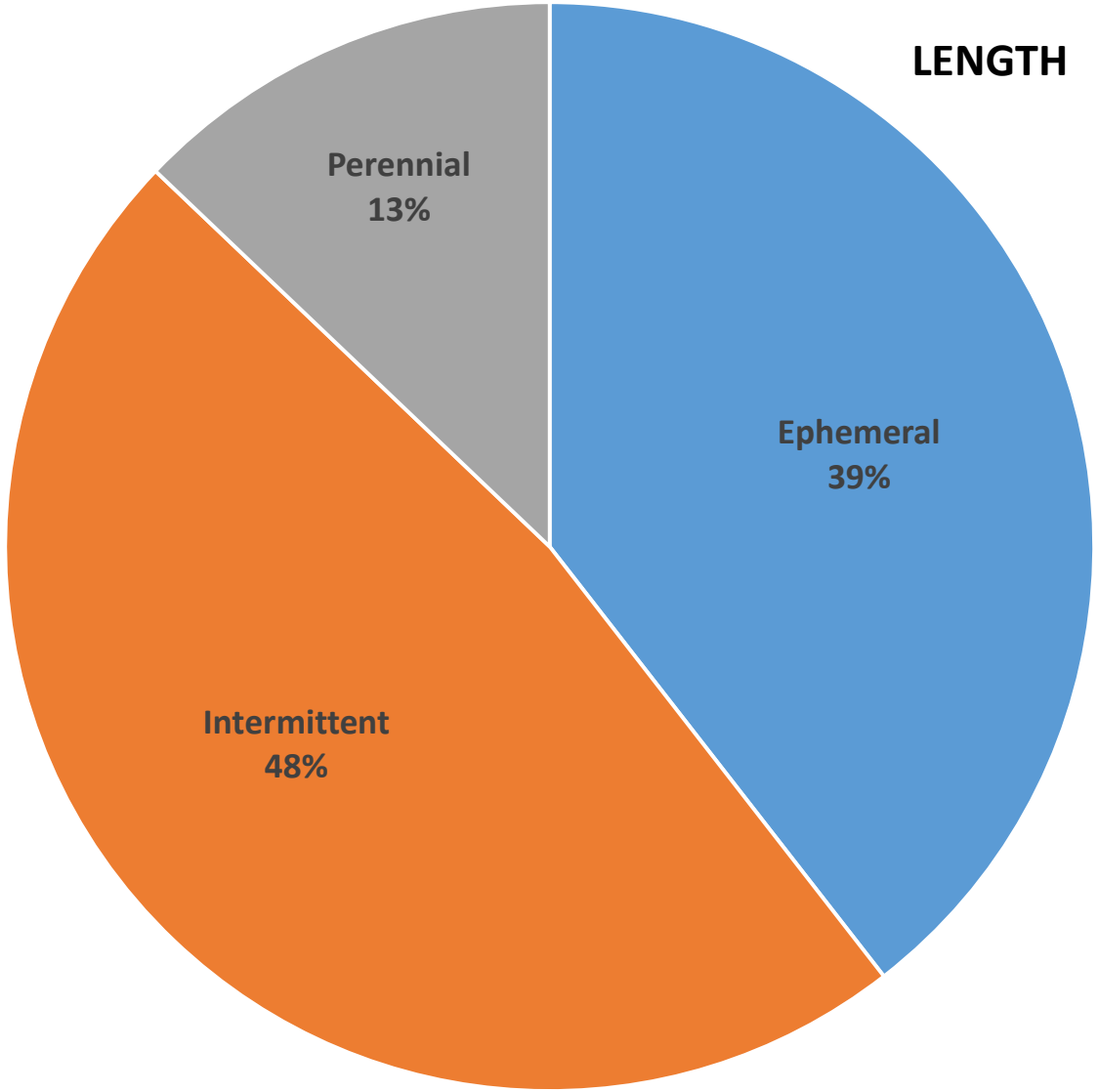
Breakdown of Flow Regimes in Arid West Streams as Mapped in NHD

18% of all streams count in the Arid West are perennial; **47%** of all streams count in the Arid West are intermittent; and **35%** of all streams count in the Arid West are ephemeral. **13%** of all stream length in the Arid West is perennial; **48%** of all stream length in the Arid West is intermittent; and **39%** of all stream length in the Arid West is ephemeral.





Key Takeaways for NHD-mapped Waters

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- Intermittent Streams:
  - Majority of total length and number of NHD features comprise Intermittent Streams (~52%)
  - Intermittent Streams are found in every state.
  - The median value of stream miles by type for all states is: Intermittent Streams - ~46,000 miles; Perennial Streams - ~24,000; and Ephemeral Streams - ~300 miles.
  - Potential policy options for defining “relatively permanent flow” excluding Intermittent Streams could result in a large reduction in jurisdiction and would impact every state.
- Arid West:
  - NHD mapping has focused on distinguishing Ephemeral from Intermittent Streams in the Arid West more than other parts of the U.S. In NHD, the majority of mapped Ephemeral Streams (~99%) and a large portion of mapped Intermittent Streams (47%) are in the Arid West.
  - ~87% of all mapped stream length in the Arid West is either Ephemeral (39%) or Intermittent (48%).
  - Based on NHD analysis, the proposed options for defining “relatively permanent flow” could result in a greater reduction of jurisdiction in Arid West states than in other states.
- Canals/Ditches:
  - NHD does not map all canals/ditches that may be of stakeholder interest. Canals/Ditches comprise 4% of the overall NHD-mapped features.

NHD Caveats and Status

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- Caveats:
  - NHD does not map all streams or waterbodies. The majority of perennial and most intermittent streams are captured at this resolution.
  - Ephemeral streams: although such streams do exist throughout the country, the NHD dataset focused their mapping efforts on ephemeral streams in the Arid West. Ephemeral streams in the rest of the country were generally classified as intermittent or are not mapped in the dataset. This may result in an underestimation of the number of ephemeral streams throughout the country, although it does give a more accurate picture of the stream network in the Arid West.
  - Canals/Ditches: not all canals/ditches are mapped in NHD or they may be mapped as tributaries.
  - NHD does not depict jurisdictional status of streams. **No available national datasets depict the jurisdictional extent of all mapped waters.**
- **Status: still reviewing data for further, more detailed analysis. Need to complete analysis of NHD lakes/ponds data.**

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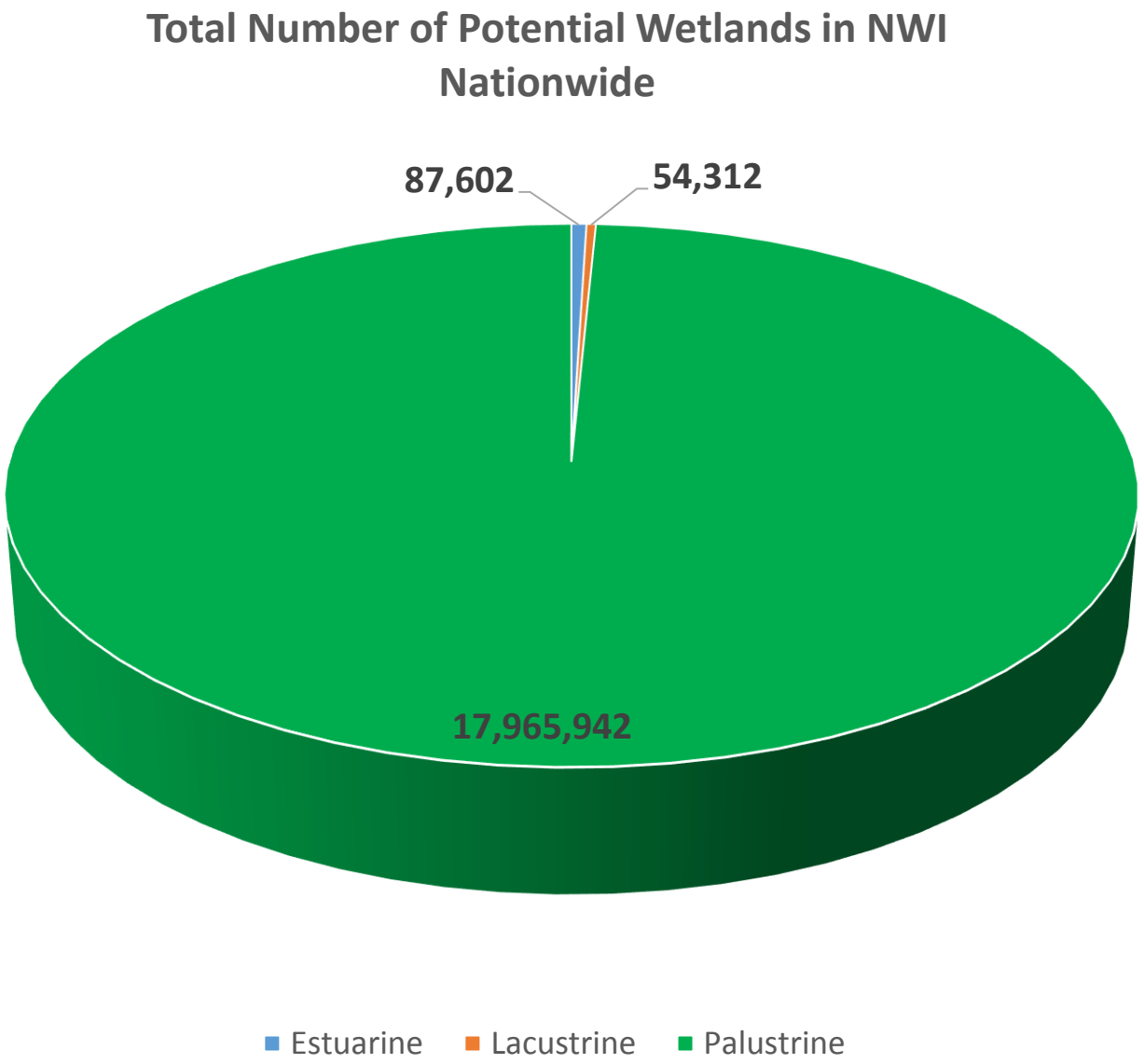

