This document is scheduled to be published in the
Federal Register on 04/21/2020 and available online at
federalregister.gov/d/2020-02500, and on **govinfo.gov**

6560-50-P

DEPARTMENT OF DEFENSE

Department of the Army, Corps of Engineers

33 CFR Part 328

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 110, 112, 116, 117, 120, 122, 230, 232, 300, 302 and 401

[EPA-HQ-OW-2018-0149; FRL-10004-88-OW]

RIN 2040–AF75

The Navigable Waters Protection Rule: Definition of "Waters of the United States"

AGENCIES: Department of the Army, Corps of Engineers, Department of Defense; and Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency and the Department of the Army are publishing a final rule defining the scope of waters federally regulated under the Clean Water Act. The Navigable Waters Protection Rule is the second step in a comprehensive, two-step process intended to review and revise the definition of "waters of the United States" consistent with the Executive Order signed on February 28, 2017, "Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the 'Waters of the United States' Rule." Once effective, it

replaces the rule published on October 22, 2019. This final rule implements the overall objective of the Clean Water Act to restore and maintain the integrity of the nation's waters by maintaining federal authority over those waters that Congress determined should be regulated by the Federal government under its Commerce Clause powers, while adhering to Congress' policy directive to preserve States' primary authority over land and water resources. This final definition increases the predictability and consistency of Clean Water Act programs by clarifying the scope of "waters of the United States" federally regulated under the Act.

DATES: This rule is effective on [**INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER**].

ADDRESSES: The EPA has established a docket for this action under Docket ID No. **EPA-HQ-OW-2018-0149.** All documents in the docket are listed on the http://www.regulations.gov website. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available electronically through http://www.regulations.gov.

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I. General Information

A. Where can I find information related to this rulemaking?

1. *Docket.* An official public docket for this action has been established under Docket ID No. EPA-HQ-OW-2018-0149. The official public docket consists of the documents specifically referenced in this action and other information related to this action. The official public docket is the collection of materials that is available for public viewing at the OW Docket, EPA West, Room 3334, 1301 Constitution Ave. NW, Washington, DC 20004. This Docket Facility is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The OW Docket telephone number is (202) 566-2426. A reasonable fee will be charged for copies.

2. *Electronic Access.* You may access this *Federal Register* document electronically under the "Federal Register" listings at *http://www.regulations.gov*. An electronic version of the public docket is available through EPA's electronic public docket and comment system, EPA Dockets. You may access EPA Dockets at *http://www.regulations.gov* to view public comments as they are submitted and posted, access the index listing of the contents of the official public

docket, and access those documents in the public docket that are available electronically, including the economic and regulatory analyses for the final rule. For additional information about EPA's public docket, visit the EPA Docket Center homepage at *http://www.epa.gov/epahome/dockets.htm*. Although not all docket materials may be available electronically, you may still access any of the publicly available docket materials through the Docket Facility.

B. What action are the agencies taking?

In this notice, the agencies are publishing a final rule defining "waters of the United States" in 33 CFR 328.3 and 40 CFR 120.2.

C. What is the agencies' authority for taking this action?

The authority for this action is the Federal Water Pollution Control Act, 33 U.S.C. 1251 *et seq*., including sections 301, 304, 311, 401, 402, 404, and 501.

II. Background

A. The Final Rule

The U.S. Environmental Protection Agency (EPA) and the U.S. Department of the Army (Army or Corps) (together, "the agencies") are publishing the Navigable Waters Protection Rule defining the scope of waters subject to federal regulation under the Clean Water Act (CWA or the Act), in light of the U.S. Supreme Court cases in *United States v. Riverside Bayview Homes* (*Riverside Bayview*), *Solid Waste Agency of Northern Cook County v. United States* (*SWANCC*), and *Rapanos v. United States* (*Rapanos*), and consistent with Executive Order 13778, signed on February 28, 2017, entitled "Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the 'Waters of the United States' Rule."

In this final rule, the agencies interpret the term "waters of the United States" to encompass:

the territorial seas and traditional navigable waters; perennial and intermittent tributaries that contribute surface water flow to such waters; certain lakes, ponds, and impoundments of jurisdictional waters; and wetlands adjacent to other jurisdictional waters. Paragraph (a) of the final rule identifies four categories of waters that are "waters of the United States." These waters are referred to as "jurisdictional" in this notice and in the regulatory text. Paragraph (b) of the final rule identifies those waters and features that are excluded from the definition of "waters of the United States." These waters are referred to as "non-jurisdictional" or "excluded" in this notice and as "non-jurisdictional" in the regulatory text. Paragraph (c) of the final rule defines applicable terms.

As a baseline concept, this final rule recognizes that waters of the United States are waters within the ordinary meaning of the term, such as oceans, rivers, streams, lakes, ponds, and wetlands, and that not all waters are waters of the United States. The final rule includes the agencies' longstanding category of the territorial seas and traditional navigable waters. A "tributary" is defined in the final rule as a river, stream, or similar naturally occurring surface water channel that contributes surface water flow to a territorial sea or traditional navigable water in a typical year either directly or indirectly through other tributaries, jurisdictional lakes, ponds, or impoundments, or adjacent wetlands. A tributary must be perennial or intermittent in a typical year. The alteration or relocation of a tributary does not modify its jurisdictional status as long as it continues to be perennial or intermittent and contributes surface water flow to a traditional navigable water or territorial sea in a typical year. A tributary does not lose its jurisdictional status if it contributes surface water flow to a downstream jurisdictional water in a typical year through a channelized non-jurisdictional surface water feature, through a subterranean river, through a culvert, dam, tunnel, or other similar artificial feature, or through a

debris pile, boulder field, or similar natural feature. The term “tributary” includes a ditch that either relocates a tributary, is constructed in a tributary, or is constructed in an adjacent wetland as long as the ditch is perennial or intermittent and contributes surface water flow to a traditional navigable water or territorial sea in a typical year.

The final rule defines “lakes and ponds, and impoundments of jurisdictional waters” as standing bodies of open water that contribute surface water flow in a typical year to a territorial sea or traditional navigable water either directly or through a tributary, another jurisdictional lake, pond, or impoundment, or an adjacent wetland. The agencies note that to be jurisdictional, an “impoundment of a jurisdictional water” must be an impoundment of a territorial sea or traditional navigable water, tributary, jurisdictional lake or pond, or an adjacent wetland, and must meet the conditions in paragraph (c)(6) of the final rule. A lake, pond, or impoundment of a jurisdictional water does not lose its jurisdictional status if it contributes surface water flow to a downstream jurisdictional water in a typical year through a channelized non-jurisdictional surface water feature, through a culvert, dike, spillway, or similar artificial feature, or through a debris pile, boulder field, or similar natural feature. A lake, pond, or impoundment of a jurisdictional water is also jurisdictional if, in a typical year, it is inundated by flooding from a territorial sea or traditional navigable water, or tributary, or from another jurisdictional lake, pond, or impoundment.

The final rule defines “adjacent wetlands” as wetlands that abut a territorial sea or traditional navigable water, a tributary, or a lake, pond, or impoundment of a jurisdictional water; are inundated by flooding from a territorial sea or traditional navigable water, a tributary, or a lake, pond, or impoundment of a jurisdictional water in a typical year; are physically separated from a territorial sea or traditional navigable water, a tributary, or a lake, pond, or impoundment of a

jurisdictional water only by a natural berm, bank, dune, or similar natural feature; or are physically separated from a territorial sea or traditional navigable water, a tributary, or a lake, pond, or impoundment of a jurisdictional water only by an artificial dike, barrier, or similar artificial structure so long as that structure allows for a direct hydrological surface connection to the territorial sea or traditional navigable water, tributary, or lake, pond, or impoundment of a jurisdictional water in a typical year, such as through a culvert, flood or tide gate, pump, or similar artificial feature. "Abut" means when a wetland touches a territorial sea, traditional navigable water, tributary, or lake, pond, or impoundment of a jurisdictional water at least at one point or side. An adjacent wetland is jurisdictional in its entirety when a road or similar artificial structure divides the wetland, as long as the structure allows for a direct hydrologic surface connection through or over that structure in a typical year.

The final rule excludes from the definition of "waters of the United States" all waters or features not mentioned above. In addition to this general exclusion, the final rule specifically clarifies that waters of the United States do not include the following:

- groundwater, including groundwater drained through subsurface drainage systems;
- ephemeral features that flow only in direct response to precipitation, including ephemeral streams, swales, gullies, rills, and pools;
- diffuse stormwater runoff and directional sheet flow over upland;
- ditches that are not traditional navigable waters, tributaries, or that are not constructed in adjacent wetlands, subject to certain limitations;
- prior converted cropland;
- artificially irrigated areas that would revert to upland if artificial irrigation ceases;
- artificial lakes and ponds that are not jurisdictional impoundments and that are

constructed or excavated in upland or non-jurisdictional waters;

- water-filled depressions constructed or excavated in upland or in non-jurisdictional waters incidental to mining or construction activity, and pits excavated in upland or in non-jurisdictional waters for the purpose of obtaining fill, sand, or gravel;
- stormwater control features constructed or excavated in upland or in non-jurisdictional waters to convey, treat, infiltrate, or store stormwater run-off;
- groundwater recharge, water reuse, and wastewater recycling structures constructed or excavated in upland or in non-jurisdictional waters; and
- waste treatment systems.

In addition, the agencies have defined the terms "upland," "prior converted cropland," and "waste treatment system" to improve regulatory predictability and clarity.

To 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. This final rule presents a unifying legal theory for federal jurisdiction over those waters and wetlands that maintain a sufficient surface water connection to traditional navigable waters or the territorial seas. This definition strikes a reasonable and appropriate balance between Federal and State waters and carries out Congress' overall objective to restore and maintain the integrity of the nation's waters in a manner that preserves the traditional sovereignty of States over their own land and water resources. The final rule also provides clarity and predictability for Federal agencies, States, Tribes, the regulated community, and the public. This final rule is intended to ensure that the agencies operate within the scope of the Federal government's authority over navigable waters under the CWA and the Commerce Clause of the U.S. Constitution.

B. History of this Rulemaking

1. The Clean Water Act

Congress amended the Federal Water Pollution Control Act (FWPCA), or the CWA as it is commonly called,[1] in 1972 to address longstanding concerns regarding the quality of the nation's waters and the federal government's ability to address those concerns under existing law. Prior to 1972, the ability to control and redress water pollution in the nation's waters largely fell to the Corps under the Rivers and Harbors Act of 1899 (RHA). While much of that statute focused on restricting obstructions to navigation on the nation's major waterways, section 13 of the RHA made it unlawful to discharge refuse "into any navigable water of the United States, or into any tributary of any navigable water from which the same shall float or be washed into such navigable water."[2] 33 U.S.C. 407. Congress had also enacted the Water Pollution Control Act of 1948, Pub. L. No. 80-845, 62 Stat. 1155 (June 30, 1948), to address interstate water pollution, and subsequently amended that statute in 1956 (giving the statute its current formal name), 1961, and 1965. The early versions of the CWA promoted the development of pollution abatement programs, required States to develop water quality standards, and authorized the Federal government to bring enforcement actions to abate water pollution.

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[1] The FWPCA is commonly referred to as the CWA following the 1977 amendments to the FWPCA. Pub. L. No. 95-217, 91 Stat. 1566 (1977). For ease of reference, the agencies will generally refer to the FWPCA in this notice as the CWA or the Act.

[2] The term "navigable water of the United States" is a term of art used to refer to waters subject to federal jurisdiction under the RHA. *See, e.g.*, 33 CFR 329.1. The term is not synonymous with the phrase "waters of the United States" under the CWA, *see id.*, and the general term "navigable waters" has different meanings depending on the context of the statute in which it is used. *See, e.g.*, *PPL Montana, LLC v. Montana*, 565 U.S. 576, 591-93 (2012).

These early statutory efforts, however, proved inadequate to address the decline in the quality of the nation's waters, *see City of Milwaukee v. Illinois*, 451 U.S. 304, 310 (1981), so Congress performed a "total restructuring" and "complete rewriting" of the existing statutory framework in 1972, *id*. at 317 (quoting legislative history of 1972 amendments). That restructuring resulted in the enactment of a comprehensive scheme (including voluntary as well as regulatory programs) designed to prevent, reduce, and eliminate pollution in the nation's waters generally, and to regulate the discharge of pollutants into navigable waters specifically. *See, e.g., S.D. Warren Co. v. Maine Bd. of Envtl. Prot.*, 547 U.S. 370, 385 (2006) (noting that "the Act does not stop at controlling the 'addition of pollutants,' but deals with 'pollution' generally").

The objective of the new statutory scheme was "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. 1251(a). In order to meet that objective, Congress declared two national goals: (1) "that the discharge of pollutants into the navigable waters be eliminated by 1985"; and (2) "that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983 . . . ." *Id*. at 1251(a)(1)-(2).

Congress also established several key policies that direct the work of the agencies to effectuate those goals. For example, Congress declared as a national policy "that the discharge of toxic pollutants in toxic amounts be prohibited; . . . that Federal financial assistance be provided to construct publicly owned waste treatment works; . . . that areawide waste treatment management planning processes be developed and implemented to assure adequate control of sources of pollutants in each State; . . . [and] that programs for the control of nonpoint sources of pollution be developed and implemented in an expeditious manner so as to enable the goals of

this Act to be met through the control of both point and nonpoint sources of pollution." 33 U.S.C. 1251(a)(3)-(7).

Congress provided a major role for the States in implementing the CWA, balancing the preservation of the traditional power of States to regulate land and water resources within their borders with the need for a national water quality regulation. For example, the statute highlighted "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." 33 U.S.C. 1251(b). Congress also declared as a national policy that States manage the major construction grant program and implement the core permitting programs authorized by the statute, among other responsibilities. *Id*. Congress added that "[e]xcept as expressly provided in this Act, nothing in this Act shall . . . be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States." *Id*. at 1370.[3] Congress pledged the Federal government to provide technical support and financial aid to the States "in connection with the prevention, reduction, and elimination of pollution." *Id*. at 1251(b).

To carry out these policies, Congress broadly defined "pollution" to mean "the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water," 33 U.S.C. 1362(19), in keeping with the objective of the Act "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." *Id*. at 1251(a). Congress then crafted a 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,

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[3] 33 U.S.C. 1370 also prohibits authorized States from adopting any limitations, prohibitions, or standards that are less stringent than required by the CWA.

section 105 of the Act, "Grants for research and development," authorized the 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." *Id.* at 1255(a)(1) (emphasis added). Section 105 also authorized the 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.* at 1255(b)-(c) (emphasis added); *see also id*. at 1256(a) (authorizing the EPA to issue "grants to States and to interstate agencies to assist them in administering programs for the prevention, reduction, and elimination of pollution").

Section 108, "Pollution control in the Great Lakes," authorized the EPA to enter into agreements with any State to develop plans for the "elimination or control of pollution, *within all or any part of the watersheds* of the Great Lakes." 33 U.S.C. 1258(a) (emphasis added); *see also id*. at 1268(a)(3)(C) (defining the "Great Lakes System" as "*all* the streams, rivers, lakes, and other bodies of water within the drainage basin of the Great Lakes") (emphasis added). Similar broad pollution control programs were created for other major watersheds, including, for example, the Chesapeake Bay, *see id*. at 1267(a)(3), Long Island Sound, *see id*. at 1269(c)(2)(D), and Lake Champlain, *see id*. at 1270(g)(2). Some commenters noted that the Great Lakes, Long Island Sound, Chesapeake Bay, and Lake Champlain are waters of the United States to which

regulatory programs apply, and that the purpose of the technical assistance and grants in the cited sections is to assist states and others in achieving the requirements of the Act. The agencies agree that these waters are waters of the United States, but the emphasized language in the cited provisions above makes clear that these provisions address all bodies of water in the watersheds of the Great Lakes, Long Island Sound, Chesapeake Bay, and Lake Champlain, regardless of the jurisdictional status of those waters.

In addition to the Act's non-regulatory measures to control pollution of the nation's waters generally, Congress created a federal regulatory permitting program designed to address the discharge of pollutants into a subset of those waters identified as "navigable waters," defined as "the waters of the United States," 33 U.S.C. 1362(7). Section 301 contains the key regulatory mechanism: "Except as in compliance with this section and sections 302, 306, 307, 318, 402, and 404 of this Act, the discharge of any pollutant by any person shall be unlawful." *Id*. at 1311(a). A "discharge of a pollutant" is defined to include "any addition of any pollutant to navigable waters from any point source," defined to mean "any discernible, confined and discrete conveyance" such as a pipe or ditch. *Id*. at 1362(12), (14). The term "pollutant" means "dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water." *Id*. at 1362(6). Thus, it is unlawful to discharge pollutants into the "waters of the United States" from a point source unless the discharge is in compliance with certain enumerated sections of the CWA, including obtaining authorization pursuant to the section 402 National Pollutant Discharge Elimination System (NPDES) permit program or the section 404 dredged or fill material permit program. *See id*. at 1342, 1344. Congress therefore intended to achieve the Act's objective "to

restore and maintain the chemical, physical, and biological integrity of the Nation's waters" by addressing pollution of all waters via non-regulatory means *and* federally regulating the discharge of pollutants to the subset of waters identified as "navigable waters."[4]

Many commenters on this rulemaking agreed with this summary of the CWA, stating that it accurately characterizes the full scope of the Act and the thoughtful, holistic approach Congress enacted to address water pollution in this country. Many commenters stated that Congress developed both regulatory and non-regulatory approaches for addressing water pollution, whereby "navigable waters" are subject to federal regulatory requirements under the CWA but many other classes of the "nation's waters" are not. Some 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 suggested that the agencies' interpretation is not supported by the text or structure of the Act and is based instead on mischaracterizations of the Act's provisions. Some commenters argued that the two terms are synonymous under the Act, and others stated that the non-regulatory provisions of the CWA were intended to complement the regulatory requirements applicable to waters of the United States, as opposed to addressing a

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[4] Members of Congress were aware when they drafted the 1972 CWA amendments that different types of the Nation's waters would be subject to different degrees of federal control. For instance, in House debate regarding a proposed and ultimately failed amendment to prohibit the discharge of pollutants to groundwater in addition to navigable waters, Representative Don H. Clausen stated, "Mr. Chairman, in the early deliberations within the committee which resulted in the introduction of H.R. 11896, a provision for ground waters . . . was thoroughly reviewed and it was determined by the committee that there was not sufficient information on ground waters to justify the types of controls that are required for navigable waters. . . . I refer the gentleman to the objectives of this act as stated in section 101(a). The objective of this act is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. I call your attention to the fact that this does not say the Nation's [']navigable waters,' 'interstate waters,' or 'intrastate waters.' It just says 'waters.' This includes ground waters." 118 Cong. Rec. at 10,667 (daily ed. March 28, 1972).

separate category of waters. Fundamental principles of statutory interpretation support the agencies' recognition of a distinction between the "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." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (internal quotation marks and citation omitted); *see also United Sav. Ass'n of Texas v. Timbers of Inwood Forest Associates*, 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 and local partnerships to control pollution in the nation's waters *and* a federal regulatory prohibition on the discharge of pollutants to the navigable waters. If Congress had intended the terms to be synonymous, it would have used identical terminology. Instead, Congress chose to use separate terms, and the agencies are instructed by the Supreme Court to presume Congress did so intentionally.

Under the enacted statutory scheme, the States are primarily responsible for developing water quality standards for waters of the United States within their borders and reporting on the condition of those waters to the EPA every two years. 33 U.S.C. 1313, 1315. States must 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*. at 1313(d). States also

have authority 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. *Id.* at 1341.

These same regulatory authorities can be assumed by Indian tribes under section 518 of the CWA, which authorizes the 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. 33 U.S.C. 1377(e). In addition, States and Tribes retain authority to protect and manage the use of those waters that are not navigable waters under the CWA. *See, e.g., id*. at 1251(b), 1251(g), 1370, 1377(a). At this time, forty-seven States administer portions of the CWA section 402 permit program for those waters of the United States within their boundaries,[5] and two States (Michigan and New Jersey) administer the section 404 permit program for those waters that are assumable by States pursuant to section 404(g). Several additional states are exploring the possibility of assuming the section 404 permit program. At present, no Tribes administer the section 402 or 404 programs, although some are exploring the possibility. For additional information regarding State and tribal programs, see the Resource and Programmatic Assessment for the final rule.

2. Regulatory History

In May 1973, the EPA issued its first set of regulations to implement the new NPDES permit program established in the 1972 CWA amendments. Those regulations defined the phrase "navigable waters" as:

- All navigable waters of the United States;

[5] Three States (Massachusetts, New Hampshire, and New Mexico) do not currently administer any part of the CWA section 402 program.

- Tributaries of navigable waters of the United States;
- Interstate waters;
- Intrastate lakes, rivers, and streams which are utilized by interstate travelers for recreational or other purposes;
- Intrastate lakes, rivers, and streams from which fish or shellfish are taken and sold in interstate commerce; and
- Intrastate lakes, rivers, and streams which are utilized for industrial purposes by industries in interstate commerce.

38 FR 13528, 13529 (May 22, 1973) (codified at 40 CFR 125.1 (1973)).

In 1974, the Corps issued its first set of regulations defining "waters of the United States" for the purpose of implementing section 404 of the CWA as well as sections 9, 10, 11, 13, and 14 of the RHA. These regulations reaffirmed the Corps' view that its dredged and fill jurisdiction under section 404 was the same as its traditional jurisdiction under the RHA. *See* 39 FR 12115, 12119 (Apr. 3, 1974) (codified at 33 CFR 209.120). Specifically, the Corps defined the "waters of the United States" as waters that "are subject to the ebb and flow of the tide, and/or are presently, or have been in the past, or may be in the future susceptible for use for purposes of interstate or foreign commerce." *Id*.

Environmental organizations challenged the Corps' 1974 regulation in the U.S. District Court for the District of Columbia, arguing that the Corps' definition of "navigable waters" was inadequate because it did not include tributaries or coastal marshes above the mean high tide mark or wetlands above the ordinary high water mark. The District Court held that the term "navigable waters" is not limited to the traditional tests of navigability and ordered the Corps to revoke its definition and publish a new one "clearly recognizing the full regulatory mandate of

the Water Act." *Natural Resources Defense Council, Inc. v. Callaway*, 392 F. Supp. 685 (D.D.C. 1975).

In response to this decision, the Corps issued interim regulations in 1975 that defined the term "navigable waters" to include periodically inundated coastal wetlands contiguous with or adjacent to navigable waters, periodically inundated freshwater wetlands contiguous with or adjacent to navigable waters, and, as in the EPA's 1973 regulations, certain intrastate waters based on non-transportation impacts on interstate commerce. The Corps revised the definition in 1977 to encompass traditional navigable waters, tributaries to navigable waters, interstate waters, adjacent wetlands to those categories of waters, and "[a]ll other waters" the "degradation or destruction of which could affect interstate commerce." 42 FR 37122, 37144 (Jul. 19, 1977). The EPA and the Corps have maintained separate regulations defining the statutory term "waters of the United States," but the text of the regulations has been virtually identical starting in 1986.[6] In 1986, for example, the Corps consolidated and recodified its regulations to align with clarifications that the EPA had previously promulgated. *See* 51 FR 41206 (Nov. 13, 1986). While the Corps stated in 1986 that the recodified regulation neither reduced nor expanded jurisdiction, its previous exclusion for ditches was moved from the regulatory text to the final rule preamble. *Id*. at 41216-17. And the Corps added to the preamble what later became known as the "Migratory Bird Rule," which claimed jurisdiction over any waters which are or may be used by birds protected by migratory bird treaties, waters which may be used as habitat for birds flying

[6] For convenience, the agencies generally refer to the Corps' regulations throughout this notice at 33 CFR 328.3. The EPA's codification of the definition of "waters of the United States" is found at 40 CFR 110.1, 112.2, 116.3, 117.1, 122.2, 230.3, 232.2, 300.5, 302.3, 401.11, and Appendix E to Part 300. This final rule also codifies the definition of "waters of the United States" in a new section 120.2.

across state lines, waters which may be used by endangered species, and waters used to irrigate crops sold in interstate commerce. *Id*. at 41217.

The 1986 regulatory text identified the following as waters of the United States:

- All traditional navigable waters,[7] interstate waters, and the territorial seas;
- All impoundments of jurisdictional waters;
- All "other waters" such as lakes, ponds, and sloughs the "use, degradation or destruction of which could affect interstate or foreign commerce";
- Tributaries of traditional navigable waters, interstate waters, impoundments, or "other waters"; and,
- Wetlands adjacent to traditional navigable waters, interstate waters, the territorial seas, impoundments, tributaries, or "other waters" (other than waters that are themselves wetlands).

33 CFR 328.3(a)(1)-(7) (1987). The 1986 regulation also excluded "waste treatment systems" from the definition of "waters of the United States," consistent with the EPA's regulatory definition. *Id.* at 328.3 (a)(7), (b) (1987); *see also* 44 FR 32854 (June 7, 1979).

On August 25, 1993, the agencies amended the regulatory definition of "waters of the United States" to categorically exclude "prior converted croplands." 58 FR 45008, 45031 (Aug. 25, 1993) ("1993 Rule") (codified at 33 CFR 328.3(a)(8) (1994)). The stated purpose of the amendment was to promote "consistency among various federal programs affecting wetlands," in particular the Food Security Act of 1985 (FSA) programs implemented by the U.S. Department

[7] "Traditional navigable waters" (or waters that are traditionally understood as navigable) refers to 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 subject to the ebb and flow of the tide.

of Agriculture (USDA) and the CWA programs implemented by the agencies.[8] 58 FR 45031. The agencies did not include a definition of "prior converted cropland" in the text of the Code of Federal Regulations but noted in the preamble to the 1993 Rule that the term was defined at that time by the USDA National Food Security Act Manual (NFSAM). *Id*. The agencies at that time also declined to establish regulatory text specifying when the prior converted cropland designation is no longer applicable. In the preamble to the 1993 Rule, the agencies stated that "[t]he Corps and EPA will use the [Natural Resources Conservation Service's] provisions on 'abandonment,' thereby ensuring that PC cropland that is abandoned within the meaning of those provisions and which exhibit[s] wetlands characteristics will be considered wetlands subject to Section 404 regulation." *Id*. at 45034. The agencies summarized these abandonment provisions by explaining that prior converted cropland which meets wetland criteria is considered to be abandoned unless: at least once in every five years the area has been used for the production of an agricultural commodity, or the area has been used and will continue to be used for the production of an agricultural commodity in a commonly used rotation with aquaculture, grasses, legumes, or pasture production. *Id*.

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[8] Title XII of the Food Security Act of 1985, as amended, encourages participants in USDA programs to adopt land management measures by linking eligibility for USDA program benefits to farming practices on highly erodible land and wetlands (*i.e.*, the wetland conservation provisions). USDA policy guidance regarding implementation of the wetland conservation provisions is found in the current edition of the Natural Resource Conservation Service National Food Security Act Manual (NFSAM), including the procedures for how to delineate wetlands and make wetland determinations in accordance with Subpart C of 7 CFR part 12. Due to the unique statutory provisions of the FSA, USDA wetland determinations may identify certain areas as exempt under the 1985 Act but remain subject to the requirements of the CWA. To avoid potential confusion, USDA clearly informs program participants that USDA wetland determinations are for purposes of implementing the wetland conservation provisions only, and that participants should contact the Corps for clarification as to whether a particular activity will require a CWA section 404 permit.

Congress amended the FSA wetland conservation provisions in 1996 to state that USDA certifications of eligibility for program benefits (*e.g.*, determinations by the Natural Resources Conservation Service (NRCS) that particular areas constitute prior converted cropland) "shall remain valid and in effect as long as the area is devoted to an agricultural use or until such time as the person affected by the certification requests review of the certification by the Secretary [of Agriculture]." Pub. L. No. 104-127, 322(a)(4), 110 Stat. 888 (1996); 16 U.S.C. 3822(a)(4). Thus, for purposes of farm program eligibility, the 1996 amendments designate as prior converted cropland those areas that may not have qualified for the CWA exclusion under the abandonment principles from the 1993 preamble, so long as such areas remain in agricultural use. The agencies did not update their prior converted cropland regulations for purposes of the CWA following the 1996 amendments to wetland conservation provisions of the FSA, as those regulations neither defined prior converted cropland nor specified when a valid prior converted cropland determination might cease to be valid. However, in 2005, the Army and USDA issued a joint Memorandum to the Field (the 2005 Memorandum) in an effort to again align the CWA section 404 program with the FSA amendments.[9] The 2005 Memorandum provided that a "certified [prior converted] determination made by [USDA] remains valid as long as the area is devoted to an agricultural use. If the land changes to a non-agricultural use, the [prior converted] determination is no longer applicable and a new wetland determination is required for CWA purposes." 2005 Memorandum at 4.

The 2005 Memorandum did not clearly address the abandonment principle that the agencies

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[9] Natural Resources Conservation Service and U.S. Army Corps of Engineers. Memorandum to the Field on Guidance on Conducting Wetland Determinations for the Food Security Act of 1985 and section 404 of the Clean Water Act (Feb. 25, 2005), *available at* https://usace.contentdm.oclc.org/utils/getfile/collection/p16021coll11/id/2508.

had been implementing since the 1993 rulemaking. The change in use policy was also never promulgated as a rule and was declared unlawful by one district court because it effectively modified the 1993 preamble language without any rulemaking process. *New Hope Power Co. v. U.S. Army Corps of Eng'rs*, 746 F. Supp. 2d 1272, 1282 (S.D. Fla. 2010).

3. U.S. Supreme Court Decisions

From the earliest rulemaking efforts following adoption of the 1972 CWA amendments, to the agencies' most recent attempt to define "waters of the United States" in 2015, the sparse statutory definition has spurred substantial litigation testing the meaning of the phrase. Hundreds of cases and dozens of courts have attempted to discern the intent of Congress when crafting the phrase. *See, e.g.*, *Rapanos v. United States*, 547 U.S. 715, 739 (2006) (Scalia, J., plurality) (briefly summarizing case history). The federal courts have established different analytical frameworks to interpret the phrase, and the applicable test may differ from State to State. *See, e.g.*, Memorandum from Dick Pedersen, President of the Environmental Council of the States (ECOS) of September 11, 2014, Concerning Waters of the United States under the Act at 2-23 (2014) (hereinafter, the "ECOS Memorandum"), *available at* http://acoel.org/file.axd?file=2014%2f9%2fWaters+of+the+U+S+Final+9_11_14.pdf (summarizing case history following *Rapanos*).

As part of this complex litigation history, three key U.S. Supreme Court decisions have interpreted the term "waters of the United States" and its implementing regulations and serve as guideposts for the agencies' interpretation of the phrase "waters of the United States." In 1985, the Supreme Court deferred to the Corps' assertion of jurisdiction over wetlands actually abutting a traditional navigable water in Michigan, stating that adjacent wetlands may be regulated as waters of the United States because they are "inseparably bound up" with navigable

waters and "in the majority of cases" have "significant effects on water quality and the aquatic ecosystem" in those waters. *United States v. Riverside Bayview Homes*, 474 U.S. 121, 131-35 & n.9 (1985). The Court recognized that "[i]n determining the limits of its power to regulate discharges under the Act, the Corps must necessarily choose some point at which water ends and land begins . . . . Where on this continuum to find the limit of 'waters' is far from obvious." *Id.* at 132. The Court acknowledged the "inherent difficulties of defining precise bounds to regulable waters," and deferred to the agencies' interpretation that the close ecological relationship between adjacent wetlands and traditional navigable waters provided a legal justification for treating wetlands as waters. *Id.* at 134. The Court also "conclude[d] that a definition of 'waters of the United States' encompassing all wetlands adjacent to other bodies of water over which the Corps has jurisdiction is a permissible interpretation of the Act." *Id*. at 135.

The Supreme Court again addressed the definition of "waters of the United States" in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) (*SWANCC*). In *SWANCC*, the Court rejected a claim of federal jurisdiction over nonnavigable, isolated, intrastate ponds that lack a sufficient connection to traditional navigable waters, noting that the term "navigable" must be given meaning within the context and application of the statute. *Id.* The Court held that interpreting the statute to extend to nonnavigable, isolated, intrastate ponds that lack a sufficient connection to traditional navigable waters would invoke the outer limits of Congress' power under the Commerce Clause. *Id.* at 172. Where an administrative interpretation of a statute presses against the outer limits of Congress' constitutional authority, the Court explained, it expects a clear statement from Congress that it intended that result, and even more so when the broad interpretation authorizes federal encroachment upon a traditional State power. *Id.* The CWA contains no such clear statement. *Id.* at 174.

In January 2003, the EPA and the Corps issued joint guidance interpreting the Supreme Court decision in *SWANCC*.[10] The guidance indicated that *SWANCC* focused on nonnavigable, isolated, intrastate waters, and called for field staff to coordinate with their respective Corps or EPA Headquarters on jurisdictional determinations that asserted jurisdiction over such waters. The agencies at that time focused their interpretation of *SWANCC* to its facts, and applied the decision narrowly as restricting the exercise of federal jurisdiction solely based on the Migratory Bird Rule.

The Court most recently interpreted the term "waters of the United States" in *Rapanos v. United States*, 547 U.S. 715 (2006). *Rapanos* involved two consolidated cases in which the CWA had been applied to wetlands located near man-made ditches that were ultimately connected to traditional navigable waters. All members of the Court agreed that the term "waters of the United States" encompasses some waters that are not navigable in the traditional sense.

A four-Justice plurality interpreted the term "waters of the United States" to "include[] only those relatively permanent, standing or continuously flowing bodies of water 'forming geographic features' that are described in ordinary parlance as 'streams[,] . . . oceans, rivers, [and] lakes,'" *Rapanos*, 547 U.S. at 739 (Scalia, J., plurality) (quoting *Webster's New International Dictionary* 2882 (2d ed. 1954)), and "wetlands with a continuous surface connection" to a "relatively permanent body of water connected to traditional interstate navigable waters." *Id.* at 742. The plurality explained that "[w]etlands with only an intermittent, physically remote hydrologic connection to 'waters of the United States' do not implicate the

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[10] *See* U.S. EPA and U.S. Army Corps of Engineers. Legal Memoranda Regarding *Solid Waste Agency of Northern Cook County (SWANCC) v. United States* (Jan. 15, 2003), *available at* https://www.epa.gov/sites/production/files/2016-04/documents/swancc_guidance_jan_03.pdf.

boundary-drawing problem of *Riverside Bayview*," and thus do not have the "necessary connection" to covered waters that triggers CWA jurisdiction. *Id.* at 742. The plurality also noted that its reference to "relatively permanent" waters did "not necessarily exclude streams, rivers, or lakes that might dry up in extraordinary circumstances, such as drought," or "*seasonal* rivers, which contain continuous flow during some months of the year but no flow during dry months." *Id.* at 732 n.5 (emphasis in original).

In a concurring opinion, Justice Kennedy took a different approach, concluding that "to constitute 'navigable waters' under the Act, a water or wetland must possess a 'significant nexus' to waters that are or were navigable in fact or that could reasonably be so made." *Rapanos*, 547 U.S. at 759 (Kennedy, J., concurring in the judgment) (citing *SWANCC*, 531 U.S. at 167, 172). He stated that adjacent wetlands possess the requisite significant nexus if the wetlands "either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" *Id*. at 780.

Following *Rapanos*, on June 7, 2007, the agencies issued joint guidance entitled "Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States* and *Carabell v. United States*" to address the waters at issue in that decision. The guidance did not change the codified definition of "waters of the United States." The guidance indicated that the agencies would assert jurisdiction over traditional navigable waters and their adjacent wetlands, relatively permanent nonnavigable tributaries of traditional navigable waters and wetlands that abut them, nonnavigable tributaries that are not relatively permanent if they have a significant nexus with a traditional navigable water, and wetlands adjacent to nonnavigable tributaries that are not relatively permanent if they have a significant nexus with a traditional

navigable water. The guidance was reissued with minor changes on December 2, 2008 (hereinafter, the "*Rapanos* Guidance").[11] After issuance of the *Rapanos* Guidance, Members of Congress, developers, farmers, State and local governments, environmental organizations, energy companies, and others asked the agencies to replace the guidance with a regulation that would provide clarity and certainty regarding the scope of the waters federally regulated under the CWA.

Since *Rapanos*, litigation has continued to confuse the regulatory landscape. *See, e.g.*, ECOS Memorandum at 2-23. The Supreme Court also has twice weighed in on topics related to the agencies' implementation of their authorities under the CWA to help clarify federal authority in this area. In each case, members of the Court noted the longstanding confusion regarding the scope of federal jurisdiction under the CWA and the importance of providing clear guidance to the regulated community. In 2012, for example, the Supreme Court unanimously rejected the EPA's longstanding position that compliance orders issued under the CWA to force property owners to restore wetlands are not judicially reviewable as final agency actions. *See Sackett v. EPA*, 566 U.S. 120, 131 (2012). In a concurring opinion, Justice Alito referred to the jurisdictional reach of the CWA as "notoriously unclear" and noted that the Court's decision provided only "a modest measure of relief." *Id*. at 133 (Alito, J., concurring) ("For 40 years, Congress has done nothing to resolve this critical ambiguity, and the EPA has not seen fit to

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[11] *See* U.S. EPA and 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* at 1 (Dec. 2, 2008) ("*Rapanos* Guidance"), *available at* https://www.epa.gov/sites/production/files/2016-02/documents/cwa_jurisdiction_following_rapanos120208.pdf.

promulgate a rule providing a clear and sufficiently limited definition of the phrase [‘waters of the United States’]”).

In 2016, the Supreme Court in a unanimous opinion rejected the Corps’ longstanding position that jurisdictional determinations issued by the Corps were not judicially reviewable as final agency actions. Writing for the Court, the Chief Justice recognized that it “is often difficult to determine whether a particular piece of property contains waters of the United States, but there are important consequences if it does.” *U.S. Army Corps of Eng’rs v. Hawkes Co.*, 136 S. Ct. 1807, 1812 (2016). Given those important consequences, the Court held that jurisdictional determinations are subject to immediate judicial review when made. Justice Kennedy authored a concurring opinion, “not to qualify what the Court says but to point out that, based on the Government’s representations in this case, the reach and systemic consequences of the Clean Water Act remain a cause for concern.” *Id.* at 1816-17 (referring to the “ominous reach” of the Act). On remand, the lower court found that the Corps’ assertion of jurisdiction over a peat farm more than 90 miles from the nearest traditional navigable water based on the “significant nexus” test described in the agencies’ *Rapanos* Guidance was “arbitrary and capricious.” *Hawkes Co. v. U.S. Army Corps of Eng’rs*, No. 13-107 ADM/TNL, 2017 U.S. Dist. LEXIS 10680 at *33 (D. Minn. Jan. 24, 2017).

4. The 2015 Rule

On June 29, 2015, the agencies issued a final rule (80 FR 37054) amending various portions of the CFR that set forth a definition of “waters of the United States,” a term contained in the CWA’s definition of “navigable waters,” 33 U.S.C. 1362(7). One of the stated purposes of the 2015 Rule was to “increase CWA program predictability and consistency by clarifying the scope of ‘waters of the United States’ protected under the Act.” 80 FR 37054. The 2015 Rule defined

the geographic scope of the CWA by placing waters into three categories: (A) waters that are categorically "jurisdictional by rule" in all instances (*i.e.*, without the need for any additional analysis); (B) waters that are subject to case-specific analysis to determine whether they are jurisdictional; and (C) waters that are categorically excluded from jurisdiction. Waters considered "jurisdictional by rule" included (1) 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) interstate waters, including interstate wetlands; (3) the territorial seas; (4) impoundments of waters otherwise identified as jurisdictional; (5) tributaries of the first three categories of "jurisdictional by rule" waters; and (6) waters adjacent to a water identified in the first five categories of "jurisdictional by rule" waters, including "wetlands, ponds, lakes, oxbows, impoundments, and similar waters." *See* 80 FR 37104.

The 2015 Rule relied on a scientific literature review— the Connectivity Report[12] —to support exerting federal jurisdiction over certain waters. *See* 80 FR 37065 ("[T]he agencies interpret the scope of 'waters of the United States' protected under the CWA based on the information and conclusions in the [Connectivity] Report. . . ."). Although the agencies acknowledged that science cannot dictate where to draw the line of federal jurisdiction, *see, e.g.*, *id*. at 37060, notwithstanding that qualifier, the agencies relied on the Connectivity Report extensively in establishing the 2015 Rule's definition of "waters of the United States." *See id*. at 37057 ("The [Connectivity] Report provides much of the technical basis for [the] rule.").

The 2015 Rule added new definitions of key terms such as "tributaries" and revised previous definitions of terms such as "adjacent" (by adding a new definition of "neighboring" that is used

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

in the definition of "adjacent") that would determine whether waters were "jurisdictional by rule." *See* 80 FR 37105. Specifically, a "tributary" under the 2015 Rule is a water that contributes flow, either directly or through another water, to a water identified in the first three categories of "jurisdictional by rule" waters that is characterized by the presence of the "physical indicators" of a bed and banks and an ordinary high water mark. According to the 2015 Rule's preamble, "[t]hese 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." *Id.*[13] Tributaries under the 2015 Rule could be natural, man-altered, or man-made, and do not lose their status as a tributary if, for any length, there is 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 could be identified upstream of the break. *Id.* at 37105-06.

In the 2015 Rule, the agencies did not expressly amend the longstanding definition of "adjacent" (defined as "bordering, contiguous, or neighboring"), but the agencies added, for the first time, a definition of "neighboring" that changed the meaning of "adjacent." The 2015 Rule defined "neighboring" to encompass all waters located within 100 feet of the ordinary high water mark of a category (1) through (5) "jurisdictional by rule" water; all waters located within the 100-year floodplain of a category (1) through (5) "jurisdictional by rule" water and not more

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[13] The 2015 Rule did not delineate jurisdiction specifically based on categories with established scientific meanings such as ephemeral, intermittent, and perennial waters that are based on the source of the water and nature of the flow. *See* 80 FR 37076 ("Under the rule, flow in the tributary may be perennial, intermittent, or ephemeral."). Under the 2015 Rule, tributaries also did not need to possess any specific volume, frequency, or duration of flow, or to contribute flow to a traditional navigable water in any given year or specific time period.

than 1,500 feet from the ordinary high water mark of such water; all waters located within 1,500 feet of the high tide line of a category (1) through (3) "jurisdictional by rule" water; and all waters within 1,500 feet of the ordinary high water mark of the Great Lakes. 80 FR 37105. The entire water would be considered "neighboring" if any portion of it lies within one of these zones. *See id.* These quantitative measures did not appear in the proposed rule and, as discussed in the 2019 Rule and below, the agencies concluded that they were not sufficiently supported in the administrative record for the final rule.

In addition to the six categories of "jurisdictional by rule" waters, the 2015 Rule identified certain waters that would be subject to a case-specific analysis to determine if they had a "significant nexus" to a water that is jurisdictional. 80 FR 37104-05. The first category consists of five specific types of waters in specific regions of the country: prairie potholes, Carolina and Delmarva bays, pocosins, western vernal pools in California, and Texas coastal prairie wetlands. *Id*. at 37105. The second category consists of all waters located within the 100-year floodplain of any category (1) through (3) "jurisdictional by rule" water and all waters located within 4,000 feet of the high tide line or ordinary high water mark of any category (1) through (5) "jurisdictional by rule" water. *Id.* These quantitative measures did not appear in the proposed rule and, as discussed in the 2019 Rule and below, the agencies concluded that they were not sufficiently supported in the administrative record for the final 2015 Rule.

The 2015 Rule defined "significant nexus" to mean a water, including wetlands, that either alone or in combination with other similarly situated waters in the region, significantly affected the chemical, physical, or biological integrity of a category (1) through (3) "jurisdictional by rule" water. 80 FR 37106. "For an effect to be significant, it must be more than speculative or insubstantial." *Id*. The term "in the region" meant "the watershed that drains to the nearest"

primary water. *Id*. This definition was different from the test articulated by the agencies in their 2008 *Rapanos* Guidance. That guidance interpreted "similarly situated" to include all wetlands (not waters) adjacent to the same tributary.

Under the 2015 Rule, to determine whether a water, alone or in combination with similarly situated waters across the watershed of the nearest primary water, had a significant nexus, one had to consider nine functions such as sediment trapping, runoff storage, provision of life cycle dependent aquatic habitat, and other functions. 80 FR 37106. A single function performed by a water, alone or together with similarly situated waters in the region, that contributed significantly to the chemical, physical, or biological integrity of the nearest category (1) through (3) "jurisdictional by rule" water was sufficient to establish a significant nexus. *Id.* Taken together, the enumeration of the nine functions and the more expansive consideration of "similarly situated waters in the region" in the 2015 Rule meant that the vast majority of water features in the United States may have come within the jurisdictional purview of the Federal government.[14]

The 2015 Rule also retained exclusions from the definition of "waters of the United States" for prior converted cropland and waste treatment systems. 80 FR 37105. In addition, the agencies codified several exclusions that, in part, reflected longstanding agency practice and added others such as "puddles" and "swimming pools" in response to concerns raised by stakeholders during the public comment period on the proposed 2015 Rule. *Id*. at 37096-98, 37105.

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[14] "[T]he vast majority of the nation's water features are located within 4,000 feet of a covered tributary, traditional navigable water, interstate water, or territorial sea." U.S. EPA and Department of the Army, Economic Analysis of the EPA-Army Clean Water Rule at 11 (May 20, 2015) ("2015 Rule Economic Analysis") (Docket ID: EPA-HQ-OW-2011-0880-20866), available at https://www.regulations.gov/document?D=EPA-HQ-OW-2011-0880-20866.

Following the 2015 Rule's publication, 31 States[15] and numerous non-state parties, including environmental groups and groups representing farming, recreational, forestry, and other interests, filed complaints and petitions for review in multiple federal district[16] and appellate[17] courts challenging the 2015 Rule. In those cases, the challengers alleged numerous procedural deficiencies in the development and promulgation of the 2015 Rule and substantive deficiencies in the 2015 Rule itself. Some challengers argued that the 2015 Rule was too expansive, while others argued that it excluded too many waters from federal jurisdiction.

The day before the 2015 Rule's August 28, 2015 effective date, the U.S. District Court for the District of North Dakota preliminarily enjoined the 2015 Rule in the 13 States that challenged the rule in that court.[18] The district court found those States were "likely to succeed"

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[15] Alabama, Alaska, Arizona, Arkansas, Colorado, Florida, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, New Mexico (Environment Department and State Engineer), North Carolina (Department of Environment and Natural Resources), North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, West Virginia, Wisconsin, and Wyoming. Iowa joined the legal challenge later in the process, bringing the total to 32 States. Colorado, New Mexico, and Wisconsin have since withdrawn from litigation against the 2015 Rule.

[16] U.S. District Courts for the Northern and Southern Districts of Georgia, District of Minnesota, District of North Dakota, Southern District of Ohio, Northern District of Oklahoma, Southern District of Texas, District of Arizona, Northern District of Florida, District of the District of Columbia, Western District of Washington, Northern District of California, and Northern District of West Virginia. In April 2019, an additional challenge against the 2015 Rule was filed in the U.S. District Court for the District of Oregon.

[17] U.S. Courts of Appeals for the Second, Fifth, Sixth, Eighth, Ninth, Tenth, Eleventh, and District of Columbia Circuits.

[18] Alaska, Arizona, Arkansas, Colorado, Idaho, Missouri, Montana, Nebraska, Nevada, New Mexico, North Dakota, South Dakota, and Wyoming. Iowa's motion to intervene in the case was granted after issuance of the preliminary injunction. In May 2019, the court granted motions from Colorado and New Mexico to withdraw from the litigation and lifted the preliminary injunction as to Colorado and New Mexico. Order, *North Dakota v. EPA*, No. 3:15-cv-00059 (D.N.D. May 14, 2019). At the same time, the court stated that the preliminary injunction would remain in effect as to a plaintiff-intervenor that represents ten counties in New Mexico. The agencies filed a motion seeking clarification of the applicability of the court's preliminary

on the merits of their challenge to the 2015 Rule because, among other reasons, "it appears likely that the EPA has violated its Congressional grant of authority in its promulgation of the Rule." *North Dakota v. EPA*, 127 F. Supp. 3d 1047, 1051 (D.N.D. 2015). In particular, the court noted concern that the 2015 Rule's definition of "tributary" "includes vast numbers of waters that are unlikely to have a nexus to navigable waters." *Id*. at 1056. Further, the court found that "it appears likely the EPA failed to comply with [Administrative Procedure Act (APA)] requirements when promulgating the Rule," suggesting that certain distance-based measures were not a logical outgrowth of the proposal to the 2015 Rule. *Id.* at 1051, 1058. No party sought an interlocutory appeal.

The numerous petitions for review filed in the courts of appeals were consolidated in the U.S. Court of Appeals for the Sixth Circuit. In that litigation, State and industry petitioners raised concerns about whether the 2015 Rule violated the Constitution and the CWA and whether its promulgation violated the APA and other statutes. Environmental petitioners also challenged the 2015 Rule, claiming in part that the 2015 Rule was too narrow because of the distance limitations and other issues. On October 9, 2015, approximately six weeks after the 2015 Rule took effect in the 37 States, the District of Columbia, and U.S. Territories that were not subject to the preliminary injunction issued by the District of North Dakota, the Sixth Circuit stayed the 2015 Rule nationwide after concluding, among other things, that State petitioners had demonstrated "a substantial possibility of success on the merits of their claims." *In re EPA & Dep't of Def. Final Rule*, 803 F.3d 804, 807 (6th Cir. 2015) ("*In re EPA*").

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injunction to those ten counties in New Mexico. Defendants' Motion for Clarification Regarding the Scope of the Court's Preliminary Injunction, *North Dakota v. EPA*, No. 3:15-cv-00059 (D.N.D. May 24, 2019). As of the time of signature of this final rule, that motion is pending before the court.

On January 13, 2017, the U.S. Supreme Court granted *certiorari* on the question of whether the courts of appeals have original jurisdiction to review challenges to the 2015 Rule. *See Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 137 S. Ct. 811 (2017). The Sixth Circuit granted petitioners' motion to hold in abeyance the briefing schedule in the litigation challenging the 2015 Rule pending a Supreme Court decision on the question of the court of appeals' jurisdiction. On January 22, 2018, the Supreme Court, in a unanimous opinion, held that the 2015 Rule is subject to direct review in the district courts. *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617, 624 (2018). Throughout the pendency of the Supreme Court litigation (and for a short time thereafter), the Sixth Circuit's nationwide stay remained in effect. In response to the Supreme Court's decision, on February 28, 2018, the Sixth Circuit lifted the stay and dismissed the corresponding petitions for review. *See In re Dep't of Def. & EPA Final Rule*, 713 Fed. Appx. 489 (6th Cir. 2018).

Following the Supreme Court's jurisdictional ruling, district court litigation regarding the 2015 Rule resumed. At this time, the 2015 Rule continues to be subject to a preliminary injunction issued by the District of North Dakota as to 12 States: Alaska, Arizona, Arkansas, Idaho, Iowa, Missouri, Montana, Nebraska, Nevada, North Dakota, South Dakota, and Wyoming.[19] The 2015 Rule also is subject to a preliminary injunction issued by the U.S. District Court for the Southern District of Georgia as to 11 more States: Georgia, Alabama, Florida, Indiana, Kansas, Kentucky, North Carolina, South Carolina, Utah, West Virginia, and Wisconsin. *Georgia v. Pruitt*, 326 F. Supp. 3d 1356, 1364 (S.D. Ga. 2018). The Southern District of Georgia subsequently issued an order remanding the 2015 Rule to the agencies, finding that

[19] As of the date this final rule was signed, the applicability and scope of the North Dakota district court's preliminary injunction in New Mexico is unclear. *See supra* note 18.

the 2015 Rule exceeded the agencies' statutory authority under the CWA and was promulgated in violation of the APA. *Georgia v. Wheeler*, No. 2:15-cv-079, 2019 WL 3949922 (S.D. Ga. Aug. 21, 2019). "[I]n light of the serious defects identified," the court retained its injunction against the 2015 Rule. *Id.* at *36.[20]

In September 2018, the U.S. District Court for the Southern District of Texas issued a preliminary injunction against the 2015 Rule in response to motions filed by the States of Texas, Louisiana, and Mississippi and several business associations, finding that enjoining the rule would provide "much needed governmental, administrative, and economic stability" while the rule undergoes judicial review. *See Texas v. EPA*, No. 3:15-cv-162, 2018 WL 4518230, at *1 (S.D. Tex. Sept. 12, 2018). The court observed that if it did not temporarily enjoin the rule, "it risks asking the states, their governmental subdivisions, and their citizens to expend valuable resources and time operationalizing a rule that may not survive judicial review." *Id.* In May 2019, the court remanded the 2015 Rule to the agencies on the grounds that the rule violated the APA. Specifically, the court found that the rule violated the APA's notice and comment requirements because: (1) the 2015 Rule's definition of "adjacent" waters (which relied on distance-based limitations) was not a "logical outgrowth" of the proposal's definition of "adjacent" waters (which relied on ecologic and hydrologic criteria); and (2) the agencies denied interested parties an opportunity to comment on the final version of the Connectivity Report, which served as the technical basis for the final rule. *See Texas v. EPA*, 389 F. Supp. 3d 497

[20] The Southern District of Georgia later denied as moot plaintiffs' motions for reconsideration asking the court to vacate, rather than remand, the 2015 Rule. Order, *Georgia v. Wheeler*, No. 2:15-cv-079 (S.D. Ga. Jan. 3, 2020).

(S.D. Tex. 2019).[21]

In July 2019, the U.S. District Court for the District of Oregon issued a preliminary injunction against the 2015 Rule in the State of Oregon. Order, *Or. Cattlemen's Ass'n v. EPA*, No. 19-00564 (D. Or. July 26, 2019). As a result, the 2015 Rule was enjoined in more than half of the States.

Three additional States (Ohio, Michigan, and Tennessee) sought a preliminary injunction against the 2015 Rule in the U.S. District Court for the Southern District of Ohio. In March 2019, the court denied the States' motion, finding that the States had "failed to demonstrate that they will suffer imminent and irreparable harm absent an injunction." *See Ohio v. EPA*, No. 2:15-cv-02467, 2019 WL 1368850 (S.D. Ohio Mar. 26, 2019). The court subsequently denied the States' motion for reconsideration of its order denying the preliminary injunction motion, and the States have since filed an appeal of the court's order in the Sixth Circuit. *See Ohio v. EPA*, No. 2:15-cv-02467, 2019 WL 1958650 (S.D. Ohio May 2, 2019); Plaintiffs' Notice of Appeal, *Ohio v. EPA*, No. 2:15-cv-02467 (S.D. Ohio May 28, 2019).[22]

C. Executive Order 13778 and the "Step One" Rulemaking

On February 28, 2017, the President issued Executive Order 13778 entitled "Restoring the

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[21] The Southern District of Texas later denied plaintiffs' motions for reconsideration urging the court to vacate, rather than remand, the 2015 Rule. Order, *Texas v. EPA*, No. 3:15-cv-00162 (S.D. Tex. Nov. 6, 2019).

[22] Parties challenging the 2015 Rule in the U.S. District Court for the Northern District of Oklahoma, including the State of Oklahoma and the U.S. Chamber of Commerce, unsuccessfully sought a motion for a preliminary injunction against the 2015 Rule and later stipulated to a voluntary dismissal of the case. *See* Opinion & Order, *Oklahoma v. EPA*, No. 4:15-cv-00381 (N.D. Okla. May 29, 2019); Stipulation of Voluntary Dismissal, *Oklahoma v. EPA*, No. 4:15-cv-00381 (N.D. Okla. Jan. 7, 2019). Following the effective date of the 2019 Rule, an additional motion for a preliminary injunction against the 2015 Rule was denied as moot in the U.S. District Court for the Western District of Washington. Order, *Wash. Cattlemen's Ass'n v. EPA*, No. 19-00569 (W.D. Wash. Dec. 30, 2019).

Rule of Law, Federalism, and Economic Growth by Reviewing the 'Waters of the United States' Rule." Section 1 of the Executive Order states, "[i]t is in the national interest to ensure that 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 EPA and the Army to review the 2015 Rule 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 (Section 2). 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) (Section 3).

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 the Executive Order. 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 the "Definition of 'Waters of the United States' – Recodification of Pre-Existing Rules" notice of proposed rulemaking (NPRM) (82 FR 34899) that proposed to repeal the 2015 Rule and recodify the regulatory text that governed prior to the promulgation of the 2015 Rule, consistent with Supreme Court decisions and informed by applicable guidance documents and longstanding agency practice. The agencies refer to this as the "Step One" rule. 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 proposed repeal and recodification. 83 FR 32227. The agencies invited comment on the SNPRM over a 30-day period.

On October 22, 2019, the agencies published a final rule repealing the 2015 Rule and recodifying the pre-existing regulations as an interim matter until this final rule becomes effective. 84 FR 56626. In developing the final Step One rule (referred to as the "2019 Rule"), the agencies reviewed approximately 690,000 public comments received on the NPRM and approximately 80,000 comments received on the SNPRM from a broad spectrum of interested parties. In the NPRM and SNPRM the agencies sought comment on all aspects of the NPRM, the economic analysis for the NPRM, and the SNPRM, including the repeal of the 2015 Rule, the recodification of the prior regulations, the considerations underlying the proposal and agencies' reasons for the proposal, and the agencies' proposed conclusions that the 2015 Rule exceeded the agencies' authority under the CWA.

The agencies finalized the 2019 Rule, which became effective December 23, 2019, and repealed the 2015 Rule for four primary reasons. First, the agencies concluded 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 concluded 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 repealed 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 concluded that the 2015 Rule's distance-based limitations suffered from

certain procedural errors and a lack of adequate record support. The agencies found that these reasons, collectively and individually, warranted repealing the 2015 Rule.

At this time, the regulations defining the scope of federal CWA jurisdiction are those portions of the CFR as they existed before the amendments promulgated in the 2015 Rule. The agencies concluded that it was appropriate as an interim matter to restore the pre-existing regulations to provide regulatory certainty as the agencies considered the proposed revised definition of "waters of the United States" and because, as implemented, those prior regulations adhere more closely than the 2015 Rule to the jurisdictional limits reflected in the statute and case law. As anticipated in the 2019 Rule, this final rule replaces the recodified pre-2015 regulations, upon its effective date.

As of the time of signature of this final rule, challenges to the agencies' 2019 Rule are pending in six district courts, wherein both environmental and industry groups have either filed new complaints or sought to supplement existing complaints to challenge the rule in whole or in part. *See New York v. Wheeler*, No. 19-11673 (S.D.N.Y., complaint filed Dec. 20, 2019); *Wash. Cattlemen's Ass'n v. EPA*, No. 2:19-cv-00569 (W.D. Wash., supplemental amended complaint filed Dec. 20, 2019); *Murray v. Wheeler*, No. 1:19-cv-01498 (N.D.N.Y., complaint filed Dec. 4, 2019); *S.C. Coastal Conservation League v. Wheeler*, No. 2:19-cv-3006 (D.S.C., complaint filed Oct. 23, 2019); *N.M. Cattle Growers' Ass'n v. EPA*, No. 1:19-cv-988 (D.N.M., complaint filed Oct. 22, 2019); *Pierce v. EPA*, No. 0:19-cv-2193 (D. Minn., supplemental complaint filed Oct. 22, 2019).

D. Summary of Stakeholder Outreach and the "Step Two" Rulemaking

Following the March 6, 2017 *Federal Register* notice announcing the agencies' intent to review and rescind or revise the 2015 Rule, the agencies initiated an effort to engage the public

to hear perspectives as to how the agencies could define "waters of the United States," including creating a new website to provide information on the rulemaking. *See* www.epa.gov/wotus-rule. On April 19, 2017, the agencies held an initial Federalism consultation meeting with State and local government officials as well as national organizations representing such officials. The agencies also convened several additional meetings with intergovernmental associations and their members to solicit input on the future rule. The EPA, with participation from the Army, initiated Tribal consultation on April 20, 2017, under the *EPA Policy on Consultation and Coordination with Indian Tribes*. *See* Section VI for further details on the agencies' consultations. The agencies considered comments received from federalism and tribal consultations as they developed this final rule.

In addition to engaging State, tribal, and local officials through federalism and tribal consultations, the agencies sought feedback on the definition of "waters of the United States" from a broad audience of stakeholders, including small entities (small businesses, small organizations, and small government jurisdictions), through a series of outreach webinars that were held September 9, 2017, through November 21, 2017, and through an in-person meeting for small entities on October 23, 2017. A summary of these public listening sessions is available in the docket (Docket Id. No. EPA-HQ-OW-2018-0149-0091) for this rule. The webinars were tailored to specific sectors, including agriculture (row crop, livestock, silviculture); conservation (hunters and anglers); small entities (small businesses, small organizations, small government jurisdictions); construction and transportation; environment and public advocacy (including health and environmental justice); mining; energy and chemical industry; scientific organizations and academia; stormwater, wastewater management, and drinking water agencies; and the general public.

At the pre-proposal webinars and meetings with stakeholders, the agencies provided a presentation and sought input on specific issues, such as potential approaches to defining the phrases "relatively permanent" waters and "continuous surface connections" as articulated by the plurality opinion in *Rapanos*, as well as other considerations addressing specific geomorphological features, exclusions and exemptions, costs and benefits, and aquatic resource data that the agencies might consider in the technical analyses for a future rule. As part of this outreach effort, the agencies established a public recommendations docket (Docket ID No. EPA-HQ-OW-2017-0480) that opened August 28, 2017, and closed November 28, 2017. Participant comments and letters submitted represent a diverse range of interests, positions, suggestions, and recommendations provided to the agencies. The agencies received over 6,300 recommendations (available on Regulations.gov at https://www.regulations.gov/docket?D=EPA-HQ-OW-2017-0480) that were considered as the agencies developed the proposed revised definition of "waters of the United States." The agencies also considered recommendations as to how the agencies should define "waters of the United States" that were submitted in public comments on the agencies' proposed "Step One" rule (82 FR 34899, July 27, 2017) and the July 2018 SNPRM (83 FR 32227, July 12, 2018).

The agencies continued their pre-proposal engagement with States and Tribes via additional webinars and in-person meetings. On March 8 and 9, 2018, the agencies held an in-person State Co-Regulators Workshop with representatives from nine States (Arizona, Arkansas, Florida, Iowa, Maryland, Minnesota, Oregon, Pennsylvania, and Wyoming) and convened a subsequent in-person meeting on March 22, 2018, with representatives from all States at the spring meeting of the Environmental Council of the States. The agencies also held an in-person Tribal Co-Regulators Workshop on March 6 and 7, 2018, with representatives from 20 tribes. These

meetings were intended to seek technical input as the agencies developed the proposed rule. The agencies also sought pre-proposal input from Tribes through national and regional tribal meetings, including through listening sessions at the Tribal Land and Environment Forum (August 16, 2017 and August 15, 2018) and the National Congress of American Indians Annual Convention (October 24, 2018).

On December 12, 2018, the agencies signed the proposed rule to revise the definition of "waters of the United States," as the second step of the comprehensive two-step process consistent with Executive Order 13778. The proposal was published on February 14, 2019. 84 FR 4154. The agencies proposed to interpret the term "waters of the United States" to encompass: traditional navigable waters, including the territorial seas; tributaries that contribute perennial or intermittent flow to such waters; certain ditches; certain lakes and ponds; impoundments of otherwise jurisdictional waters; and wetlands adjacent to other jurisdictional waters. The 60-day public comment period for the proposed revised definition of "waters of the United States" ("Step Two" Rule) closed on April 15, 2019.[23]

The agencies conducted a variety of stakeholder outreach on the proposed rule upon its publication in the *Federal Register.* On February 14, 2019, the agencies held a public webcast to present key elements of the proposed rule (*see* https://www.youtube.com/watch?v=ZZ6kFJasDhg&feature=youtu.be), and held a public hearing in Kansas City, Kansas, on February 27 and 28, 2019, to hear feedback from individuals from regulated industry sectors, environmental and conservation organizations, State agencies, tribal

[23] The pre-publication of the proposed rule was published on EPA's website on December 12, 2018, approximately 60 days prior to its publication in the Federal Register and the date the formal public comment period began.

governments, and private citizens. The agencies also continued engagement with States and Tribes through a series of in-person meetings with State and tribal representatives in Kansas City, Kansas; Atlanta, Georgia; Albuquerque, New Mexico; and Seattle, Washington during the public comment period for the proposed rule. During these meetings, the agencies provided an overview of the proposed rule, responded to clarifying questions from participants, discussed implementation considerations, and heard feedback on the agencies' interest in developing geospatial datasets of jurisdictional waters. A transcript of the public hearing and related materials and summaries of the State and tribal meetings can be found in the docket for the final rule. At the request of individual Tribes, the agencies also continued to hold staff-level and leader-to-leader meetings with individual Tribes.

