

**PRE-PUBLICATION NOTICE.** The EPA Administrator, Andrew R. Wheeler, signed the following final rule on 9/12/2019, with signature by Mr. R.D. James, Assistant Secretary of the Army for Civil Works, on 9/5/2019, and EPA is submitting it for publication in the *Federal Register* (FR). EPA is providing this document solely for the convenience of interested parties. This document is not disseminated for purposes of EPA's Information Quality Guidelines and does not represent an Agency determination or policy. While we have taken steps to ensure the accuracy of this Internet version of the rule, it is not the official version of the rule for purposes of compliance or effectiveness. Please refer to the official version in a forthcoming FR publication, which will appear on the Government Printing Office's govinfo website (<https://www.govinfo.gov/app/collection/fr>) and on Regulations.gov (<https://www.regulations.gov>) in Docket No. EPA-HQ-OW-2017-0203. Notwithstanding the fact that EPA is posting a pre-publication version, the final rule will not be promulgated until published in the *Federal Register*. Once the official version of this document is published in the FR, this version will be removed from the Internet and replaced with a link to the official version.

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, 122, 230, 232, 300, 302, and 401**

**[EPA-HQ-OW-2017-0203; FRL-XXXX-XX-OW]**

**RIN 2040-AF74**

### **Definition of “Waters of the United States”—Recodification of Pre-Existing Rules**

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

**ACTION:** Final rule.

**SUMMARY:** The Environmental Protection Agency (EPA) and the Department of the Army (“the agencies”) are publishing a final rule to repeal the 2015 Clean Water Rule: Definition of “Waters of the United States” (“2015 Rule”), which amended portions of the Code of Federal Regulations (CFR), and to restore the regulatory text that existed prior to the 2015 Rule. The agencies will implement the pre-2015 Rule regulations informed by applicable agency guidance documents and consistent with Supreme Court decisions and longstanding agency practice.

The agencies are repealing the 2015 Rule for four primary reasons. First, the agencies conclude that the 2015 Rule did not implement the legal limits on the scope of the agencies’

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authority under the Clean Water Act (CWA) as intended by Congress and reflected in Supreme Court cases, including Justice Kennedy’s articulation of the significant nexus test in *Rapanos*.

Second, the agencies conclude that in promulgating the 2015 Rule the agencies failed to adequately consider and accord due weight to the policy of the Congress in CWA section 101(b) to “recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution” and “to plan the development and use . . . of land and water resources.” 33 U.S.C. 1251(b). Third, the agencies repeal the 2015 Rule to avoid interpretations of the CWA that push the envelope of their constitutional and statutory authority absent a clear statement from Congress authorizing the encroachment of federal jurisdiction over traditional State land-use planning authority. Lastly, the agencies conclude that the 2015 Rule’s distance-based limitations suffered from certain procedural errors and a lack of adequate record support. The agencies find that these reasons, collectively and individually, warrant repealing the 2015 Rule.

With this final rule, the regulations defining the scope of federal CWA jurisdiction will be those portions of the CFR as they existed before the amendments promulgated in the 2015 Rule.

**DATES:** This rule is effective on [insert 60 days from publication].

**ADDRESSES:** The EPA has established a docket for this action under Docket ID No. EPA-HQ-OW-2017-0203. 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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**FOR FURTHER INFORMATION CONTACT:** Michael McDavit, Office of Water (4504-T), Environmental Protection Agency, 1200 Pennsylvania Avenue, NW, Washington, DC 20460; telephone number: (202) 566-2428; email address: [CWAwotus@epa.gov](mailto:CWAwotus@epa.gov); or Jennifer Moyer, Regulatory Community of Practice (CECW-CO-R), U.S. Army Corps of Engineers, 441 G Street, NW, Washington, DC 20314; telephone number: (202) 761-6903; email address: [USACE\\_CWA\\_Rule@usace.army.mil](mailto:USACE_CWA_Rule@usace.army.mil).

**SUPPLEMENTARY INFORMATION:** The agencies are taking this final action to repeal the Clean Water Rule: Definition of “Waters of the United States,” 80 FR 37054 (June 29, 2015), and to recodify the regulatory definitions of “waters of the United States” that existed prior to the August 28, 2015 effective date of the 2015 Rule. Those pre-existing regulatory definitions are the ones that the agencies are currently implementing in more than half the States in light of various judicial decisions currently enjoining the 2015 Rule. As of the effective date of this final rule, the agencies will administer the regulations promulgated in 1986 and 1988 in portions of 33 CFR part 328 and 40 CFR parts 110, 112, 116, 117, 122, 230, 232, 300, 302, and 401,<sup>1</sup> and will continue to interpret the statutory term “waters of the United States” to mean the waters covered by those regulations consistent with Supreme Court decisions and longstanding practice, as informed by applicable agency guidance documents, training, and experience.

State, tribal, and local governments have well-defined and established relationships with the Federal government in implementing CWA programs. This final rule returns the relationship

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<sup>1</sup> While the EPA administers most provisions in the CWA, the Department of the Army, Corps of Engineers administers the permitting program under section 404. During the 1980s, both agencies adopted substantially similar definitions of “waters of the United States.” See 51 FR 41206 (Nov. 13, 1986) (amending 33 CFR 328.3); 53 FR 20764 (June 6, 1988) (amending 40 CFR 232.2).

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between the Federal government, States, and Tribes to the longstanding and familiar distribution of power and responsibilities that existed under the CWA for many years prior to the 2015 Rule.

In issuing the July 27, 2017 notice of proposed rulemaking (NPRM) and the July 12, 2018 supplemental notice of proposed rulemaking (SNPRM), the agencies gave interested parties an opportunity to comment on important considerations and reasons for the agencies' proposal, including whether it is desirable and appropriate to recodify the pre-2015 regulations as an interim step pending a substantive rulemaking to reconsider the definition of "waters of the United States." *See* 82 FR 34899, 34903 (July 27, 2017); 83 FR 32227 (July 12, 2018). The agencies received approximately 770,000 public comments on this rulemaking and carefully reviewed those comments in deciding whether to finalize this rule.

For the reasons discussed in Section III of this notice, the agencies conclude that the 2015 Rule exceeded the agencies' authority under the CWA by adopting an interpretation of Justice Kennedy's "significant nexus" standard articulated in *Rapanos v. United States and Carabell v. United States*, 547 U.S. 715 (2006) ("*Rapanos*") that was inconsistent with important aspects of that opinion (as well as the opinion of the Court in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) ("*SWANCC*")) and which enabled federal regulation of waters outside the scope of the Act, even though Justice Kennedy's concurring opinion was identified as the basis for the significant nexus standard established in the 2015 Rule. The agencies also conclude that, contrary to reasons articulated in support of the 2015 Rule, the rule expanded the meaning of "tributaries" and "adjacent" wetlands to include waters beyond those regulated by the agencies under the pre-existing regulations, including certain isolated waters, as applied by the agencies following decisions of the Supreme Court in *Rapanos* and *SWANCC*. One of the agencies' stated goals in the 2015 Rule was to provide greater clarity

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in identifying the geographic scope of the CWA, believing that “State, tribal, and local governments have well-defined and longstanding relationships with the Federal government in implementing CWA programs and these relationships are not altered by the final rule.” 80 FR 37054. The agencies now believe that the 2015 Rule improperly altered the balance of authorities between the Federal and State governments, in contravention of CWA section 101(b), 33 U.S.C. 1251(b), and pushed the envelope of the agencies’ constitutional and statutory authority, despite the absence of a clear indication that Congress intended to invoke the outer limits of its power. The agencies also conclude that the 2015 Rule’s distance-based limitations in the (a)(6) and (a)(8) categories of waters were procedurally deficient and lacked adequate record support.

Additionally, since the agencies’ publication of the SNPRM, the U.S. District Courts for the Southern District of Texas and the Southern District of Georgia have found that the rule suffered from certain procedural (both courts) and substantive (Southern District of Georgia) errors and issued orders remanding the 2015 Rule back to the agencies. *Texas v. EPA*, No. 3:15-cv-162, 2019 WL 2272464 (S.D. Tex. May 28, 2019); *Georgia v. Wheeler*, No. 2:15-cv-079, 2019 WL 3949922 (S.D. Ga. Aug. 21, 2019). As reflected below, a number of the agencies’ conclusions regarding the validity of the 2015 Rule are consistent with and reinforced by the findings of these courts.

Further, for the reasons discussed in Section IV of this notice, the agencies conclude that regulatory certainty will be best served by repealing the 2015 Rule and recodifying the pre-2015 regulations currently in effect in those States where the 2015 Rule is enjoined. Though the agencies recognize that the pre-existing regulations pose certain implementation challenges, the agencies find that restoring the prior regulations is preferable to maintaining the 2015 Rule, including because returning to the pre-2015 regulations will reinstate nationwide a longstanding

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regulatory framework that is more familiar to and better-understood by the agencies, States, Tribes, local governments, regulated entities, and the public while the agencies consider public comments on the proposed revised definition of “waters of the United States.” *See* 84 FR 4154 (Feb. 14, 2019). In that separate rulemaking, as referenced in Section VII, the agencies are reconsidering the proper scope of federal CWA jurisdiction and seek to establish a clear and implementable regulatory definition that better effectuates the language, structure, and purposes of the CWA.

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### **I. General Information**

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

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1. *Docket*. An official public docket for this action has been established under Docket ID No. EPA-HQ-OW-2017-0203. 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. 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 repealing the 2015 amendments to the definition of “waters of the United States” in portions of 33 CFR part 328 and 40 CFR parts 110, 112, 116, 117, 122, 230, 232, 300, 302, and 401, and are restoring the pre-existing regulatory text.

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

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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 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 section 502(7) 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 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



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in the definition of “adjacent”) that would determine whether waters were “jurisdictional by rule.” *See id.* at 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 and that is characterized by the presence of the “physical indicators” of a bed and banks and an ordinary high water mark. “These physical indicators demonstrate there is volume, frequency, and duration of flow sufficient to create a bed and banks and an ordinary high water mark, and thus to qualify as a tributary.” *Id.*<sup>2</sup> 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 affected the interpretation 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 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

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<sup>2</sup> 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 id.* at 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.

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waters within 1,500 feet of the ordinary high water mark of the Great Lakes. *Id.* at 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 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. *Id.* at 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 were not sufficiently supported in the administrative record for the final 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.<sup>3</sup> *Id.* This definition was different from the test articulated by the agencies in their

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<sup>3</sup> In this notice, a “primary water” is a category (1) through (3) “jurisdictional by rule” water as defined in the 2015 Rule.

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2008 *Rapanos* Guidance.<sup>4</sup> 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. It was sufficient for determining whether a water had a significant nexus under the 2015 Rule if any single function performed by the water, alone or together with similarly situated waters in the region, contributed significantly to the chemical, physical, or biological integrity of the nearest category (1) through (3) “jurisdictional by rule” water. *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 means that the vast majority of water features in the United States may have come within the jurisdictional purview of the Federal government.<sup>5</sup>

The 2015 Rule also retained exclusions from the definition of “waters of the United States” for prior converted cropland and waste treatment systems. *Id.* at 37105. In addition, the agencies codified several exclusions that, in part, reflected longstanding agency practice and added others

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<sup>4</sup> 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](https://www.epa.gov/sites/production/files/2016-02/documents/cwa_jurisdiction_following_rapanos120208.pdf). The agencies acknowledge that the *Rapanos* Guidance does not impose legally binding requirements, see *id.* at 4 n.17, but believe that this guidance is relevant to the discussion in this notice.

<sup>5</sup> “[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>.

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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.

#### *B. Legal Challenges to the 2015 Rule*

Following the 2015 Rule’s publication, 31 States<sup>6</sup> and 53 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<sup>7</sup> and appellate<sup>8</sup> 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.<sup>9</sup> The district court found those States were “likely to succeed”

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<sup>6</sup> 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.

<sup>7</sup> U.S. District Courts for the Northern and Southern District 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.

<sup>8</sup> U.S. Court of Appeals for the Second, Fifth, Sixth, Eighth, Ninth, Tenth, Eleventh, and District of Columbia Circuits.

<sup>9</sup> 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

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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 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 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

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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 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.

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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*”).

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).

Since the Supreme Court’s jurisdictional ruling, district court litigation regarding the 2015 Rule has 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.<sup>10</sup> 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 has since issued an order

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<sup>10</sup> As of the date this final rule was signed, it is unclear whether the North Dakota district court’s preliminary injunction also applies to New Mexico. *See supra* note 9.

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remanding the 2015 Rule to the agencies, finding that 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 preliminary injunction against the 2015 Rule. *Id.* at \*36.

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,<sup>11</sup> which served as the technical basis for the final rule. *See Texas v. EPA*, No. 3:15-cv-162, 2019 WL 2272464 (S.D. Tex. May 28, 2019).

Moreover, 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*

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<sup>11</sup> 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).

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*Ass'n v. EPA*, No. 19-00564 (D. Or. July 26, 2019). As a result, at this time, the 2015 Rule is enjoined in more than half of the States.<sup>12</sup>

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).