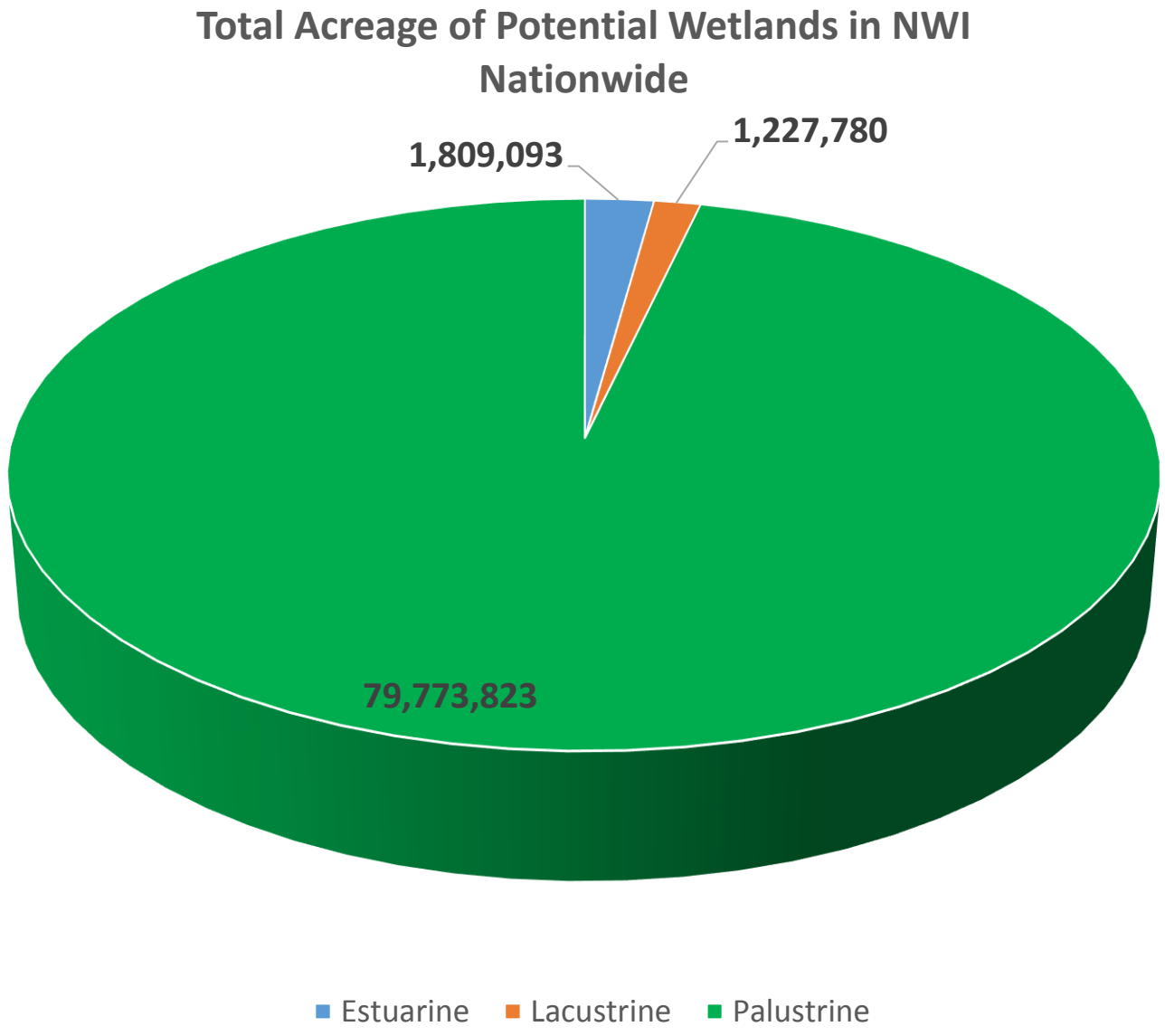

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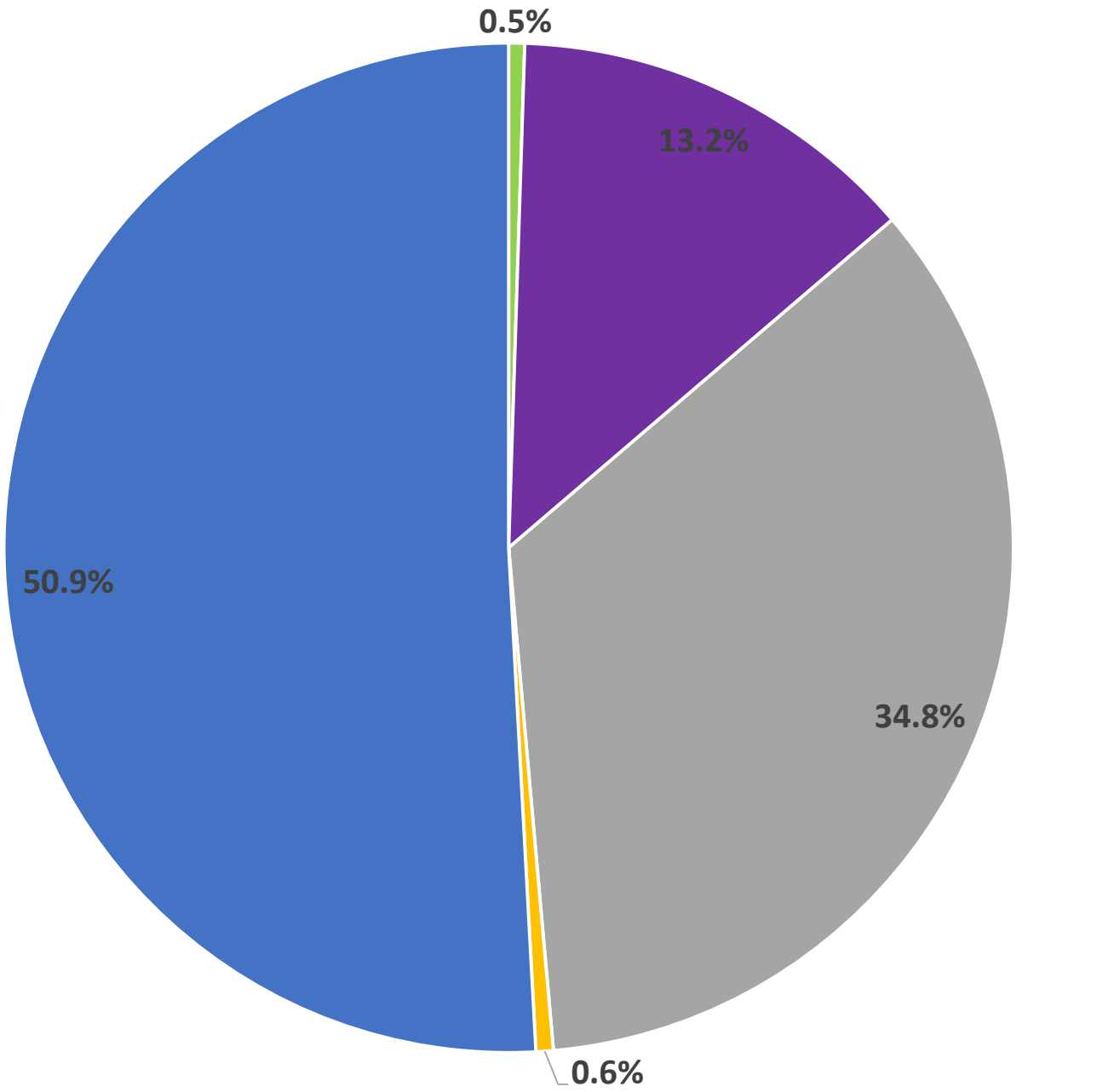
Process



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Key Takeaways for NWI-mapped Potential Wetlands

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- Majority of NWI-mapped potential wetlands in both number and acreage are Palustrine (freshwater wetlands). This may be because wetlands associated with lakes/ponds (Lacustrine) are generally smaller in number and size due to the depth of water and limited floodplains compared to streams, and there are many more interior freshwater systems than remaining coastal wetlands (Estuarine) due to coastal development.
  - Potential policy options for defining "continuous surface connections" may reduce jurisdiction over Palustrine waters the most since they may not be directly touching rivers, lakes, or tidal waters.
- Majority of NWI-mapped potential wetlands (by acreage) do not intersect any NHD stream feature.
  - The proposed option of defining "continuous surface connection" as directly touching a waters of the U.S. may result in ~51% of NWI-mapped potential wetland acreage not being considered adjacent.