In developing this final rule, the agencies reviewed and considered approximately 620,000 comments received on the proposed rule from a broad spectrum of interested parties. Commenters provided a wide range of feedback on the various aspects of the proposal, including the legal basis for the proposed rule, the agencies' proposed treatment of categories of jurisdictional waters and those features that would not be jurisdictional, the economic analysis and resource and programmatic assessment for the proposed rule, and the agencies' considerations for developing geospatial datasets of jurisdictional waters in partnership with other federal agencies, States, and Tribes. The agencies discuss comments received and their responses in the applicable sections of this final rule. A complete response to comments document is available in the docket for this final rule at Docket ID No. EPA-HQ-OW-2018-0149.

The agencies also engaged with the EPA's Science Advisory Board (SAB) during the development of the rule on several occasions. The agencies met with the SAB prior to the

proposed rule and following publication of the proposed rule to explain the basis for the rule and to address the SAB's questions and initial observations. The SAB issued a draft commentary on the proposed rule on December 31, 2019, and held a public meeting on the matter on January 17, 2020. The SAB's draft commentary asserted that the proposed rule did not fully incorporate the Connectivity Report and offers no comparable body of peer reviewed evidence to support this departure. As the agencies made clear in the proposed rule preamble and explain in greater detail in this notice, the agencies used the Connectivity Report to inform certain aspects of the definition of "waters of the United States," but recognize that science cannot dictate where to draw the line between Federal and State waters, as this is a legal question that must be answered based on the overall framework and construct of the CWA. The SAB's draft also addresses the absence of "ground water protection;" the exclusion of "irrigation canals" from regulatory jurisdiction; the exclusion of "adjacent wetlands that do not abut or have a direct hydrologic surface connection to otherwise jurisdictional waters;" and the absence of "long term clarity" as a result of the asserted lack of scientific basis for the proposed rule.

The relevant comments raised by the SAB were also raised by public commenters throughout the rulemaking process, and as a result, have been addressed by the agencies in the final rule, supporting documents, and throughout this notice. In brief, however, the agencies note that the final rule is consistent with the agencies' longstanding position that "waters of the United States" do not include groundwater; that the agencies do not use the term "irrigation canals" in the final rule; that "irrigation ditches" constructed in uplands and "irrigation return flows" generally have been not been subject to CWA regulatory requirements; and that the agencies have expanded jurisdiction over certain "adjacent wetlands" compared to the proposal to better incorporate common principles from the *Rapanos* plurality and concurring opinions, that the final rule strikes

a better balance between the objective and policy in CWA sections 101(a) and 101(b), respectively; and that the final rule is consistent with the text, structure, legislative history, and applicable Supreme Court guidance. A memorandum summarizing the agencies' interactions with the SAB and the SAB's draft commentary are available in the docket for this final rule.

E. Overview of Legal Construct for the Final Rule

As the preceding summary of the statutory and regulatory history makes clear, the central term delineating the federal geographic scope of authority under the CWA— "waters of the United States"—has been the subject of debate and litigation for many years. The agencies are promulgating a regulation to define "waters of the United States" adhering to Constitutional and statutory limitations, the policies and objective of the CWA, and case law. The revised definition will allow the regulatory agencies and the regulated community to protect navigable waters from pollution while providing an implementable approach to determining regulatory jurisdiction under the CWA. This subsection summarizes the legal principles that inform the agencies' final rule, and the following section (Section III) describes how the agencies are applying those legal principles to support the final revised definition of "waters of the United States."

1. Statutory Framework

To determine the scope of executive branch authority under the CWA, the agencies begin with the text of the statute. The objective of the CWA, as established by Congress, is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. 1251(a). As discussed in Section II.B, in order to meet that objective, Congress declared two national water quality goals and established several key policies that direct the work of the agencies. Congress also 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 national water quality regulation.

The agencies have developed regulatory and non-regulatory programs designed to ensure that the full statute is implemented as Congress intended. *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."). This includes pursuing the overall "objective" of the CWA to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters," 33 U.S.C. 1251(a), while implementing the specific "policy" directives from Congress 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.* at 1251(b); *see also* Webster's II, New Riverside University Dictionary (1994) (defining "policy" as a "plan or course of action, as of a government[,] designed to influence and determine decisions and actions;" an "objective" is "something worked toward or aspired to: Goal").[24] The agencies therefore recognize a distinction between the specific word choices of Congress, including the need to develop regulatory and

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[24] The legislative history of the CWA further illuminates the distinction between the terms "policy" and "objective," or "goal." As Congress drafted the 1972 CWA amendments, the Senate bill set the "no-discharge of pollutants into the navigable water by 1985" provision as a policy whereas the House bill set it as a goal. The Act was ultimately passed with the "no-discharge by 1985" provision established as a goal. *See* 33 U.S.C 1251(a)(1). During the House's consideration of the Conference Report, Representative Robert E. Jones, Jr. captured the policy versus goal distinction in section 101(a)(1) as follows: "The objective of this legislation is to restore and preserve for the future the integrity of our Nation's waters. The bill sets forth as a national goal the complete elimination of all discharges into our navigable waters by 1985, but . . . the conference report states clearly that achieving the 1985 target date is a goal, not a national policy. As such, it serves as a focal point for long-range planning, and for research and development in water pollution control technology . . . . While it is our hope that we can succeed in eliminating all discharge into our waters by 1985, without unreasonable impact on the national life, we recognized in this report that too many imponderables exist, some still beyond our horizons, to prescribe this goal today as a legal requirement." 118 Cong. Rec. H. 33749 (daily ed. October 4, 1972).

non-regulatory programs that aim to accomplish the goals of the Act while implementing the specific policy directives of Congress.[25] To do so, the agencies must determine what Congress had in mind when it defined "navigable waters" in 1972 as "the waters of the United States."

Congress' authority to regulate navigable waters under the CWA 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). In *United States v. Lopez*, the Supreme Court explained that the Commerce Clause gives Congress the authority to regulate in three areas: the "channels of interstate commerce," the "instrumentalities of interstate commerce," and those additional activities having "a substantial relation to interstate commerce." 514 U.S. 549, 558-59 (1995). Some commenters stated that Congress' authority over "waters of the United States" is not tethered to navigable channels of interstate commerce, but is also derived from its authority over the "instrumentalities of interstate commerce" and activities that "substantially affect" interstate commerce. *See id.* The agencies disagree with these comments. The Supreme Court made clear in *SWANCC* that the term "navigable" indicates "what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made." 531 U.S. 159, 172 (2001). 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. The Supreme Court, however, has recognized that Congress intended "to exercise its powers under the

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[25] *See, e.g.*, *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 544 (2012) ("Where Congress uses certain language in one part of a statute and different language in another, it is generally presumed that Congress acts intentionally."); *Russello v. United States*, 464 U.S. 16, 23 (1983) ("[Where] Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.")

Commerce clause to regulate at least some waters that would not be deemed 'navigable' under the classical understanding of that term." *Riverside Bayview*, 474 U.S. at 133; *see also SWANCC*, 531 U.S. at 167.

The classical understanding of the term "navigable" was first articulated by the Supreme Court in *The Daniel Ball*:

> Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways of commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. And they constitute navigable waters of the United States within the meaning of the acts of Congress, in contradistinction from the navigable waters of the States, when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water.

77 U.S. (10 Wall.) 557, 563 (1871). Subsequently, this traditional test was expanded to include waters that had been used in the past for interstate commerce, *see Economy Light & Power Co. v. United States*, 256 U.S. 113, 123 (1921), and waters that are susceptible for use with reasonable improvement, *see United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 407-10 (1940).

By the time the 1972 CWA amendments were enacted, the Supreme Court had held that Congress' authority over the channels of interstate commerce was not limited to regulation of the channels themselves but could extend to activities necessary to protect the channels. *See Oklahoma ex rel. Phillips v. Guy F. Atkinson Co.*, 313 U.S. 508, 523 (1941) ("Congress may exercise its control over the non-navigable stretches of a river in order to preserve or promote commerce on the navigable portions."). The Supreme Court had also clarified that Congress could regulate waterways that formed a part of a channel of interstate commerce, even if they are not themselves navigable or do not cross state boundaries. *See Utah v. United States*, 403 U.S. 9, 11 (1971).

These developments were discussed during the legislative process leading up to the passage of the 1972 CWA amendments, and certain members referred to the scope of the amendments as encompassing waterways that serve as a "link in the chain" of interstate commerce as it flows through various channels of transportation, such as railroads and highways. *See, e.g.*, 118 Cong. Rec. 33756-57 (1972) (statement of Rep. Dingell); 118 Cong. Rec. 33699 (Oct. 4, 1972) (statement of Sen. Muskie).[26] Other references suggest that congressional committees at least contemplated applying the "control requirements" of the Act "to the navigable waters, portions thereof, and their tributaries." S. Rep. No. 92-414, at 77 (1971). Some commenters on this rulemaking stated that Congress' authority under the CWA is limited to waters that actually transport commerce, not their tributaries or adjacent wetlands, and that this limitation on CWA jurisdiction would fully preserve the authority of States to address pollution. The agencies disagree with these commenters based on the Supreme Court's holdings and the legislative history of the 1972 amendments discussed above, as well as the text of the 1977 amendments to the CWA. Specifically, in 1977, when Congress authorized State assumption over the section 404 dredged or fill material permitting program, Congress limited the scope of waters that could be assumed by a State or Tribe by requiring the Corps to retain permitting authority over RHA waters (as identified by the test outlined in *The Daniel Ball*) plus wetlands adjacent to those waters, minus historic-use-only waters. *See* 33 U.S.C. 1344(g)(1).[27] This suggests that Congress

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[26] The agencies recognize that individual member statements are not a substitute for full congressional intent, but they do help provide context for issues that were discussed during the legislative debates. For a detailed discussion of the legislative history of the 1972 CWA amendments, *see* Albrecht & Nickelsburg, *Could SWANCC Be Right? A New Look at the Legislative History of the Clean Water Act*, 32 ELR 11042 (Sept. 2002).

[27] For a detailed discussion of the legislative history supporting the enactment of CWA section 404(g), *see Final Report of the Assumable Waters Subcommittee* (May 2017), App. F., *available*

had in mind a broader scope of waters subject to CWA jurisdiction than waters traditionally understood as navigable. *See SWANCC*, 531 U.S. at 171; *Riverside Bayview*, 474 U.S. at 138 n.11. Thus, Congress intended to assert federal authority over more than just waters traditionally understood as navigable, and Congress rooted that authority in "its commerce power over navigation." *SWANCC*, 531 U.S. at 168 n.3. However, there must be a limit to that authority and to what water is subject to federal jurisdiction. How the agencies should exercise that authority has been the subject of dispute for decades, but the Supreme Court on three occasions has analyzed the issue and provided some instructional guidance for the agencies to consider in developing this final rule.

2. U.S. Supreme Court Precedent

a. Adjacent Wetlands

In *Riverside Bayview*, the Supreme Court considered the Corps' assertion of jurisdiction over "low-lying, marshy land" immediately abutting a water traditionally understood as navigable on the grounds that it was an "adjacent wetland" within the meaning of the Corps' then-existing regulations. 474 U.S. at 124. The Court addressed the question of whether non-navigable wetlands may be regulated as waters of the United States on the basis that they are "adjacent to" navigable-in-fact waters and "inseparably bound up with" them because of their "significant effects on water quality and the aquatic ecosystem." *See id*. at 131-35 & n.9.

In determining whether to give deference to the Corps' assertion of jurisdiction over adjacent wetlands, the Court acknowledged the difficulty in determining where federal jurisdiction ends,

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at https://www.epa.gov/sites/production/files/2017-06/documents/awsubcommitteefinalreprort_05-2017_tag508_05312017_508.pdf < Caution-https://www.epa.gov/sites/production/files/2017-06/documents/awsubcommitteefinalreprort_05-2017_tag508_05312017_508.pdf.

noting that the line is somewhere between open water and dry land:

> *In determining the limits of its power* to regulate discharges under the Act, the Corps must necessarily choose some point at which water ends and land begins. Our common experience tells us that this is often no easy task: the transition from water to solid ground is not necessarily or even typically an abrupt one. Rather, between open waters and dry land may lie shallows, marshes, mudflats, swamps, bogs—in short, a huge array of areas that are not wholly aquatic but nevertheless fall far short of being dry land. Where on this continuum to find the limit of "waters" is far from obvious.

Id. at 132 (emphasis added). Within this statement, the Supreme Court identifies a basic principle for adjacent wetlands: The limits of jurisdiction lie within the "continuum" or "transition" "between open waters and dry land." Observing that Congress intended the CWA "to regulate at least some waters that would not be deemed 'navigable,'" the Court held that it is "a permissible interpretation of the Act" to conclude that "a wetland that actually abuts on a navigable waterway" falls within the "definition of 'waters of the United States.'" *Id.* at 133, 135. Thus, a wetland that abuts a water traditionally understood as navigable is subject to CWA jurisdiction because it is "inseparably bound up with the 'waters' of the United States." *Id.* at 134. "This holds true even for wetlands that are not the result of flooding or permeation by water having its source in adjacent bodies of open water." *Id.*

The Supreme Court also noted that the agencies can establish categories of jurisdiction for adjacent wetlands. *See id.* at 135 n.9. It made clear that these categories could be reasonable if the Corps concludes that "in the majority of cases, adjacent wetlands have significant effects on water quality and the aquatic ecosystem." *Id.* A definition of "waters of the United States" "can stand" even if it potentially sweeps in individual wetlands that are not sufficiently "intertwined with the ecosystem of adjacent waterways" to warrant protection. *Id.* In such cases, if the regulating entity determines that a particular wetland lacks importance to the aquatic environment, or its importance is outweighed by other factors, that wetland could be developed

through the permit issuance process. *Id.*

Some commenters noted that the definition of "adjacent wetlands" that the Supreme Court unanimously upheld in *Riverside Bayview* included categories of wetlands that would not be *per se* "adjacent" under the proposed rule, including all "[w]etlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like." 51 FR 41251 (Nov. 13, 1986). These commenters stated that the Court deferred to the Corps' judgment that wetlands may affect the water quality of jurisdictional waterbodies even if the waterbodies do not inundate the wetlands. *See Riverside Bayview,* 474 U.S. at 133-35. The proposed rule included wetlands as jurisdictional absent inundation by another water. *See e.g.,* 84 FR 4187 ("The proposed definition of 'adjacent wetlands' would not require surface water exchange between wetlands and the jurisdictional waters they abut to create the jurisdictional link[.]"). As explained in Section III.G., the agencies have considered public comments in light of the statutory text and other relevant considerations and are finalizing a definition of "adjacent wetlands" that is more encompassing than the proposal. In any event, the agencies note that a Court's deference to an agency's particular interpretation of a statute does not foreclose alternative interpretations. The Supreme Court has held that "a court's choice of one reasonable reading of an ambiguous statute does not preclude an implementing agency from later adopting a different reasonable interpretation." *United States v. Eurodif S.A.,* 555 U.S. 305, 315 (2009). This principle follows from *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837 (1984), which "established a 'presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows.'" *Nat'l Cable &*

Telecommunications Ass'n v. Brand X Internet Servs., 545 U.S. 967, 982 (2005) (quoting *Smiley v. Citibank*, 517 U.S. 735, 740–41 (1996)). Moreover, an "initial agency interpretation is not instantly carved in stone." *Chevron*, 467 U.S. at 863; *see also Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016) ("[A]gencies are free to change their existing policies as long as they provide a reasoned explanation for the change.") (citations omitted). Consistent with the APA and applicable case law, in this final rule the agencies have provided ample justification for a change in interpretation of the CWA concerning the scope of jurisdiction over waters and wetlands, including any changes from their prior interpretations.

The Supreme Court in *Riverside Bayview* declined to decide whether wetlands that are not adjacent to navigable waters could also be regulated by the agencies. *See* 474 U.S. at 124 n.2 and 131 n.8. In *SWANCC* a few years later, however, the Supreme Court analyzed a similar question in the context of an abandoned sand and gravel pit located some distance from a traditional navigable water, with excavation trenches that ponded—some only seasonally—and served as habitat for migratory birds. 531 U.S. at 162-63. The Supreme Court rejected the government's stated rationale for asserting jurisdiction over such "nonnavigable, isolated, intrastate waters" as outside the scope of CWA jurisdiction. *Id.* at 171-72. In doing so, the Supreme Court noted that *Riverside Bayview* upheld "jurisdiction over wetlands that actually abutted on a navigable waterway" because the wetlands were "inseparably bound up with the 'waters' of the United States." *Id*. at 167.[28] As summarized by the *SWANCC* majority:

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[28] At oral argument during *Riverside Bayview*, the attorney representing the United States characterized the wetland at issue as "in fact an adjacent wetland, adjacent—by adjacent, I mean it is immediately next to, abuts, adjoins, borders, whatever other adjective you might want to use, navigable waters of the United States." Transcript of Oral Argument at 16, *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985) (No. 84-701).

> It was the significant nexus between the wetlands and "navigable waters" that informed our reading of the CWA in *Riverside Bayview Homes*. Indeed, we did not "express any opinion" on the "question of authority of the Corps to regulate discharges of fill material into wetlands that are not adjacent to bodies of open water. . . ." In order to rule for [the Corps] here, we would have to hold that the jurisdiction of the Corps extends to ponds that are not adjacent to open water. But we conclude that the text of the statute will not allow this.

Id. at 167-68 (internal citations and emphasis omitted).

The Court also rejected the argument that the use of the abandoned ponds by migratory birds fell within the power of Congress to regulate activities that in the aggregate have a substantial effect on interstate commerce, or that the CWA regulated the use of the ponds as a municipal landfill because such use was commercial in nature. *Id.* at 173. Such arguments, the Court noted, raised "significant constitutional questions." *Id.* "Where an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result." *Id.* at 172-73 ("Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority."). 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; *see also Will v. Michigan Dep't of State Police*, 491 U.S. 58, 65 (1989) ("[I]f Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute.'" (quoting *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985))); *Gregory v. Ashcroft*, 501 U.S. 452, 460-61 (1991) ("[The] plain statement rule . . . acknowledg[es] that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere."). "Rather than expressing a desire to readjust the federal-state balance in this manner, Congress chose [in the CWA] to 'recognize, preserve, and protect the primary responsibilities and rights of

States . . . to plan the development and use . . . of land and water resources . . . ." *SWANCC*, 531 U.S. at 174 (quoting 33 U.S.C. 1251(b)). The Court 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.*[29]

Historically, the Federal government has interpreted and applied the *SWANCC* decision more narrowly, focusing on the specific holding in the case as rejecting federal jurisdiction over the isolated ponds and mudflats at issue in that case based on their use by migratory birds. By contrast, members of the regulated community, certain States and other interested stakeholders have argued that *SWANCC* stands for a broader proposition based on key federalism and separation of powers principles.[30] In the preamble to the proposed rule, the agencies solicited

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[29] The agencies note that during oral argument in *SWANCC*, Justice Kennedy stated, "[T]his case, it seems to me, does point up the problem that petitioner's counsel raised quoting from page 1 of the blue brief, 'it is the primary responsibility of the states to eliminate pollution and to plan development and use of land' . . . . It seems to me that this illustrates that the way in which the Corps has promulgated its regulation departs from the design of the statute." Transcript of Oral Argument at 40, *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) (No. 99-1178) (emphasis added). And several years later, during oral argument in *Rapanos*, after the U.S. Solicitor General stated, "[W]hat Congress recognized in 1972 is that they had to regulate beyond traditional navigable waters," Justice Kennedy stated, "But the Congress in 1972 also . . . said it's a statement of policy to reserve to the States the power and the responsibility to plan land use and water resources. And under your definition, I just see that we're giving no scope at all to that clear statement of the congressional policy." Transcript of Oral Argument at 58, *Rapanos v. United States* and *Carabell v. United States*, 547 U.S. 715 (2006) (Nos. 04-1034, 04-1384). Although the agencies do not give independent weight to these statements at oral argument, the statements are consistent with the agencies' interpretation of the CWA and applicable Supreme Court decisions.

[30] The agencies also recognize that Justice Stevens, writing for himself and three other Justices in dissent in *SWANCC*, interpreted the *SWANCC* majority opinion to apply beyond the Migratory Bird Rule and the specific ponds at issue in *SWANCC*. His dissent stated that the decision "invalidates the 1986 migratory bird regulation *as well as the Corps' assertion of jurisdiction*

comment as to the proper scope and interpretation of *SWANCC*. 84 FR 4165. Some commenters argued that the *SWANCC* decision should be interpreted narrowly to apply only to the facts presented in that case; other commenters argued that the agencies should apply the reasoning of the *SWANCC* decision broadly, in a manner similar to how the agencies had previously interpreted the reasoning of Justice Kennedy's concurring opinion in *Rapanos* to extend beyond wetlands to tributaries and other waters, for example. The agencies agree with commenters that the interpretation and implementation of these Supreme Court decisions within agency regulatory programs should be consistent, and that the reasoning in the *SWANCC* decision stands for key principles related to federalism and the balancing of the traditional power of States to regulate land and water resources within their borders with the need for national water quality regulation.

The agencies recently repealed the 2015 Rule and explained in the preamble of that action that the 2015 Rule had improperly allowed for the application of the significant nexus standard in a manner that would result in the assertion of jurisdiction over waters that the Court deemed non-jurisdictional in *SWANCC*. 84 FR 56626-27. By allowing federal jurisdiction to reach certain isolated ponds, such as those at issue in *SWANCC*, and certain physically remote wetlands that "do not implicate the boundary-drawing problem of *Riverside Bayview*," the agencies concluded that the 2015 Rule asserted federal control over some features that "lack the necessary connection to covered waters . . . described as a 'significant nexus' in *SWANCC*[.]" *Rapanos*, 547 U.S. at 742 (Scalia, J., plurality); *see also Hawkes*, 136 S. Ct. at 1817 (Kennedy, J., concurring in the judgment) ("[T]he *reach* and systemic consequences of the Clean Water Act

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over all waters except for actually navigable waters, their tributaries, and wetlands adjacent to each." 531 U.S. at 176-77 (Stevens, J., dissenting) (emphasis added).

remain a cause for concern." (emphasis added)). This final rule, in contrast to the 2015 Rule, avoids pressing against the outer limits of the agencies' authority under the Commerce Clause and Supreme Court case law and recognizes the limiting principles articulated by the *SWANCC* decision. This final rule would not allow for the exercise of jurisdiction over waters similar to those at issue in *SWANCC*.

Several years after *SWANCC*, the Supreme Court considered the concept of adjacency in consolidated cases arising out of the Sixth Circuit. *See Rapanos v. United States*, 547 U.S. 715 (2006). In one case, the Corps had determined that wetlands on three separate sites were subject to CWA jurisdiction because they were adjacent to ditches or man-made drains that eventually connected to traditional navigable waters several miles away through other ditches, drains, creeks, and rivers. *Id.* at 719-20, 729. In another case, the Corps had asserted jurisdiction over a wetland separated from a man-made drainage ditch by a four-foot-wide man-made berm. *Id.* at 730. The ditch emptied into another ditch, which then connected to a creek, and eventually connected to Lake St. Clair,[31] a traditional navigable water, approximately a mile from the parcel at issue. The berm was largely or entirely impermeable but may have permitted occasional overflow from the wetland to the ditch. *Id.* The Court, in a fractured opinion, vacated and remanded the Sixth Circuit's decision upholding the Corps' asserted jurisdiction over the four wetlands at issue, with Justice Scalia writing for the plurality and Justice Kennedy concurring in the judgment but on alternative grounds. *Id.* at 757 (Scalia, J., plurality); *id.* at 787 (Kennedy, J.,

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[31] Lake St. Clair is a Rivers and Harbors Act section 10 water. *See* p. 7: https://www.lre.usace.army.mil/Portals/69/docs/regulatory/PDFs/GENSEC10.pdf. It is also described in Justice Kennedy's opinion in *Rapanos* as "a 430-square mile lake located between Michigan and Canada that is popular with boating and fishing and produces some 48 percent of the sport fish caught in the Great Lakes[.]" *Rapanos*, 547 U.S. at 764 (Kennedy, J., concurring in the judgment).

concurring in the judgment).

The plurality determined that CWA jurisdiction extended to only adjacent "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 'waters' and wetlands." *Rapanos*, 547 U.S. at 742 (Scalia, J., plurality). The plurality then concluded that "establishing . . . wetlands . . . covered by the Act requires two findings: first, that the adjacent channel contains a 'wate[r] of the United States,' (*i.e.*, a relatively permanent body of water connected to traditional interstate navigable waters); and second, that the wetland has a continuous surface connection with that water, making it difficult to determine where the 'water' ends and the 'wetland' begins." *Id.* (alteration in original).

In reaching the adjacency component of the two-part analysis, the plurality interpreted *Riverside Bayview* and the Court's subsequent *SWANCC* decision characterizing *Riverside Bayview* as authorizing jurisdiction over wetlands that physically abutted traditional navigable waters. *Id.* at 740-42. The plurality focused on the "inherent ambiguity" described in *Riverside Bayview* in determining where on the continuum between open waters and dry land the scope of federal jurisdiction should end. *Id.* at 740. It was "the inherent difficulties of defining precise bounds to regulable waters," *id.* at 741 n.10, according to the plurality, that prompted the Court in *Riverside Bayview* to defer to the Corps' inclusion of adjacent wetlands as "waters" subject to CWA jurisdiction based on proximity. *Id.* at 741 ("When we characterized the holding of *Riverside Bayview* in *SWANCC*, we referred to the close connection between waters and the wetlands they gradually blend into: 'It was the significant nexus between the wetlands and 'navigable waters' that informed our reading of the CWA in *Riverside Bayview Homes*.'"); *see also Riverside Bayview*, 474 U.S. at 134 ("For this reason, the landward limit of Federal

jurisdiction under Section 404 must include any adjacent wetlands that form the border of or are in reasonable proximity to other waters of the United States, as these wetlands are part of this aquatic system." (quoting 42 FR 37128 (July 19, 1977))). The plurality also noted that "*SWANCC* rejected the notion that the ecological considerations upon which the Corps relied in *Riverside Bayview* . . . provided an *independent* basis for including entities like 'wetlands' (or 'ephemeral streams') within the phrase 'the waters of the United States.' *SWANCC* found such ecological considerations irrelevant to the question whether physically isolated waters come within the Corps' jurisdiction." *Rapanos*, 547 U.S. at 741-42 (emphasis in original).

Justice Kennedy disagreed with the plurality's conclusion that adjacency requires a "continuous surface connection" to covered waters. *Id.* at 772 (Kennedy, J., concurring in the judgment). In reading the phrase "continuous surface connection" to mean a continuous "surface-*water* connection," *id.* at 776 (emphasis added), and interpreting the plurality's standard to include a "surface-*water*-connection requirement," *id.* at 774 (emphasis added), Justice Kennedy stated that "when a surface-water connection is lacking, the plurality forecloses jurisdiction over wetlands that abut navigable-in-fact waters—even though such navigable waters were traditionally subject to federal authority." *Id.* at 776. He noted that the *Riverside Bayview* Court "deemed it irrelevant whether 'the moisture creating the wetlands . . . find[s] its source in the adjacent bodies of water." *Id.* at 772 (internal citations omitted); *see also Riverside Bayview*, 474 U.S. at 134 ("[A]djacent wetlands may be defined as waters under the Act. This holds true even for wetlands that are not the result of flooding or permeation by water having its source in adjacent bodies of open water.").

The plurality did not directly address the precise distinction raised by Justice Kennedy regarding his interpretation of the plurality's "continuous surface connection" requirement to

mean a continuous "surface-water connection." The plurality did note in response, however, that the "*Riverside Bayview* opinion required" a "continuous *physical* connection," *Rapanos*, 547 U.S. at 751 n.13 (Scalia, J., plurality) (emphasis added), and focused on evaluating adjacency between a "water" and a wetland "in the sense of possessing a continuous surface connection that creates the boundary-drawing problem we addressed in *Riverside Bayview*." *Id.* at 757. The plurality also noted that its standard includes a "*physical*-connection requirement," not hydrological, between wetlands and covered waters. *Id.* at 751 n.13 (emphasis added). In other words, the plurality appeared to be more focused on the abutting nature rather than the source of water creating the wetlands at issue in *Riverside Bayview* to describe the legal constructs applicable to adjacent wetlands. *See id.* at 747; *see also* Webster's II, New Riverside University Dictionary (1994) (defining "abut" to mean "to border on" or "to touch at one end or side of something"). The plurality agreed with Justice Kennedy and the *Riverside Bayview* Court that "[a]s long as the wetland is 'adjacent' to covered waters . . . its creation *vel non* by inundation is irrelevant." *Rapanos*, 547 U.S. at 751 n.13 (Scalia, J., plurality).[32]

Because wetlands with a physically remote hydrologic connection do not raise the same boundary-drawing concerns presented by actually abutting wetlands, the plurality determined that the "inherent ambiguity in defining where water ends and abutting ('adjacent') wetlands begin" upon which *Riverside Bayview* rests does not apply to such features. *Id.* at 742 ("Wetlands with only an intermittent, physically remote hydrologic connection to 'waters of the

[32] In the *Rapanos* Guidance, the agencies interpreted the plurality's "continuous surface connection" as not requiring a continuous surface water connection. *See, e.g.*, *Rapanos* Guidance at 7 n.28 ("A continuous surface connection does not require surface water to be continuously present between the wetland and the tributary."). The agencies continue to endorse that interpretation. In *Rapanos*, both Justice Scalia and Justice Kennedy recognized that a wetland can be adjacent to a jurisdictional water absent inundation from that water.

United States' do not implicate the boundary-drawing problem of *Riverside Bayview*, and thus lack the necessary connection to covered waters that we described as a 'significant nexus' in *SWANCC*[.]"). The plurality supported this position by referring to the Court's treatment of certain isolated waters in *SWANCC* as non-jurisdictional. *Rapanos*, 547 U.S. at 741-42; *see also id*. at 726 ("We held that 'nonnavigable, isolated, intrastate waters—which, unlike the wetlands at issue in *Riverside Bayview*, did not 'actually abu[t] on a navigable waterway,'—were not included as 'waters of the United States.'") (internal citations omitted). It interpreted the reasoning of *SWANCC* to exclude isolated waters. The plurality also found "no support for the inclusion of physically unconnected wetlands as covered 'waters'" based on *Riverside Bayview*'s treatment of the Corps' definition of adjacent. *Id.* at 747; *see also id.* at 746 ("[T]he Corps' definition of 'adjacent' . . . has been extended beyond reason . . . .").

Although ultimately concurring in the judgment, Justice Kennedy focused on the "significant nexus" between adjacent wetlands and traditional navigable waters as the basis for determining whether a wetland is a water subject to CWA jurisdiction. He quotes the *SWANCC* decision, which explains that "[i]t was the significant nexus between the wetlands and 'navigable waters' that informed our reading of the [Act] in *Riverside Bayview Homes*." *SWANCC*, 531 U.S. at 167. But Justice Kennedy also interpreted the reasoning of *SWANCC* to exclude certain isolated waters. His opinion notes that: "Because such a nexus [in that case] was lacking with respect to isolated ponds, the Court held that the plain text of the statute did not permit the Corps' action." *Rapanos*, 547 U.S. at 767 (Kennedy, J., concurring in the judgment) (internal citation omitted). It further states that the wetlands at issue in *Riverside Bayview* were "adjacent to [a] navigable-in-fact waterway[ ]" while the "ponds and mudflats" considered in *SWANCC* "were isolated in the sense of being unconnected to other waters covered by the Act." *Id.* at 765-66. "Taken together,

these cases establish that in some instances, as exemplified by *Riverside Bayview*, the connection between a nonnavigable water or wetland and a navigable water may be so close, or potentially so close, that the Corps may deem the water or wetland a 'navigable water' under the Act. In other instances, as exemplified by *SWANCC*, there may be little or no connection. Absent a significant nexus, jurisdiction under the Act is lacking." *Id.* at 767.

According to Justice Kennedy, whereas the isolated ponds and mudflats in *SWANCC* lacked a "significant nexus" to navigable waters, it is the "conclusive standard for jurisdiction" based on "a reasonable inference of ecological interconnection" between adjacent wetlands and navigable-in-fact waters that allows for their categorical inclusion as "waters of the United States." *Rapanos*, 547 U.S. at 780 ("[T]he assertion of jurisdiction for those wetlands [adjacent to navigable-in-fact waters] is sustainable under the Act by showing adjacency alone."). Justice Kennedy surmised that it may be that the same rationale "without any inquiry beyond adjacency . . . could apply equally to wetlands adjacent to certain major tributaries." *Id.* He noted that the Corps could establish by regulation categories of tributaries based on volume of flow, proximity to navigable waters, or other relevant factors that "are significant enough that wetlands adjacent to them are likely, in the majority of cases, to perform important functions for an aquatic system incorporating navigable waters." *Id.* at 780-81. However, "[t]he Corps' existing standard for tributaries" provided Justice Kennedy "no such assurance" to infer the categorical existence of a requisite nexus between waters traditionally understood as navigable and wetlands adjacent to nonnavigable tributaries. *Id*. at 781. That is because:

> [T]he breadth of the [tributary] standard—which seems to leave wide room for regulation of drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water volumes towards it—precludes its adoption as the determinative measure of whether adjacent wetlands are likely to play an important role in the integrity of an aquatic system comprising navigable waters as traditionally understood. Indeed, in many cases, wetlands adjacent to tributaries covered by this standard might appear little more

> related to navigable-in-fact waters than were the isolated ponds held to fall beyond the Act's scope in *SWANCC*.

Rapanos, 547 U.S. at 781-82.

To avoid this outcome, Justice Kennedy stated that, absent development of a more specific regulation and categorical inclusion of wetlands adjacent to "certain major" or even "minor" tributaries as was established in *Riverside Bayview*, *id.* at 780-81, the Corps "must establish a significant nexus on a case-by-case basis when it seeks to regulate wetlands based on adjacency to nonnavigable tributaries. Given the potential overbreadth of the Corps' regulations, this showing is necessary to avoid unreasonable applications of the statute." *Id.* at 782. Justice Kennedy stated that adjacent "wetlands possess the requisite nexus, and thus come within the statutory phrase 'navigable waters,' if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" *Id.* at 780. "Where an adequate nexus is established for a particular wetland, it may be permissible, as a matter of administrative convenience or necessity, to presume covered status for other comparable wetlands in the region." *Id.* at 782. In establishing this significant nexus test, Justice Kennedy relied, in part, on the overall objective of the CWA to "restore and maintain the chemical, physical and biological integrity of the Nation's waters." *Id.* at 779 (quoting 33 U.S.C. 1251(a)). However, Justice Kennedy also acknowledged that "environmental concerns provide no reason to disregard limits in the statutory text." *Id.* at 778. With respect to wetlands adjacent to nonnavigable tributaries, Justice Kennedy therefore determined that "mere adjacency . . . is insufficient[.] A more specific inquiry, based on the significant-nexus standard, is . . . necessary." *Id.* at 786. Justice Kennedy noted that under the Corps' interpretation at issue in the case, which did not require adjacent wetlands to possess a significant nexus with navigable waters, federal regulation would be

permitted "whenever wetlands lie alongside a ditch or drain, however remote or insubstantial, that eventually may flow into traditional navigable waters. The deference owed to the Corps' interpretation of the statute does not extend so far." *Id.* at 778-79.

Since the *Rapanos* decision, the Federal government has adopted a broad interpretation of Justice Kennedy's concurring opinion, arguing that his "significant nexus" test provides an independent basis for establishing jurisdiction over certain waters of the United States. And rather than limiting the application of Justice Kennedy's opinion to the specific facts and wetlands at issue in that case, similar to their treatment of the *SWANCC* decision, the agencies previously have applied Justice Kennedy's reasoning more broadly to include, for example, the application of the significant nexus test to determining jurisdiction over tributaries, not just wetlands. Many courts have deferred to this position, and some courts rely exclusively on Justice Kennedy's significant nexus test while other courts have held that jurisdiction can be established under either the plurality or concurring opinions. The agencies' final rule, as explained in Section III, is informed in several key aspects by Justice Kennedy's opinion, but the agencies now appropriately recognize some of the limiting principles articulated within his concurring opinion. The agencies also recognize that the reasoning in *SWANCC* contains more instruction than the agencies have historically acknowledged.

In summary, although the standards that the *Rapanos* plurality and Justice Kennedy established are not identical, and each standard excludes some waters and wetlands that the other standard does not, the standards contain substantial similarities. The plurality and Justice Kennedy agreed in principle that the determination must be made using a basic two-step approach that considers (1) the connection of the wetland to the tributary; and (2) the status of the tributary with respect to downstream traditional navigable waters. The plurality and Justice

Kennedy also agreed that the connection between the wetland and the tributary must be close. The plurality referred to that connection as a "continuous surface connection" or "continuous physical connection," as demonstrated in *Riverside Bayview*. *Id.* at 742, 751 n.13. Justice Kennedy recognized that "the connection between a nonnavigable water or wetland and a navigable water may be so close, or potentially so close, that the Corps may deem the water or wetland a 'navigable water' under the Act." *Id.* at 767. The second part of their common analytical framework is addressed in the next section.

b. Tributaries

As some commenters noted, the definition of "tributary" was not addressed in either *Riverside Bayview* or *SWANCC*, nor were tributaries the waters at issue in *Rapanos*. Yet while the focus of *Rapanos* was on whether the Corps could regulate wetlands adjacent to nonnavigable tributaries far removed from navigable-in-fact waters, the plurality and concurring opinions provide some guidance as to the scope of CWA coverage of tributaries to waters more traditionally understood as navigable.

The plurality and Justice Kennedy both recognized the jurisdictional scope of the CWA is not restricted to traditional navigable waters. *Rapanos*, 547 U.S. at 731 (Scalia, J., plurality) ("[T]he Act's term 'navigable waters' includes something more than traditional navigable waters."); *id.* at 767 (Kennedy, J., concurring in the judgment) ("Congress intended to regulate at least some waters that are not navigable in the traditional sense."). Both also agreed that federal authority under the Act has limits. *See id.* at 731-32 (Scalia, J., plurality) ("'[T]he waters of the United States' . . . cannot bear the expansive meaning that the Corps would give it."); *id*. at 778-79 (Kennedy, J., concurring in the judgment) ("The deference owed to the Corps' interpretation of the statute does not extend" to "wetlands" which "lie alongside a ditch or drain, however remote

or insubstantial, that eventually may flow into traditional navigable waters.”).

With respect to tributaries specifically, both the plurality and Justice Kennedy focused in part on a tributary’s contribution of flow to and connection with traditional navigable waters. The plurality would include as “waters of the United States” “only relatively permanent, standing or flowing bodies of water” and would define such “waters” as including streams, rivers, oceans, lakes and other bodies of waters that form geographical features, noting that all such “terms connote continuously present, fixed bodies of water.” *Rapanos*, 547 U.S. at 732-33, 739 (Scalia, J., plurality). The plurality would have also required relatively permanent waters to be connected to traditional navigable waters in order to be jurisdictional. *See id.* at 742 (describing a “‘wate[r] of the United States”’ as “*i.e.*, a relatively permanent body of water *connected to* traditional interstate navigable waters”) (emphasis added). The plurality would also have excluded ephemeral flows and related features, stating “[n]one of these terms encompasses transitory puddles or ephemeral flows of water.” *Id.* at 733; *see also id.* at 734 (“In applying the definition to ‘ephemeral streams,’ . . . the Corps has stretched the term ‘waters of the United States’ beyond parody. The plain language of the statute simply does not authorize this ‘Land Is Waters’ approach to federal jurisdiction.”). Justice Kennedy likely would exclude some streams considered jurisdictional under the plurality’s opinion, but he may include some that would be excluded by the plurality. *See id*. at 769 (Kennedy, J., concurring in the judgment) (noting that under the plurality’s test, “[t]he merest trickle, if continuous, would count as a ‘water’ subject to federal regulation, while torrents thundering at irregular intervals through otherwise dry channels would not”).

Both the plurality and Justice Kennedy would have included some seasonal or intermittent streams as waters of the United States. *Rapanos*, 547 U.S. at 732 n.5, 733 (Scalia, J., plurality);

id. at 769 (Kennedy, J., concurring in the judgment). The plurality noted, for example, that its reference to "relatively permanent" waters did "not necessarily exclude streams, rivers, or lakes that might dry up in extraordinary circumstances, such as drought," or "*seasonal* rivers, which contain continuous flow during some months of the year but no flow during dry months." *Id.* at 732 n.5 (emphasis in original). Neither the plurality nor Justice Kennedy, however, defined with precision where to draw the line. *See, e.g., id.* (Scalia, J., plurality) ("[W]e have no occasion in this litigation to decide exactly when the drying-up of a stream bed is continuous and frequent enough to disqualify the channel as a 'wate[r] of the United States.' It suffices for present purposes that channels containing permanent flow are plainly within the definition, and that . . . streams whose flow is '[c]oming and going at intervals . . . [b]roken, fitful,' . . . or 'existing only, or no longer than, a day; diurnal . . . short-lived,' . . . are not.") (internal citations omitted). The plurality provided, however, that "navigable waters" must have "at a bare minimum, the ordinary presence of water," *id.* at 734, and Justice Kennedy noted that the Corps can identify by regulation categories of tributaries based on "their volume of flow (either annually or on average), their proximity to navigable waters, or other relevant considerations" that "are significant enough that wetlands adjacent to them are likely, in the majority of cases, to perform important functions for an aquatic system incorporating navigable waters," *id.* at 780-81 (Kennedy, J., concurring in the judgment).

Both the plurality and Justice Kennedy also agreed that the Corps' existing treatment of tributaries raised significant jurisdictional concerns. For example, the plurality was concerned about the Corps' broad interpretation of tributaries. *See Rapanos*, 547 U.S. at 738 (Scalia, J., plurality) ("Even if the term 'the waters of the United States' were ambiguous as applied to channels that sometimes host ephemeral flows of water (which it is not), we would expect a

clearer statement from Congress to authorize an agency theory of jurisdiction that presses the envelope of constitutional validity."). And Justice Kennedy objected to the categorical assertion of jurisdiction over wetlands adjacent to waters deemed tributaries under the Corps' then-existing standard, "which seems to leave wide room for regulation of drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water volumes towards it." *Id.* at 781 (Kennedy, J., concurring in the judgment); *see also id.* at 781-82 ("[I]n many cases wetlands adjacent to tributaries covered by this standard might appear little more related to navigable-in-fact waters than were the isolated ponds held to fall beyond the Act's scope in *SWANCC*.").

Beyond tributaries, the plurality and Justice Kennedy also offered some insight regarding CWA jurisdiction with respect to other relatively permanent bodies of water, such as lakes and ponds, and their connection to traditional navigable waters. The plurality describes a "water of the United States" as "a relatively permanent body of water *connected to* traditional interstate navigable waters[.]" *Id.* at 742 (emphasis added). The plurality did not specify, however, what would constitute a sufficient connection between such relatively permanent waters and downstream traditional navigable waters. When considered in the context of Justice Scalia's entire opinion, the plurality signaled concern that certain types of connections are likely insufficient to maintain jurisdiction; for instance, by characterizing an "expansive definition of 'tributaries'" as one that includes "dry arroyos connected to remote waters through the flow of groundwater over 'centuries,'" *id*. at 725-26 (internal citations omitted), and describing potential federal control over "irrigation ditches and drains that intermittently connect to covered waters" as "sweeping." *Id*. at 726-27. In addition to "tributaries," the plurality noted that the Corps and lower courts have "define[d] 'adjacent' wetlands broadly" to include wetlands "hydrologically

connected" "to covered waters" "through directional sheet flow during storm events," and wetlands "connected to the navigable water by flooding, on average, once every 100 years[.]" *Rapanos*, 547 U.S. at 728 (internal quotations and citations omitted). Justice Kennedy noted that "in some instances, as exemplified by *Riverside Bayview*, the connection between a nonnavigable water . . . and a navigable water may be so close, or potentially so close, that the Corps may deem the water . . . a 'navigable water' under the Act. In other instances, as exemplified by *SWANCC*, there may be little or no connection." *Id*. at. 767 (Kennedy, J., concurring in the judgment). Justice Kennedy also stated that "mere hydrologic connection should not suffice in all cases; the connection may be too insubstantial for the hydrologic linkage to establish the required nexus with navigable waters as traditionally understood." *Id*. at 784-85.

Some commenters agreed that aspects of the plurality's and Justice Kennedy's opinions share similarities regarding the limits of federal jurisdiction under the CWA, while other commenters disagreed that the opinions share important commonalities. These commenters asserted that the opinions have disparate rationales that cannot be reconciled. While the agencies acknowledge that the plurality and Justice Kennedy viewed the question of federal CWA jurisdiction differently, as discussed above, 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.

3. Principles and Considerations

As discussed in the previous sections, a few important principles emerge that can serve as the basis for the agencies' final regulatory definition. As a threshold matter, the power conferred on the agencies under the CWA to regulate the waters of the United States is grounded in Congress' commerce power over navigation. The agencies can choose to regulate beyond waters more

traditionally understood as navigable, including some tributaries and relatively permanent bodies of water connected to those traditional navigable waters, but the agencies must provide a reasonable basis grounded in the language and structure of the Act for determining the extent of jurisdiction. The agencies can also choose to regulate wetlands adjacent to covered waters beyond those traditionally understood as navigable, if the wetlands are closely connected to those waters, such as in the transitional zone between open waters and dry land. The Supreme Court's opinion in *SWANCC*, however, calls into question the agencies' authority to regulate nonnavigable, isolated, intrastate waters that lack a sufficient connection to traditional navigable waters. The decision counsels that the agencies should avoid regulatory interpretations of the CWA that raise constitutional questions regarding the scope of their statutory authority. Finally, the agencies can regulate certain waters by category, which could improve regulatory predictability and certainty and ease administrative burdens while still effectuating the purposes of the Act.

In developing an appropriate regulatory framework for the final rule, the agencies recognize and respect the primary responsibilities and rights of States to regulate their land and water resources as reflected in CWA section 101(b). 33 U.S.C. 1251(b), *see also id.* at 1370. The oft-quoted objective of the CWA to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters," *id.* at 1251(a), must be implemented in a manner consistent with Congress' policy directives to the agencies. The Supreme Court long ago recognized the distinction between federal waters traditionally understood as navigable and waters "subject to the control of the States." *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 564-65 (1870). Over a century later, the Supreme Court in *SWANCC* reaffirmed the State's "traditional and primary power over land and water use." *SWANCC*, 531 U.S. at 174; *accord Rapanos*, 547 U.S. at 738

(Scalia, J., plurality). While CWA section 101(b) does not specifically identify Tribes, the policy of preserving States' sovereign authority over land and water use is equally relevant to ensuring the primary authority of Tribes to address pollution and plan the development and use of tribal land and water resources. This final rule recognizes and preserves the autonomy of Tribes just as it recognizes and preserves the authority of States.

Ensuring that States and Tribes retain authority over their land and water resources, reflecting the policy in section 101(b), 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, e.g.*, *Rapanos*, 547 U.S. at 755-56 (Scalia, J., plurality) ("[C]lean water is not the *only* purpose of the statute. So is the preservation of primary state responsibility for ordinary land-use decisions. 33 U.S.C. 1251(b).") (emphasis in original). That includes 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 the nation's waters, not just its navigable waters. These 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 of the nation's waters in addition to a federal regulatory prohibition on the discharge of pollutants to its navigable waters. *See e.g.*, *id.* at 745 ("It is not clear that the state and local conservation efforts that the CWA explicitly calls for, *see* 33 U.S.C. 1251(b), are in any way inadequate for the goal of preservation."). Regulating *all* of the nation's waters using the Act's federal regulatory mechanisms would call into question the need for the more holistic planning provisions of the Act and the State partnerships they entail. Therefore, by recognizing the distinctions between the nation's waters and its navigable waters and between the overall objective and goals of the CWA and the specific policy directives from

Congress, the agencies can fully implement the entire structure of the Act while respecting the specific word choices of Congress. *See, e.g.*, *Bailey*, 516 U.S. at 146; *Nat'l Fed'n of Indep. Bus.*, 567 U.S. at 544.

Some commenters agreed with the interpretation that the CWA establishes a comprehensive scheme to achieve the Act's objective through a combination of non-regulatory programs and grants for all of the nation's waters, and a more targeted federal permitting program for discharges of pollutants to the subset of the nation's waters identified as waters of the United States. Other commenters expressed concern that the proposed rule would not further 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), because fewer waters would be jurisdictional under the proposal than were regulated under the 2015 Rule or the pre-2015 regulatory regime. The agencies disagree with these commenters. The agencies are mindful that "no legislation pursues its purposes at all costs," *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987), including the CWA. The CWA's objective must be balanced with the policy of Congress to preserve the primary State responsibility for ordinary land-use decisions. The purpose of this rulemaking is to establish the boundary between regulated "waters of the United States" and the waters subject solely to State and tribal authority. The CWA's longstanding regulatory permitting programs, coupled with the controls that States, Tribes, and local entities choose to exercise over their land and water resources, will continue to address the discharge of pollutants into waters of the United States, and the CWA's non-regulatory measures will continue to address pollution of the nation's waters generally. These programs and measures collectively pursue the objective of restoring and maintaining the chemical, physical, and biological integrity of the nation's waters.

Some commenters agreed with the statements in the preamble to the proposed rule that the

CWA preserves a significant and primary role for the States in implementing various aspects of the CWA, reflecting an intent to balance the States' traditional powers to regulate land and water resources within their borders with the need for national water quality regulation. Other commenters stated that section 101(b) is primarily concerned with State implementation of water pollution control measures, not the jurisdictional reach of the Act, and that a lawful and protective definition of jurisdictional waters under the Act does not disturb or undermine the States' exercise of primary authority. Rather, they expressed concern that the rule would harm the States in exercising their authority as envisioned by section 101(b) by, for example, increasing the financial and administrative burden on States to protect their waters.

The agencies interpret the policy of Congress, set forth in section 101(b), as relevant to all aspects of the implementation of the CWA, both implementing federally-established standards as well as the scope of waters subject to such standards and regulatory programs. When promulgating the 2015 Rule, the agencies endorsed a narrower view of Congress' policy in section 101(b) as limited to implementation of the Act's regulatory programs by States and State authority to impose conditions on "waters of the United States" that are more stringent than the conditions that the agencies impose under the Act. In the final Step One Rule, the agencies concluded that such a view was improperly narrow and failed to place sufficient weight on the policy of Congress in section 101(b). *See* 84 FR 56654. Having considered the public comments submitted in this rulemaking, the agencies remain of the view that nothing in section 101(b) suggests that it is limited to implementing federal regulatory programs or imposing conditions on "waters of the United States" that are more stringent than the conditions that the agencies impose under the Act. Indeed, the overarching policy statement of 101(b) "to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate

pollution, to plan the development and use . . . of land and water resources," was included in the Act in 1972; the additional 101(b) policy statement "that the States . . . implement the permit programs under sections 402 and 404 of this Act" was not added until the 1977 amendments. 91 Stat. 1567, 1575 Pub. L. 95-217 (1977); *see also Rapanos*, 547 U.S. at 737 (Scalia, J., plurality) ("Thus, the policy [to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use . . . of land and water resources] plainly referred to something beyond the subsequently added state administration program of 33 U.S.C. 1344(g)–(l).") (citations omitted). The agencies acknowledge that States without comprehensive pre-existing programs that seek to regulate waters no longer jurisdictional under this final rule may incur new costs and administrative burdens, and they discuss those costs in the Economic Analysis for the final rule. Such obligations are inherent in the exercise of the States' authority that Congress embedded in the CWA. States are free to evaluate the most effective means of addressing their waters and may weigh the costs and benefits of doing so.

The agencies also heard from Tribes that because the agencies generally implement CWA programs on tribal lands, the proposed rule would affect Tribes differently than it would affect most States. Some Tribes have received Treatment as a State status to administer CWA programs, and other Tribes have established tribal water programs under tribal law or have the authority to establish such tribal water programs. Other Tribes may currently lack the capacity to create a tribal water program, to administer a program, or to expand programs that currently exist, and may rely on the Federal government for enforcement of water quality violations. *See* Chapter III of the Resource and Programmatic Assessment (RPA) for the final rule. The final rule preserves tribal authority to choose whether or not to regulate waters that are not covered

under the CWA.

The agencies are also cognizant that the "Clean Water Act imposes substantial criminal and civil penalties for discharging any pollutant into waters covered by the Act without a permit." *Hawkes*, 136 S. Ct. at 1812; *see also Sackett*, 132 S. Ct. at 1374-75 (Alito, J., concurring) ("[T]he combination of the uncertain reach of the Clean Water Act and the draconian penalties imposed for the sort of violations alleged in this case still leaves most property owners with little practical alternative but to dance to the EPA's tune."). As the Chief Justice observed in *Hawkes*, "[i]t is often difficult to determine whether a particular piece of property contains waters of the United States, but there are important consequences if it does." 136 S. Ct. at 1812; *see also id.* at 1816-17 (Kennedy, J., concurring in the judgment) (stating that "the reach and systemic consequences of the Clean Water Act remain a cause for concern" and "continue[] to raise troubling questions regarding the Government's power to cast doubt on the full use and enjoyment of private property throughout the Nation"). Given the significant civil and criminal penalties associated with the CWA, the agencies seek to promote regulatory certainty and to provide fair and predictable notice of the limits of federal jurisdiction. A number of commenters expressed support for the emphasis on the importance of fair notice in the proposed rule and cited in support Justice Gorsuch's concurring opinion in *Sessions v. Dimaya*, 138 S. Ct. 1204, 1223-25 (2018) (characterizing fair notice as possibly the most fundamental of the customary protections provided by the Constitution's guarantee of due process, and stating that vague laws are an exercise of "arbitrary power . . . leaving the people in the dark about what the law demands and allowing prosecutors and courts to make it up").

The agencies interpret their authority to include promulgation of a new regulatory definition of "waters of the United States," as directed by Executive Order 13778, so long as the new

definition is authorized under the law and based on a reasoned explanation. *FCC v. Fox Television Stations, Inc*., 556 U.S. 502, 515 (2009) ("*Fox*"). A revised rulemaking based on a change in interpretation of statutory authorities is well within federal agencies' discretion. *Nat'l Ass'n of Home Builders v. EPA*, 682 F.3d 1032, 1038 (D.C. Cir. 2012) (citing *Fox*, 556 U.S. at 514-15). Under this rule, the agencies do not view the definition of "waters of the United States" as conclusively determining which of the nation's waters warrant environmental protection and which do not; rather, the agencies interpret the definition as drawing the boundary between those waters subject to federal requirements under the CWA and those waters that States and Tribes are free to manage under their independent authorities. The agencies are establishing this line-drawing based primarily on their interpretation of their authority under the Constitution and the language, structure, and legislative history of the CWA, as articulated in decisions by the Supreme Court.

Some commenters viewed the proposed rule as complicated and, because one of the agencies' goals in proposing a new definition was to provide simplicity and clarity, stated that the proposal failed to meet that goal and is therefore arbitrary and capricious. The agencies disagree with these commenters' view that the proposed rule would not have provided necessary clarity. Notwithstanding this disagreement, the agencies have made certain enhancements to the final rule that will further promote clarity and provide fair notice to the public. As a threshold matter, the agencies for the first time have streamlined the regulatory text to four simple categories of jurisdictional waters, provided clear exclusions for many water features that traditionally have not been regulated, and defined the operative terms used in the regulatory text. And while the categories of jurisdiction in the final rule must be applied to specific facts to determine jurisdiction, the final rule does not include a regulatory category of case-specific

jurisdiction as the 2015 Rule did in paragraphs (a)(7) and (a)(8). As such, the agencies believe the final rule will be clearer than either the 2015 Rule or the pre-existing regulatory regime restored by the 2019 Rule. However, clarity as an end in itself is not the primary or fundamental basis for the final rule.

Section III of this notice describes in detail the fundamental bases for this rule as the text and structure of the CWA and the constitutional boundaries within which Congress enacted the CWA. The final rule is securely grounded in the text of the CWA and is supported by legislative history and Supreme Court case law. As to simplicity and clarity, the agencies acknowledge that field work may frequently be necessary to verify whether a feature is a water of the United States; however, replacing the multi-factored case-specific significant nexus analysis with categorically jurisdictional and categorically excluded waters in the final rule provides clarifying value for members of the regulated community. The application of a clear test for categorically covered and excluded waters, as presented in this final rule, is inherently less complicated than a complex multi-factored significant nexus test that must be applied on a case-by-case basis to countless waters and wetlands across the nation.

Some commenters stated that the agencies' desire to facilitate implementation of the regulatory definition does not override the agencies' legal obligations under the CWA, including fulfillment of the goals of the CWA. The agencies agree in principle. The agencies have determined that requiring surface water flow in a typical year from relatively permanent bodies of water to traditional navigable waters and wetlands adjacent to such waters as a core requirement of the rule is the most faithful way of interpreting the Federal government's CWA authority over a water. The agencies carefully considered the comments received on the proposal and have made certain revisions to the regulatory text that provide further clarity without

sacrificing or undermining the fundamental legal and constitutional bases for the rule.

A number of commenters stated that the proposed rule failed to incorporate scientific and ecological principles into the definition of "waters of the United States." The agencies disagree. While science informs the agencies' interpretation of the definition of "waters of the United States," science cannot dictate where to draw the line between Federal and State or tribal 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 to achieve specific scientific, policy, or other outcomes. Within the legal limits of the CWA, the agencies have looked to scientific principles to inform implementation of the final rule as the agencies differentiate between waters of the United States and non-jurisdictional waters and features. For example, and as discussed further in Section III.A.1, in requiring the use of a "typical year" scenario to assess the surface water connection between a particular water or wetland and a downstream water identified in paragraph (a)(1), (2), or(3) (generally referred to as "paragraph (a)(1) through (3) waters" or "a paragraph (a)(1) through (3) water" in this notice), the agencies recognize the influence of precipitation, evapotranspiration, and other climatic variables on the flow of surface water in a tributary and its contribution of flow to downstream waters and the hydrologic surface connection between a jurisdictional water and an adjacent wetland. In other words, the agencies will evaluate the flow regime of a stream and the connectedness of a wetland within the context of what is typical for that water or wetland to avoid making erroneous jurisdictional determinations at times that may be too wet or too dry to be considered "normal." The agencies also looked to science to inform other aspects of the final rule; for example, in

defining the terms "perennial," "intermittent," and "ephemeral"; in establishing that wetlands separated from jurisdictional waters only by a natural berm, bank, dune, or similar natural feature are "inseparably bound up with" and adjacent to those waters; and in accounting for the connectivity gradient[33] in deciding how to apply key principles from the *Riverside Bayview*, *SWANCC*, and *Rapanos* decisions.

The agencies consider the priorities they have outlined to be reasonable, especially in light of the long history of controversy and confusion over the definition of "waters of the United States." In concurring with the *Rapanos* plurality opinion, Chief Justice Roberts stated that "[g]iven the broad, somewhat ambiguous, but clearly limiting terms Congress employed in the Clean Water Act, the [agencies] would have enjoyed plenty of room to operate in developing *some* notion of an outer bound to the reach of their authority" under the CWA, and that the agencies' interpretations under the Act are "afforded generous leeway by the courts." *Rapanos*, 547 U.S. at 758 (Roberts, C.J., concurring) (emphasis in original); *see also id.* ("Rather than refining its view of its authority in light of our decisions in *SWANCC*, . . . the Corps chose to

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[33] As part of the 2015 Rule, EPA's SAB stressed that "the EPA should recognize that there is a gradient of connectivity." *See* Letter to Gina McCarthy. SAB Review of the Draft EPA Report Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence at 3 (Oct. 17, 2014) ("SAB Review"). The SAB recommended that "the interpretation of connectivity be revised to reflect a gradient approach that recognizes variation in the frequency, duration, magnitude, predictability, and *consequences* of physical, chemical, and biological connections." *Id*. at 2 (emphasis added); *see also* Connectivity Report at 1-18 ("Variation in the degree of connectivity is critical to the integrity and sustainability of downstream waters, and can be described in terms of the frequency, duration, magnitude, timing, and rate of change of fluxes to and biological exchanges with downstream waters. These descriptors characterize the range over which streams and wetlands vary and shift along connectivity gradients and the probable effects of different types (hydrologic, chemical, biological) and degrees of connectivity over time. . . . Ultimately, differences in the frequency, duration, magnitude, timing, and rate of change of physical, chemical, and biological connections describe different positions along the connectivity gradient and produce different types of downstream effects.").

adhere to its essentially boundless view of the scope of its power. The upshot today is another defeat for the agency."). In this rule, as described in detail in Section III, the agencies are reasonably interpreting the scope of their authority under the Act in a manner that is consistent with its text, structure, legislative history, and applicable Supreme Court guidance. This final rule presents a unifying legal theory for federal jurisdiction over those waters and wetlands that maintain a sufficient surface water connection to traditional navigable waters or the territorial seas.

F. Summary of Final Rule as Compared to the 1986 Regulations Recodified in the 2019 Rule and the 2015 Rule

The agencies are finalizing a definition of "waters of the United States" that they consider to be superior to the 1986 regulations re-codified in the 2019 Rule, as well as to the 2015 Rule. The agencies are revising previous regulatory definitions of this term to distinguish between waters that are "waters of the United States" subject to Federal regulation under the CWA and waters or features that are subject to exclusive State or tribal jurisdiction, consistent with the scope of jurisdiction authorized under the CWA and the direction in the Act to both "restore and maintain the chemical, physical, and biological integrity of the Nation's waters," 33 U.S.C. 1251(a), and "recognize, preserve, and protect the primary responsibilities and rights of States to . . . plan the development and use (including restoration, preservation, and enhancement) of land and water resources . . . ." *Id*. at 1251(b). The Supreme Court has recognized that new administrations may reconsider the policies of their predecessors so long as they provide a reasonable basis for the change in approach. *Nat'l Ass'n of Home Builders,* 682 F.3d at 1043 (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 59 (1983) (Rehnquist, J., concurring in part and dissenting in part)). The agencies intend that the revised interpretation of the federal

regulatory scope of the CWA will resolve longstanding confusion over broad and unclear definitions of "waters of the United States."

This final rule is more consistent with the agencies' constitutional and statutory authority than the 2015 Rule, for the reasons discussed in the preamble to the 2019 Rule as well as the rest of this section and Section III of this notice. The 2015 Rule did not implement the legal limits on the scope of the agencies' authority under the CWA as intended by Congress and as reflected in Supreme Court cases, including Justice Kennedy's articulation of the significant nexus test in *Rapanos*. In the 2019 Rule, the agencies concluded 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). The 2015 Rule interpreted the CWA in a manner that pushed the envelope of the agencies' constitutional and statutory authority in the absence of a clear statement from Congress authorizing substantial encroachment upon traditional State land-use planning authority. *See Georgia v. Wheeler*, No. 2:15–cv–079, 2019 WL 3949922, at *23 (S.D. Ga. Aug. 21, 2019) (finding the 2015 Rule "unlawful" given its "significant intrusion on traditional state authority" without "any clear or manifest statement to authorize intrusion into that traditional state power").

In addition, the agencies recognize that the 2015 Rule has been remanded by the U.S. District Court for the Southern District of Texas for failing to comply with the APA. That court found that the 2015 Rule suffered from several problems, including that the distance-based limitations in the 2015 Rule were not a logical outgrowth of the proposal in violation of the APA's public notice and comment requirements. *See Texas v. EPA*, 389 F. Supp. 3d 497 (S.D. Tex. 2019). The

court found this error "significant" because the specific distance-based limitations "alter[ed] the jurisdictional scope of the Act." *Id.* at 504. Litigants challenging the 2015 Rule alleged other APA deficiencies, including the lack of record support for the distance-based limitations inserted into the final rule without adequate notice. Several commenters on the proposed repeal of the 2015 Rule raised similar concerns, arguing that the 2015 Rule was arbitrary and capricious because of the lack of record support for those limitations. The agencies recognize that the Federal government, in prior briefs before the various district courts that heard challenges to the 2015 Rule, defended the procedural steps the agencies took to develop and support the 2015 Rule. Having considered the public comments and relevant litigation positions, and the decision of the Southern District of Texas on related arguments, the agencies concluded in the 2019 rulemaking that the administrative record for the 2015 Rule did not contain sufficient record support for the distance-based limitations that appeared for the first time in that final rule. This conclusion is further supported by similar findings of the U.S. District Court for the Southern District of Georgia, which remanded the 2015 Rule to the agencies in August 2019 after identifying substantive and procedural errors with respect to numerous provisions, including the rule's distance limitations. *Georgia v. Wheeler*, 2019 WL 3949922, at *12-32. By contrast, for the reasons discussed elsewhere in this section and in Section III of this notice, this final rule remains within the bounds of the agencies' authority under the Constitution and the CWA, is properly supported by the record in this rulemaking, and is a logical outgrowth of the NPRM.