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, also filed a motion for a preliminary injunction against the 2015 Rule. In May 2019, the court denied the parties' motion, finding that the parties had "not shown that they will suffer irreparable harm if the 2015 Rule is permitted to remain in effect while this case is pending." *See Oklahoma v. EPA*, No. 4:15-cv-00381, slip. op. at 11-12 (N.D. Okla. May 29, 2019). Proceedings in this case are stayed pending the parties' appeal of the court's order denying a preliminary injunction to the Tenth Circuit. *See Order, Oklahoma v. EPA*, No. 4:15-cv-00381 (N.D. Okla. June 14, 2019).

Finally, an additional motion for a preliminary injunction against the 2015 Rule is pending in the U.S. District Court for the Western District of Washington. *See Motion for Preliminary Injunction, Wash. Cattlemen's Ass'n v. EPA*, No. 19-00569 (W.D. Wash. June 14, 2019).

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<sup>12</sup> Prior to this final rule, the applicability of the 2015 Rule in New Mexico has been unclear. *See supra* note 9.



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C. *Executive Order 13778 and the “Step One” Notice of Proposed Rulemaking and Supplemental Notice of Proposed Rulemaking*

On February 28, 2017, the President issued Executive Order 13778 entitled “Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the ‘Waters of the United States’ Rule.” Section 1 of the Executive Order states, “[i]t is in the national interest to ensure the Nation’s navigable waters are kept free from pollution, while at the same time promoting economic growth, minimizing regulatory uncertainty, and showing due regard for the roles of the Congress and the States under the Constitution.” The Executive Order directs the EPA and the Department of 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 “Step One” 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 invited comment on the NPRM over a 62-day period. On July 12, 2018, the agencies published a supplemental notice of proposed rulemaking to clarify, supplement, and seek additional

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comment on the Step One notice of proposed rulemaking, 83 FR 32227. The agencies invited comment on the SNPRM over a 30-day period.

In developing this final rule, the agencies reviewed approximately 690,000 public comments received on the NPRM and approximately 80,000 comments received on the SNPRM from a broad spectrum of interested parties. With the NPRM and SNPRM the agencies sought comment on the repeal of the 2015 Rule, the recodification of the prior regulations, the considerations and agencies' reasons for the proposal, and proposed conclusions that the agencies exceeded their authority under the CWA. In addition, the public could comment on all aspects of the NPRM, the economic analysis for the NPRM, and the SNPRM. Some commenters expressed support for the agencies' proposal to repeal the 2015 Rule, stating, among other things, that the 2015 Rule exceeds the agencies' statutory authority. Other commenters opposed the proposal, stating, among other things, that repealing the 2015 Rule will increase regulatory uncertainty and adversely impact water quality. A complete response to comment document is available in the docket for this final rule at Docket ID No. EPA-HQ-OW-2017-0203.

#### D. *The Applicability Date Rule*

On November 22, 2017, the agencies published and solicited public comment on a proposal to establish an applicability date for the 2015 Rule that would be two years from the date of any final rule. 82 FR 55542. On February 6, 2018, the agencies issued a final rule, 83 FR 5200, adding an applicability date to the 2015 Rule. The applicability date was established as February 6, 2020. When adding an applicability date to the 2015 Rule, the agencies clarified that they would continue to implement nationwide the previous regulatory definition of "waters of the United States," consistent with the practice and procedures the agencies implemented long before and immediately following the 2015 Rule pursuant to the preliminary injunction issued by

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the District of North Dakota and the nationwide stay issued by the Sixth Circuit. The agencies further explained that the final applicability date rule would ensure regulatory certainty and consistent implementation of the CWA nationwide while the agencies reconsider the 2015 Rule and pursue further rulemaking to develop a new definition of “waters of the United States.”

The applicability date rule was challenged in a number of district courts by States and environmental organizations. On August 16, 2018, the U.S. District Court for the District of South Carolina granted summary judgment in favor of the plaintiffs and enjoined the applicability date rule nationwide. *South Carolina Coastal Conservation League, et al., v. Pruitt*, 318 F. Supp. 3d 959 (D.S.C. Aug. 16, 2018). In addition, on November 26, 2018, the U.S. District Court for the Western District of Washington vacated the applicability date rule nationwide. *Puget Soundkeeper Alliance, et al. v. Andrew Wheeler, et al.*, No. C15-1342-JCC (W.D. Wash. Nov. 26, 2018). As a result, the 2015 Rule is now in effect in 22 States.<sup>13</sup> The 2015 Rule continues to be subject to preliminary injunctions issued by the U.S. District Court for the District of North Dakota, the U.S. District Court for the District of Oregon, the U.S. District Court for the Southern District of Georgia, and the U.S. District Court for the Southern District of Texas in a total of 27 States.<sup>14</sup>

### **III. Basis for Repealing the 2015 Rule**

#### *A. Legal Authority to Repeal*

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<sup>13</sup> To assist the public in keeping up with the changing regulatory landscape of federal jurisdiction under the CWA, the EPA has posted a map of current effective regulation by state online at <https://www.epa.gov/wotus-rule/definition-waters-united-states-rule-status-and-litigation-update>.

<sup>14</sup> The agencies filed a motion seeking clarification of the applicability of the North Dakota district court’s preliminary injunction to New Mexico. *See supra* note 9. That motion remains pending before the court as of the time of signature of this final rule.

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The agencies' ability to repeal an existing regulation through notice-and-comment rulemaking is well-grounded in the law. The APA defines "rule making" to mean "agency process for formulating, amending, or repealing a rule." 5 U.S.C. 551(5). The CWA complements this authority by providing the Administrator with broad authority to "prescribe such regulations as are necessary to carry out the functions under this Act." 33 U.S.C. 1361(a). This broad authority includes issuing regulations that repeal or revise CWA implementing regulations promulgated by a prior administration.

As discussed in the NPRM and SNPRM, "agencies are free to change their existing policies as long as they provide a reasoned explanation for the change." *See Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016) (citations omitted); *see also* 82 FR 34901; 83 FR 32231. Agencies may seek to revise or repeal regulations based on changes in circumstance or changes in statutory interpretation or policy judgments. *See, e.g., FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 514-15 (2009) ("*Fox*"); *Ctr. for Sci. in Pub. Interest v. Dep't of Treasury*, 797 F.2d 995, 998-99 & n.1 (D.C. Cir. 1986). Indeed, the agencies' interpretation of the statutes they administer, such as the CWA, are not "instantly carved in stone"; quite the contrary, the agencies "must consider varying interpretations and the wisdom of [their] policy on a continuing basis, . . . for example, in response to . . . a change in administrations." *Nat'l Cable & Telecommc'ns Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981-82 (2005) ("*Brand X*") (internal quotation marks omitted) (quoting *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 863-64 (1984)) (citing *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)). As such, a revised rulemaking based "on a reevaluation of which policy would be better in light of the facts" is "well within an agency's discretion," and "[a] change in administration brought about by the people casting their votes is a

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perfectly reasonable basis for an executive agency’s reappraisal” of its regulations and programs. *Nat’l Ass’n of Home Builders v. EPA*, 682 F.3d 1032, 1038 & 1043 (D.C. Cir. 2012) (“*NAHB*”).

In providing a reasoned explanation for a change in position, “an agency must also be cognizant that longstanding policies may have engendered serious reliance interests that must be taken into account.” *Encino Motorcars*, 136 S. Ct. at 2126 (internal quotation marks and citation omitted). In *Encino Motorcars*, the Supreme Court held that the Department of Labor issued a regulation without the necessary “reasoned explanation” where the Department “offered barely any explanation” for changing its position despite “the significant reliance interests involved.” *Id.* The Court found that the Department “did not analyze or explain” why the statute should be interpreted in the manner reflected in the new rule and “said almost nothing” to explain whether there were “good reasons for the new policy.” *Id.* at 2127. The Court explained that while a “summary discussion may suffice in other circumstances,” the Department’s explanation was particularly inadequate given the “decades of industry reliance on the Department’s prior policy.” *Id.* at 2126.

The 2015 Rule, unlike the decades-old regulation discussed in *Encino Motorcars*, has not engendered significant reliance interests. As explained in Section II.B, the 2015 Rule has never been in effect nationwide, and the applicability of the rule has remained in flux due to a shifting set of preliminary injunctions barring implementation of the rule in different States across the country. Indeed, over the past year alone, the number of States subject to the 2015 Rule has changed multiple times. Regardless, the agencies have provided ample justification for their change in position. As reflected in this preamble to the final rule, the agencies have carefully analyzed their statutory and constitutional authority, along with relevant case law, and have

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provided a detailed explanation of their reasons for deciding to repeal the 2015 Rule and restore the pre-existing regulations.

Some commenters found that the agencies provided a reasoned explanation to repeal the 2015 Rule given the agencies' concerns that the 2015 Rule was inconsistent with the agencies' statutory authority and Supreme Court precedent. Commenters also found that the agencies provided good reasons for the change in policy, such as the desire to balance the objective, goals, and policies of the CWA. Other commenters asserted that the agencies have not satisfied the legal requirements for revising an existing regulation. Some of these commenters stated that the agencies have failed to provide a reasoned explanation to support this action or the agencies' change in position and noted that a change in administrations is insufficient, in and of itself, to support this rule.

As referenced above, the Supreme Court and lower courts have acknowledged that an agency may repeal regulations promulgated by a prior administration based on changes in agency policy where "the agency adequately explains the reasons for a reversal of policy." *Brand X*, 545 U.S. at 981. The agencies need not demonstrate that the reasons for a new policy are better than the reasons for the old one because "it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency believes it to be better, which the conscious change of course adequately indicates." *Fox*, 556 U.S. at 515. Further, "[w]hen an agency changes its existing position, it need not always provide a more detailed justification than what would suffice for a new policy created on a blank slate." *Encino Motorcars*, 136 S. Ct. at 2125 (citations and internal quotation marks omitted).

Consistent with the APA and applicable case law, the agencies have provided a reasoned explanation for repealing the 2015 Rule and recodifying the pre-existing regulations, including

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that the 2015 Rule exceeded the scope of statutory authority in certain respects. The agencies acknowledge, as some commenters observed, that certain legal interpretations and conclusions supporting the agencies' rationale for this rulemaking are inconsistent with the agencies' prior administrative findings and previous positions taken by the United States in legal briefs.

However, so long as an agency "adequately explains the reasons for a reversal of policy, change is not invalidating." *Fox*, 545 U.S. at 981 (citation and internal quotation marks omitted). Indeed, departing from a prior position is proper where, as here, the agencies' change in position is based on a considered evaluation of the relevant factors following a thorough rulemaking process.

Throughout this rulemaking process, the agencies have clearly identified the issues the agencies were considering in deciding whether to finalize this action, and the agencies solicited, received, and considered many comments on those issues. *See, e.g.*, 83 FR 32240–42, 32247–48. The agencies have also thoroughly explained their rationale in this preamble to the final rule and in the accompanying response to comments document.

## *B. Legal Background*

### 1. The Clean Water Act

Congress amended the Federal Water Pollution Control Act (FWPCA), or Clean Water Act (CWA) as it is commonly called,<sup>15</sup> 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 U.S. Army Corps of Engineers ("Corps") under the Rivers and Harbors Act of 1899 (RHA). While much of that statute focused on restricting obstructions to navigation

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<sup>15</sup> 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.

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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.”<sup>16</sup> 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. These 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.

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 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 Env’tl. Prot.*, 547 U.S. 370, 385 (2006) (“[T]he 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

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<sup>16</sup> 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*, 132 S. Ct. 1215, 1228 (2012).



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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 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.” *Id.* at 1251(a)(3)-(7).

Congress provided a major role for the States in implementing the CWA, balancing 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 . . . .” *Id.* at 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

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boundary waters) of such States.” *Id.* at 1370.<sup>17</sup> Congress also pledged 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,” *id.* at 1362(19), to parallel the broad 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, section 105 of the Act, “Grants for research and development,” authorized EPA “to make grants to any State, municipality, or intermunicipal or interstate agency for the purpose of assisting in the development of any project which will demonstrate a new or improved method of preventing, reducing, and eliminating the discharge into *any waters* of pollutants from sewers which carry storm water or both storm water and pollutants.” 33 U.S.C. 1255(a)(1) (emphasis added). Section 105 also authorized 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.” 33 U.S.C. 1255(b)-(c) (emphasis added); *see also id.* at 1256(a) (authorizing EPA to issue “grants to States and to interstate agencies to assist them in administering programs for the prevention, reduction, and

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<sup>17</sup> 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.

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elimination of pollution”). Section 108, “Pollution control in the Great Lakes,” authorized 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.” *Id.* at 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”). 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).

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.” *Id.* at 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,” such as a pipe, ditch or other “discernible, confined and discrete conveyance.” *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 waters of the United States from a point source unless the discharge is in compliance with certain enumerated sections of the CWA, including obtaining authorizations pursuant to the section 402 National Pollutant Discharge Elimination System

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(NPDES) permit program or the section 404 dredged or fill material permit program. *See id.* at 1342 and 1344. Congress therefore hoped 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.”<sup>18</sup>

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 selectively quoting from and mischaracterizing the Act’s provisions. Other commenters argued that the two terms are synonymous under the Act.