Key Takeaways for NWI-mapped Potential Wetlands (cont'd)

- Of the 49% of NWI-mapped potential wetland acreage which does intersect an NHD stream, the largest proportion intersect Perennial Streams.
  - Perennial Streams would be expected to have wider floodplains and larger acreages of adjacent wetlands than Intermittent or Ephemeral Streams.
  - Majority of potential wetland acreage which intersected NHD streams was Palustrine which correlates with the majority of mapped potential wetland acreage in NWI being Palustrine; larger wetlands may more often intersect NHD-mapped streams due to their size, landscape position, and hydrology. However, 51% of all Palustrine wetlands did not intersect any NHD stream.
  - Estuarine potential wetlands almost exclusively intersected perennial streams.
  - The option selected for RPW would have an effect on the option selected for CSC; for example, ~13% of NWI potential wetlands intersected Intermittent Streams.
- Small amounts of acreage of NWI-mapped potential wetlands intersect Ephemeral Streams.
  - Ephemeral Streams often lack adequate hydrology to maintain adjacent wetlands.
  - Reminder: NHD has generally not mapped Ephemeral Streams outside the Arid West.

NWI Caveats

Withhold in Entirety (b)(5) Deliberative Process

- NWI does not map all wetlands and deepwater habitats. Certain wetland habitats may be excluded from the NWI because of the limitations of aerial imagery interpretation.
- The accuracy of image interpretation depends on the quality of the imagery, the experience of the image analysts, and the amount of ground truth verification work conducted.
- Wetlands or other mapped features may have changed since the date of the imagery and/or field work.
- NWI does not recognize ephemeral water areas as a wetland type so ephemeral waters/wetlands are not included. These are areas flooded or ponded less than seven days.
- Certain wetlands are harder to identify remotely (e.g., wetlands in forested areas).
- NWI excludes certain types of “farmed wetlands” as defined by the Food Security Act.
- Wetlands are dynamic systems that may sustain several years of drought conditions, making it difficult to identify and map simply because they are not detected on aerial imagery.
- Small wetlands <1.0 acre are not required to be mapped; minimum mapping unit target for NWI is 1.0 acre.
- Wetland boundary location can be an inaccurate up to 10 meters and still be acceptable.
- NWI does not depict jurisdictional status of wetlands. **No available national datasets depict the jurisdictional extent of all mapped wetlands.**

ATTACHMENT C

Draft Letter from EPA SAB to Andrew Wheeler, Subject: Commentary on the Proposed Rule Defining the Scope of Waters Federally Regulated Under the Clean Water Act, EPA-SAB-20-xxx (Oct. 16, 2019)

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON D.C. 20460

OFFICE OF THE ADMINISTRATOR
SCIENCE ADVISORY BOARD

EPA-SAB-20-xxx

The Honorable Andrew R. Wheeler
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Subject: Commentary on the Proposed Rule Defining the Scope of Waters Federally Regulated Under the Clean Water Act

Dear Administrator Wheeler:

Establishing a sound, consistent, scientifically supported and clear definition of "waters of the United States" (WOTUS) is a critical component of implementing the United States Federal Water Pollution Control Act (1972), more commonly known as the Clean Water Act (CWA). The Act itself does not provide such a definition. Achievement of the Act's overall objective "to restore and maintain the chemical, physical and biological integrity of the Nation's waters" requires a clear definition of the geographic and hydrologic scope of these waters. On February 14, 2019, the EPA and the Department of the Army, Corps of Engineers published a new proposed rule defining the scope of waters federally regulated under the Clean Water Act (84 FR 4154)[1]. At the EPA Science Advisory Board (SAB) meeting on June 5-6, 2019, the SAB discussed the scientific and technical underpinnings of the proposed WOTUS rule and concluded that aspects of the proposed rule are in conflict with established science, the existing WOTUS rule developed based on the established science, and the objectives of the Clean Water Act. The SAB voted to provide a commentary to the Agency outlining the nature of this conflict.

Process Used by the SAB to Develop This Commentary

The SAB established a WOTUS Work Group to develop an initial draft of this commentary. The draft commentary was then reviewed and approved by the full SAB at a public teleconference held on [insert date]. The SAB WOTUS Work Group consisted of Drs. Alison Cullen (chair), Bob Blanz, John Guckenheimer, Michael Honeycutt, Clyde Martin, Robert Merritt, Robert Puls, and Tara Sabo-Attwood. The SAB Work Group considered the proposed rule's content,

[1] Available at: https://www.govinfo.gov/content/pkg/FR-2019-02-14/pdf/2019-00791.pdf

supporting materials and documents, a previous fact-finding teleconference with EPA, comments from EPA staff at the June 5-6, 2019 SAB meeting, and the deliberation of the entire chartered SAB at this meeting in developing the draft commentary.

Commentary on Revised Definition of "Waters of the United States" (84 FR 4154)

The SAB finds that the proposed revised definition of WOTUS (84 FR 4154) (hereafter, the proposed Rule) decreases protection for our Nation's waters and does not support the objective of restoring and maintaining "the chemical, physical and biological integrity" of these waters. At the June 5-6, 2019 SAB meeting, the Board offered to support EPA in the application of more recent scientific advances to increase clarity and consistency for CWA needs. However, it was made clear that the EPA has chosen to interpret the CWA and subsequent case law as constraining them to limiting the definition of WOTUS to the language of the proposed rule. The SAB acts under no such constraint to give deference to shifting legal opinions in its advisory capacity and is in fact obligated by statute to communicate the best scientific consensus on this topic. The following key elements amplify this finding.

- The proposed Rule does not fully incorporate EPA's 2015 Connectivity Report (U.S. EPA 2015)[2], Rains (2011)[3], and Rains et al. (2016)[4] and is a substantial departure from the earlier WOTUS rule definition. The EPA's 2015 Connectivity Report emphasizes that functional connectivity is more than a matter of surface geography. The report illustrates that a systems approach is imperative when defining the connectivity of waters, and that functional relationships must be the basis of determining adjacency. The proposed Rule offers no comparable body of peer reviewed evidence to support such a departure, and no scientific justification for abandoning the more expansive view of connectivity of waters accepted by current hydrological science, which has advanced substantially since the CWA was enacted decades ago, as reflected in the Connectivity report.

- The proposed Rule neglects established science pertaining specifically to the connectivity of ground water to wetlands and adjacent major bodies of water by failing to acknowledge watershed systems and processes discussed in EPA's 2015 Connectivity Report. In particular, there is no scientific justification for excluding ground water from WOTUS if spring-fed creeks are considered to be jurisdictional. The chemical or biological contamination of ground water may lead to contamination of functionally connected surface water. Ground water may also contribute to intermittent flow of jurisdictional tributaries. Shallow ground water may directly connect wetlands to adjacent major bodies of water. Therefore, the scientific importance of ground water protection and ground water connections should require that these waters be protected from unacceptably high contamination. The same threats apply to those bodies of water that only occasionally flow, such as the arroyos of the Southwest United States. In the

[2]U.S. EPA. 2015. *Connectivity of streams and wetlands to downstream waters: a review and synthesis of the scientific evidence technical report*. EPA/600/R-14/475F. U.S. Environmental Protection Agency, Washington, D.C.
[3] Rains, M.C. 2011. Water Sources and Hydrodynamics of Closed-Basin Depressions, Cook Inlet Region, Alaska. *Wetlands* 31:377-387.
[4] Rains, M.C., S.G. Leibowitz, M. J. Cohen, I.F. Creed, H.E. Golden, J.W. Jawitz, P. Kalla, C.R. Lane, M.W. Lang, and D.L. McLaughlin. 2016. Geographically isolated wetlands are part of the hydrological landscape. *Hydrological Processes* 30:153-160.

proposed Rule the EPA and Department of the Army specifically requested comment on "if and under what circumstances subsurface water connections between wetlands and jurisdictional waters could be used to determine adjacency." The SAB submits that there is a solid body of scientific evidence regarding the existence of these connections documented in EPA's 2015 Connectivity Report, which provide the basis for answering this request for comment.