Finally, the agencies believe that this final rule will be clearer than the pre-existing regulatory regime restored by the regulatory text of the 2019 Rule and the prior implementation of that regime in response to adverse Supreme Court decisions and agency guidance. For the reasons discussed in the 2019 Rule preamble, that regulatory regime is preferable to the 2015

Rule; however, a clear, comprehensive regulation that encompasses the Supreme Court's interpretations is preferable to the pre-existing regulatory regime restored by the 2019 Rule. The language of the 2019 Rule regulatory text leaves substantially more room for discretion and case-by-case variation than does this final rule, particularly paragraph (a)(3) in the 2019 Rule, which claims jurisdiction over waters that are used by interstate or foreign travelers for recreational or other purposes, with no reference to navigable waters. Following the Supreme Court's opinions on the definition of "waters of the United States," particularly *SWANCC* and *Rapanos*, the 2019 Rule must be implemented taking into account the Court's holdings and agency guidance interpreting those cases. In the decade since the *Rapanos* decision, the agencies and the public have become familiar with this multi-layered interpretive approach, which is in part why the agencies finalized the 2019 Rule to maintain the pre-existing regime during the process of developing and considering public comments on this final rule. The regulatory definition of "waters of the United States" set forth in this final rule reflects Supreme Court case law and clearly establishes the scope of jurisdictional waters under the CWA. It provides greater regulatory predictability than the regulatory regime restored by the 2019 Rule.

In sum, as compared with both the 2015 Rule and the regulatory regime restored by the 2019 Rule, this final rule more appropriately reflects the scope of the agencies' authority under the statute and the Constitution; respects the vital role of the States and Tribes in managing their land and water resources; and addresses the need of the public for predictable, more easily implementable regulations that aim to accomplish the objective of the Act, "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. 1251(a).

G. Existing Guidance

In several places in the preamble to the proposed rule, the agencies solicited comment on whether they should revoke the 2003 *SWANCC* Guidance or the 2008 *Rapanos* Guidance if the agencies were to finalize the proposal. 84 FR 4165, 4167. These guidance documents were drafted to inform the agencies' implementation of the 1986 and 1988 regulations, which the 2019 Rule recodified, in a manner consistent with the Supreme Court's decisions in *SWANCC* and *Rapanos*. Some commenters thought that the 2003 and 2008 guidance documents provided helpful information and assistance to the public in understanding how the agencies might implement a definition of "waters of the United States." Other commenters thought that the documents should be rescinded to avoid confusion during implementation of this final rule, particularly because the agencies have totally restructured the regulatory definitions. The agencies considered these comments and conclude that, when this final rule becomes effective, these and other related agency guidance documents, memoranda, and materials will be rendered inoperative because they will no longer be necessary or material, and they may in fact create confusion as the agencies implement this final rule. The agencies can develop new guidance to facilitate implementation of this final rule should questions arise, if any, regarding the application of the rule to specific circumstances.[34]

III. Definition of "Waters of the United States"

The following is a summary of the key elements and each substantive provision of this final

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[34] To the extent that, as a result of litigation, the 1986 and 1988 regulations, which the 2019 Rule recodified, remain or become legally effective after the effective date of this rule as a result of litigation, the agencies intend to use the guidance documents relevant to those regulations, including the 2003 *SWANCC* Guidance and 2008 *Rapanos* Guidance, if necessary to inform implementation of those regulations.

rule. Each subsection describes what the agencies are finalizing, why the agencies are finalizing the regulatory text, and how the agencies plan to implement the final rule. To assist the reader, the longer subsections have internal headings.

In this final rule the agencies interpret the term "the waters" in the phrase "the waters of the United States" to encompass relatively permanent flowing and standing waterbodies that are traditional navigable waters in their own right or that have a specific surface water connection to traditional navigable waters, as well as wetlands that abut or are otherwise inseparably bound up with such relatively permanent waters. As the plurality decision in *Rapanos* notes, the term "the waters" is most commonly understood to refer to "streams and bodies forming geographical features such as oceans, rivers, lakes," or "the flowing or moving masses, as of waves or floods, making up such streams or bodies." 547 U.S. at 732 (citing *Webster's New International Dictionary* 2882 (2d ed. 1954)); *see also Riverside Bayview*, 474 U.S. at 131 (characterizing "waters of the United States" as including "rivers, streams, and other hydrographic features more conventionally identifiable as 'waters'"); *see also* 118 Cong. Rec. 33699 (Oct. 4, 1972) (statement of Sen. Muskie) (referring to "navigable waters" as "water bodies"). According to the *Rapanos* plurality, however, the ordinary meaning of the term "waters" does not include areas that are dry most of the year, and which may occasionally contain "transitory puddles or ephemeral flows of water." 547 U.S. at 733.

The agencies received considerable public comments on the scope of the proposed definition of "waters of the United States." Some commenters stated that the proposed rule would include more waters and wetlands than appropriate under a strict reading of Justice Scalia's plurality opinion in *Rapanos* and is therefore inconsistent with Executive Order 13778. Some commenters agreed with the proposed rule, stating that it struck an appropriate balance of asserting

jurisdiction over waters that should be regulated by the Federal government, provided clear direction for the regulated community, and respected State and tribal authority over their own land and water resources. Some commenters stated that the proposal failed to include ecologically important waters and wetlands and failed to give due weight to Justice Kennedy's concurring opinion in *Rapanos*. Other commenters stated that the proposed rule and supporting rationale were based exclusively on the CWA section 101(b) policy to ensure that States maintain primary authority over land and water resources and failed to give due weight to the objective in CWA section 101(a) to restore and maintain the chemical, physical, and biological integrity of the nation's waters.

The agencies disagree with commenters' suggestion that the Executive Order requires the agencies to rely exclusively on Justice Scalia's opinion in *Rapanos*. The Executive Order requires the agencies to consider that opinion, which is what the agencies have done here. The agencies also disagree with commenters' suggestion that the proposal failed to incorporate principles from Justice Kennedy's opinion, and further disagree with commenters' suggestion that the agencies failed to consider the objective of section 101(a) in determining where to draw the line of federal jurisdiction. However, the agencies considered these and other public comments, and have made modifications in the final rule to better incorporate common principles of the *Rapanos* plurality and concurring opinions, and to strike a careful balance between the clear directive from Congress to ensure that States maintain primary authority over land and water resources, and the importance of maintaining federal authority over those waters that Congress determined should be regulated by the Federal government under its Commerce Clause powers.

The final definition of "waters of the United States" aligns with the intent of Congress to interpret the term "navigable waters" beyond just commercially navigable-in-fact waters. This definition recognizes Congress' intent "to exercise its powers under the Commerce Clause to regulate at least some waters that would not be deemed 'navigable' under the classical understanding of that term," *Riverside Bayview*, 474 U.S. at 133, but at the same time acknowledges that "[t]he grant of authority to Congress under the Commerce Clause, though broad, is not unlimited." *SWANCC*, 531 U.S. at 173. The definition also recognizes the constitutional underpinning of the CWA, which was Congress' exercise of "its commerce power over navigation." *Id*. at 168 n.3.

This final rule establishes categorical bright lines to improve clarity and predictability for regulators and the regulated community by defining "waters of the United States" to include the following four categories: (1) the territorial seas and traditional navigable waters; (2) tributaries of such waters; (3) certain lakes, ponds, and impoundments of jurisdictional waters; and (4) wetlands adjacent to other jurisdictional waters (other than waters that are themselves wetlands). The final rule eliminates the case-specific application of the agencies' previous interpretation of Justice Kennedy's significant nexus test in the *Rapanos* Guidance, and instead establishes clear categories of jurisdictional waters that adhere to the basic principles articulated in the *Riverside Bayview*, *SWANCC*, and *Rapanos* decisions while respecting the overall structure and function of the CWA.

A. Key Terms and Concepts

Each of the four categories of waters of the United States established by this final rule, as well as the waters that fall beyond CWA jurisdiction, is discussed in detail in Sections III.B through III.H below. Many of the operative terms used in the final rule are defined in paragraph

(c), and their applicability is discussed at length throughout those subsections. This subsection summarizes a few key terms and concepts that help inform the overall implementation of the jurisdictional categories established by paragraph (a) and the non-jurisdictional waters established by paragraph (b), and are highlighted here for ease of reference and additional clarity.

One such term is "typical year." As discussed above, the meaning of the phrase "waters of the United States" has been mired in confusion for decades. This is in part because courts, regulators, the regulated community, and members of the public have lacked clear guidance as to how far up the watershed federal jurisdiction extends, and what connection is required for waters to be considered part of the regulated tributary system to traditional navigable waters and the territorial seas. The last two Supreme Court cases on point– *SWANCC* and *Rapanos* –provided clear instruction to the agencies that their prior interpretations had exceeded their jurisdictional authority under the CWA. The phrase "typical year" as used in the final rule and throughout this notice is intended to provide a predictable framework in which to establish federal jurisdiction over relatively permanent waters that contribute surface water flow to waters identified in paragraph (a)(1) (generally referred to as "paragraph (a)(1) waters" or "a paragraph (a)(1) water" in this notice), and wetlands adjacent to such waters. The term "typical year" is summarized in Section III.A.1 and is further discussed throughout the notice.

The agencies are also defining the terms "perennial," "intermittent," and "ephemeral" in the final rule, adding clarity and certainty for how these frequently used terms apply in the "waters of the United States" context. The agencies have used these terms to assess jurisdictional status under the CWA, but until this final rule have never defined them in the regulatory text. The terms have specific meaning in the scientific community, but when used in legal settings, common parlance often converges with scientific meaning, creating opportunities for

misunderstanding. For example, while the *Rapanos* plurality stated that the term "waters of the United States" does not include "ordinarily dry channels through which water occasionally or *intermittently* flows," 547 U.S. at 733 (emphasis added), it also stated the phrase does "not necessarily exclude *seasonal* rivers, which contain continuous flow during some months of the year but no flow during dry months."). *Id*. at 732 n.5 (emphasis in original). "Seasonal rivers"– which the plurality would not categorically exclude– are known among scientists as "intermittent streams" –which the plurality stated it would exclude. The plurality also appears to confuse the scientific understanding of the terms "'intermittent' and 'ephemeral' streams," conflating them to mean "streams whose flow is . . . 'existing only, or no longer than, a day[.]'" *Id*. Indeed, this description more accurately captures the hydrological definition of "ephemeral streams" which only flow during or in immediate response to rainfall. By contrast, "intermittent streams" typically flow for a more continuous period like the "seasonal rivers" the plurality describes. Because the definition of "tributary" specifically uses and relies on the terms "perennial" and "intermittent," but not "ephemeral," the agencies are clearly defining these terms in the final rule. These terms are summarized below in Section III.A.2 and are further discussed throughout the preamble.

Another challenging issue that has confounded the meaning of "waters of the United States" for years is what types of natural or artificial features potentially sever jurisdiction between the upstream and downstream portions of a waterway. For example, if the waters of a perennial headwater stream are diverted to another basin for consumptive use and the downstream reach runs dry for major portions of a year, or the flow of a stream disappears into the desert floor before reaching a traditional navigable water, questions are frequently raised regarding the jurisdictional status of those waters. Subsection III.A.3 below discusses the "breaks" topic in

detail and how the agencies have addressed the various artificial and natural features that either maintain or sever jurisdiction under the final rule.

1. Typical Year

In this final rule, the agencies use the term "typical year" to help establish the surface water connection between a relatively permanent body of water and traditional navigable waters, and between certain wetlands and other jurisdictional waters, that is sufficient to warrant federal jurisdiction. "Typical year" is defined in the final rule to mean when precipitation and other climatic variables are within the normal periodic range (*e.g.*, seasonally, annually) for the geographic area of the applicable aquatic resource based on a rolling thirty-year period. Under this final definition, a typical year would generally not include times of drought or extreme flooding. In other words, the purpose of the term is to ensure that flow characteristics are not assessed under conditions that are too wet or are too dry. As discussed in Section III.G.2, climatic conditions, including flow or flooding, that may occur under "typical year" conditions do not necessarily occur in every calendar year.

The agencies proposed to use the term "typical year" to mean within the normal range of precipitation over a rolling thirty-year period for a particular geographic area; that is, during times when it is not too wet and not too dry. However, some commenters on the proposed rule expressed confusion about the proposed "typical year" definition, including how it is calculated and what timeframe it represents. Commenters also expressed concern that the proposed definition included only precipitation as a driver of streamflow classification. Other commenters supported the typical year concept as proposed. In response to these comments, the agencies have modified the definition of "typical year" to expressly include other climatic variables in addition to precipitation and additional description of the normal periodic range, signaling that

such range need not be based on a calendar year. The agencies believe the revised definition more appropriately reflects what the agencies intended to measure, which is, simply put, the characteristics of a waterbody at times that are not too wet and not too dry.

To determine whether water features are being assessed during normal precipitation conditions, the agencies currently use data from the National Oceanic and Atmospheric Administration's (NOAA) Global Historic Climatology Network, which integrates climate data from over 20 sources. The agencies evaluate normal precipitation conditions based on the three 30-day periods preceding the observation date. For each period, a weighted condition value is assigned by determining whether the 30-day precipitation total falls within, above, or below the 70th and 30th percentiles for totals from the same date range over the preceding 30 years. The agencies make a determination of "normal," "wetter than normal," or "drier than normal" based on the condition value sum. While the agencies will generally use this method to implement this final rule, the agencies also recognize there may be other accurate and reliable measurements of normal precipitation conditions and will make adjustments to the approach as is scientifically warranted. The agencies may also consider alternative methods that are developed and appropriately validated, including different statistical percentiles, evaluation periods, or weighting approaches for condition values.

Some commenters on the proposed rule were concerned that a 30-year period may be too long or too short of a record, or that rolling 30-year climate percentiles would be difficult to calculate. The agencies have concluded that a rolling 30-year period would account for variability to provide a reliable indicator of the climate in a given geographic area without being confounded by a year or two of unusual climate data. A standard timeframe is necessary to ensure consistent application across the country, and 30 years is the most common and

recognized timeframe utilized in other government climatic data programs (*e.g.*, NOAA's National Climatic Data Center climate normals, which are based on World Meteorological Organization requirements). Nearly a century ago, the International Meteorological Organization, now known as the World Metrological Organization, instructed member nations to calculate climate normals using 30-year periods, beginning with 1901 to 1930 (*see* https://www.ncdc.noaa.gov/news/defining-climate-normals-new-ways). Recognizing that precipitation and temperature change over time, the agencies have determined that a rolling 30-year record is necessary to ensure that changing conditions are captured by the calculation. The agencies have considered other alternative time periods and are maintaining the well-established 30-year period.

The agencies proposed that the geographic area be on a watershed-scale basis to ensure specific climatic data are representative of the landscape in relation to the feature under consideration for meeting the "tributary" definition and sought comment on the appropriate watershed scale. Some commenters on the proposed rule suggested constraining precipitation data sources to the smallest practicable watershed scale (*e.g.*, a USGS HUC-12 scale). However, other commenters noted that 30 years of data may not always be available at that scale, and other considerations such as distance or ecoregion are also important for identifying appropriate climatic data. In response to these comments, the agencies have determined that specifying a particular watershed size or Hydrologic Unit Code (HUC) could preclude the use of the best available data sources, but that watershed boundaries should be a consideration when selecting climate records. Other considerations should include data availability, topography, and distance of climatic data collection in relation to the aquatic resource location.

The agencies recognize that precipitation data may not be the only appropriate indicator for

determining “typical year,” as was noted by many commenters on the proposed rule. Although the agencies will generally use the methodology described in this notice for determining normal precipitation conditions, the agencies will consider and use the best available data and information, which provides the most accurate and reliable representative information for the aquatic resource in question, to determine “typical year.” For instance, determinations of “typical year” based on precipitation totals may conflict with other sources of information such as drought indices, which account for other hydrologic factors like evapotranspiration and water storage. The agencies currently use professional judgment and a weight of evidence approach as they consider precipitation normalcy along with other available data sources. These data sources include, but are not limited to, the Web-based Water-Budget Interactive Modeling Program (WebWIMP) for approximate dates of wet and dry seasons for any terrestrial location based on average monthly precipitation and estimated evapotranspiration (http://climate.geog.udel.edu/~wimp/); Climate Analysis for Wetlands Tables (known as WETS tables, or similar tools, as the WETS tables are currently in a fixed 30-year timeframe), which are provided by the NRCS National Water and Climate Center (https://www.wcc.nrcs.usda.gov/climate/wets_doc.html) and were calculated from long-term (30-year) weather records gathered at National Weather Service meteorological stations; and drought indices, such as the Palmer Drought Severity Index (PDSI) (Sprecher and Warne 2000), where time-series plots of PDSI values by month or year are available from the National Climatic Data Center (https://www.ncdc.noaa.gov/temp-and-precip/drought/historical-palmers/psi/201811-201910 or https://www.cpc.ncep.noaa.gov/products/monitoring_and_data/drought.shtml).

2. Perennial, Intermittent, and Ephemeral

Though "perennial," "intermittent," and "ephemeral" are commonly used scientific terms, the agencies are including definitions of these terms in the final rule to ensure that the regulation is clear. In this final rule, the agencies define the term "perennial" to mean surface water flowing continuously year-round. The term "intermittent" in the final rule means surface water flowing continuously during certain times of the year and more than in direct response to precipitation (*e.g.*, seasonally when the groundwater table is elevated or when snowpack melts). The phrase "certain times of the year" is intended to include extended periods of predictable, continuous surface flow occurring in the same geographic feature year after year. Continuous surface water flow during certain times of the year may occur seasonally such as in the spring when evapotranspiration is low and the groundwater table is elevated. Under these conditions, the groundwater table intersects the channel bed and groundwater provides continuous baseflow for weeks or months at a time even when it is not raining or has not very recently rained. Melting snowpack can be the sole or primary source of perennial or intermittent flow in a tributary. The term "snowpack" is defined as "layers of snow that accumulate over extended periods of time in certain geographic regions or at high elevation (*e.g.*, in northern climes or mountainous regions)." Perennial or intermittent flow in certain mountain streams, for example, may result primarily from melting snowpack, not from groundwater contributions to the channel. The term "ephemeral" in the final rule means surface water flowing or pooling only in direct response to precipitation, such as rain or snow fall. With these definitions, the agencies distinguish *ephemeral* flow resulting from a snow fall event from sustained *intermittent* flow resulting from melting snowpack that is continuous, such as for weeks or months at a time.

Some commenters requested that the final rule require that groundwater must be the source

for perennial and intermittent flow in tributaries. The agencies recognize that groundwater input is an element of most scientific definitions of perennial and intermittent flow,[35] but have decided not to mandate groundwater input as part of the definition of "perennial" or "intermittent" in the final rule. As a threshold matter, the agencies believe that such an approach would too narrowly limit CWA jurisdiction over waters that provide continuous or intermittent and predictable flow to traditional navigable waters in a typical year. For example, many headwater streams in mountainous regions flow through channels incised in bedrock with no groundwater interface with the bed of the stream. These streams instead are fed by glacial or high elevation snowpack melt. The same scenario may also exist in northern climes, where spring flows could be fed almost exclusively through melting snowpack absent elevated groundwater tables. Mandating a groundwater interface and contribution of flow could also be challenging to implement, as identifying whether the channel bed intersects the groundwater table may be difficult to accomplish in the field, gathering the relevant data could be time consuming, and implementing a source water-based definition could require new tools and training of field staff and the regulated public. The requirement for a groundwater flow source could also render effluent-dependent streams non-jurisdictional. The agencies do not interpret the text or legislative history of the CWA or Supreme Court guidance to mandate groundwater input as a condition precedent for asserting jurisdiction over tributaries to traditional navigable waters.

A few commenters asked for clarification to better distinguish between flow "in direct response to precipitation" versus "more than in direct response to precipitation," as well as

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[35] *See, e.g.,* 82 FR 2006 (Jan. 6, 2017) (Corps nationwide permit program); National Research Council. 2002. Riparian Areas: Functions and Strategies for Management. Washington, DC: The National Academies Press. https://doi.org/10.17226/10327.

further clarification on the distinction between ephemeral and intermittent flow classifications in general. For example, they requested clarification on whether streams that flow continuously during a rainy season (*e.g.*, monsoon-driven streams in the arid West) are considered intermittent. The use of the term "direct" by the agencies in the proposed rule and maintained in this final rule is intended to distinguish between flow solely caused by individual precipitation events (including multiple, individual back-to-back storms), and continuous flow resulting, for example, from weeks- or months-long accumulation of precipitation in the form of snowpack that melts slowly over time or an elevated groundwater table that provides baseflow to the channel bed.

Ephemeral flow may occur simply because it is raining or has very recently rained or it has recently snowed and the snow has melted. For example, ephemeral flow could be the result of a small, brief storm event, one long storm event producing rainfall for several days without pause, or several back-to-back storms. Continuous flow occurring more than in direct response to precipitation could include "seasonal" flow, such as when snowpack melts or when groundwater is elevated and provides baseflow to the channel bed. Streamflow that occurs during the monsoon season in certain parts of the country (typically June through September in the arid West) may be ephemeral or intermittent, with the distinction made according to the definition of each term in the final rule. For example, a stream in the arid West is ephemeral if it flows only in direct response to rainfall, even if the flow may appear relatively continuous as a result of multiple, individual storms during the monsoon season. On the other hand, when monsoon floodwaters locally recharge the riparian aquifer through bank infiltration and supply sustained baseflow to streams in the arid West when it is not raining or has not recently rained, such streams meet the rule's definition of "intermittent" if they flow seasonally, for example, or

"perennial" if they flow continuously year-round.[36]

Some commenters requested clarity on the specific geographic regions where "snowpack" as defined under the proposed rule would occur. Other commenters requested that the agencies clarify how melting snowpack is distinguished from melting snowfall and clearly articulate the amount of snow needed to meet the definition of "snowpack," as well as provide clarity on what "extended periods" of time means. They also requested clarification on the sources of information (*e.g.*, from NOAA, NRCS, or another source) that can be used to identify "snowpack." "Extended periods of time" refers to more than merely a single snowfall event or periodic events with repeated snowmelts after each occurrence, but rather recurring snow events which result in an accumulation of multiple layers of snow in certain geographic regions, which may include, for example, parts of North Dakota or Alaska, or at high elevation, to potentially include the Rocky, Sierra Nevada, or Cascade mountains. A foot of new snow fall on the high plains of southern Wyoming in May will typically melt quickly under the intense sun of subsequent days, while a foot of snow in northern Wisconsin in January will likely contribute to seasonal snowpack that may not melt until spring thaw. The first scenario is more likely to cause

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[36] *See e.g.*, Baillie, M.N., J.F. Hogan, B. Ekwurzel, A.K. Wahi, and C.J. Eastoe. 2007. Quantifying water sources to a semiarid riparian ecosystem, San Pedro River, Arizona, *J. Geophysical Res.*, 112, GO3S02, doi: 10.1029/2006JG000263. Ballie et al. (2007) found that locally recharged monsoon floodwater is one of the dominant water sources in the main stem of the spatially intermittent San Pedro River in Arizona. The authors also define "monsoon storms" as "short, intense rainstorms that generate significant amounts of flooding and *ephemeral flow* (i.e., flow in ephemeral channels on the basin floor) and represent, on average, the bulk of summer moisture." (Emphasis added). *See also* Connectivity Report at B-39 ("Monsoon-generated, short-duration runoff dominates the San Pedro watershed. . . Most perennial and intermittent rivers in the Southwest are groundwater dependent, flowing primarily in a baseflow regime and supported by discharge from a connected regional or alluvial aquifer or both. . . . [P]art of the baseflow is often sustained or augmented by slow drainage of a shallow alluvial aquifer from past flooding.")

ephemeral flow, the second is more likely to cause intermittent flow. The agencies could consider any data sources that provide an accurate estimation of "snowpack" in identifying that feature. The agencies are not limiting the identification of snowpack to one data source, such as those provided by NOAA or NRCS, although those are reliable existing sources to find information on snowpack. The Bureau of Reclamation and several western States depend on accurate snow fall and accumulation data to project water availability for consumptive needs and the allocation of water rights. Analyzing the location and seasonality of snowpack is a common, well understood practice in other contexts and will not pose implementation challenges to the agencies under the final rule as they draw on the expertise of other Federal and State partners.

In certain parts of the country and during certain times of the year, snowpack may have a more significant influence on flow classifications than rainfall. Sources of information on "snowpack" can be found in the NOAA national snow analyses maps (https://www.nohrsc.noaa.gov/nsa/), in NRCS sources (https://www.wcc.nrcs.usda.gov/snow/), or by using hydrographs of subject locations as a potential guide to alert the regulated public and regulators as to which regions of the country have to consider snowpack scenarios. In these regions, for example, a hydrograph could indicate a large increase in discharge volume due to the late spring/early summer thaws of melting snowpack. These are indicators of a regular, predictable, seasonal occurrence of flow. The large water contribution source for those northern geographic regions which do not have significant elevation changes, but which do have a consistent, predictable snowfall that accumulates on the ground for extended periods of time, are covered in this rule's definition of "snowpack" in paragraph (c)(10), in addition to mountainous regions with snowpack.

3. Breaks

Under the proposed rule, an artificial or natural ephemeral feature (*e.g.*, an ordinarily dry channel only flowing during or in immediate response to precipitation) occurring in a typical year at any point along a tributary network would have severed jurisdiction upstream of the "break" because the waterbody would not convey surface water to a paragraph (a)(1) water year-round or continuously for extended periods of time. 84 FR 4173-74. To be jurisdictional, lakes and ponds that are not paragraph (a)(1) waters would have needed to maintain perennial or intermittent flow to a paragraph (a)(1) water in a typical year or be flooded by a jurisdictional water in a typical year. *Id.* at 4182. In other words, to be jurisdictional, the proposed rule would have required tributaries and most lakes and ponds to maintain a perennial or intermittent surface water connection all the way to a downstream paragraph (a)(1) water. The agencies received public comments indicating that this approach could affect the jurisdictional status of many waters, particularly in the arid West; that it could inadvertently subject otherwise exempt water transfers to CWA section 402 permitting; and it could create implementation challenges. The agencies received other comments supporting the proposed approach.

As further discussed below, the final rule contains some important changes to address these concerns, which are intended to better incorporate common principles from the *Rapanos* plurality and concurring opinions, and to strike a better balance between the objective and policy in CWA sections 101(a) and 101(b), respectively. Changes made in the final rule, however, remain faithful to the overall text, structure, and legislative history of the CWA and the legal principles outlined in Section II.E. Many of the changes were designed to address questions and concerns regarding under what circumstances a natural or artificial feature severed upstream

jurisdiction, as discussed in detail in this subsection and as further explained throughout Section III.

The Supreme Court has not spoken directly to the question of whether a non-jurisdictional ephemeral break along or downstream of an otherwise jurisdictional tributary, lake, pond, or impoundment would sever jurisdiction of upstream waters. As described in Section II.E, Supreme Court precedent provides some insight regarding CWA jurisdiction of relatively permanent bodies of water, including tributaries, lakes, and ponds, and their connection to traditional navigable waters, but it does not provide comprehensive guidance. For example, the *Rapanos* plurality describes a "water of the United States" as "a relatively permanent body of water *connected to* traditional interstate navigable waters[.]" *Rapanos*, 547 U.S. at 742 (emphasis added). Regarding the connection between a water in question and downstream navigable waters, Justice Kennedy noted that "in some instances, as exemplified by *Riverside Bayview*, the connection between a nonnavigable water . . . and a navigable water may be so close, or potentially so close, that the Corps may deem the water . . . a 'navigable water' under the Act. In other instances, as exemplified by *SWANCC*, there may be little or no connection." *Id*. at. 767. Justice Kennedy also stated that "mere hydrologic connection should not suffice in all cases; the connection may be too insubstantial for the hydrologic linkage to establish the required nexus with navigable waters as traditionally understood." *Id*. at 784-85.

Although the *Rapanos* plurality opinion did not specify what would constitute a sufficient connection between relatively permanent waters and downstream traditional navigable waters, it did signal types of connections that are likely insufficient to maintain jurisdiction when read in context with the principles articulated throughout the balance of the opinion. For instance, the plurality characterized an "expansive definition of 'tributaries'" as including "dry arroyos

connected to remote waters through the flow of groundwater over 'centuries,'" *id*. at 725-26 (internal citations omitted), and described federal control over "irrigation ditches and drains that intermittently connect to covered waters" as "sweeping assertions of jurisdiction." *Id*. at 726-27. In addition to "tributaries," the plurality noted with disapproval that the Corps and lower courts had "define[d] 'adjacent' wetlands broadly" to include wetlands "hydrologically connected" "to covered waters" "'through directional sheet flow during storm events,'" and wetlands "connected to the navigable water by flooding, on average, once every 100 years[.]" *Id*. at 728. The agencies considered these observations in developing the final rule but recognize that the Supreme Court has not spoken directly to every aspect of the agencies' existing regulations or every fact pattern that may raise questions of federal jurisdiction. 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.

The proposed rule, which would have severed jurisdiction upstream of any ephemeral feature, reflected a reasonable interpretation of the CWA and incorporated relevant Supreme Court guidance. However, upon further consideration, the agencies conclude that the proposed rule's treatment of ephemeral features would have severed jurisdiction for certain relatively permanent bodies of water that are regularly "connected to" traditional navigable waters via channelized surface water flow, allowing such waters to connect and become indistinguishable when flowing. Some ephemeral reaches between upstream and downstream relatively permanent (*i.e.*, perennial or intermittent) waters convey surface water from the upstream water to the downstream covered water during a typical year. These reaches allow upstream relatively permanent jurisdictional waters to have a surface water connection to downstream jurisdictional

waters in a typical year when there is sufficient water in the system. In contrast, other ephemeral streams, including those at the very headwaters of a channel network, do not connect relatively permanent jurisdictional waters to downstream jurisdictional waters; rather, they are merely "channels that periodically provide drainage for rainfall." *Rapanos*, 547 U.S at 739 (Scalia, J. plurality). The agencies conclude in this final rule that certain ephemeral features between upstream relatively permanent jurisdictional waters and downstream jurisdictional waters do not sever jurisdiction upstream so long as such features satisfy the conditions described further below. Like the proposed treatment of ephemeral features, the final rule is based on an equally reasonable interpretation of the CWA and Supreme Court precedent, and appropriately balances the plurality and concurring opinions in *Rapanos* and the objective of the Act and the policy of Congress set forth in CWA sections 101(a) and 101(b).

In the final rule, certain ephemeral features do not sever jurisdiction of an upstream relatively permanent jurisdictional water so long as they provide a surface water connection to a downstream jurisdictional water in a typical year. Specifically, the final rule provides that a tributary does not lose its jurisdictional status if it contributes surface water flow in a typical year to a downstream jurisdictional water through a channelized non-jurisdictional surface water feature, through a subterranean river, through a culvert, dam, tunnel, or similar artificial feature, or through a debris pile, boulder field, or similar natural feature. *See* paragraph (c)(12). The final rule applies the same basic principles to the category of lakes, ponds, and impoundments of jurisdictional waters. *See* paragraph (c)(6). A lake, pond, or impoundment of a jurisdictional water does not lose its jurisdictional status if it contributes surface water flow to a downstream jurisdictional water in a typical year through artificial features such as culverts and spillways. The agencies conclude that such features do not necessarily sever jurisdiction of upstream

waters. However, if an artificial feature does not allow for the contribution of surface water flow to a downstream jurisdictional water in a typical year, it severs jurisdiction upstream of the artificial feature. The final rule treats natural features such as debris piles and boulder fields the same way that it treats the artificial features described above.

The changes made in the final rule address concerns raised by commenters about features that would sever the jurisdiction of upstream portions of the tributary network, including relatively permanent upstream waters that contribute surface water flow to downstream waters when enough water is in the system. It also addresses concerns raised by water management interests that suggested the proposed rule could have inadvertently undermined the NPDES permitting exemption authorized by the EPA's Water Transfers Rule, 73 FR 33697 (June 13, 2008). That rule does not require NDPES permits for water transfers between waters of the United States because they do not result in the "addition" of a pollutant. *Id.* at 33699. In many regions of the country, particularly the arid West, inter- and intra-basin water transfers may originate in perennial or intermittent waters that may be disconnected from downstream waters by ephemeral breaks. In many circumstances, those ephemeral breaks may be caused by water management systems, including through water transfers, water storage reservoirs, flood irrigation channels, and similar structures. Not all diversions will cause a downstream portion of an otherwise perennial or intermittent stream to become ephemeral in a typical year; however, the modifications made by the final rule to the categories of tributaries and of lakes, ponds, and impoundments of jurisdictional waters help address the concerns raised by commenters regarding the potential impact of the proposed rule on longstanding water management practices in this country. The agencies are cognizant of the importance of water management in the States

and the explicit policy directives of Congress to recognize the authority of States to allocate and manage water resources within their respective jurisdictions. *See* 33 U.S.C. 1251(g), 1370.

Under the final rule, ephemeral features and other excluded artificial and natural features are not jurisdictional and do not become jurisdictional even if they episodically convey surface water from upstream relatively permanent jurisdictional waters to downstream jurisdictional waters in a typical year, and thereby help maintain the jurisdictional status of the upstream waters. This approach incorporates the plurality's requirement that jurisdictional waters be continuously present, fixed bodies of water and that dry channels, transitory puddles, and ephemeral flows be excluded from jurisdiction. 547 U.S. at 733-34; *see also id*. at 731 ("[T]he CWA authorizes federal jurisdiction only over 'waters.' 33 U. S. C. 1362(7)."). This approach also requires a regular and predictable surface water connection—one that occurs in a typical year—which addresses Justice Kennedy's concern that speculative and insubstantial connections may not be sufficient to establish jurisdiction. *Id.* at 784-86. The types of connections that maintain jurisdiction between relatively permanent bodies of water are described more fully below.

The agencies conclude that tributaries, lakes, ponds, and impoundments of jurisdictional waters that are relatively permanent flowing or standing waterbodies upstream of certain excluded features are jurisdictional so long as the non-jurisdictional feature maintains a channelized surface water connection to downstream jurisdictional waters in a typical year. Paragraph (b) of the final regulation identifies twelve categories of excluded features, but only those features that convey channelized surface flow between upstream relatively permanent waters and downstream jurisdictional waters in a typical year can maintain jurisdiction of the upstream waters. For example, non-jurisdictional ditches could be capable of conveying channelized surface water flow between upstream relatively permanent jurisdictional waters and

downstream jurisdictional waters in a typical year. Similarly, a surface water connection may occur through an ephemeral channelized conveyance and may result in the mixing of upstream and downstream relatively permanent waters following sufficient precipitation, but in all cases such a connection must occur in a typical year.

The final rule also provides that other types of artificial or natural features, such as dams or boulder fields, may maintain jurisdiction so long as they convey surface water flow from an upstream tributary, lake, pond or impoundment of a jurisdictional water to a downstream jurisdictional water in a typical year. The agencies have concluded that water flowing through features such as dams or boulder fields can sustain a regular and predictable surface connection between upstream and downstream waters and therefore can maintain jurisdiction between such waters.

By contrast, diffuse stormwater runoff and directional sheet flow by their very nature do not convey channelized surface flow and do not provide regular and predictable surface water connections between upstream relatively permanent bodies of water and downstream jurisdictional waters. Unchannelized surface flow, such as diffuse runoff or overland sheet flow, lacks an adequate physical indicator of regular surface flow and can be ubiquitous across the landscape, occurring over parking lots and lawns, for example. As Justice Kennedy notes in *Rapanos*, "mere hydrologic connection should not suffice in all cases[,]" 547 U.S. at 784, and the agencies agree with the *Rapanos* plurality that "[t]he plain language of the statute simply does not authorize [a] 'Land is Waters' approach to federal jurisdiction." *Id*. at 734. The agencies "must necessarily choose some point at which water ends and land begins[,]" *Riverside Bayview*, 474 U.S. at 132, and conclude that diffuse runoff and overland sheet flow connections are "too insubstantial for the hydrologic linkage to establish the required nexus with navigable waters as

traditionally understood." *Rapanos*, 547 U.S. at 784-85 (Kennedy, J. concurring in the judgment). In this final rule, the agencies therefore conclude that surface water flowing as unchannelized runoff or sheet flow over land cannot sustain a regular or predictable surface water connection between upstream and downstream waters and therefore cannot maintain jurisdiction between such waters. By contrast, channelized ephemeral features may indicate that surface water predictably moves from upstream relatively permanent waters to downstream jurisdictional waters, such that they may be capable of providing a surface water connection sufficient to warrant federal regulation over the upstream water. As noted above, a non-jurisdictional feature remains non-jurisdictional even if it provides a channelized surface water connection between jurisdictional waters in a typical year.

Like diffuse overland flow, the agencies also conclude that relatively permanent bodies of water that are connected to downstream jurisdictional waters only via groundwater are not jurisdictional and are more appropriately regulated by the States and Tribes under their sovereign authorities. The agencies have long interpreted the CWA as not authorizing jurisdiction over groundwater and have historically excluded groundwater from the definition of "waters of the United States." The agencies are retaining that longstanding principle in this final rule. *See* paragraph (b)(2). If groundwater is not jurisdictional, it also makes practical sense that surface water features connected only via groundwater likewise are not jurisdictional. *See Rapanos*, 547 U.S. at 725-26 (Scalia, J., plurality) (identifying groundwater connections as an example of the expansive interpretation of tributaries under the Act). The term "navigable" as used in the statute must be given some meaning, *see SWANCC*, 531 U.S. at 172, and regulating surface waters with no surface water connection to traditionally navigable waters stretches that meaning "beyond parody." *Rapanos*, 547 U.S. at 734 (Scalia, J., plurality). There are, however, certain unique

subsurface connections that could maintain jurisdiction as discussed below; the agencies recognize that there are some relatively permanent tributaries that are relocated below ground to allow reasonable development to occur.

In urban areas, for example, it can be common for surface waters to be buried underground through an artificial tunnel system to facilitate urban development. *See, e.g.*, Connectivity Report at 3-3. Examples include Jones Falls, which flows under Baltimore, Maryland, and daylights into the Baltimore's Inner Harbor; Park River which flows under Hartford, Connecticut, and daylights into the Connecticut River; and Mill Creek, a tributary of Lake Erie, which is diverted underground beneath downtown Erie, Pennsylvania, and daylights into Presque Isle Bay. These underground tunnels and similar channelized subsurface features do not become groundwater, even though they flow under the surface of the ground for a period of time. These features do not break the jurisdictional status of upstream tributaries subject to the conditions of paragraph (c)(12). In some cases where such channels never return to the surface or otherwise do not contribute surface water flow to a paragraph (a)(1) water in a typical year, the upstream surface water features may not be jurisdictional under the final rule. In all cases, the underground or buried portion of a channel network is not jurisdictional under the final rule. By comparison, tributaries that are relocated through a ditch or similar artificial surface channel are jurisdictional under the final rule so long as they continue to meet the flow conditions of paragraph (c)(12), including through the relocated portion.

In very limited circumstances, a tributary can naturally, temporarily flow underground as a channelized river or stream, maintaining the same or very nearly the same flow volume underground and at the downstream point where it returns to the surface. These natural systems are commonly referred to as subterranean rivers or streams and can occur as a result of unique

geologic formations, such as sink holes and lava tubes. Examples include the Popo Agie River in Wyoming, which becomes subterranean and daylights about a quarter of a mile downstream; the Lost River in Indiana, which flows underground for eight miles from where it disappears, to where it rises at two places to flow aboveground again; and formations like the St. Marks and Santa Fe Rivers in Florida, which flow into large sinkholes and reappear a little over one-half mile and three miles downstream, respectively. The agencies do not consider subterranean rivers to be groundwater, even though they flow under the surface of the ground for what is generally a short period of time through subterranean natural channels. Although it has never been promulgated in regulatory text, the agencies have historically treated these subterranean flowing connections as not severing jurisdiction over the upstream surface channel, and the Corps has developed expertise in performing field verifications for these unique waters. The final rule does not change this longstanding practice and for the first time provides certainty and transparency regarding the agencies' approach for making jurisdictional determinations. The agencies have added the phrase "subterranean river" to paragraph (c)(12) to clarify that subterranean rivers, as compared to groundwater and other subsurface waters, may not break jurisdiction of upstream tributaries, including any jurisdictional lakes, ponds, and impoundments of jurisdictional waters that contribute surface water flow through these tributaries, depending on the factual circumstances. These subterranean rivers are distinguished in this final rule from other surface waters that, for example, may disappear underground and never daylight or daylight as an aquifer-fed spring or headwater of another river.[37] The final rule does not maintain jurisdiction

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[37] *See* Connectivity Report at A-1, defining "aquifer" as "[a] geologic formation (*e.g.*, soil, rock, alluvium) with permeable materials partially or fully saturated with *ground water* that yields ground water to a well, spring, or stream." (emphasis added).

upstream of these other surface waters that may disappear underground and become part of the aquifer because the aquifer holds groundwater. The agencies have concluded that groundwater connections are an insufficient basis to assert jurisdiction over otherwise disconnected waters. In all cases, the underground portions of all waters are not jurisdictional under the final rule.

The final rule also establishes that waters that do not contribute surface water to a downstream territorial sea or traditional navigable water in a typical year are not jurisdictional. These waters include completely losing streams (*e.g.*, streams that experience a complete loss of surface water to a groundwater system) that do not reach traditional navigable waters in a typical year and waters that connect downstream only as a result of precipitation events that generally do not occur in a typical year (*e.g.*, 10-, 25-, 50-, 100- or 500-year storms or floods). These waters do not provide a regular surface water connection to jurisdictional waters. Given that the term "navigable" must be given some effect, and that the Supreme Court has cautioned the agencies to avoid interpretations of the statute that raise significant constitutional questions, the agencies conclude that such waters are more properly regulated as land and water resources of the States and Tribes. *See SWANCC*, 531 U.S. at 173.

As described in detail in Section III.G, adjacent wetlands are subject to a different jurisdictional test than tributaries, lakes, ponds, and impoundments of jurisdictional waters. According to the *Rapanos* plurality, for example, to be "waters of the United States," a tributary, lake, pond, or impoundment must be "a relatively permanent body of water connected to traditional interstate navigable waters," 547 U.S. at 742 (Scalia, J., plurality); to be "waters of the United States," a wetland must have "a continuous surface connection" to such relatively permanent waters, "making it difficult to determine where the 'water' ends and the 'wetland begins." *Id*. The final rule defines "adjacent wetlands" to include all wetlands that abut—

meaning to touch at least one point or side of—a territorial sea, traditional navigable water, tributary, lake, pond, or impoundment of a jurisdictional water. The final rule also includes other wetlands that are inseparably bound up with jurisdictional waters and relies on certain regular hydrologic surface connections to establish jurisdiction. For instance, the "adjacent wetlands" definition includes wetlands physically separated only by artificial structures such as dikes, or barriers, or divided by roads and similar structures so long as the structure allows for a direct hydrologic surface connection in a typical year: for example, through a culvert, flood or tide gate, pump, or similar feature. Jurisdiction of the wetland is severed when, in a typical year, an artificial feature does not allow for a direct hydrologic surface connection between the wetland and the jurisdictional water, or the wetland is not inundated by flooding from a territorial sea, traditional navigable water, tributary, lake, pond, or impoundment of a jurisdictional water. *See* 547 U.S. at 742 (Scalia, J., plurality) (such wetlands "do not implicate the boundary-drawing problem of *Riverside Bayview*," and thus do not have the "necessary connection" to jurisdictional waters that triggers CWA jurisdiction); *see also id*. at 747 (the plurality found "no support for the inclusion of physically unconnected wetlands as covered 'waters'").

Wetlands are jurisdictional if they are inundated by flooding from a territorial sea, traditional navigable water, tributary, lake, pond, or impoundment of a jurisdictional water in a typical year. The agencies conclude that these wetlands are inseparably bound up with their adjacent jurisdictional waters and are therefore jurisdictional. *See Rapanos*, 547 U.S. at 732 (Scalia, J., plurality) (quoting *Webster's New International Dictionary* 2882 (2d ed. 1954)) (recognizing floods as "making up such streams or bodies" of water); *id*. at 740 (recognizing the principle that wetlands that adjoin other jurisdictional waters are part of those waters for purposes of CWA jurisdiction). The final rule likewise asserts jurisdiction over lakes, ponds, and impoundments of

jurisdictional waters that are inundated in a typical year by flooding from a territorial sea, traditional navigable water, tributary, or another lake, pond, or impoundment of a jurisdictional water.

The final rule also provides that wetlands separated from jurisdictional waters only by a natural berm, bank, dune, or other similar natural feature are adjacent wetlands. These natural features are indicators of a sufficient hydrologic surface connection between the jurisdictional water and the wetland, and the agencies conclude that wetlands that are separated from jurisdictional waters only by such features are inseparably bound up with the adjacent jurisdictional waters and are therefore "part of those waters." *Id*.

Physically remote isolated wetlands (*i.e.*, wetlands that do not abut, are separated by more than a natural berm from, are not inundated by flooding in a typical year from, and do not have a direct hydrologic surface connection in a typical year to a jurisdictional non-wetland water) are not adjacent wetlands under the final rule. For example, impoundments that are formerly adjacent wetlands that are physically disconnected from other jurisdictional waters in a typical year are not jurisdictional under the final rule. Additionally, in keeping with the agencies' longstanding practice, the final rule maintains that wetlands can be jurisdictional only if they are adjacent to the territorial seas or a traditional navigable water, tributary, lake, pond or impoundment of a jurisdictional water. In 1986, the Corps defined "waters of the United States" as including "wetlands adjacent to [other jurisdictional] waters (other than waters that are themselves adjacent)," 51 FR 41250, meaning that wetlands obtain jurisdictional status under the CWA by virtue of their adjacency to traditional navigable waters, tributaries, and other actual

waters, not by adjacency to other wetlands.[38] In 2019, the agencies recodified this definition of "waters of the United States." 84 FR 56626. Under this final rule, wetlands cannot be adjacent to other wetlands; they can only be adjacent to the territorial seas, a traditional navigable water, a tributary, or a lake, pond, or impoundment of a jurisdictional water. This holds true regardless of any hydrologic connection between a distinct wetland (*i.e.*, a wetland delineated with boundaries distinct from those of an adjacent wetland) and an adjacent wetland when the distinct wetland is physically separated from the adjacent wetland by upland or other artificial or natural features. Because the agencies believe that the final rule's definition of "adjacent wetlands" is clear on the jurisdictional linchpin for adjacency (by tethering jurisdiction to paragraph (a)(1) through (3) waters), the agencies are not including the "other than waters that are themselves adjacent" provision from the 2019 Rule (and earlier versions) in this final rule.

B. Territorial Seas and Traditional Navigable Waters

1. What Are the Agencies Finalizing?

The agencies are making no substantive textual changes to the longstanding inclusion of traditional navigable waters and the territorial seas in the definition of "waters of the United States." The agencies are finalizing this portion of the rule as proposed, with slight modifications

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[38] The agencies note that at oral argument in *Rapanos*, Chief Justice Roberts recognized this principle, stating that the 1986 definition "covers wetlands adjacent to waters other than waters that are themselves wetlands," and "the Corps says we're not going to reach the wetland that is adjacent to another wetland." Transcript of Oral Argument at 45, 47, *Rapanos v. United States and Carabell v. United States*, 547 U.S. 715 (2006) (Nos. 04-1034, 04-1384). The Chief Justice added that this "suggests that even the Corps recognized that at some point you've got to say stop because logically any drop of water anywhere is going to have some sort of connection through drainage. And they're stopping there, and I wonder if we ought to take that same instinct that you see in [the wetlands definition] and apply it to your definition of tributary and say, at some point, the definition of tributary has to have an end. Otherwise, you're going to go and reach too far, beyond what Congress reasonably intended." *Id*. at 46.

discussed below. The final rule maintains these categories of "waters of the United States" but consolidates them into a single paragraph in the regulatory text.

Many commenters supported the retention of the agencies' longstanding foundational category of CWA jurisdiction, unchanged from previous regulatory text. They stated that the category was well understood, and its application guided by a developed body of case law. Most commenters supported integrating territorial seas into a single category with traditional navigable waters, agreeing with the agencies that it helped streamline the regulatory text, but some requested clarifications to maintain the distinction between the two types of waters. Some commenters requested that the agencies modify the test for traditional navigable waters by clarifying that such waters must be used to "transport commerce" rather than simply being "used" for or susceptible to "use" in interstate or foreign commerce, reflecting the terminology used by Congress in section 404(g) of the CWA. Responding to the agencies' request for comment on Appendix D, several commenters requested that the agencies eliminate or modify Appendix D to the U.S. Army Corps of Engineers Jurisdictional Determination Form Instructional Guidebook (hereinafter, "Appendix D"),[39] stating that Appendix D is confusing,

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

overstates the agencies' authority under existing case law, and allows the agencies to regulate virtually any isolated water by misapplying the established judicial tests for navigability under the CWA. Other commenters suggested the agencies retain Appendix D as useful field guidance and to avoid confusion associated with any changes in the agencies' approach to traditional navigable water determinations.

The agencies have considered all of the public comments received addressing these topics and are finalizing paragraph (a)(1) as proposed, with slight modifications to address questions regarding the inclusion of the territorial seas within a single category with traditional navigable waters. The agencies are not modifying the definition of "traditional navigable waters" as it has existed in regulatory text for decades. As discussed in Section II.G, when this final rule becomes effective, certain agency guidance documents, memoranda, and materials (*e.g.,* the 2003 *SWANCC* Guidance and 2008 *Rapanos* Guidance) will be rendered inoperative because they will no longer be necessary or material, and they may in fact create confusion as the agencies implement this final rule. However, because the agencies have not modified the definition of "traditional navigable waters," the agencies are retaining Appendix D to help inform implementation of that provision of this final rule, as discussed further in Section III.B.2.

2. Summary of Final Rule Rationale and Public Comment

The final rule defines "waters of the United States" to encompass traditional navigable waters and the territorial seas. The agencies' existing definition of "waters of the United States" includes all waters that are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide. *See, e.g.,* 33 CFR 328.3(a)(1). This paragraph of the 2019 Rule (and previous regulations) encompasses waters that are often referred to as waters more traditionally

understood as navigable or "traditional navigable waters." A separate paragraph of the 2019 Rule (and previous regulations) lists the territorial seas as jurisdictional. *See* 33 CFR 328.3(a)(6). To streamline and simplify the definition of "waters of the United States," the agencies are finalizing the rule as proposed to include both traditional navigable waters and the territorial seas into a single paragraph of jurisdictional waters. The final rule makes no other substantive changes to these historically regulated categories of waters.

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

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

In the proposed rule, the agencies included the territorial seas as a type of traditional navigable water because the agencies had not identified an instance in which a territorial sea would not also be considered traditionally navigable and thus proposed that the broader term

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

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

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

Id. at 563. As explained by the Supreme Court in 2012, "[t]he *Daniel Ball* formulation has been invoked in considering the navigability of waters for purposes of assessing federal regulatory authority under the Constitution, and the application of specific federal statutes, as to the waters and their beds." *PPL Montana, LLC v. Montana*, 565 U.S. 576, 592 (2012). "With respect to the federal commerce power, the inquiry regarding navigation historically focused on interstate

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

Many commenters expressed support for the agencies' decision to retain the existing regulatory text describing traditional navigable waters. These commenters stated that the existing text is clear, concise, predictable, and well understood by the public. Other commenters expressed concern about implementation of the regulation and guidance and suggested modifications to the regulation. Some commenters suggested clarifying that traditional navigable waters must be used to "transport commerce," as that is the phrase Congress used to describe the waters over which the Corps retains permitting authority when States and Tribes assume CWA section 404 permitting. *See* 33 U.S.C. 1344(g). As discussed in Section II.E, and consistent with

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

The Supreme Court has not spoken directly to the precise meaning of the phrase "traditional navigable waters" as that term applies in the CWA context, but it has stated that the statutory "term 'navigable' has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made." *SWANCC*, 531 U.S. at 172. In the agencies' view, the Supreme Court has therefore signaled an acceptance of the first prong of *The Daniel Ball* test. Whether the second prong applies in full to the administrative definition of "traditional navigable waters" is less clear, but the legislative history suggests that Congress had in mind a more expanded notion of interstate commerce when enacting the CWA, including overland links to commercial navigation on navigable-in-fact waters.[40] As described in Section II.E, the Supreme Court has stated that nothing in the legislative history of the Act suggests "that Congress intended to exert anything more than its commerce power over navigation." *SWANCC*, 531 U.S. at 168 & n.3. The agencies therefore are not modifying the longstanding regulatory text

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

for traditional navigable waters to specifically align it with the RHA test for jurisdiction, as some commenters suggested.

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

Other commenters provided examples of traditional navigable water determinations about which the commenters asserted that the capacity to float a boat in a water that is near an interstate highway was deemed sufficient to make a traditional navigable water determination under the paragraph (a)(1) standard. This interpretation is inconsistent with the applicable case law, including the cases discussed in Appendix D. Simply driving across a State line and using a waterbody, or having the potential to use a waterbody, is similar to the theory of jurisdiction that the Supreme Court specifically rejected in *SWANCC*. One of the arguments raised in support of the "Migratory Bird Rule" for CWA jurisdiction was that individuals cross State lines and

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

The agencies intend to update their guidance materials, if and as necessary, as the agencies begin to implement the revised tests for jurisdiction established by the final rule, both initially and as the agencies gain field experience to address implementation questions that may arise. As part of that process, the agencies will continue to evaluate prior guidance on how to apply established case law principles to traditional navigable water determinations. The agencies will also implement field elevation procedures should difficult legal questions arise, including requiring such interpretations to be reviewed by senior legal staff at each of the agencies' respective headquarters. Implementation of this section of the traditional navigable waters

provision of paragraph (a)(1) in the final rule will be case-specific, as it has always been. This case-specific analysis will include relevant portions of EPA and Corps regulations, prior determinations by the Corps and by the federal courts, and case law. Should the agencies determine that additional, more formal guidance on traditional navigable waters is warranted, the agencies will develop any such guidance in compliance with Executive Order 13891, and with any applicable public participation requirements.

C. Interstate Waters

1. What Are the Agencies Finalizing?

Consistent with the proposal, this final rule removes interstate waters, including interstate wetlands, as a separate category of "waters of the United States." The agencies are finalizing this aspect of the proposal to more closely align the regulatory definition with the constitutional and statutory authorities reflected in the CWA and judicial interpretations of the term "navigable waters," while balancing the statute's objective to restore and maintain the integrity of the nation's waters and its policy directives to preserve and protect the rights and responsibilities of the States.

Many commenters supported the removal of interstate waters and wetlands as an independent category of "waters of the United States." Those commenters stated that such a category was not authorized by the CWA and that, as proposed by the agencies, waters must be connected to traditional navigable waters to be jurisdictional under the CWA. Commenters also stated that interstate waters and wetlands that actually fall within the scope of CWA jurisdiction would be covered by the other categories of waters as proposed. Other commenters opposed removing interstate waters as an independent jurisdictional category. Those commenters stated that any water that crosses a State line is by definition a "water of the United States." The same is true,

some commenters added, for waters that cross tribal boundaries. Additional commenters added that the proposed rule would arbitrarily narrow the scope of CWA jurisdiction over ecologically important waters and recommended that the agencies continue to regulate interstate waters. Other commenters suggested that the exclusion for ephemeral features, if finalized, would help balance the inclusion of interstate waters as a category.

The agencies have considered this diverse range of opinions, and for the reasons discussed below, have concluded that the best interpretation of the CWA and its legislative history is to finalize the regulatory text as proposed, without a separate interstate waters category. Interstate waters and interstate wetlands remain subject to CWA jurisdiction under the final rule if they are waters identified in paragraph (a)(1), (2), (3), or (4) (generally referred to as "paragraph (a)(1) through (4) waters" or "a paragraph (a)(1) through (4) water" in this notice).

2. Summary of Final Rule Rationale and Public Comment

The agencies have evaluated their earlier legal and policy rationales supporting the inclusion of interstate waters as a separate category of "waters of the United States" and comments on the proposed rule and are not including this category in the final rule. The agencies have concluded that the regulation of interstate waters as a standalone category is based on an overly broad reading of the original Water Pollution Control Act (WPCA) of 1948 and lacks foundation in statutory text of the 1972 CWA amendments. The WPCA stated that the "pollution of interstate waters in or adjacent to any State or States (whether the matter causing or contributing to such pollution is discharged directly into such waters or reaches such waters after discharge into a tributary of such waters), which endangers the health or welfare of persons in a State other than that in which the discharge originates, is hereby declared to be a public nuisance and subject to abatement as herein provided." WPCA of 1948, 2(d)(1), (4), 62 Stat. 1155, 1156-57. The statute

defined "interstate waters" as "all rivers, lakes, and other waters that flow across, or form a part of, State boundaries." *Id*. at 10(e), 62 Stat. 1161.

In 1961, Congress amended the statute to substitute the term "interstate or navigable waters" for "interstate waters" in the statute's enforcement provision while making minor changes to the definition of "interstate waters." *See* Pub. L. No. 87-88, 75 Stat. 208 (1961). In 1965, Congress again amended the statute to require states to develop water quality standards for all "interstate waters" within their borders. *See* Pub. L. No. 89-234, 79 Stat. 908 (1965). In 1972, Congress amended the statute again and selected the term "navigable waters" as the operative term for the major regulatory programs established by the 1972 amendments, dropping the definition of "interstate waters" from the statute. *See, e.g.*, 33 U.S.C. 1362(7) (defining "navigable waters" as "waters of the United States"). In doing so, however, Congress allowed States to retain existing water quality standards for interstate waters developed under the pre-1972 statutory program. *See* 33 U.S.C. 1313(a).

The EPA promulgated its first regulatory definition for the term "waters of the United States" in 1973. 38 FR 13528 (May 22, 1973). In that regulation, the EPA administratively determined that "interstate waters" should be a separate category of "waters of the United States," distinct from the traditional navigable waters category, and until this final rule the agencies had retained it as a separate category.

The agencies previously viewed navigable and interstate waters as having distinct and separate meanings because Congress in 1961 used both terms in the statute. The agencies explained their prior interpretation in part through the doctrine of congressional acquiescence, in that Congress was aware of the EPA's retention of "interstate waters" as a separate category when amending the CWA in 1977 (making no amendments to remove the agencies' regulatory

inclusion of interstate waters), and therefore acquiesced to its inclusion as a separate category. The agencies have also historically relied on two Supreme Court cases – *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972) and *City of Milwaukee v. Illinois*, 451 U.S. 304 (1981) – addressing interstate water pollution to further support their prior interpretation. In the 1972 case, which was decided prior to the date of the 1972 CWA amendments, the Supreme Court referred to the two categories in the disjunctive, implying that the Court viewed the pre-1972 statutory program as encompassing two separate categories. *See Illinois*, 406 U.S. at 102 ("it is federal, not state, law that in the end controls pollution of *interstate or navigable waters"*) (emphasis added). The 1981 case is described further below. The agencies also have referred to section 303(a) of the CWA as further evidence that Congress intended "interstate waters" to be retained as an independent category of jurisdictional waters because that provision authorized water quality standards for "interstate waters" developed following the 1965 amendments to remain in effect, subject to revision under the new statutory program. A more complete summary of the agencies' prior legal position with respect to interstate waters was included in a Technical Support Document prepared in support of the 2015 Rule ("2015 Rule TSD").[41] The agencies now conclude that their prior interpretation is inconsistent with the text and structure of the CWA.

When Congress enacted the 1972 CWA amendments, it selected the term "navigable waters" to frame the scope of federal regulatory jurisdiction under the Act. Rather than interpreting those amendments as retaining "interstate waters" as a separate and distinct category of "waters of the United States," the agencies now conclude that a more natural interpretation of the 1972

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[41] U.S. EPA and U.S. Department of the Army. Technical Support Document for the Clean Water Rule: Definition of Waters of the United States (May 2015) (Docket ID: EPA-HQ-OW-2011-0880-20869), *available at* https://www.regulations.gov/document?D=EPA-HQ-OW-2011-0880-20869.

amendments is an express rejection of that independent category, as Congress had before it both options within the scope of the statute it was modifying. Congress specifically did not carry that term forward as the operative phrase for federal jurisdiction. Under basic canons of statutory construction, the agencies begin with the presumption that Congress did so intentionally. *See, e.g.*, *Stone v. INS*, 514 U.S. 386, 397 (1995) ("When Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect.").

Congressional acquiescence is a doctrine of limited application and was specifically rejected as a basis for expansive federal jurisdiction in *SWANCC* in the context of analyzing the Corps' 1977 regulations. *SWANCC*, 531 U.S. at 170-71 ("Although we have recognized congressional acquiescence to administrative interpretations of a statute in some situations, we have done so with extreme care."). The plurality opinion in *Rapanos* further elaborated, when also rejecting the notion that Congress acquiesced to the Corps' 1977 regulations, that "Congress takes no governmental action except by legislation. What the dissent refers to as 'Congress' deliberate acquiescence' should more appropriately be called Congress's failure to express any opinion." *Rapanos*, 547 U.S. at 750 (Scalia, J., plurality). The plurality explained that we cannot know whether Congress' inaction resulted from their belief that the Corps' regulations were correct, or from other reasons, such as confidence that courts would correct excesses or political considerations. *See SWANCC*, 531 U.S. at 169-70, 178 n.5 ("Absent such overwhelming evidence of acquiescence, we are loath to replace the plain text and original understanding of a statute with an amended agency interpretation."). The agencies now conclude, consistent with the admonitions of *SWANCC* and the *Rapanos* plurality, that the doctrine of congressional acquiescence is not a sound basis to guide the agencies' decision regarding the scope of federal jurisdiction over certain waters in this final rule, particularly as it applies to interstate waters

divorced from any notion of commercial navigability.

The legislative history of the 1972 amendments, in fact, supports the agencies' conclusion that Congress did not consider interstate waters and navigable waters to be two separate and distinct categories, and instead referred to terms in the pre-1972 statutory regime conjunctively as "interstate navigable waters." S. Rep. No. 92-414, at 2 (1971) ("Each State was required by the 1965 Act to develop standards for water quality within its boundaries. These standards were to be applied to all *interstate navigable waters* flowing through the State; intrastate waters were not included.") (emphasis added); *id.* at 4 ("The setting of water quality standards for *interstate navigable waters* . . . is the keystone of the present program for control of water pollution.") (emphasis added); *id*. ("The States have first responsibility for enforcement of their standards. When approved by the [EPA], however, the standards for *interstate navigable waters* become Federal-State standards.") (emphasis added). In fact, the legislative history suggests that Congress modified the text of the statute in 1972 in part because the States had narrowly interpreted the phrase "interstate" to apply only to interstate navigable waters and had failed to establish water quality standards for the intrastate tributaries to such waters. *See, e.g., id.* at 77 ("The control strategy of the Act extends to navigable waters. . . . Through a narrow interpretation of the definition of interstate waters the implementation [of the] 1965 Act was severely limited."); 118 Cong. Rec. 10240 (1972) (the amendment "expands the coverage of the law to intrastate, as well as *interstate navigable waterways*") (emphasis added). In 1976, the Supreme Court shared the same view of the pre-1972 statutory scheme: "Before it was amended in 1972, the Federal Water Pollution Control Act employed ambient water quality standards specifying the acceptable levels of pollution in a State's *interstate navigable waters* as the primary mechanism in its program for the control of water pollution." *EPA v. California*, 426

U.S. 200, 202 (1976) (emphasis added) (footnote omitted). This history suggests that the section 303(a) provision relating to existing water quality standards for "interstate waters" was referring to "interstate navigable waters," not interstate waters more broadly.

Neither Supreme Court case previously relied on by the agencies and discussed in the 2015 Rule TSD addressed the specific question whether "interstate waters" and "navigable waters" are separate and distinct categories of jurisdictional waters under the CWA. They instead addressed interstate water pollution generally, and the water at issue in those cases was Lake Michigan, an interstate navigable-in-fact water. The 1981 decision, however, did recognize that the 1972 amendments "were viewed by Congress as a 'total restructuring' and 'complete rewriting' of the existing water pollution legislation considered in that case." *Milwaukee*, 451 U.S. at 317 (citing legislative history of the 1972 CWA amendments). This supports the agencies' conclusion that prior iterations of the statute, referring to both interstate waters and navigable waters, were replaced with a completely new program in 1972, not that certain aspects of that program continued through congressional acquiescence in a later regulatory determination. The final rule therefore eliminates "interstate waters" as a separate category of "waters of the United States."