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

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<sup>18</sup> 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 ground waters 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).

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scheme.” *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (internal quotation marks and citation omitted); *see also United Savings Ass’n 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 in addition to a federal regulatory prohibition on the discharge of pollutants into the navigable waters.

Under this statutory scheme, the States are responsible for developing water quality standards for “waters of the United States” within their borders and reporting on the condition of those waters to 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 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. *Id.* at 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 the CWA section

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402 permit program for those “waters of the United States” within their boundaries,<sup>19</sup> 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). At present, no Tribes administer the section 402 or 404 programs, although some are exploring the possibility.

The agencies have developed 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”).<sup>20</sup> The agencies therefore recognize a distinction between the

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<sup>19</sup> Three States (Massachusetts, New Hampshire, and New Mexico) do not currently administer any part of the CWA section 402 program.

<sup>20</sup> 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). In House consideration of the Conference Report, Congressman Jones 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.

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specific word choices of Congress, including the need to develop regulatory programs that aim to accomplish the goals of the Act while implementing the specific policy directives of Congress.<sup>21</sup>

To do so, the agencies must determine what Congress had in mind when it defined “navigable waters” in 1972 as simply “the waters of the United States.”

Congress’ authority to regulate “navigable waters” derives from its power to regulate the “channels of interstate commerce” under the Commerce Clause. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824); *see also United States v. Lopez*, 514 U.S. 549, 558-59 (1995) (describing the “channels of interstate commerce” as one of three areas of congressional authority under the Commerce Clause). The Supreme Court explained in *SWANCC* that the term “navigable” indicates “what Congress had in mind as its authority for enacting the Clean Water Act: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made.” 531 U.S. 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 Commerce Clause to regulate at least some waters that would not be deemed ‘navigable’ under the classical

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. . . 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).

<sup>21</sup> *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.”); *see also Crandon v. United States*, 494 U.S. 152, 158 (1990) (“In determining the meaning of the statute, we look not only to the particular statutory language, but to the design of the statute as a whole and to its object *and policy*.”) (emphasis added).

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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). Over the years, this traditional test has been 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 also had 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).



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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).<sup>22</sup> 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, 92nd Cong., 1st Sess. at 77 (1971). And in 1977, when Congress authorized State assumption over the section 404 dredged or fill material permitting program, Congress limited the scope of assumable waters by requiring the Corps to retain permitting authority over Rivers and Harbors Act waters (as identified by *The Daniel Ball* test) plus wetlands adjacent to those waters, minus historic use only waters. *See* 33 U.S.C. 1344(g)(1).<sup>23</sup> This suggests that Congress 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

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<sup>22</sup> 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).

<sup>23</sup> For a detailed discussion of the legislative history supporting the enactment of section 404(g), *see Final Report of the Assumable Waters Subcommittee* (May 2017), App. F.

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has been the subject of dispute for decades, but the Supreme Court on three occasions has analyzed the issue and provided some instructional guidance.

## 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 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 the limits of federal jurisdiction end, 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 therefore held that it is "a permissible interpretation of the Act" to conclude that "a wetland that actually abuts on a

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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 Court also noted that the agencies can establish categories of jurisdiction for adjacent wetlands. *See id.* at 135 n.9.

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 id.* at 124 n.2 & 131 n.8. In *SWANCC* a few years later, however, the Supreme Court analyzed a similar question but 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 162-64. The Supreme Court rejected the government’s stated rationale for asserting jurisdiction over these “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.<sup>24</sup> As summarized by the *SWANCC* majority:

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

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<sup>24</sup> For additional context, at oral argument during *Riverside Bayview*, the government attorney 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, Inc.*, 474 U.S. 121 (1985) (No. 84-701).

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the text of the statute will not allow this.

*Id.* at 167-68 (citations 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 Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242-43 (1985) (“If 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[.]’”); *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

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State power and construed the CWA to avoid the significant constitutional questions related to the scope of federal authority authorized therein. *Id.*<sup>25</sup>

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/or 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, 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

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<sup>25</sup> 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.*” (emphasis added). 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). And several years later, in oral argument in *Rapanos*, after U.S. Solicitor General Clement stated, “[W]hat Congress recognized in 1972 is that they had to regulate beyond traditional navigable waters,” Justice Kennedy immediately replied, “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).

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wetlands at issue, with Justice Scalia writing for the plurality and Justice Kennedy concurring in the judgment but on alternate grounds. *Id.* at 757 (plurality), 787 (Kennedy, J., concurring).

The plurality determined that CWA jurisdiction only extended to 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.” *Id.* at 742. 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 its 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. 134, quoting 42 FR 37128 (July 19, 1977) (“For this reason, the landward

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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.”). 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.” *Id.* at 741-42 (original emphasis).

Justice Kennedy disagreed with the plurality’s conclusion that adjacency requires a “continuous surface connection” to covered waters. *Id.* at 772. In reading the phrase “continuous surface connection” to mean a continuous “surface-water connection,” *id.* at 776, and interpreting the plurality’s standard to include a “surface-water-connection requirement,” *id.* at 774, 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 (citations omitted).

The plurality did not directly address the precise distinction raised by Justice Kennedy. It did note in response that the “*Riverside Bayview* opinion required” a “continuous *physical* connection,” *id.* at 751 n.13 (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 explained that its standard includes a “physical-connection requirement” between wetlands

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and covered waters. *Id.* at 751 n.13. 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.” *Id.* at 751 n.13.<sup>26</sup>

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 “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 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. *Id.* 741-42 (“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.’”). It interpreted the reasoning of *SWANCC* to exclude those waters. The plurality found “no support for the inclusion of physically unconnected wetlands as covered ‘waters’” based on *Riverside Bayview*’s treatment

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<sup>26</sup> The agencies’ 2008 *Rapanos* Guidance recognizes that the plurality’s “continuous surface connection” does not refer to 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.”).



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of the Corps' definition of adjacent. *Id.* at 747; *see also id.* at 746 (“the Corps’ definition of ‘adjacent’ . . . has been extended beyond reason.”).

Although ultimately concurring in judgment, Justice Kennedy focused on the “significant nexus” between adjacent wetlands and traditional navigable waters as the basis for determining whether a wetland is subject to CWA jurisdiction. He quotes the *SWANCC* decision, which explains, “[i]t was the significant nexus between wetlands and navigable waters . . . that informed our reading of the [Act] in *Riverside Bayview Homes*.” 531 U.S. at 167. Justice Kennedy also interpreted the reasoning of *SWANCC* to exclude certain isolated waters. His opinion notes that: “Because such a nexus was lacking with respect to isolated ponds, the Court held that the plain text of the statute did not permit the Corps’ action.” 547 U.S. at 767 (internal quotations and citations omitted). Justice Kennedy notes 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* lack 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.” *Id.* at

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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:

the 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*.

*Id.* 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

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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. By not requiring adjacent wetlands to possess a significant nexus with navigable waters, Justice Kennedy noted that under the Corps’ interpretation, 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 the Corps’ interpretation of the statute does not extend so far.” *Id.* at 778-79.

In summary, although the standards that the plurality and Justice Kennedy established are not identical, and each standard excludes some waters that the other standard does not, the standards contain substantial similarities. The plurality and Justice Kennedy agree 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

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traditional navigable waters. The plurality and Justice Kennedy also agree that the connection between the wetland and the tributary must be close. The plurality refers 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 recognizes 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*

The definition of “tributary” was not addressed in either *Riverside Bayview* or *SWANCC*. And 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 do provide guidance as to the scope of CWA coverage of tributaries to navigable-in-fact waters.

The plurality and Justice Kennedy both recognize that the jurisdictional scope of the CWA is not restricted to traditional navigable waters. *Rapanos*, 547 U.S. at 731 (Scalia, J., plurality) (“the Act’s term ‘navigable waters’ includes something more than traditional navigable waters”); *id.* at 767 (Kennedy, J., concurring) (“Congress intended to regulate at least some waters that are not navigable in the traditional sense.”). Both also agree that federal authority under the Act does have limits. *See id.* at 731-32 (plurality).

With respect to tributaries specifically, both the plurality and Justice Kennedy focus 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,

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lakes and other bodies of waters that form geographical features, noting that all such “terms connote continuously present, fixed bodies of water . . . .” *Id.* at 732-33, 739. The plurality would also require 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 exclude 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 would appear to exclude some streams considered jurisdictional under the plurality’s test, but he may include some that would be excluded by the plurality. *See id.* at 769 (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 include some seasonal or intermittent streams as “waters of the United States.” *Id.* at 733 & n.5, 769. 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. The plurality provides that “navigable waters” must have “at a bare minimum, the ordinary presence of water,” *id.* at 734, and Justice Kennedy notes that

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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.

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 themselves. *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.”). And Justice Kennedy objected to the categorical assertion of jurisdiction over wetlands adjacent to the Corps’ existing standard for tributaries “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), *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*.”).

Though some commenters agreed that aspects of the plurality’s and Justice Kennedy’s opinions align regarding the limits of federal jurisdiction under the CWA, 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

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differently, the agencies find that there are sufficient commonalities between these opinions to help instruct the agencies on where to draw the line between Federal and State waters.

### 3. Principles and Considerations

As discussed in the previous section, a few important principles emerge that can serve as the basis for the agencies' conclusion that the agencies exceeded their authority when defining the scope of CWA jurisdiction under the 2015 Rule. 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 to those traditional navigable waters, but 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 the traditional navigable waters and some tributaries, if the wetlands are closely connected to the tributaries, 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 certain nonnavigable, isolated, intrastate waters that lack a sufficient connection to traditional navigable waters. This 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 burden while still effectuating the purposes of the Act.

The agencies also recognize and respect the primary responsibilities and rights of States to regulate their land and water resources. *See* 33 U.S.C. 1251(b), 1370. The oft-quoted objective of the CWA to "restore and maintain the chemical, physical, and biological integrity of the Nation's

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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.” 531 U.S. at 174; *accord Rapanos*, 547 U.S. at 738 (Scalia, J., plurality opinion).

Ensuring that States retain authority over their land and water resources pursuant to section 101(b) and section 510 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., id.* at 755-56 (Scalia, J., plurality opinion) (“[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).”) (original emphasis). 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 all of the nation’s waters, not just its navigable waters. Controlling all waters using the Act’s federal regulatory mechanisms would significantly reduce 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 the 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 v. United States*, 516 U.S. at 146; *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. at 544.

Further, the agencies are cognizant that the “Clean Water Act imposes substantial criminal and civil penalties for discharging any pollutant into waters covered by the Act without a



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permit . . . .” *U.S. Army Corps of Engineers v. Hawkes Co.*, 136 S. Ct. 1807, 1812 (2016). As Justice Kennedy observed in 2016, “the reach and systemic consequences of the Clean Water Act remain a cause for concern” and “continues to raise troubling questions regarding the Government’s power to cast doubt on the full use and enjoyment of private property throughout the Nation . . . .”). *Id.* at 1816-17 (Kennedy, J., concurring). The agencies recognize that the 2015 Rule and subsequent litigation challenging the legality of core components of that rule have added to the questions regarding the appropriate scope of the Federal government’s regulatory power and power over private property, and that currently the scope of those powers varies based on State line.

### C. Reasons for Repeal

The agencies are repealing the 2015 Rule for four primary reasons. First, the agencies have concluded that the 2015 Rule misapplied Justice Kennedy’s significant nexus standard despite identifying that standard as its touchstone. The 2015 Rule adopted an interpretation of the significant nexus standard that impermissibly expanded the scope of federal jurisdiction, resulting in the regulation of waters beyond what Congress intended. The rule did so by misapplying Justice Kennedy’s standard to broaden the meaning and application of the terms “tributary,” “adjacent,” and “significant nexus” while reinterpreting the phrase “similarly situated lands in the region” to support the potential assertion of federal regulation over nearly all waters within large watersheds. The agencies are repealing the 2015 Rule because the agencies have now concluded that the 2015 Rule exceeded the legal limits on the scope of the agencies’

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jurisdiction under the CWA as intended by Congress and as reflected in Supreme Court cases, including Justice Kennedy’s articulation of the significant nexus standard in *Rapanos*.<sup>27</sup>

Second, the agencies have concluded that the 2015 Rule did not adequately consider and accord due weight to the express congressional policy in CWA section 101(b) to “recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce and eliminate pollution” and “to plan the development and use . . . of land and water resources.” 33 U.S.C. 1251(b). The CWA balances preservation of the traditional power of States to regulate land and water resources within their borders with federal water quality regulation and oversight to protect the “waters of the United States.” The agencies now conclude that in promulgating the 2015 Rule, they did not accord due weight to that balance. The 2015 Rule expanded jurisdiction over the pre-existing regulatory regime in a manner that encroached on traditional State land-use regulation and the authority of States to regulate State waters, and it altered Federal, State, tribal, and local government relationships in implementing CWA programs without a clear statement from Congress. By repealing the 2015 Rule, the agencies are reversing that encroachment on State authority and restoring those pre-existing relationships.