- The proposed Rule excludes irrigation canals from the definition of WOTUS. The biological and chemical contamination of large-scale irrigation canals is an established and serious threat to public health and safety (Allende and Monaghan 2015)[5]. The presence of *E. coli* in leafy vegetables is often traceable to irrigation water contaminated by animals in feed lots or pastures adjacent to the canals. Water associated with confined animal feeding operations has also been shown to contain chemical contaminants, such as steroids, that are associated with public health concerns (Allende and Monaghan 2015; Bartelt-Hunt et al. 2011; Gall et al. 2014).[6,7,8]

- The definition of jurisdictional waters in the proposed Rule also departs from established science cited by EPA in support of the 2015 WOTUS Rule, in the exclusion of adjacent wetlands that do not abut or have a direct hydrologic surface connection to otherwise jurisdictional waters. SAB review of the 2015 WOTUS rule found a sound scientific basis for the inclusion of these wetlands (U.S. EPA Science Advisory Board 2014)[9]. No body of peer reviewed evidence has been presented to support an alternative conclusion.

- The proposed Rule portrays three Supreme Court decisions as establishing a coherent basis for drawing simple "bright lines" to determine jurisdictional waters for the purpose of the CWA; however, by abandoning a scientific basis to adopt a simplistic, if clear surface water-based definition, this approach neither rests upon science, nor provides long term clarity, as is evidenced by the continuing interpretation and re-interpretation of these decisions over time. However, we understand that the EPA and Department of the Army will abide by their current interpretation of the law.

In summary, the SAB is disappointed that the EPA and Department of the Army have decided that the CWA and subsequent case law precludes full incorporation of the scientific aspects of EPA's 2015 Connectivity Report into the proposed Rule. The proposed definition of WOTUS is

[5] Allende, A. and J. Monaghan. 2015. Irrigation Water Quality for Leafy Crops: A Perspective of Risks and Potential Solutions. *International Journal of Environmental Research and Public Health*, 2015 Jul. 12(7): 7457-7477.

[6] Ibid.

[7] Bartelt-Hunt, S., D.D. Snow, T. Damon-Powel, and D. Miesbach. 2010. Occurrence of steroid hormones and antibiotics in shallow groundwater impacted by livestock waste control facilities. Journal of Contaminant Hydrology 123(3-4):94-103. doi: 10.1016/j.jconhyd.2010.12.010. Epub 2011 Jan 4.

[8] Gall, H.E., S.A. Sassman, B. Jenkinson, L.S. Lee, and C.T. Jafvert. 2015. Comparison of export dynamics of nutrients and animal-borne estrogens from a tile-drained Midwestern agroecosystem. Water Research 72:162-73. doi: 10.1016/j.watres.2014.08.041. Epub 2014 Sep 6.

[9] U.S. EPA Science Advisory Board. 2014. *Science Advisory Board (SAB) Consideration of the Adequacy of the Scientific and Technical Basis of the EPA's Proposed Rule titled "Definition of Waters of the United States under the Clean Water Act."* EPA-SAB-14-007. U.S. EPA Science Advisory Board, Washington, D.C.

not fully consistent with established EPA recognized science, may not fully meet the key objectives of the CWA – "to restore and maintain the chemical, physical and biological integrity of the Nation's waters," and is subject to a lack of clarity for implementation. The departure of the proposed Rule from EPA recognized science threatens to weaken protection of the nation's waters by disregarding the established connectivity of ground waters and by failing to protect ephemeral streams and wetlands which connect to navigable waters below the surface. These changes are proposed without a fully supportable scientific basis, while potentially introducing substantial new risks to human and environmental health.

It is readily apparent that a conflict exists between current, recognized hydrological science versus the CWA and its subsequent case law. This suggests that new legislation is needed to update the CWA to reflect scientific discoveries since 1972.

Dr. Michael Honeycutt, Chair

Science Advisory Board

Enclosure

1) Roster, EPA Science Advisory Board

NOTICE

This report has been written as part of the activities of the EPA Science Advisory Board (SAB), a public advisory group providing extramural scientific information and advice to the Administrator and other officials of the Environmental Protection Agency. The SAB is structured to provide balanced, expert assessment of scientific matters related to problems facing the Agency. This report has not been reviewed for approval by the Agency and, hence, the contents of this report do not necessarily represent the views and policies of the Environmental Protection Agency, nor of other agencies in the Executive Branch of the Federal government, nor does mention of trade names of commercial products constitute a recommendation for use. Reports of the SAB are posted on the EPA Web site at http://www.epa.gov/sab.

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SCIENCE ADVISORY BOARD STAFF

Dr. Thomas Armitage, Designated Federal Officer, U.S. Environmental Protection Agency, Washington, DC

ATTACHMENT D

Complaint, PEER, *et al*., to Charles J. Sheehan, Acting Inspector General, Office of Inspector General regarding *Violation of the U.S. Environmental Protection Agency's (EPA's) Scientific Integrity Policy by Andrew Wheeler, David Ross, Matt Leopold, David Fotoui, Owen McDonough, Dennis Lee Forsgren, and Anna Wildeman* (Jan. 18, 2020)

PUBLIC EMPLOYEES FOR ENVIRONMENTAL RESPONSIBILITY
962 Wayne Ave • Suite 610 • Silver Spring, MD 20910

January 18, 2020

Acting Inspector General Charles J. Sheehan
Office of Inspector General
1200 Pennsylvania Avenue, N.W.
Mail code: 2410T
Washington, DC 20460

Re: Violation of the U.S. Environmental Protection Agency's (EPA's) *Scientific Integrity Policy* by Andrew Wheeler, David Ross, Matt Leopold, David Fotoui, Owen McDonough, Dennis Lee Forsgren, and Anna Wildeman; sent by email to OIG_Hotline@epa.gov

Dear Acting Inspector General Sheehan:

On behalf of Public Employees for Environmental Responsibility (PEER) and the undersigned former and current federal employees, we write to request an inquiry under the *Scientific Integrity Policy* into the final Rule regarding the definition of waters of the U.S. (WOTUS), which we expect to be issued in final form during January 2020.[1] The writing of the final Rule was controlled solely by U.S. Environmental Protection Agency (EPA) Headquarters (HQ) political appointees. The final Rule contradicts the overwhelming scientific consensus on the connectivity of wetlands and waters, and the impacts that ephemeral streams and so-called "geographically isolated" wetlands have on downstream navigable waters. Moreover, the EPA employees who directed the writing of the final Rule failed to consult properly with regional experts, and did not allow these experts to voice their dissenting opinions formally. Finally, these EPA employees failed to disclose the potentially adverse impacts the final Rule will have on human health and the environment and exaggerated the uncertainties associated with these impacts. As such, the final Rule violates EPA's *Scientific Integrity Policy* (hereinafter "*Policy*").[2] We respectfully urge you to investigate the situation and remedy this violation to prevent further loss of scientific integrity at EPA, and to prevent the foreseeable harm to human health and the environment.

[1] See, e.g., https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201910&RIN=2040-AF75, which states the final rule will be issued "01/00/2020."
[2] https://www.epa.gov/sites/production/files/2014-02/documents/scientific_integrity_policy_2012.pdf

Complainants. This complaint is filed by PEER, a nonprofit service organization representing public employees, together with and on behalf of 44 scientists and lawyers formerly and currently working within federal agencies such as the EPA, the U.S. Army Corps of Engineers (Corps), and the U.S. Fish and Wildlife Service (USFWS).[3] Collectively, Complainants have hundreds of years of experience in aquatic and wetland science and law. Please note that *all* signatories to the Complaint attest to the fact that the Rule's WOTUS definition is not based on science, and that it will have potentially long-term negative effects on human health and the environment. Not all signatories have personal knowledge of each statement in this Complaint, but each statement is backed up by one or more signatory agency scientists or attorneys.

Subjects of Complaint. The EPA HQ employees who violated the *Scientific Integrity Policy* are Andrew Wheeler (Administrator of EPA), David Ross (Assistant Administrator for Office of Water), Matt Leopold (EPA's General Counsel), David Fotoui (Principal Deputy General Counsel), Owen McDonough (Senior Science Advisor to the Assistant Administrator, Office of Water), Dennis Lee Forsgren (Deputy Assistant Administrator for Office of Water), and Anna Wildeman (Principal Deputy Assistant Administrator for the Office of Water) (hereinafter "HQ employees"). PEER is aware many career employees[4] at EPA HQ, together with some Corps' employees, also worked on the rule, but at the direction of those individuals named above. Moreover, we are aware that regional career EPA employees were asked for limited input into the final Rule, but that the scientific expertise of many were not considered; in fact, as alleged below, their opinions were kept out of the formal record. In addition, some HQ career EPA employees were peripherally involved in the development of the Rule. Because these regional and HQ career employees were merely doing as instructed, they are not subjects of this complaint.

Complaint Summary. The HQ employees who directed the writing of the final Rule violated EPA's Scientific Integrity Policy because they: 1) did not base the Rule on science, let alone high quality science; 2) directed expert staff to refrain from submitting comments as part of the formal administrative record; 3) blocked the use of scientific information to inform policy when writing the Rule; 4) publicly mischaracterized scientific content and exaggerated uncertainties associated with the impacts of the Rule; and 5) did not welcome differing views as a legitimate and necessary part of the scientific process by failing to consult adequately with regional expertise.