By eliminating a separate category for interstate waters, the final rule adheres to the legal principles discussed in Section II.E by including within the definition of "waters of the United States" traditional navigable waters, the territorial seas, and waters subject to the ebb and flow of the tide; tributaries to such waters; certain lakes, ponds, and impoundments of otherwise jurisdictional waters; and wetlands adjacent to jurisdictional waters. Because the agencies' authority flows from Congress' use of the term "navigable waters" in the CWA, the agencies lack authority to regulate waters untethered from that term. Nothing in the legislative history of the 1972 CWA amendments "signifies that Congress intended to exert anything more than its

commerce power over navigation." *SWANCC*, 531 U.S. at 168 n.3.

Therefore, those interstate waters that would satisfy the definitions in this final rule are jurisdictional; interstate waters without any surface water connection to traditional navigable waters or the territorial seas are not within the agencies' authority under the CWA and are more appropriately regulated by the States and Tribes under their sovereign authorities.

The agencies' rationale is supported by the U.S. District Court for the Southern District of Georgia's remand order. *Georgia v. Wheeler*, No. 2:15-cv-00079, 2019 WL 3949922 (S.D. Ga. Aug. 21, 2019). There, the court directly addressed the 2015 Rule's assertion of authority over all interstate waters, including nonnavigable interstate waters. *Id*. at *10-13. The court found that "the inclusion of all interstate waters in the definition of 'waters of the United States,' regardless of navigability, extends the Agencies' jurisdiction beyond the scope of the CWA because it reads the term navigability out of the CWA." *Id*. at *12. The court also found that, because the 2015 Rule would assert jurisdiction over tributaries, adjacent waters, and case-by-case waters based on their relationship to non-navigable isolated interstate waters, it would result in federal jurisdiction over even the most remote and isolated waters that the Supreme Court held in *SWANCC* are beyond the reach of the CWA. *Id*. at *13. The agencies agree with the court's analysis and conclusion.

This final rule marks a shift away from prior agency positions. The agencies received public comment that the proposal had failed to analyze potential impacts resulting from the removal of "interstate waters" as a separate category, but as noted in the preamble to the proposed rule, the agencies are not aware of any database that identifies the jurisdictional status of interstate waters based solely on the fact that they cross state lines, or any other resource that would identify these waters. The agencies therefore lack the ability to perform a comparative analysis with any

precision. Some commenters provided examples of interstate waters that may lose jurisdictional status if the separate category is eliminated; however, the Corps' ORM2 database does not contain any jurisdictional determinations based solely on a water's status as an interstate water. Since issuance of the *Rapanos* Guidance, the Corps has not tracked this category separately for approved jurisdictional determinations conducted under the Guidance in ORM2.

The agencies requested comment on the rationales in favor of and opposed to a separate jurisdictional category for "interstate waters." Some commenters supported the proposal to remove "interstate waters" as a separate category, noting that there is no statutory or constitutional basis to regulate interstate waters that would not otherwise be jurisdictional and suggesting that the agencies lacked the authority to include a separate "interstate" category in earlier versions of the regulations. Other commenters opposed the proposal, asserting that the text and structure of the CWA, legislative history, and prior court cases, including Justice Scalia's discussion in *Rapanos*, demonstrate that the CWA applies to interstate waters regardless of navigability. The agencies considered these comments and, for the reasons explained above, conclude that the final rule most closely aligns with the agencies' constitutional and statutory authorities reflected in the CWA and relevant judicial interpretations of the term "navigable waters" and the legislative history of the CWA, while balancing the statute's objective to restore and maintain the integrity of the nation's waters and its policy directives to preserve and protect the rights and responsibilities of the States.

Some commenters stated that the agencies did not provide sufficient rationale for deviating from their prior analysis and interpretation, as provided in the 2015 Rule TSD. The agencies disagree, as the proposal clearly identified independent reasons questioning the validity of the agencies' prior interpretation. The agencies' 2015 Rule TSD, for example, included three

primary arguments supporting the prior interpretation: first, the language, structure, and history of the CWA demonstrate that Congress intended to include interstate waters in addition to navigable waters; second, the Supreme Court decisions in *Rapanos* and *SWANCC* did not constrain CWA jurisdiction over isolated, nonnavigable, interstate waters; and third, Supreme Court precedent supports jurisdiction over interstate waters, regardless of navigability. These arguments are addressed in the proposal and in earlier sections of this notice, but the agencies provide additional detail to respond to comments received as follows.

The 2015 Rule TSD analyzed two Supreme Court decisions to support its conclusion that interstate waters should be a separate category of jurisdiction under the CWA. The first decision was issued in 1972, just prior to the 1972 CWA amendments, and concluded that federal common law was appropriate to resolve a cross-border water pollution dispute among states where existing statutes did not address the dispute. *Illinois,* 406 U.S. 91. The Court found that where "no fixed rules" govern cross-boundary pollution disputes, "these will be equity suits in which the informed judgment of the chancellor will largely govern." *Id*. at 107-08.

The second decision was issued in 1981, and it analyzed the effect of the 1972 amendments on a federal common law claim concerning the same cross-border water pollution dispute that was presented the 1972 case. *City of Milwaukee,* 451 U.S. 304. In that case, the Court acknowledged the 1972 amendments and noted that "[t]he establishment of such a self-consciously comprehensive program by Congress, which certainly did not exist when *Illinois v. Milwaukee* was decided, *strongly suggests* that there is no room for courts to attempt to improve on that program with federal common law." *Id*. at 319 (emphasis added).

Contrary to the assertions in the 2015 Rule TSD, however, the Court did not conclude that

the CWA occupies the field with regard to all interstate waters.[42] Instead, the Court considered the facts of the case before it—whether NPDES permits issued by an authorized State in compliance with the CWA could be modified or augmented by federal common law claims brought by a downstream State. Focusing on respondents' claims that discharges from the facilities were causing a public nuisance, the Court observed that, "the action of Congress in supplanting the federal common law is perhaps clearest when the question of effluent limitations for discharges from the two treatment plants is considered." *City of Milwaukee, 451* U.S. at 319-20. The Court identified the numerous provisions of the permits that addressed discharges and overflows from the facilities, and the State-initiated enforcement action contemplated by the CWA, and concluded that "[t]here is no 'interstice' here to be filled by federal common law: overflows are covered by the Act and have been addressed by the regulatory regime established by the Act. Although a Federal court may disagree with the regulatory approach taken by the agency . . . such disagreement alone is no basis for the creation of federal common law." *Id*. at 323.

The Court also noted that in its 1972 decision, the Court was concerned that the downstream State "did not have any forum in which to protect its interests unless federal common law were

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[42] *See* U.S. EPA and Department of the Army, Technical Support Document of the EPA-Army Clean Water Rule at 210 (May 20, 2015) ("2015 Rule TSD") (Docket ID: EPA-HQ-OW-2011-0880-20869) available at https://www.regulations.gov/document?D=EPA-HQ-OW-2011-0880-20869. ("In *City of Milwaukee*, the Court found that the CWA was the 'comprehensive regulatory program' that 'occupied the field' (451 U.S. 317) with regard to interstate water pollution, eliminating the basis for an independent common law of nuisance to address interstate water pollution."). The 2015 Rule TSD also asserts that the Court "expressly overruled" its decision in *Illinois*; however, a more precise statement would be that the Court found no federal common law remedy available "*at least so far as concerns the claims of respondents*" because Congress occupied the field with a federal regulatory program that establishes effluent limits and other specific requirements that supersede the "often vague and indeterminate nuisance concepts and maxims of equity jurisprudence." *City of Milwaukee*, 451 U.S. at 317 (emphasis added).

created," *City of Milwaukee*, 541 U.S. at 325, but that the NPDES permitting provisions of the 1972 amendments "provided ample opportunity for a State affected by decisions of a neighboring State's permit-granting agency to seek redress." *Id*. at 325-26 (identifying the CWA requirement to provide notice to affected States and opportunity to comment and request public hearings, the Wisconsin law that provides the same, affected States' opportunity under the CWA to petition the EPA to object to a NPDES permit, and noting that respondents did not take advantage of these provisions). The case therefore presented a dispute between States concerning NPDES permits lawfully issued for discharges into an otherwise navigable water—Lake Michigan. The Supreme Court did not consider disputes outside of the NPDES permit program or those concerning non-navigable interstate waters, and the Court did not broadly conclude that the CWA occupies the field of all interstate water pollution.[43] All it had before it was the CWA, and as discussed in Section II, Congress chose not to exercise its full powers under the Commerce Clause when enacting the 1972 amendments. Congress specifically recognized that there are other land and water resources that are more appropriately regulated by the States and Tribes under their sovereign authorities. Field preemption cannot extend beyond the field. *Hines v. Davidowitz*, 312 U.S. 52, 78–79 (1941) ("[e]very Act of Congress occupies some field, but we

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[43] In a footnote, the 2015 Rule TSD identifies two other Supreme Court decisions and concludes that "[n]othing in either decision limits the applicability of the CWA to interstate water pollution disputes involving navigable interstate waters or interstate waters connected to navigable waters." 2015 Rule TSD at 211 n.16 (referencing *International Paper v. Ouellette*, 479 U.S. 481 (1987), and *Arkansas v. Oklahoma*, 503 U.S. 91 (1992)). Similar to the facts of *City of Milwaukee*, both of these cases addressed disputes that arose in the CWA's NPDES permitting context for waters that would otherwise be jurisdictional—Lake Champlain and the Illinois River. In neither case was the Court asked to consider whether or how the CWA may apply to non-navigable interstate waters, and these cases do not provide useful context or precedent on that issue. The 2015 Rule TSD similarly concluded that neither *SWANCC* nor *Rapanos* addressed or limited CWA jurisdiction over non-navigable interstate waters. *See* Section II.E of this notice for the agencies' detailed analysis of the *SWANCC* and *Rapanos* decisions.

must know the boundaries of that field before we can say that it has precluded a state from the exercise of any power reserved to it by the Constitution"); *see also Gonzales v. Oregon*, 546 U.S. 243, 275 (2006); *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475 (1996); *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 756 (1985)).

The agencies also requested comment on an alternative approach that would retain "interstate waters" as a separate category, reflecting longstanding agency practice, and whether the term "interstate" should be interpreted as crossing between States, between States and tribal lands, between States and/or tribal lands and foreign countries, or other formulations. Some commenters opposed this alternative approach, stating that the agencies lacked the authority to codify or implement it. Other commenters supported retaining "interstate waters" as a separate category and expressed concern that removing it would eliminate the EPA's role as a co-regulator in cross-boundary disputes over water quality.

The CWA provides two opportunities for the EPA to mediate disputes among States: the section 401(a)(2) neighboring jurisdiction notification provisions for federally permitted projects that may discharge to navigable waters and the section 319(g) provisions allowing the EPA to convene an interstate management conference to address cross-boundary nonpoint pollution in navigable waters. In the past, these provisions have been invoked infrequently by States, and the agencies do not expect a significant increase in cross-boundary disputes as a result of this rulemaking. In addition, the EPA can address concerns of States whose waters may be affected by the issuance of a permit in another State through the permit objection process pursuant to CWA sections 402(b)(5), 402(d)(d), and 40 CFR 123.44(c)(2). As demonstrated in *City of Milwaukee*, if a cross-boundary dispute is one that is contemplated and addressed by the CWA, such as the sufficiency of effluent limits in a NPDES permit, the statute has occupied the field

and federal common law does not provide a remedy. 451 U.S. at 317. However, if a State NPDES permit or a section 401 certification is not required, the EPA does not have a role within the CWA permitting framework to address cross-boundary disputes; similarly, if a water is not a "water of the United States," then the EPA's conference convening authorities under section 319(g) would not apply. In addition, and as described in the Section II.B of this notice, the CWA provides the EPA with numerous other authorities to provide technical assistance to States and Tribes to facilitate the management of non-jurisdictional waters.[44]

Under the current framework, the remedies available for cross-boundary water pollution disputes over non-jurisdictional waters depends upon the parties and the issues in the case. As an initial matter, many State programs regulate more waters than are covered by the federal definition of "waters of the United States" and may have similar notification provisions in place for States affected by a State-issued NPDES permit. *See e.g.*, Wis. Stat. 281.33 (authorizing Wisconsin to issue NPDES permits for all waters of the State); Wis. Admin. Code. 203.03 (providing notice during the NPDES process to other agencies, including other States potentially affected by the discharge). This important fact supports the agencies' conclusion that all States protect their water resources under State law and many have the ability and expertise to do so in the absence of federal regulation, as discussed in more detail in the Resource and Programmatic Assessment for the final rule. As they do today, remedies for pollution disputes among States that do not implicate CWA sections 319(g), 401, or 402 would likely derive from federal

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[44] In addition, the notion that categorical federal regulation of interstate waters is necessary to end water pollution disputes between States would call into the question the need for CWA section 103 ("Interstate Cooperation and Uniform Laws"), 33 U.S.C. 1253, which establishes a framework for the Administrator to encourage cooperation between States for the prevention and control of pollution.

common law under the Supreme Court's original jurisdiction. *See, e.g.*, *Illinois,* 406 U.S. at 98-99. Remedies for disputes between a State and a public or private party would likely derive from State or federal common law and be heard by State or Federal courts. *See id.* at 100, 107-08; *International Paper*, 479 U.S. at 497-500.

D. Tributaries

1. What Are the Agencies Finalizing?

In this final rule, the agencies retain "tributaries" as a category of jurisdictional waters subject to CWA jurisdiction. The final rule defines "tributary" to mean a river, stream, or similar naturally occurring surface water channel that contributes surface water flow to the territorial seas or traditional navigable waters (paragraph (a)(1) waters) in a typical year either directly or through one or more tributaries (paragraph (a)(2) waters), lakes, ponds, and impoundments of jurisdictional waters (paragraph (a)(3) waters), or adjacent wetlands (paragraph (a)(4) waters). A tributary must be perennial or intermittent in a typical year. The alteration or relocation of a tributary does not modify its jurisdictional status as long as it continues to satisfy the flow conditions of this definition. A tributary does not lose its jurisdictional status if it contributes surface water flow to a downstream jurisdictional water in a typical year through a channelized non-jurisdictional surface water feature, through a subterranean river, through a culvert, dam, tunnel, or similar artificial feature, or through a debris pile, boulder field, or similar natural feature.

As discussed in greater detail in Section III.E, the term "tributary" includes a ditch that either relocates a tributary, is constructed in a tributary, or is constructed in an adjacent wetland as long as the ditch satisfies the flow conditions of the "tributary" definition. A ditch can also be a traditional navigable water if it meets the conditions of that category. The agencies are excluding

all other ditches from the definition of "waters of the United States," other than those identified in paragraph (a)(1) or (2) and ditches any portion of which are constructed in an adjacent wetland that lack perennial or intermittent flow (meaning they do not satisfy the "tributary" definition in paragraph (c)(12)) but that develop wetlands in all or portions of the ditch that satisfy the "adjacent wetlands" definition in paragraph (c)(1). Excluded ditches may be subject to regulation under State or tribal law and could potentially be conveyances of discharges of pollutants from "point sources" subject to CWA permitting (*see* 33 U.S.C. 1362(14)) if they convey pollutants from a discharger to jurisdictional waters.

Regardless of the name they are given locally (*e.g.*, creek, bayou, branch, brook, run), or their size (*e.g.*, discharge volume, width, depth, stream order), waters that meet the definition of "tributary" are jurisdictional under this final rule. Surface features that flow only in direct response to precipitation, such as ephemeral streams, swales, gullies and rills, are not tributaries. These features lack the required perennial or intermittent flow to satisfy the "tributary" definition and therefore are not jurisdictional. However, such features may convey surface water flow from an upstream jurisdictional water to a downstream jurisdictional water without severing jurisdiction of the tributary.

The regulatory status of tributaries has evolved over the last several decades, resulting in confusion for the regulated community and regulators alike. Some commenters said that all channels on the landscape that convey water, regardless of flow regime, should be subject to CWA regulation, including both natural and artificial channels. Others asserted that Congress intended to regulate only traditional navigable waters, and navigable tributaries to those waters. Some would regulate all ditches, while others would exclude all ditches from CWA jurisdiction. Some stated that all ephemeral washes should be regulated, while others viewed ephemeral

features as more like land that is wet after it rains. Some would extend jurisdiction to perennial rivers and streams and cut off jurisdiction for intermittent or seasonal waters. Others would regulate intermittent waters based on a minimum number of days of continuous flow, such as 30, 90, or 185. Even the Supreme Court has struggled with articulating clear principles governing which tributaries to traditional navigable waters should be subject to CWA jurisdiction, as evidenced by the fractured opinion in *Rapanos*. What is clear from that opinion, however, is that a majority of the Court believed the agencies' existing standard for tributaries at that time raised serious questions regarding the scope of the agencies' authority under the CWA. *See* Section II.E.2.

The agencies proposed a definition for "tributary" that they believed respected their statutory and constitutional authorities, consistent with principles established in *Riverside Bayview*, *SWANCC*, and *Rapanos*. Many commenters agreed with the proposal, indicating that it balanced federal authority over the core waters targeted by Congress under the CWA with waters that are more appropriately regulated solely by the States and Tribes. Others argued that the proposed "tributary" definition regulated too broadly, preferring instead that the agencies restrict jurisdiction to perennial tributaries only. Others argued that the agencies failed to regulate ecologically important ephemeral reaches and cut off jurisdiction to headwater reaches that are important to the tributary network.

The agencies have considered all comments received and have crafted a final regulatory definition of "tributary" designed to adhere to the legal principles articulated in this notice and that provides a predictable, implementable regulatory framework. The agencies are finalizing their proposal to regulate perennial and intermittent tributaries to traditional navigable waters, while excluding ephemeral streams from CWA jurisdiction as those features are more

appropriately regulated by States and Tribes under their sovereign authorities. However, the agencies have modified the final rule to reduce the instances in which natural and artificial features and structures sever jurisdiction of upstream waters, as discussed in Section III.A.3 and in more detail below. The agencies conclude that interpreting upstream waters that contribute surface water flow in a typical year to a paragraph (a)(1) water to be part of the regulated tributary network better balances the CWA's objective in section 101(a) with the need to respect State and tribal authority over land and water resources as mandated by Congress in section 101(b).

2. Summary of Final Rule Rationale and Public Comment

The definition of "tributary" in the final rule reflects the authority granted by Congress to regulate navigable waters and the interconnected nature of the tributary system, as well as the ordinary meaning of the term "waters." In addition, the agencies are adhering to their constitutional and statutory authority regarding the role of the Federal government and limits on its authority to regulate the use of land and waters within State and tribal boundaries, and their intention to establish a clear and easily implementable definition. The definition of "tributary" in the final rule sets a boundary on the scope of the regulation to ensure that it is consistent with the role of the Federal government under the Constitution and the CWA. As the Supreme Court recognizes, States traditionally exercise "primary power over land and water use," *SWANCC*, 531 U.S. at 174. The Federal government should avoid pressing against the outer limits of its authority when doing so would infringe upon the traditional rights and responsibilities of States to manage their own waters. *See id*. at 172-73 and *supra* Section II.E.

Under this final rule, a tributary must be perennial or intermittent, and it must contribute surface water flow in a typical year to a traditional navigable water or territorial sea directly or

through one or more waters identified in paragraph (a)(2), (3), or (4) (generally referred to as "paragraph (a)(2) through (4) waters" or "a paragraph (a)(2) through (4) water" in this notice), or through one or more of the features described in Section III.A.3. The "tributary" category includes waters that, due to their relatively permanent flow classifications and their contribution of surface water flow to paragraph (a)(1) waters, are appropriately regulated under the Commerce Clause powers that Congress exercised when enacting the CWA. The agencies have concluded that their regulatory authority under the CWA and Supreme Court precedent is most appropriately interpreted to encompass the perennial and intermittent flow classifications provided in the definition of "tributary," and that this approach also balances the regulation of the Federal government with the authority of States and Tribes to more appropriately regulate certain waters within their jurisdiction, such as ephemeral streams. The agencies have also concluded that this definition effectively furthers both the objective of the Act to "restore and maintain the chemical, physical, and biological integrity of the nation's waters" and the "policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution [and] to plan for the development and use (including restoration, preservation, and enhancement) of land and water resources . . . ." 33 U.S.C. 1251(b); *see also Rapanos*, 547 U.S. at 737 (Scalia, J., plurality). The agencies' approach to defining "tributary" is also intended to ensure that federal regulatory jurisdiction does not intrude upon State, tribal, and local control of land and water use decisions. *See Rapanos, 547 U.S.* at 738 (Scalia, J., plurality) ("Regulation of land use, as through the issuance of the development permits . . . is a quintessential state and local power."). With this final definition, the agencies seek to avoid "impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States." 33 U.S.C. 1370.

A clear regulatory line between jurisdictional and excluded waters has the additional benefit of being less complicated than prior regulatory regimes that required a case-specific significant nexus analysis. Ephemeral features, such as dry washes and arroyos, that lack the perennial or intermittent flow necessary to satisfy the "tributary" definition under this final rule are excluded from the definition. Although the agencies are not regulating features that flow only in direct response to precipitation, certain ephemeral features can convey surface water flow that is sufficient to maintain the jurisdictional status of the upstream tributary reach, as discussed in Section III.A.3. States and Tribes may also address ephemeral features as "waters of the State" or "waters of the Tribe" under their own laws to the extent they deem appropriate, as envisioned under section 101(b) of the CWA. In addition, an ephemeral feature may convey a discharge of pollutants from a point source to a water of the United States. *See Rapanos*, 547 U.S. at 743-44 (Scalia, J., plurality).

Some commenters stated that the agencies' proposal for tributaries is not supported by science and is inconsistent with the CWA and judicial precedent. The agencies disagree. As discussed in the preamble to the proposed rule, the agencies relied on the available science to help inform where to draw the line of federal jurisdiction over tributaries, consistent with their statutory authorities. *See* 84 FR 4175 ("This proposed definition [of tributary] is also informed by the science.") As noted in that preamble, while the SAB found that the draft Connectivity Report "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 stressed that "the EPA should recognize that there is a gradient of connectivity." SAB Review at 3. The SAB recommended that "the interpretation of connectivity be revised to reflect a gradient approach

that recognizes variation in the frequency, duration, magnitude, predictability, and *consequences* of physical, chemical, and biological connections." *Id.* at 2 (emphasis added). To describe the "connectivity gradient" and the probability that impacts occurring along the gradient will be transmitted downstream, the SAB developed a figure as part of its review of the Draft Connectivity Report. *See id*. at 54 figure 3. The figure illustrates the connectivity gradient and potential consequences between perennial, intermittent, and ephemeral streams and downstream waters and depicts a decreased "probability that changes . . . will be transmitted to downstream waters" at flow regimes less than perennial and intermittent. *Id*. While the SAB stated that "at sufficiently large spatial and temporal scales, all waters and wetlands are connected," it found that "[m]ore important are the degree of connection (e.g., frequency, magnitude, timing, duration) and the extent to which those connections affect the chemical, physical, and biological integrity of downstream waters." *Id*. at 17.

The SAB, however, recognized 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." *id.* at 2. "The SAB also recommended that the agencies clarify in the preamble to the final rule that 'significant nexus' is a legal term, not a scientific one." 80 FR 37065. And in issuing the 2015 Rule, the agencies stated, "the science does not provide a precise point along the continuum at which waters provide only speculative or insubstantial functions to downstream waters." *Id*. at 37090. Thus, the agencies use the Connectivity Report to inform certain aspects of the revised definition of "waters of the United States," such as recognizing the "connectivity gradient" and potential consequences between perennial, intermittent, and ephemeral streams and downstream waters within a tributary system. The "tributary" definition that the agencies are finalizing, which takes

into consideration the connectivity gradient, "rests upon a reasonable inference of ecological interconnection" between those tributaries and paragraph (a)(1) waters. 547 U.S. at 780 (Kennedy, J., concurring in the judgment). The agencies acknowledge that science alone 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 agencies also relied on scientific principles, as appropriate and within the agencies' statutory limits, to inform several other aspects of this final rule, including, for example, how the agencies define the flow classifications (perennial, intermittent, ephemeral) used throughout the regulation, the incorporation of inundation and flooding to create surface water connections, and the use of the typical year concept that relies upon a large body of precipitation and other climatic data to inform what may be within a normal range for a particular geographic region. The agencies will also rely on science to implement the final rule, such as with the development of tools and scientific-based approaches to identify flow classification and typical year conditions.

Thus, contrary to the assertions of some commenters, the agencies' decisions in support of this final rule have been informed by science. The agencies therefore agree with other commenters who stated that the agencies appropriately balanced science, policy, and the law when crafting the proposed rule. But to be clear, as discussed in the preamble to the proposed rule, 84 FR 4176, and in Section II.E of this notice, science cannot dictate where to draw the line between Federal and State or tribal 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 guidance.

By defining perennial and intermittent tributaries of traditional navigable waters as jurisdictional and ephemeral features as non-jurisdictional, the agencies balance Congress' intent to interpret the term "navigable waters" more broadly than the classical understanding of that term, *see Riverside Bayview*, 474 U.S. at 133, with the fact that nothing in the legislative history of the Act "signifies that Congress intended to exert anything more than its commerce power over navigation." *SWANCC*, 531 U.S. at 168 n.3. The final rule's definition of "tributary" is also consistent with the *Rapanos* plurality's position that "'the waters of the United States' include only relatively permanent, standing, or flowing bodies of waters . . . as opposed to ordinarily dry channels . . . or ephemeral flows of water." *Rapanos*, 547 U.S. at 732-33 *see also id.* at 736 n.7 ("[R]elatively continuous flow is a *necessary* condition for qualification as a 'water,' not an *adequate* condition" (emphasis in original)). Perennial waters, by definition, are permanent. And while the plurality did note that waters of the United States do not include "ordinarily dry channels through which water occasionally or intermittently flows," *id*. at 733, the plurality would "not necessarily exclude *seasonal* rivers, which contain continuous flow during some months of the year but no flow during dry months." *Id.* at 732 n.5 (emphasis in original); *compare id*. at 770 (Kennedy, J., concurring in the judgment) ("an intermittent flow can constitute a stream . . . while it is flowing . . . [i]t follows that the Corps can reasonably interpret the Act to cover the paths of such impermanent streams"). The agencies note that intermittent waters may occur seasonally, for example, during times when groundwater tables are elevated or when snowpack runoff produces relatively permanent flow, returning on an annual basis in known, fixed geographic locations.

By defining "tributary" as perennial or intermittent rivers and streams that contribute surface water flow to traditional navigable waters or the territorial seas in a typical year, the agencies are

establishing that a mere hydrologic connection cannot provide the basis for CWA jurisdiction; the bodies of water must be "geographical features" (*i.e.*, rivers and streams) that are "relatively permanent" (*i.e.*, perennial or intermittent) and that contribute surface water flow to a traditional navigable water or the territorial seas in a typical year. *Rapanos*, 547 U.S. at 732. This requirement is informed by *Rapanos*, wherein the plurality determined that the phrase "the waters of the United States" "cannot bear the expansive meaning that the Corps would give it," *id*. at 732, and challenged the notion that "even the most insubstantial hydrologic connection may be held to constitute a 'significant nexus.'" *Id*. at 728. Similarly, Justice Kennedy noted, "mere hydrologic connection should not suffice in all cases; the connection may be too insubstantial for the hydrologic linkage to establish the required nexus with navigable waters as traditionally understood." *Id*. at 784-85. The agencies believe that the requirement that a tributary be perennial or intermittent and be connected to a traditional navigable water is reasonable and reflects the plurality's description of a "'wate[r] of the United States'" as "*i.e.*, a relatively permanent body of water connected to traditional interstate navigable waters." *Id*. at 742.

Under the proposed definition of "tributary," an artificial or natural ephemeral feature would have severed jurisdiction upstream of the feature, because the waterbody would not contribute surface water to a paragraph (a)(1) water on a perennial or intermittent basis. Several commenters supported this approach, noting that waters above ephemeral breaks are more appropriately subject to State or tribal jurisdiction. Others criticized the approach as too restrictive and raised concerns regarding the importance of those upstream waters to the tributary system. The agencies recognize that the proposed rule's treatment of ephemeral features would have severed jurisdiction for certain relatively permanent bodies of water that are regularly "connected to" traditional navigable waters in a typical year via channelized surface water flow

through those features. The final rule has been modified to address these concerns regarding ephemeral breaks between two relatively permanent waters while remaining faithful to the text, structure, and legislative history of the CWA and Supreme Court guidance.

As discussed in Section III.A.3, the final rule provides that channelized non-jurisdictional surface water features do not sever jurisdiction of upstream perennial or intermittent waters so long as they convey surface water from such upstream waters to downstream jurisdictional waters in a typical year. The use of "channelized" in this context generally indicates features with a defined path or course, such as a ditch or the bed of an ephemeral stream. The flow must be channelized in the sense of being discrete and confined to a channel, as opposed to diffuse, non-channelized flow. Channelized non-jurisdictional surface water features are generally continuously present on the landscape as geomorphic features and may regularly "connect" the upstream tributary to the downstream jurisdictional water such that those waters can mix and become indistinguishable in a typical year. This may occur, for example, where managed water systems alter the flow classification of a perennial or intermittent tributary to ephemeral but the perennial or intermittent flow returns farther downstream. It could also occur as a result of natural conditions, such as a tributary that becomes a losing stream for a reach, but then becomes perennial again downstream of the losing reach. The losing reach could occur because of water infiltrating into the ground and recharging groundwater, where the water table is below the bottom of the channel bed.

The final rule also allows for other types of artificial or natural features, such as dams or boulder fields, which may maintain jurisdiction so long as they convey surface water flow from an upstream tributary to a downstream jurisdictional water in a typical year. The agencies have determined in this final rule that such conditions do not sever jurisdiction for the upstream reach

of the tributary if a channelized non-jurisdictional surface water feature conveys surface water flow to a downstream jurisdictional water in a typical year. The agencies have concluded that water flowing through features such as dams or boulder fields can sustain a regular and predictable surface water connection between upstream and downstream waters and therefore can maintain jurisdiction between such waters. In all cases, however, the excluded or ephemeral feature remains non-jurisdictional. Certain other excluded features are incapable of providing channelized surface flow (*e.g.*, groundwater, diffuse stormwater run-off, or directional sheet flow over upland) and therefore sever jurisdiction upstream of such excluded features.

The Supreme Court has not spoken directly to the question of whether an ephemeral reach along or downstream of an otherwise jurisdictional tributary severs jurisdiction, and the agencies believe that the final rule appropriately reflects their statutory authority. In particular, the plurality decision in *Rapanos* emphasized that jurisdictional waters themselves must be relatively permanent and connected to traditional navigable waters, 547 U.S. at 742, but did not specify the type of connection necessary between the relatively permanent waters and downstream traditional navigable waters. Justice Kennedy's opinion stated that the Corps could identify by regulation categories of tributaries based on "their volume of flow (either annually or on average), their proximity to navigable waters, or other relevant considerations," *id.* at 780-81, but fails to provide further guidance. The agencies conclude that the final rule appropriately reflects and balances these general guiding principles by exercising jurisdiction over perennial and intermittent tributaries but not ephemeral streams and dry washes, while under certain circumstances allowing such channelized features to maintain jurisdiction between upstream and downstream more permanent waters.

Some commenters agreed with the agencies' proposal that ephemeral reaches should sever

jurisdiction of upstream waters because those waters no longer have a continuous hydrologic surface connection of relatively permanent flow to a downstream jurisdictional water. Other commenters stated that the proposed definition of "waters of the United States" was inconsistent in that some forms of natural or artificial features could connect upstream tributaries with downstream jurisdictional waters, whereas ephemeral reaches would have severed jurisdiction of upstream perennial and intermittent streams. In addition, many commenters raised concerns about implementing a definition of "tributary" in which an ephemeral feature would sever jurisdiction of upstream reaches, indicating that it may be difficult to apply in the field. Commenters also stated that if ephemeral features severed jurisdiction of perennial and intermittent waters upstream, many waters in certain regions, such as the arid West, would be non-jurisdictional. Some commenters expressed concern that the proposed definition would place a burden on project applicants to identify and anticipate such ephemeral breaks to avoid potential responsibility for compensatory mitigation of upstream losses. The agencies have modified the final rule language in a manner that addresses these concerns. Under the final rule, tributaries that contribute surface water flow to a downstream jurisdictional water in a typical year through certain natural features (such as debris piles or boulder fields) or artificial features (such as culverts or dams) are tributaries, even though these features may result in an interruption in the surface water channel. A perennial or intermittent tributary above the natural or artificial feature does not lose its jurisdictional status as long as the natural or artificial feature continues to convey surface water flow from the upstream reach to a downstream jurisdictional water in a typical year.

Commenters also requested clarification on whether a natural feature through which a tributary flows could be considered a jurisdictional feature as part of the tributary itself, such as a

boulder field or subterranean river. Natural or artificial features that do not satisfy the surface water flow conditions of the "tributary" definition are not tributaries under this rule, even if they convey surface water flow from upstream relatively permanent waters to downstream jurisdictional waters in a typical year. *See* Section III.A.3 for additional discussion.

Some commenters asked for clarification on whether tributaries are viewed as reaches or as an entire network. The agencies are using the term "reach" in this preamble to the final rule to mean a section of a stream or river along which similar hydrologic conditions exist, such as discharge, depth, area, and slope.[45] If a perennial tributary becomes intermittent and then ephemeral and then perennial again, it may be viewed as four separate reaches (*e.g.*, perennial reach, intermittent reach, ephemeral reach, perennial reach), especially if they also share other similarities with respect to depth, slope, or other factors. In general, a reach can be any length of a stream or river, but the agencies are clarifying for implementation purposes that such length is bounded by similar flow characteristics.

Commenters suggested that flow classification and jurisdictional status could be determined based on the flow in the majority of a reach (*i.e.*, whether it is perennial, intermittent, and ephemeral), which they said would be simpler than differentiating various segments from the broader stream reach. The agencies are not determining flow classification using the majority of the reach. Under the *Rapanos* Guidance, a tributary "reach" was identified by a stream order classification system where the relevant reach was used for purposes of a significant nexus determination. However, stream order is not directly relevant to stream and river jurisdiction

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[45] *See* Connectivity Report at A-10, defining "reach" as "a length of stream channel with relatively uniform discharge, depth, area, and slope." A similar definition is used by the USGS, at https://www.usgs.gov/faqs/what-a-reach.

under this final rule, and instead flow classification is a key aspect in determining the jurisdictional status of a tributary. The agencies conclude that such an approach is easier to implement in light of the final rule's "tributary" definition and is more consistent with the legal and scientific foundation for the rule. Along the length of a tributary, the flow classification may fluctuate, and the points at which flow classifications change are the points at which a reach is bounded. If a tributary flows through a non-jurisdictional ephemeral reach to downstream jurisdictional waters, the point at which a tributary becomes ephemeral may fluctuate upstream and downstream in a typical year based on climatic conditions, changes in topography and surrounding development, water input, and water withdrawals. When such a transition zone of flow classification occurs, the agencies will use best professional judgment and various tools to identify where the change in flow classification occurs. The agencies have historically implemented comparable approaches at transition zones, for example with the identification of the extent of tidal influence (also referred to as the head of tide). This generally occurs where a river flows into tidal waters and the agencies must identify the farthest point upstream where a tributary is affected by tidal fluctuations in order to determine which lateral extent to apply for the limits of jurisdiction (*i.e.*, high tide line or ordinary high water mark), permitting requirements, and similar factors. There is generally not a hard demarcation distinguishing where a waterbody ceases to be tidal, so the agencies must use best professional judgment utilizing all available information and tools which may assist in making the determination. *See* Section III.B.3 for additional information.

Many commenters recommended that tributaries that were altered or relocated should remain tributaries. The agencies agree with those comments and, consistent with the proposal, have included that provision in the final rule. Many commenters expressed concern about the

challenges of implementing a flow-based "tributary" definition where many systems have been modified by human actions. Some commenters also stated that the use of "naturally occurring" in the proposed "tributary" definition was unclear and questioned how it would apply to modified systems. The agencies disagree with the proposition that identifying flow conditions would be challenging in modified systems. An altered tributary is one in which the flow or geomorphic conditions have been modified in some way, for example, by straightening a sinuous tributary, adding concrete or riprap to stabilize the banks of a tributary, reducing flow conditions from perennial to intermittent flow due to water withdrawals, or widening or adding physical features (such as riffle/pool complex restoration or check dams) to the tributary to reduce the velocity of flow. A relocated tributary is one in which an entire portion of the tributary may be moved to a different location, as when a tributary is rerouted around a city center to protect it from flooding or around a mining complex to enable extraction of commercially valuable minerals. To be considered a tributary, such features must continue to meet the flow conditions of the "tributary" definition. The agencies conclude that identifying flow conditions in these features would be no more challenging than identifying flow conditions in other tributaries, which the agencies have been doing to apply the *Rapanos* Guidance since 2008. In a relocated tributary, the reach that has been relocated may meet the definition of "ditch" or may be colloquially called a ditch, which is why, for simplicity and clarity, the agencies have included these ditches in the definition of "tributary." The agencies also believe that retaining jurisdiction over the relocated tributary is consistent with its legal authorities and the agencies' treatment of impoundments of jurisdictional waters (*see* Section III.F), which may alter the course or form of a water of the United States but maintains sufficient surface water connection to a traditional navigable water in a typical year.

Some commenters requested clarification on how water diversions may affect the

jurisdictional status of tributaries. A water diversion that completely reroutes a tributary through a tunnel would be considered an artificial feature that would not sever jurisdiction under this final rule. The tunnel itself is not a tributary under the rule, however, because it is not a surface water channel. This final rule clarifies that jurisdiction applies based on current flow classification in a typical year. When completing jurisdictional determinations in managed systems, just as in natural systems, the agencies will consider whether features meet the flow conditions of the "tributary" definition in a typical year. Managed systems are jurisdictional as long as they satisfy the definition of "tributary," including the flow conditions. If a stream is ephemeral in a typical year due to managed water withdrawals, the feature is an excluded ephemeral stream. Tributaries that have been altered via water management systems, or whose morphology has been altered in some manner, maintain their tributary status as long as they are perennial or intermittent and contribute surface water flow to the territorial seas or a traditional navigable water in a typical year.

Under the pre-existing regulatory regime (recodified in the 2019 Rule), the agencies conducted a significant nexus analysis for certain types of waters referred to as "non-relatively permanent waters," which includes ephemeral features and some intermittent streams. *See Rapanos* Guidance at 7 ("'[R]elatively permanent' waters do not include ephemeral tributaries which flow only in response to precipitation and intermittent streams which do not typically flow year-round or have continuous flow at least seasonally. However, CWA jurisdiction over these waters will be evaluated under the significant nexus standard[.]"). The definition of "tributary" in the final rule replaces existing procedures that utilize a case-specific "significant nexus" analyses of the relationship between a particular stream and downstream traditional navigable water. The agencies are eliminating this case-specific "significant nexus" analysis by providing a clear

definition of "tributary" that is easier to implement. Justice Kennedy's "significant nexus" test for wetlands adjacent to nonnavigable tributaries was needed only "absent more specific regulations," *Rapanos*, 547 U.S. at 782, because "the breadth of [the Corps' existing tributary] standard . . . seems to leave wide room for regulation of drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water volumes towards it" and thus "precludes its adoption as the determinative measure of whether adjacent wetlands are likely to play an important role in the integrity of an aquatic system comprising navigable waters as traditionally understood." *Id*. at 781. In light of the "more specific [tributary] regulations" finalized in this rule, the agencies are eliminating the case-specific significant nexus review through categorical treatment, as "waters of the United States," of all tributaries with perennial or intermittent flow that contribute surface water flow to downstream navigable-in-fact waters in a typical year. *See id.* at 780-81 (Kennedy, J., concurring in the judgment) ("Through regulations or adjudication, the Corps may choose to identify *categories of tributaries* that, due to their volume of flow (either annually or on average), their proximity to navigable waters, or other relevant considerations, are significant enough that wetlands adjacent to them are likely, in the majority of cases, to perform important functions for an aquatic system incorporating navigable waters.") (emphasis added). In doing so, the agencies believe they avoid interpretations of the CWA that raise significant constitutional questions. *See id.* at 738 (plurality) ("Even if the term 'the waters of the United States' were ambiguous as applied to channels that sometimes host ephemeral flows of water (which it is not), we would expect a clearer statement from Congress to authorize an agency theory of jurisdiction that presses the envelope of constitutional validity.").

The agencies recognize that this is a departure from prior positions of the Federal

government. The agencies also recognize that prior to the finalization of this rule, some courts applied the significant nexus standard articulated in Justice Kennedy's opinion as the exclusive test of CWA jurisdiction over certain waters. As described in detail in Section II.E, the agencies have analyzed the text, structure, and legislative history of the CWA in light of Supreme Court guidance and conclude that this final rule incorporates important aspects of Justice Kennedy's opinion, together with those of the plurality, to craft a clear and implementable definition that stays within their statutory and constitutional authorities.

The final "tributary" definition contains no flow volume requirement, but only a requirement of perennial or intermittent flow and a contribution of surface water flow to a paragraph (a)(1) water in a typical year. The agencies believe that establishing a specific flow volume requirement for all tributaries is inappropriate, given the wide spatial and temporal variability of flow volume in rivers and streams across the country. While the definition may in certain instances assert jurisdiction over bodies of water contributing "the merest trickle," 547 U.S. at 769 (Kennedy, J., concurring in the judgment), to a traditional navigable water during certain times of the year, the agencies conclude that such bodies are "'waters' in the ordinary sense of containing a relatively permanent flow" regardless of flow volume. *Id*. at 757 (Scalia, J., plurality).

Some commenters suggested that using stream flow volumes rather than flow duration classifications for the definition of "tributary" would be easier to implement. The agencies disagree with this suggestion based on their experience. In 1977, the Corps proposed to use flow volumes (*i.e.*, five cubic feet per second) to define "headwaters" in the definition of "waters of the United States," and instead finalized the use of flow volumes for implementation of their general permit program. 42 FR 37129 (July 19, 1977). Stream flow volume is challenging to

measure directly, in particular in an intermittent stream where flow is not always present and may require multiple field-based measurements that can make implementation inefficient and result in delays in making a jurisdictional determination. While flow duration classifications may also require field measurements, in certain instances remote tools, such as remote sensing and aerial photography, can be used to observe presence or absence of flow and identify flow duration classifications, but cannot also assess flow volumes. In addition, the agencies have not identified a reasonable or appropriate rationale or justification for specific flow volumes that should establish jurisdiction given the broad nationwide applicability of the final rule.

A few commenters requested a flow duration metric (*e.g.*, 30, 90, or 185 days) to determine a jurisdictional tributary. Several commenters recommended the agencies adopt a definition of "intermittent" that contains the requirement of continuous flow for a specific duration, such as "at least one month of the calendar year" to provide certainty for determining flow classification. *See e.g.*, 30 CFR 710.5 (definition of "intermittent" used in a U.S. Department of Interior regulation). Several commenters also recommended a regionalized approach to flow classification. The agencies have finalized an approach that considers streamflow duration in the flow classification definitions generally (*e.g.*, "flowing continuously year-round," "flowing continuously during certain times of the year and more than in direct response to precipitation," and "flowing . . . only in response to precipitation") but without specifying an exact number of days of flow. The agencies are not providing a specific duration (*e.g.*, the number of days, weeks, or months) of surface flow that constitutes intermittent flow, as the time period that encompasses intermittent flow can vary widely across the country based upon climate, hydrology, topography, soils, and other conditions. The "typical year" construct captures that variability, however, and provides for regional and local variations in the actual application of a uniform nationwide

definition. The agencies acknowledge that an approach utilizing a specific duration would provide for enhanced national consistency, but it would also undermine the regionalized implementation of intermittent tributaries as provided for under this final rule. Some commenters cautioned the agencies against treating intermittent streams similarly across the country based on a prescriptive flow duration metric, as intermittent streams in the arid West are fundamentally different from intermittent streams in the Southeast, for example. A specific duration requirement would also be challenging to implement—even landowners familiar with their properties may not know the number of days a stream flows per year.

Other commenters recommended the use of physical indicators of flow, such as ordinary high water mark and bed and banks, which could be regionalized for a field-based approach. These commenters stated that physical indicators can be more readily observable and can indicate flows of sufficient magnitude and duration to qualify as a tributary. The agencies disagree with these comments and conclude that physical indicators of flow, absent verification of the actual occurrence of flow, may not accurately represent the flow classifications required for tributaries under this rule. *See, e.g.*, 547 U.S at 781 (Kennedy, J., concurring in the judgment) (expressing concerns that a the Corps' existing tributary standard based, in part, on the "possess[ing]" of "an ordinary high water mark, defined as a 'line on the shore established by the fluctuations of water and indicated by [certain] physical characteristics,' . . . seems to leave wide room for regulation of drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water volumes towards it"). For example, ephemeral streams can have an ordinary high water mark and bed and banks, which would not allow for the agencies or the public to distinguish between a non-jurisdictional ephemeral stream and a jurisdictional intermittent or perennial tributary using those physical indicators. Ephemeral streams in the arid West, for example, may

have ordinary high water marks that were incised years ago following a single large storm. It makes more practical sense for a feature to be first assessed as a tributary, after which the lateral extent of that tributary can be identified using the ordinary high water mark.

Physical indicators, however, may be one line of evidence the agencies could use to evaluate whether a stream meets the flow requirements to be a tributary under this definition. These indicators could be regionalized to obtain a practical field-based approach for identifying the flow classification of a stream which is a required component of identifying a tributary. Such physical indicators are further discussed in Section III.D.3 of this notice. In addition, the agencies cannot always rely on field-based physical indicator methods—for example, when evaluating a site at a time that does not meet the definition of "typical year." In some instances, completing a desktop determination with remote tools may supplement or substitute for field-based indicators.

3. How Will the Agencies Implement the Final Rule?

The agencies will employ many different methods and tools to identify and determine whether a feature meets the definition of "tributary" under this final rule. A few commenters recommended that the agencies identify a variety of methods which may be employed to identify flow classifications, and that such methods involve tools readily available to a typical landowner. Methods and tools used by the agencies are generally available for the public to use so that they can make an informed decision about how to proceed with requests for jurisdictional determinations or authorization for activities under the CWA. The agencies believe that there are numerous cases where an informed decision can save valuable time and money by avoiding unnecessary jurisdictional determination requests. This can be done, for example, where landowners are familiar with the water features on their property and know that they only flow in

response to a rain event, or that an isolated wetland in the middle of a ranch is not flooded by a nearby perennial river in a typical year. However, in cases where a member of the general public makes an informed decision to not request a jurisdictional determination and discharges pollutants into a waterbody that is, in fact, jurisdictional without required permits, the individual could be subject to the agencies' enforcement authorities under the CWA.

One of the first steps in determining whether a feature is a tributary is to identify relevant features on the landscape, such as rivers, streams, or similar naturally occurring surface water channels, as well as ditches. Field work to include direct observation and other reliable methods can indicate the existence of a tributary, such as stream gage data, elevation data, historic or current water flow records, flood predictions, statistical evidence, aerial imagery, and USGS maps.

Another step in determining whether a feature is a tributary is to identify whether the feature contributes surface water flow to a paragraph (a)(1) water either directly or through one or more paragraph (a)(2) through (4) waters in a typical year. The agencies intend to use several sources to identify the flow path of a potential tributary to determine whether surface water flow is being contributed eventually to a paragraph (a)(1) water. The agencies can use USGS maps, State and local knowledge or maps, aerial photography, or other remote sensing information so long as the tools the agencies use have been verified to be reliable (*see, e.g.*, Section IV of this notice regarding limitations of existing aquatic resource mapping datasets) to assess a feature's flow path. The agencies can also use available models, including models developed by Federal, State, tribal and local governments, academia, and the regulated community. One such model includes the "Flow (Raindrop) Path" GIS tool which allows the user to click a point on a map to signify a falling raindrop on that point, after which a flow path is drawn to estimate where the raindrop

may flow, eventually making its way to the ocean if the tributary network allows for it (https://streamstats.usgs.gov/ss/). The StreamStats tool may potentially be used to identify the flow path from the subject water to the downstream paragraph (a)(1) water using the "Flow (Raindrop) Path" component of the tool. These tools could be used in conjunction with field observations, data, and other desktop tools to evaluate whether a specific point on a potential tributary may have a surface water connection to a downstream paragraph (a)(1) water in a typical year.

In addition to identifying the presence of rivers, streams, or similar naturally occurring surface water channels which contribute surface water flow to a downstream paragraph (a)(1) water, the agencies must assess the feature's flow classification. The agencies have substantial experience using visual hydrologic observations, field data and indicators, and remote tools to determine flow classification. Commenters expressed several key concerns about the flow classification concept. Some commenters noted that there is no established or universally accepted methodology to identify flow classification. The agencies agree that there is no universally accepted methodology; however, scientists, environmental consultants, and other water resource professionals, including agency staff, have used the terms "perennial," "intermittent," and "ephemeral" for decades in the field. Indeed, the agencies have used these terms to evaluate the jurisdictional status of waters for more than a decade, in accordance with the 2008 *Rapanos* Guidance.[46] More recently, the Corps has applied these terms in its

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[46] Under the *Rapanos* Guidance, the agencies applied a different jurisdictional test based upon a tributary's flow regime. "The agencies will assert jurisdiction over relatively permanent non-navigable tributaries of traditional navigable waters without a legal obligation to make a significant nexus finding." *Rapanos* Guidance at 7. Relatively permanent tributaries were described in the guidance as tributaries that "typically flow year-round or have continuous flow

Nationwide Permit Program (NWP). *See* 82 FR 1860, 2005 (January 6, 2017). The terms are used in the NWP in a manner similar to the definitions in this final rule, but in the NWP the terms adhere more closely to the generally-accepted scientific definitions that focus on groundwater rising above the bed of the stream channel as differentiating between ephemeral features and perennial and intermittent waters. *See id*. at 2006. For the reasons explained in Section III.A.2, however, the agencies have finalized definitions for the three flow classification terms in this rule that better align with the scope of CWA jurisdiction, while improving clarity of the rule and transparency of the agencies' implementation. These flow classification terms can be implemented using readily available resources in addition to visual assessments.

Some commenters expressed concern that the information needed to determine flow classification would require a high burden of proof and would result in significantly longer processing times for jurisdictional determinations. The agencies will continue to bear the burden of proof for determinations and, as noted above, have already implemented a version of the flow classification concept under the *Rapanos* Guidance and the Corps' NWP. The agencies disagree with the suggestion that the use of these flow classifications will result in a lengthier process for jurisdictional determinations. With the clear and categorical definition as to the scope of CWA

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at least seasonally (e.g., typically three months)[.]" *Id.* at 1. At the same time, the guidance established that "'relatively permanent' waters do not include ephemeral tributaries which flow only in response to precipitation and intermittent streams which do not typically flow year-round or have continuous flow at least seasonally. . . . CWA jurisdiction over these waters will be evaluated under the significant nexus [test.]" *Id*. at 7. The agencies also note that in June 2009, the Corps added a classification code "R6," entitled "Riverine Ephemeral," to identify ephemeral aquatic resources. The Corps created the "R6" code to provide clarity to field staff when identifying ephemeral waters for entry into the ORM2 database. *See* https://www.spa.usace.army.mil/Portals/16/docs/civilworks/regulatory/Bulk%20Upload/Bulk%20Data%20Cowardin.pdf.

jurisdiction included in this final rule, the elimination of the significant nexus determination requirement for tributaries, the use of existing tools, and the development of new tools, jurisdictional determinations for tributaries should be more efficient under this final rule than under prior regulatory regimes.

Some commenters also noted that the data and resources identified in the preamble to the proposed rule to evaluate flow classification have limited availability. The agencies agree that some data and resources have significant limitations and other national-level tools and methods may not be readily available or accurate for use in many areas of the country, including in rural or remote areas and in heavily modified systems. The agencies will continue to rely on local knowledge, information provided by the landowner, and local, State, and tribal agencies, and a variety of additional tools and resources to evaluate flow classification in such systems. The final rule language on flow classifications allows for consistent implementation approaches for modified systems and more natural systems.

Visual observations of surface hydrology are a useful primary method to identify flow classifications. The agencies expect that landowners will often have sufficient knowledge to understand how water moves through their properties, although visual observations could be conducted by Federal, State, tribal and local agencies, and other public or private organizations, as appropriate. The agencies also recognize that a single visual observation may not always be sufficient to accurately determine flow classification, and visual observations should generally be combined with precipitation and other climate data and expected flow seasonality to accurately determine flow classification. For example, observing flow directly after a large rainfall or observing no flow during a dry season may not be good indicators of a stream's typical flow classification.

In addition to visual observations of surface hydrology, the agencies may use field-based indicators and tools as another line of evidence to determine flow classification. Some commenters recommended using local flow data collected by government agencies, where available, and the agencies acknowledge that this could be a useful source of data. The agencies have also used methods such as trapezoidal flumes and pressure transducers for measuring surface flow. During the public comment period, many commenters mentioned the availability of existing rapid, field-based, streamflow duration assessment methods that have been developed for use across various States or geographic regions and suggested that these existing methods could be used to distinguish between streams with perennial, intermittent, and ephemeral flow classifications. Many commenters also recommended that the agencies develop similar methods for use across the United States, with input from the public and the scientific community.

The agencies recognize that some States have developed streamflow duration assessment methods (SDAMs) that use physical and biological field indicators, such as the presence of hydrophytic vegetation and benthic macroinvertebrates, to determine the flow duration class of a stream reach as perennial, intermittent, or ephemeral (*e.g.*, the Streamflow Methodology for Identification of Intermittent and Perennial Streams and Their Origins, developed by the North Carolina Division of Water Quality, available at http://portal.ncdenr.org/c/ document_ library/ get_file?uuid= 0ddc6ea1-d736-4b55-8e50-169a4476de96&groupId=38364). The EPA, the Corps, and the State of Oregon also previously developed a regionalized SDAM that has been validated for use throughout the Pacific Northwest since 2015 (available at http://www.epa.gov/measurements/streamflow-duration-assessment-method-pacific-northwest).

Because SDAMs use indicators that are robust to seasonal and short-term climatic variability, these methods can be applied in a single site visit to distinguish streamflow duration when a

channel is flowing or in the absence of flow. The agencies agree with commenters that these methods are useful and practical tools that could be used to help inform timely and predictable jurisdictional determinations, for implementation of the final "tributary" definition, in the States and regions where previously developed SDAMs are available. The agencies also agree with commenters that developing similar methods for use across the United States would promote consistent implementation of the final tributary definition and note that the agencies are currently working to develop regionally-specific SDAMs for nationwide coverage. The agencies believe that developing regionally-specific SDAMs is important to account for the differences in climate, geology, and topography that can influence relationships between physical and biological indicators and streamflow permanence.

A variety of remote, desktop tools could be used to determine flow classification of potential tributaries, particularly when coupled with site specific information. In meetings with stakeholders, some local government officials recommended using local maps developed by government agencies, where available, as opposed to national maps, noting for example that the National Hydrography Dataset (NHD) has been shown to overestimate flow in certain areas. The agencies will assess flow classification using a compilation of the best available mapping sources, which may include the NHD[47] or local maps, as well as other remote tools such as photographs, StreamStats by the USGS (available at https://streamstats.usgs.gov/ss/), Probability of Streamflow Permanence (PROSPER) by the USGS (available at https://www.usgs.gov/centers/wy-mt-water/science/probability-streamflow-permanence-

[47] As described in the RPA for the final rule, the agencies note that NHD at High Resolution does not distinguish intermittent from ephemeral features in most parts of the country and may not accurately identify on-the-ground flow conditions.

prosper), Natural Resources Conservation Service (NRCS) hydrologic tools and soil maps, desktop tools that provide for the hydrologic estimation of a discharge sufficient to generate intermittent or perennial flow (*e.g.*, a regional regression analysis or hydrologic modeling), USGS topographic data, or modeling tools using drainage area, precipitation data, climate, topography, land use, vegetation cover, geology, and/or other publicly available information. The agencies will continue to rely on field observations and field data to verify desktop assessments as appropriate, and will also consider data and tools developed by academia, the regulated community, and other stakeholders.

Ultimately, multiple data points and multiple sources of information should be used to determine flow classification. For example, a "blue line stream" on a USGS topographic map and/or mapped in the NHD may indicate a potential tributary. Combining this information with stream order can further inform determinations of flow classification, as higher order streams may be more likely to exhibit perennial or intermittent flow compared to lower order streams, though some headwater streams are perennial or intermittent. The agencies could further determine whether flow data, field indicators, or visual observations of surface hydrology are available to confirm a stream's flow classification. Field-based and remote information may vary in availability and accuracy in different parts of the country, so care will be taken to evaluate additional information prior to reasonably determining the presence or absence of a tributary. Also, the agencies will continue to use the specific, validated tools developed by States to identify stream flow classifications.

As noted previously, the agencies will use best professional judgment and various tools to identify where the change in flow classification occurs (*e.g.*, from intermittent to ephemeral and vice-versa). The tools described above can assist in the identification of that transition in flow

classification and therefore the delineation of a reach as used in this final rule. The primary distinction necessary under this rule is the identification of when a perennial or intermittent reach transitions to an ephemeral reach and vice-versa. The agencies acknowledge that there are spatial and temporal variations in stream attributes such that there may not always be a distinct point demarcating the flow classification changes. For example, a single distinct point may occur at the confluence of two ephemeral streams, which become intermittent at the confluence. However, in some situations between stream confluences, there may be a transition zone where the flow classification change fluctuates within that zone throughout a typical year. The agencies will gather information from upstream and downstream of the transition zone as far as needed to get an accurate assessment of the conditions on the ground when it may be necessary for a decision point. This transition zone where the change in flow classification occurs will be evaluated by the agencies using the tools described above, as well as best professional judgment, to identify the most appropriate point at which to distinguish flow classifications.

In addition to determining the flow classification of a potential tributary, the agencies will also determine whether climatic conditions are typical to determine whether the water feature meets the definition of "tributary" under the final rule. As discussed in Section III.A.1, the final rule defines the term "typical year" to mean "when precipitation and other climatic variables are within the normal periodic range (*e.g.*, seasonally, annually) for the geographic area of the applicable aquatic resource based on a rolling thirty-year period." The agencies will use readily available climatic data and tools to evaluate normal precipitation and climatic conditions for the region at issue and will ensure that the time period of evaluation is representative of the normal characteristics of the subject waterbody (*i.e.*, it is neither too wet nor too dry). A detailed discussed of how the agencies intend to implement this definition is provided in Section III.A.1.

In utilizing the data sources described above and determining the flow classifications of tributaries under typical climatic conditions, the agencies recognize the need to consider seasonality and timing of tributary flows. For instance, in some geographic areas, intermittent streams may typically flow only at certain times, such as during seasonally wet conditions. Thus, the agencies would not expect to observe streamflow in seasonally dry conditions, even if precipitation during those dry conditions is considered typical for the dates of interest. The agencies may need to use the multiple tools described above to determine the flow classification for a tributary that is not flowing because of seasonally dry conditions, including remote- and field-based hydrologic and non-hydrologic indicators of the flow classification that would occur during seasonally wet conditions. For example, remote indicators might include a series of aerial and satellite images, spanning multiple years and taken under normal climatic conditions, the majority of which depict water flowing in the channel.

In the field, evidence of recent flow can be observed through the presence of multiple or abundant signs of certain ordinary high water mark indicators for the region, such as the presence of point bars, concentrations of drift deposits, or the destruction of terrestrial vegetation. Furthermore, certain wetland hydrology indicators can help clarify whether water is present in the area only immediately following precipitation events, or whether longer-term saturation has likely occurred. An example of an indicator is the presence of oxidized rhizospheres along living root channels, which can take four to eight weeks of continuous saturation to form. This indicator alone cannot be conclusive of water flowing above the surface, but multiple positive indicators could provide an increased degree of confidence in these situations. Conversely, the agencies may observe flow during wetter than normal precipitation conditions. In this case, the agencies can use other lines of evidence, including remote- and field-based hydrologic and non-

hydrologic indicators of flow classification as appropriate. Streams that contain flowing water during wetter than normal climatic conditions, but which lack an ordinary high water mark or hydrology indicators may be less likely to flow during normal climatic conditions. This assessment is further supported if the majority of wet season aerial and satellite images taken during normal climatic conditions depict a dry channel. In addition, a landowner's specific information indicating whether a water feature meets the definition of a "tributary" under "typical year" conditions may also aid in determining flow classification.

In addition to requesting clarification about when a surface water feature meets the definition of "tributary," some commenters also stated that it would be helpful to incorporate the lateral limits of jurisdiction directly into the "tributary" definition and questioned how such limits would be determined. In addition, some commenters expressed concern regarding the status of braided rivers that migrate and have multiple channels where the jurisdictional limits would be identified. The lateral limits of jurisdiction for tributaries extends to the ordinary high water mark, as indicated by the physical characteristics provided in the definition. Consistent with existing practice, the agencies intend to continue to use the Corps' ordinary high water mark manuals, as well as Regulatory Guidance Letter 05-05, when making ordinary high water mark determinations.[48] The outer limits of a braided channel may be used to identify the lateral extent when appropriate, which may encompass multiple low-flow channels and the migratory islands that separate them. Adding the ordinary high water mark concept to the definition of "tributary"

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[48] The Corps' ordinary high water mark manuals are available at: https://www.erdc.usace.army.mil/Media/Fact-Sheets/Fact-Sheet-Article-View/Article/486085/ordinary-high-water-mark-ohwm-research-development-and-training/. Regulatory Guidance Letter 05-05 is available at: https://usace.contentdm.oclc.org/utils/getfile/collection/p16021coll9/id/1253.

is unnecessary because it is already located in the Corps' regulations at 33 CFR 328.4 to identify the lateral extent of jurisdiction. The agencies are finalizing the rule with the definition of "ordinary high water mark" as proposed, however, to improve consistency between the corresponding regulations and also because the term "ordinary high water mark" is used in the final rule's definition of "upland."

E. Ditches

1. What Are the Agencies Finalizing?

The regulatory status of ditches has long created confusion for farmers, ranchers, irrigation districts, municipalities, water supply and stormwater management agencies, and the transportation sector, among others. To address this confusion, the agencies proposed to add a new category to the definition of "waters of the United States" for jurisdictional ditches and similar artificial features. The agencies proposed to include in that category: (1) ditches that are traditional navigable waters or that are subject to the ebb and flow of the tide (*e.g.*, paragraph (a)(1) waters); (2) ditches that are constructed in tributaries or that relocate or alter tributaries as long as the ditch satisfies the flow conditions of the tributary definition; and (3) ditches constructed in adjacent wetlands as long as the ditch likewise satisfies the conditions of the tributary definition. 84 FR 4203. All other ditches were excluded from CWA jurisdiction under the proposal.

Many commenters did not find that the separate jurisdictional category of "ditches" provided the regulatory clarity and predictability that the agencies had sought. They instead stated that the separate category created confusion. Other commenters said that the proposed separate category provided additional clarity, while others argued that all ditches should be excluded. Other commenters stated that the proposal was too limiting and should include more ditches as

jurisdictional, including any ditch that contributes perennial, intermittent, or ephemeral flow to other "waters of the United States."

In response to these diverse comments, the final rule does not include the separate category of "ditches" under paragraph (a)(3) as proposed and instead incorporates the elements of the proposal into the "tributary" category, with some additional clarifying edits. Ditches that are paragraph (a)(1) waters do not need to be identified in another jurisdictional category, so that aspect of the proposal has been eliminated as unnecessary and redundant. Ditches that are constructed in or that relocate a tributary are included in the final rule as tributaries, as long as the ditch satisfies the flow conditions of the "tributary" definition. The same is true for ditches that are constructed in adjacent wetlands.

The agencies did not retain the term "alter" from the proposed rule given the potential confusion associated with the use of that term. As some commenters noted, most, if not all, ditches may have some effect on and therefore may "alter" a tributary or some portion of the tributary system. As described throughout this notice, the CWA does not authorize the agencies to regulate all waters, nor does it authorize the agencies to regulate all ditches that exist across the landscape to assist in water management activities. The agencies conclude that ditches that are "constructed in" or that "relocate" a tributary, and that satisfy the flow conditions of the "tributary" definition, are appropriately within the authority granted to the agencies under the CWA, consistent with the legal principles outlined in Section II.E. The regulation and management of all other ditches is appropriately left to States and Tribes as part of their primary authority over land and water resources within their border. *See* 33 U.S.C. 1251(b), 1370.