Third, given the errors in applying Justice Kennedy’s significant nexus standard to assert an expanded theory of federal jurisdiction and the failure to adequately consider and accord due weight to the policy direction from Congress to respect the roles and responsibilities of the

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<sup>27</sup> The agencies are not taking a position in this rulemaking regarding whether Justice Kennedy’s concurring opinion in *Rapanos* is or should be the controlling authority regarding the scope of federal jurisdiction under the CWA. *See, e.g., Rapanos*, 547 U.S. at 758 (Roberts, C.J., concurring). The agencies used Justice Kennedy’s significant nexus standard as the touchstone for the 2015 Rule, and for the reasons described herein, the agencies are repealing the 2015 Rule because it exceeded the scope of authority described in that standard. The agencies requested comment regarding whether Justice Kennedy’s concurring opinion “must be a mandatory component of any future definition of ‘waters of the United States’” as part of the rulemaking on a proposed revised definition. *See* 84 FR 4154, 4167, 4177 (Feb. 14, 2019).

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Federal government and States in implementing the full suite of regulatory and non-regulatory programs in the CWA, the agencies have concluded that the 2015 Rule, like the application of the Corps' regulations in *SWANCC*, "raise[s] significant questions of Commerce Clause authority and encroach[es] on traditional state land-use regulation." *Rapanos*, 547 U.S. at 776 (Kennedy, J., concurring); *see also 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"). Given the absence of a "clear indication" that Congress intended to invoke the outer limits of its power, *see* 531 U.S. at 172-73, the agencies are repealing the 2015 Rule to avoid interpretations of the CWA that push the envelope of their constitutional and statutory authority, consistent with principles of constitutional avoidance.

Lastly, the agencies also 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 distance-based limitations in the final rule were not a logical outgrowth of the proposal in violation of the APA's public notice and comment requirements. *See Texas v. EPA*, No. 3:15-cv-162, 2019 WL 2272464 (S.D. Tex. May 28, 2019). The court found this error "significant" because the specific distance-based limitations "alter[ed] the jurisdictional scope of the Act." *Id.* at \*5. The agencies are also aware that 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 briefing, has defended the procedural steps the agencies took to develop and

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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 now conclude 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 the 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*, No. 2:15-cv-079, 2019 WL 3949922 (S.D. Ga. Aug. 21, 2019). By repealing the 2015 Rule for the reasons stated herein, the agencies are remedying the procedural defects underlying the 2015 Rule and responding to these court orders remanding the 2015 Rule.

In reaching this decision, the agencies considered the public comments received in response to the NPRM and SNPRM. The agencies also carefully reviewed their statutory and constitutional authority, as well as court rulings interpreting the CWA and others arising from litigation challenging the 2015 Rule. Some courts issuing preliminary injunctions to stay implementation of the 2015 Rule have suggested that the agencies' interpretation of the "significant nexus" standard, as applied in the 2015 Rule, may not have implemented the limits of federal CWA jurisdiction reflected in decisions of the Supreme Court. *See, e.g., North Dakota v. EPA*, 127 F. Supp. 3d 1047, 1055-56 (D.N.D. 2015). The agencies now agree with the rationale of those decisions as they appropriately recognize the limits of the agencies' authority under the CWA. Moreover, the agencies find that the court rulings issued thus far against the 2015 Rule corroborate the agencies' concerns regarding the scope and legal basis of the rule.

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1. The 2015 Rule Misapplied and Inappropriately Expanded the Significant Nexus Standard

When promulgating the 2015 Rule, the agencies did not properly apply Justice Kennedy’s significant nexus standard as a limiting test in a manner that would avoid unreasonable applications of the CWA. Having reconsidered the relevant Supreme Court opinions, the agencies now conclude that the significant nexus standard is indeed a limiting test necessarily constraining overly broad applications of the statute. In *Rapanos*, Justice Kennedy concluded that the CWA covers only “waters that are or were navigable in fact or that could reasonably be so made” as well as waters with a “significant nexus” to navigable waters in the traditional sense. 547 U.S. at 779 (Kennedy, J., concurring). Specifically, Justice Kennedy found that “wetlands possess the requisite nexus” if they “either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of” navigable-in-fact waters. *Id.* at 780. In contrast, according to Justice Kennedy, the CWA does not regulate wetlands with “speculative or insubstantial” effects on the integrity of navigable waters. *Id.*

In promulgating the 2015 Rule, the agencies sought to interpret “the scope of the ‘waters of the United States’ for the CWA using the goals, objectives, and policies of the statute, the Supreme Court case law, the relevant and available science, and the agencies’ technical expertise and experience as support.” 80 FR 37056. In particular, the agencies focused on the significant nexus standard in defining the scope of CWA jurisdiction. *Id.* at 37060 (“The key to the agencies’ interpretation of the CWA is the significant nexus standard, as established and refined in Supreme Court opinions.”).

After careful review of the 2015 Rule and the public comments received in response to the notices proposing to repeal the 2015 Rule, the agencies now conclude that the rule misconstrued

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the significant nexus standard described by Justice Kennedy in *Rapanos*. Key provisions of the rule were at odds with Justice Kennedy’s understanding of the phrase “significant nexus” because they permitted “applications . . . that appeared likely . . . to raise constitutional difficulties and federalism concerns,” 547 U.S. at 776 (Kennedy, J., concurring),<sup>28</sup> including the categorical assertion of jurisdiction over certain wetlands and waters that “lie alongside a ditch or drain, however remote and insubstantial.” *See id.* at 778-79. The agencies’ misapplication of the significant nexus standard also ran counter to principles articulated by the Supreme Court in *SWANCC*, as the 2015 Rule permitted federal jurisdiction over certain nonnavigable, isolated, intrastate waters similar to the ponds and mudflats that “raise[d] significant constitutional questions” in that case. 531 U.S. at 173-74; *see also Georgia v. Wheeler*, No. 2:15-cv-079, 2019 WL 3949922, at \*23 (S.D. Ga. Aug. 21, 2019). The agencies’ misapplication of the significant nexus standard in the 2015 Rule also resulted in a definition of “waters of the United States” that did not give sufficient effect to the word “navigable” within the phrase “navigable waters” in a manner consistent with Supreme Court precedent. Ultimately, the fundamental and systemic broad interpretation and misapplication of the significant nexus standard in the 2015 Rule resulted in a “close-to-the-edge expansion of [the agencies’] own powers” with a “theory of jurisdiction that presse[d] the envelope of constitutional validity.” 547 U.S. at 738, 756 (Scalia,

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<sup>28</sup> Although not central to the agencies’ decision to repeal the 2015 Rule, the agencies also conclude that the 2015 Rule’s regulatory definition of “significant nexus” was incompatible with the *Rapanos* plurality’s interpretation of “significant nexus.” *See* 547 U.S. at 755 (Scalia, J., plurality) (“*Our* interpretation of the phrase [‘significant nexus’] is both consistent with [*Riverside Bayview* and *SWANCC*] and compatible with what the Act *does* establish as the jurisdictional criterion: ‘waters of the United States.’ Wetlands are ‘waters of the United States’ if they bear the ‘significant nexus’ of physical connection, which makes them as a practical matter *indistinguishable* from waters of the United States. What other nexus could *conceivably* cause them to be ‘waters of the United States?’” (original emphasis)).

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J., plurality). For these reasons, described in detail below, the agencies misconstrued the limits of the CWA and are repealing the 2015 Rule.

*a. The 2015 Rule failed to properly consider and adopt the limits of the “significant nexus” standard as first established in SWANCC*

The phrase “significant nexus” first appeared in *SWANCC* wherein Chief Justice Rehnquist, joined by Justice Kennedy and other Justices, described the holding of the Court in *Riverside Bayview*: “It was the significant nexus between the wetlands and ‘navigable waters’ that informed our reading of the CWA in *Riverside Bayview Homes*.” 531 U.S. at 167. While the *Riverside Bayview* Court did not “express any opinion” on the “question of the authority of the Corps to regulate discharges of fill material into wetlands that are not adjacent to bodies of open water,” 474 U.S. at 131-32 n.8, the *SWANCC* Court “conclude[d] that the text of the statute will not allow” jurisdiction of the Corps to “extend[] to ponds that are not adjacent to open water.” 531 U.S. at 168.

In describing the significant nexus standard in *Rapanos*, Justice Kennedy recognized 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.” 547 U.S. at 767 (Kennedy, J., concurring). Justice Kennedy explained his interpretation of the meaning and import of *SWANCC*: “Because such a [significant] nexus was lacking with respect to isolated ponds, the Court held that the plain text of the statute did not permit” the Corps to assert jurisdiction over the isolated ponds and mudflats at issue in *SWANCC*. *Id.*; *see also id.* at 774 (describing “*SWANCC*’s holding” to mean that “‘nonnavigable, isolated, intrastate waters,’ are not

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‘navigable waters.’” (quoting *SWANCC*, 531 U.S. at 171)); *id.* at 781-82 (“[I]n many cases wetlands adjacent to tributaries covered by [the Corps’ existing tributary] 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*.”). The *Rapanos* plurality recognized the same jurisdictional limits articulated in *SWANCC*. *See* 547 U.S. at 726 (“Observing that ‘[i]t was the significant nexus between the wetlands and ‘navigable waters’ that informed our reading of the CWA in *Riverside Bayview*,’ we held that *Riverside Bayview* did not establish ‘that the jurisdiction of the Corps extends to ponds that are not adjacent to open water.’” (citations and emphasis omitted)). And Justice Stevens, writing for four Justices in dissent in *Rapanos*, also recognized this principle. *See id.* at 795 (Stevens, J., dissenting) (“The Court [in *SWANCC*] rejected [the Corps’ exercise of jurisdiction] since these isolated pools, unlike the wetlands at issue in *Riverside Bayview*, had no ‘significant nexus’ to traditionally navigable waters.”); *id.* at 796 (Stevens, J., dissenting) (“[T]he Corps has reasonably interpreted its jurisdiction to cover *nonisolated* wetlands.” (emphasis added)).

In the SNPRM, the agencies specifically requested comment and additional information on “whether the water features at issue in *SWANCC* or other similar water features could be deemed jurisdictional under the 2015 Rule,” and whether such a determination would be “consistent with or otherwise well-within the agencies’ statutory authority.” 83 FR 32249. The agencies now conclude that in formulating the significant nexus test in the 2015 Rule, the agencies failed to properly consider or adopt the limits of the significant nexus standard established in *SWANCC*—the very case in which the phrase “significant nexus” originated—and Justice Kennedy’s opinion in *Rapanos*. The preamble to the 2015 Rule stated that “[t]he agencies utilize[d] the significant nexus standard, as articulated by Justice Kennedy’s opinion [in *Rapanos*] and informed by the



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unanimous opinion in *Riverside Bayview* and the plurality opinion in *Rapanos*.” 80 FR 37061.

But the rule did not properly consider the limits of the significant nexus standard as first described in *SWANCC* and subsequently relied upon by Justice Kennedy in *Rapanos*, nor was it adequately informed by the unanimous opinion in *Riverside Bayview*.

For example, applying the 2015 Rule to the waters at issue in *SWANCC* demonstrates that the 2015 Rule did not comport with the limits of the CWA as interpreted in that decision. The “seasonally ponded, abandoned gravel mining depressions” at issue in *SWANCC* were within 4,000 feet of Poplar Creek—a “tributary” under the 2015 Rule which leads to the Fox River and in turn flows into the Illinois and Mississippi Rivers. Based on this information, the *SWANCC* ponds and mudflats would have been subject to a case-specific significant nexus analysis under the 2015 Rule’s (a)(8) provision. *See* 80 FR 37105.<sup>29</sup> Considering the nine functions relevant to a significant nexus evaluation as defined in the 2015 Rule, including “runoff storage” and “sediment trapping,” *id.* at 37067, as well as the descriptions of the site available to the agencies, the *SWANCC* ponds and mudflats would almost certainly have a “significant nexus” under the 2015 Rule because they could be found to retain “stormwater volumes and associated sediment

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<sup>29</sup> The “seasonally ponded, abandoned gravel mining depressions located on the [*SWANCC*] project site,” 531 U.S. at 164, would not have been covered by the 2015 Rule’s exclusion for water-filled depressions created incidental to mining activity. *See e.g.*, 33 CFR 328.3(b)(4)(v). While the text of the 2015 Rule is not clear on this point, the earlier regulatory preambles that this exclusion is based on and the 2015 Rule Response to Comments (RTC) document confirm that this exclusion ceases to apply if the mining activities that created the waters are abandoned. *See* 53 Fed. Reg. 20764, 20765 (June 6, 1988) (“we generally do not consider the following waters to be ‘waters of the United States’ ... [w]ater-filled depressions created in dry land incidental to construction activity and pits excavated in dry land for the purpose of obtaining fill, sand, or gravel *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”) (emphasis added); *see also* 2015 Rule RTC, Topic 7 at 209 (“The exclusion applies to pits excavated in dry land for obtaining fill, sand, or gravel. The rule does not change the agencies’ existing practice that these features could be found to be jurisdictional once the construction or mining activity is completed or abandoned and the water feature remains.”).