Relief Requested. PEER and the federal complainants request that: 1) the Scientific Integrity Officer and/or the Inspector General investigate this matter and issue a report containing findings stemming from this investigation. Federal wetland experts must be allowed to have meaningful input into the crafting of any future WOTUS definition. Any Rule that attempts to define the jurisdictional limitations of wetlands and waters must be based primarily on science, not solely politics and law; 2) HQ employees named in this Complaint be subject to appropriate discipline for violating the *Policy*; and 3) HQ employees named in this Complaint receive training on the *Policy*.

Background. The federal Clean Water Act (CWA) was passed in 1972 in order to remedy the poor state of our nation's waters at the time. The CWA prohibits "the discharge of any pollutant" to navigable

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[3] Please note that the current employees signing onto this complaint are not willing to be named, due to the potential for retaliation.

[4] We are using the term "career employee" to characterize staff who applied for jobs and were hired - some have been at EPA through several Administrations - as opposed to employees who were appointed by the Trump Administration.

waters from any point source. The term "navigable waters" is defined as "the waters of the United States (WOTUS), including the territorial seas." No clarification to this phrase was given, and it was left to the EPA to issue guidance and regulations to define the scope of jurisdiction. It defied common sense to restrict the definition to traditionally navigable waterways (those that are capable of being used by vessels for interstate commerce), and initially, the CWA was given a broad jurisdictional reach.

The precise meaning of WOTUS has been litigated extensively. In the years following enactment of the CWA, the Corps and EPA used different definitions. After litigation in 1977, the Corps re-defined WOTUS to include all waters which could affect interstate commerce. Finally, in 1982, the two federal agencies agreed on one definition of WOTUS:

> All waters which are currently used, 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 tide; (b) All interstate waters, including interstate "wetlands"; (c) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, "wetlands," playa lakes, or natural ponds the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce including any such waters: (1) Which are or could be used by interstate or foreign travelers for recreational or other purposes; (2) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or (3) Which are used or could be used for industrial purposes by industries in interstate commerce; (d) All impoundments of waters otherwise defined as waters of the United States under this definition; (e) Tributaries of waters identified in paragraphs (1)-(4) of this definition; (f) The territorial seas; and (g) "Wetlands" adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a)-(f) of this definition.

Wetlands were defined as "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."[5] Wetlands generally include swamps, marshes, bogs, and similar areas.

In the 1985 *Riverside Bayview Homes* case, the Supreme Court ruled unanimously that the Corps could regulate intrastate wetlands adjacent to navigable waters that affected interstate commerce.[6] The Court did not decide whether wetlands isolated from navigable waterways were jurisdictional. After this ruling, the Corps and EPA began to use a clarification termed the "Migratory Bird Rule" to extend jurisdiction to isolated waters and wetlands, arguing that areas "which are or would be used as habitat by ... migratory birds that cross state lines" could affect interstate commerce, and thus were jurisdictional. In 2001, the Supreme Court, in a 5-4 decision, struck down the Migratory Bird Rule in a case commonly referred to as *SWANCC*.[7] The Court held that extending jurisdiction over these isolated wetlands exceeded the agencies' authority. Specifically, the Court said that the ponds that had formed in the abandoned gravel pit at issue in the *SWANCC* case lacked the "significant nexus" to traditionally navigable waters necessary to extend jurisdiction under the CWA.

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[5] 33 C.F.R. § 328.3(b)

[6] *United States v. Riverside Bayview*, 421 U.S. 121 (1985)

[7] *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001)

Post-*SWANCC*, the agencies issued guidance concluding that they could exercise jurisdiction over isolated waters if the use, degradation, or destruction of such waters could affect downstream navigable-in-fact water bodies. This guidance was based on science and informed by Congressional intent. The intent of the CWA is to restore and maintain the chemical, physical, and biological integrity of the nation's waters.[8] It makes little sense only to regulate navigable waters if the degradation of smaller tributaries and wetlands upstream of those waters would lead to the impairment of the navigable waters themselves.

Matters came to a head in 2005, when the Supreme Court heard the *Rapanos*[9] case; at issue was whether the Corps could exert jurisdiction over non-navigable wetlands that did not abut navigable waters. A 4-1-4 plurality decision resulted in two alternative tests: one authored by Justice Scalia, and one authored by Justice Kennedy. The two tests were:

> **Scalia's test**: The word "waters" in "waters of the United States" means only "relatively permanent, standing or continuously flowing bodies of water"—that is, streams, rivers, and lakes. Wetlands could potentially be included, but only when they have a "continuous surface connection" to other "waters of the United States."
>
> **Kennedy's test**: if the wetland at issue possesses a "significant nexus" to waters that are navigable-in-fact, they are jurisdictional. A wetland has a significant nexus to navigable-in-fact waters when the wetland significantly impacts the chemical, physical, and biological integrity of a traditionally navigable waterbody.

In response to this holding, the agencies issued guidance in 2008 that wetlands or waters are jurisdictional if they satisfied either of the two tests. This unfortunately did little to clarify the situation. EPA viewed the proper fix to the WOTUS problem as coming from Congress. But after Congress tried and failed to pass amendments to the CWA, EPA started a rulemaking effort to correct the problem. On May 27, 2015, after extensive scientific review and a massive public comment process, EPA issued the 2015 Clean Water Rule (CWR).[10] The CWR expanded jurisdiction over then-current waters and wetlands nationwide by roughly 2.84% to 4.65%.[11] Significant litigation ensued, and the CWR was stayed in about half of the country and went into effect in the other half until it was repealed in 2019 by the Trump administration. That repeal rule is now being challenged in the courts.

On February 14, 2019, the EPA and the Corps published a proposed rule defining the scope of WOTUS federally regulated under the CWA.[12] Even though all of the Circuit Courts in the country have ruled that the Scalia test by itself is not a proper interpretation of *Rapanos*, the proposed rule essentially codified Justice Scalia's narrow test, above; that is, it eliminated geographically isolated wetlands, ephemeral streams, and some intermittent streams from federal jurisdiction. The final version of the Rule, which is expected to be substantially the same as the proposed Rule, will be issued imminently.

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[8] 33 U.S.C. § 1251(a)

[9] *Rapanos v. United States*, 546 U.S. 932-33 (2005)

[10] 80 Fed. Reg. 37,054 (June 29, 2015)

[11] https://www.epa.gov/sites/production/files/2015-06/documents/508-final_clean_water_rule_economic_analysis_5-20-15.pdf at p. vii

[12] 84 Fed. Reg. 4154 (Feb. 14, 2019)

This Complaint pertains solely to the final Rule and the process that led to it. As explained below, the new definition for WOTUS is contrary to well-established science.

EPA's Scientific Integrity Policy. EPA's *Scientific Integrity Policy*[13] states in relevant part:

> Science is the backbone of the EPA's decision-making [citation omitted]. The Agency's ability to pursue its mission to protect human health and the environment depends upon the integrity of the science on which it relies. The environmental policies, decisions, guidance, and regulations that impact the lives of all Americans every day must be grounded, at a most fundamental level, in sound, high quality science. When dealing with science, it is the responsibility of every EPA employee to conduct, utilize, and communicate science with honesty, integrity, and transparency, both within and outside the Agency. To operate an effective science and regulatory agency like the EPA, it is also essential that political or other officials not suppress or alter scientific findings...[14]

In the case at hand, EPA crafted a regulation at the direction of President Trump's EO. He mandated that the agencies "shall ***consider*** interpreting the term 'navigable waters' ... in a manner consistent with the opinion of Justice Antonin Scalia"[15] in *Rapanos* (emphasis added).

As the *Policy* states, EPA's regulations, policies, and decisions impact the lives of all Americans on a daily basis, and as such, must be "grounded, at a most fundamental level, in sound, high quality science."[16] The WOTUS definition reflects the values in the *Policy* because wetlands and waters provide, among other things, flood control, irrigation water, clean and plentiful drinking water, and water supplies for industry. Protection from flooding and clean water supplies are two basic but critical requirements for human life. Climate change is exacerbating flooding and increasing the contamination/scarcity of drinking water, and as such, it is vital that EPA be rigorous and cautious about any policy or regulation that affects these functions. It is therefore worrisome that the subjects of this Complaint violated the *Policy* in order to promulgate a regulation that ignores established and accepted science regarding wetlands and waters.

Science should have been used to inform the reach of the law. The science indisputably shows the interconnectivity of ephemeral streams and geographically isolated wetlands with downstream waters, including traditionally navigable waters. Rejecting the connectivity science has led EPA to ignore the overall purpose of the CWA to enhance and maintain the integrity of waters of the U.S.

***Scientific Integrity Policy* Applicability.** Both the subjects and the subject matter of this Complaint can be properly considered under the *Policy*.