The agencies consider it to be clearer to include in the definition of "tributary" that the alteration of a tributary does not modify its jurisdictional status as a tributary as long as it

continues to meet the flow conditions of the definition, rather than to classify the alteration of a tributary as a ditch. This is also consistent with longstanding agency practice. The agencies have modified the exclusion for ditches in paragraph (b)(5) to reflect these changes. The agencies also recognize that in certain circumstances, ditches that are constructed in adjacent wetlands that lack sufficient flow to be considered tributaries under this final rule may develop wetland characteristics if not maintained. As discussed below, in limited circumstances, those wetlands may be treated as adjacent wetlands, subject to the permitting exemptions in 33 U.S.C. 1344(f). All other ditches are excluded under the final rule.

The agencies believe that this approach to ditches best addresses the comments received and provides clarity and regulatory certainty to determine when a ditch may be a jurisdictional water and when a ditch may be excluded, consistent with the agencies' authority under the CWA. Finally, as discussed in Section III.A.3, non-jurisdictional ditches under this final rule may be capable of conveying channelized surface water flow between upstream relatively permanent jurisdictional waters and downstream jurisdictional waters in a typical year. In this example, the ditch itself, however, would remain non-jurisdictional.

2. Summary of Final Rule Rationale and Public Comment

During the 1970s, the Corps interpreted its authorities under the CWA as excluding drainage and irrigation ditches from the definition of "waters of the United States." *See, e.g.*, 40 FR 31320, 31321 (July 25, 1975) ("Drainage and irrigation ditches have been excluded."). The ditch exclusion was expressly stated in regulatory text in the Corps' 1977 regulations. 33 CFR 323.2(a)(3); 42 FR 37122, 37144 (July 19, 1977) ("manmade nontidal drainage and irrigation ditches excavated on dry land are not considered waters of the United States under this definition"). As the Corps explained in 1977: "nontidal drainage and irrigation ditches that feed

into navigable waters will not be considered 'waters of the United States' under this definition. To the extent that these activities cause water quality problems, they will be handled under other programs of the FWPCA, including Section 208 and 402." 42 FR at 37127 (July 19, 1977). Similar statements in preambles to the proposed rules from the early 1980s confirmed this interpretation: "man-made, non-tidal drainage and irrigation ditches excavated on dry land are not considered waters of the United States." 45 FR 62732, 62747 (September 19, 1980); *see also* 48 FR 21466, 21474 (May 12, 1983) ("Waters of the United States do not include the following man-made waters: (1) Non-tidal drainage and irrigation ditches excavated on dry land, (2) Irrigated areas which would revert to upland if the irrigation ceased.").

The general exclusion for non-tidal drainage and irrigation ditches excavated in dry land continued through 1986, although the Corps modified its earlier statements that year by noting in preamble text that "we generally do not consider" such features to be "waters of the United States," and indicating that the agency would evaluate certain ditches on a case-by-case basis. 51 FR 41206, 41217 (November 13, 1986).[49] The EPA also included similar language in a Federal Register notice in 1988. 53 FR 20764 (June 6, 1988). The Corps further clarified the regulation of ditches in its nationwide permit regulation in March 2000, stating that "non-tidal drainage ditches are waters of the United States if they extend the [ordinary high water mark] of an existing water of the United States." 65 FR 12818, 12823 (March 9, 2000). In other words, if flow or flooding from a jurisdictional non-tidal river or stream inundated an upland ditch, the agencies would assert jurisdiction over that upland ditch because the ordinary high water mark of

[49] The Corps also moved the ditch exclusion from rule text to preamble language in 1986 but stated that this was not a substantive change and that jurisdiction was not expanded. 51 FR 41206, 41216-17 (November 13, 1986).

the river or stream extends into the ditch, and the agencies would then assert jurisdiction over the entire reach of that ditch.

This final rule clarifies the regulatory status of ditches in a manner that is more consistent with the Corps' regulations following the 1972 and 1977 CWA amendments, with some modifications to provide a clear definition that also falls within the scope of the agencies' authority under the CWA. When Congress enacted the 1972 amendments, it specifically included ditches and related artificial features as "point sources," declaring them to be "discernible, confined, and discrete conveyances . . . from which pollutants are or may be discharged." Pub. L. No. 92-500, 86 Stat. 816, 887 (1972) codified at 33 U.S.C. 1362(14). Congress envisioned protecting the quality of the navigable waters, defined as "waters of the United States" at that time, by regulating the discharge of pollutants from conveyances like pipes, ditches, channels, tunnels and similar features into waters of the United States. *Id*. at 1362(12) (defining "discharge of pollutant" as "any addition of any pollutant to navigable waters from any point source").

The agencies evaluated the treatment of ditches in the CWA and its legislative history to discern whether Congress intended ditches to be point sources, navigable waters, or both. For example, Congress exempted the discharge of dredged or fill material into waters of the United States when that discharge occurs as a result of the construction or maintenance of irrigation ditches, the maintenance of drainage ditches, or minor drainage associated with normal farming activities. 33 U.S.C. 1344(f)(1)(A), (C) (exempting such activities from sections 301, 402, and 404 of the Act). One possible interpretation of these exemptions is that they function as an implicit acknowledgement that there may be some irrigation or drainage ditches that are waters of the United States, thus the need to exempt common agricultural and related practices in those waters from CWA section 404 permitting. Another interpretation is that dredged or fill material

or other pollutant discharges arising from such activities are not subject to federal permitting if those materials get washed down the ditch into a connected water of the United States.

For irrigation ditches, which typically are constructed in upland but frequently must connect to a water of the United States to either capture or return flow, Congress exempted both the construction and maintenance of such facilities. 33 U.S.C. 1344(f)(1)(C); *see also* 33 U.S.C. 1362(14) (excluding agricultural stormwater discharges and irrigation return flows from the definition of "point source").[50] The construction activities performed in upland areas are beyond the reach of the CWA, but the permitting exemption applies to the diversion structures, weirs, headgates, and other related facilities that connect the irrigation ditches to jurisdictional waters. *See, e.g.*, Corps, *Regulatory Guidance Letter No. 07-02*, at 1-2 (July 4, 2007).

For drainage ditches, by contrast, the permitting exemption is limited to only maintenance of such ditches. 33 U.S.C. 1344(f)(1)(C). That is because a parallel exemption for construction would allow the drainage of wetlands subject to CWA jurisdiction without a permit. Congress' intent to prevent such a result is evident in the "recapture" provision of 33 U.S.C. 1344(f)(2). *See, e.g.*, Sen. Rpt. 95-370, 95th Cong. 1st Sess., at 76-77 (July 19, 1977) (noting that exempted "activities should have no serious adverse impact on water quality if performed in a manner that will not impair the flow and circulation patterns and the chemical and biological characteristics of the affected waterbody" and noting that the "exemption for minor drainage does not apply to the drainage of swampland or other wetlands").

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[50] The agencies also note that Congress exempted the discharge of irrigation return flows into waters of the United States from the section 402 permit program. 33 U.S.C. 1342(l). This exemption potentially would not be needed if agricultural drainage ditches carrying irrigation return flow were themselves waters of the United States, as the entry point of the irrigation return flow into the drainage ditch might then lack the requisite point source discharging mechanism given the diffuse overland flow entry point from the field to ditch in most circumstances.

In summary, Congress may have envisioned the interconnection between the irrigation and drainage ditches and down-gradient waters of the United States as creating the need for the section 404(f) permitting exemptions, not necessarily that those ditches themselves are waters of the United States. Or Congress could have envisioned that some drainage ditches constructed in jurisdictional wetlands become waters of the United States themselves and thus require section 404(f) permitting exemptions for maintenance work performed in them. The agencies have not been able to identify any legislative history that signals the clear intent of Congress on this complex topic, and commenters provided a diverse range of viewpoints that failed to provide a clarifying position. To resolve the ambiguity, the agencies are interpreting the statutory text in section 404(f) and its legislative history as an indication that Congress may have intended, in certain limited circumstances, that ditches constructed in jurisdictional wetlands could become jurisdictional waters themselves. The agencies believe that the final rule formulation adheres more closely to the language of the statute and the positions articulated by the plurality opinion in *Rapanos*. *See, e.g.*, 547 U.S. at 735-36 and n.7.

Many commenters requested the agencies clarify that a water of the United States and point source are mutually exclusive. Some commenters expressed concern about features which may be considered point sources rather than waters of the United States under the proposed rule, and whether such features would require section 402 permits to convey pollutants downstream. Other commenters stated that permit requirements may need to be modified by sampling at the downstream end of the ditch to demonstrate that pollutants are being added to a water of the United States. The final rule does not make any changes to the agencies' interpretation of the definition of "point source" in CWA section 502(14). The agencies believe that this final rule will help clarify whether a ditch is a water of the United States or a point source. Either it is a

water of the United States that subjects a discharger to sections 402 and 404 permitting requirements for direct discharges into the ditch, or, if it is non-jurisdictional but conveys pollutants to downstream jurisdictional waters, it may be a point source that subjects a discharger into a ditch to section 402 permitting requirements. Both scenarios could also be subject to statutory exemptions that would obviate the need for a permit. In addition, if the ditch is a non-jurisdictional water that does not convey pollutants, it would not require a permit.

The agencies recognize that a change in jurisdiction resulting from this rule may change the scope of application of the CWA regulatory programs to a particular water, but the longstanding approach that the agencies have taken to implementing and enforcing those programs would remain the same. If a CWA section 402 permit is not currently required for a discharge to a water, it is unlikely that this final rule will create a requirement for a new CWA permit. If a section 402 permit is currently required for a discharge to a water that is no longer jurisdictional under this final rule, that permit may no longer be required; it may still be required if the non-jurisdictional feature conveys a discharge of pollutants from a point source to a water of the United States; or it may still be required but the conditions associated with the permit may need to be modified, subject to applicable anti-backsliding permit requirements.

This final rule includes the agencies' longstanding interpretation that ditches that satisfy any of the conditions of a paragraph (a)(1) water are waters of the United States as paragraph (a)(1) waters. This also includes tidal ditches and ditches that transport goods and services in interstate and foreign commerce, as those ditches – more commonly referred to as "canals" – provide important commercial navigation services to the nation and operate more like natural waters traditionally understood as navigable. *See, e.g.*, *id.* at 736 n.7 (Scalia, J., plurality) ("a permanently flooded man-made ditch used for navigation is normally described, not as a 'ditch,'

but a ‘canal’”). The Los Angeles River, for example, is a water of the United States (having been determined to be a traditional navigable water) and is not excluded under paragraph (b) even where it has been channelized or concreted. Other examples include the St. Lawrence Seaway, the Sturgeon Bay Ship Canal, and the Chesapeake and Delaware Canal.

Under the final rule, the agencies limit the term “waters of the United States” to apply to clearly defined ditches and related features that meet the flow conditions of the “tributary” definition and are not otherwise excluded. The agencies include ditches in the “tributary” category that were constructed in or relocated a tributary and that continue to meet the flow conditions of the “tributary” definition. The final rule retains the agencies’ longstanding position that the alteration or relocation of a tributary does not modify the jurisdictional status of that water. Accordingly, ditches that relocate a tributary or are constructed in a tributary would be jurisdictional as tributaries. This provision is also consistent with the agencies’ longstanding, historic position that non-tidal ditches excavated in upland (and historically described as “dry land”) are not jurisdictional.

The agencies also include ditches in the “tributary” category that were constructed in a wetland that meets the definition of “adjacent wetland,” as long as the ditch also satisfies the flow conditions of the “tributary” definition. As discussed above, this approach aligns the rule with the CWA section 404(f) permitting exemption for the maintenance but not construction of drainage ditches, and the associated concern expressed during the legislative process for the 1977 CWA amendments related to draining swamps and wetlands. The provision is restricted to ditches that satisfy the flow conditions of the definition of “tributary,” which aligns the treatment of jurisdictional ditches with natural tributaries. *See* Section III.D for a broader discussion of the “tributary” category.

Ditches used to drain surface and shallow subsurface water from cropland are a quintessential example of the interconnected relationship between land and water resource management, as is the case for managing water resources in the Western United States, conveying irrigation water to and from fields, and managing surface water runoff from lands and roads following precipitation events – all activities that rely on ditches. *See, e.g.*, *FERC v. Mississippi*, 456 U.S. 742, 767 n.30 (1982) (characterizing "regulation of land use [as] perhaps the quintessential state activity"). The majority of these ditches will not be jurisdictional under the final rule. This final rule therefore effectuates the clear policy directive from Congress to preserve and protect the primary authority of States over land and water resources within their borders. *See* 33 U.S.C. 1251(b), 1370.

Commenters had differing views on the jurisdictional status of ditches. Many commenters supported the agencies' proposed approach to exclude many types of ditches, in particular those ditches constructed in upland which do not relocate a tributary. Some commenters stated that ditches should be jurisdictional even if constructed in upland if they have perennial flow. Some commenters recommended the agencies use the function of the ditch as the basis for an exclusion, such as all agricultural ditches, regardless of flow. The agencies disagree with the inclusion of upland ditches as jurisdictional waters aside from ditches that relocate a tributary or that meet the conditions of paragraph (a)(1). Such ditches are not part of the naturally occurring tributary system and are not something the agencies consider to be within their authority to regulate under the CWA. Upland ditches (other than those ditches that relocate a tributary or that meet the conditions of paragraph (a)(1)) do not fall under the ordinary meaning of the term "waters" within the scope of the CWA. In general, upland ditches were not jurisdictional for decades under the agencies' previous definitions of "waters of the United States," and they are

not jurisdictional under this final rule (with the exceptions noted above). The agencies considered identifying and excluding ditches based on the function or purpose of the ditch but concluded that such an approach could result in the regulation of ditches with ephemeral flow and the exclusion of ditches which are essentially relocated tributaries. Both outcomes would be contrary to the agencies' interpretation of the scope of CWA jurisdiction described throughout this notice.

The agencies recognize that there have been questions over time about the jurisdictional status of ditches that are not maintained. Under this final rule, a ditch constructed in an adjacent wetland that contributes less than perennial or intermittent flow to a paragraph (a)(1) water in a typical year and that, due to lack of maintenance, gains wetland characteristics may be viewed as an adjacent wetland if it meets the definition of both "wetlands" under paragraph (c)(16) and "adjacent wetlands" under paragraph (c)(1). For example, a ditch constructed in an adjacent wetland that abuts a tributary may have portions that could be considered an adjacent wetland if the portions meet the definition of "wetland." Only the portion or portions of the ditch that meets the definition of "adjacent wetland" are jurisdictional under this final rule. Other ditches not constructed in adjacent wetlands, or not otherwise covered by paragraph (a)(1) or (2), are excluded from jurisdiction under paragraph (b)(5). Such an approach aligns the treatment of ditches as tributaries and adjacent wetlands in this final rule with the section 404(f) permitting exemption for the maintenance but not construction of drainage ditches, and the associated concern expressed during the legislative process for the 1977 amendments related to draining swamps and wetlands.

The agencies also note that the maintenance of certain jurisdictional ditches may occur without permitting under the section 404(f) exemptions of the CWA. Congress expressly

excluded the construction and maintenance of irrigation ditches and the maintenance of drainage ditches (such as farm or roadside drainage ditches, many of which are also excluded from jurisdiction under this rule) from the permitting requirements of sections 301, 402, and 404. Discharges of dredged or fill material associated with those exempt activities into a ditch constructed in an adjacent wetland are therefore exempt from CWA permitting, even if those materials are transported down the ditch to other jurisdictional waters. The agencies note that section 404(f) has a recapture provision that is designed to override the permitting exemptions in section 404(f) if the otherwise exempt activity alters the previous use of a jurisdictional water through impairment of the circulation or flow of such waters or a reduction in the reach of such waters. 33 U.S.C. 1344(f)(2). The agencies are aware that in some circumstances, questions about the applicability of this recapture provision to ditches that develop wetland characteristics have created confusion. Some question whether the development of wetland characteristics in a ditch establishes a new use for the water feature such that the recapture provision overrides the ditch maintenance exemption. This interpretation would eliminate the maintenance exemption from performing the very purpose Congress intended – allowing the dredging of the bottom of the ditch to eliminate obstructions to flow, including vegetation, without the need for a permit.

Many commenters noted that under the proposed rule, ditches must meet the definition of "tributary" to be jurisdictional, but because a "ditch" was defined as an artificial channel and a tributary was "naturally occurring," a ditch could never meet the definition of "tributary." The phrase "naturally occurring" does not exclude modified natural tributaries. The final rule clarifies that the "alteration" or "relocation" of a tributary does not modify its jurisdictional status as long as it originally occurred naturally and continues to satisfy the flow conditions of the definition. In addition, the agencies have clarified in the final rule that the definition of "tributary" includes

ditches that are constructed in or relocate tributaries so long as the ditch satisfies the flow conditions of the definition. A “naturally occurring” tributary may be altered in such a manner that it no longer appears “natural” and instead has been constructed to become a channel that conveys water. One such example is the Los Angeles River. Such a feature may satisfy the definition of “ditch” in this rule, but it also satisfies the definition of “tributary,” which overrides the general exclusion for ditches in paragraph (b)(5) as clarified in that exclusion. A ditch that straightens a tributary is considered to be “constructed in” a tributary, and the ditch would be jurisdictional as a tributary so long as it continues to meet the flow conditions of the “tributary” definition.

The proposed rule required ditches to satisfy the “conditions” of the “tributary” definition to be jurisdictional as tributaries; however, the agencies have clarified in the final rule that the ditches must satisfy the *flow conditions* of the “tributary” definition to be jurisdictional as a tributary. This requirement allows for such ditches to be artificial (as in not “naturally occurring”) and still be considered tributaries. The agencies’ longstanding interpretation of the CWA is that tributaries that are altered or relocated tributaries are jurisdictional, and the agencies are not changing this interpretation. If a tributary is channelized, its bed and/or banks are altered in some way, it is re-routed and entirely relocated, or its flow is modified through water diversions or through other means, then it remains jurisdictional under the final rule as long as it continues to satisfy the flow conditions in the definition of “tributary.”

Finally, the agencies note that starting in the early 2000s, certain ditches (such as roadside and agricultural ditches) have been regarded by the Corps as jurisdictional if water from another jurisdictional water, such as a perennial river, overflows into a ditch and extends the ordinary high water mark of the contributing water into the ditch. The Corps has then asserted jurisdiction

over the entire "reach" of the ditch regardless of the location of the ordinary high water mark in that portion of the ditch. Under this final rule, the agencies will continue the existing practice of regulating portions of otherwise non-jurisdictional ditches as waters of the United States based on the ordinary high water mark of the contributing water, *but only up to* the location of the ordinary high water mark, as mandated by existing Corps regulations. The agencies will not, however, assert jurisdiction over the entire "reach" of the ditch regardless of the location of the ordinary high water mark in that portion of the ditch. Those regulations establish the limits of jurisdiction of non-tidal waters of the United States as extending to the ordinary high water mark and not beyond. *See* 33 CFR 328.4(c). The agencies note that continuing the practice of regulating portions of otherwise non-jurisdictional ditches based on the ordinary high water mark of contributing down-gradient waters will maintain better alignment with the rule's treatment of ditches subject to the ebb and flow of the tide as jurisdictional up to the tidal influence. It also provides some jurisdictional commonality with the treatment of certain lakes, ponds, and impoundments and adjacent wetlands as jurisdictional based on inundation by flooding from other jurisdictional waters.

3. How Will the Agencies Implement the Final Rule?

The agencies have determined that in order to be jurisdictional under this final rule, a ditch or other similar artificial feature would first need to meet the definition of "ditch" (*i.e.*, a constructed or excavated channel used to convey water). Once a feature has been determined to meet the definition of "ditch," a ditch would be considered a tributary where the ditch relocates a tributary, is constructed in a tributary, or is constructed in an adjacent wetland as long as the ditch satisfies the flow conditions of the "tributary" definition. The phrase "constructed in an adjacent wetland" refers to ditches originating in or constructed entirely within an adjacent

wetland. The phrase also includes ditches that are constructed through adjacent wetlands, but jurisdiction over those ditches only includes those portions in adjacent wetlands and downstream to other jurisdictional waters, as long as those portions satisfy the flow conditions of paragraph (c)(12). Jurisdiction does not extend to upland portions of the ditch prior to entry into an adjacent wetland. Consistent with the exclusion in paragraph (b)(5), a ditch or portions thereof may also be considered an adjacent wetland where it was constructed in an adjacent wetland and the portion in that wetland meets the conditions of paragraph (c)(1).

If ditches were tributaries prior to their construction and continue to meet the flow conditions of the "tributary" definition after construction, they are jurisdictional as tributaries under the final rule. The burden of proof lies with the agencies to demonstrate that a ditch relocated a tributary or was constructed in a tributary or an adjacent wetland. For example, if the agencies are not sure whether a ditch was constructed in a tributary given the physical appearance and functionality of the current ditch, the agencies will review the available evidence to attempt to discern when the ditch was constructed and the nature of the landscape before and after construction. If the evidence does not demonstrate that the ditch was located in a natural waterway, the ditch will be non-jurisdictional under this rule. If the evidence suggests that the ditch may have been constructed in a natural waterway, the agencies will review the available evidence to attempt to discern whether that natural waterway would qualify as a tributary under this final rule. Absent such evidence, the agencies will conclude that the ditch is non-jurisdictional. The same methods above for ditches constructed in a tributary apply when determining the jurisdictional status of a ditch constructed in an adjacent wetland. Note that under this final rule, a ditch cannot render an otherwise isolated wetland an "adjacent wetland" and thus jurisdictional on that basis, unless the ditch itself is a tributary. *See* Section III.G for further discussion regarding the jurisdictional

status of wetlands under this final rule.

Many commenters noted that historic conditions at the time of ditch construction could be difficult to identify, and some commenters requested more specific guidance and standards of evidence which would be used by the agencies. Along with field data and current information on the subject water, historic tools and resources may be used to determine the presence of a tributary or adjacent wetland at the time of ditch construction, and several sources of information may be required to make such determination. Information sources may include historic and current topographic maps, historic and recent aerial photographs, local and state records and surface water management plans, agricultural records, street maintenance data, precipitation records, historic permitting and jurisdictional determination records, certain hydrogeomorphological or soil indicators, wetlands and conservation programs and plans, and functional assessments and monitoring efforts. For example, when a USGS topographic map displays a tributary located upstream and downstream of a ditch, this may indicate that the ditch was constructed in or relocated a tributary. As another example, an NRCS soil survey displaying the presence of specific soil series which are linear in nature and generally parallel to a potential ditch may be indicative of alluvial deposits formed by a tributary in which the ditch was constructed.

In addition, high-resolution aerial photographs may be used to identify whether there are or were characteristics of a tributary upstream or downstream of a ditch, indicating that a ditch may have been constructed in or relocated a tributary. In some cases, stream channel morphology is visible on the aerial photograph along with visible persistent water (*e.g.*, multiple dates of aerial photography showing visible water) providing evidence of the flow classification necessary to identify a tributary under this rule at the time of ditch construction. However, characteristics of

tributaries may not be visible in aerial photographs taken in areas with high shrub or tree cover, in which case aerial photographs or satellite imagery taken during "leaf off" may provide the most beneficial information. The burden of proof is on the agencies to determine the historic status of the ditch construction, and if evidence does not show that the ditch relocated a tributary, was constructed in a tributary, or was constructed in an adjacent wetland, then a determination would be made that the ditch is not jurisdictional under this final rule.

F. Lakes and Ponds, and Impoundments of Jurisdictional Waters

1. What Are the Agencies Finalizing?

The final rule includes a category of "waters of the United States" that combines lakes, ponds, and impoundments of jurisdictional waters into a single category. A lake, pond, or impoundment of a jurisdictional water meets the definition of "waters of the United States" if it (1) satisfies any of the conditions in paragraph (a)(1), *i.e.*, it is a traditional navigable water like Lake Michigan or Lake Mead; (2) contributes surface water flow to the territorial seas or a traditional navigable water in a typical year either directly or through one or more jurisdictional waters; or (3) is inundated by flooding from a paragraph (a)(1) through (3) water in a typical year. A lake, pond, or impoundment of jurisdictional waters does not lose its jurisdictional status if it contributes surface water flow to a downstream jurisdictional water in a typical year through a channelized non-jurisdictional surface water feature, through a culvert, dike, spillway, or similar artificial feature, or through a debris pile, boulder field, or similar natural feature.

The agencies had proposed to include two separate categories for lakes, ponds, and impoundments of jurisdictional waters, one for jurisdictional lakes and ponds and another for jurisdictional impoundments. The proposal followed the historic treatment of jurisdictional impoundments in treating them separately as "waters of the United States." For lakes and ponds,

the agencies proposed including them as a separate waterbody-specific category for the first time, more clearly tethering jurisdiction over those features to the text of the statute and applicable Supreme Court guidance.

The agencies received a wide range of public comments on the proposed approach. Many commenters expressed support for including lakes and ponds as a separate category, while others also supported retaining separate treatment for impoundments of jurisdictional waters. Other commenters suggested that because lakes, ponds, and impoundments of jurisdictional waters are functionally similar they should be treated as a combined category. Some commenters stated that the proposal excluded too many lakes and ponds and said that the CWA should apply to such features regardless of their hydrologic surface connection to traditional navigable waters. Others argued that the proposal asserted jurisdiction over too many lakes and ponds. Some commenters stated that the agencies should adopt their longstanding treatment of jurisdictional impoundments, retaining jurisdiction over them even if they are completely disconnected from the tributary system. Others stated that the agencies should regulate impoundments of jurisdictional waters only if they continue to contribute flow to other jurisdictional waters, arguing for different flow regimes (*i.e.*, perennial only, perennial and intermittent, any hydrologic connection). The agencies have considered the full range of comments and have finalized a rule that balances these diverse viewpoints, as discussed below, while streamlining and improving the clarity and applicability of the rule and remaining faithful to the agencies' statutory authorities as discussed in Section II.B.

2. Summary of Final Rule Rationale and Public Comment

Historically, the Corps' regulations specifically defined "lakes," "ponds," and "impoundments." In 1975, for example, the Corps published an interim final regulation, 40 FR

31320 (July 25, 1975), that administratively defined "lakes" as "natural bodies of water greater than five acres in surface area and all bodies of standing water created by the impounding of [waters of the United States]. Stock watering ponds and settling basins that are not created by such impoundments are not included." 40 FR 31325. In response to the 1975 regulation, the Corps received a number of comments and criticisms regarding the definition of "lake." Some stated that the size limitation was too small, while others stated that it was too large. Others questioned the legality of imposing any size limitation on natural lakes, arguing that a lake fewer than five acres in size is as much a "water of the United States" as one that is more than five acres in size. In response, the Corps established two new definitions in 1977, one for "natural lake" and one for "impoundment." 42 FR 37129-30 (July 19, 1977). The Corps believed the two definitions would help alleviate confusion over the broad definition of "lake" provided in 1975. In the 1977 regulation, "natural lake" was defined as "a natural depression fed by one or more streams and from which a stream may flow, that occurs due to the widening or natural blockage of river or stream, or that occurs in an isolated natural depression that is not part of a surface river or stream." 42 FR 37144. The Corps believed that definition reflected the three types of situations in which a natural lake may exist. The 1977 regulation defined "impoundment" as a "standing body of open water created by artificially blocking or restricting the flow of a river, stream, or tidal area. As used in this regulation, the term does not include artificial lakes or ponds created by excavating and/or diking dry land to collect and retain water for such purposes as stock watering, irrigation, settling basins, cooling, or rice growing." 42 FR 37144. No size limitation was placed on the 1977 definitions, and instead, the size limitations were used as a distinguishing element of the CWA section 404 nationwide permit program.

In 1982, the Corps again published an interim final rule which combined "natural lake" and

"impoundment" into one term, "lake." 47 FR 31794-95 (July 22, 1982). Commenters stated that impoundments should not be given the same status in the review process as natural lakes; however, the Corps believed that the evaluation of the public interest should be based on what the impacts are, and not on whether the area in question is natural or manmade. In the 1982 regulations, the Corps defined "lake" as

> a standing body of open water that occurs in a natural depression fed by one or more streams from which a stream may flow, that occurs due to the widening or natural blockage or cutoff of a river or stream, or that occurs in an isolated natural depression that is not a part of a surface river or stream. The term also includes a standing body of open water created by artificially blocking or restricting the flow of a river, stream, or tidal area. As used in this regulation, the term does not include artificial lakes or ponds created by excavating and/or diking dry land to collect and retain water for such purposes as stock watering, irrigation, settling basins, cooling, or rice growing.

47 FR 31811. This same definition was retained when the Corps issued its consolidated set of regulations in 1986 (51 FR 41206, November 13, 1986); however, the term "lake" was only retained in the part of the regulations related to "Permits for Discharges of Dredged or Fill Material into Waters of the United States" (33 CFR 323) and was not included in the new part specifically related to the definition of "waters of the United States" (33 CFR 328). The definition of "lake" remains in the Corps' current regulation at 33 CFR 323.2(b), and includes, "a standing body of open water created by artificially blocking or restricting the flow of a river, stream, or tidal area" but excludes, "artificial lakes or ponds created by excavating and/or diking dry land to collect and retain water for such purposes as stock watering, irrigation, settling basins, cooling, or rice growing."

Until this final rule, the definition of "waters of the United States" has not included a separate category for lakes and ponds. To date, the agencies viewed non-isolated "lakes and ponds" as traditional navigable waters or as part of the tributary system where they met the tributary standard. For example, if a tributary enters a standing body of open water in a natural

depression, such as a lake, which then outlets into a downstream tributary, the lake was considered part of the tributary system and the limits of jurisdiction were defined by the ordinary high water mark unless adjacent wetlands were present. Starting in the 1982 regulation, impoundments of waters otherwise defined as "waters of the United States" were included as a separate category of "waters of the United States." *See* 40 CFR 323.2(a)(4) (1983); 47 FR 31810 (July 22, 1982). In implementing its regulations, the Corps deemed impoundments "waters of the United States" when they were created from a water of the United States, still met another category of "waters of the United States" after creation, or were isolated with a nexus to interstate or foreign commerce.[51]

In this rulemaking, the agencies proposed to maintain the "impoundments" category of "waters of the United States" as it existed in the 1980s regulation and proposed to create a new category for certain lakes and ponds. The agencies requested comment as to whether a separate category was needed for impoundments of jurisdictional waters or whether those features could be captured in other categories of "waters of the United States," such as the proposed "lakes and ponds" category. The agencies received comments in support of maintaining a separate category for impoundments, which stated that doing so would provide clarity because it is consistent with the agencies' longstanding practice. Commenters supporting a separate category for impoundments also stated that impoundments are fundamentally different from lakes and ponds and therefore should be regulated differently. Other commenters supported combining the two categories and stated that lakes, ponds, and impoundments function similarly on the landscape

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[51] *See* the U.S. Army Corps of Engineers Jurisdictional Determination Form Instructional Guidebook p. 58 at: https://usace.contentdm.oclc.org/utils/getfile/collection/p16021coll11/id/2310.

and therefore should be regulated consistently. These commenters also stated that the agencies do not have legal authority to regulate impounded features that do not otherwise satisfy the jurisdictional requirements of the CWA. Other commenters generally found the term "impoundment" to be unclear and requested that the agencies include a definition of the term in the final rule. The agencies also requested comment on whether existing jurisdictional impoundments could become non-jurisdictional if they were no longer regulated as a separate category of "waters of the United States." In response, some commenters raised a concern that, if impoundments are combined into a single category with lakes and ponds, adjacent wetlands that are impounded could lose their jurisdictional status.

The agencies received comments stating that lakes and ponds should not constitute a separate category of jurisdictional waters because these features do not have a universally-accepted definition. Some commenters stated that the category of lakes and ponds may be redundant with other categories of waters, such as impoundments, and that the extent of wetland vegetation within a shallow pond can change over time, making it difficult to distinguish between wetland and pond boundaries in some cases. Other commenters agreed that lakes and ponds should comprise a separate category of jurisdictional waters to distinguish them from other features such as tributaries and impoundments. Commenters noted that a separate category could increase regulatory certainty, as jurisdictional requirements may be different for lakes and ponds as compared to other categories of waters.

The agencies have considered these competing public comments and for the reasons provided below are finalizing the rule with a single category for lakes, ponds, and impoundments of jurisdictional waters. The agencies agree with the commenters that stated lakes, ponds, and impoundments function similarly on the landscape. The final rule is consistent with the Corps'

existing definition of "lakes" that includes impoundments, although its "lakes" definition is not for purposes of defining "waters of the United States." *See* 33 CFR 323.2(b). Like lakes and ponds, many impoundments are lentic systems (*i.e.*, still waters) as opposed to tributaries, which are typically lotic systems (*i.e.*, flowing waters). In many areas of the country, lakes and ponds exist only because rivers and other flowing features or wetlands have been impounded. Impounded features often provide similar commercial opportunities, water quality benefits, and wildlife habitat as compared with natural features. Similarly, both naturally occurring (but modified) and impounded waters and wetlands may have structures, such as culverts, weirs, or pumps, that are designed to manage the movement of water upstream and downstream of the structure. The agencies conclude that because lakes, ponds, and impoundments of jurisdictional waters generally function similarly across the landscape, they should be regulated consistently.

In the final rule, certain lakes, ponds, and impoundments of jurisdictional waters are waters of the United States because these features are waters within the ordinary meaning of the term. As discussed in Section II.E, the plurality opinion in *Rapanos* stated that the term "the waters" is most commonly understood to refer to "'streams and bodies forming geographical features such as oceans, rivers, [and] *lakes*,' or 'the flowing or moving masses, as of waves or floods, making up such streams or bodies.'" 547 U.S. at 732 (quoting *Webster's New International Dictionary* 2882 (2d ed. 1954) (emphasis added). The plurality also noted that its reference to "relatively permanent" waters did "not necessarily exclude streams, rivers, or *lakes* that might dry up in extraordinary circumstances, such as drought." *Id.* at 732 n.5 (emphasis added).

Under the final rule, lakes, ponds, and impoundments that meet the conditions to be a traditional navigable water are waters of the United States under paragraph (a)(1) of this final rule. These waters are discussed in more detail in Section III.B. It would be redundant to include

additional regulatory text in the lakes, ponds, and impoundments category that declares such water features to be jurisdictional if they satisfy the paragraph (a)(1) standard, as the agencies had proposed for lakes and ponds. For clarity and simplicity, the agencies are not including that cross reference in the final rule.

The final rule focuses in large part on the lake's, pond's, or impoundment's surface water connection to traditional navigable waters or the territorial seas so as to remain consistent with the overall structure and function of the CWA. *See, e.g., SWANCC,* 531 U.S. at 168 n.3. This final rule presents a unifying legal theory for federal jurisdiction over waters and wetlands adjacent thereto that maintain a sufficient surface water connection to traditional navigable waters or the territorial seas and is supported by the legal precedent and principles articulated in this notice. As discussed in Section II, the agencies' authority to regulate "the waters of the United States" is grounded in Congress' commerce power over navigation. Given the broad purposes of the CWA, the agencies can choose to regulate beyond waters more traditionally understood as navigable but must provide a reasonable basis for doing so. Lakes, ponds, and impoundments of jurisdictional waters that contribute surface water flow to traditional navigable waters or the territorial seas in a typical year fall within the statutory authorities delegated to the agencies by Congress. Federally regulating these features effectuates the objective, goals, and policies of the CWA. By contrast, the agencies conclude that when lakes, ponds, and impoundments of jurisdictional waters do not contribute surface water flow to a traditional navigable water or the territorial seas in a typical year, such lakes, ponds, and impoundments have an insufficient connection to jurisdictional waters to warrant federal jurisdiction, unless they are inundated by flooding from a paragraph (a)(1) through (3) water in a typical year. Regulating these features would push the outer limits of the agencies' delegated authorities and

infringe on the powers of States to regulate their own land and water resources and therefore are not jurisdictional under this final rule. Through this combined category, the agencies are incorporating common principles from the *Rapanos* plurality and concurring opinions and respecting both the objective and the policy in CWA sections 101(a) and 101(b), respectively.

Some commenters stated that only perennial lakes, ponds, and impoundments conveying perennial flow to a downstream paragraph (a)(1) water should be considered "waters of the United States." Other commenters maintained that lakes, ponds, and impoundments conveying ephemeral flow to a downstream paragraph (a)(1) water should also be considered jurisdictional. The agencies proposed that perennial or intermittent flow from a lake or pond to a paragraph (a)(1) water either directly or indirectly through another jurisdictional water could establish jurisdiction. Some commenters expressed concern that it would be too difficult to determine the flow regime of features connecting lakes and ponds to waters of the United States. The agencies disagree that it would be too difficult to determine flow regime to establish jurisdiction for lakes and ponds as proposed, as the agencies have been using flow classifications to make jurisdictional determinations since the 2008 *Rapanos* Guidance was issued. However, upon further consideration, the agencies conclude that the proposed rule's requirement for perennial or intermittent flow from a lake or pond to a downstream paragraph (a)(1) water would have severed jurisdiction for certain relatively permanent lakes and ponds that are regularly "connected to" traditional navigable waters via surface water flow. Such regular surface water flows allow such waters to connect and become indistinguishable when flowing (*i.e.*, they look like one water). In the final rule, the agencies have eliminated the flow classification requirement and instead have clarified the types of features that can provide a sufficient surface water connection between the lake, pond, or impoundment of a jurisdictional water and a downstream

jurisdictional water in a typical year to warrant federal jurisdiction consistent with the CWA. This will simplify implementation of this category.

As discussed in Section III.A.3, the agencies have determined that channelized non-jurisdictional ephemeral features are capable of providing a sufficient surface water connection and that they do not sever jurisdiction if they convey surface water flow between an upstream relatively permanent jurisdictional water and a downstream jurisdictional water in a typical year. In other words, an ephemeral feature between an upstream lake and a downstream jurisdictional water would not sever jurisdiction upstream if the ephemeral feature conveys channelized surface water flow sufficient to allow the upstream and downstream waters to mix in a typical year. By contrast, the agencies conclude that diffuse stormwater run-off and directional sheet flow over upland (non-jurisdictional features under paragraph (b)(4)) do not provide a sufficient surface water connection to downstream jurisdictional waters. Therefore, upstream lakes, ponds, and impoundments that are connected to downstream jurisdictional waters only by such flows are not jurisdictional. These types of connections do not satisfy the limiting principles articulated in *SWANCC* and the plurality and concurring opinions in *Rapanos*.

Lakes, ponds, and impoundments of jurisdictional waters often contribute surface water flow to other waters in a manner similar to a tributary. The agencies conclude that if these features contribute surface water flow to traditional navigable waters or the territorial seas in a typical year, they are jurisdictional for the same reasons that a tributary is jurisdictional. Lakes, ponds, and impoundments of jurisdictional waters that do not contribute surface water flow to a paragraph (a)(1) water in a typical year are not jurisdictional for the same reasons that streams are excluded if they do not contribute surface water flow to a paragraph (a)(1) water in a typical year. *See* Section III.D of this notice for additional discussion on tributaries. The agencies do not

explicitly define "lakes and ponds, and impoundments of jurisdictional waters" in paragraph (c)(6) of the final rule to require those waters to be perennial and intermittent, as the agencies have required for tributaries in paragraph (c)(12). Nonetheless, ephemeral lakes, ponds, and impoundments are categorically excluded from jurisdiction under paragraph (b)(3) of the final rule. The key test for jurisdiction is that lakes, ponds, and impoundments of jurisdictional waters must contribute surface water flow to a paragraph (a)(1) water in a typical year. Waters that flow only in direct response to precipitation do not satisfy the permanence element of the phrase "relatively permanent bodies of water" and are not jurisdictional under this final rule.

The agencies conclude that the category of lakes, ponds, and impoundments of jurisdictional waters in this final rule reflects the limits of the agencies' authority that the plurality and concurring opinions recognized in *Rapanos*. By requiring a contribution of surface water flow from a lake, a pond, or an impoundment of jurisdictional waters to a paragraph (a)(1) water in a typical year, the agencies are establishing that a mere hydrologic connection cannot provide the basis for CWA jurisdiction; the connection must be a surface water connection that occurs in a typical year. Such connection to a paragraph (a)(1) water is sufficiently frequent to warrant federal jurisdiction. This requirement reflects the *Rapanos* plurality's description of a "wate[r] of the United States" as "*i.e.*, a relatively permanent body of water *connected to* traditional interstate navigable waters." *Id.* at 742 (emphasis added). It is also informed by the *Rapanos* plurality's rejection of the overly broad hydrologic connection theory that the Federal government had advanced in that case. The plurality concluded that the phrase "the waters of the United States" "cannot bear the expansive meaning that the Corps would give it," *id*. at 732, and rejected the notion that "even the most insubstantial hydrologic connection may be held to constitute a 'significant nexus.'" *Id*. at 728. Justice Kennedy further established that "mere

hydrologic connection should not suffice in all cases; the connection may be too insubstantial for the hydrologic linkage to establish the required nexus with navigable waters as traditionally understood." *Id*. at 784-85.

An impoundment may lose its surface water connection to a downstream jurisdictional water due to any number of reasons, including consumptive use or evaporation or due to the structure that was constructed to impound the water. In the proposed rule, all impoundments of jurisdictional waters would be jurisdictional, regardless of any surface water connection to a downstream (a)(1) water. The agencies supported the proposed rule in part by citing the Supreme Court's decision in *S.D. Warren Co. v. Maine Board of Environmental Protection*, 547 U.S. 370 (2006), for the proposition that impounding a jurisdictional water does not change its status as a "water of the United States." 84 FR 4154, 4172 (Feb. 14, 2019), citing *S.D. Warren Co.*, 547 U.S. at 379 n.5. The agencies solicited comment on the category of "impoundments" in the proposed rule, including whether impoundments that release water downstream, but do so less than intermittently, should remain jurisdictional. Some commenters agreed that *S.D. Warren Co.* would authorize disconnected and isolated impounded waters to remain jurisdictional and supported the agencies' longstanding position that such impoundments of waters of the United States remain jurisdictional. Other commenters stated that impoundments that lack a surface connection to a downstream jurisdictional water should not be waters of the United States. The agencies conclude that an impounded water that lacks a sufficient surface water connection to a downstream paragraph (a)(1) water in a typical year is not a water of the United States. This interpretation of federal regulatory authority over impoundments is most consistent with the scope of authority granted by Congress and the legal principles articulated in Section II.E of this notice. On further review and consideration, the agencies observe that *S.D. Warren Co.* analyzes

the definition of "discharge" in CWA section 502(16) but does not grapple with or address the subject of this rulemaking—the definition of "waters of the United States." The cited footnote in that case merely states that exerting private control over water flow (an everyday occurrence in many parts of this country) does not "denationalize" otherwise national waters. *S.D. Warren Co.*, 547 U.S. at 379 n.5 ("[W]e [cannot] agree that one can denationalize national waters by exerting private control over them."). The case did not address what happens when a water of the United States is so altered as to significantly modify its connection to traditional navigable waters, nor did the cases cited in that opinion. For example, waters of the United States are regularly defederalized under the section 404 permitting program—in some instances by transforming portions of traditional navigable waters for harbor development, and jurisdictional wetlands or small tributaries to fast land for communities and energy development, and in other instances by cutting off or separating part of jurisdictional waters that nonetheless remain waters, as is the case with certain causeway construction or application of the waste treatment exclusion for natural resource development projects. Furthermore, the agencies are aware of no decision of the Supreme Court that has ruled that the indelibly navigable principle applies to all waters of the United States, although the principle does apply to certain traditional navigable waters or any decision that would prohibit the United States from consenting to defederalization of a water by a lawfully issued section 404 permit. In this final rule, the agencies have defined "waters of the United States" not to include a water—including an impoundment of a jurisdictional water—that lacks a sufficient surface water connection to a downstream traditional navigable water, consistent with the principles articulated in *SWANCC*. *See SWANCC*, 531 U.S. at 168 n.3. Impoundments of traditional navigable waters that continue to meet the criteria in paragraph (a)(1) of this final rule would remain jurisdictional under the CWA. *S.D. Warren* is not to the

contrary.

The agencies recognize that many lakes, ponds, and impoundments of jurisdictional waters may be connected to other jurisdictional waters by a variety of natural and artificial non-jurisdictional features. The agencies have specified under this final rule that lakes, ponds, and impoundments of jurisdictional waters do not lose their jurisdictional status if they contribute surface water flow to a downstream jurisdictional water in a typical year through a channelized non-jurisdictional surface water feature, through a culvert, dike, spillway, or similar artificial feature, or through a debris pile, boulder field, or similar natural feature. The agencies describe in Section III.A.3 of this notice that such non-jurisdictional features do not sever jurisdiction when surface water flow is conveyed in a typical year, and that such flow leads to mixing between an upstream relatively permanent jurisdictional water and a downstream jurisdictional water. Consistent with this discussion, a non-jurisdictional feature remains non-jurisdictional even if it provides a channelized surface water connection between jurisdictional waters in a typical year.

Lakes, ponds, and impoundments of jurisdictional waters that are inundated by flooding from a paragraph (a)(1) through (3) water in a typical year are also waters of the United States under this final rule. *See Rapanos*, 474 U.S. at 732 (Scalia, J., plurality) (recognizing that the term "the waters" within "the waters of the United States" includes "the flowing or moving masses, as of waves or *floods*, making up . . . streams or bodies") (emphasis added) (internal quotations omitted); *id.* at 770 (Kennedy, J., concurring in the judgment) ("the term 'waters' may mean '*flood* or inundation' events that are impermanent by definition") (emphasis added) (internal citations omitted). During times of inundation by flooding from a paragraph (a)(1) through (3) water to a lake, pond, or impoundment of jurisdictional waters in a typical year, such a water is

indistinguishable from the jurisdictional water from which the flooding originates.

Inundation sufficient to establish jurisdiction occurs only in one direction, from the paragraph (a)(1) through (3) water to the lake, pond or impoundment of jurisdictional waters, rendering the feature "itself a part of those waters" "that are 'waters of the United States' in their own right." *Rapanos*, 547 U.S. at 740, 742 (Scalia, J., plurality). The agencies received a comment that the inundation requirement should create jurisdiction if it occurs in either or both directions, rather than just *from* a jurisdictional water *to* a lake, pond or impoundment. For the reasons discussed above, the agencies have concluded that in order to be considered part of the tributary system, the surface water flow from a lake, pond, or impoundment of jurisdictional waters to a paragraph (a)(1) through (3) water needs to occur with sufficient frequency that the flow is channelized in a typical year. Non-channelized diffuse overland flow from an otherwise isolated waterbody lacks the indicia of permanence and sufficiency necessary to establish jurisdiction, as described in more detail in Section III.A.3. Mere hydrologic surface connection is not enough. *Id*. at 784 (Kennedy, J., concurring in the judgment). Flooding in a typical year from a paragraph (a)(1) through (3) water to a lake, pond, or impoundment of jurisdictional waters (that is not otherwise jurisdictional under the tests described above) is sufficient to establish jurisdiction. That is because inundation by flooding in a typical year makes the lake, pond or impoundment of jurisdictional waters "part of" the jurisdictional water, as may occur, for example, when an oxbow lake is located in a former channel of a meandering river. The agencies note, however, that oxbow lakes are not categorically jurisdictional under the final rule; to be jurisdictional, they must satisfy one or more of the conditions of paragraph (c)(6).

Some commenters expressed concern that, as proposed, lakes and ponds may be considered jurisdictional due to a single flood event in a typical year and suggested incorporating a flood

duration requirement so that brief, infrequent floods from a paragraph (a)(1) through (3) water would not cause a lake or pond to become jurisdictional. Under the final rule, inundation by flooding from a paragraph (a)(1) through (3) water to a lake, pond, or impoundment of jurisdictional waters can occur as a result of seasonal or permanent flooding, for example, so long as flood waters connect such waters to a paragraph (a)(1) through (3) water in a typical year and have as their source a paragraph (a)(1) through (3) water. The agencies are not including a minimum number of flood events or duration of flooding that must take place in the course of a typical year, due to the need to accommodate regional hydrological differences. However, a mere hydrologic connection between a non-navigable, isolated lake, pond, or impoundment and a jurisdictional water is insufficient to establish jurisdiction under this rule. For instance, a lake that may be connected to a water of the United States by flooding, on average, once every 100 years is not jurisdictional. To be jurisdictional, a lake, pond, or impoundment of jurisdictional waters that is otherwise physically separated from a water of the United States must be inundated by flooding from a paragraph (a)(1) through (3) water at least once during a typical year. Oxbow lakes, for example, may be jurisdictional under this category via inundation where they otherwise may not satisfy the flow contribution elements of paragraph (c)(6) of the final rule.

The agencies have determined that an ecological connection between physically separated lakes, ponds, and impoundments of jurisdictional waters and other paragraph (a)(1) through (3) waters is insufficient to assert jurisdiction over such waters. *See 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."). Some commenters requested that the agencies eliminate a case-specific "significant nexus" analysis for lakes and ponds, while other commenters supported maintaining a "significant nexus" analysis and

identifying jurisdictional lakes and ponds based on ecological connections to water features such as traditional navigable waters and the territorial seas. The agencies have concluded that the lakes, ponds, and impoundments of jurisdictional waters category should replace existing procedures that may depend on a case-specific "significant nexus" analysis of the relationship between a particular water feature and downstream traditional navigable waters. Lakes, ponds, and impoundments of jurisdictional waters constitute a category of "waters of the United States" that is more consistent and predictable for members of the public and regulatory agencies to implement than a case-specific "significant nexus" analysis.

The approach to lakes, ponds, and impoundments of jurisdictional waters in this final rule is also intended to avoid "impairing or in any manner affecting any right or jurisdiction of the States with respect to waters (including boundary waters) of such States." 33 U.S.C. 1370. For example, lakes, ponds, and impoundments of jurisdictional waters are not waters of the United States if they do not contribute surface water flow to a traditional navigable water in a typical year or are not inundated by flooding from a paragraph (a)(1) through (3) water in a typical year. Rather, they are water resources of the States (or Tribes), and therefore States have an inherent interest in managing such features pursuant to the powers reserved to the States under the Constitution (and Tribes have analogous interests as well). *See., e.g., North Dakota*, 127 F. Supp. 3d at 1059. States and Tribes may therefore address such features under their own laws to the extent they deem appropriate.

To address comments that combining the lakes and ponds category with impoundments could result in impounded adjacent wetlands losing jurisdiction, the agencies have made minor modifications to the final regulatory text from the proposal. Under the final rule, impoundments of wetlands are jurisdictional as "impoundments of jurisdictional waters" if the wetlands being

impounded first meet the definition of "adjacent wetlands" and then meet the conditions of the lakes, ponds, and impoundments of jurisdictional waters category. For example, under the final rule, impounded adjacent wetlands are jurisdictional as "impoundments of jurisdictional waters" if they form a feature that meets the conditions of the lakes, ponds, and impoundments of jurisdictional waters category. That is, adjacent wetlands that are impounded frequently become ponds and may lose their jurisdictional status as adjacent wetlands because they no longer satisfy all three factors of the "wetlands" definition. The final rule would ensure that these waters remain jurisdictional if they satisfy the elements of paragraph (c)(6). If those impounded wetlands, however, continue to satisfy the definition of "adjacent wetlands," they would remain jurisdictional as adjacent wetlands. In the uncommon circumstance where an impoundment completely severs the surface water connection between an adjacent wetland and a jurisdictional water in a typical year, such that the feature no longer satisfies the definition of "adjacent wetlands," the wetland would no longer be jurisdictional under this final rule. Section III.G of this notice provides additional discussion on adjacent wetlands.

The agencies acknowledge that this final rule represents a change from the agencies' longstanding practice concerning impoundments of jurisdictional waters. Under the 2019 Rule, notwithstanding the principles of *SWANCC*, impoundments of jurisdictional waters would be jurisdictional under the separate impoundments category regardless of any surface water connection to a downstream jurisdictional water. The agencies now conclude that this prior interpretation is not supported by the text, structure, or legislative history of the CWA, Supreme Court precedent, or the foundational legal principles of this final rule. *See* Section II.E. Justice Kennedy's concurring opinion also indicates that completely isolated waters are too remote to be regulated under the Commerce Clause powers. *See* 547 U.S. at 779 (Kennedy, J., concurring in

the judgment) ("Nevertheless, the word 'navigable' in the Act must be given some effect. Thus, in *SWANCC* the Court rejected the Corps' assertion of jurisdiction over isolated ponds and mudflats bearing no evident connection to navigable-in-fact waters." (internal citation omitted)). The agencies conclude that this principle should be applied to all waters, whether they are impoundments or not. The final rule is also consistent with the agencies' longstanding practice that a jurisdictional water may be altered and made non-jurisdictional by obtaining a CWA section 404 permit to place fill material in a wetland or other water, thereby converting that water to fast land.

Some commenters requested the agencies define the terms "lake" and "pond," but other commenters stated that there were deficiencies in the proposed alternatives for defining "lakes" and "ponds" such as the definitions based on size, depth, or the Cowardin classification system developed by the U.S. Fish and Wildlife Service. Although regional naming conventions may vary, the agencies conclude that the terms "lake" and "pond" are well-understood and that additional regulatory definitions beyond what is included in the final rule are not necessary. Rather than defining "lakes" and "ponds" based on their geomorphology or artificial or natural status, the agencies have instead defined surface water characteristics and conditions in paragraph (c)(6) for purposes of establishing jurisdiction over lakes and ponds (*i.e.*, standing bodies of open water that contribute surface water flow to traditional navigable waters or are inundated by flooding from a paragraph (a)(1) through (3) water in a typical year). The same is true for the term "impoundment," which some commenters suggested is unclear. The agencies intend the term "impoundment," as it is used in this rule and as it is used in common parlance, to mean a standing body of open water that is formed by blocking or restricting the flow of a pre-existing river, stream, or tidal area or by

blocking or restricting the water of a pre-existing wetland, lake, or pond. *Compare* Webster's II, New Riverside University Dictionary (1994) (defining "impound" to mean to "confine in" or to "accumulate (water) in a reservoir"). This is generally consistent with the Corps' current definition in 33 CFR 323.2(b) and should provide sufficient guidance for the public to understand the regulation. An impoundment that holds back, blocks, or restricts the flow of a water of the United States is considered "constructed in" that water for purposes of this final rule, even if portions of the impounded water also cover areas that were originally upland or non-jurisdictional waters.

3. How Will the Agencies Implement the Final Rule?

Lakes and ponds are naturally formed through a variety of events, including glacial, tectonic, and volcanic activity. Natural lakes and ponds can also be subsequently modified to change surface elevation, depth, and size. In some parts of the country these modified lakes and ponds are referred to as impoundments, whether they impound or enlarge an existing water of the United States or modify a non-jurisdictional water; in other areas, these may retain lake or pond nomenclature. Lakes, ponds, and impoundments can be man-made features constructed for industrial and agricultural uses, power generation, domestic water supply, or for aesthetic or recreational purposes. Many lakes, ponds, and impoundments have at least one outflow in the form of a river, stream, or drain which maintain a feature's surface water level or stage by allowing excess water to discharge. Some lakes, ponds, and impoundments do not have an outflow and lose water solely by evaporation, underground seepage, or consumptive use. Individual lakes, ponds and impoundments range in size. Ponds are generally smaller in size than lakes, but regional naming conventions vary. Lakes are also generally deeper than ponds. Like lakes and ponds, impoundments can be large or small, deep or shallow. Some of these waters are

jurisdictional under paragraph (a)(3) of the final rule, as discussed above, while others are non-jurisdictional, particularly many artificial lakes and ponds pursuant to paragraph (b), as discussed in Section III.H.

Lakes, ponds, and impoundments are familiar types of waters that can be easily identified by landowners; the agencies; local, State, and tribal governments; consultants; and others. The tools discussed in Section III.D of this notice to identify the presence of a potential tributary can also be helpful to establish the presence of a lake, pond, or impoundment. For example, indication of an enclosed body of water on a USGS topographic map or certain waterbody types in the NHD data may show that a lake, pond, or impoundment is present. USGS topographic maps often include different symbols to indicate perennial and intermittent lakes and ponds where such features are mapped. *See* "Topographic Map Symbols," available at https://pubs.usgs.gov/gip/TopographicMapSymbols/topomapsymbols.pdf. Waterbodies such as perennial and intermittent lakes and ponds, and reservoirs are also represented in NHDWaterbody, where such features are mapped.[52] The NHD portrays the spatial geometry and the attributes of the features. However, as the agencies recognize in Section IV, these tools were not designed to indicate the jurisdictional status of waters of the United States, and limitations associated with these maps and data sets may require field-verification for accuracy.

After identifying a lake, pond, or impoundment, the next step is to determine whether the lake, pond, or impoundment meets the conditions of a paragraph (a)(1) water under the final rule and would therefore be regulated under that category. Consistent with the agencies' longstanding

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[52] *See* "Complete FCode list for NHD Hydrography Features," available at https://nhd.usgs.gov/userGuide/Robohelpfiles/NHD_User_Guide/Feature_Catalog/Hydrography_Dataset/Complete_FCode_List.htm.

regulation and practice, paragraph (a)(3) waters do not include impoundments of non-jurisdictional waters. If an impoundment does not meet the conditions of a paragraph (a)(1) water, then the agencies must establish whether the feature is an impoundment of a jurisdictional water. The agencies may use historical and current sources of information such as construction plans, permit records, aerial photography, maps, and remote sensing data, as well as topographic information or relevant field data from site visits, to determine whether an impoundment was created by impounding a jurisdictional water such as a tributary or adjacent wetland. In making a jurisdictional determination under this rule, the agencies would evaluate the open body of water or wetland.[53]

If a lake, pond, or impoundment of a jurisdictional water does not meet the conditions of a paragraph (a)(1) water, then the agencies would determine whether the water directly or indirectly contributes surface water flow to a paragraph (a)(1) water in a typical year, or is inundated by flooding from a paragraph (a)(1) through (3) water in a typical year. The agencies could use similar sources of information indicating the existence of a lake, pond, or impoundment to determine whether the water feature contributes surface water flow to a paragraph (a)(1) water in a typical year. Many commenters requested that the agencies identify specific sources of information that would be used to determine whether lakes, ponds, and impoundments contribute surface water flow to a water of the United States. A combination of the tools and other resources described in Section III.D.3 may be used to establish jurisdiction of

[53] The agencies note that the construction of a physical structure that impounds a body of water (*e.g.*, a dam, berm, or weir) may require a CWA section 404 permit (*e.g.*, when a discharge of dredged or fill material into a jurisdictional water occurs during construction of the impounding structure), in addition to other authorizations which may be required, such as a RHA section 9 or section 10 permit.

a lake, pond, or impoundment. For instance, if utilizing the NHD, waterbodies that are classified as a lake/pond or a reservoir in the dataset may have NHDFlowline artificial paths represented as flowing through them to complete a stream network and as a surrogate for general water flow direction. Combining this information with site visits, climate data, and surrounding hydrology data can yield greater certainty as to the presence of a lake, pond, or impoundment, and as to whether the feature contributes surface water flow to a downstream paragraph (a)(1) water in typical year. These tools may also be helpful in indicating whether a lake, pond, or impoundment of a jurisdictional water is part of the tributary network of a paragraph (a)(1) water. For example, the presence of a "blue line stream" on USGS topographic or NHD maps which extends from the feature may indicate that the lake, pond, or impoundment contributes surface water flow, directly or indirectly through a paragraph (a)(2) through (4) water, to a paragraph (a)(1) water in a typical year, which may indicate that the feature is jurisdictional. Other complementary data sources that can be used in conjunction with maps to determine the potential jurisdictional status of a lake, pond, or impoundment of a jurisdictional water include gage data, bathymetry data, elevation data, spillway height, historic water flow records, flood predictions, statistical evidence, aerial photographs, remote sensing data, and hydrologic and non-hydrologic field observations.

A lake, pond, or impoundment of a jurisdictional water does not lose its jurisdictional status if it contributes surface water flow to a downstream jurisdictional water in a typical year through a channelized non-jurisdictional surface water feature; through a culvert, dike, spillway, or similar artificial feature; or through a debris pile, boulder field, or similar natural feature. Under the final rule, the agencies have determined that lakes, ponds, and impoundments of jurisdictional waters may be jurisdictional if they have a channelized surface water connection to a paragraph (a)(1) water in a typical year. To determine the existence of channelized non-

jurisdictional surface water features (*e.g.*, ephemeral streams or non-jurisdictional ditches), culverts, dikes, spillways, or similar artificial features, or debris piles, boulder field, or similar natural features, the agencies may use remote sensing data, aerial photography, and field observations. The agencies may also rely on elevation data, aerial photography, remote sensing data, hydrologic models, flow data, field indicators, operation records, and visual observations to determine whether flow likely occurs through these non-jurisdictional water features in a typical year.

Lakes, ponds, and impoundments of jurisdictional waters that are inundated by flooding from a paragraph (a)(1) through (3) water in a typical year are also waters of the United States under this rule. Commenters noted that field observations, sometimes based on multiple site visits, may be necessary to determine that a surface water connection exists for lakes and ponds as a result of flooding from a traditional navigable water, tributary, or other jurisdictional lake or pond, or jurisdictional impoundment. Many commenters also stated that establishing a surface water connection based on inundation from a paragraph (a)(1) through (3) water to a lake or pond in a typical year may be difficult to implement. The agencies disagree with this suggestion as they are frequently asked to complete jurisdictional determinations when surface water connections are not present. In these cases, the agencies have used a variety of data sources that do not depend on visual observations of inundation, including but not limited to flood records, precipitation data, elevation data, aerial photography, remote sensing data, and hydrologic models. The agencies will complement remote tools with hydrologic and non-hydrologic field observations when necessary to determine the presence of a jurisdictional lake, pond, or impoundment due to inundation by flooding from a paragraph (a)(1) through (3) water.

The agencies recognize that artificial features such as a dike or berm could prevent a lake or

pond from releasing surface water downstream to a water of the United States in a typical year. Similarly, a dam could prevent an impounded water from releasing surface water downstream to a water of the United States in a typical year. Under the final rule, lakes, ponds, and impoundments of jurisdictional waters are jurisdictional if they meet the conditions of paragraph (c)(6), including contributing surface water flow to a downstream jurisdictional water in a typical year. Such contribution could occur through pumps, flood gates, reservoir releases, or other mechanisms. The agencies do not distinguish between natural and artificially-manipulated surface water flow that connects a lake, pond, or impoundment with another water of the United States in a typical year. Furthermore, if an artificial feature such as a dike or dam causes a channelized downstream perennial or intermittent feature to become ephemeral, that channelized ephemeral feature would be non-jurisdictional under paragraph (b)(3) but would not sever jurisdiction of upstream features as long as it conveys surface water flow in a typical year to a downstream paragraph (a)(1) water.

In Section III.A.1 of this notice, the agencies describe a variety of methods and data sources that could be used to determine whether conditions meet the definition of "typical year." For instance, the agencies have developed and utilized a method for determining normal precipitation conditions. The agencies currently use professional judgment and a weight of evidence approach as they consider precipitation normalcy along with other available data sources. The agencies recognize the need to consider seasonality and timing of surface water connections in utilizing the data sources described above and determining whether lakes, ponds, and impoundments meet the conditions of paragraph (c)(6) in the final rule. For example, a lake, pond, or impoundment of a jurisdictional water may be inundated by flooding from a paragraph (a)(1) through (3) water only during seasonally wet conditions. If the agencies complete a jurisdictional determination

during seasonally dry conditions and do not visually observe inundation, they may use the multiple tools described above, including remote- and field-based hydrologic and non-hydrologic indicators, to determine whether inundation from flooding would typically occur during seasonally wet conditions.

A few commenters discouraged the agencies from relying solely on one source of data and recommended that mapping sources should be paired with remote sensing and field verification data. As described above, the agencies encourage the use of multiple complementary data sources to establish the presence of lakes, ponds, and impoundments and to determine their jurisdictional status. For example, waterbody and flowline features in the NHD could be used to determine the likelihood of an existing lake, pond, or impoundment that has a direct or indirect surface water connection to a paragraph (a)(1) water. A site visit could then confirm the existence of the lake, pond, or impoundment, and aerial photography and physical field indicators or local knowledge could establish the likelihood of recent inundation. Finally, the agencies could determine whether climatic conditions meet the definition of "typical year" using, for example, the method for determining normal precipitation conditions described in Section III.A.1 of this notice, combined with other relevant sources of information such as the Palmer Drought Severity Index. Many commenters noted that the availability of data records and tools may vary across the country. The agencies have determined that the information provided by the tools described herein and other available information will vary in availability and accuracy in different parts of the country, and will take that into account when utilizing their expert judgment in evaluating the information prior to determining the jurisdictional status of a lake, pond, or impoundment of a jurisdictional water.