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coming off the landfill” that would otherwise reach a navigable water. *See* Brief of Dr. Gene Likens et al. as *Amici Curiae* in Support of Respondent at 6-28, *SWANCC*, 531 U.S. 159 (No. 99-1178) [hereinafter Scientists’ Brief] (quoting Decision Document A.R. 15645-47); *see also id.* (“[The *SWANCC* site] holds enough water to fill the Pentagon four feet deep. . . . Absent strict controls, this water could easily end up directly or indirectly in the Fox River, . . . which in turn flows into the navigable Illinois and Mississippi Rivers.”); *Rapanos*, 547 U.S. at 749 (Scalia, J., plurality) (“[T]he ponds at issue in *SWANCC* could . . . offer nesting, spawning, rearing and resting sites for aquatic or land species, and serve as valuable storage areas for storm and flood waters[.]” (internal quotation marks and citations omitted)). In fact, given this evidence, were the Corps not to find jurisdiction over the *SWANCC* ponds under the 2015 Rule’s (a)(8) provision, the agencies are cognizant that the Corps could be subject to allegations that such a finding would be an arbitrary and capricious application of that provision. And yet, with this information before it,<sup>30</sup> the majority of the *SWANCC* Court concluded that the nonnavigable, isolated, intrastate waters at issue in *SWANCC* fell beyond the scope of federal CWA jurisdiction. *See SWANCC*, 531 U.S. at 174 (“[W]e find nothing approaching a clear statement from Congress that it intended § 404(a) to reach an abandoned sand and gravel pit such as we have here.”).

The agencies have solicited comment on the proper scope and interpretation of the *SWANCC* decision as part of their effort to propose a revised definition of “waters of the United States”

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<sup>30</sup> This information, along with other ecological functions of isolated waters, was submitted to the *SWANCC* Court in *amicus* briefs filed in support of the Corps by ecologists and several States. *See* Scientists’ Brief; Brief of the States of California et al. as *Amici Curiae* in Support of Respondents, *SWANCC*, 531 U.S. 159 (No. 99-1178). Additionally, in oral argument during *SWANCC*, U.S. Deputy Solicitor General Wallace stated, “The waters here . . . serve as storage for what would otherwise be flood waters during periods of heavy rain that would cause overflow. That was part of what the Corps had to deal with in dealing with this [permit] application.” Transcript of Oral Argument at 39, *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) (No. 99-1187).

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pursuant to Executive Order 13778. *See* 84 FR 4165. In that proposal, the agencies noted that the Federal government historically has applied a more narrow reading of *SWANCC* when determining jurisdiction over individual water features,<sup>31</sup> while simultaneously applying a broader reading of Justice Kennedy’s concurring opinion in *Rapanos*. *Id.* at 4167, 4177. While the agencies consider comments as to the appropriateness of that dichotomy as part of their separate rulemaking, the agencies continue to agree with their express statement in the 2008 *Rapanos* Guidance regarding the jurisdictional limitations articulated in *SWANCC* as interpreted by Justice Kennedy:

When applying the significant nexus standard to tributaries and wetlands, it is important to apply it within the limits of jurisdiction articulated in *SWANCC*. Justice Kennedy cites *SWANCC* with approval and asserts that the significant nexus standard, rather than being articulated for the first time in *Rapanos*, was established in *SWANCC*. 126 S. Ct. at 2246 (describing *SWANCC* as “interpreting the Act to require a significant nexus with navigable waters”). It is clear, therefore, that Justice Kennedy did not intend for the significant nexus standard to be applied in a manner that would result in assertion of jurisdiction over waters that he and the other justices determined were not jurisdictional in *SWANCC*. Nothing in this guidance should be interpreted as providing authority to assert jurisdiction over waters deemed non-jurisdictional by *SWANCC*.

2008 *Rapanos* Guidance at 9 n.32.<sup>32</sup> The agencies continue to utilize the 2008 *Rapanos* Guidance in those States where the pre-2015 regulations are in place, and upon reconsideration reiterate and agree “that Justice Kennedy did not intend for the significant nexus standard to be

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<sup>31</sup> *But see* Transcript of Oral Argument at 41, *Rapanos v. United States and Carabell v. United States*, 547 U.S. 715 (2006) (Nos. 04-1034, 04-1384) where U.S. Solicitor General Clement stated that after *SWANCC* “the Corps and the EPA’s view of wetlands would cover about 80 percent of the wetlands in the country. And that shows that *the impact of this Court’s decision in SWANCC was real and substantial* because about 20 percent of the Nation’s wetlands are *isolated.*” (emphasis added).

<sup>32</sup> The agencies also recognize that Justice Stevens interpreted the *SWANCC* majority opinion to apply beyond the Migratory Bird Rule and the specific ponds at issue in *SWANCC*, stating the decision “invalidates the 1986 migratory bird regulation *as well as the Corps’ assertion of jurisdiction 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).

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applied in a manner that would result in assertion of jurisdiction over waters that he and the other justices determined were not jurisdictional in *SWANCC*.” *Id.*

In the 2015 Rule, and in particular the (a)(8) provision, the agencies reinterpreted their understanding of the limits of jurisdiction set by Justice Kennedy’s significant nexus test as described in the 2008 *Rapanos* Guidance. Thus, under the 2015 Rule’s (a)(8) category for waters subject to case-specific significant nexus analyses, the 2015 Rule could have swept “ponds that are not adjacent to open water,” 531 U.S. at 168, along with other non-adjacent waters and wetlands into the scope of federal jurisdiction under the CWA. It did so by applying the nine functions described at 80 FR 37067, only one of which—provided its effect on the nearest primary water, either alone or in combination with other similarly situated waters in the watershed, was more than speculative or insubstantial—was necessary to subject a non-adjacent water or wetland to federal jurisdiction under the 2015 Rule. *See id.* at 37091. Under this formulation of the significant nexus standard, the very ponds at issue in *SWANCC* would be subject to federal review under the (a)(8) category of the 2015 Rule, and, as described above, would almost certainly be found to have a significant nexus under the 2015 Rule.

Some commenters identified a narrow interpretation of *SWANCC* that they suggested would not conflict with the 2015 Rule’s (a)(8) category of jurisdictional waters: while the *SWANCC* ponds may not be jurisdictional based on the use of those waters as habitat for migratory birds, they could be jurisdictional nonetheless if they satisfy one of the functions listed at 80 FR 37067 (e.g., sediment trapping, runoff storage). Similarly, noting that Justice Kennedy had characterized the *SWANCC* ponds as “bearing no evident connection to navigable-in-fact waters,” some commenters suggested that it would be appropriate to assert federal jurisdiction over the *SWANCC* ponds if the agencies established that such features satisfy the significant

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nexus test and thus have an “evident connection” to downstream navigable waters. Other commenters asserted that finding the *SWANCC* ponds jurisdictional under the 2015 Rule would be inconsistent with Justice Kennedy’s understanding of the scope of federal jurisdiction under the Act.

As noted above, the agencies believe that Justice Kennedy did not intend for the significant nexus standard to be applied in a manner that would result in the assertion of jurisdiction over waters that he and the other justices determined were not jurisdictional in *SWANCC*. The text of *SWANCC* supports this interpretation. The *SWANCC* majority specifically concluded that the “text of the statute will not allow” the assertion of CWA jurisdiction over the ponds at issue in that case. 531 U.S. at 168. Thus, the agencies could not develop a formulation of a case-specific significant nexus test that the Supreme Court specifically rejected.<sup>33</sup>

For these reasons, the agencies now find that the 2015 Rule departed from and conflicted with the agencies’ prior interpretation of *SWANCC* without adequate notice and a reasoned explanation for the change in interpretation. *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515-16 (2009) (“*Fox*”). In promulgating the 2015 Rule, the agencies acknowledged potential differences between their legal interpretations underlying the rule and the 2008 *Rapanos* Guidance. *See, e.g.*, Technical Support Document for the Clean Water Rule: Definition of Waters of the United States at 79-83. The agencies failed to identify or acknowledge, however, that the 2015 Rule could regulate that which the Supreme Court rejected in *SWANCC*,

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<sup>33</sup> These same defects apply to the 2015 Rule’s (a)(7) category. The preamble to the 2015 Rule stated, “a water [or wetland] that does not meet the definition of ‘adjacent waters’ may be determined to be a ‘water of the United States’ on a case-specific basis under paragraph (a)(8) of the rule,” 80 FR 37080, and the 2015 Rule subjected (a)(7) waters to the same case-specific significant nexus analysis that it applied to (a)(8) waters, only without the distance-based limitations used in the (a)(8) category. *See id.* (“[W]aters may be determined to have a significant nexus on a case-specific basis under paragraph (a)(7) or (a)(8).”) (emphasis added).

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a clear departure from their opposite position in the 2008 *Rapanos* Guidance. In this regard, the agencies recognize that their reinterpretation of *Rapanos*, *SWANCC*, and Justice Kennedy's significant nexus test was inconsistent with those cases.

After reconsidering this issue, the agencies conclude that they lack statutory authority to promulgate a rule that would result in assertion of jurisdiction over waters that the Supreme Court determined were not jurisdictional in *SWANCC*, and that Justice Kennedy did not intend for the significant nexus standard he articulated in *Rapanos* to be applied in such a manner. In finalizing the 2015 Rule, the agencies therefore improperly departed from their prior position regarding this key element of the 2008 *Rapanos* Guidance.

In returning to an interpretation of Justice Kennedy's decision that comports with the 2008 *Rapanos* Guidance, the agencies recognize the *SWANCC* Court's admonition to avoid constructions of the statute that raise significant constitutional questions related to the scope of federal authority authorized therein. 531 U.S. at 174; *see also* Section III.C.3, *infra*. By interpreting Justice Kennedy's significant nexus standard to regulate the very same or similar waters the Supreme Court ruled the text of the statute would not allow, the agencies pushed the boundaries of statutory interpretation. The 2015 Rule also raised questions regarding whether there is any meaning to the limits of jurisdiction articulated by a unanimous Supreme Court in *Riverside Bayview*, which found that "[i]n determining the limits of [their] power to regulate discharges under the Act," the agencies "must necessarily choose some point at which water ends and land begins." 474 U.S. at 132 ("[B]etween 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."). By allowing federal jurisdiction to reach certain isolated ponds, such as

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those at issue in *SWANCC*, and certain physically remote wetlands that “do not implicate the boundary-drawing problem of *Riverside Bayview*,” the 2015 Rule asserted federal control over some features that “lack the necessary connection to covered waters . . . described as a ‘significant nexus’ in *SWANCC*[.]” 547 U.S. at 742 (Scalia, J., plurality);<sup>34</sup> *see also Hawkes*, 136 S. Ct. at 1817 (Kennedy, J., concurring) (“[T]he *reach* and systemic consequences of the Clean Water Act remain a cause for concern.” (emphasis added)).

Given the 2015 Rule permitted federal jurisdiction over certain physically disconnected waters and wetlands like those at issue in *SWANCC*—either categorically as “adjacent” waters or on a case-specific basis according to an expanded significant nexus test—the agencies now conclude for this and other reasons that the 2015 Rule exceeded the agencies’ statutory authority as interpreted in *SWANCC* and Justice Kennedy’s concurrence in *Rapanos*. The agencies may not exceed the authority of the statutes they are charged with administering, *see* 5 U.S.C. 706(2)(C) (prohibiting agency actions “in excess of statutory jurisdiction, authority, or limitations”), and must avoid interpretations of the statutes they administer that push constitutional boundaries. *See* Section III.C.3, *supra*. In contrast to the 2008 *Rapanos* Guidance, the 2015 Rule failed to respect the limits of the significant nexus standard established in

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<sup>34</sup> While the agencies acknowledged being informed by the *Rapanos* plurality in developing the 2015 Rule, *see* 80 FR 37061, the regulation of non-adjacent waters as jurisdictional via the (a)(7) and (a)(8) categories is inconsistent with that opinion. *See Rapanos*, 547 U.S. at 742 (Scalia, J., plurality) (“[O]nly those wetlands with a continuous surface connection to bodies that are ‘waters of the United States’ in their own right, so that there is no clear demarcation between ‘waters’ and wetlands, are ‘adjacent to’ such waters and covered by the Act.” (emphasis omitted)); *see also id.* at 748 (“If isolated permanent and seasonal ponds of varying size and depth, which, after all, might at least be described as ‘waters’ in their own right—did not constitute ‘waters of the United States,’ *a fortiori*, isolated swampy *lands* do not constitute ‘waters of the United States.’”) (original emphasis) (internal quotation marks and citations omitted).

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*SWANCC* and the foundation for Justice Kennedy’s significant nexus standard in *Rapanos*. For these reasons, the agencies repeal the 2015 Rule.