> The *Policy* applies to the subjects of this Complaint. It provides that "...all Agency employees, including scientists, managers, ***and political appointees***, are required to follow this policy when engaging in, supervising, managing, or influencing scientific activities; ... and utilizing scientific

[13] https://www.epa.gov/sites/production/files/2014-02/documents/scientific_integrity_policy_2012.pdf (hereinafter "*Policy*")
[14] *Id.* at 1
[15] *Id.*
[16] *Id.*

information in making Agency policy or management decisions"[17] (emphasis added). In this case, the *Policy* applies to the subjects of our Complaint, as they are all EPA employees, managers and political appointees.

The *Policy* applies to the WOTUS Rule. By dictating the content of the final Rule, which is a Rule that will determine how waters and wetlands are defined for purposes of the CWA (a scientific activity that is informed by law), HQ employees were "supervising, managing, or influencing scientific activities." In addition, the HQ employees utilized the "scientific information" in "making policy ... decisions" (i.e., a regulation). Therefore, application of this *Policy* to the WOTUS Rule is appropriate.

Specific Violations of the *Scientific Integrity Policy*. The *Policy* sets forth that EPA employees should produce scientific work of the "highest quality rigor, and objectivity" and that they should be impartial and welcome different views and opinions on scientific matters.[18] Complainants address each of these in turn:

The "scientific work" at issue is not of the highest quality. Not only does the science behind the final Rule fail the "highest quality" test mandated in the *Policy*, but it ***directly conflicts*** with the established, best-available science. Specifically, the Rule does not incorporate EPA's 2015 *Connectivity of Streams and Wetlands to Downstream Waters: a Review and Synthesis of the Scientific Evidence (Final Report)* (hereinafter "*Connectivity Report*").[19] The *Connectivity Report* was a Herculean effort that involved the review of over 1,200 peer-reviewed scientific articles and summarized the "state of the science" on connectivity of wetlands and waters in the United States. According to EPA itself, the *Connectivity Report* concludes that "[t]he scientific literature unequivocally demonstrates that streams, regardless of their size or frequency of flow, are connected to downstream waters and strongly influence their function"[20] and that so-called geographically isolated wetland "provide physical, chemical, and biological functions that could affect the integrity of downstream waters. Some potential benefits of these wetlands are due to their isolation rather than their connectivity."[21] EPA also states: "The literature strongly supports the conclusion that the incremental contributions of individual streams and wetlands are cumulative across entire watersheds, and their effects on downstream waters should be evaluated within the context of other streams and wetlands in that watershed."[22] [23] The final Rule does not provide any science that contradicts or alters the *Connectivity Report*, but instead simply rejects the majority of this comprehensive review of scientific literature. As such, the basis for the final Rule is not "highest quality" science. The final Rule is also contrary to the CWA in that it will not lead to the restoration and maintenance of the chemical, physical, and biological integrity of the nation's waters.

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[17] *Id.* at 2

[18] *Id.* at 3

[19] *Connectivity of Streams and Wetlands to Downstream Waters: a Review and Synthesis of the Scientific Evidence (Final Report)*. EPA/600/R-14/475F. U.S. Environmental Protection Agency, Washington, D.C. (2015)

[20] https://cfpub.epa.gov/ncea/risk/recordisplay.cfm?deid=296414

[21] *Id.*

[22] *Id.*

[23] Note that these three statements from EPA are currently (as of January 17, 2020) on its website and represent the best available science.

Complainants are not alone in our concern. A draft letter from an EPA Science Advisory Board (SAB) WOTUS Workgroup was recently released. The SAB stated:

> In summary, the SAB is disappointed that the EPA and Department of the Army have decided that the CWA and subsequent case law precludes full incorporation of the scientific aspects of EPA's 2015 Connectivity Report into the proposed Rule. The proposed definition of WOTUS is not fully consistent with established EPA recognized science, may not fully meet the key objectives of the CWA – "to restore and maintain the chemical, physical and biological integrity of the Nation's waters," and is subject to a lack of clarity for implementation. The departure of the proposed Rule from EPA recognized science threatens to weaken protection of the nation's waters by disregarding the established connectivity of ground waters and by failing to protect ephemeral streams and wetlands which connect to navigable waters below the surface. These changes are proposed without a fully supportable scientific basis, while potentially introducing substantial new risks to human and environmental health.[24]

It is worth noting that most of the current SAB members were appointed by the Trump Administration. As you are aware, SAB review is important to ensure that regulations are based on the best science, and not in spite of such science. Because of this, the SAB's views on this matter should be afforded great deference.

The HQ employees (in this complaint) failed to welcome differing scientific views and opinions. The *Policy* mandates that employees "[w]elcome differing views and opinions on scientific and technical matters as a legitimate and necessary part of the scientific process."[25] Although the HQ employees did hold occasional conference calls with regional experts, and maintained a WOTUS Sharepoint site where career employees could insert their comments, the career employees were explicitly cautioned to ***not*** provide formal comments that would become part of the docket, which resulted in these comments being withheld from the public. Forbidding scientists from publicly expressing their scientific concerns flies in the face of the *Policy*.

Career employees continually expressed their concern that the Rule abandoned the established science in the *Connectivity Report* and they were dismissed with no justification. The HQ employees directed the career employees to respond to the myriad thoughtful public comments submitted on the proposed rule, but were told to respond from a policy or legal stance, not a scientific one. Therefore, HQ employees did not welcome experts' views, science was suppressed, and experts' opinions were stifled, especially pertaining to consideration of the public comments and writing the final Rule.

Specific Violations of the Culture of Scientific Integrity. The *Policy* outlines four areas of scientific integrity at EPA, two of which apply here: 1) promoting a culture of scientific integrity; and 2) public communications:[26]

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[24] https://aboutblaw.com/NRJ
[25] *Policy* at 3.
[26] *Policy* at 3.

The final Rule, and the process used to develop the Rule, does not promote a culture of scientific integrity. The *Policy* provides that "[s]uccessful application of science in Agency policy decision relies on the integrity of the scientific process both to ensure the validity of scientific information and to engender public trust in the Agency."[27] This culture of scientific integrity is supposed to enhance transparency and protect Agency scientists.

In order to promote a culture of scientific integrity within the Agency, employees must "foster honest investigation, open discussion...and a firm commitment to evidence."[28] The HQ employees named above abandoned these tenets when writing the new rule.

First, no "honest investigation" occurred. Complainants directly observed that the HQ employees were not interested in an investigation into the connectivity of geographically isolated wetlands and ephemeral and intermittent waters, or their impacts on downstream waters. HQ employees were determined to drastically decrease federal jurisdiction over wetlands and waters, and they ignored all information that did not support their desired result. An honest investigation would have taken the new findings and conclusions in the 2015 *Connectivity Report* into account, but that did not occur. An honest investigation would also have allowed career employees to offer their expertise into the process of writing the final Rule, but that did not occur either. In sum, EPA leadership ignored substantial scientific sources that should have been assessed in order to inform the jurisdictional reach of the CWA.

Second, the Complainants observed that HQ employees were uninterested in open discussions with regional and career HQ staff, as evidenced by their order forbidding career employees from submitting formal comments that would be seen by the public. ***It is important to note that this is not merely a difference of scientific opinion between HQ employees and the career employees.*** This is the difference between established science, and excluding and manipulating that established science. Complainants freely admit that there can be differing scientific opinions in many instances, but in this case, virtually all of the peer-reviewed science contradicts the final Rule. HQ employees are entitled to their own opinions, but not to their own set of unsupported facts.

Third, it is clear that the HQ employees were not committed to the scientific evidence, as they dismissed the critical findings of the *Connectivity Report* and did not produce or point to any evidence that supported their new position of a severely restricted WOTUS jurisdiction. The scientific method - formulating a hypothesis based on the evidence, testing that hypothesis, and then analyzing the data and coming to a conclusion - is inconsistent with dismissing previous findings without the evidence to do so.

The science used in the final Rule is not of the highest quality. According to the *Policy*, promoting a culture of scientific integrity also requires that the Agency produce scientific products "of the highest quality, rigor, and objectivity for use in policy decisions."[29] As discussed above, the exhaustive *Connectivity Report* was of the highest quality and rigor, and yet was largely ignored in the writing of the final Rule.

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[27] *Id.*
[28] *Id.*
[29] *Id.*

The *Policy* prohibits all employees, including leadership, from "suppressing ... scientific findings or conclusions"[30] in order to promote a culture of scientific integrity. In this case, the HQ employees suppressed scientific conclusions by asking career employees to refrain from submitting their formal comments on the proposed Rule. Even if HQ employees were aware of the career employees' concerns, failure to submit these concerns into the docket results in keeping this information from the public and reducing transparency. In sum, the final Rule is not based on science, and the science that career employees offered was suppressed by the HQ employees.