Some commenters asked whether features could simultaneously be excluded from regulation

as artificial lakes and ponds, but also meet the definition of jurisdictional impoundments. As discussed in Section III.H of this notice, paragraph (b)(8) of the final rule specifies that the artificial lakes and ponds exclusion does not apply to jurisdictional impoundments. An artificial lake or pond will be excluded even if it satisfies the definition in paragraph (c)(6), so long as it was constructed or excavated in upland or in non-jurisdictional waters and is not a jurisdictional impoundment. In other words, paragraph (b)(8) is designed to exclude artificial lakes and ponds that are constructed in upland or non-jurisdictional waters, even where they may have a surface water connection to a downstream jurisdictional water in a typical year.

G. Adjacent Wetlands

1. What Are the Agencies Finalizing?

The agencies are finalizing a category of "waters of the United States" to include all adjacent wetlands to: the territorial seas and traditional navigable waters (paragraph (a)(1) waters); tributaries to those waters (paragraph (a)(2) waters); and lakes, ponds, and impoundments of jurisdictional waters (paragraph (a)(3) waters). In this final rule, the agencies define the term "adjacent wetlands" to mean wetlands that: (1) abut a paragraph (a)(1) through (3) water; (2) are inundated by flooding from a paragraph (a)(1) through (3) water in a typical year; (3) are physically separated from a paragraph (a)(1) through (3) water only by a natural berm, bank, dune, or similar natural feature; or (4) are physically separated from a paragraph (a)(1) through (3) water only by an artificial dike, barrier, or similar artificial structure so long as that structure allows for a direct hydrologic surface connection between the wetlands and the paragraph (a)(1) through (3) water in a typical year, such as through a culvert, flood or tide gate, pump, or similar artificial feature. Under the final rule, an adjacent wetland is jurisdictional in its entirety when a road or similar artificial structure (*i.e.*, not naturally occurring) divides the wetland, as long as

the structure allows for a direct hydrologic surface connection through or over that structure in a typical year.

By retaining the term "adjacent" in the definition from the longstanding regulations, the agencies are continuing to use terminology that is familiar to the agencies and the regulated public. As proposed, however, the agencies are not including the terms "bordering, contiguous, or neighboring" from the previous regulations to reduce the potential confusion associated with using three seemingly similar terms in the same definition. *See, e.g.*, U.S. General Accounting Office, *Waters and Wetlands*, GAO-04-297, at 10 (Feb. 2004) ("The regulations specify that adjacent means 'bordering, contiguous, or neighboring'. . . . This definition of adjacency leaves some degree of interpretation to the Corps districts."); *see also id*. at 3 ("Districts apply different approaches to identify wetlands that are adjacent to other waters of the United States and are subject to federal regulation."). Instead, the agencies use the term "abut" to clearly identify those waters that are inseparably bound up with other jurisdictional waters, in addition to the other clear tests for adjacency in this final rule.

The final rule adopts categorical tests for adjacency that are like those included in the proposal, but upon consideration of the public comments received, the agencies have enhanced the final definition to improve its clarity and ease of implementation, and to include additional wetlands that, upon further consideration, the agencies conclude should be subject to federal jurisdiction. Like the proposal, adjacent wetlands are those that abut or otherwise have a direct hydrologic surface connection to other covered waters in a typical year. But the agencies have modified the test to maintain jurisdiction over wetlands separated from other jurisdictional waters only by natural berms, banks, or dunes as those natural separations are evidence of a dynamic and regular direct hydrologic surface connection between the resources based on the

agencies' technical expertise and experience. The agencies have also simplified and expanded the type of surface water connections that are not jurisdictional themselves but can nevertheless maintain jurisdictional connectivity between wetlands and other waters of the United States that are separated only by artificial dikes and other barriers. The agencies have also expanded jurisdiction, as compared to the proposal, over wetland complexes that are crossed by roads and similar structures if those structures allow for a surface water connection between the segregated wetland portions (such as through a culvert through a roadway) in a typical year.

Many commenters supported the proposal as establishing an appropriate balance between Federal and State jurisdiction over wetlands. Others stated that the proposal regulated too broadly. Still others asserted that the proposal too narrowly interpreted the agencies' CWA authorities and restricted jurisdiction over many ecologically important wetlands. The agencies have considered the diverse range of comments and are finalizing a rule that results in a balance of these competing views while adhering to the agencies' delegated authorities under the CWA and avoiding the outer limits of such authority.

Like the proposed rule, this final rule maintains the longstanding regulatory definition of "wetlands" in paragraph (c)(16) to mean "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. Wetlands generally include swamps, marshes, bogs, and similar areas." This is a well-established definition that is familiar to regulators, environmental consultants, and the scientific community. The agencies received many public comments urging them to maintain this definition, while certain other commenters suggested the agencies adopt different formulations. In this final rule, the agencies have retained the longstanding definition unchanged,

as proposed.

Consistent with the proposal, the agencies are finalizing a definition of "upland" to mean any land area above the ordinary high water mark or high tide line that does not satisfy all three wetland factors (*i.e.*, hydrology, hydrophytic vegetation, and hydric soils[54]) under normal circumstances, as described in the Corps' 1987 Wetlands Delineation Manual. Features that were once wetlands but have been naturally transformed or lawfully converted to upland (*e.g.,* in compliance with a CWA section 404 permit) are considered upland under the final rule. For convenience, the agencies are including the existing Corps definitions for "ordinary high water mark" and "high tide line" from 33 CFR 328.3 in the EPA's regulations, as those terms are used in the final definition of "upland."

2. Summary of Final Rule Rationale and Public Comments

Under the final rule, the "adjacent wetlands" definition is based on the text, structure, and legislative history of the CWA and on the core principles and concepts set forth in the three Supreme Court cases addressing the scope of the phrase "the waters of the United States," as discussed at length in Section II.E.2. Adjacent wetlands form part of the waters of the United States if they are "inseparably bound up with the 'waters' of the United States." *Riverside Bayview*, 474 U.S. at 134. Non-adjacent wetlands, on the other hand, are isolated from waters of

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[54] *See* Corps' 1987 Wetlands Delineation Manual at 9-10 ("Wetlands have the following general diagnostic environmental characteristics: (1) Vegetation. The prevalent vegetation consists of macrophytes that are typically adapted to areas having hydrologic and soil conditions . . . Hydrophytic species, due to morphological, physiological, and/or reproductive adaptation(s), have the ability to grow, effectively compete, reproduce, and/or persist in anaerobic soil conditions. . . . (2) Soil. Soils are present and have been classified as hydric, or they possess characteristics that are associated with reducing soil conditions. . . . (3) Hydrology. The area is inundated either permanently or periodically at mean water depths ≤ 6.6 ft. or the soil is saturated to the surface at some time during the growing season of the prevalent vegetation.").

the United States and are non-jurisdictional for the reasons discussed below and in Section III.A of this notice. This rule's categorical treatment of adjacent wetlands balances the objective in CWA section 101(a) to "restore and maintain the chemical, physical, and biological integrity of the nation's waters," 33 U.S.C. 1251(a), and the clear policy direction 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 for the development and use (including restoration, preservation, and enhancement) of land and water resources . . . ." 33 U.S.C. 1251(b); *see also Rapanos*, 547 U.S. at 737 (Scalia, J., plurality). Under this final rule, wetlands that do not abut a paragraph (a)(1) through (3) water, are not inundated in a typical year by a paragraph (a)(1) through (3) water, or are physically separated from a paragraph (a)(1) through (3) water by more than a natural barrier and lack a direct hydrologic surface connection to a paragraph (a)(1) through (3) water in a typical year, as described in paragraph (c)(1), are not inseparably bound up with the "waters of the United States." Such non-adjacent wetlands are more appropriately regulated by States and Tribes pursuant to their own authorities. This final rule establishes a clear, predictable regulatory framework that can be implemented in the field.

Some commenters supported the agencies' proposed definition of "adjacent wetlands" and stated that it adheres to the key Supreme Court decisions, the CWA, and the Constitution. Other commenters stated that the proposal struck an appropriate balance between retaining federal jurisdiction over wetlands that are truly adjacent to, and therefore inseparably bound up with, jurisdictional waters and leaving isolated and disconnected wetlands subject to the laws of States and Tribes. Other commenters opposed the agencies' proposed definition because it included wetlands that abut more than traditional navigable waters, wetlands that may not physically touch other jurisdictional waters, and wetlands that lack a continuous hydrologic surface

connection to such waters. Several commenters, for example, interpreted the plurality opinion in *Rapanos* as requiring a constant surface water connection to reach beyond the water's edge.

Some commenters recommended that all wetlands be deemed jurisdictional. Other commenters stated that the agencies' proposal was arbitrary and capricious, was inconsistent with the CWA, and that narrowing CWA jurisdiction over adjacent wetlands should be based more on scientific considerations than on legal ones. Other commenters stated that the agencies' proposed definition was inconsistent with the *Riverside Bayview* and *Rapanos* decisions, particularly Justice Kennedy's concurring opinion in *Rapanos*. Some commenters stated that the direct hydrologic surface connection requirement in the proposed rule would not sufficiently protect certain wetlands with hydrological, chemical, and biological connections that the commenters believed are important to restoring and maintaining the chemical, physical, and biological integrity of the nation's waters and was therefore incompatible with section 101(a) of the CWA.

The agencies do not view the scope of their authority as limited to wetlands that abut traditional navigable waters, nor do they view their authorities as limited to wetlands that physically touch other jurisdictional waters. The agencies also do not view the *Rapanos* plurality opinion as narrowly as some commenters suggest. However, classifying all wetlands as jurisdictional is clearly inconsistent with the CWA and Supreme Court guidance, and such expansive federal jurisdiction would not allow for the appropriate delineation between federally-regulated waters and State and tribal land and water resources. The same is true for asserting federal authority over isolated wetlands that lack hydrological surface connection to other jurisdictional waters, or that connect hydrologically only infrequently. The agencies agree with commenters who said that the revised definition should be based on the law and science;

however, the agencies recognize that science cannot dictate where to draw the line between Federal and State or tribal waters, as those are legal distinctions that have been established within the overall framework and construct of the CWA..

In short, the agencies recognize that the scope of CWA jurisdiction over wetlands has confounded courts, members of the regulated community, regulators, and the public for decades. There are widely varying views as to which wetlands should be covered, and why. The different views in *Rapanos* and of *Rapanos* highlight the complexity of the issue. In this final rule, the agencies have considered the law, the science, and the multiple perspectives that have been offered over the years and in response to the agencies' proposal. The agencies believe that the proposal was a lawful and appropriate interpretation of agency authority under the CWA, but as described further below, the agencies have made some modifications in the final rule to better incorporate common principles from the *Rapanos* plurality and concurring opinions and to strike a better balance that furthers both the objective and the policy in CWA sections 101(a) and 101(b), respectively. The agencies also recognize that the definition of "adjacent wetlands" in the final rule differs from the regulatory definition that the Supreme Court addressed in *Riverside Bayview*, but as discussed in Section II.E.2.a of this notice, a court's deference to an agency's interpretation of a statute does not foreclose an agency from adopting alternative interpretations. This final rule adopts an alternative interpretation, but it is based on the text, structure, and legislative history of the CWA, additional Supreme Court instruction developed since *Riverside Bayview*, 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.

"In determining the limits of [their] power to regulate discharges under the Act," the agencies

according to the Supreme Court in *Riverside Bayview*, "must necessarily choose some point at which water ends and land begins." 474 U.S. at 132. "Where on this continuum to find the limit of 'waters' is far from obvious[,]" but the Court has subsequently identified some additional limiting principles to help guide the agencies. In *SWANCC*, the Supreme Court held that the agencies do not have authority to regulate nonnavigable, isolated, intrastate waters that lack a sufficient connection to a traditional navigable water, as regulation of those waters would raise constitutional questions regarding the scope of CWA authority. 531 U.S. at 172. The plurality opinion in *Rapanos* added that it did not consider certain wetlands to be jurisdictional under the Act, specifically, wetlands with only an "intermittent, physically remote hydrologic connection to 'waters of the United States,'" as those "do not implicate the boundary-drawing problem of *Riverside Bayview*." 547 U.S. at 742. Justice Kennedy's concurring opinion in *Rapanos* adds that in some instances, as exemplified by the "ponds and mudflats that were isolated in the sense of being unconnected to other waters covered by the Act," "there may be little or no connection" "between a nonnavigable water or wetland and a navigable water," and jurisdiction under the Act may be lacking. *Id*. at 766-67.

The final rule is consistent with *SWANCC* and the *Rapanos* plurality and concurring opinions in that it would exclude isolated wetlands with only physically remote hydrologic connections to jurisdictional waters. Ecological connections likewise do not provide an independent basis for including physically isolated wetlands within the phrase "the waters of the United States." *See, e.g., id.* at 741-42 (Scalia, J., plurality) ("*SWANCC* rejected the notion that the ecological considerations upon which the Corps relied in *Riverside Bayview* – and upon which the dissent repeatedly relies today . . . [–] provided an *independent* basis for including entities like 'wetlands' (or 'ephemeral streams') within the phrase 'the waters of the United States.'

SWANCC found such ecological considerations irrelevant to the question whether physically isolated waters come within the Corps' jurisdiction." (emphasis in original)); *see also, e.g., id*. at 778 (Kennedy, J., concurring in the judgment) ("[E]nvironmental concerns provide no reason to disregard limits in the statutory text.").

In this rule, wetlands adjacent to paragraph (a)(1) through (3) waters are categorically jurisdictional. The agencies adopt this position based on the rationale that an adjacent wetland is "inseparably bound up with" the jurisdictional water; if the water is jurisdictional, so is the adjacent wetland. *Riverside Bayview*, 474 U.S. at 134; *Rapanos*, 547 U.S. at 740 (Scalia, J., plurality) ("'Faced with such a problem of defining the bounds of its regulatory authority,' we held, the agency could reasonably conclude that a wetland that 'adjoin[ed]' waters of the United States is itself a part of those waters.") (quoting *Riverside Bayview*, 474 U.S. at 132, 135 & n.9). The *Riverside Bayview* Court also acknowledged "that a definition of 'waters of the United States' encompassing all wetlands adjacent to other bodies of water over which the [agencies have] jurisdiction is a permissible interpretation of the Act," 474 U.S. at 135, and Justice Kennedy added in *Rapanos* that "the assertion of jurisdiction for those wetlands is sustainable under the Act by showing adjacency alone." 547 U.S. at 780. The balance of this subsection describes the four ways in which the agencies will assert categorical jurisdiction over adjacent wetlands under this final rule.

Consistent with the proposal, under this final rule, wetlands are considered indistinguishable from other jurisdictional waters, and therefore are adjacent, when they abut such waters. The agencies clarify in the final rule that the term "abut" means "to touch at least at one point or side." *See Webster's II, New Riverside University Dictionary* (1994) (defining "abut" to mean "to touch at one end or side of something"). "Abut" as used in this final rule is also consistent

with the common understanding of the term "adjacent," which means "next to," "adjoining," "to lie near," or "close to." *See id.* The term "abut" is therefore intended to provide members of the regulated community with clear, predictable and understandable guidance as to which wetlands lie in such close proximity to jurisdictional waters that they are considered categorically jurisdictional under the CWA.

As discussed in Section II.E.2, the plurality in *Rapanos* characterized the scope of CWA jurisdiction over wetlands as encompassing wetlands, like those at issue in *Riverside Bayview*, with a "continuous surface connection" or a "continuous physical connection" to a navigable water. *Rapanos*, 547 U.S. at 742, 751 n.13 (Scalia, J., plurality). Justice Kennedy's concurrence recognized that "the connection between a nonnavigable water or wetland and a navigable water may be so close, or potentially so close, that the Corps may deem the water or wetland a 'navigable water' under the Act." *Id.* at 767 (Kennedy, J., concurring in the judgment). Wetlands that abut another jurisdictional water have a continuous surface or physical connection to those waters and are therefore inseparably bound up with them. *See, e.g., id.* at 740 (Scalia, J., plurality).

Wetlands that abut other jurisdictional waters are adjacent under this final rule even absent evidence of a hydrologic surface connection occurring between the two, as not all abutting wetlands display surface water as the wetland hydrology factor but rather may have saturated soils, a high water table, or other indicators of hydrology. In this final rule, an abutting wetland is "adjacent" regardless of where "the moisture creating the wetlands. . . find[s] its source." *Rapanos*, 547 U.S. at 772 (Kennedy, J., concurring in the judgment) (citing *Riverside Bayview*, 474 U.S. at 135), so long as the wetland touches the jurisdictional water at one point or side. In other words, while a surface water exchange between a wetland and a paragraph (a)(1) through

(3) water under this final rule is evidence that the wetland is abutting, such an exchange is not required under the definition for wetlands that abut. The inclusion of abutting wetlands without a surface water exchange with a paragraph (a)(1) through (3) water adheres 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 a hydrologic connection (in the sense of interchange of waters) that shows the wetlands' significance for the aquatic system." *Id*. at 786.

The agencies recognize that the categorical inclusion of adjacent wetlands beyond wetlands that "actually abut[]" navigable-in-fact waters, like those addressed in *Riverside Bayview*, 474 U.S. at 135, is dependent on the relationship between the other categories of "waters of the United States" and waters more traditionally understood as navigable. The agencies believe that the definition of "tributary" in this final rule, as described in Section III.D, appropriately limits federal jurisdiction to those rivers and streams that due to their relatively permanent flow regime and contribution of surface water flow to navigable waters in a typical year are "significant enough that wetlands adjacent to them are likely, in the majority of cases, to perform important functions for an aquatic system incorporating navigable waters." *Rapanos*, 547 U.S. at 781 (Kennedy, J., concurring in the judgment). Because the "tributary" definition as finalized "rests upon a reasonable inference of ecological interconnection" with navigable waters, and adjacent wetlands must abut, be inundated by flooding from, or be physically separated from tributaries only by certain natural features or by artificial structures that allow for a direct hydrologic surface connection and are thus "inseparably bound up with" tributaries, the agencies conclude that the assertion of jurisdiction over wetlands adjacent to tributaries "is sustainable under the Act by showing adjacency alone." *Id.* at 780 (citing *Riverside Bayview*, 474 U.S. at 134). The "tributary" definition in this final rule—which is appropriately limited to address the "breadth of

[the] standard" about which Justice Kennedy was concerned in *Rapanos, id.* at 781, is consistent with and finds support in the Court's conclusion in *Riverside Bayview* "that a definition of 'waters of the United States' encompassing all wetlands adjacent to other bodies of water over which the Corps has jurisdiction is a permissible interpretation of the Act." 474 U.S. at 135.

In assessing the appropriate "limits of 'waters'" on the continuum between open waters and dry land, this rule's definition balances the inclusion of certain wetlands beyond those that merely abut jurisdictional waters with the fact that "mere hydrologic connection should not suffice in all cases." *Rapanos*, 547 U.S. at 784 (Kennedy, J., concurring in the judgment). The *Rapanos* plurality questioned the Corps' broad interpretation of its regulatory authority to "conclude that wetlands are 'adjacent' to covered waters if they are hydrologically connected through directional sheet flow during storm events or if they lie within the 100-year floodplain of a body of water." *Id.* at 728 (plurality opinion) (internal citations and quotations omitted). The plurality also declared 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 that we described as a 'significant nexus' in *SWANCC*." *Id*. at 742. Similarly, Justice Kennedy stated that "the connection may be too insubstantial for the hydrologic linkage to establish the required nexus with navigable waters as traditionally understood." *Id*. at 784-85 (Kennedy, J., concurring in the judgment). Justice Kennedy also believed that "possible flooding" could be an unduly speculative basis for a jurisdictional connection between wetlands and other jurisdictional waters. *Id*. at 786.

In this final rule, wetlands are not adjacent simply because a hydrologic connection between jurisdictional waters and wetlands is possible or if, for example, wetlands are connected by

flooding once every 100 years or by directional sheet flow during or following storm events. Instead, wetlands are considered "adjacent" if they are inundated by flooding from a paragraph (a)(1) through (3) water in a typical year. The typical year requirement, described further in Section III.A.1, ensures that a sufficient surface water connection occurs and that the connection is not merely "possible" or "speculative." *Riverside Bayview* held that flooding was not necessary to assert jurisdiction over wetlands that abut jurisdictional waters, but it also indicated that wetlands created by flooding from a jurisdictional water could be jurisdictional. *See Rapanos*, 547 U.S. at 773-74 (Kennedy, J., concurring in the judgment) (characterizing *Riverside Bayview* to find that jurisdiction may be appropriate "even for wetlands that are not the result of flooding or permeation"). The agencies conclude in this final rule that wetlands that are inundated by flooding from a paragraph (a)(1) through (3) water in a typical year are inseparably bound up with and are part of the jurisdictional water. That is because flooding in a typical year creates a continuous surface connection with another jurisdictional water during the flood event, or, in the terminology of the agencies' proposal, a direct hydrologic surface connection.

Wetlands can be inundated by flooding from a paragraph (a)(1) through (3) water in a typical year when, for example, a tributary's flow overtops its banks. Inundation sufficient to establish adjacency occurs only in one direction, from the paragraph (a)(1) through (3) water to the wetland, which provides a direct hydrologic surface connection from a jurisdictional water to a wetland, thereby rendering the wetland "itself a part of those waters" "that are 'waters of the United States' in their own right." *Rapanos*, 547 U.S. at 740, 742 (Scalia, J., plurality). Inundation can occur as a result of infrequent, seasonal, or permanent flooding, for example, so long as inundation occurs in a typical year and has as its source a paragraph (a)(1) through (3) water. The typical year requirement ensures that the hydrologic surface connection occurs

regularly and is not "unduly speculative." Although "flood or inundation events . . . are impermanent by definition," *id*. at 770 (Kennedy, J., concurring in the judgment), when a jurisdictional water inundates a wetland by flooding on a regular basis, those waterbodies are part of the same aquatic system.

The agencies received comments that the inundation requirement should create jurisdiction over a wetland if it occurs in either or both directions, rather than only *from* a jurisdictional water *to* the wetland as proposed. The agencies disagree and conclude in this final rule that it is the inundation of water from the paragraph (a)(1) through (3) water to a wetland, and not vice versa, that indicates the wetland is inseparably bound up with the paragraph (a)(1) through (3) water. Flooding from a nearby wetland to a paragraph (a)(1) through (3) water is more like diffuse stormwater run-off and directional sheet flow over upland, which the agencies have concluded are not sufficient to create or maintain federal jurisdiction. *See* Section III.A.3 for more information on this topic. Wetlands connected to jurisdictional waters by only such means are more appropriately regulated by the States and Tribes under their sovereign authorities. If the surface water communication from a wetland to a jurisdictional water is more frequent, for example as regular groundwater elevation rise expressed through the wetland similar to groundwater intersecting the bed of perennial or intermittent stream), then that flow from the wetland will likely channelize and form a jurisdictional tributary to a downstream water which the wetland would then abut (because it would be touching the tributary at a single point where the tributary left the wetland). If the flow is not channelized, it suggests a more attenuated connection. Alternatively, if the overland flow frequently reaches a jurisdictional water but does not channelize, it likely will form wetland characteristics in the flow path that could meet the definition of wetland that abuts the jurisdictional water.

Some commenters requested clarification on the frequency and amount of inundation required to establish adjacency. The agencies have clarified in the final rule that inundation occurs via flooding. Inundation need only occur at least once in a typical year to establish adjacency for wetlands with no particular requirement for the volume or duration of inundation. *See* Section III.A.1 for additional discussion of the "typical year," which allows for flexibility in determining when the precipitation and other climatic variables are within the normal periodic range. Others commented that bankfull flow, which describes the flow that just fills the channel, most commonly occurs every 1.5 years, and therefore higher magnitude flows which cause inundation from a river or stream to a riverine wetland may not occur in every calendar year or in every "typical year." The agencies note that an event that may occur under "typical year" conditions does not necessarily occur in every calendar year. This is because the typical year is based on a rolling 30-year period of record, which necessarily includes variability from year to year over that 30-year period. One method for calculating "normal precipitation" requires comparing precipitation totals for a given period to the 30th to 70th percentiles of precipitation totals from the same dates over the 30-year period, as described in Section III.D.3. This range could correspond to a variety of flood recurrence intervals and flow magnitudes depending on the geographic area, time of year, climate, and other factors. Some typical years will be more wet, and others will be more dry, but the "typical year" definition in this final rule is intended to reflect the characteristics of a waterbody at times that are not abnormally wet or dry based on the specific historical characteristics of the water or wetland. The agencies expect that bankfull discharge flows will occur in a typical year in many riverine systems such that those flooded wetlands will be jurisdictional under the final rule. Additionally, the bankfull discharge flow conditions—and sediments carried in those flood waters and deposited landward—commonly

create a natural river berm between the active channel and nearby wetlands. As described below, wetlands separated from paragraph (a)(1) through (3) waters only by a natural berm, bank, dune, or similar natural feature are jurisdictional without regard to a specific hydrologic surface connection in a typical year.

In this final rule, wetlands are categorically adjacent if they are physically separated from a paragraph (a)(1) through (3) water only by a natural berm, bank, dune or similar natural feature. Such wetlands do not require a hydrologic surface connection to a paragraph (a)(1) through (3) water to be "adjacent wetlands" in the final rule, nor is this provision of the "adjacent wetlands" definition tied to the "typical year" construct. This is a change from the proposal that reflects the agencies' further consideration and conclusion that certain wetlands that were excluded from jurisdiction by the proposed rule are in fact regularly connected to jurisdictional waters such that they are inseparably bound up with such waters, as many commenters noted. In this final rule, the agencies conclude that the presence of a natural berm, bank, dune, or similar natural feature indicates that a sufficient surface water connection occurs between the jurisdictional water and the wetland. For example, a natural river berm can be created by repeated flooding and sedimentation events when a river overtops its banks and deposits sediment between the river and a wetland.[55] The wetland could have been formed at the same time as or after the formation of the natural river berm due to repeated flooding and the impeded return flow created by the berm. Adjacent wetlands separated only by a bank from a paragraph (a)(1) through (3) water can

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[55] See, for example, Connectivity of Stream and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence, p. A-7, defining a "levee (natural)" as a "broad, low ridge or embankment of coarse silt and sand that is deposited by a stream on its floodplain and along either bank of its channel. Natural levees are formed by reduced velocity of flood flows as they spill onto floodplain surfaces and can no longer transport the coarse fraction of the suspended sediment load."

also occur when there is an elevation difference between the wetland and the paragraph (a)(1) through (3) water (*e.g.*, when the stream is incised). The surface water flow of the tributary over time can erode a channel to contain the tributary which separates itself from the adjacent wetland by a bank. As with berms, these banks are indicators of a regular surface water connection and being inseparably bound up with the tributary's aquatic system. The agencies clarify that while natural barriers may at times occur within a floodplain, the existence of a floodplain generally (and other land masses similar to a floodplain, such as a riparian area or fluvial terrace) is not sufficient to indicate a direct hydrological surface connection. The agencies also clarify that wetlands separated from jurisdictional waters by cliffs, bluffs, or canyon walls are not adjacent on the basis of being separated from a jurisdictional water only by a natural barrier because such features prohibit regular surface water communication between jurisdictional waters and such wetlands.

Some commenters said that a wetland must immediately abut a jurisdictional water to be adjacent. Other commenters recommended that wetlands perched atop the riverbank of an incised stream be considered adjacent. The agencies have modified the final rule to include wetlands as "adjacent" when they are separated only by a natural berm, bank, dune, or similar feature. Some commenters recommended that natural berms not sever adjacency because such features form naturally in undisturbed rivers as a result of sediment deposits associated with routine flooding. The agencies agree that natural berms and similar natural features are indicators of a direct hydrologic surface connection as they are formed through repeated hydrologic events. It follows that wetlands separated from paragraph (a)(1) through (3) waters only by such berms and similar natural features should not sever adjacency. The formation of dunes between wetlands and connected waters often occurs, for example, in interdunal wetlands in coastal areas

or around parts of the Great Lakes. These wetlands are often formed through wind erosion which results in the sand surface interacting with the water table, providing enough hydrology to create wetlands. They may also be formed when water levels drop in lakes or from historic glacial retreat. Many interdunal wetlands have seasonally variable hydroperiods where they may be dry during periods of low rainfall. These processes and the resulting natural berm, bank, dune or similar natural feature indicate that the wetlands are integrated and "inseparably bound up" with the paragraph (a)(1) through (3) waters to which they are adjacent. Accordingly, the agencies conclude in this final rule that wetlands are adjacent wetlands if they are physically separated from a paragraph (a)(1) through (3) water only by a natural berm, bank, dune, or similar natural feature. While this category of "adjacent wetlands" differs from the proposed rule, these types of adjacent wetlands have been included in prior regulations defining "waters of the United States," and their inclusion in the final rule is consistent with the agencies' longstanding practice. *See* 42 FR 37129; *see also* 51 FR 41251 ("Wetlands separated from other waters of the United States by man-made dikes or barriers, *natural river berms, beach dunes* and the like are 'adjacent wetlands.'") (emphasis added).

Under the final rule, wetlands may be separated from a paragraph (a)(1) through (3) water by only one natural feature, such as a single river berm or dune, in order to be considered adjacent. The agencies intend for wetlands separated by several natural features, such as a series of natural berms or a foredune and a backdune, from the paragraph (a)(1) through (3) water to be too remote from the jurisdictional water and therefore non-adjacent. In another example, where there is a paragraph (a)(1) water, then a dune landward of the paragraph (a)(1) water, followed by a wetland, followed by another dune and then another wetland, the first wetland is an "adjacent wetland" but the second distant wetland is not.

Wetlands are not "adjacent wetlands" if they are adjacent merely to another wetland; rather under the final rule, wetlands are jurisdictional only if they are adjacent to paragraph (a)(1) through (3) waters. This position is consistent with the agencies' longstanding regulations. *See* 51 FR 41206, 41250 (Nov. 13, 1986) (defining "waters of the United States as including "wetlands adjacent to" other jurisdictional "waters (other than waters that are themselves adjacent)"). For example, if there is an intervening wetland between the subject wetland and a tributary, and the intervening wetland is adjacent to the tributary but is not part of the same wetland as the subject wetland (*e.g.*, they are separated by upland), the subject wetland is not adjacent to the tributary unless it satisfies the conditions of paragraph (c)(1) in its own right (*e.g.*, if it is inundated by flooding from the tributary in a typical year). In addition, this final rule does not allow for a "chain" of wetlands which may be connected hydrologically via groundwater, shallow subsurface flow, overland sheet flow, or non-wetland swales to be considered adjacent to each other or to a paragraph (a)(1) through (3) water simply because one of the wetlands in the chain is adjacent to the paragraph (a)(1) through (3) water. Wetlands that exhibit this type of "fill and spill" scenario are not "adjacent wetlands" under this final rule if the wetlands can be delineated separately from each other, with upland or non-jurisdictional waters or wetlands between them.

Under this final rule, the definition of "adjacent wetlands" also encompasses wetlands that are physically separated from a paragraph (a)(1) through (3) water only by an artificial dike, barrier, or similar artificial structure, so long as that structure allows for a direct hydrologic surface connection between the wetlands and the paragraph (a)(1) through (3) water in a typical year, such as through a culvert, flood or tide gate, pump, or similar artificial feature. Although this final rule differs from the proposal in this respect, these types of adjacent wetlands have

been defined as "waters of the United States" in prior regulations (although those prior regulations did not require the direct hydrologic surface connection that this final rule requires to occur in a typical year). *See* 42 FR 37129 (July 19, 1977). Some commenters recommended that tide gates, as well as pumps in managed aquatic systems, be allowed to maintain sufficient surface water connections for purposes of determining adjacency. The agencies agree and have modified the final rule to include wetlands with a direct hydrologic surface connection through or over such structures to a paragraph (a)(1) through (3) water in a typical year. A flood gate may be designed to restrict water flow other than in times of high water. Under the final rule, a flood gate, culvert, pump, or similar structure that allows for and is used to maintain a direct hydrologic surface connection between a jurisdictional water and a wetland at any point in a typical year satisfies the definition of "adjacent wetlands."

Some artificial structures may allow for frequent direct hydrologic surface connections between the wetland and the paragraph (a)(1) through (3) water, while others may not. Under the final rule, a direct hydrologic surface connection through an artificial structure must occur at least once in a typical year to establish adjacency. When an artificial structure separating a wetland from a paragraph (a)(1) through (3) water does not allow for a direct hydrologic surface connection in a typical year, the wetland is not adjacent. For example, although some artificial structures (*e.g.*, a levee) may have subsurface connections through porous soils, this final rule requires the structure to allow for direct hydrologic *surface* connection between a paragraph (a)(1) through (3) water and a wetland in a typical year for the wetland to be adjacent. Similarly, if a culvert or a pump conveys water from a wetland to a jurisdictional water only during a 100-year storm, such features would not allow for a direct hydrologic surface connection between the wetland and jurisdictional water in a typical year, and those wetlands would not be adjacent.

In this section of the final rule, the agencies retained the concept of direct hydrologic surface connection from the proposed rule, but modified it for ease of implementation. The proposed rule would have required that for such wetlands, a direct hydrologic surface connection occurs as a result of inundation from a jurisdictional water to a wetland or via perennial or intermittent flow between a wetland and a jurisdictional water in a typical year. Some commenters supported the use of perennial or intermittent flow classifications to establish a direct hydrologic surface connection from a wetland to a jurisdictional water in a typical year. Other commenters stated that the concept was confusing and that the requirement to identify a perennial or intermittent connection could create implementation challenges. The agencies have been using flow classifications to make jurisdictional determinations since the 2008 *Rapanos* Guidance was issued, and are familiar with and can manage existing implementation challenges. However, to provide additional clarity and to improve and streamline implementation, the agencies have simplified the proposal's approach to establishing adjacency and have eliminated the requirement that a wetland maintain a perennial or intermittent connection to the jurisdictional water in a typical year. In the final rule, a direct hydrologic surface connection in a typical year, regardless of the flow classification, is sufficient to demonstrate that the wetland and jurisdictional water are inseparably bound up.

By not including a flow classification requirement for direct hydrologic surface connections in paragraph (c)(1), the agencies anticipate that more wetlands will be regulated as "adjacent wetlands" under the final rule as compared to the proposal. The final rule will also be easier to implement, as landowners and regulators can easily discern if an artificial structure exists and whether that structure likely allows for a direct hydrologic surface connection to occur in a typical year. *See* Section III.G.3 for additional discussion on implementation.

Under this final rule, an adjacent wetland is jurisdictional in its entirety when a road or similar artificial structure divides the wetland, as long as the structure allows for a direct hydrologic surface connection through or over that structure in a typical year. This aspect of the final rule was modified from the proposal but is consistent with establishing jurisdiction over wetlands physically separated by artificial structures that provide a direct hydrologic surface connection in a typical year. A road that divides one wetland into two parts (or multiple roads that divide one wetland into multiple parts) does not change the jurisdictional status of an "adjacent wetland" under this final rule so long as a direct hydrologic surface connection is maintained through a culvert or similar feature or over the structure (*e.g.*, water overtopping the road at an engineered low point) which enables a direct hydrologic surface connection in a typical year between the otherwise separated portions of the adjacent wetland. With a direct hydrologic surface connection, the bisected wetland is still functioning as one wetland and is jurisdictional as one adjacent wetland. But for the road, the wetland portions would be one intact adjacent wetland, and thus the agencies have determined that it is appropriate to treat the separated portions as one adjacent wetland, so long as the structure allows for a direct hydrologic surface connection through or over that structure in a typical year. Where more than one road crosses a wetland, and the first allows for continued direct hydrologic surface water connection to a jurisdictional water but the second does not, the wetlands on the far side of the second road are not part of the adjacent wetland. This modification to the final rule addresses comments that stated that prior road construction activities may not have fully mitigated for the loss of jurisdictional wetlands.

Commenters raised questions about the jurisdictional status of wetland complexes under the proposed rule. Consistent with the proposal, the final rule establishes that if a wetland can be

delineated from another wetland by upland or other separation (other than a road or similar artificial structure dividing a wetland that allows for a direct hydrologic surface connection through or over that structure in a typical year) then each wetland will be considered separately for purposes of determining adjacency. These separate wetlands are not adjacent to each other even if a hydrologic surface connection is present between them. Where wetlands in a complex of wetlands have a continuous physical surface connection to one another such that upland boundaries or dikes, barriers, or other structures cannot distinguish or delineate them as physically separated, the entire area is viewed as one wetland for consideration as to whether the wetland meets the terms of adjacency. If any portion of a wetland, including these physically interconnected wetlands, is adjacent to a paragraph (a)(1) through (3) water, the entire wetland is adjacent. *See Riverside Bayview*, 474 U.S. at 135 ("Because respondent's property is *part* of a wetland that actually abuts on a navigable waterway, respondent was required to have a permit in this case.") (emphasis added). Physically remote isolated wetlands are not adjacent wetlands under this rule.

Some commenters expressed concern that allowing artificial barriers to sever jurisdiction of a wetland that would otherwise be adjacent to a jurisdictional water would create incentives for the illegal construction of such barriers. The agencies note that construction of an artificial barrier such as a berm may not sever jurisdiction under the final rule, depending on the circumstances. For example, if the barrier allows for a direct hydrologic surface connection in a typical year, jurisdiction is not severed. Alternatively, a CWA section 404 permit may be issued with applicable mitigation requirements for a structure that does not allow for a direct hydrologic surface connection in a typical year and therefore severs jurisdiction of the wetland. In addition, although the agencies recognize that relevant factual issues bear on the legality of construction at

any particular site, the agencies do not intend this rule to allow artificial barriers illegally constructed under the CWA to sever jurisdiction of a wetland that would otherwise be adjacent to a jurisdictional water. To be clear, this final rule does not modify the CWA prohibition on unauthorized discharges, such as the unlawful construction of a barrier in a jurisdictional wetland. Construction that is unlawful under the CWA remains subject to the agencies' enforcement authorities. *See* Section III.A.3 of this notice for further discussion of what does or does not sever jurisdiction.

Some commenters stated that adjacent wetlands should include constructed and restored wetlands. The agencies agree and do not view a wetland's status as constructed, restored, rehabilitated, modified, or natural as affecting its jurisdictional status if it meets the definitions of both "wetlands" and "adjacent wetlands" under the final rule.

Several commenters stated that groundwater and subsurface connections between a wetland and a paragraph (a)(1) through (3) water should be sufficient to establish adjacency. Other commenters stated that the proposal appropriately required a regular *surface* water connection to create jurisdictional "adjacent wetlands." Given that the focus of this rule's definition of "adjacent wetlands" is on the ordinary meaning of the term "waters," common principles from Supreme Court guidance, and balancing the policy in CWA section 101(a) with the limitations on federal authority embodied in CWA section 101(b), the agencies are finalizing the definition of "adjacent wetlands" that does not include subsurface hydrologic connectivity as a basis for determining adjacency, consistent with the proposed rule. The agencies believe that implementation of subsurface connections as a basis for CWA jurisdiction would be overinclusive and would encroach on State and tribal authority over land and water resources. *See* Section II.E.2.a. for further discussion of the legal principles underlying the agencies'

interpretation of the surface connection requirement. A groundwater or subsurface connection could also be confusing and difficult to implement, including in the determination of whether a subsurface connection exists and to what extent. The categorical inclusion of "adjacent wetlands" as defined in the final rule will include some wetlands that connect to other jurisdictional waters through subsurface flow, such as some that abut or are separated by natural berms and related features. However, these wetlands must meet one of the four criteria established in paragraph (c)(1) to be "adjacent wetlands" and are not adjacent based simply on a subsurface hydrologic connection to jurisdictional waters. Physically remote wetlands and other wetlands that do not meet the final rule's definition of "adjacent wetlands" are reserved to regulation by States and Tribes as land and water resources of those States and Tribes.

A few commenters recommended that the agencies establish an administrative boundary for adjacency, such as a linear distance from a jurisdictional water to provide clarity. Other commenters stated that establishing distance thresholds or limits would be inappropriate and arbitrary. After considering these comments, the agencies are not including any distance thresholds or limits to determine adjacency in the final rule, consistent with the proposal. Indeed, the agencies believe that it would be difficult to select a boundary that is not arbitrary for a rule that applies to so many diverse situations nationwide. In addition, it can be difficult to identify a starting point from which to measure an administrative boundary. While distance thresholds for establishing CWA jurisdiction over wetlands may be too arbitrary and difficult to establish, however, the same is likely not true for determining lead permitting responsibility when States or Tribes assume section 404 permitting authority under 33 U.S.C. 1344(g). In assumed programs, the question for adjacent wetlands is which regulatory authority is responsible for permitting, not whether the wetlands themselves are waters of the United States.

Some members of the public commented that adjacent wetlands should include all wetlands within the 100-year floodplain. Other commenters disagreed and stated that wetlands with a one percent annual chance of flooding should not be considered waters of the United States. Under the final rule, although not all wetlands in the 100-year floodplain are jurisdictional, many adjacent wetlands will be located within the 100-year floodplain of a jurisdictional water. In addition to the other tests for adjacency, flooding in a typical year may occur in portions of the 100-year floodplain. For example, wetlands which are inundated by flooding from a paragraph (a)(1) through (3) water in a typical year may be floodplain wetlands, or wetlands which are physically separated from a paragraph (a)(1) through (3) water only by a natural berm or dune may be floodplain wetlands. The agencies also recognize that it can be difficult to measure a floodplain's extent as floodplains are not mapped everywhere in the country. In any event, the agencies believe that including wetlands as adjacent due solely to their presence in the 100-year floodplain goes beyond the scope of the agencies' legal authority under the CWA and contravenes Supreme Court guidance. *See, e.g.*, *Rapanos*, 547 U.S. at 746 (Scalia, J., plurality) ("the Corps' definition of 'adjacent,' . . . has been extended beyond reason to include, *inter alia*, the 100-year floodplain of covered waters"). Consistent with the proposal, the agencies are not including a floodplain criterion (*e.g.*, a general floodplain requirement or a specific floodplain interval requirement) to determine adjacency in the final rule.

Some commenters recommended that the agencies include wetlands with a significant nexus to navigable waters as jurisdictional while others supported the agencies' proposed approach to remove the case-specific significant nexus analysis from the determination of jurisdiction. This final rule ends the agencies' practice of conducting case-specific significant nexus evaluations for determining whether wetlands are jurisdictional as adjacent. Under the agencies' *Rapanos*

Guidance, this evaluation required individual analyses of the relationship between a particular wetland (or group of wetlands aggregated together with its nearest tributary) with traditional navigable waters. Importantly, Justice Kennedy's "significant nexus" test for wetlands adjacent to non-navigable tributaries was only needed "absent more specific regulations," *id.* at 782 (Kennedy, J., concurring in the judgment), because "the breadth of [the then-existing tributary] standard . . . seems to leave wide room for regulations of drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water volumes towards it" and thus "precludes its adoption as a determinative measure of whether adjacent wetlands are likely to play an important role in the integrity of an aquatic system comprising navigable waters as traditionally understood." *Id*. at 781. In light of the "more specific [tributary] regulations" in this final rule, the agencies are eliminating the case-specific significant nexus analysis through categorical treatment of all adjacent wetlands, as defined by this rule, as "waters of the United States." The agencies recognize that this is a new position and modifies prior agency positions on Justice Kennedy's concurring opinion in *Rapanos*. The agencies also recognize that several courts have adopted the significant nexus standard as a test for jurisdiction for both adjacent wetlands and tributaries. For all the reasons described in Section II.E, the agencies are finalizing a rule that is more consistent with the body of Supreme Court guidance, including the origins of the significant nexus standard, and their authority under the Act, than were previous regulations. The agencies believe that this final rule achieves the goals of the Act and provides better clarity for the regulators and the regulated community alike, while adhering to the basic principles articulated in *Rapanos*, *SWANCC*, and *Riverside Bayview*.

Some commenters recommended including as waters of the United States specific waters based solely on ecological importance, such as prairie potholes. Other commenters urged the

agencies to finalize a rule consistent with Supreme Court guidance which directs that ecological considerations do not provide an independent basis for federal jurisdiction. 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." *See, e.g.*, *Rapanos*, 547 U.S. at 741-42 (Scalia, J., plurality); *see also id*. at 778 (Kennedy, J., concurring in the judgment).

Some commenters recommended the agencies incorporate more scientific analysis in their interpretation of the proper scope of "adjacent wetlands". The definition of "adjacent wetlands" and the categorical treatment of jurisdiction over wetlands adjacent to other jurisdictional waters is informed by science, though it is not dictated by science alone. For example, the EPA's SAB noted when reviewing the Draft Connectivity Report in 2014, that "[s]patial proximity is one important determinant of the magnitude, frequency and duration of connections between wetlands and streams that will ultimately influence the fluxes of water, materials and biota between wetlands and downstream waters." SAB Review at 60. "Wetlands that are situated *alongside* rivers and their tributaries are likely to be connected to those waters through the exchange of water, biota and chemicals. As the distance between a wetland and a flowing water system increases, these connections become less obvious." *Id*. at 55 (emphasis added). The Connectivity Report also recognizes that "areas that are closer to rivers and streams have a higher probability of being connected than areas farther away." Connectivity Report at ES–4. The agencies considered these and other scientific principles described above in crafting this final rule; however, as discussed in Section II.E of this notice, the line between Federal and State waters is a legal distinction, not a scientific one, that reflects the overall framework and construct of the CWA. This rule's definition draws the legal limit of federal jurisdiction in a clear and

implementable way that adheres to established legal principles, while being informed by the policy choices and scientific expertise of the executive branch agencies charged with administering the CWA.

Consistent with the proposal, the agencies are retaining the longstanding definition of "wetlands" in this final rule. Some commenters expressed support for this approach. Some commenters requested that the agencies clarify that a wetland must satisfy all three wetland delineation factors to be considered a wetland under the rule. Other commenters requested that the agencies clarify the term "normal circumstances" as used in the definition of "wetlands," and suggested that the term should not apply when higher than normal rainfall conditions are present. Commenters also requested clarification on whether human alteration affects "normal circumstances."

The agencies have clarified that the presence and boundaries of wetlands are determined based upon an area satisfying all three of the definition's factors (*i.e.*, hydrology, hydrophytic vegetation, and hydric soils) under normal circumstances. This is evident in the final definition of "upland" in paragraph (c)(14). The agencies have also clarified that certain elements of the "adjacent wetlands" definition include a "typical year" requirement to ensure that the jurisdictional status of wetlands is being assessed under conditions that are not too wet and not too dry. In addition, the agencies consider climatic conditions when delineating wetlands, for example, whether there are drought conditions or conditions of unusually high rainfall. The term "typical year" is not intended to modify the agencies' current implementation of normal circumstances.

The agencies recognize that there have been questions over time about the jurisdictional status of ditches that are not maintained. Under this final rule, as discussed in more detail in

Section III.E, when a ditch constructed in an adjacent wetland contributes less than perennial or intermittent flow to a paragraph (a)(1) water in a typical year and yet, due to lack of maintenance, gains wetland characteristics, that ditch may be viewed as an adjacent wetland if it meets the definition of both "wetlands" under paragraph (c)(16) and "adjacent wetlands" under paragraph (c)(1).

3. How Will the Agencies Implement the Final Rule?

If a wetland satisfies this rule's definition of "wetlands" and "adjacent wetlands" it is considered a water of the United States without need for further analysis. This categorical inclusion, however, does not alleviate the need for site-specific verification of jurisdiction, such as confirmation of wetland characteristics, whether the wetlands meet the final rule's definition of "adjacent wetlands," and other issues typically addressed during a jurisdictional determination process.

This rule provides a definition of "adjacent wetlands" that includes wetlands that abut, meaning to touch at least at one point or side of, a water identified in paragraph (a)(1), (2), or (3). Such abutting wetlands need not abut the paragraph (a)(1) through (3) water along the entire length of a delineated wetland boundary to be considered adjacent. Rather, the wetlands need only touch the paragraph (a)(1) through (3) water at one point. In addition, and consistent with the proposal and *Riverside Bayview*, the final rule does not require surface water exchange between wetlands and the jurisdictional waters they abut to create the jurisdictional link. 474 U.S. at 134.

Abutting occurs when the wetland delineated boundary touches the delineated boundary of the paragraph (a)(1) through (3) water, which does not require a direct hydrologic surface connection because not all wetlands have standing or flowing surface water as their wetland

hydrology factor. For example, some wetlands may have saturated soils or a high water table, and these are also indicators of wetland hydrology. Abutting occurs at the interface between the adjacent wetland and the paragraph (a)(1) through (3) water. In the field, the agencies would identify the presence of a paragraph (a)(1) through (3) water and delineate the boundary of such water at the lateral extent identified by the ordinary high water mark or high tide line, depending on which is appropriate. *See* 33 CFR 328.4. The agencies would then delineate the wetlands within the review area to determine whether the wetland boundary touches the paragraph (a)(1) through (3) water boundary at any point or side. The wetlands need not abut for a specific duration in order to be considered abutting. For example, wetlands that abut a tributary only during the wet or rainy season remain adjacent under this final rule. Similarly, if a wetland abuts an intermittent tributary it remains abutting even when water is not present in the tributary. Wetlands abutting an ephemeral stream or other non-jurisdictional feature are non-jurisdictional even if the non-jurisdictional feature maintains jurisdiction between upstream and downstream waters.

Some commenters stated that surface connections may not be present or identifiable year-round. Many commenters questioned whether the use of remote tools could identify the necessary connections and stated that field indicators and site-specific verification for wetland connections may be needed. In addition, commenters requested clarification on systems with modifications, such as dikes, levees, and other man-made structures.

The agencies modified the final rule language from the proposal in response to many of these comments to provide additional clarity and ease of implementation, while remaining faithful to the overall text, structure, and legislative history of the CWA and the legal principles outlined in Section II.E. Culverts or other structures conveying water through an artificial barrier, such as a

levee or a road, can maintain jurisdiction in the final rule if they provide a direct hydrological surface connection between a wetland and a jurisdictional water in a typical year. Where a wetland is physically separated from a tributary by a manmade levee and such artificial structure has a culvert connection through the levee, the culvert is visibly apparent and can be easily observed for efficiency in identifying it as potentially providing a direct hydrologic surface connection. In other locations, pumps may be used to control water levels. In some scenarios, the pumps are continually operating to maintain flow conditions, and in other scenarios, they are turned on only when flood conditions are present. Pumps can move water through the artificial structure or over it. A pump can create a direct hydrologic surface connection in a typical year between paragraph (a)(1) through (3) waters and their adjacent wetlands. Tide gates can also allow for a direct hydrologic surface connection in a typical year between wetlands and the paragraph (a)(1) through (3) water to which they are adjacent under the final rule. As long as a feature present within the artificial structure allows for a direct hydrologic surface connection between the wetland and a paragraph (a)(1) through (3) water in a typical year, the wetland is an adjacent wetland even if flow is not present at the time of observation. The agencies may not assume the presence of such artificial features; rather they may identify such artificial features via on-site observations or remotely using construction design plans, permitting data, state and local information, or levee or drainage district information. As is the case with jurisdictional determinations made under any regulatory regime, site-specific verification may be required in certain instances where remote tools may not be readily available or accurate or in other, often more complex site scenarios.

A wetland flooded by a navigable water, on average, once every 100 years would not satisfy the final rule's "adjacent wetlands" definition. Such inundation via flooding must occur from a

paragraph (a)(1) through (3) water at least once in a typical year for purposes of adjacency. The agencies may determine that inundation by flooding or a direct hydrologic surface connection exists during a typical year using, for example, USGS stream gage records, recurrence intervals of peak flows, wetland surface water level records, visual observation, aerial imagery, flood records, inundation modeling techniques and tools (*e.g.*, Hydrologic Engineering Centers River System Analysis System, or HEC-RAS, or tools available from USGS through their Flood Inundation Mapping program), or engineering design records. The agencies may also need to complete one or more site visits to collect field indicators of inundation. For example, the presence of water marks, sediment and drift deposits, water-stained leaves, or algal mats may indicate that an inundation event has recently occurred. The agencies believe that it is also important to consider weather and climatic conditions, *i.e.*, to review recent precipitation and climate records, to ensure the feature is not being assessed during a period of drought or after a major precipitation or infrequent flood event. Tools for determining whether climatic conditions meet the definition of "typical year" are described in Section III.A.1 of this notice.

In addition, under this final rule an adjacent wetland divided by an artificial structure, such as a road or railroad line, is treated as a single wetland and is jurisdictional in its entirety as long as the structure allows for a direct hydrologic surface connection through or over that structure in a typical year. The direct hydrologic surface connection can occur through or over the artificial structure, such as through a culvert, or as is present in some areas, over roads designed to overtop during certain conditions. Without a direct hydrologic surface connection in a typical year, only that wetland (*i.e.*, that portion of the original wetland) which meets the terms of the definition of "adjacent wetlands" under paragraph (c)(1) would be an adjacent wetland, even if there is a subsurface hydrologic connection (*e.g.*, shallow subsurface flow or aquifer) between the

wetlands present on either side of the road or other artificial structure. To identify the direct hydrologic surface connection through or over a road or other artificial structure, the agencies may use tools similar to those that are used to identify a direct hydrologic surface connection through an artificial structure, such as a dike.

To implement this aspect of the rule as applied to a particular wetland, the agencies will first need to determine whether the wetland is adjacent to a paragraph (a)(1) through (3) water. The agencies will then need to consider the conditions on the ground in order to determine whether the divided parts of the wetland should be considered one adjacent wetland, where it otherwise meets the terms of the definition. For example, if a wetland is present on either side of a road which has a direct hydrologic surface connection via a culvert connecting both parts of the wetland in a typical year, the agencies need not recreate the history of the road construction and what the conditions on the ground were at time of road construction. Rather, the agencies will observe the artificial structure and will note whether the artificial structure allows for a direct hydrologic surface connection such that the wetlands on both sides of the road can connect via surface hydrology in a typical year. If so, then the wetlands are considered one wetland.

As a general matter and consistent with longstanding practice, the agencies take a physical separation as they find it. The physical separation will be evaluated in its current form (unless normal circumstances are not present or where there is evidence of unlawful activity or efforts to circumvent jurisdiction, in which case, the separation will be evaluated using other tools to approximate normal circumstances). If a dike is originally designed not to allow for a direct hydrologic surface connection between a paragraph (a)(1) through (3) water and wetlands on the other side of the dike, but later a culvert is added to provide adequate drainage in a typical year or a pump is added to provide flood protection in a typical year, these features create a direct

hydrologic surface connection between the jurisdictional water and the wetlands. In this scenario, the wetlands become adjacent wetlands. If a natural feature is modified or changes over time (as when a berm develops over time separating a wetland from a paragraph (a)(1) water) the agencies intend to take the feature as they find it, determine whether it is a natural physical separation, and then consider whether the wetland is adjacent. Pumps are considered to be the "normal" circumstances of the hydrology when they are permanently present and are serviceable. Pumps create adjacency under the final rule when they are permanent features which allow for a direct hydrologic surface connection in a typical year through an artificial structure between a wetland and the paragraph (a)(1) through (3) water.

Temporary structures are not subject to the "take it as they find it" principle. Their presence is intended to modify the relationship between the paragraph (a)(1) through (3) water and a wetland for only a limited duration of time. For example, a temporary culvert in place for three months during construction would not allow for a wetland to become adjacent under this rule. Such temporary structures are not considered normal circumstances when considering whether a wetland may be adjacent.

For purposes of adjacency under the rule, the entire wetland is considered adjacent if any portion of the wetland meets the terms of the definition under paragraph (c)(1), regardless of the size and extent of the wetland. For example, if a portion of one side of a wetland physically touches a tributary, then the wetland is jurisdictional in its entirety. Determining the entire wetland to be adjacent if any portion of it satisfies the "adjacent wetlands" definition is consistent with longstanding practice. The agencies have found this approach to be simpler and easier to implement in the field than establishing a means of administratively bifurcating wetlands. An adjacent wetland that changes classification (*e.g.*, as defined in Cowardin *et al.*

1979) within the overall wetland delineated boundary due to landscape position, hydrologic inundation, or other factors, such as changing from salt marsh to brackish to freshwater wetland, is jurisdictional as one adjacent wetland.

Certain wetland indicators may not be present year-round in a typical year due to normal seasonal or annual variability. Adjacent wetlands under this final rule include wetlands with alternating hydroperiods and seasonal wetlands with vegetation shifts. Consistent with the agencies' longstanding practice, the delineated boundary of a seasonal wetland remains constant, even though all three delineation factors may not be apparent year-round. This approach acknowledges seasonal variation in visible wetland factors as well as the variation in hydrology and climatic conditions across the country. For example, seasonal wetlands with vegetation shifts may display hydrophytic vegetation abutting another water of the United States throughout the year except during the dry season. Also, wetlands with alternating hydroperiods that abut another water of the United States in the arid West may have hydrology present only for three months while otherwise similar wetlands in the Southeast may have hydrology present for nine months. Wetland hydrology indicators that require direct observation of surface water or saturated soils are often present only during the normal wet portion of the growing season and may be absent during the dry season. The wetland hydrology factor is often much more variable on short time scales than the hydrophytic vegetation and hydric soil factors, especially in seasonal wetlands like some bottomland hardwood forests which can lack flooding or saturation.

Some commenters noted that a ditch constructed in an adjacent wetland can drain water and create a zone of influence which may render the entire wetland non-jurisdictional under the proposed rule. Under this final rule, a wetland must first be considered adjacent to a paragraph (a)(1) through (3) water before a ditch constructed in it may be considered a tributary. Therefore,

the wetland may still be jurisdictional as an adjacent wetland to the paragraph (a)(1) through (3) water under (c)(1) even if the ditch's zone of influence reduces the extent of the wetland around the ditch, as the wetland's jurisdictional status is not directly tied to the ditch. Historical and current aerial photographs, NWI maps, NRCS soils maps, and other similar resources may indicate whether a ditch was constructed in an adjacent wetland. There may also be certain instances where a ditch has lawfully drained a wetland.

H. Waters and Features that Are Not Waters of the United States

1. What Are the Agencies Finalizing?

In paragraph (b) of the final rule, the agencies are codifying twelve exclusions from the definition of "waters of the United States." Many of the exclusions reflect longstanding agency practice and are expressly included in the final rule to ensure predictability, as the agencies continue to implement them in the future. Two of the exclusions (waste treatment systems and prior converted cropland) have been expressly included in regulatory text for decades, but the agencies are defining them for the first time to enhance implementation clarity. The majority of paragraph (b) has been finalized as proposed, but as discussed in the next subsection, the agencies have made some changes to what they proposed in response to public comments and additional analysis of the proposed regulatory text. For example, in the final rule the agencies split ephemeral surface features and diffuse stormwater runoff and overland sheet flow into separate exclusions for added clarity.

Waters and features that are excluded under paragraph (b) of the final rule cannot be determined to be jurisdictional under any of the categories in the rule under paragraph (a). Any water not enumerated in paragraphs (a)(1) through (4) is not a "water of the United States." In addition to this overarching exclusion, the final rule includes additional exclusions to provide

more specificity for certain common landscape features and land uses that are more appropriately regulated, if at all, under the sovereign authorities of States and Tribes. For example, the final rule excludes groundwater from the definition of "waters of the United States," including groundwater drained through subsurface drainage systems, reflecting the agencies' longstanding practice. The rule creates a new exclusion for ephemeral features, including ephemeral streams, swales, gullies, rills, and pools, and excludes diffuse stormwater run-off and directional sheet flow over upland. Adhering more closely to the agencies' original interpretation of the CWA, the rule excludes ditches from the definition of "waters of the United States" except those ditches identified as jurisdictional under paragraph (a)(1) or (2) and those ditches constructed in adjacent wetlands that do not meet the flow conditions of the definition of "tributary" but that meet the conditions of paragraph (a)(4). The agencies are retaining an exclusion for prior converted cropland but are defining it for the first time in regulatory text. The agencies are also retaining an exclusion for waste treatment systems.

The final rule also excludes artificially irrigated areas, including fields flooded for agricultural production, that would revert to upland should application of irrigation water to that area cease. In addition, the rule excludes artificial lakes and ponds, including water storage reservoirs and farm, irrigation, stock watering, and log cleaning ponds, constructed or excavated in upland or in non-jurisdictional waters, so long as those artificial lakes and ponds are not impoundments of jurisdictional waters that meet the conditions of paragraph (c)(6). The final rule excludes water-filled depressions constructed or excavated in upland or in non-jurisdictional waters incidental to mining or construction activity, and pits excavated in upland or in non-jurisdictional waters for the purpose of obtaining fill, sand, or gravel. The agencies also have excluded stormwater control features constructed or excavated in upland or in non-jurisdictional

waters to convey, treat, infiltrate, or store stormwater run-off. Also excluded in the final rule are groundwater recharge, water reuse, and wastewater recycling structures, including detention, retention, and infiltration basins and ponds, constructed or excavated in upland or in non-jurisdictional waters.

As discussed in Section III.G, the agencies have defined "upland" in paragraph (c)(14) and specify in the regulatory text that certain water features constructed or excavated in upland or in non-jurisdictional waters are excluded from the definition of "waters of the United States." In the final rule, "upland" means any land area that under normal circumstances does not satisfy all three wetland characteristics identified in the definition of "wetlands" (hydrology, hydrophytic vegetation, hydric soils) and does not lie below the ordinary high water mark or the high tide line of a jurisdictional water. The term is used in six of the exclusions listed in paragraph (b), and the definition is intended to provide additional clarity as the agencies implement the exclusions while also informing the application of the "adjacent wetlands" definition. *See* Section III.G of this notice.

The agencies received a broad range of comments on the proposed rule's list of exclusions, some stating that the exclusions provide necessary clarity while allowing the regulated community to plan investments in infrastructure and other projects with increased regulatory certainty and predictability. Others expressed support for the new exclusion in paragraph (b)(1), stating that it clarified that if a water is not jurisdictional under paragraph (a), it is not subject to CWA jurisdiction. Other commenters supported the inclusion of definitions for prior converted cropland and waste treatment systems, acknowledging that the new definitions help clarify those longstanding exclusions. Some commenters opposed many of the exclusions, arguing that they restrict CWA jurisdiction over too many ecologically important waters. Some commenters

argued that prior converted cropland and waste treatment systems should not be excluded from CWA jurisdiction, stating that nothing in the CWA supports the agencies' longstanding positions. The agencies have considered these diverse comments and have generally adhered to the approach set forth in the proposed rule, while making some adjustments to the regulatory text to address certain questions that were raised and to improve the clarity of the regulatory text, as discussed in the next subsection.

2. Summary of Final Rule Rationale and Public Comment

Many of these exclusions generally reflect the agencies' current and historic practice, and their inclusion in the final rule furthers the agencies' goal of providing greater clarity over which waters are and are not regulated under the CWA. Just as the categorical assertions of jurisdiction over tributaries, lakes, ponds, and impoundments of jurisdictional waters, and adjacent wetlands simplify the jurisdictional determination process, the categorical exclusions likewise simplify the process. In certain circumstances, they also reflect the agencies' determinations of the limits of their jurisdiction under the CWA based on the text of the statute, Supreme Court guidance, and the agencies' longstanding practice and technical judgment that certain waters and features are not subject to regulation under the CWA. These waters are or could be subject to State or tribal jurisdiction, as the CWA recognizes that States and Tribes can regulate more broadly than the Federal government.

Some State comments on the proposed exclusions indicated that the exclusions uphold State sovereignty to administer and allocate water resources and preserve traditional State and local authority over private property. Some commenters also stated that the proposed exclusions are consistent with the principles of cooperative federalism under the CWA. For example, a commenter asserted that the types of waters proposed for exclusion are all waters that would

traditionally fall under State jurisdiction and should remain subject to State regulation under the framework for cooperative federalism set forth in the CWA. The agencies agree that the CWA's cooperative federalism approach to protecting water quality is important and continue to reflect that approach in the exclusions finalized in this rule.

Importantly, the agencies' final rule clarifies that all waters and features identified in paragraph (b) as non-jurisdictional would not be waters of the United States. As stated in paragraph (b)(1) of the final rule, waters or water features not enumerated in paragraphs (a)(1) through (4) would not be a water of the United States. The agencies have taken this approach to avoid suggesting that but for an applicable exclusion, such features could be jurisdictional. This approach in the final rule comprehensively excludes all waters and features that the agencies have not included as waters of the United States under paragraph (a) of the rule. Different features are called different names in different parts of the country, so this approach is also intended to eliminate the risk of confusion. The agencies note that the examples of features in each exclusion are illustrative of the types of features covered under each exclusion.