*b. The 2015 Rule’s interpretation and application of the significant nexus standard did not respect the limits of federal jurisdiction reflected in Justice Kennedy’s opinion in Rapanos*

In the SNPRM, the agencies “propose[d] to conclude that the 2015 Rule exceeded the agencies’ authority under the CWA” by adopting an “expansive” interpretation of Justice Kennedy’s significant nexus standard that was “inconsistent with important aspects of that opinion” and resulted in a rule that “cover[ed] waters outside the scope of the Act.” 83 FR 32228, 32240. The agencies have considered the many comments received discussing these issues and now conclude that, in contrast to the limiting nature of the significant nexus standard first described in *SWANCC* and elaborated on by Justice Kennedy in *Rapanos*, the agencies’ interpretation of the significant nexus standard in the 2015 Rule was overly expansive and did not comport with or respect the limits of jurisdiction reflected in the CWA and decisions of the Supreme Court.

The agencies’ broader interpretation of the significant nexus standard served as a fundamental basis of the 2015 Rule and informed the development of the definitions of the categorically jurisdictional and case-specific waters under the rule. *See* 80 FR 37060 (“The key to the agencies’ interpretation of the CWA is the significant nexus standard, as established and refined in Supreme Court opinions.”). In applying this broad standard, the agencies established an expansive definition of jurisdictional “tributaries,” which in turn provided for *per se* jurisdictional “adjacent” (including “neighboring”) waters and wetlands within specific distance and geographic limits of those tributaries and from which even farther-reaching case-specific



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significant nexus analyses could be conducted for isolated waters and wetlands not already meeting the broad jurisdictional-by-rule definitions. The result was a compounding of errors that subjected the vast majority of water features in the United States to the jurisdictional purview of the Federal government.<sup>35</sup> This outcome is incompatible with the significant nexus standard and the limits of jurisdiction described in *SWANCC* and by Justice Kennedy in *Rapanos*.

To be sure, the agencies enjoy discretion in setting the jurisdictional limits of the Act. *See Rapanos*, 547 U.S. at 758 (Roberts, C.J., concurring); *but see id.* at 757 (noting that the Corps’ “boundless view” of its authority in *SWANCC* “was inconsistent with the limiting terms Congress had used in the Act”). However, that discretion is not unbridled. It must remain within the confines of the Act’s text and the Supreme Court’s interpretations of the outer bounds of jurisdiction. The agencies exercised this discretion in an impermissible manner in 2015 by codifying a regulatory test for jurisdiction that exceeded the agencies’ authority under the Act. Whereas “the significant-nexus test itself *prevents* problematic applications of the statute,” 547 U.S. at 783 (Kennedy, J., concurring) (emphasis added), the 2015 Rule misapplied the standard to *create* them.

- i. The 2015 Rule’s definition of “significant nexus” was inconsistent with the limiting nature of Justice Kennedy’s significant nexus standard*

In *Rapanos*, Justice Kennedy found 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

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<sup>35</sup> The agencies noted in 2015 “that the 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.” 2015 Rule Economic Analysis at 11.

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‘navigable.’” *Id.* at 780 (Kennedy, J., concurring). Justice Kennedy articulated this significant nexus standard to limit federal jurisdiction under the CWA to avoid “problematic” or “unreasonable” applications of the statute arising from the breadth of the Corps’ then-existing standard for tributaries. *See id.* at 783, 782. Pursuant to Justice Kennedy’s opinion, if a water lacks a “significant nexus,” it is not jurisdictional under the Act. *See id.* at 767.

After reviewing the public comments received on this rulemaking, the agencies conclude that the 2015 Rule’s definition of “significant nexus” was inconsistent with the limiting nature of Justice Kennedy’s significant nexus standard, resulting in a definition of “waters of the United States” that exceeded the scope of federal jurisdiction under the Act. In particular, the agencies now find that the 2015 Rule’s interpretation of the phrase “similarly situated lands in the region” contravened the limiting principles inherent in Justice Kennedy’s articulation of the significant nexus test. The significant change in the agencies’ understanding of the meaning of Justice Kennedy’s opinion and reasons for reinterpreting it was not explained and led to a compounding of errors in the agencies’ misapplication of the significant nexus test.

Justice Kennedy did not expressly define the phrase “similarly situated lands in the region.” His opinion, nevertheless, provides indications of the intended meaning of this phrase. The agencies expressed their understanding of this phrase in the 2008 *Rapanos* Guidance (at 8), stating that the phrase includes a tributary and all wetlands adjacent to that tributary. The guidance describes a “tributary” as “the entire reach of the stream that is of the same order (i.e., from the point of confluence, where two lower order streams meet to form the tributary, downstream to the point such tributary enters a higher order stream).” *Id.* at 10. Thus, under the agencies’ 2008 guidance:

[W]here evaluating significant nexus for an adjacent wetland, the agencies will consider the flow characteristics and functions performed by the tributary to

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which the wetland is adjacent along with the functions performed by the wetland and all other wetlands adjacent to that tributary. This approach reflects the agencies' interpretation of Justice Kennedy's term "similarly situated" to include all wetlands adjacent to the same tributary. . . . Interpreting the phrase "similarly situated" to include all wetlands adjacent to the same tributary is reasonable because such wetlands are physically located in a like manner (i.e., lying adjacent to the same tributary).

*Id.*

In the 2015 Rule, the agencies reinterpreted the phrase "similarly situated lands in the region" by defining "(1) which waters are 'similarly situated,' and thus should be analyzed in combination, in (2) the 'region,' for purposes of a significant nexus analysis." 80 FR 37065. This approach departed from the agencies' interpretation in the 2008 *Rapanos* Guidance by splitting the phrase into two separate, expansive concepts ("similarly situated" and "in the region"). The agencies considered waters to be "similarly situated" in the 2015 Rule when they "function alike and are sufficiently close to function together in affecting downstream waters." 80 FR 37106.

The preamble of the 2015 Rule further explained the concept of "sufficiently close":

Similarly situated waters can be identified as sufficiently close together for purposes of this paragraph of the regulation when they are within a contiguous area of land with relatively homogeneous soils, vegetation, and landform (e.g., plain, mountain, valley, etc.). In general, it would be inappropriate, for example, to consider waters as "similarly situated" under paragraph (a)(8) if these waters are located in different landforms, have different elevation profiles, or have different soil and vegetation characteristics, *unless the waters perform similar functions and are located sufficiently close to a "water of the United States" to allow them to consistently and collectively function together to affect a traditional navigable water, interstate water, or the territorial seas.* In determining whether waters under paragraph (a)(8) are sufficiently close to each other the agencies will also consider hydrologic connectivity to each other *or a jurisdictional water.*

80 FR 37092 (emphasis added). The 2015 Rule preamble also established that "under paragraph (a)(8), waters do not need to be of the same type (as they do in paragraph (a)(7)) to be considered similarly situated. As described above, waters are similarly situated under paragraph (a)(8) where they perform similar functions *or* are located sufficiently close to each other, regardless of type."

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*Id.* (emphasis added). The agencies explained that this interpretation was based in part on “one of the main conclusions of the [Connectivity Report] . . . that the incremental contributions of individual streams and wetlands are cumulative across entire watersheds, and their effects on downstream waters should be evaluated within the context of other streams and wetlands in that watershed.” *Id.* at 37066. The agencies then defined “in the region” within the 2015 Rule’s regulatory definition of “significant nexus” to mean “the watershed that drains to the nearest” primary water (i.e., categories (a)(1)-(3)).<sup>36</sup>

The agencies acknowledged this change in position from the 2008 *Rapanos* Guidance by explaining: “The functions of the contributing waters are inextricably linked and have a cumulative effect on the integrity of the downstream traditional navigable water, interstate water, or the territorial sea. For these reasons, it is more appropriate to conduct a significant nexus analysis at the watershed scale than to focus on a specific site, such as an individual stream segment.” *Id.* at 37066. As expressed in the 2008 *Rapanos* Guidance, the agencies previously understood the phrase “similarly situated lands in the region” to include all wetlands adjacent to the same tributary. The 2008 *Rapanos* Guidance states that “[a] tributary . . . is the entire reach of the stream that is of the same order[.]” 2008 *Rapanos* Guidance at 10.

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<sup>36</sup> The preamble of the 2015 Rule, however, created an exception for the codified definition of “in the region” in the Arid West in “situations where the single point of entry watershed is very large.” See 80 FR 37092 (“[In those situations] it may be reasonable to evaluate all similarly situated waters in a smaller watershed. Under those circumstances, the agencies may demarcate adjoining catchments surrounding the water to be evaluated that, together, are generally no smaller than a typical 10-digit hydrologic unit code (HUC-10) watershed in the same area. The area identified by this combination of catchments would be the ‘region’ used for conducting a significant nexus evaluation under paragraphs (a)(7) or (a)(8) under those situations. The basis for such an approach in very large single point of entry watersheds in the arid West should be documented in the jurisdictional determination.”). The agencies now conclude that this exception, included in the final rule preamble without adequate notice, was at odds with the regulatory text of the 2015 Rule and created further confusion as to the application of the 2015 Rule’s “significant nexus” test and the scope of aggregation for purposes of a significant nexus inquiry under the rule.

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The 2015 Rule also departed from the 2008 *Rapanos* Guidance by applying the concept of “similarly situated lands in the region” to other waters, not only wetlands, across the entire watershed of the nearest primary water. *See id.* at 37066 (“A single point of entry watershed is the drainage basin within whose boundaries all precipitation ultimately flows to the nearest single traditional navigable water, interstate water, or the territorial sea. . . . The watershed includes all streams, wetlands, lakes, and open waters within its boundaries.”). In essence, the agencies determined that not only do “wetlands possess the requisite 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,’” 547 U.S. at 780 (Kennedy, J., concurring) (emphasis added), but also “[tributaries] possess the requisite nexus, and thus come within the statutory phrase ‘navigable waters,’ if the [tributaries], either alone or in combination with similarly situated [tributaries] in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as ‘navigable.’” 80 FR 37068 (“[W]aters meeting the definition of ‘tributary’ in a single point of entry watershed are similarly situated and have a significant nexus because they significantly affect the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, and the territorial seas.”).

As a result of the agencies’ reinterpretation of a Supreme Court Justice’s opinion referencing “similarly situated lands in the region,” the 2015 Rule broadened the scope of aggregation for determining jurisdiction in a “significant nexus” analysis relative to the 2008 *Rapanos* Guidance, which more closely aligned with what Justice Kennedy intended for that test. In the SNPRM, the agencies solicited comment on whether the 2015 Rule’s approach to the phrase “similarly situated lands in the region” relied on the scientific literature “without due regard for the

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restraints imposed by the statute and case law.” 83 FR 32240. Multiple commenters expressed concern that the 2015 Rule’s interpretation of the phrase was inconsistent with Justice Kennedy’s opinion. In particular, these commenters suggested that the 2015 Rule’s approach of aggregating the contributions of all streams or all wetlands within an entire watershed impermissibly lowered the bar for establishing a significant nexus. Other commenters asserted that the 2015 Rule’s approach was consistent with Justice Kennedy’s opinion because the agencies found, in reliance on the Connectivity Report, that waters aggregated at a watershed scale have a connection to and impact downstream traditional navigable waters.

The agencies now conclude that applying Justice Kennedy’s concept of “similarly situated lands in the region” to encompass all “tributaries” as broadly defined in the 2015 Rule and potentially all wetlands in a single point of entry watershed of the nearest primary water resulted in a regulatory definition that expanded federal jurisdiction to cover waters outside the scope of the Act, and thus exceeded the agencies’ statutory authority. The agencies’ analytical failure occurred in the first instance in the transition between the proposed and final versions of the 2015 Rule. For example, potential inclusion of all of the wetlands or waters in the watershed of the nearest primary water under the final 2015 Rule significantly expanded the scope of aggregation that determined jurisdiction in a “significant nexus” analysis from the focus in the proposed rule on waters “located sufficiently close together or sufficiently close to a ‘water of the United States’ so that they can be evaluated as a single landscape unit.” 79 FR 22263. The proposed rule adhered more closely to the agencies’ position on aggregation in the 2008 *Rapanos* Guidance in that wetlands adjacent to the same tributary reach are inherently located closer together and closer to a “water of the United States” than are all non-adjacent wetlands across an entire single point of entry watershed. But in finalizing the 2015 Rule, the agencies viewed the

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scientific literature through a broader lens relative to the proposed rule. *See, e.g.*, 80 FR 37094.

This broader lens, as discussed in the following subsections, resulted in the *per se* regulation of a more expansive class of (a)(5) “tributaries,” including categorical jurisdiction over ephemeral “tributaries,” the *per se* regulation of a broader range of waters (not just wetlands) considered “adjacent” under the (a)(6) category, and case-specific inclusion of waters (not just wetlands) that are not “adjacent” to other waters but nonetheless could be regulated as “waters of the United States” according to the rule’s (a)(7) and (a)(8) categories.

The agencies adopted this broader aggregation approach without proper analysis of whether this approach was consistent with the statutory limits in the CWA’s text and the limits included in Justice Kennedy’s opinion in *Rapanos*. As explained in Section III.B, Justice Kennedy articulated the significant nexus standard to limit federal jurisdiction under the CWA to avoid “unreasonable” assertions of jurisdiction arising from the breadth of the Corps’ then-existing standard for tributaries. As evidenced by the discussion in his concurrence, Justice Kennedy intended his significant nexus standard to be a limiting test, cabining the potential overreach of federal CWA jurisdiction. The agencies now believe that interpreting “similarly situated lands in the region” to encompass all “tributaries” as broadly defined in the 2015 Rule and potentially all wetlands in a “watershed that drains to the nearest” primary water was inconsistent with the application of Justice Kennedy’s significant nexus test as a limiting standard.