HQ employees did not "enhance transparency" within agency scientific processes. The *Policy* requires that agency managers and leadership review a scientific product using "only" scientific quality considerations.[31] In the case at hand, HQ employees did not restrict their review to only scientific quality considerations; in fact, it appears that they rejected almost all science and substituted political considerations. There is no way to accurately determine which wetlands and waters will restore and maintain the chemical, physical and biological integrity of the Nation's waters as mandated by the CWA *without* using science. In order to promulgate the now-defunct 2015 CWR, EPA assessed over 1,200 peer-reviewed scientific articles. While the Rule must be supported by the law, it must also be based on good science per the *Policy*. Furthermore, as stated above, the *Rapanos* decision was a plurality decision and subsequent Circuit Court decisions have uniformly held that it cannot serve as the sole basis for asserting jurisdiction under the CWA. The EPA has chosen the wrong legal standard to apply.

HQ employees did not "enhance transparency" when they communicated their scientific findings. The *Policy* requires that EPA employees accurately contextualize uncertainties, and describe probabilities associated with both optimistic and pessimistic projections.[32] There are many uncertainties associated with the final Rule, most importantly the lack of data regarding how many miles of streams and acres of wetlands will be vulnerable to filling and pollution, and whether States will pick up the slack in light of the void left by the federal government. The effects of this uncertainty were not communicated to the public; rather, EPA freely admits it is unable to quantify the economic and environmental effects of the final Rule, but it provides neither optimistic nor pessimistic effects projections, per the *Policy*.

HQ Employees Did Not Assure the Protection of Agency Scientists. The *Policy* purports to protect EPA's scientists by prohibiting managers and agency leadership from "intimidating or coercing scientists to alter scientific data, findings, or professional opinions" and states they "shall not knowingly misrepresent, exaggerate, or downplay areas of scientific uncertainty associated with policy decisions."[33] HQ employees engaged in both of these behaviors:

HQ employees asked career employees to suppress their professional opinions and keep them out of the public record. As stated above, HQ employees asked career employees to refrain from providing their scientific comments to the docket.

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[30] *Id.* at 4
[31] *Id.* at 4
[32] *Id.*
[33] *Id.* at 5

HQ employees knowingly misrepresented and downplayed scientific uncertainty associated with implementation of the Rule. The *Policy* states that "...policy makers shall not knowingly misrepresent, exaggerate, or downplay areas of scientific uncertainty associated with policy decisions."[34] On December 10, 2018, David Ross told reporters on a press call that estimates in the public domain of the percentage of wetlands and waters that will no longer be jurisdictional are untrue: "If you see percentages of water features that are claimed to be in, or reductions, there really isn't (sic) the data to support those statistics. No one has that (sic) data." However, a 2017 slideshow prepared by EPA and the Corps – obtained through a Freedom of Information Act request – showed that EPA does have those data.[35] While these data may be underestimates of what will be lost should the Rule be finalized as is, EPA HQ employees had these data, kept them from the public, and misrepresented them. Another EPA study showed that 60% of all U.S. streams are ephemeral, and up to 81% are ephemeral in the arid Southwest.[36] Administrator Andrew Wheeler disputed these figures when touting the new Rule without providing any science to back up his statements.[37]

While there is scientific uncertainty associated with the *exact* percentage of streams and acres of isolated wetlands that will lose jurisdiction, it is inaccurate for EPA to claim that there is no data. Indeed, it is EPA's own data that supports these figures cited above. Therefore, at least two of the HQ employees knowingly misrepresented and exaggerated the scientific uncertainty associated with implementation of the Rule, contrary to the *Policy*.

EPA must protect the current employee Complainants. The *Policy* states that whistleblower protections are extended to "all EPA employees who uncover or report allegations of scientific ... misconduct, or who express a differing scientific opinion, from retaliation or other punitive actions."[38] The current career employees signing onto this Complaint anonymously are understandably concerned about potential retaliation. PEER expects EPA to abide by the terms of this *Policy* and refrain from attempts to uncover the identity of these employees or retaliate against them. PEER will take any legal action necessary to protect them.

Specific Violations of Public Communications. The *Policy* states that "[s]cientific research and analysis comprise the foundation of ***all*** major EPA policy decisions" (emphasis added).[39] The WOTUS Rule is no exception to this statement; science should provide the foundation to this Rule. The *Policy* goes on to say that "...the Agency should maintain vigilance toward ensuring that scientific research and results are presented openly and with integrity ... [and] accuracy ..."[40] The *Policy* also states that there should be "unfiltered dissemination ... uncompromised by political or other interference"[41] of scientific information. Clearly, HQ employees did not abide by this requirement; they suppressed comments of the career employees and misrepresented data to the media and the public.

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[34] *Id.*
[35] https://www.eenews.net/assets/2018/12/11/document_gw_05.pdf
[36] https://www.epa.gov/sites/production/files/2015-03/documents/ephemeral_streams_report_final_508-kepner.pdf
[37] https://www.npr.org/2018/12/11/675477583/trump-epa-proposes-big-changes-to-federal-water-protections
[38] *Policy* at 5
[39] *Id.*
[40] *Id.*
[41] *Id.*

The *Policy* also states that "[w]hen an Agency employee substantively engaged in the science informing an Agency policy decision disagrees with the scientific data, scientific interpretations, or scientific conclusions that will be relied upon for said Agency decision, the employee is encouraged to express that opinion, complete with rationale, preferably in writing."[42] In this case, when career employees disagreed with the conclusions of HQ employees, the career employees were asked to refrain from putting their opinions in writing to be formally submitted into the docket.

Facts to Confirm in a Scientific Integrity Investigation. Complainants respectfully request that EPA's Scientific Integrity officials, and/or the Inspector General, investigate by:

1) interviewing the SAB members who wrote the letter about WOTUS, cited above;
2) interviewing regional and career EPA employees who were peripherally involved in the WOTUS re-write;
3) interviewing retired EPA officials who are considered national experts on wetland science, including but not limited to the national experts who are signatories to this Complaint;
4) interviewing the agency scientists who wrote the *Connectivity Report*;
5) reviewing the comments on the WOTUS Sharepoint site; and
6) reviewing communications among and between regional and HQ employees regarding the WOTUS Rule.[43]

Conclusion. The WOTUS Rule severely restricts CWA jurisdiction over wetlands and waters. EPA's own estimates (which were hidden from the public and were obtained through a FOIA) state that a minimum of 1.35 million miles of streams and 40 million acres of wetlands would be removed from CWA jurisdiction, exacerbating flooding and water and drinking water contamination for millions of Americans. HQ employees did not base the Rule on science. Instead of validating or contradicting the comprehensive science contained in the *Connectivity Report*, HQ employees dismissed much of the science in that report. HQ employees suppressed the scientific opinions of career EPA employees - EPA has qualified expert scientists on staff at HQ and across the country, but this expertise was suppressed and dismissed. Because of this, EPA's career employees were not given the opportunity to do their best work or contribute their expertise to the development of the Rule. There was no honest investigation, no commitment to the evidence, no culture of robust scientific inquiry and discussion, and no transparency. These HQ employees have suppressed evidence, misrepresented data, exaggerated uncertainties, and let perceived policy implications improperly override undisputed scientific conclusions. This case is *not* one of a difference of personal views: the overwhelming number of former and current agency personnel, together with the SAB and independent scientists, all agree that the HQ employees improperly rejected science when finalizing the WOTUS Rule.

Thank you for your attention to this important matter. The WOTUS Rule has the potential to impact human health and the environment significantly, and as such must be based on the best available science. Instead, HQ employees politicized the agency's analysis and undermined the culture of scientific integrity within EPA. Failing to take action in this matter will show that EPA has abandoned all pretense of making science-based decisions, which is counter to its mission of protecting human health and the environment.

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[42] *Id.*

[43] Note that PEER has requested these documents through FOIA, but has yet to receive them.

Sincerely,

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Laury Zicari
former USFWS, Fish and Wildlife Administrator, Maine Field Office

and on behalf of 9 additional federal employees, including current employees

ATTACHMENT E

Ariel Wittenberg, *A 'Gap in Protection': Ariz. Looks for a Plan B under WOTUS, E&E News* (Jan. 28, 2020)

THE LEADER IN ENERGY AND ENVIRONMENT NEWS

CLEAN WATER ACT

A 'gap in protection': Ariz. looks for a Plan B under WOTUS

Ariel Wittenberg, E&E News reporter • Published: Tuesday, January 28, 2020

A view of Tres Rios Wetlands in Arizona. docentjoyce/Flickr

Arizona is evaluating whether to strengthen water regulations in the face of federal rollbacks from the Trump administration that could leave 93% of the state's stream miles unprotected by the Clean Water Act.

Arizona has long supported the Trump administration's efforts to rewrite Clean Water Act jurisdiction, with Gov. Doug Ducey (R) agreeing in a 2017 **letter** to EPA that "the original intent of Congress was not to use the Clean Water Act as a blanket regulation to cover all waters."

Officials continued to celebrate last week when the administration finalized its Navigable Waters Protection Rule, also known as the Waters of the U.S., or WOTUS, rule, which erased federal protections for streams that only flow in response to rainfall and most wetlands without surface water connections to larger waterways.