Groundwater

In paragraph (b)(2) of the final rule, the agencies exclude groundwater, including groundwater drained through subsurface drainage systems. The agencies have never interpreted waters of the United States to include groundwater, and they continue that practice through this final rule by explicitly excluding groundwater. The agencies also note that groundwater, as opposed to subterranean rivers or tunnels, cannot serve as a connection between upstream and downstream jurisdictional waters. For example, a losing stream that flows to groundwater without resurfacing does not meet the definition of "tributary" because it does not contribute surface water flow to a downstream jurisdictional water. However, a subterranean river does not

sever jurisdiction of the tributary if it contributes surface water flow in a typical year to a downstream jurisdictional water, as described in Section III.A.3, even though the subterranean river itself is not jurisdictional.

Many commenters cited legislative history in the development of the Act, the agencies' implementing regulations, and case law as evidence of Congressional intent in support of the groundwater exclusion. Commenters noted that CWA legislative history demonstrates that Congress clearly did not intend to include groundwater as "waters of the United States," because Congress did not support a proposed amendment to include groundwater as waters of the United States. Many commenters stated that all subsurface water should be non-jurisdictional. Other commenters stated that groundwater is not a "navigable water" or a "channel of interstate commerce" and therefore should be excluded. Conversely, several commenters stated that groundwater is important to commerce, because it is essential as a source of drinking water for much of the population. Other commenters stated that groundwater should be jurisdictional, based on concerns regarding pollution moving to or from shallow subsurface waters. Some commenters stated that groundwater, including shallow subsurface water, could serve as a conduit for discharge of pollutants to surface water.

The agencies agree with those commenters who stated that nothing in the language of the CWA or its legislative history, Supreme Court interpretations, or past agency practices support the inclusion of groundwater, including groundwater drained through subsurface drainage systems, in the definition of "waters of the United States." The agencies disagree with other commenters' assertion that groundwater should be included in the definition of "waters of the United States." The agencies acknowledge the importance of groundwater as a resource and its role in the hydrologic cycle. But its regulation is most appropriately addressed by other Federal,

State, tribal, and local authorities. Therefore, consistent with the agencies' longstanding practice, the final rule clarifies that groundwater is non-jurisdictional. This includes shallow subsurface water and groundwater that is channelized in subsurface systems, like tile drains used in agriculture. The agencies acknowledge that, in certain circumstances, pollutants released to groundwater can reach surface water resources. However, the statutory reach 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 an understanding and application of the limits expressed in Supreme Court opinions interpreting that term. This final rule does that, while also supporting the agencies' goals of providing greater clarity, certainty, and predictability for the regulated public and regulators.

While the final rule excludes groundwater from regulation, many States include groundwater in their definitions of "waters of the State" and therefore may subject groundwater to State regulation. Indeed, the CWA incentivizes State protection of groundwater; for example, grants under CWA section 319 may implement management programs which will carry out groundwater quality protection activities as part of a comprehensive nonpoint source pollution control program. 33 U.S.C. 1329(h)(5)(D). CWA section 319(i) directs the EPA Administrator to make grants to States for the purpose of assisting States in carrying out groundwater quality protection activities which the Administrator determines will advance the State toward implementation of a comprehensive nonpoint source pollution control program. Such activities include research, planning, groundwater assessment, demonstration programs, enforcement, technical assistance, education, and training to protect the quality of groundwater and to prevent contamination of groundwater from nonpoint sources of pollution. 33 U.S.C 1329(i). In addition, groundwater quality is regulated and protected through several other legal mechanisms,

including the Safe Drinking Water Act, the Resource Conservation and Recovery Act, and various State and local laws.[56]

Ephemeral Features and Diffuse Stormwater Run-Off

In paragraph (b)(3), the final rule excludes ephemeral features, including ephemeral streams, swales, gullies, rills, and pools. In paragraph (b)(4), the rule excludes diffuse stormwater run-off and directional sheet flow over upland. Such features are not jurisdictional under the terms of paragraph (a) in the final rule or its definitions in paragraph (c). They are specifically excluded in the final rule for additional clarity. The final rule differs from the proposed rule, as (b)(3) and (b)(4) were combined into one category of exclusions in the proposal. The agencies believe that separating the exclusions into two categories, as they have done for the final rule, provides greater clarity. The separation does not have a practical effect on or substantively change the types of waters and features that the final rule excludes compared to the proposed rule. As described in detail in Section III.A.3, the agencies have revised the proposed rule to clarify that while ephemeral features are not waters of the United States, a tributary does not lose its jurisdictional status if it contributes surface water flow to a downstream jurisdictional water in a typical year through a channelized ephemeral feature, such as an ephemeral stream or gully. However, if an upstream reach is connected to the downstream reach only by diffuse stormwater runoff or directional sheet flow over upland, the upstream reach is not jurisdictional under the final rule. Providing additional clarity in the paragraph (b) exclusions helps to highlight that only some excluded features are capable of providing a channelized surface water connection between

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[56] For additional description of these programs, *see* https://www.epa.gov/npdes/interpretative-statement-releases-pollutants-point-sources-groundwater.

upstream and downstream perennial or intermittent waters. Under the final rule, ephemeral features are not jurisdictional and do not become jurisdictional even if they maintain jurisdiction of relatively permanent upstream waters by conveying surface water from those waters to downstream jurisdictional waters in a typical year.

Some commenters supported the ephemeral features exclusion as being consistent with the CWA, Commerce Clause, and case law, particularly the plurality opinion in *Rapanos*. For example, one commenter indicated that the proposed exclusion aligned with CWA section 101(b) and, by avoiding jurisdiction over primarily dry features, did not significantly alter the Federal-State framework. Other commenters expressed concern that if they are not jurisdictional, ephemeral features could be subject to uncontrolled pollution or filled, and some commenters emphasized the potential adverse impacts to downstream jurisdictional waters into which ephemeral features flow.

By defining perennial and intermittent tributaries of traditional navigable waters as jurisdictional and defining ephemeral features as non-jurisdictional, and by including (b)(3) and (b)(4) exclusions explicitly emphasizing the non-jurisdictional status of ephemeral features and diffuse stormwater run-off, the agencies are balancing Congress' intent to interpret the term "navigable waters" more broadly than the classical meaning of that term and the notion that nothing in the legislative history of the Act "signifies that Congress intended to exert anything more than its commerce power over navigation." *SWANCC*, 531 U.S. at 168 n.3. The exclusions in paragraphs (b)(3) and (b)(4) and the final rule's limitation of jurisdiction to perennial and intermittent rivers and streams most appropriately balances the Federal government's interest in regulating the nation's navigable waters with respecting State and Tribal land use authority over features that are only episodically wet during and/or following precipitation events. *See, e.g.*,

Rapanos, 547 U.S. at 734 (Scalia, J., plurality) (identifying "ephemeral streams" and "directional sheet flow during storm events" as beyond the scope of CWA jurisdiction).

Some commenters raised concerns with potential adverse impacts to downstream jurisdictional waters from discharges to non-jurisdictional ephemeral features. The agencies believe that a CWA section 402 permittee currently discharging to a jurisdictional water that becomes non-jurisdictional under this final rule would likely remain subject to the requirements of the Act. This specific concern was raised in *Rapanos*, that enforcement of section 402 could be frustrated by "polluters . . . evad[ing] permitting requirement . . . by discharging their pollutants into noncovered intermittent watercourses that lie upstream of covered waters." *Id*. at 742-43. In the words of Justice Scalia, "That is not so." *Id*. New or continuing discharges, whether illicit or not, could be subject to sections 301 and 402 of the Act if the discharge is conveyed from a point source to a "water of the United States." The agencies view ephemeral features, such as arroyos or ditches, as potential conveyances of discharges of pollutants from point sources subject to NPDES permitting requirements. So too, the agencies believe, did Justice Scalia. He referred to "channels" – a term used in the definition of "point source" at 33 U.S.C. 1362(14) – as "ephemeral streams," "dry arroyos in the middle of the desert," and "manmade drainage ditches" when characterizing the types of features that he believed stretched the meaning of the "term 'waters of the United States' beyond parody." *Id*. at 734. Additional discussion of the final rule's treatment of ephemeral features is provided in Section III.A.3 of this notice.

Ditches

The final rule's ditch exclusion in paragraph (b)(5) is intended to provide greater clarity for the regulated public and to be more straightforward for agency staff to implement than current

practice. The agencies have incorporated a clear statement in the final rule that all types of ditches would be excluded except where they meet the conditions of paragraph (a)(1) or (2) of the final rule or where, in limited instances, they meet the conditions of paragraph (c)(1). Further, as discussed in Section III.D and Section III.E of this notice, the final rule clarifies that ditches are tributaries under paragraph (a)(2) where they relocate a tributary, are constructed in a tributary, or are constructed in an adjacent wetland, so long as the ditch satisfies the flow conditions of the "tributary" definition. Many States, regional groups, and national associations that commented during the Federalism consultation as part of development of the proposed rule and during the agencies' general outreach efforts noted that the definition of "waters of the United States" should exclude ditches. The agencies received further comments on the proposed rule's category of jurisdictional ditches and the exclusion for all other ditches. Some commenters argued that all ditches should be jurisdictional if they convey any volume of water to a covered water, however infrequent or insubstantial, while others took the opposite view. As discussed in Sections III.D. and III.E., the approach adopted in this final rule reasonably balances the exclusion of features that are fundamental to State, tribal, and local land use planning while respecting the need to preserve jurisdiction over certain ditches.

Prior Converted Cropland

The agencies are finalizing the prior converted cropland exclusion in paragraph (b)(6) and adding a definition of "prior converted cropland" in paragraph (c)(9). The definition of "prior converted cropland" clarifies that the exclusion is no longer applicable when the cropland is abandoned *and* the land has reverted to wetlands, as that term is defined in paragraph (c)(16). Under this final rule, prior converted cropland is considered abandoned if it is not used for, or in support of, agricultural purposes at least once in the immediately preceding five years.

Agricultural purposes include land use that makes the production of an agricultural product possible, including but not limited to grazing and haying. Additional discussion on agricultural purposes is provided below. This final rule also clarifies that cropland that is left idle or fallow for conservation or agricultural purposes for any period or duration of time remains in agricultural use (*i.e*., it is used for, or in support of, agriculture purposes), and therefore maintains the prior converted cropland exclusion. The agencies conclude that this clarification will ensure that cropland enrolled in long-term and other conservation programs administered by the Federal government or by State and local agencies that prevents erosion or other natural resource degradation does not lose its prior converted cropland designation as a result of implementing conservation practices.

In 1993, the agencies categorically excluded prior converted cropland from the definition of "waters of the United States." 58 FR 45034-36 (August 25, 1993). As further explained below, in keeping with the Food Security Act of 1985 (FSA), the 1993 preamble defined prior converted cropland as "areas that, prior to December 23, 1985, were drained or otherwise manipulated for the purpose, or having the effect, of making production of a commodity crop possible [and that are] inundated for no more than 14 consecutive days during the growing season." 58 FR 45031. As explained in detail in the 1993 preamble, due to the degraded and altered nature of prior converted cropland, the agencies determined that such lands should not be treated as jurisdictional wetlands for purposes of the CWA because regulating such lands does not further the objective of the Act. 58 FR 45032. The 1993 preamble also set out a mechanism to "recapture" prior converted cropland into the section 404 program when the land has been abandoned and wetland features return. 58 FR 45034. This approach is consistent with the principles in the 1990 Corps Regulatory Guidance Letter 90-7. Although included in the 1993

preamble and Regulatory Guidance Letter 90-7, these principles have not been incorporated into the text of any promulgated rule until now. This rule therefore represents the first time the agencies are promulgating regulatory language to clarify the meaning of "prior converted cropland" for CWA purposes, the application of the exclusion, and a recapture mechanism based on abandonment and reversion to wetlands.

Historically, the agencies have attempted to create consistency between the CWA and the FSA wetlands conservation provisions for prior converted cropland. The agencies continue to believe that consistency across these programs is important for the regulated community (*see* 58 FR 45033), and therefore are continuing to exclude prior converted cropland from the definition of "waters of the United States." By incorporating the abandonment principles from the 1993 preamble and providing examples of "agricultural purposes," this final rule remains consistent with the concepts underlying the FSA but differs in implementation from certain aspects of USDA's current wetlands compliance authority. Incorporating the abandonment principle, as opposed to a pure "change in use" policy (described below), is important for the agencies to appropriately manage certain wetland resources while providing better clarity to the agricultural community.

When the 1993 preamble was published, the abandonment principle was consistent with USDA's implementation of the FSA. Three years later, the 1996 FSA amendments modified the abandonment principle and incorporated a "change in use" policy. *See* Pub. L. No. 104-127, 110 Stat. 888 (1996). Under the new policy, prior converted cropland would continue to be treated as such even if wetland characteristics returned because of lack of maintenance of the land or other circumstances beyond the owner's control, "as long as the prior converted cropland continues to be used for agricultural purposes." H.R. 2854, Conf. Rep. No. 104-494, at 380 (1996). In 2005,

the Corps and NRCS issued a joint "Memorandum to the Field" (the 2005 Memorandum) in an effort to again align the CWA section 404 program with the FSA by adopting the amended FSA's change in use policy. The 2005 Memorandum provided that, a "certified [prior converted] determination made by [USDA] remains valid as long as the area is devoted to an agricultural use. If the land changes to a non-agricultural use, the [prior converted cropland] determination is no longer applicable, and a new wetland determination is required for CWA purposes."[57]

The 2005 Memorandum did not clearly address the abandonment principle that the agencies had been implementing since the 1993 rulemaking. The change in use policy articulated in the 2005 Memorandum was also never promulgated as a rule and was declared unlawful by one district court because it effectively modified the 1993 preamble language without any formal rulemaking process. *See New Hope Power Co. v. U.S. Army Corps of Eng'rs*, 746 F. Supp. 2d 1272, 1282 (S.D. Fla. 2010). Implementing the 2005 Memorandum created other challenges for the agencies and the regulated community. For example, because the 2005 Memorandum did not clearly address whether or how the abandonment principles should be applied in prior converted cropland cases, neither the agencies nor the regulated community could be certain which approach would be applied to a specific case.

The agencies received many public comments on the prior converted cropland exclusion, with some commenters noting that the exclusion will provide clarification needed to protect prior converted cropland that may be subject to flooding and to other natural occurrences that result in wet or saturated fields. The agencies also received public comments on both the abandonment

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[57] Memorandum to the Field on Guidance on Conducting Wetland Determinations for the Food Security Act of 1985 and section 404 of the Clean Water Act, February 25, 2005, *available at* https://usace.contentdm.oclc.org/utils/getfile/collection/p16021coll11/id/2508.

principle and the change in use analysis. Some commenters supported the abandonment principle, stating, for example, that prior converted cropland should lose its status only when the land is abandoned and the area reverts back to wetland. Other commenters requested that the agencies finalize the change in use analysis, as articulated in the 2005 Memorandum. The agencies have considered these comments and for the reasons provided herein are finalizing the abandonment principle as proposed and are not adopting the change in use approach.

The agencies received many comments in support of the term "for or in support of, agricultural purposes" and recommendations as to how the term should be interpreted. Commenters requested that the agencies provide additional examples of agricultural purposes, including, but not limited to, idling land for conservation uses (*e.g.*, habitat; pollinator and wildlife management; and water storage, supply, and flood management); irrigation tailwater storage; crawfish farming; cranberry bogs; nutrient retention; and idling land for soil recovery following natural disasters like hurricanes and drought. The uses listed above, in addition to crop production, haying, and grazing, fall within the term "agricultural purposes" and, if documented, may maintain the prior converted cropland exclusion. Conservation practices, including those required or supported by USDA, State, and local programs (including recognized private sector programs that partner with government programs or that can provide verifiable documentation of participation) are critical to the success of agricultural systems across the country. Conservation practices and programs also are conducted "for or in support of agricultural purposes" and are appropriate to maintain the prior converted cropland exclusion.

The agencies also received public comment on the type of documentation that a landowner should maintain to demonstrate that cropland has been used "for or in support of, agricultural purposes." Commenters suggested the use of aerial photographs, topographical maps, cultivation

maps, crop expense or receipt records, field- or tract-specific grain elevator records, and other records generated and maintained in the normal course of doing business. The agencies agree that these types of documents and other documentation reasonably establishing "agricultural purposes" are appropriate to demonstrate that the prior converted cropland exclusion applies to a certain field or tract of land.

Finally, the agencies received public comments on whether the five-year timeframe for maintaining agricultural purposes is appropriate. Some commenters supported the five-year timeframe. Other commenters thought that five years was too long to avoid federal jurisdiction if wet cropland was providing some ecological or habitat benefit that should be maintained. Other commenters thought that the five-year timeframe was too short to account for unforeseen circumstances that could leave cropland idle for longer periods of time (*e.g.*, bankruptcy, the probate and estate administration process, natural disasters), and recommended that the agency adopt a seven, ten, or twenty-year timeframe. Some commenters specifically requested that the agencies allow more than five years when drought or flood conditions prevent cultivation, planting or harvest. The agencies have considered these comments and conclude that a five-year timeframe for maintaining agricultural purposes is reasonable and consistent with the 1993 preamble (58 FR 45033) and with the five-year timeframe regarding validity of an approved jurisdictional determination (2005 Corps Regulatory Guidance Letter (RGL) 05-02). The five-year timeframe is longstanding in the CWA section 404 program and will be familiar to landowners and regulators alike, increasing clarity in implementation. The agencies are finalizing the rule with the five-year timeframe, as proposed, but as described in the next subsection, the agencies will work closely with USDA, and will consider documentation from USDA, NOAA, FEMA, or other Federal or State agencies to determine if the land was used for

or in support of agricultural purposes in the immediately preceding five years to evaluate whether cropland has in fact been abandoned.

The agencies consider rulemaking to be appropriate here in order to clarify the definition of "prior converted cropland" and to provide regulatory certainty over when such lands are no longer eligible for the CWA exclusion. This final rule provides much needed clarity about the prior converted cropland exclusion and how wetlands can be recaptured into CWA jurisdiction through the abandonment test. In addition to finalizing the exclusion as proposed, the Corps will withdraw the 2005 Memorandum simultaneous with the effective date of this rule.

Artificially Irrigated Areas, Artificial Lakes and Ponds, and Water-filled Depressions

Paragraph (b) also excludes from waters of the United States under this final rule:

- Artificially irrigated areas, including fields flooded for agricultural production, that would revert to upland should application of irrigation water to that area cease (paragraph (b)(7));
- Artificial lakes and ponds, including water storage reservoirs and farm, stock watering, and log cleaning ponds, constructed or excavated in upland or in non-jurisdictional waters, so long as those artificial lakes and ponds are not impoundments of jurisdictional waters that meet the conditions of paragraph (c)(6) (paragraph (b)(8)); and
- Water-filled depressions constructed or excavated in upland or in non-jurisdictional waters incidental to mining or construction activity, and pits excavated in upland or in non-jurisdictional waters for the purpose of obtaining fill, sand, or gravel (paragraph (b)(9)).

Paragraphs (b)(7), (8), and (9) of the final rule identify features and waters that the agencies have generally excluded from the definition of "waters of the United States" in previous

preambles since 1986 (*see, e.g.*, 51 FR 41206, 41217 (November 13, 1986) and 53 FR 20764-65 (June 6, 1988)). The agencies have codified these longstanding exclusions to further the agencies' goals of providing greater clarity and predictability for the regulated public and the regulators.

Several of these exclusions use the phrase "upland." In keeping with the goal of providing greater clarity, the agencies have included in the final rule a definition of "upland" in paragraph (c)(14). It is important to note that a water of the United States is not considered "upland" just because it lacks water at a given time. Similarly, an area may remain "upland" even if it is wet sporadically or after a rainfall or flood event. In addition, the agencies recognize that excluded water features may be constructed or excavated in non-jurisdictional ponds, wetlands, or other non-jurisdictional features. Therefore, the agencies added the phrase "non-jurisdictional waters" to some of these exclusions to provide greater clarity and to confirm that these features can be constructed or excavated in a non-jurisdictional water, such as an isolated pond or wetland, while continuing to be excluded from federal jurisdiction.

The upland requirement does not apply to all exclusions under paragraph (b). For those waters or features in paragraph (b) of this final rule that do contain the stipulation that they must be constructed or excavated in upland or in non-jurisdictional waters to be excluded, the agencies intend that these features be constructed or excavated wholly in upland or in non-jurisdictional waters. For example, construction activities that enlarge a water of the United States beyond its current boundaries are not constructed wholly in upland. Where portions of a new or modified water feature are built in a jurisdictional water, the agencies would not view the new or modified feature as having been constructed or excavated wholly in upland or in non-jurisdictional waters, and therefore not subject to the exclusion. But where a stock watering pond, for example, is

developed in a spring that is non-jurisdictional under this final rule, that pond will be considered by the agencies to have been constructed wholly in upland and/or non-jurisdictional waters. Even if a feature is not constructed or excavated wholly in upland or in non-jurisdictional waters and meets the definition of "waters of the United States," it may be otherwise excluded under another part of paragraph (b). The agencies note, however, that the mere interface between the excluded feature constructed or excavated wholly in upland and a jurisdictional water does not make that feature jurisdictional. For example, a ditch constructed or excavated wholly in upland that connects to a tributary would not be considered a jurisdictional ditch. The connection to a jurisdictional water does not eliminate applicability of a paragraph (b) exclusion conditioned by the upland or non-jurisdictional waters language. To avoid any confusion in implementation, this is why the agencies have not included the term "wholly" in the final regulatory text. Finally, an excluded feature under the final rule that develops wetland characteristics within the confines of the non-jurisdictional water or feature remains excluded from the definition of "waters of the United States," with the exception in limited circumstances of wetlands that develop in ditches constructed in adjacent wetlands, as discussed in Section III.G.

Many commenters were in favor of the proposed exclusion under (b)(6) of the proposed rule, now under (b)(7), for artificially irrigated areas. A few commenters were opposed to the exclusion entirely, and some commenters were opposed to expanding the exclusion for other crops and/or aquaculture. Some commenters cited the need for clarity as to whether the listed crops were the only ones covered under the exclusion. After considering the comments received, the agencies have modified this exclusion in the final rule to clarify their intent that it is not limited to rice and cranberry production and applies more generally to "agricultural production." The references to cranberries and rice in the proposed rule were examples and were not an

exhaustive list of crops to which the exclusion would apply. When evaluating an area to determine whether it meets the exclusion, the focus should be on whether the area is artificially irrigated or flooded for the purpose of agricultural production and on whether it would revert to upland if the irrigation ceases.

Paragraph (b)(8) of the final rule provides that artificial lakes and ponds, including water storage reservoirs and farm, irrigation, stock watering, and log cleaning ponds, are excluded from the definition of "waters of the United States" so long as these features are constructed or excavated in upland or in non-jurisdictional waters, and so long as these features are not impoundments of jurisdictional waters meeting the conditions of paragraph (c)(6). Many commenters provided edits and additions to the list of water features included in paragraph (b)(8). However, the agencies did not intend to provide an exhaustive list of features that are excluded under paragraph (b)(8) and have determined that any feature that meets the conditions of paragraph (b)(8) will be non-jurisdictional under this rule.

The agencies modified the proposed exclusion for artificial lakes and ponds to clarify their intent. As drafted in the proposed rule, the exclusion unintentionally would have been narrower than under the 1980s regulations. For example, when a farm pond is constructed in upland and connected via a ditch also constructed in upland to divert flow from a tributary and the farm pond does not connect back into the tributary system, it has been longstanding agency practice that the farm or stock pond is non-jurisdictional, similar to irrigation ditches which do not connect back into the tributary network. The pond's source of water is the tributary and serves to provide water for irrigation, livestock, and other agricultural uses. Because such ponds do not contribute surface water flow to a downstream paragraph (a)(1) water, they have not been jurisdictional under historic practice and are not jurisdictional under this final rule. Another

example involves a stock watering pond developed in a non-jurisdictional spring. If that pond has a spillway that creates a potential surface water connection to a nearby stream, the pond has traditionally been excluded from CWA jurisdiction. This final rule adopts that longstanding position.

In the final rule, the agencies are clarifying that artificial features including water storage reservoirs and farm, irrigation, stock watering, and log cleaning ponds are not jurisdictional unless they are impoundments of jurisdictional waters meeting the conditions of paragraph (c)(6), as discussed in Section III.F of this notice. The agencies acknowledge that many artificial lakes and ponds may have been created by impounding other waters. The text of the final rule clarifies that artificial lakes and ponds that also meet the conditions of a jurisdictional impoundment under paragraph (c)(6) are not excluded under paragraph (b)(8). However, consistent with longstanding practice, when an applicant receives a permit to impound a water of the United States in order to construct a waste treatment system (as excluded under paragraph (b)(12)), under this final rule the agencies are affirmatively relinquishing jurisdiction over the resulting waste treatment system as long as it is used for this permitted purpose. Also consistent with longstanding practice, waters upstream of the waste treatment system are still considered jurisdictional where they meet the final rule's definition of "waters of the United States."

The (b)(8) exclusion for artificial lakes and ponds uses the term "constructed or excavated" in the final rule, while the proposed rule used the term "constructed." The agencies do not intend for this change to alter the meaning of the exclusion from proposal. The agencies believe that this edit provides clarity to the public about how excluded artificial lakes and ponds can be created – some are constructed through dams, dikes, or barriers, while some are excavated pits. Excavation can entail construction, and construction can entail excavation, but the agencies have

decided to use both terms in the final rule for added clarity.

Several commenters stated that artificial lakes and ponds should be excluded regardless of whether they are located either wholly or partially in upland, and that the (b)(8) exclusion should extend to artificial lakes and ponds not constructed or excavated in upland. A few commenters noted that farmers and ranchers often determine the location of farm and stock ponds based on topography, which will typically result in the construction of such features in low areas that may have some characteristics of wetlands or a natural ephemeral feature. One commenter noted that many artificial lakes or ponds are isolated features, and that their connectivity to waters of the United States rather than their relationship to upland should be the primary factor in determining jurisdiction.

The final rule continues to require an artificial lake or pond to be constructed or excavated wholly in upland or in non-jurisdictional waters to be considered excluded under (b)(8). This reflects the agencies' longstanding policy, as discussed above with the stock watering pond example. Artificial lakes and ponds constructed or excavated partially in uplands or in non-jurisdictional waters and partially in jurisdictional waters are jurisdictional if such lakes and ponds meet the conditions of paragraph (c)(6). The agencies are concerned that if only part of an artificial lake or pond need be in upland, the exclusion could be inappropriately applied to waters where just a small portion is constructed in upland. The agencies again note that the mere interface between the excluded lake or pond otherwise constructed or excavated wholly in upland and a jurisdictional water does not make that feature jurisdictional. For example, an artificial lake or pond that meets the conditions of paragraph (b)(8) and that connects to a tributary would not be considered jurisdictional. With respect to artificial lakes and ponds that are constructed in isolated or ephemeral features, the agencies modified the exclusion to make

clear that artificial lakes or ponds constructed or excavated in non-jurisdictional features are excluded.

Paragraph (b)(9) of the final rule excludes water-filled depressions constructed or excavated in upland or in non-jurisdictional waters incidental to mining or construction activity, and pits excavated in upland or in non-jurisdictional waters for the purpose of obtaining fill, sand, or gravel. In this final rule, the agencies have modified this exclusion from the proposal. In the proposed rule, such depressions would have been excluded where they are "created in upland," but in the final rule such depressions are excluded where they are "constructed or excavated in upland or in non-jurisdictional waters." The change from "created" to "constructed or excavated," as discussed above, is not meant to change the meaning or applicability of the exclusion from the proposed rule, but rather is intended to add clarity to the regulated public about how such excluded water-filled depressions can be created.

Aside from this clarifying change, the agencies are finalizing this exclusion as it was proposed. In the final rule, this exclusion clarifies longstanding practice reflected in the agencies' 1986 and 1988 preambles, 51 FR 41206, 41217 (November 13, 1986); 53 FR 20764-65 (June 6, 1988) and includes several refinements to the language in those preambles. In addition to construction activity, the agencies have also reflected in the final rule an exclusion for water-filled depressions created in upland incidental to mining activity. This is consistent with the 1986 and 1988 preambles, which generally excluded pits excavated for obtaining fill, sand, or gravel, and the agencies believe there is no need to distinguish between features based on whether they are created by construction or mining activity.

Several commenters supported the (b)(9) exclusion, because such water-filled depressions are often needed for facility management but are not part of the tributary system and are not

natural waters. Some commenters opposed the exclusion, stating that the exclusion benefited mining companies and would allow mining activities to negatively impact water quality. Other commenters stated that the exclusion should be expanded to include water-filled depressions constructed or excavated incidental to other activities such as silviculture, or incidental to all activities, asserting that the agencies should not have singled out specific industries in the exclusion. With respect to expanding the exclusion to encompass additional industries or activities, the agencies note that the (b)(9) exclusion is not the only one that addresses artificial waters. Paragraph (b) of the final rule excludes a number of artificial features not limited to specific industries. In addition, CWA section 404(f) exempts a number of discharges associated with certain activities in jurisdictional waters from the requirement to obtain a section 404 permit, including normal farming, ranching, and silviculture activities as part of an established operation. 33 U.S.C. 1344(f)(1)(A).

Some commenters wanted the (b)(9) exclusion to be expanded so that once a water-filled depression was excluded, it remained excluded for CWA section 404 purposes. The 1986 and 1988 preambles stated that these depressions were excluded "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." (51 FR 41206, 41217 (November 13, 1986); 53 FR 20764-65 (June 6, 1988)). The agencies proposed that such water-filled depression would remain excluded, which represented a change from the 1986 and 1988 preamble language. After further consideration, and after considering comments received, the agencies have concluded that once a feature subject to the (b)(9) exclusion is no longer used for the original purpose for which it was excluded, it no longer qualifies for the (b)(9) exclusion. This is consistent with the approach to other exclusions, such as waste treatment systems and artificially irrigated areas, and reaffirms

the agencies' longstanding practice regarding this exclusion. In many cases, even if the (b)(9) exclusion may no longer apply to a feature, the feature may still remain non-jurisdictional because it does not meet the conditions of paragraphs (a)(1) through (4) and thus is excluded under paragraph (b)(1).

Stormwater Control Features

In paragraph (b)(10) of the final rule, the agencies exclude stormwater control features constructed or excavated in upland or in non-jurisdictional waters to convey, treat, infiltrate, or store stormwater runoff. Although stormwater control features are not specifically included in the list of waters that the agencies consider to be generally non-jurisdictional per the 1986 and 1988 preamble language, 51 FR 41206 (November 13, 1986) and 53 FR 20764 (June 6, 1988), the agencies' longstanding practice is to view stormwater control features that are not built in waters of the United States as non-jurisdictional. Conversely, the agencies view some relatively permanent bodies of water, such as channelized streams with intermittent or perennial flow, as jurisdictional even when used as part of a stormwater management system. Nothing in this final rule changes the agencies' longstanding practice. Rather, this exclusion clarifies the appropriate limits of jurisdiction relating to these systems.

A key element of the exclusion is whether the feature or control system was built wholly in upland or in a non-jurisdictional water. As discussed above and as further clarified below, the agencies recognize that upland features may be connected to jurisdictional waters and that such a connection does not preclude application of the exclusion. Another key element is that the feature must convey, treat, infiltrate, or store stormwater. Stormwater control features have evolved considerably over time, and their nomenclature is not consistent, so in order to avoid unintentionally limiting the exclusion, the agencies have not included a list of excluded features

in the final rule. The rule excludes the diverse range of stormwater control features that are currently in place and may be developed in the future. However, the agencies note that excluded stormwater control features when they have channelized surface water may provide a connection between the upstream reach of a relatively permanent water and a downstream jurisdictional water such that the upstream reach is jurisdictional. Even in this circumstance, the stormwater control feature would remain non-jurisdictional under this final rule. *See* Section III.D of this notice for further discussion. The agencies also note that while excluded from the definition of "waters of the United States," stormwater control features may function as a conveyance of a discharge of pollutants from a point source to a water of the United States.

Traditionally, stormwater controls were designed to direct runoff away from people and property as quickly as possible. Cities built systems to collect, convey, or store stormwater, using structures such as curbs, gutters, and sewers. Retention and detention stormwater ponds were built to store excess stormwater until it could be more safely released. More recently, use of stormwater controls to remove pollutants before the stormwater is discharged has become more prevalent. Even more recently, cities have turned to green infrastructure, using existing natural features or creating new features that mimic natural hydrological processes that work to infiltrate, evaporate, or transpire precipitation, to manage stormwater at its source and keep it out of the conveyance system. These engineered components of stormwater management systems can address both flood control and water quality concerns, as well as provide other benefits to communities. This final rule is designed to avoid disincentives to this environmentally beneficial trend in stormwater management practices.

Many commenters supported the proposed rule's exclusion for stormwater control features constructed or excavated in upland, asserting that environmentally beneficial solutions to manage

stormwater could be discouraged if such features were designated as "waters of the United States." Several commenters noted concerns that an exclusion dependent on an upland location could potentially deter stormwater system operators from installing beneficial green infrastructure and suggested that jurisdictional waters incorporated into the stormwater system should be excluded. Many commenters suggested that the final rule should define "stormwater control features" that would be excluded.

The agencies' longstanding practice is to view stormwater control features as non-jurisdictional when built outside of waters of the United States. The agencies do not agree with commenters who stated that jurisdictional waters that are incorporated into a drainage or stormwater conveyance system should be excluded by virtue of the fact that they are part of the larger stormwater control system. A water does not lose its jurisdictional status if it is modified for use as a stormwater control measure. The agencies recognize that highly engineered municipal separate storm sewer systems (MS4s) that may have replaced natural drainage features may therefore have jurisdictional waters within their systems, but this does not represent a change from longstanding practice. For example, the Los Angeles River is a traditional navigable water highly engineered for stormwater control, and it still meets the requirements of a paragraph (a)(1) water. Regarding comments related to defining the term "stormwater control features," the agencies do not name specific stormwater control features that would fall under the stormwater control feature exclusion, as they do not want the final rule to be perceived as limiting the exclusion, particularly given differences among regional naming conventions and the likelihood that technologies and nomenclature will evolve in the future.

Groundwater Recharge, Water Reuse, and Wastewater Recycling Structures

In this final rule under paragraph (b)(11), the agencies exclude from the definition of "waters

of the United States" groundwater recharge, water reuse, and wastewater recycling structures constructed or excavated in upland or in non-jurisdictional waters. While such features are not explicitly listed in the categories of waters that the agencies generally consider to be non-jurisdictional in the 1986 and 1988 preamble language, 51 FR 41206 (November 13, 1986) and 53 FR 20764 (June 6, 1988), this exclusion clarifies the agencies' longstanding practice that waters and water features used for water reuse and recycling are not jurisdictional when constructed in upland or in non-jurisdictional waters. The agencies recognize the importance of water reuse and recycling, particularly in the arid West where water supplies can be limited and droughts can exacerbate supply issues. This exclusion is intended to avoid discouraging or creating barriers to water reuse and conservation practices and projects. Detention and retention basins can play an important role in capturing and storing water prior to beneficial reuse. Similarly, groundwater recharge basins and infiltration ponds are becoming more prevalent tools for water reuse and recycling. These features are used to collect and store water, which then infiltrates into groundwater via permeable soils. Though these features are often created in upland, they are also often located in close proximity to tributaries or other larger bodies of water. The exclusion in paragraph (b)(11) of the final rule codifies the agencies' longstanding practice and encourages water management practices that the agencies recognize are important and beneficial.

Many commenters expressed support for the proposed rule's exclusion for wastewater recycling structures. Some commenters stated that the exclusion would encourage water reuse and other innovative approaches to water management. A few commenters supported the exclusion because they said wastewater recycling structures should be regulated at the State level. Some commenters stated that considering a wastewater recycling structure a water of the

United States could create unnecessary regulatory and economic burdens, while providing no additional water quality protection. Several commenters stated that the exclusion of groundwater recharge basins and similar structures was consistent with Justice Scalia's plurality opinion in *Rapanos*, as groundwater recharge basins do not discharge to any navigable waters, are filled only during part of the year, and do not otherwise constitute a traditional navigable water within the meaning of the plurality's jurisdictional test. A number of commenters suggested that the qualifying language in the proposed rule's wastewater recycling structures exclusion, which would have limited the exclusion to wastewater recycling structures "constructed in upland," could create barriers to water reuse and conservation.

For the reasons described above, the agencies believe that the (b)(11) exclusion reflects an appropriate balance among CWA policies and encouraging water reuse and effective water management. As a result, this final rule includes the (b)(11) exclusion largely unchanged from the proposal. The agencies did modify the exclusion in response to comments to add the term "water reuse" to the exclusion as it is commonly used in water and wastewater management. The agencies also added "or non-jurisdictional waters" to the exclusion to ensure that it is not narrowly restricted to construction in upland only. As discussed above, the agencies will apply the qualifier "constructed or excavated in upland or in non-jurisdictional waters" consistently across four exclusions that use the term.

Waste Treatment Systems

Paragraph (b)(12) of the final rule excludes waste treatment systems. The waste treatment system exclusion has existed since 1979 (44 FR 32854), and the agencies are continuing the exclusion under this final rule. The agencies are also for the first time providing in the final rule a definition of "waste treatment system" under paragraph (c)(15), so as to clarify which waters

and features are considered part of a waste treatment system and therefore excluded. Continuing the agencies' longstanding practice, any entity with a waste treatment system would need to comply with the CWA by obtaining a section 404 permit for new construction in a water of the United States, and a section 402 permit for discharges from the waste treatment system into waters of the United States. Consistent with the proposal, the agencies intend for this exclusion to apply only to waste treatment systems constructed in accordance with the requirements of the CWA and to all waste treatment systems constructed prior to the 1972 CWA amendments. One ministerial change in the final rule from the 2019 Rule is the deletion of a cross-reference to a regulatory definition of "cooling ponds" that no longer exists in the Code of Federal Regulations.[58]

Many commenters supported the waste treatment system exclusion and definition as proposed and agreed that the proposed exclusion would codify the agencies' longstanding practice. Some commenters requested that the exclusion be expanded to include all ancillary systems, channels, appurtenances, conveyances, and diversion ditches associated with the waste treatment system. Other commenters stated that the proposed exclusion was unlawful and that it should be eliminated entirely. Some commenters suggested that there may be confusion concerning the agencies' intent to apply the exclusion to waste treatment systems constructed prior to the 1972 CWA amendments and requested that this concept be explicitly included in the final regulatory text.

The agencies have considered these public comments and have finalized the waste treatment exclusion as it was proposed. As noted above, the agencies agree with commenters that this final

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[58] *See* 47 FR 52290, 52291, 52305 (Nov. 19, 1982) (deleting definition of cooling ponds at 40 CFR 423.11(m)).

rule codifies the longstanding exclusion that was first included in regulation in 1979. The agencies disagree with suggestions to expand or eliminate the exclusion and have finalized the definition as proposed. The agencies also disagree with the suggestion that the exclusion is unlawful and that there is confusion over the agencies' intent to apply this exclusion to all waste treatment systems constructed prior to the 1972 CWA amendments. The agencies clearly stated their intent to do so in the notice of proposed rulemaking and in this final rule, and do not believe it is necessary to repeat this intent in the regulatory text. The regulatory text applies to all waste treatment systems that meet the definition set forth therein, including systems constructed prior to the 1972 CWA amendments, and there is no basis for construing the exclusion not to apply to such systems.

The agencies also considered other exclusions recommended by stakeholders prior to the proposed rule and suggested in comments on the proposed rule. The agencies did not include these additional proposed exclusions in the final rule. Some of the suggested exclusions were so broadly characterized that they would have introduced confusion and potentially excluded waters that the agencies have consistently determined should be covered as waters of the United States. Other suggested exclusions were so site-specific or activity-based that they did not warrant inclusion in the nationally-applicable definition. Still other suggested exclusions were covered by another exclusion in the rule, and thus would have been superfluous, in whole or in part.

3. How Will the Agencies Implement the Final Rule?

To determine whether a water meets the final rule's exclusions in paragraphs (b)(1) through (b)(12), the agencies will first evaluate whether the water meets the definition of "waters of the United States" under paragraphs (a)(1) through (4). If the water does not satisfy any of the paragraph (a)(1) through (4) conditions, it is non-jurisdictional under paragraph (b)(1). If the

water does satisfy one or more of the conditions to be a paragraph (a)(1) through (4) water, the agencies will evaluate if the water is identified in any of the categories of excluded waters and features under paragraphs (b)(2) through (12) of this final rule. If the water meets any of these exclusions, the water is excluded even if the water satisfies one or more of the conditions to be a paragraph (a)(1) through (4) water.

As discussed above, the agencies' final rule includes an exclusion for groundwater under paragraph (b)(2), including groundwater drained through subsurface drainage systems. The final rule clarifies that even when groundwater is channelized in subsurface systems, like tile drains used in agriculture, it remains subject to the exclusion. However, the exclusion does not apply to surface expressions of groundwater, such as where groundwater discharges to the channel bed and becomes baseflow in intermittent or perennial streams. The agencies' exclusion for groundwater in the final rule is consistent with longstanding agency practice.

Some commenters requested that the agencies provide guidance as to how to implement the exclusion for ephemeral features. For example, a commenter stated that a blanket exclusion of ephemeral streams without regard to flow quantity could increase the difficulty in delineating such features and could limit activities to certain time periods. Some commenters suggested the agencies consider certain ephemeral features to be jurisdictional on a situational or regional basis, while other commenters supported a case-by-case determination of ephemeral features that would fall under the exclusion, rather than excluding ephemeral features categorically. One commenter requested implementation tools, including visual aids or benchmarks to identify excluded features, observing that distinguishing between ephemeral and intermittent waters may be challenging.

This final rule is intended to establish categorical bright lines that provide clarity and

predictability for regulators and the regulated community. Consistent with that goal, the final rule eliminates the case-specific application of Justice Kennedy's significant nexus test, and instead establishes clear categories of jurisdictional waters and non-jurisdictional waters and features that adhere to the basic principles articulated in the *Riverside Bayview*, *SWANCC*, and *Rapanos* decisions, including key principles expressed in Justice Scalia's plurality opinion and Justice Kennedy's concurring opinion in that case, as discussed at length in this preamble, while respecting the overall structure and function of the CWA. The agencies have existing field and remote tools and additional implementation tools and methods under development that will help distinguish flow classifications of streams and other waterbodies. The agencies can use many tools and remote and field-based methods described in Section III.D.3 to distinguish between paragraph (b)(3) ephemeral streams, swales, gullies, rills, and pools and paragraph (b)(4) areas with diffuse stormwater run-off and directional sheet flow over upland, while comparing both against waters subject to jurisdiction under paragraph (a). Under past and existing practice, the agencies have substantial experience using remote tools and field observations to distinguish between channelized and non-channelized features, and the agencies expect that many landowners can distinguish between these features using visual observations. Under this final rule, landscapes with non-channelized, diffuse stormwater and overland sheet flow are excluded regardless of the flow regime characteristics, because under these circumstances, flow is occurring only in direct response to precipitation over areas that meet the definition of "upland." As explained by the *Rapanos* plurality, regulating these features as waters of the United States extends beyond the rational meaning of the term. 547 U.S. at 734.

With respect to implementing the final rule's paragraph (b)(5) exclusion for certain ditches, the reach of a ditch that meets paragraph (a)(1) or (2) of the final rule is considered a water of the

United States, with "reach" interpreted similarly to how it is used for tributaries in Section III.D of this notice (*i.e.*, a section of a ditch along which similar hydrologic conditions exist, such as discharge, depth, area, and slope). The jurisdictional status of other reaches of the same ditch must be assessed based on the specific facts and under the terms of the final rule to determine the jurisdictional status of those reaches. For example, a ditch that is constructed in a tributary is not an excluded ditch under paragraph (b)(5) so long as it satisfies the flow conditions of the "tributary" definition or the conditions of the "adjacent wetlands" definition as further described in Section III.D and Section III.E. Further, the ditch exclusion does not affect the possible status of a ditch as a point source. Also, a ditch constructed in an adjacent wetland that satisfies the conditions of paragraph (a)(4) is not excluded. The agencies believe that the final rule's ditch exclusion encompasses most irrigation and drainage ditches, including most roadside and other transportation ditches, as well as most agricultural ditches.

In paragraph (b)(6) of this final rule, the agencies are reconfirming the longstanding prior converted cropland exclusion. This final rule also codifies the abandonment principle as applied to the prior converted cropland exclusion, as first articulated in the 1993 preamble (58 FR 45033), and provides additional clarification regarding what constitutes "agricultural purposes." As a result of this final rule, the change in use analysis will no longer be used to evaluate whether the prior converted cropland exclusion applies. Under the final rule, when cropland has been abandoned (*i.e.*, the cropland has not been used for or in support of agricultural purposes for a period of greater than five years), and wetlands have returned, any prior converted cropland designation for that site will no longer be valid for purposes of the CWA.

The USDA is responsible for making determinations as to whether land is prior converted cropland for its FSA purposes, whereas the agencies are responsible for determining applicability

of the exclusion for CWA purposes, consistent with the government's longstanding interpretation of the agencies' authority under the CWA. *See* 33 CFR 328.3(a)(8) ("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."); CWA Regulatory Programs, 58 FR 45,008, 45,036 (Aug. 25, 1993); Administrative Authority to Construe § 404 of the Federal Water Pollution Control Act ("Civiletti Memorandum"), 43 Op. Att'y Gen. 197 (1979). The agencies will defer to USDA for purposes of establishing whether a parcel or tract of land has received a prior converted cropland determination and is therefore eligible for the prior converted cropland exclusion under this rule. A landowner without an existing prior converted cropland determination may seek a new determination from the USDA.[59] The USDA is subject to specific statutes designed to protect landowner privacy and, as such, is prohibited from making certain parcel-specific information available without the landowner's consent. To ensure that the agencies can rely on a USDA prior converted cropland determination, the landowner will need to either provide a copy of the determination or provide the agencies with a signed consent form to allow the agencies access to the relevant information for the limited purpose of verifying USDA's prior converted cropland determination. The agencies recognize that privacy and confidentiality issues concerning certain

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[59] The agencies note that the USDA's regulatory definition of "prior converted cropland" in the FSA and the definition being established in this final rule have different purposes and they are substantively different. Based on the FSA's statutory requirements, the USDA definition of "prior converted cropland" requires that agricultural commodity crop production be made possible prior to 1985. *See* 7 CFR 12.2(a)(8); 16 U.S.C. 3801 (defining converted wetland) and 16 U.S.C. 3822(b)(1)(A) (establishing the pre-1985 exemption). If commodity crop production was made possible on a particular parcel or tract of land prior to 1985, that land is eligible for the prior converted cropland exclusion in this final rule. Once eligibility is determined, the agencies will evaluate the land to determine if the exclusion currently applies, or if the land has been abandoned, as described in this final rule.

producer information is addressed at section 1619 of the Food, Conservation, and Energy Act of 2008 (7 U.S.C. 8791(b)) and section 1244(b) of the Food Security Act of 1985, as amended (16 U.S.C. 3844(b)). If a parcel is found to be prior converted cropland, as defined in this rule, it is not a water of the United States.

Once a threshold determination has been made that certain lands are prior converted cropland, the EPA and the Corps are responsible for implementing the prior converted cropland exclusion for CWA purposes and identifying (as further explained below) whether the lands have been abandoned and whether wetlands conditions have returned such that they are no longer eligible for the prior converted cropland exclusion in this rule and thus may be waters of the United States. In addition to working closely with the USDA, the agencies will consider documentation from NOAA and FEMA when evaluating whether a parcel of land may no longer be eligible for the CWA prior converted cropland exclusion. In all cases, the burden to prove that such parcel is a water of the United States remains on the agencies. The agencies' implementation of the prior converted cropland exclusion for CWA regulatory purposes does not affect the USDA's administration of the FSA or a landowner's eligibility for benefits under FSA programs.[60]

Under the final rule, to determine the continuing applicability of the prior converted cropland exclusion, the Corps must first determine whether the land has been "abandoned." As described previously, prior converted cropland will be considered abandoned if it is not used for, or in support of, agricultural purposes at least once in the immediately preceding five years. In making an abandonment determination, the Corps will work with the landowner and USDA, as

[60] See the Notice of Proposed Rulemaking at 84 FR 4193 for a summary of how the agencies historically implemented and enforced this exclusion.

appropriate, to determine whether the land is currently or has been used for or in support of agricultural purposes at least once in the immediately preceding five years. As noted above, there are many uses that may fall within this category, including but not limited to, grazing; haying; idling land for conservation purposes (*e.g.*, habitat; pollinator and wildlife management; and water storage, water supply, and flood management); irrigation tailwater storage; crawfish farming; cranberry bogs; nutrient retention; and idling land for soil recovery following natural disasters like hurricanes and drought. Some of those land uses may not be obvious to Corps field staff, so the agencies may rely on public or private documentation to demonstrate that the land is enrolled in a conservation program or is otherwise being used for or in support of agricultural purposes. Such information may include aerial photographs, topographical maps, cultivation maps, crop expense or receipt records, field- or tract-specific grain elevator records, and other records generated and maintained in the normal course of doing business, including government agency records documenting participation in a conservation program, and other documentation reasonably establishing one or more "agricultural purposes."

The final rule requires that the land be used for or in support of agricultural purposes within the immediately preceding five years. In implementing this requirement, the agencies will consider documentation from USDA, NOAA, FEMA, and other Federal and State agencies to determine whether the land was used for or in support of agricultural purposes in the immediately preceding five years. For example, USDA administers multiple programs that track whether fields have been planted or harvested in the normal course, or enrolled in long-term conservation rotations, and the agency provides crop insurance for years where those activities were halted for reasons covered under their insurance policies; NOAA tracks long- and short-term weather patterns and can provide information and data concerning flood or drought

conditions that may cause or contribute to idling land in support of agricultural purposes; and FEMA administers emergency response programs for natural disasters, including hurricanes, wildfires, and other events that could also require idling land for soil recovery and other agricultural purposes. The agencies will take into account this information, and additional documentation reasonably establishing "agricultural purposes" when evaluating whether cropland has been used for or in support of agricultural purposes in the immediately preceding five years.

If the Corps determines that the land is abandoned, then it must evaluate the current condition of the land to determine whether wetland conditions have returned. If wetlands are currently present on the property, the agencies will determine whether the wetlands are "adjacent wetlands" and therefore "waters of the United States," consistent with this final rule. As the term "prior *converted* cropland" suggests, and as stated in the preamble to the 1993 Rule, land properly designated as prior converted cropland has typically been so extensively modified from its prior condition that it no longer exhibits wetland hydrology or vegetation, and no longer performs the functions it did in its natural and original condition as a wetland. 58 FR 45032. It is often altered and degraded, with long-term physical and hydrological modifications that substantially reduce the likelihood of reestablishment of hydrophytic vegetation. Consistent with longstanding agency policy and wetland delineation procedures, if a former wetland has been lawfully manipulated to the extent that it no longer exhibits wetland characteristics under normal circumstances, it would not be jurisdictional under the CWA. The altered nature of prior converted cropland and its conditions constitute the "normal circumstances" of such areas. The agencies expect the majority of prior converted cropland in the nation to fall into this category and not to be subject to CWA regulation, even after it is abandoned. However, at least some

abandoned prior converted cropland may, under normal circumstances, meet the definition of "wetlands" under paragraph (c)(16).

In paragraph (b)(7), the agencies clarify their longstanding view that the artificial irrigation exclusion applies only to the specific land being artificially irrigated, including fields flooded for agricultural production, including but not limited to rice or cranberry growing, which would revert to upland should artificial irrigation cease. Historically, the agencies have taken the position that ponds for rice growing are generally not considered waters of the United States, as reflected in the 1986 and 1988 preambles. *See* 51 FR 41206, 41217 (November 13, 1986) and 53 FR 20764-65 (June 6, 1988). In the past, the agencies have considered those under the artificial lakes or ponds category of waters that are generally non-jurisdictional, but this final rule includes them in the artificial irrigation exclusion category as any wetland crop species, such as rice and cranberry operations, that is typically supplied with artificial flow irrigation or similar mechanisms.

A number of commenters addressed the difficulty in proving that land would revert to upland when irrigation ceased and suggested clarification as to whether documentation was needed as proof. The agencies agree that proving that land would revert to upland may be challenging in some circumstances. The agencies have developed strategies and guidance to assist with determining if wetland conditions will persist when irrigation ceases. This includes, but is not limited to, utilizing aerial photography, soil maps, LiDAR, remote sensing, and field assessments to determine if wetland conditions are the result of irrigation or are naturally occurring.

Commenters also raised concern about whether the exclusion is only available for rice and cranberry growing areas. The inclusion of rice and cranberries in the proposed rule were simply examples and not intended to be exhaustive. In this final rule, the agencies conclude that it is not

necessary to list all crops potentially eligible for the exclusion, and therefore simply reference "agricultural production." The relevant factor in determining the application of the exclusion is not what type of crop may be planted or cultivated, but whether the area is artificially irrigated and would revert to upland should irrigation cease.

Under the final rule, the exclusion for waters meeting the conditions of paragraph (b)(8) applies to artificial lakes and ponds created through construction or excavation in upland or in non-jurisdictional features. Such artificial lakes and ponds would not be jurisdictional under the final rule even if they maintain a hydrologic surface connection to waters of the United States or are inundated by waters of the United States. Conveyances created in upland that are physically connected to and are a part of the excluded feature also are excluded.

A commenter inquired as to whether the artificial waterbody created by impounding a jurisdictional tributary would be jurisdictional. The agencies note that under the final rule, impoundments are considered jurisdictional if they impound a paragraph (a)(1) through (4) water, which includes jurisdictional tributaries, and contribute surface water flow in a typical year to a paragraph (a)(1) water or are inundated by flooding from a paragraph (a)(1) through (3) water in a typical year. Impounding a jurisdictional tributary does not create a non-jurisdictional lake or pond that would be excluded under paragraph (b)(8), but rather creates a jurisdictional impoundment so long as it meets the conditions of paragraph (a)(3) as defined in paragraph (c)(6). The agencies note that artificial lakes and ponds that are excluded from the definition of "waters of the United States" could, in some circumstances, be point sources of pollutants subject to sections 301 and 402 of the Act.

Under paragraph (b)(9), water-filled depressions constructed or excavated in upland or in non-jurisdictional waters that are incidental to mining or construction activity, and pits excavated

in upland or in non-jurisdictional waters for the purpose of obtaining fill, sand, or gravel are excluded from the definition of "waters of the United States." To determine whether a water or feature meets this exclusion, the agencies will evaluate whether the water feature is constructed or excavated in upland or in non-jurisdictional waters as part of these industrial activities. In addition, such water-filled depressions and pits could become waters of the United States once construction or mining activities have permanently ceased and the depressions or pits meet the conditions of a paragraph (a)(1) through (4) water.

The final rule excludes in paragraph (b)(10) stormwater control features constructed or excavated in upland or in non-jurisdictional waters to convey, treat, infiltrate, or store stormwater run-off. As stated previously, the rule excludes a diverse range of stormwater control features that are currently in place and that may be developed in the future. To determine if such a water or feature meets the exclusion, the agencies will evaluate whether the stormwater feature is constructed or excavated in upland or in non-jurisdictional waters.

Paragraph (b)(11) of the final rule clarifies that groundwater recharge, water reuse, and wastewater recycling structures constructed or excavated in upland or in non-jurisdictional waters are excluded. To determine whether a such a structure meets this exclusion, the agencies will evaluate whether the water or feature is constructed or excavated in upland or in non-jurisdictional waters. This exclusion includes detention and retention basins as well as groundwater recharge basins and infiltration ponds excavated in upland or in non-jurisdictional waters for wastewater recycling. The exclusion also covers water distributary structures that are built in upland or in non-jurisdictional waters for water recycling. These features often connect or carry surface water flow to other water recycling structures, for example, a channel or ditch that carries water to an infiltration pond. Consistent with longstanding practice, the agencies do

not consider these water distributary systems jurisdictional.

As discussed previously, the agencies are not changing the longstanding approach to implementing the waste treatment system exclusion. As a result, the agencies will continue to apply the exclusion to systems that are treating water to meet the requirements of the CWA. Discharges from these systems to waters of the United States would continue to be subject to regulation by the CWA section 402 permitting program. Similarly, if a waste treatment system is abandoned or otherwise ceases to serve the treatment function for which it was designed, it does not continue to qualify for the exclusion.

Some commenters suggested the agencies clarify the way in which the waste treatment system exclusion is currently implemented. Many comments inquired as to whether stormwater systems and wastewater reuse facilities are considered part of a complete waste treatment system for purposes of the waste treatment system exclusion. To enhance clarity, the agencies have provided in the final rule two related exclusions in paragraphs (b)(10) and (b)(11) and have added settling basins and cooling ponds to the definition of "waste treatment system" in paragraph (c)(15). The agencies note that cooling ponds that are created under CWA section 404 in jurisdictional waters and that have CWA section 402 permits are subject to the waste treatment system exclusion under the 2019 Rule and will also be excluded under the final rule. Cooling ponds created to serve as part of a cooling water system with a valid State or Federal permit constructed in waters of the United States prior to enactment of the 1972 amendments of the CWA and excluded from jurisdiction under the 2019 Rule also remain excluded under the final rule. Some commenters on the proposed rule's waste treatment system exclusion expressed confusion regarding whether stormwater treatment features would be excluded under the exclusion for stormwater control features or under the waste treatment exclusion. Such

determinations will depend on the specific attributes of the control and the water feature and thus need to be made on a case-by-case basis. It is possible that a stormwater feature could qualify for both the stormwater control features exclusion and the waste treatment systems exclusion. This same principle applies to other exclusions that may have similar cross-over features, like certain ditches used in stormwater management systems.

It is important to reiterate that while the waters and features listed in the final rule's exclusions are not waters of the United States, some of them may convey surface water flow to a downstream jurisdictional water, so that reaches of a water upstream and downstream of the excluded water or feature may meet the definition of "tributary" in paragraph (c)(12). For example, when some water from a tributary is moved into a downstream jurisdictional water through an excluded ditch, the ditch itself is excluded from jurisdiction under the final rule but the tributary upstream of the ditch is jurisdictional if the non-jurisdictional ditch conveys surface water flow in a typical year to the downstream jurisdictional reach.

I. Placement of the Definition of "Waters of the United States" in the Code of Federal Regulations

1. What Are the Agencies Finalizing?

The definition of "waters of the United States" has historically been placed in eleven locations in the Code of Federal Regulations (CFR). For the sake of simplicity, in this final rule, the agencies are codifying the definition of "waters of the United States" in only two places in the CFR—once in Title 33 (which implements the Corps' statutory authority) and once in Title 40 (which generally implements the EPA's statutory authority).

2. Summary of Final Rule Rationale and Public Comment

The agencies proposed to maintain the definition of "waters of the United States" at 33 CFR

328 and in ten locations in Title 40. The agencies solicited comment on an alternative approach under which the definition would be codified in just two locations within the CFR, rather than in the eleven locations in which it has previously appeared. Most commenters recommended that the definition of "waters of the United States" be codified twice, once in Title 33 of the CFR and once in Title 40 of the CFR. These commenters recommended limiting codification to two locations in order to clarify that there is a single definition of "waters of the United States" applicable to the entire CWA, to reduce confusion and conflicting interpretations under different programs, and to promote ease of use for the regulated community and for laypersons. Many of these commenters suggested including a cross-reference in the original ten locations of Title 40 of the CFR. Some commenters recommended continuing the agencies' practice of codifying the definition of "waters of the United States" in eleven locations within the CFR.

The agencies agree with commenters that stated that codifying the definition of "waters of the United States" in two locations within the CFR will reduce confusion and promote ease of use for States, Tribes, local government, the regulated community, and the general public. With this final rule, the agencies are codifying the definition of "waters of the United States" in Title 33 of the CFR, which implements the Corps' statutory authority, at 33 CFR 328.3, and in Title 40, which generally implements the EPA's statutory authority, at 40 CFR 120.2. In the sections of the CFR where the EPA's regulatory definition previously existed, 40 CFR sections 110.1, 112.2, 116.3, 117.1, 122.2, 230.3, 232.2, 300.5, 302.3, 401.11, and Appendix E to 40 CFR part 300, this final rule cross-references the newly created section of the regulations containing the definition of "waters of the United States." The agencies have placed the EPA's definition of "waters of the United States" in a previously unassigned part of 40 CFR. The change in placement has no implications on CWA program implementation; it is made for the sole purpose

of enhancing the clarity of the federal regulations. Placing the definition of "waters of the United States" in a single section in the part of the regulations that implements the EPA's authority and once again in the part of the regulations that implements the Corps' authority makes clearer to members of the public that there is a single definition of "waters of the United States" applicable to the CWA and its implementing regulations.

IV. State, Tribal, and Federal Agency Datasets of Waters of the United States

During the extensive pre-proposal outreach to the general public and focused engagement with States and Tribes, the agencies heard from a number of States about their familiarity with waters within their borders and their expertise in aquatic resource mapping. As co-implementers of CWA programs, they also emphasized the potential benefit of greater State and tribal involvement in jurisdictional determinations. For these reasons, several States suggested that the agencies consider their knowledge and increase the role of States and Tribes in identifying those waters that are waters of the United States. Stakeholders also indicated that maps could increase certainty and transparency regarding the data and methods used to determine which waters are jurisdictional and which waters are not.

In the Notice of Proposed Rulemaking for this rule, the agencies solicited comment as to how to create a regulatory framework that would authorize interested States, Tribes, and other Federal agencies to develop for the agencies' approval geospatial datasets representing waters of the United States, as well as waters excluded from the definition, "waters of the State" or "waters of the Tribe" within their respective borders. 84 FR 4154, 4198-4200 (February 14, 2019). This concept was not part of the proposed regulatory text; the agencies utilized the notice to solicit input and suggestions from the regulated public, States, Tribes, and other stakeholders.

Some commenters raised concerns regarding the limitations of data currently available for

creating geospatial datasets of jurisdictional waters, particularly commenting on the limitations of national datasets such as the National Hydrography Dataset (NHD) and the National Wetlands Inventory (NWI). Some commenters expressed concerns about the resolution, completeness, accuracy, and usefulness of publicly-available data, with some stating that geospatial datasets cannot accurately assess the details needed to remotely determine or delineate jurisdictional waters. Other commenters noted that, despite the limitations in the available data, the agencies should attempt to quantify changes in the jurisdictional status of specific waterbody categories as a result of the final rule.

The agencies agree that there are significant limitations to the extent to which currently available data can be used to identify the scope of all or even a subset of jurisdictional waters. There are currently no comprehensive datasets through which the agencies can depict the universe of federally-regulated waters under the CWA. For example, the agencies attempted to use the NHD at high resolution and NWI to assess the potential change in CWA jurisdiction as a result of the proposed rule to revise the definition of "waters of the United States," but ultimately concluded that the limitations of these datasets precluded their use for quantifying the extent of waters whose jurisdictional status could change under the proposed rule, as discussed in Section V and in the Resource and Programmatic Assessment for the final rule. Due to these limitations, which were confirmed during the public comment period for the proposed rule and an evaluation by the agencies, the agencies also did not use the NHD or NWI to assess potential changes in jurisdiction as a result of the final rule.

While the NHD and NWI are the most comprehensive hydrogeographic datasets mapping waters and wetlands in the United States and are useful resources for a variety of Federal programs, including CWA programs, they currently have technical limitations that present

significant challenges for use as standalone tools to determine the full scope of CWA jurisdiction and for creating geospatial datasets of jurisdictional waters, regardless of the regulatory definition of "waters of the United States." Importantly, the NHD and NWI were not created for regulatory purposes, so their limitations as comparative tools for CWA jurisdiction are not surprising.

Due in part to the resolution of the data, limitations of the NHD for purposes of accurately mapping the scope of jurisdictional waters under the CWA include errors of omission (*e.g.*, failure to map streams that exist on the ground); errors of commission (*e.g.*, mapping streams that do not exist on the ground); horizontal positional inaccuracies; misclassification of stream flow condition, particularly in headwaters; and inconsistent mapping in different parts of the country. The NWI presents similar challenges for identifying federally-regulated waters, including the foundational obstacle of having a "wetlands" definition that differs from the federal regulatory "wetlands" definition. The NWI also contains errors of omission (*e.g.*, failure to map wetlands that exist on the ground), errors of commission (*e.g.*, mapping wetlands that do not exist on the ground), and potentially inaccurate wetland boundary identification. The limitations identified herein are examples and do not represent an exhaustive list of challenges faced by the agencies in potentially using them to identify the scope of CWA jurisdiction. For a more detailed discussion of the NHD and NWI datasets and their limitations for use as standalone tools to determine the full scope of waters that are and are not waters of the United States, *see* Chapter II of the Resource and Programmatic Assessment supporting this final rule.