For example, the agencies should have considered whether the aggregated landscape approach swept certain isolated ponds, such as those at issue in *SWANCC*, into federal jurisdiction. *See* Section III.C.1.a, *supra*. The *SWANCC* Court concluded that “the text of the statute will not allow” the Corps to regulate “ponds that are not adjacent to open water.” *SWANCC*, 531 U.S. at 168. And in *Rapanos*, Justice Kennedy even questioned the dissent’s

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conclusion “that the ambiguity in the phrase ‘navigable waters’ allows the Corps to construe the statute as reaching all ‘non-isolated wetlands[.]’” 547 U.S. at 780 (emphasis added) (stating that this position “seems incorrect”). Similarly, Justice Kennedy did not subscribe to the *Rapanos* dissent’s position that “would permit federal regulation whenever wetlands lie alongside a ditch or drain, however remote and insubstantial, that eventually may flow into traditional navigable waters.” *Id.* at 778. “The deference owed to the Corps’ interpretation of the statute,” Justice Kennedy wrote, “does not extend so far.” *Id.* at 778-79.

The 2015 Rule also permitted the agencies to find a “significant nexus” based on “just one function,” 80 FR 37068, such as “provision of life cycle dependent aquatic habitat” for species found in primary waters. *Id.* at 37106. For an effect to be significant, the rule required that it must be more than speculative or insubstantial. *Id.* The rule allowed for jurisdiction when a water significantly affects “aquatic habitats through wind- and animal-mediated dispersal” of “[a]nimals and other organisms,” *id.* at 37072, including when “[p]lants and invertebrates” “hitchik[e]’ on waterfowl” “to and from prairie potholes” anywhere across an entire watershed. Connectivity Report at 5-5. Yet if, as the *SWANCC* Court held, the use of isolated ponds by migratory birds themselves was an insufficient basis upon which to establish jurisdiction, it cannot stand to reason that the seeds and critters clinging to their feathers can constitute a “significant nexus.” *See* 547 U.S. at 749 (Scalia, J., plurality) (“This [strictly ecological] reasoning would swiftly overwhelm *SWANCC* altogether[.]”).

Several federal courts have now questioned the 2015 Rule’s interpretation of Justice Kennedy’s significant nexus standard in *Rapanos*. The U.S. District Court for the District of North Dakota found “[t]he Rule . . . likely fails to meet [Justice Kennedy’s significant nexus] standard” and “allows EPA regulation of waters that do not bear any effect on the ‘chemical,



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physical, and biological integrity’ of any navigable-in-fact water.” *North Dakota v. EPA*, 127 F. Supp. 3d 1047, 1056 (D.N.D. 2015). Likewise, the Sixth Circuit stated in response to petitioners’ “claim that the [2015] Rule’s treatment of tributaries, ‘adjacent waters,’ and waters having a ‘significant nexus’ to navigable waters is at odds with the Supreme Court’s ruling in *Rapanos*” that “[e]ven assuming, for present purposes, as the parties do, that Justice Kennedy’s opinion in *Rapanos* represents the best instruction on the permissible parameters of ‘waters of the United States’ as used in the Clean Water Act, it is far from clear that the new Rule’s distance limitations are harmonious with the instruction.” *In re EPA*, 803 F.3d at 807 & n.3 (noting that “[t]here are real questions regarding the collective meaning of the [Supreme] Court’s fragmented opinions in *Rapanos*”). The agencies recognize these deficiencies in the 2015 Rule and agree with the concerns raised by these courts.

As explained in the following sections, the agencies find that the application of an overly broad significant nexus standard in the 2015 Rule resulted in a regulatory definition of “waters of the United States” that did not comport with Justice Kennedy’s understanding of the limits of federal CWA jurisdiction and exceeded the agencies’ statutory authority. Moreover, the agencies find that while Justice Kennedy noted “the significant-nexus test itself prevents problematic applications of the statute,” 547 U.S. at 783 (Kennedy, J., concurring), including asserting jurisdiction over waters or wetlands like those at issue in *SWANCC* having “little or no connection” to navigable waters, *id.* at 767, the 2015 Rule’s broad significant nexus standard would have led to similar unreasonable applications of the CWA that the *SWANCC* Court and Justice Kennedy both sought to prevent. *See* Section III.C.3, *infra*.

- ii. *The 2015 Rule’s definition of (a)(5) waters exceeded the scope of CWA jurisdiction envisioned in Justice Kennedy’s significant nexus test*

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The agencies' misinterpretation of Justice Kennedy's significant nexus standard resulted in the categorical assertion of *per se* jurisdiction over an expansive "tributary" network. The 2015 Rule defined "tributary" as a water that contributes flow, either directly or through another water, to a primary water and that is characterized by the presence of the "physical indicators" of a bed and banks and an ordinary high water mark. "These physical indicators demonstrate there is volume, frequency, and duration of flow sufficient to create a bed and banks and an ordinary high water mark, and thus to qualify as a tributary." 80 FR 37105. The 2015 Rule's "tributary" definition included channels that flow "only in response to precipitation events," *id.* at 37076-77, and features that may be dry for months or many years<sup>37</sup> as long as they contribute flow, however minimal, infrequent, or indirect to a primary water, and exhibit physical indicators of a bed, bank, and an ordinary high water mark.

Coupling the 2015 Rule's expansive definition of "significant nexus" with the findings of the Connectivity Report, the agencies concluded at that time that features meeting the rule's "tributary" definition "provide many common vital functions important to the chemical, physical, and biological integrity of downstream waters" and "function together to affect downstream waters" such that all features that satisfied the "tributary" definition could be considered "similarly situated" and thus assessed together in a significant nexus analysis. 80 FR 37066. Because of this aggregate approach, the agencies found that all (a)(5) "tributaries" could be considered categorically jurisdictional because any covered tributary, either alone or when

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<sup>37</sup> A study by the U.S. Army Corps of Engineers in the Arid West, for example, revealed flood recurrence intervals for the field ordinary high water mark ranged from <1 to 15.5 years. See U.S. Army Corps of Engineers Engineer Research and Development Centers. ERDC/CRREL TR-11-12. *Ordinary High Flows and the Stage-Discharge Relationship in the Arid West Region*. Curtis, K.E., R.W. Lichvar, L.E. Dixon. (July 2011) at Table 4, available at [http://www.spk.usace.army.mil/Portals/12/documents/regulatory/pdf/TR11-12\\_gage.pdf](http://www.spk.usace.army.mil/Portals/12/documents/regulatory/pdf/TR11-12_gage.pdf) (hereafter, "Ordinary High Flows in the Arid West").

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considered in combination with other covered tributaries in the watershed, had a significant nexus to primary waters. 80 FR 37058.

Though some commenters found that the agencies properly relied on the 2015 Rule's scientific record to conclude that features meeting the "tributary" definition possess the requisite significant nexus and are thus categorically jurisdictional, other commenters expressed concern with the agencies' categorical assertion of jurisdiction over covered tributaries. These commenters suggested that the rule's "tributary" definition was too broad and would extend federal jurisdiction to features with remote proximity and tenuous connections to traditional navigable waters, contrary to the limits of CWA authority recognized in Justice Kennedy's *Rapanos* concurrence.

The agencies now conclude that the 2015 Rule's "tributary" definition exceeded the jurisdictional limits envisioned in Justice Kennedy's significant nexus standard. Under the 2015 Rule's definition of "tributary," the agencies determined that the mere contribution of flow to primary waters—however minimal, infrequent, or indirect—and the presence of "physical indicators" of a bed and banks and an ordinary high water mark were sufficient to support the categorical assertion of jurisdiction over features (including individual features) meeting the definition of "tributary" because the agencies determined that such features, in the aggregate, would possess a significant nexus to navigable waters. *See* 80 FR 37076. Yet, Justice Kennedy found that "[a]bsent some measure of the significance of the connection for downstream water quality," a "mere hydrologic connection" is "too uncertain" and "should not suffice in all cases" as "the connection may be too insubstantial . . . to establish the required nexus" with "navigable waters as traditionally understood." 547 U.S. at 784-85 (Kennedy, J., concurring). Moreover, while Justice Kennedy questioned jurisdiction over features with "[t]he merest trickle [even] if

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continuous” as potentially lacking a significant nexus to navigable waters, *id.* at 769, the 2015 Rule’s definition of “tributary” categorically includes the merest trickle—whether continuous or discontinuous—so long as it contributes flow at some unspecified time, directly or indirectly, to downstream navigable-in-fact waters, has the requisite physical indicators, and is not covered by an exclusion. Such an interpretation of “tributary” is, at the very least, in significant tension with Justice Kennedy’s standard.

The agencies also conclude that the categorical assertion of jurisdiction over features meeting the 2015 Rule’s “tributary” definition, particularly ephemeral features, was inconsistent with Justice Kennedy’s significant nexus standard. Because ephemeral streams were not categorically jurisdictional under the pre-2015 regulations as informed by the agencies’ applicable guidance, *see 2008 Rapanos* Guidance at 7 (“[R]elatively permanent’ waters do not include ephemeral tributaries which flow only in response to precipitation. . . . CWA jurisdiction over these waters will be evaluated under the significant nexus standard[.]”), the 2015 Rule’s “tributary” definition expanded the scope of federal CWA jurisdiction over such features without subjecting them to a case-specific significant nexus evaluation. The agencies expect that the extent of this change might have been greater in portions of the country where non-relatively permanent (i.e., non-seasonal intermittent and ephemeral) streams are more prevalent (e.g., the arid West), relative to other parts of the country. The agencies now conclude that this change in the scope of federal CWA jurisdiction due to the categorical inclusion of ephemeral streams meeting the rule’s “tributary” definition encroached too far into the realm of traditional State land use authority by asserting *per se* federal control over certain waters more appropriately left to the jurisdiction of the States, such as ephemeral streams distant or far-removed from navigable-in-fact waters. This intrusion into State authority does not align with Justice Kennedy’s significant nexus standard, as

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it gives rise to the type of federalism concerns and “problematic applications of the statute” that Justice Kennedy’s significant nexus test was intended to prevent. *See* 547 U.S. at 783 (Kennedy, J., concurring) (“[T]he significant-nexus test itself prevents problematic applications of the statute[.]”). Though the agencies had found it appropriate to categorically include (a)(5) “tributaries” due to the “science-based conclusion” that such waters, either individually or collectively, possess the requisite significant nexus, the agencies now find that this approach was flawed, as the agencies relied on scientific information about the aggregate effects of (a)(5) “tributaries” without due regard for the limits on federal CWA jurisdiction reflected in Justice Kennedy’s *Rapanos* concurrence. *See* 80 FR 37079; 2015 Rule Response to Comments – Topic 8: Tributaries at 140; *see also* Section III.C.1.d, *infra*.

The agencies’ concerns regarding the breadth of the 2015 Rule’s “tributary” definition are echoed in the U.S. District Court for the Southern District of Georgia’s remand order. *Georgia v. Wheeler*, No. 2:15-cv-079, 2019 WL 3949922 (S.D. Ga. Aug. 21, 2019). There, the court found that the categorical assertion of jurisdiction over features meeting the 2015 Rule’s “tributary” standard “is an impermissible construction of the CWA,” as it could cover waters that lack the requisite significant nexus, particularly in the Arid West. *Id.* at \*13-15.

The agencies also conclude that the 2015 Rule’s “tributary” definition failed to properly account for Justice Kennedy’s concerns, explained in *Rapanos*, regarding the use of a broad “tributary” standard as the “determinative measure” of whether adjacent wetlands possess the requisite significant nexus. 547 U.S. at 781. Before *Rapanos*, the Corps deemed a water a jurisdictional tributary if it fed into a traditional navigable water (or a tributary thereof) and possessed “an ordinary high-water mark,” defined as a “line on the shore established by the fluctuations of water and indicated by [certain] physical characteristics.” *Id.* Justice Kennedy

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found that this tributary concept “may well provide a reasonable measure of whether specific minor tributaries bear a sufficient nexus with other regulated waters to constitute ‘navigable waters’ under the Act” if it “is subject to reasonably consistent application.” *Id.* (citing a 2004 GAO Report “noting variation in results among Corps district offices”). “Yet,” as Justice Kennedy stated, “the breadth of this 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 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.” *Id.* “[M]ere adjacency to a tributary of this sort is insufficient; a similar ditch could just as well be located many miles from any navigable-in-fact water and carry only insubstantial flow towards it. A more specific inquiry, based on the significant-nexus standard, is therefore necessary.” *Id.* at 786. Justice Kennedy’s discussion focused on adjacent wetlands because the facts of *Rapanos* presented the question of jurisdiction over wetlands. However, his concern that the agencies’ “tributary” definition giving rise to the *Rapanos* dispute may be overly expansive—such that federal jurisdiction over wetlands adjacent to those tributaries may exceed the scope of the CWA—is relevant to the agencies’ consideration of the “tributary” definition in the 2015 Rule.