But the rule, which won't take effect for a few months, could have a huge impact in arid states like Arizona, where waterways are dry most of the time but can flow in torrents after winter storms.

Arizona has few of its own state-level protections for wetlands and waterways, so this fall, the Department of Environmental Quality began examining how the new Trump rule would affect the state.

The staggering statistics: Not only would the vast majority of streams no longer be federally regulated, but 99% of lakes would also lose protections.

What's more, 98% of point-source pollution permits discharge into those waterways, meaning limits on those polluters could disappear when the federal rule changes.

"ADEQ acknowledges that the new definition creates a gap in protection for many Arizona waterways and supports developing a 'local control approach' at the state level to protect Arizona's important and precious water resources," the agency wrote on its website.

EPA officials have insisted that the federal rollback will not leave millions of stream miles unprotected nationwide, insisting that changing federal rules allows states to take charge and decide which waterways are important enough to protect.

"Our new rule recognizes this relationship and strikes the proper balance between Washington, D.C., and the states and clearly details which waters are subject to federal control under the Clean Water Act and which waters fall solely under states' jurisdiction," EPA Administrator Andrew Wheeler told reporters last week. "Many states already have a robust network of regulations that protect their state waterways."

A senior EPA official agreed, telling reporters times have changed since the Clean Water Act was passed.

"This isn't the 1970s and 1980s; the states have robust environmental programs," he said. "They value and cherish their resources. This is not a rule that presumes that if the federal government doesn't regulate, there is no regulation."

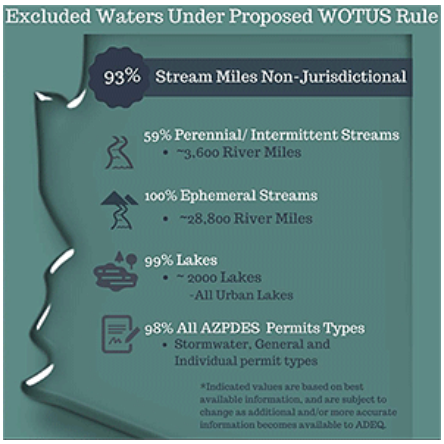
EPA has previously calculated that 29 states that currently lack robust wetlands regulations "may" or are "likely" to bolster dredge and fill rules as federal oversight retreats — something critics have called an overestimate (***Greenwire***, Jan. 21, 2019).

Even so, new state regulatory efforts can take time.

California's new wetlands regulations finalized just last year, for example, were the result of more than a decade of work that began in response to a pair of Supreme Court rulings issued near the turn of the century (***Greenwire***, Feb. 4, 2019).

Arizona regulators currently estimate that any new regulatory program would be effective by 2023 — potentially years after the Trump rollbacks take effect.

That's alarming to Chris McVie, who sits on the board of the Coalition for Sonoran Desert Protection and said, "In the meantime, there is the potential for your mom-and-pop dry cleaner to just dump their waste wherever they see fit."



[+] Arizona Department of Environmental Quality

It's also not even clear whether the state will ultimately finalize any changes and if new state protections would be comparable to those being lost under the Clean Water Act.

ADEQ spokeswoman Erin Jordan wrote in an email that there's a limit to how much the state agency can do without approval from the state Legislature.

For example, ADEQ could decide to create water quality standards for waterways that are no longer federally protected, but creating a new permitting program to control pollution to those waterways would require lawmakers' approval.

That means new protections are no guarantee, said McVie.

"Arizona is a state that has, historically, been knee-jerk in its abhorrence of regulation," she said.

McVie said the state's struggle to regulate groundwater pumping as its population grows — despite widespread acknowledgement that the state's water supply is limited — makes her believe the Legislature won't strengthen water protections for waterways that are often dry.

"We require clean water in order to have a safe and healthy life, but how they are going to do that when they are in denial of part of the problem is going to be interesting," she said.

Pushback

Already, ADEQ's effort is seeing significant pushback from housing developers and farmers.

Arizona Farm Bureau President Stefanie Smallhouse, who called the effort "premature" because the Trump rule will likely be met with lawsuits that could delay its implementation, said she does not believe the federal rollback will actually negatively affect Arizona water quality.

She questioned ADEQ's statistics for the number of waterways that will lose federal protections, saying many don't count as "waterways" because they are actually dry for most of the year.

"There is just no point in regulating waterways that don't have water," she said. "That would be the state of Arizona basically controlling land use instead of water quality."

ADEQ's Jordan said the agency's statistics for newly unregulated waterways were developed using currently available geospatial mapping.

But Smallhouse said she doubts them, in part because her group has asked ADEQ for maps of unprotected waterways and hasn't seen any.

"I think what they are doing is basically trying to scare people to say this rule has been reversed and now nothing will be protected, which is just not true," she said. "They have not produced maps, so it's difficult to know where they are coming from when they make these statements that we now have unprotected water, when they won't show you where this unprotected water is or if it has water in it."

Smallhouse's group supports the new WOTUS definition and believes the state should similarly only regulate waterways with permanent or intermittent flow.

She accused state regulators of "confusing the efforts of the federal government to bring more clarity to regulation."

"We support state jurisdiction over the state's waters, but we also support clarity in the rules, which govern our clean water," she said.

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The essential news for energy & environment professionals

ATTACHMENT F

Ariel Wittenberg, *Legal Analysis, Not Science, Drives WOTUS Stream Protections*, E&E News (Dec. 11, 2018)

LATE-BREAKING NEWS

CLEAN WATER ACT

Legal analysis, not science, drives WOTUS stream protections

Ariel Wittenberg, E&E News reporter

Published: Tuesday, December 11, 2018

The Trump administration is heavily relying on its own interpretations of the Clean Water Act and Supreme Court decisions — not the scientific record — in deciding to cut some streams out of federal protections.

The proposed definition of so-called Waters of the U.S., or WOTUS, released today by EPA and the Army Corps of Engineers would not protect streams that only flow after rain events — which account for 18 percent of streams nationwide (***Greenwire***, Dec. 11).

The proposal would still cover streams that deliver constant or intermittent flows to larger waterways downstream, officials said.

"It is a legal call," EPA Office of Water chief David Ross told reporters during a briefing yesterday. "So we took a look at Supreme Court precedent and also made some policy decisions on where to draw the line that were informed by science."

Today's proposal to exclude ephemeral streams represents a departure from the George W. Bush and Obama administrations, which protected ephemeral streams if they had a hydrological, biological or chemical impact on larger downstream waters.

The Trump administration's decision is largely based on a 2006 opinion from the late Supreme Court Justice Antonin Scalia.

One key Scalia quote cited by the proposal: "Relatively continuous flow is a *necessary* condition for qualification as a 'water,' not an *adequate* condition."

The proposed rule states that its "baseline concept" is that "waters of the U.S. are waters within the ordinary meaning of the term."

That line imitates another part of Scalia's opinion in *Rapanos v. United States*, where he turned to a dictionary to determine that the phrase "waters of the U.S. include only those relatively permanent, standing or continuously flowing bodies of water 'forming geographic features.'"

Echoes of Scalia are also seen in EPA and the Army Corps' definitions of intermittent and perennial streams that are covered by the new proposal.

The proposal would protect streams that contribute "extended periods of predictable, continuous, seasonal surface flow occurring in the same geographic feature year after year."

The agencies don't specify how often those streams have to flow in order to be included — or how much water needs to be in them — but will look at a rolling 30-year average of precipitation for a particular geographic area to determine whether a stream flows independent of rainfalls.

That means the new WOTUS would include intermittent streams that only flow in the spring when the groundwater table intersects with a streambed and provides "continuous baseflow for weeks or months at a time even when it is not raining or has not recently rained."

It would also include streams fed by "snowpack" — layers of snow that accumulate over extended periods of time. It would not, however, include ephemeral streams that only flow after rain or snowfall. Again, the agencies base that distinction on Scalia.

The definitions, they write, "would establish that a mere hydrologic connection cannot provide the basis for [Clean Water Act] jurisdiction; the bodies of water must be 'geographical features' ... that are 'relatively permanent,'" the proposed rule states.

Scientific record

Although the agencies heavily rely on the text of the Clean Water Act and Supreme Court decisions to justify excluding ephemeral streams from federal jurisdiction, they say, "Today's proposed definition is also informed by science."

They note that under the Obama administration, EPA and the Army Corps developed a 300-page "connectivity report" detailing how wetlands and small streams impact larger waterways downstream.

But the Trump administration's rule homes in on one section of the Science Advisory Board's review of the connectivity report that called the report "a science, not policy, document."

The Science Advisory Board at the time described a "connectivity gradient," meaning the potential consequences of pollution on larger waterways are greater if it enters perennial, versus ephemeral, waterways.

The agencies say they are thus using the connectivity report to "inform certain aspects" of the rulemaking, including "recognizing the 'connectivity gradient.'"

But, the agencies write, they "acknowledge that science cannot be used to draw the line between Federal and State waters, as those are legal distinctions that have been established within the overall framework and construct of the [Clean Water Act]."

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