It has been the consistent position of the agencies that the NHD and the NWI do not

represent the scope of waters subject to CWA jurisdiction.[61] Indeed, as part of the 2015 rulemaking, the agencies stated that they "do not have maps depicting waters of the United States under either present regulatory standards or those in the final [2015] rule."[62] This remains true today; the agencies do not have maps of waters of the United States under the 2015 Rule, under the 2019 Rule, or under this final rule. For this reason, and to provide the public and the agencies with more information on which waters are or are not waters of the United States, the agencies sought public comment on a possible framework for developing geospatial datasets.

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[61] *See, e.g.*, Letter from Nancy Stoner, Acting Assistant Adm'r, EPA Office of Water, to Lamar Smith, Chairman, Comm. on Science, Space, and Tech., 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. ("[N]o 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*[.]") (emphasis added); *see also* Letter from Nancy Stoner, Deputy Assistant Adm'r, EPA Office of Water, to Lamar Smith, Chairman, Comm. on Science, Space, and Tech., 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); U.S. EPA, *Mapping the Truth*, THE EPA BLOG (Aug. 28, 2014), *available at* 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."); Letter from Kenneth J. Kopocis, Deputy Assistant Adm'r, EPA Office of Water, to Lamar Smith, Chairman, Comm. on Science, Space, and Tech., U.S. House of Representatives (Jan. 8, 2015) ("These [USGS] maps were not prepared for the purpose of, nor do they represent, a depiction of the scope of waters protected under the Clean Water Act."); Impact of the Proposed "Waters of the United States"' Rule on State and Local Governments Before the H. Comm. on Transp. & Infrastructure and the S. Comm. on Env't & Pub. Works, 114th Cong. (2015)(testimony of Gina McCarthy, Adm'r, EPA)(stating that the NHD and NWI maps were "not used to determine jurisdiction and not intended to be used for jurisdiction," "are not relevant to the jurisdiction of the 'waters of the U.S.'," "are not consistent with how we look at the jurisdiction of the Clean Water Act," and have "nothing to do, as far as I know, with any decision concerning jurisdiction of the Clean Water Act").

[62] *See Response to Comments for the Clean Water Rule*, Clean Water Rule Comment Compendium Topic 8: Tributaries, Docket ID. No. EPA-HQ-OW-2011-0880-20872, p. 442, https://www.regulations.gov/document?D=EPA-HQ-OW-2011-0880-20872.

The agencies acknowledge that they have previously taken the position that "maps of all the jurisdictional or non-jurisdictional waters are not feasible,"[63] and that maps "cannot be used to determine Clean Water Act jurisdiction – now or ever," *see* U.S. EPA, *Mapping the Truth*, THE EPA BLOG (August 28, 2014). Rather than declaring the task too difficult, the agencies have decided to initiate development of state-of-the-art geospatial data tools through Federal, State, and tribal partnerships to provide an enhanced, publicly-accessible platform for critical CWA information, such as the location of federally jurisdictional waters, the applicability of State and tribal water quality standards, permitted facility locations, impaired waters, and other significant features. Such mapped features would make it easier for agency field staff, the general public, property owners, permit-holders and others to understand the relationship between familiar geographical features and the overlay of CWA jurisdictional waters. For Federal, State, and tribal agencies, such geospatial datasets could improve the administration of CWA programs and attainment of water quality goals. Geospatial datasets and resulting future maps that indicate waters likely subject to federal jurisdiction could allow members of the regulated community to more easily and quickly ascertain whether they may want to contact a government agency regarding the potential need for a CWA permit. These datasets, when fully developed, would promote greater regulatory certainty, relieve some of the regulatory burden associated with determining the need for a permit, and play an important part in helping to attain the goals of the CWA. In the future, the agencies and States could use geospatial datasets to identify waters with applicable water quality standards, total maximum daily loads, water quality monitoring data, and other beneficial information in one layered geospatial map.

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[63] *Id.* at p. 593.

Since the proposed rule was published, the agencies have been engaging with other Federal agencies to discuss existing geospatial datasets and discuss opportunities to build upon them to map the nation's aquatic resources, including both waters of the United States and non-jurisdictional waters. To align the agencies' waters of the United States mapping interests with the U.S. Department of Interior's (DOI) established and ever-improving aquatic resource mapping efforts, including the NHD, NWI, and other datasets, the EPA and the Corps are engaging with the U.S. Geological Survey (USGS) and the U.S. Fish and Wildlife Service (FWS) and have established a technical working group to develop strategies that can address their CWA mapping needs.[64] The agencies believe the most efficient way to address their regulatory needs is to better align their efforts with DOI's existing processes and national mapping capabilities. The EPA, USGS, and FWS have a long history of working together to map the nation's aquatic resources. As the agencies pursue this mapping effort, they will continue to collaborate with DOI to enhance the NHD, NWI, and other products to better map the nation's water resources and the waters of the United States while enhancing their utility to other CWA programs that the EPA and the Corps implement.

In addition, the EPA's Office of Research and Development (ORD) has established an "Improved Aquatic Resource Mapping" research area, which will be implemented in

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[64] *See* Letter from David Ross, Asst. Adm'r, EPA Office of Water, and Ryan Fisher, Principal Deputy Asst. Sec. of the Army (Civil Works), U.S. Army, to Dr. Tim Petty, Asst. Sec. for Water and Science, U.S. DOI, and Rob Wallace, Asst. Sec. for Fish, Wildlife, and Parks, U.S. DOI (September 17, 2019); *see also* Letter from Dr. Jim Reilly, Director, U.S. Geological Survey, to David Ross, Asst. Adm'r, EPA Office of Water, and Ryan Fisher, Principal Deputy Asst. Sec. of the Army (Civil Works), U.S. Army (October 1, 2019); *see also* Letter from Gary Frazer, Asst. Dir. for Ecological Services, U.S. Fish and Wildlife Service to David Ross, Asst. Adm'r, EPA Office of Water, and Ryan Fisher, Principal Deputy Asst. Sec. of the Army (Civil Works), U.S. Army (December 4, 2019).

coordination with the Corps and EPA's Office of Water. This research area could build upon longstanding EPA aquatic resource research and leverage existing research partnerships with other Federal agencies, States, and Tribes to improve mapping of aquatic resources. This research effort is intended to support the agencies' need for improved data to inform CWA jurisdictional determinations, to support other regulatory and non-regulatory needs, and to contribute to ongoing and new EPA research. In the long-term, the agencies anticipate that this effort will yield improved methods of verifying aquatic resources to support CWA jurisdictional determinations and other programmatic needs. In the short-term, ORD intends to produce three primary products to begin to advance this goal: a review of the existing aquatic resource mapping methodologies, development of novel geospatial datasets in select watersheds, and development of calibration and validation datasets. All three products can incorporate outreach efforts to communicate and transfer results to stakeholders.

The agencies also believe that any future efforts they pursue to work with States, Tribes, and Federal agencies to create geospatial datasets of jurisdictional waters will improve the data and information that is available to the public about the jurisdictional scope of the CWA, recognizing that data limitations may always exist. Many commenters supported the development of geospatial datasets or a mapping system of waters of the United States to provide a clear understanding of the presence or absence of jurisdictional waters. Many such commenters provided caveats and anticipated challenges. Other commenters suggested that creating such datasets posed too many challenges to be worthwhile. Many of these commenters considered the development of geospatial datasets of jurisdictional waters to be infeasible or inappropriate based on the need for field verification and maintenance to keep the datasets up-to-date, and the concern that potentially incomplete lists could be inaccurately perceived as a definitive list of all

waters of the United States. These commenters stated that any datasets established should be used only as a planning tool to inform jurisdictional determinations or to provide guidance on the location of potential waters of the United States.

The agencies solicited comment on potential approaches to establishing a framework to allow States, Tribes, or Federal agencies to create geospatial datasets of jurisdictional waters. Some commenters supported deferring this effort to a future rulemaking. Several commenters recommended using existing technology to prioritize mapping traditional navigable waters prior to attempting to map jurisdictional tributaries or wetlands. A few commenters suggested engaging in several pilot projects or a phased approach before rolling out a dataset nationwide. Some commenters suggested that data in the geospatial datasets should either expire or be updated every five years, to reflect the timeframe for approved jurisdictional determinations or to ensure that the datasets effectively represent current conditions.

The agencies solicited comment on appropriate features and attributes of the website that would publish this information, as well as any privacy considerations the agencies should understand. A few commenters opposed making public the details of jurisdictional determinations or expressed privacy concerns regarding the creation of geospatial datasets of jurisdictional waters. Some commenters stated that jurisdictional determinations or geospatial datasets of jurisdictional waters should be made available to the public.

As the agencies work to pursue improved geospatial mapping of waters in the future, they intend to also work to enhance information that is already available to the public on jurisdictional determinations. The Corps maintains a website at https://permits.ops.usace.army.mil/orm-public that presents information on the Corps' approved jurisdictional determinations and CWA section 404 permit decisions. Similarly, the EPA maintains a website at

https://watersgeo.epa.gov/cwa/CWA-JDs/ that presents information on approved jurisdictional determinations made by the Corps and the EPA under the CWA since August 28, 2015. These websites will incorporate approved jurisdictional determinations made under the revised definition of "waters of the United States" that the agencies are finalizing in this notice.

In the Notice of Proposed Rulemaking, the agencies expressed interest in learning about experiences States, Tribes, and other Federal agencies have had with mapping aquatic resources and using this information for program implementation. A few State and tribal commenters expressed interest in working as partners with the agencies on mapping jurisdictional waters. Some State and local governments offered to share existing geospatial data with the agencies. Other State commenters were less supportive of an effort to map jurisdictional waters, with some raising concerns about the regulatory implications of mapping based on experiences in their States. Several State commenters raised concerns about costs of a mapping effort, with some commenters pointing to their own costly past mapping efforts. One commenter cited a State study that found that the State's best attempt at mapping wetlands was only 56 percent successful at classifying wetlands compared to field delineations. The agencies will consider the comments and concerns raised and coordinate closely with States, Tribes, and other Federal agencies in future efforts to develop geospatial datasets. The agencies do not anticipate developing a regulatory framework for geospatial datasets that would impose requirements on States and Tribes to develop geospatial datasets of jurisdictional waters; the option would simply be available for interested States and Tribes.

The agencies believe that pursuing the development of geospatial datasets of waters of the United States could provide for greater regulatory certainty and provide important information to States, Tribes, the regulated community, and the public. The agencies are in the early stages of

this effort, and they will be informed by public comments and suggestions received in response to this rulemaking as they move forward.

V. Overview of the Effects of the Rule and Supporting Analyses

This section provides an overview of the potential effects of the final rule on federal and state regulatory programs and potential economic impacts of the final rule. Additional detail on these analyses are contained in and described more fully in the *Resource and Programmatic Assessment for the Navigable Waters Protection Rule: Definition of "Waters of the United States"* and in the *Economic Analysis for the Navigable Waters Protection Rule: Definition of "Waters of the United States."* Copies of these documents are available in the docket for this action.

In 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, confined of course by the statutory text and Supreme Court guidance recognizing the outer limits of the agencies' authorities. *See, e.g.*, *Rapanos*, 547 U.S. at 758 (Roberts, C.J., concurring) ("Given the broad, somewhat ambiguous, but nonetheless clearly limiting terms Congress employed in the Clean Water Act, the Corps and the EPA would have enjoyed plenty of room to operate in developing *some* notion of an outer bound to the reach of their authority.") (emphasis in original). With this action, the agencies are finalizing a new definition of "waters of the United States."

As discussed in Section II.E, the agencies conclude that this final rule clearly establishes the scope of jurisdictional waters under the CWA consistent with the legislative history and text of the statute and Supreme Court case law and provides greater regulatory predictability than the 2019 Rule regulatory text as interpreted by the Supreme Court and implemented through agency guidance. This final rule replaces the 2019 Rule.

With respect to the CWA section 404 permitting program for the discharge of dredged and fill material, the agencies recognize that this final rule could affect approved jurisdictional determinations (AJDs) issued before the 2015 Rule or in States where the 2015 Rule was not in effect due to litigation, under the 2015 Rule, or under the 2019 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). The possessor of a valid AJD may request that the Corps reassess a parcel and grant a new AJD before the five-year expiration date. An AJD constitutes a final agency action pursuant to the agencies' definition of "waters of the United States" at the time of its issuance. *See Hawkes*, 136 S. Ct. at 1814. This final rule does not invalidate an AJD that was issued before the 2015 Rule or in States where the 2015 Rule was not in effect due to litigation, under the 2015 Rule, or under the 2019 Rule. As such, these AJDs will remain valid until the expiration date unless one of the criteria for revision is met under RGL 05-02, or the recipient of such an AJD requests that a new AJD be issued pursuant to this final rule.

Preliminary jurisdictional determinations (PJDs) issued by the Corps, 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 2005). PJDs do not definitively state whether waters of the United States are present on a parcel. *See Hawkes*, 136 S. Ct. at 1812. However, as with AJDs, a recipient of a PJD

may request a new PJD or an AJD be issued under this final rule.

This final rule should not significantly affect the scope of waters over which the Corps retains permitting authority in States that have assumed the CWA section 404 dredged or fill material permit program pursuant to section 404(g), or the waters over which the Corps would retain permitting authority should States and Tribes assume the program in the future. When States or Tribes assume administration of the section 404 program, the Corps retains administration of permits in certain waters. 33 U.S.C. 1344(g). The scope of CWA jurisdiction as defined by "waters of the United States" is distinct from the scope of waters over which the Corps retains authority following State or tribal assumption. The Corps-retained waters are identified during approval of a State or tribal section 404 program, and any modifications are approved through a formal EPA process. 40 CFR 233.36. The way in which the Corps identifies waters to be retained was most recently addressed on July 30, 2018, in a memorandum from R.D. James, Assistant Secretary of the Army (Civil Works).[65] The EPA also intends to clarify the issue in a separate ongoing rulemaking process designed to facilitate State and tribal assumption of the section 404 program. The scope of waters assumed by States or Tribes that are granted permitting authority under section 404(g) is dependent on the definition of "waters of the United States," and will change with this final rule. For the States that already have section 404 programs (Michigan and New Jersey), those States have corresponding State wetland permitting programs that may apply in State waters that will no longer be jurisdictional under the final rule.

For the proposed rule, the agencies conducted a series of analyses to better understand the potential effects across CWA programs associated with a revised definition of "waters of the

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[65] The memorandum is available at https://www.army.mil/e2/c/downloads/525981.pdf.

United States." The agencies solicited comment on all aspects of the analyses performed and published in support of the proposed rule, including the assumptions made, information used, and the three case studies presented in the economic analysis. The agencies further requested that commenters provide any data that could assist the agencies in evaluating and characterizing potential effects of the proposed rule. The agencies have incorporated additional information on tribal programs, updated the aquatic resource analysis, and have made other changes, particularly in light of the final rule repealing the 2015 Rule and recodifying the pre-existing regulations (the 2019 Rule). The 2019 Rule was finalized between the proposed and final rulemaking phases of this rule and changed the baseline for the analyses and discussion of potential effects on aquatic resources, CWA programs, and costs. The agencies note that the final rule is not based on the information in the agencies' economic analysis or resource and programmatic assessment. *See, e.g.*, *NAHB*, 682 F.3d at 1039–40. This information was not used to establish the new regulatory text for the definition of "waters of the United States."

As discussed in Section IV and in the proposed rule preamble (84 FR 4200), 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. Establishing a mapped baseline from which to assess regulatory changes is likewise impracticable at this time, just as it was when the agencies finalized the 2015 Rule.[66] The challenge of identifying an

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[66] *See* U.S. EPA and Department of the Army, Response to Comments of the EPA-Army Clean Water Rule at Topic 8: Tributaries p. 442 (May 20, 2015) ("2015 Rule RTC") (Docket ID: EPA-HQ-OW-2011-0880-20872), available at https://www.regulations.gov/document?D=EPA-HQ-OW-2011-0880-20872.("The agencies do not have maps depicting waters of the United States under either present regulatory standards or those in the final rule."); *see also id.* at 593 ('[M]aps of all the jurisdictional or non-jurisdictional waters are not feasible[.]").

accurate baseline is further complicated by a long history of an evolving definition of "waters of the United States." As summarized in Section II, what was understood about the potential scope of CWA jurisdiction changed in the 1970s following *National Resources Defense Council, Inc. v. Callaway*, 392 F. Supp. 685 (D.D.C. 1975), in the mid-1980s with *Riverside Bayview* and regulatory updates, in 2001 with the landmark *SWANCC* decision, in 2006 with the fractured *Rapanos* decision, in 2007 and 2008 with the agencies' attempts to discern the meaning of the *Rapanos* decision through guidance and throughout the ensuing decade of litigation that tested those interpretations, in 2015 with a major rulemaking to redefine the operative phrase "waters of the United States" and throughout the complex litigation following that rulemaking, and in 2019 with a rule to repeal the 2015 Rule and recodify pre-existing regulations. As the Chief Justice of the Supreme Court succinctly observed in 2016, "[i]t is often difficult to determine whether a particular piece of property contains waters of the United States . . . ." *Army Corps of Eng'rs v. Hawkes Co.*, 136 S. Ct. at 1812. Given the complicated history of "waters of the United States," the agencies are not aware of any means to quantify changes in CWA jurisdiction with any precision that may or may not occur as a result of this final rule.

The agencies acknowledge that they faced criticism from many commenters regarding the accuracy and assumptions they made when attempting to estimate changes in jurisdiction for the 2015 Rule's economic analysis (EA), which was then utilized for a portion of the proposed rule EA and the 2019 Rule EA. For the 2015 Rule EA, the agencies reviewed Corps approved jurisdictional determinations made under pre-2015 Rule practice to evaluate how the jurisdictional status of those waters might change under the 2015 Rule. Other commenters on the

proposed rule critiqued the agencies for not repeating the analysis used to support the 2015 Rule's EA. The agencies have determined that the analysis of approved jurisdictional determinations conducted for the 2015 Rule EA may have incorrectly assumed that the 2015 Rule would affect entities regulated under the CWA in direct proportion to the percent change in positive jurisdictional determinations. This proportional assumption could have yielded overestimates of costs and benefits of the rule. Thus, the agencies have determined that conducting such an analysis for this final rule would not be appropriate.

In addition, some commenters questioned the adequacy of the agencies' Resource and Programmatic Assessment (RPA) analyses for the proposed rule, primarily because the agencies did not use the NHD or NWI, even heavily caveated. Other commenters raised concerns about the lack of the quantification of potential changes in jurisdiction and asserted that the agencies overestimated the ability of States to regulate additional non-jurisdictional waters. Other commenters noted that even though the NHD and the NWI have limitations, the errors associated with the datasets would underestimate, not overestimate, the scale of resources likely to be identified as non-jurisdictional under the proposed rule.

As discussed in the RPA for the final rule, the agencies attempted to use publicly available data from national datasets (*i.e.*, the NHD and the NWI) to estimate the potential extent of aquatic resources across the country before publishing the proposed rule. The agencies ultimately concluded that the limitations of the datasets (*e.g.*, errors of omission, errors of commission, positional inaccuracies, misclassification of flow regime, different definitions compared to both existing and proposed regulations) precluded using the NHD and the NWI to quantify the potential extent of waters whose CWA jurisdictional status could change under the proposed revised definition. Because these limitations still exist, the agencies decided to qualitatively

describe the potential effects of this final rule relative to the baseline of the 2019 Rule as implemented.

Some commenters stated that the RPA and the EA for the proposed rule thoroughly addressed the potential impacts of the proposed revised definition, correctly acknowledged the technical limitations of the analysis and datasets, accurately noted that the avoided costs of the proposal far outweighed any foregone benefits it may have, and agreed with the agencies' decision not to rely on flawed data to perform comparative analyses of the proposed regulatory changes. Other commenters expressed support for the RPA's comprehensive analysis of the potential implications of the revised definition for all relevant CWA programs and the interplay between relevant State and federal regulations.

Recognizing that there will be limitations with any approach, in the RPA and EA for the final rule the agencies describe how the revised definition compares to the baseline of the 2019 Rule as implemented (*i.e.*, the pre-2015 regulations that were recodified in 2019, and as interpreted by the Supreme Court and implemented consistent with those decisions and informed by agency guidance). *See* 84 FR 56626 (Oct. 22, 2019). The documents outline the agencies' assessment of the potential effects of the revised definition on types of aquatic resources (*e.g.*, wetlands, tributaries, impoundments) across the country and on CWA programs, and the RPA provides further information on programs addressing aquatic resource quality under other Federal statutes. To further inform the final rule and in an effort to respond to comments received on the proposed rule analyses, the agencies conducted additional research on current State and tribal laws and programs to better understand how States and Tribes already regulate waters within their borders. Descriptions of State programs are in Appendix A of the RPA, and descriptions of tribal programs are in Appendix B of the RPA.

To assess the potential effects of the rule on aquatic resources, the agencies examined data records in the Corps' Operation and Maintenance Business Information Link, Regulatory Module (ORM2) database that documents Corps decisions regarding the jurisdictional status of various aquatic resource types (*i.e.*, jurisdictional determinations). The aquatic resource types used in ORM2 generally track the *Rapanos* Guidance (*e.g.*, "relatively permanent waters," "non-relatively permanent waters") but do not directly correlate with the terms used in the final rule, with limited exceptions. For the final rule, the agencies updated their analysis from the proposal RPA and EA to reflect data from ORM2 for fiscal years 2013-2018. Because of various limitations in accurately estimating a change in CWA jurisdiction, as described in Section IV of this notice, and uncertainties regarding the way States and Tribes might respond following a change in the definition of "waters of the United States," many of the potential effects of the final rule are discussed qualitatively, and some are discussed quantitatively where possible.

As discussed in the RPA and the EA for the final rule, the agencies also evaluated potential effects of the final rule across CWA regulatory programs. The RPA and EA describe certain potential short-term effects for CWA regulatory programs; however, the potential long-term effects will depend on whether or how States and Tribes choose to modify their existing regulatory programs. For example, States may elect to make changes to their statutes or regulations to regulate waters that are no longer jurisdictional under the final rule. As discussed more fully in the EA, complete State "gap-filling" could result in a zero-net impact in the long-run.

Regarding the permitting programs under sections 402 and 404 of the CWA, the final rule will reduce the scope of waters subject to CWA permitting compared with the baseline of the 2019 Rule as implemented. For instance, the 2019 Rule, as implemented, would regulate certain

ephemeral streams found to have a significant nexus with traditional navigable waters according to the 2008 *Rapanos* Guidance, whereas the revised definition in this final rule categorically excludes ephemeral features. Because fewer waters and wetlands are federally regulated under this rule relative to the 2019 Rule as implemented, the agencies anticipate that the regulated public would need to prepare fewer CWA permit applications. Additionally, some facilities currently discharging under a CWA section 402 permit may no longer be required to obtain permit coverage under federal law where there is a jurisdictional change to the receiving water and the receiving water does not convey pollutants from a point source to a water of the United States. The agencies note that they retain section 402 permitting authority over discharges that reach jurisdictional waters through conveyances, such as non-jurisdictional waters. In some section 402 permits, water quality-based effluent limitations may be modified, subject to applicable anti-backsliding permit requirements, where a facility discharges to a water that is non-jurisdictional under the final rule, but the pollutants discharged still reach a jurisdictional water. Any permittee with questions about the effects of this rule should consult their permitting authority, as State law may be broader than federal authority under the CWA. A reduction in jurisdictional waters under the final rule may reduce the number of federal permits that require a section 401 certification and may reduce the applicability of the section 311 program and associated Oil Spill Liability Trust Fund, as discussed in more detail in the EA and RPA.

A change in the scope of CWA jurisdiction could affect existing and future State or tribal CWA section 303(d) lists and Total Maximum Daily Load (TMDL) restoration plans under section 303(d). For example, some States or Tribes may not assess non-jurisdictional waters, and thus may identify fewer waters as impaired and may develop fewer TMDLs. States may continue to apply their own State law-based programs to identify and restore impaired waters, although

this activity would not be required under the CWA for waters that are not jurisdictional under the final rule. The agencies expect that States will, however, be able to focus their section 303(d) financial resources on a more targeted range of waters and could accelerate adoption of plans and standards on waters that may have more ecological value. If Western States, for example, do not need to assess dry washes in the desert and establish CWA water quality standards for those typically dry "waters," they can focus their research and restoration resources on waters with more substantial aquatic habitat. For additional discussion of potential effects on State and tribal water quality standards and section 303(d) programs, *see* the RPA.

Some commenters on the proposed rule raised concerns about its potential effects on CWA financial assistance programs. The agencies do not anticipate that the final rule will affect the EPA's current CWA financial assistance programs. With respect to CWA sections 106 and 319 grant programs, the authorizing language and the range of programmatic activities are sufficiently broad that they have long addressed both jurisdictional and non-jurisdictional waters, so it is unlikely that a change in the definition of "waters of the United States" will affect the programs and funding allocations.

Other commenters raised concerns about potential effects of the proposed rule on sources of drinking water. Drinking water regulations under the Safe Drinking Water Act (SDWA) will continue to apply to water delivered by public water systems, with the goal of protecting public health. The Drinking Water State Revolving Fund is available to help fund State source water protection programs and finance improvements to drinking water utilities. Overall, the potential effects of a change in CWA jurisdiction on drinking water quality will depend on whether activities affecting non-jurisdictional waters also affect the quality of the water at a drinking water utility's water intake, and the capabilities of individual drinking water utilities to respond

to a potential change in source water quality.

In the EA for the proposed rule, the agencies applied a two-stage analysis to make the best use of limited local and national level water resource information in their effort to assess the potential implications of the proposal. When the proposed rule was published, the agencies determined that the outputs of this two-stage analysis were the best way to illustrate the potential overall impact of the proposed rule compared to the 2015 Rule being in effect nationwide (*i.e.*, the sum effect of both stages) and the 2015 Rule not being in effect (*i.e.*, second stage only). In the "Stage 1" analysis in the EA for the proposed rule, the agencies used the EA for the 2015 Rule as a starting point, made several updates, and developed a quantitative assessment limited to Stage 1. Because the 2015 Rule was repealed (84 FR 56626) between the proposed and final rule stages of this rulemaking, the EA for this final rule does not contain the Stage 1 quantitative analysis comparing the 2015 Rule with the pre-existing regulations.

The EA for the final rule incorporates an updated analysis depicting how States may respond to a change in CWA jurisdiction. This analysis of State authorities and programs was initially presented in the EA for the related rulemaking effort, *Economic Analysis for the Final Rule: Definition of "Waters of the United States"-Recodification of Pre-Existing Rules.* Potential State responses to a change in the definition of a "water of the United States" fall along a continuum and depend on legal and other constraints. Some States rely on the federal CWA to regulate impacts to wetlands and other aquatic resources. These States may be affected by this action; however, nothing in the CWA or this final rule prevents or precludes states from regulating more stringently than federal requirements. Some States, based on limitations established in State law, cannot currently regulate a more expansive set of waters than those subject to the federal CWA definition of "waters of the United States." In contrast, States that regulate surface waters and

wetlands as broadly as or more broadly than the 2019 Rule as implemented, independently of the scope of the federal CWA, may not be affected by this action. Complete State "gap-filling" could result in no change in compliance costs to the regulated community and no change in environmental benefits (that is, neither avoided costs nor forgone benefits would occur), suggesting a zero-net impact in the long-run. States that fall between these extremes are evaluated by either including or excluding them from the estimates of cost savings and forgone benefits. In reality, some States may regulate only a subset of affected waters, but the agencies did not have sufficient information to incorporate that level of detail into the analysis.

Another potential outcome of the change in CWA jurisdiction is that State governments may be able to find more efficient ways of managing local resources than the Federal government, consistent with the theory of "environmental federalism" as described in the EA for the final rule. Depending on the value of a newly characterized non-jurisdictional water, States may or may not choose to regulate that water and the compliance costs and environmental benefits of its regulation could increase or decrease, respectively. In either case, however, net benefits would increase, assuming that a State can more efficiently allocate resources towards environmental protection due to local knowledge of amenities and constituent preferences. As effective regulation requires political capital and fiscal resources, however, the likely best indication of the way in which States will exercise their authority as the Federal government changes the scope of CWA jurisdiction is the way in which they have exercised authority in the past and whether the infrastructure to manage the regulatory programs already exists. The qualitative analysis is intended to provide information on the likely direction of the potential effects of the final rule on CWA regulatory programs.

In addition, the agencies conducted case studies in three major watersheds (Ohio River basin, Lower Missouri River basin, and Rio Grande River basin) to provide information for a quantitative assessment of the potential effects of the final rule. The case studies considered potential ecological effects, and their accompanying potential economic effects for programs implemented pursuant to sections 311, 402, and 404 of the CWA. Because of data limitations, the agencies were able to provide national-level estimates of the potential avoided permit and mitigation costs and forgone benefits for only the CWA section 404 program. The agencies developed several scenarios to estimate the national annual avoided costs and foregone benefits of the CWA section 404 program under the final rule using different assumptions about potential State dredged and fill regulation of waters. Using the same methodologies employed in the case studies, under scenarios assuming State regulation of dredged and fill activities in newly non-jurisdictional waters, the agencies estimate that the final rule would produce annual avoided costs ranging between $109 million to $264 million and annual forgone benefits ranging between from $55 million to $63 million. Under the scenario that assumes that no States will regulate dredged and fill activities in newly non-jurisdictional waters, an outcome the agencies believe is unlikely, the agencies estimate the final rule would produce annual avoided costs ranging from $245 million to $513 million, and annual forgone benefits are estimated at $173 million.

VI. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review; Executive Order 13563: Improving Regulation and Regulatory Review

This action is an “economically significant regulatory action” that was submitted to the Office of Management and Budget (OMB) for review. Any changes made in response to OMB recommendations have been documented in the docket for this action. In addition, the agencies

prepared an analysis of the potential costs and benefits associated with this action. This analysis is contained in the *Economic Analysis for the Navigable Waters Protection Rule: Definition of "Waters of the United States,"* which is available in the docket and briefly summarized in Section V. Additional analysis can be found in the *Resource and Programmatic Assessment for the Navigable Waters Protection Rule: Definition of "Waters of the United States"* which is also available in the docket.

While the economic analysis is informative in the rulemaking context, the agencies are not relying on the economic analysis performed pursuant to Executive Orders 12866 and 13563 and related procedural requirements as a basis for this final rule. *See, e.g.*, *NAHB*, 682 F.3d at 1039–40 (noting that the quality of an agency's economic analysis can be tested under the APA *if* the "agency decides to rely on a cost-benefit analysis as part of its rulemaking").

B. Executive Order 13771: Reducing Regulation and Controlling Regulatory Costs

Pursuant to Executive Order 13771 (82 FR 9339, February 3, 2017), this final rule is a deregulatory action. Details on the estimated cost savings of this rule can be found in the Economic Analysis in the docket for this rule.

C. Paperwork Reduction Act

This action does not impose any new information collection burden under the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* OMB has previously approved the information collection activities contained in the existing regulations and has assigned OMB control numbers 2050–0021 and 2050–0135 for the CWA section 311 program and 2040–0004 for the CWA section 402 program. For the CWA section 404 program, the current OMB approval number for information requirements is maintained by the Corps (OMB approval number 0710–0003). However, there are no new approval or application processes required as a result of this

rulemaking that necessitate a new Information Collection Request (ICR).

D. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

For purposes of assessing the impacts of this final rule on small entities, "small entity" is defined as: (1) a small business that is a small industrial entity as defined in the U.S. Small Business Administration's size standards (*see* 13 CFR 121.201); (2) a small governmental jurisdiction that is a government of a city, county, town, school district, or special district with a population of less than 50,000; or (3) a small organization that is any not-for-profit enterprise that is independently owned and operated and is not dominant in its field.

The purpose of the RFA is "to fit regulatory and informational requirements to the scale of the businesses, organizations and governmental jurisdictions subject to the regulation." 5 U.S.C. 601. Small entities subject to this final rule are largely those entities whose activities are directly covered by the CWA sections 402, 404, and 311 programs. The final rule is expected to result in fewer entities subject to these programs, and a reduced regulatory burden for many of the entities that will still be subject to these programs. As a result, small entities subject to these regulatory programs are unlikely to suffer adverse impacts as a result of regulatory compliance.

As addressed in the Economic Analysis for the final rule, narrowing the scope of CWA regulatory jurisdiction over waters may result in a reduction in the ecosystem services provided by some waters, and as a result, some entities may be adversely impacted. Some business sectors

that depend on habitat, such as those catering to hunters or anglers, or that require water treatment to meet production needs, could experience a greater impact relative to other sectors. Potential changes in ecosystem services are likely to be small, infrequent, and dispersed over wide geographic areas, thereby limiting the significance of these impacts on these business sectors. In addition, States and Tribes may already address waters potentially affected by a revised definition, thereby reducing forgone benefits.

The sectors likely to be most impacted by the rule are mitigation banks and companies that provide aquatic resource restoration services. Because fewer waters would be subject to the CWA regulation under the final rule than are subject to regulation under the 2019 Rule, there may be a reduction in demand for mitigation and restoration services under the section 404 permitting program. Assessing impacts to this sector is problematic, however, because this sector lacks a precise SBA small business definition, and many of the businesses that fall within this sector are also classified under various other North American Industry Classification System (NAICS) categories. Furthermore, impacts to this 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 no longer being required to mitigate for discharges of dredged or fill material into waters that would no longer be jurisdictional under the final rule. In addition, potential impacts would be lessened when accounting for State and tribal dredged and fill programs that would necessitate the purchase of mitigation credits or through the actions of States and Tribes that choose to regulate their wetlands under State or tribal law. For a more detailed discussion see the RFA section of the Economic Analysis for the final rule.

The agencies certify that this action will not have a significant economic impact on a substantial number of small entities under the RFA. In making this determination, the impact of

concern is any significant adverse economic impact on small entities. An agency may certify that a rule will not have a significant economic impact on a substantial number of small entities if the rule relieves regulatory burden, has no net burden, or otherwise has a positive economic effect on the small entities subject to the rule. As documented in the Economic Analysis for the final rule, the agencies do not expect the cost of the rule to result in adverse impact to a significant number of small entities, since the rule is expected to result in net cost savings for all entities affected by this rule. The agencies have therefore concluded that this action will relieve regulatory burden to small entities.

E. Unfunded Mandates Reform Act

This final rule does not contain any unfunded mandate as described in the Unfunded Mandates Reform Act of 1995 (UMRA), 2 U.S.C. 1531–1538, and does not significantly or uniquely affect small governments. The definition of "waters of the United States" applies broadly to CWA programs. The final action imposes no enforceable duty on any State, local, or tribal governments or the private sector, and does not contain regulatory requirements that significantly or uniquely affect small governments.

F. Executive Order 13132: Federalism

Consulting with State and local government officials, or their representative national organizations, is an important step in the process prior to proposing regulations that may have implications for State and local governments under the terms of Executive Order 13132 (64 FR 43255, August 10, 1999). State and local governments were engaged in a 60-day Federalism consultation at the outset of rule development starting on April 19, 2017. All letters received by the agencies during Federalism consultation may be found on in the docket at EPA Docket Id

No. EPA-HQ-OW-2018-0149-0088, available at https://www.regulations.gov/document?D=EPA-HQ-OW-2018-0149-0088.

The agencies held nineteen Federalism meetings between April 19 and June 16, 2017. Seventeen intergovernmental associations, including nine of the ten organizations identified in EPA's 2008 E.O. 13132 Guidance, attended the initial Federalism consultation meeting, as well as several associations representing State and local governments. Organizations in attendance included: the National Governors Association, the National League of Cities, the National Association of Counties, the U.S. Conference of Mayors, the Council of State Governments, the National Conference of State Legislatures, the County Executives of America, the National Association of Towns and Townships, the Environmental Council of the States, the Western Governors Association, the National Association of Clean Water Agencies, the Association of Clean Water Administrators, the National Association of State Departments of Agriculture, the Association of State Wetlands Managers, the Association of State Floodplain Managers, the National Water Resources Association, the State/Local Legal Center, and several members of EPA's Local Government Advisory Committee (LGAC).

The LGAC met 10 times during this period to address the charge given to its members by the EPA Administrator on a revised rule and completed a report addressing the questions outlined in their charge. The July 14, 2017, final report can be obtained here: https://www.epa.gov/sites/production/files/2017-07/documents/lgac-final-wotusreport-july2017.pdf and in the docket as attachment to EPA Docket Id No. EPA-HQ-OW-2018-0149-0088, available at https://www.regulations.gov/document?D=EPA-HQ-OW-2018-0149-0088.

The agencies then conducted additional outreach to States prior to proposing the rule to ensure that the agencies could hear the perspectives on how the agencies might revise the

definition of “waters of the United States” from State co-regulators. The agencies held two additional webinars, the first for Tribes, States, and local governments on December 12, 2017; and one for States on February 20, 2018. In addition, one in-person meeting to seek technical input on the development of the proposed rule was held with a group of nine states (Arizona, Arkansas, Florida, Iowa, Maryland, Minnesota, Oregon, Pennsylvania, and Wyoming) on March 8 and 9, 2018.

These meetings and the letters provided by representatives provided a wide and diverse range of interests, positions, comments, and recommendations to the agencies. The agencies have prepared a report summarizing their consultation and additional outreach to State and local governments and the results of this outreach. A copy of the final report is available in the docket (Docket Id. No. EPA-HQ-OW-2018-0149) for this final rule.

Following publication of the proposed rule, the agencies held four additional in-person meetings with State representatives to answer clarifying questions about the proposal, and to discuss implementation considerations and State interest in working with the agencies to develop geospatial datasets of water resources as articulated in the preamble to the proposed rule.

Under the technical requirements of Executive Order 13132, agencies must conduct a federalism consultation as outlined in the Executive Order for regulations that (1) have federalism implications, that impose substantial direct compliance costs on state and local governments, and that are not required by statute; or (2) that have federalism implications and that preempt state law. This rule does not impose any new costs or other requirements on states, preempt state law, or limit states’ policy discretion; rather, it provides more discretion for states as to how best to manage waters under their sole jurisdiction. Executive Order paras. (6)(b) and (6)(c). As discussed in the earlier sections of the notice, this final rule establishes a clear

boundary between waters subject to federal regulatory requirements under the CWA and those that States may solely manage under their independent authorities. This action will not 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. The rule preserves State authority to choose whether or not to regulate waters that are not waters of the United States under the CWA. The agencies believe that the requirements of the Executive Order have been satisfied in any event.

G. Executive Order 13175: Consultation and Coordination with Indian Tribal Governments

Executive Order 13175, entitled "Consultation and Coordination with Indian Tribal Governments" (65 FR 67249, Nov. 9, 2000), 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 action has tribal implications. However, it will neither impose substantial direct compliance costs on federally recognized tribal governments, nor preempt tribal law.

During tribal consultation and engagement efforts and in tribal comments on the proposed rule, many Tribes expressed concern that the proposed rule would or could adversely impact tribal waters. Two tribes supported the proposed rule and noted that it would increase the tribes' ability to manage and regulate their own Reservation lands. The agencies acknowledge that because they generally implement CWA programs on tribal lands, a reduced scope of CWA jurisdiction will affect Tribes differently than it will affect States. Currently, of the Tribes that are eligible, most have not received treatment in a manner similar to a state (TAS) status to administer CWA regulatory programs. While some Tribes have established tribal water programs under tribal law or have the authority to establish tribal programs under tribal law, many Tribes

may lack the capacity to create a tribal water program under tribal law, to administer a program, or to expand programs that currently exist. Other Tribes may rely on the Federal government for enforcement of water quality violations. Nonetheless, the rule preserves tribal authority to choose whether or not to regulate waters that are not covered under the CWA. Any decision by the Tribes to protect beyond the limits of the CWA is not compelled by the statute or by this final rule.

The EPA consulted with tribal officials under the *EPA Policy on Consultation and Coordination with Indian Tribes* early in the process of developing this action to permit them to have meaningful and timely input into its development. The Department of the Army participated in the consultation process and further engagement with Tribes. All letters received by the agencies during tribal consultation may be found in the docket for this action, Docket Id. No. EPA-HQ-OW-2018-0149.

The EPA initiated a tribal consultation and coordination process before proposing this rule by sending a "Notification of Consultation and Coordination" letter on April 20, 2017, to all of the 567 Tribes federally recognized at that time. The letter invited tribal leaders and designated consultation representatives to participate in the tribal consultation and coordination process. The agencies held two identical webinars concerning this matter for tribal representatives on April 27 and May 18, 2017. Tribes and tribal organizations sent 44 pre-proposal comment letters to the agencies as part of the consultation process. Of those Tribes requesting consultation, the agencies met with nine Tribes at a staff-level and with three Tribes at a leader-to-leader level pre-proposal. The agencies continued engagement with Tribes after the end of the formal consultation, including at national update webinars on December 12, 2017, and February 20, 2018, and an in-person tribal co-regulators workshop on March 6 and 7, 2018.

Following the publication of the proposed rule, the agencies held four in-person meetings with tribal representatives to answer clarifying questions about the proposal, and to discuss implementation considerations and tribal interest in working with the agencies to develop geospatial datasets of water resources as articulated in the preamble to the proposed rule. In addition, the agencies continued to meet with individual Tribes requesting consultation or engagement following publication of the proposed rule, holding staff-level meetings with four Tribes and leader-to-leader level meetings with eight Tribes post-proposal. The agencies also continued engaging with Tribes and tribal organizations via listening sessions at regional and national tribal meetings. In total, the agencies met with 21 individual Tribes requesting consultation, holding leader-to-leader level consultation meetings with 11 individual tribes and staff-level meetings with 13 individual tribes (the agencies met with some tribes more than once). The agencies have prepared a report summarizing the consultation and further engagement with tribal nations. This report, *Summary Report of Tribal Consultation and Engagement for the Navigable Waters Protection Rule: Definition of "Waters of the United States"* (Docket Id. No. EPA-HQ-OW-2018-0149), is available in the docket for this final rule.

As required by section 7(a), the EPA's Tribal Consultation Official has certified that the requirements of the executive order have been met in a meaningful and timely manner. A copy of the certification is included in the docket for this action.

H. Executive Order 13045: Protection of Children from Environmental Health and Safety Risks

This action is not subject to Executive Order 13045 (62 FR 19885, April 23, 1997) because the environmental health or safety risks addressed by this action do not present a disproportionate risk to children.

I. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

This action is not a "significant energy action" as defined in Executive Order 13211 (66 FR 28355, May 22, 2001) because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy.

J. National Technology Transfer and Advancement Act

This action is not subject to the National Technology Transfer and Advancement Act of 1995 because the rule does not involve technical standards.

K. Executive Order 12898: Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations

This action is not subject to Executive Order 12898 (59 FR 7629, February 11, 1994) because there is no significant evidence of disproportionately high and adverse human health or environmental effects on minority populations, low-income populations, and/or indigenous peoples, as specified in Executive Order 12898.

L. Congressional Review Act

This action is subject to the Congressional Review Act, and the agencies will submit a rule report to each House of the Congress and to the Comptroller General of the United States. OMB has concluded that this action is a "major rule" as defined by 5 U.S.C. 804(2).

List of Subjects

33 CFR Part 328

Navigation (water), Water pollution control, Waterways.

40 CFR Part 110

Oil pollution, Reporting and recordkeeping requirements.

40 CFR Part 112

Oil pollution, Penalties, Reporting and recordkeeping requirements.

40 CFR Part 116

Hazardous substances, Reporting and recordkeeping requirements, Water pollution control.

40 CFR Part 117

Hazardous substances, Penalties, Reporting and recordkeeping requirements, Water pollution control.

40 CFR Part 120

Environmental protection, Water pollution control, Waterways.

40 CFR Part 122

Administrative practice and procedure, Confidential business information, Environmental protection, Hazardous substances, Reporting and recordkeeping requirements, Water pollution control.

40 CFR Part 230

Water pollution control.

40 CFR Part 232

Intergovernmental relations, Water pollution control.

40 CFR Part 300

Air pollution control, Carbon monoxide, Chemicals, Environmental protection, Greenhouse gases, Hazardous substances, Hazardous waste, Intergovernmental relations, Lead, Natural resources, Occupational safety and health, Oil pollution, Ozone, Penalties, Reporting and recordkeeping requirements, Sulfur Dioxide, Superfund, Volatile organic compounds, Water pollution control, Water supply.

40 CFR Part 302

Air pollution control, Chemicals, Hazardous substances, Hazardous waste, Intergovernmental relations, Natural resources, Reporting and recordkeeping requirements, Superfund, Water pollution control, Water supply.

40 CFR Part 401

Waste treatment and disposal, Water pollution control.

Dated: January 23, 2020.

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Andrew R. Wheeler,

Administrator,

Environmental Protection Agency.

Dated: January 23, 2020.

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R.D. James,

Assistant Secretary of the Army (Civil Works),

Department of the Army.

Title 33—Navigation and Navigable Waters

For the reasons set forth in the preamble, title 33, chapter II of the Code of Federal Regulations is amended as follows:

PART 328—DEFINITION OF WATERS OF THE UNITED STATES

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

§328.3 Definitions.

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(a) *Jurisdictional waters*. 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) The territorial seas, and waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including waters which are subject to the ebb and flow of the tide;

(2) Tributaries;

(3) Lakes and ponds, and impoundments of jurisdictional waters; and

(4) Adjacent wetlands.

(b) *Non-jurisdictional waters*. The following are not "waters of the United States":

(1) Waters or water features that are not identified in paragraph (a)(1), (2), (3), or (4) of this section;

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

(3) Ephemeral features, including ephemeral streams, swales, gullies, rills, and pools;

(4) Diffuse stormwater run-off and directional sheet flow over upland;

(5) Ditches that are not waters identified in paragraph (a)(1) or (2) of this section, and those portions of ditches constructed in waters identified in paragraph (a)(4) of this section that do not satisfy the conditions of paragraph (c)(1) of this section;

(6) Prior converted cropland;

(7) Artificially irrigated areas, including fields flooded for agricultural production, that would revert to upland should application of irrigation water to that area cease;

(8) Artificial lakes and ponds, including water storage reservoirs and farm, irrigation, stock watering, and log cleaning ponds, constructed or excavated in upland or in non-jurisdictional waters, so long as those artificial lakes and ponds are not impoundments of jurisdictional waters that meet the conditions of paragraph (c)(6) of this section;

(9) Water-filled depressions constructed or excavated in upland or in non-jurisdictional waters incidental to mining or construction activity, and pits excavated in upland or in non-jurisdictional waters for the purpose of obtaining fill, sand, or gravel;

(10) Stormwater control features constructed or excavated in upland or in non-jurisdictional waters to convey, treat, infiltrate, or store stormwater run-off;

(11) Groundwater recharge, water reuse, and wastewater recycling structures, including detention, retention, and infiltration basins and ponds, constructed or excavated in upland or in non-jurisdictional waters; and

(12) Waste treatment systems.

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

(1) *Adjacent wetlands*. The term *adjacent wetlands* means wetlands that:

(i) Abut, meaning to touch at least at one point or side of, a water identified in paragraph (a)(1), (2), or (3) of this section;

(ii) Are inundated by flooding from a water identified in paragraph (a)(1), (2), or (3) of this section in a typical year;

(iii) Are physically separated from a water identified in paragraph (a)(1), (2), or (3) of this section only by a natural berm, bank, dune, or similar natural feature; or

(iv) Are physically separated from a water identified in paragraph (a)(1), (2), or (3) of this section only by an artificial dike, barrier, or similar artificial structure so long as that structure allows for a direct hydrologic surface connection between the wetlands and the water identified in paragraph (a)(1), (2), or (3) of this section in a typical year, such as through a culvert, flood or tide gate, pump, or similar artificial feature. An adjacent wetland is jurisdictional in its entirety when a road or similar artificial structure divides the wetland, as long as the structure allows for a direct hydrologic surface connection through or over that structure in a typical year.

(2) *Ditch*. The term *ditch* means a constructed or excavated channel used to convey water.

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

(4) *High tide line.* The term *high tide line* means the line of intersection of the land with the water's surface at the maximum height reached by a rising tide. The high tide line may be determined, in the absence of actual data, by a line of oil or scum along shore objects, a more or less continuous deposit of fine shell or debris on the foreshore or

berm, other physical markings or characteristics, vegetation lines, tidal gages, or other suitable means that delineate the general height reached by a rising tide. The line encompasses spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds, such as those accompanying a hurricane or other intense storm.

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

(6) *Lakes and ponds, and impoundments of jurisdictional waters.* The term *lakes and ponds, and impoundments of jurisdictional waters* means standing bodies of open water that contribute surface water flow to a water identified in paragraph (a)(1) of this section in a typical year either directly or through one or more waters identified in paragraph (a)(2), (3), or (4) of this section. A lake, pond, or impoundment of a jurisdictional water does not lose its jurisdictional status if it contributes surface water flow to a downstream jurisdictional water in a typical year through a channelized non-jurisdictional surface water feature, through a culvert, dike, spillway, or similar artificial feature, or through a debris pile, boulder field, or similar natural feature. A lake or pond, or impoundment of a jurisdictional water is also jurisdictional if it is inundated by flooding from a water identified in paragraph (a)(1), (2), or (3) of this section in a typical year.

(7) *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 soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.

(8) *Perennial.* The term *perennial* means surface water flowing continuously year-round.

(9) *Prior converted cropland*. The term *prior converted cropland* means any area that, prior to December 23, 1985, was drained or otherwise manipulated for the purpose, or having the effect, of making production of an agricultural product possible. EPA and the Corps will recognize designations of prior converted cropland made by the Secretary of Agriculture. An area is no longer considered *prior converted cropland* for purposes of the Clean Water Act when the area is abandoned and has reverted to wetlands, as defined in paragraph (c)(16) of this section. Abandonment occurs when prior converted cropland is not used for, or in support of, agricultural purposes at least once in the immediately preceding five years. For the purposes of the Clean Water Act, the EPA Administrator shall have the final authority to determine whether prior converted cropland has been abandoned.

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

(11) *Tidal waters* and *waters subject to the ebb and flow of the tide*. The terms *tidal waters* and *waters subject to the ebb and flow of the tide* mean those waters that rise and fall in a predictable and measurable rhythm or cycle due to the gravitational pulls of the moon and sun. Tidal waters and waters subject to the ebb and flow of the tide

end where the rise and fall of the water surface can no longer be practically measured in a predictable rhythm due to masking by hydrologic, wind, or other effects.

(12) *Tributary.* The term *tributary* means a river, stream, or similar naturally occurring surface water channel that contributes surface water flow to a water identified in paragraph (a)(1) of this section in a typical year either directly or through one or more waters identified in paragraph (a)(2), (3), or (4) of this section. A tributary must be perennial or intermittent in a typical year. The alteration or relocation of a tributary does not modify its jurisdictional status as long as it continues to satisfy the flow conditions of this definition. A tributary does not lose its jurisdictional status if it contributes surface water flow to a downstream jurisdictional water in a typical year through a channelized non-jurisdictional surface water feature, through a subterranean river, through a culvert, dam, tunnel, or similar artificial feature, or through a debris pile, boulder field, or similar natural feature. The term *tributary* includes a ditch that either relocates a tributary, is constructed in a tributary, or is constructed in an adjacent wetland as long as the ditch satisfies the flow conditions of this definition.

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

(14) *Upland*. The term *upland* means any land area that under normal circumstances does not satisfy all three wetland factors (*i.e.*, hydrology, hydrophytic vegetation, hydric soils) identified in paragraph (c)(16) of this section, and does not lie below the ordinary high water mark or the high tide line of a jurisdictional water.

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

(16) *Wetlands.* The term *wetlands* means areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

*****

Title 40—Protection of Environment

For reasons set out in the preamble, title 40, chapter I of the Code of Federal Regulations is amended as follows:

PART 110—DISCHARGE OF OIL

3. The authority citation for part 110 is revised to read as follows:

   Authority: 33 U.S.C. 1251 *et seq.*, 33 U.S.C. 1321(b)(3) and (b)(4) and 1361(a); E.O. 11735, 38 FR 21243, 3 CFR parts 1971-1975 Comp., p. 793.

4. Section 110.1 is amended by revising the definition of "Navigable waters" and removing the definition of "Wetlands" to read as follows:

§110.1 Definitions.

* * * * *

Navigable waters means waters of the United States, including the territorial seas, as defined in

§120.2 of this chapter.

* * * * *

PART 112—OIL POLLUTION PREVENTION

5. The authority citation for part 112 is revised to read as follows:

   Authority: 33 U.S.C. 1251 *et seq*.

6. Section 112.2 is amended by revising the definition of "Navigable waters" and removing the definition of "Wetlands" to read as follows:

§112.2 Definitions.

* * * * *

Navigable waters means waters of the United States, including the territorial seas, as defined in §120.2 of this chapter.

* * * * *

PART 116—DESIGNATION OF HAZARDOUS SUBSTANCES

7. The authority citation for part 116 is revised to read as follows:

   Authority: 33 U.S.C. 1251 *et seq*.

8. Section 116.3 is amended by revising the definition of "Navigable waters" to read as follows:

§116.3 Definitions.

* * * * *

Navigable waters means "waters of the United States," including the territorial seas, as defined in §120.2 of this chapter.

* * * * *

PART 117—DETERMINATION OF REPORTABLE QUANTITIES FOR HAZARDOUS

SUBSTANCES

9. The authority citation for part 117 is revised to read as follows:

   Authority: 33 U.S.C. 1251 *et seq.*, and Executive Order 11735, superseded by Executive Order 12777, 56 FR 54757.

10. Section 117.1 is amended by revising paragraph (i) to read as follows:

§117.1 Definitions.

* * * * *

(i) *Navigable waters* means "waters of the United States, including the territorial seas," as defined in §120.2 of this chapter.

* * * * *

11. Add part 120 to read as follows:

PART 120—DEFINITION OF WATERS OF THE UNITED STATES

Sec.

120.1 Purpose and scope.

120.2 Definitions.

Authority: 33 U.S.C. 1251 *et seq.*

§120.1 Purpose and scope.

Part 120 contains the definition of "navigable waters" and "waters of the United States" for purposes of the Clean Water Act, 33 U.S.C. 1251 *et seq*. and its implementing regulations.

§120.2 Definitions.

For the purposes of this part, the following terms shall have the meanings indicated:

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

Waters of the United States means:

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

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

(ii) Tributaries;

(iii) Lakes and ponds, and impoundments of jurisdictional waters; and

(iv) Adjacent wetlands.

(2) *Non-jurisdictional waters*. The following are not "waters of the United States":

(i) Waters or water features that are not identified in paragraph (1)(i), (ii), (iii), or (iv) of this definition;

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

(iii) Ephemeral features, including ephemeral streams, swales, gullies, rills, and pools;

(iv) Diffuse stormwater run-off and directional sheet flow over upland;

(v) Ditches that are not waters identified in paragraph (1)(i) or (ii) of this definition, and those portions of ditches constructed in waters identified in paragraph (1)(iv) of this definition that do not satisfy the conditions of paragraph (3)(i) of this definition;

(vi) Prior converted cropland;

(vii) Artificially irrigated areas, including fields flooded for agricultural production, that would revert to upland should application of irrigation water to that area cease;

(viii) Artificial lakes and ponds, including water storage reservoirs and farm, irrigation, stock watering, and log cleaning ponds, constructed or excavated in upland or in non-jurisdictional

waters, so long as those artificial lakes and ponds are not impoundments of jurisdictional waters that meet the conditions of paragraph (3)(vi) of this definition;

(ix) Water-filled depressions constructed or excavated in upland or in non-jurisdictional waters incidental to mining or construction activity, and pits excavated in upland or in non-jurisdictional waters for the purpose of obtaining fill, sand, or gravel;

(x) Stormwater control features constructed or excavated in upland or in non-jurisdictional waters to convey, treat, infiltrate, or store stormwater run-off;

(xi) Groundwater recharge, water reuse, and wastewater recycling structures, including detention, retention, and infiltration basins and ponds, constructed or excavated in upland or in non-jurisdictional waters; and

(xii) Waste treatment systems.

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

(i) *Adjacent wetlands.* The term *adjacent wetlands* means wetlands that:

(A) Abut, meaning to touch at least at one point or side of, a water identified in paragraph (1)(i), (ii), or (iii) of this definition;

(B) Are inundated by flooding from a water identified in paragraph (1)(i), (ii), or (iii) of this definition in a typical year;

(C) Are physically separated from a water identified in paragraph (1)(i), (ii), or (iii) of this definition only by a natural berm, bank, dune, or similar natural feature; or

(D) Are physically separated from a water identified in paragraph (1)(i), (ii), or (iii) of this definition only by an artificial dike, barrier, or similar artificial structure so long as that structure allows for a direct hydrologic surface connection between the wetlands and the water identified in paragraph (1)(i), (ii), or (iii) of this definition in a typical year, such as through a culvert, flood

or tide gate, pump, or similar artificial feature. An adjacent wetland is jurisdictional in its entirety when a road or similar artificial structure divides the wetland, as long as the structure allows for a direct hydrologic surface connection through or over that structure in a typical year.

(ii) *Ditch*. The term *ditch* means a constructed or excavated channel used to convey water.

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

(iv) *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.

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

(vi) *Lakes and ponds, and impoundments of jurisdictional waters.* The term *lakes and ponds, and impoundments of jurisdictional waters* means standing bodies of open water that contribute surface water flow to a water identified in paragraph (1)(i) of this definition in a typical year either directly or through one or more waters identified in paragraph (1)(ii), (iii), or (iv) of this definition. A lake, pond, or impoundment of a jurisdictional water does not lose its jurisdictional

status if it contributes surface water flow to a downstream jurisdictional water in a typical year through a channelized non-jurisdictional surface water feature, through a culvert, dike, spillway, or similar artificial feature, or through a debris pile, boulder field, or similar natural feature. A lake or pond, or impoundment of a jurisdictional water is also jurisdictional if it is inundated by flooding from a water identified in paragraph (1)(i), (ii), or (iii) of this definition in a typical year.

(vii) *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 soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.

(viii) *Perennial.* The term *perennial* means surface water flowing continuously year-round.

(ix) *Prior converted cropland*. The term *prior converted cropland* means any area that, prior to December 23, 1985, was drained or otherwise manipulated for the purpose, or having the effect, of making production of an agricultural product possible. EPA and the Corps will recognize designations of prior converted cropland made by the Secretary of Agriculture. An area is no longer considered *prior converted cropland* for purposes of the Clean Water Act when the area is abandoned and has reverted to wetlands, as defined in paragraph (3)(xvi) of this definition. Abandonment occurs when prior converted cropland is not used for, or in support of, agricultural purposes at least once in the immediately preceding five years. For the purposes of the Clean Water Act, the EPA Administrator shall have the final authority to determine whether prior converted cropland has been abandoned.

(x) *Snowpack.* The term *snowpack* means layers of snow that accumulate over extended

periods of time in certain geographic regions or at high elevation (*e.g.*, in northern climes or mountainous regions).

(xi) *Tidal waters* and *waters subject to the ebb and flow of the tide*. The terms *tidal waters* and *waters subject to the ebb and flow of the tide* mean those waters that rise and fall in a predictable and measurable rhythm or cycle due to the gravitational pulls of the moon and sun. Tidal waters and waters subject to the ebb and flow of the tide end where the rise and fall of the water surface can no longer be practically measured in a predictable rhythm due to masking by hydrologic, wind, or other effects.

(xii) *Tributary.* The term *tributary* means a river, stream, or similar naturally occurring surface water channel that contributes surface water flow to a water identified in paragraph (1)(i) of this definition in a typical year either directly or through one or more waters identified in paragraph (1)(ii), (iii), or (iv) of this definition. A tributary must be perennial or intermittent in a typical year. The alteration or relocation of a tributary does not modify its jurisdictional status as long as it continues to satisfy the flow conditions of this definition. A tributary does not lose its jurisdictional status if it contributes surface water flow to a downstream jurisdictional water in a typical year through a channelized non-jurisdictional surface water feature, through a subterranean river, through a culvert, dam, tunnel, or similar artificial feature, or through a debris pile, boulder field, or similar natural feature. The term *tributary* includes a ditch that either relocates a tributary, is constructed in a tributary, or is constructed in an adjacent wetland as long as the ditch satisfies the flow conditions of this definition.

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

(xiv) *Upland*. The term *upland* means any land area that under normal circumstances does not satisfy all three wetland factors (*i.e.*, hydrology, hydrophytic vegetation, hydric soils) identified in paragraph (3)(xvi) of this definition, and does not lie below the ordinary high water mark or the high tide line of a jurisdictional water.

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

(xvi) *Wetlands.* The term *wetlands* means areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

PART 122—EPA ADMINISTERED PERMIT PROGRAMS: THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM

12. The authority citation for part 122 continues to read as follows:

Authority: The Clean Water Act, 33 U.S.C. 1251 *et seq.*

13. Section 122.2 is amended by:

a. Lifting the suspension of the last sentence of the definition of "Waters of the United States" published July 21, 1980 (45 FR 48620).

b. Revising the definition of "Waters of the United States".

c. Removing the definition of "Wetlands".

The revision reads as follows:

§122.2 Definitions.

*** * * * ***

Waters of the United States or *waters of the U.S.* means the term as it is defined in §120.2 of this chapter.

* * * * *

PART 230—SECTION 404(b)(1) GUIDELINES FOR SPECIFICATION OF DISPOSAL SITES FOR DREDGED OR FILL MATERIAL

14. The authority citation for part 230 is revised to read as follows:

Authority: 33 U.S.C. 1251 *et seq*.

15. Section 230.3 is amended by:

a. Removing paragraph (b) and reserved paragraphs (f), (g), (j), and (l);

b. Redesignating paragraphs (c) through (e) as paragraphs (b) through (d);

c. Redesignating paragraphs (h) and (i) as paragraphs (e) and (f)

d. Redesignating paragraph (k) as paragraph (g);

e. Redesignating paragraphs (m) through (q) as paragraphs (h) through (l);

f. Redesignating paragraph (q-1) as paragraph (m);

g. Redesignating paragraph (r) as paragraph (n);

h. Redesignating paragraph (s) as paragraphs (o);

i. Revising newly designated paragraph (o); and

j. Removing paragraph (t).

The revision reads as follows:

§ 230.3 Definitions.

*** * * * ***

(o) *Waters of the United States* means the term as it is defined in §120.2 of this chapter.

PART 232—404 PROGRAMS DEFINITIONS; EXEMPT ACTIVITIES NOT REQUIRING 404 PERMITS

16. The authority citation for part 232 is revised to read as follows:

Authority: 33 U.S.C. 1251 *et seq.*

17. Section 232.2 is amended by revising the definition of "Waters of the United States" and removing the definition of "Wetlands" to read as follows:

§232.2 Definitions.

* * * * *

Waters of the United States means the term as it is defined in §120.2 of this chapter.

PART 300—NATIONAL OIL AND HAZARDOUS SUBSTANCES POLLUTION CONTINGENCY PLAN

18. The authority citation for part 300 is revised to read as follows:

Authority: 33 U.S.C. 1251 *et seq*.

19. Section 300.5 is amended by revising the definition of "Navigable waters" to read as follows:

§ 300.5 Definitions.

*** * * * ***

Navigable waters means the waters of the United States, including the territorial seas, as defined in §120.2 of this chapter.

* * * * *

20. In appendix E to part 300, section 1.5 Definitions is amended by revising the definition of "Navigable waters" to read as follows:

Appendix E to Part 300—Oil Spill Response

* * * * *

1.5 Definitions. * * *

Navigable waters means the waters of the United States, including the territorial seas, as defined in §120.2 of this chapter.

* * * * *

PART 302— DESIGNATION, REPORTABLE QUANTITIES, AND NOTIFICATION

21. The authority citation for part 302 is revised to read as follows:

Authority:33 U.S.C. 1251 *et seq*.

22. Section 302.3 is amended by revising the definition of "Navigable waters" to read as follows:

§ 302.3 Definitions.

*** * * * ***

Navigable waters means the waters of the United States, including the territorial seas, as defined in §120.2 of this chapter.

*** * * * ***

PART 401— GENERAL PROVISIONS

23. The authority citation for part 401 is revised to read as follows:

Authority: 33 U.S.C. 1251 *et seq.*

24. Section 401.11 is amended by revising paragraph (l) to read as follows:

§ 401.11 General definitions.

*** * * * ***

(l) *Navigable waters* means "waters of the United States, including the territorial seas," as defined in §120.2 of this chapter.

[FR Doc. 2020-02500 Filed: 4/20/2020 8:45 am; Publication Date: 4/21/2020]