Justice Kennedy stated that “[t]hrough 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,” *id.* at 780-81, but the 2015 Rule did not properly consider those factors. Under the 2015 Rule, many minor ditches and ephemeral

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“tributaries” would be considered “navigable waters” categorically, regardless of their distance to traditional navigable waters or whether the downstream water quality effects of such individual features are “speculative or insubstantial.” 547 U.S. at 780 (Kennedy, J., concurring). As such, the agencies conclude that the 2015 Rule’s “tributary” definition would have swept in “drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water volumes towards it” such that it could not be “the determinative measure of whether adjacent wetlands [to such features] are likely to play an important role in the integrity of an aquatic system.” *See id.* at 781 (Kennedy, J., concurring); *see also id.* at 738 (plurality).<sup>38</sup>

The agencies now conclude that the 2015 Rule inappropriately established *per se* jurisdiction over features that Justice Kennedy characterized as “drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water volumes toward it.” *Id.* at 781 (Kennedy, J., concurring). The rule then used those “tributaries” as the starting point from which to establish its category of jurisdictional-by-rule “adjacent” and “neighboring” waters and wetlands and the baseline from which to extend distance limits of up to 4,000 feet to determine the jurisdictional status of those waters and wetlands based on a case-specific significant nexus test. In doing so (as described in the next two subsections), the agencies now find that they compounded their error and cast an even wider net of federal jurisdiction in contravention of Justice Kennedy’s concurrence in *Rapanos*.

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<sup>38</sup> Courts that have considered the merits of challenges to the 2015 Rule at the preliminary injunction stage similarly observed that the rule may conflict with Justice Kennedy’s opinion in *Rapanos*, particularly the rule’s definition of “tributary.” The District of North Dakota found that the definitions in the 2015 Rule raise “precisely the concern Justice Kennedy had in *Rapanos*, and indeed the general definition of tributary [in the 2015 Rule] is strikingly similar” to the standard for tributaries that concerned Justice Kennedy in *Rapanos*. *North Dakota*, 127 F. Supp. 3d at 1056. The Southern District of Georgia also found that “[t]he same fatal defects that plagued the definition of tributaries in *Rapanos* plague the [2015 Rule] here.” *Georgia v. Wheeler*, No. 2:15-cv-079, 2019 WL 3949922, at \*16 (S.D. Ga. Aug. 21, 2019).

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iii. *The 2015 Rule's definition of (a)(6) waters exceeded the scope of CWA jurisdiction envisioned in Justice Kennedy's significant nexus test*

Under category (a)(6), the 2015 Rule asserted jurisdiction-by-rule over “all waters adjacent to a water identified in paragraphs (a)(1) through (5) of this section, including wetlands, ponds, lakes, oxbows, impoundments, and similar waters.” 80 FR 37104. The agencies did not expressly amend the longstanding definition of “adjacent” (defined as “bordering, contiguous, or neighboring”), but effectively broadened the definition by adding a definition of “neighboring” that impacted the interpretation 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 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 was considered neighboring if any portion of it lies within one of these zones. *See id.* The agencies’ 2014 proposed rule did not include these distance limitations on the definition of “adjacent” or “neighboring.”

The agencies received many comments on the NPRM and SNPRM discussing the 2015 Rule’s approach to “adjacent” waters. Many commenters asserted that the rule’s definition of “adjacent” waters could cover waters adjacent to remote tributaries, resulting in the assertion of jurisdiction over the same type of waters that Justice Kennedy suggested did not fall within the scope of CWA jurisdiction. Other commenters stated that the 2015 Rule’s “adjacent” waters definition was consistent with Justice Kennedy’s significant nexus standard because they stated



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that the scientific record for the 2015 Rule supported the agencies' finding at that time that such waters had a significant nexus to downstream navigable-in-fact waters. After considering the public comments, the agencies now find that the 2015 Rule's treatment of "adjacent" exceeded the agencies' statutory authority and ran afoul of Justice Kennedy's significant nexus test in *Rapanos*.

As a threshold matter, because the definition of (a)(6) waters in the 2015 Rule was keyed to waters "adjacent" to (a)(1) through (a)(5) waters, the definition of (a)(6) waters rests on tenuous jurisdictional footing for the reasons discussed in the (a)(5) "tributaries" section above. In addition, the rule's definition of (a)(6) waters did not comport with Justice Kennedy's significant nexus test.

In *Rapanos*, Justice Kennedy's analysis of the agencies' jurisdictional test clearly distinguished between "wetlands adjacent to navigable-in-fact waters," which can be regulated based on adjacency alone, and wetlands adjacent "to nonnavigable tributaries," for which "the Corps must establish a significant nexus on a case-by-case basis" should it seek to regulate them, "[a]bsent more specific regulations." 547 U.S. at 782 (Kennedy, J., concurring). Justice Kennedy found this individualized significant nexus determination "necessary to avoid unreasonable applications of the statute" in the face of "the potential overbreadth of the Corps' regulations." *Id.* Specifically, Justice Kennedy expressed concern that the breadth of the Corps' then-existing tributary standard "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.

The agencies now conclude that the 2015 Rule did just that—adopted a categorically jurisdictional rule for all adjacent wetlands (and waters) tied to a similarly broad "tributary"

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standard that did not adequately respond to Justice Kennedy's concerns about “insubstantial flow” and remoteness. *Id.* at 786. The agencies now find that the 2015 Rule codified the very test that Justice Kennedy rejected and for which the dissenting Justices in *Rapanos* advocated. Justice Stevens, writing for himself and three other Justices in dissent, did not share Justice Kennedy’s concerns with the breadth of the Corps’ then-existing tributary standard and with it serving as the basis for determining adjacency. Indeed, Justice Stevens would have held that the significant nexus test “is *categorically satisfied* as to wetlands adjacent to navigable waters *or their tributaries*” because “it [is] clear that wetlands adjacent to tributaries of navigable waters generally have a ‘significant nexus’ with the traditionally navigable waters downstream.” 547 U.S. at 807 (Stevens, J., dissenting) (emphasis added). Although the agencies sought to implement the significant nexus test articulated by Justice Kennedy in *Rapanos* when finalizing the 2015 Rule, the agencies now conclude that by failing to address Justice Kennedy’s concerns as to the breadth of the “tributary” definition to which the “adjacent” definition was tied, the agencies erroneously adopted and codified a test more like Justice Stevens’s categorical test for adjacent waters under the guise of promulgating “more specific regulations.” *Id.* at 782 (Kennedy, J., concurring).

In remanding the 2015 Rule to the agencies, the U.S. District Court for the Southern District of Georgia also found that the rule’s “adjacent” waters definition relied on an impermissibly broad “tributary” standard. *Georgia v. Wheeler*, No. 2:15-cv-079, 2019 WL 3949922, at \*15-17 (S.D. Ga. Aug. 21, 2019). There, the court explained that though the 2015 Rule’s “tributary” definition contained the additional requirement of a bed and banks, the rule’s definition was “functionally the same as the definition in *Rapanos*,” as the court found “no evidence demonstrating how the addition of bed and banks . . . does anything to further limit the definition

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of tributaries so as to alleviate Justice Kennedy’s concerns of over-breadth in *Rapanos*.” *Id.* at \*16-17. The court held that as a result, the “adjacent” waters provision “could include ‘remote’ waters . . . that have only a ‘speculative or insubstantial’ effect on the quality of navigable in fact waters,” contrary to the significant nexus standard in Justice Kennedy’s opinion. *Id.* (quoting *Rapanos*, 547 U.S. at 778-81 (Kennedy, J., concurring)).

Upon further reflection, including consideration of arguments made in the subsequent litigation expressing certain concerns that litigants were unable to make during the notice and comment period, as well as the decisions of those courts that have preliminarily or finally reviewed the 2015 Rule, the agencies now believe that Justice Kennedy would not have endorsed the agencies’ approach in the 2015 Rule, just as he did not join the dissenting Justices in *Rapanos*. For the agencies to conclude otherwise in the 2015 Rule was an error, requiring its repeal.

In addition, the agencies find that the 2015 Rule’s definition of “adjacent” also exceeded the agencies’ authority to regulate “navigable waters” under the CWA. Under the 2015 Rule, the agencies determined that all waters and wetlands meeting the “adjacent” definition categorically possessed a significant nexus, either alone or in combination with similarly situated waters, and thus were jurisdictional. 80 FR 37058. The agencies justified this approach through heavy reliance on the findings of the Connectivity Report, *see* 80 FR 37066, and a reinterpretation of the phrase “similarly situated lands in the region.” *See* Section III.C.1.b.i, *supra*. Under the 2008 *Rapanos* Guidance, which the agencies now believe hews closer to Justice Kennedy’s opinion in that case, only wetlands adjacent to the “reach of the stream that is of the same order” of a non-navigable tributary that is not relatively permanent or wetlands adjacent to but that do not directly abut a relatively permanent non-navigable tributary were aggregated for the purposes of

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a significant nexus analysis. 2008 *Rapanos* Guidance at 1. In contrast, under the 2015 Rule, these same wetlands were *per se* jurisdictional as “adjacent waters.” The 2015 Rule also expanded the scope of aggregation for its case-specific significant nexus analysis to *non-adjacent wetlands and waters* alone or in combination with similarly situated wetlands and waters across an entire single point of entry watershed that drains to the nearest primary water. The agencies now conclude that this approach was inconsistent with the agencies’ CWA authority as envisioned by Justice Kennedy’s concurring opinion in *Rapanos*.

While the 2015 Rule asserted categorical jurisdiction over “all waters [and wetlands] located within 100 feet of the ordinary high water mark” of even the most remote and minor channel meeting the rule’s definition of “tributary,” Justice Kennedy stated that “[t]he deference owed to the Corps’ interpretation of the statute does not extend” to “wetlands” that “lie alongside a ditch or drain, however remote or insubstantial, that eventually may flow into traditional navigable waters.” *Rapanos*, 547 U.S. at 778-79 (Kennedy, J., concurring). Justice Kennedy also stated that “[t]he Corps’ theory of jurisdiction” in *Rapanos* and *Carabell*—that being “adjacency to tributaries, however remote and insubstantial”—“raises concerns.” *Id.* at 780. In fact, Justice Kennedy took issue with the dissent’s conclusion in *Rapanos* that “the ambiguity in the phrase ‘navigable waters’ allows the Corps to construe the statute as reaching all ‘non-isolated wetlands,’” noting that this position “seems incorrect.” *Id.* Further, with respect to wetlands adjacent to nonnavigable tributaries, Justice Kennedy determined that “mere adjacency . . . is insufficient. A more specific inquiry, based on the significant-nexus standard, is . . . necessary.” *Id.* at 786; *see also id.* at 774 (“As *Riverside Bayview* recognizes, the Corps’ adjacency standard is reasonable in *some* of its applications.”) (emphasis added). Yet, under the 2015 Rule’s expansive “adjacent” waters definition, the agencies established that adjacency alone was

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sufficient and reasonable in *all* of its applications—including situations where any portion of a physically disconnected wetland lay within 100 feet of a remote drain meeting the rule’s broad “tributary” definition.

The agencies also find that the 2015 Rule’s *per se* coverage under the definition of “adjacent” of all waters and wetlands located within the 100-year floodplain and within 1,500 feet of the ordinary high water mark of a primary water, jurisdictional impoundment, or tributary was not consistent with the limits of federal jurisdiction under the CWA as interpreted by Justice Kennedy. Pursuant to that provision, the rule extended federal jurisdiction to certain isolated ponds, wetlands, and ditches categorically simply because they might have a hydrologic connection with such waters during a storm event with a low probability of occurring in any given year. The agencies now conclude that this categorical inclusion was inconsistent with Justice Kennedy’s significant nexus standard in *Rapanos*, which requires beyond “speculat[ion]” that a water or wetland “significantly affect[s] the chemical, physical, and biological integrity of other covered waters more readily understood as ‘navigable.’” *Id.* at 780. Indeed, Justice Kennedy stated that a “mere hydrologic connection *should not suffice* in all cases” because it “may be too insubstantial for the hydrologic linkage to establish the required nexus with navigable waters as traditionally understood.” *Id.* at 784-85 (emphasis added). As applied to the facts of *Carabell*, Justice Kennedy believed that “possible flooding” was an unduly speculative basis for a jurisdictional connection between wetlands and other jurisdictional waters. *Id.* at 786 (Kennedy, J., concurring). The *Rapanos* plurality similarly questioned the Corps’ broad interpretation of its regulatory authority to include wetlands “‘adjacent’ to covered waters . . . if they lie within the 100-year floodplain of a body of water.” *Id.* at 728 (Scalia, J., plurality) (internal quotation marks and citations omitted). Thus, the agencies find that a once in a 100-year

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hydrologic connection between otherwise physically disconnected waters, which satisfied the definition of “neighboring” in the 2015 Rule, is too insubstantial to justify a categorical finding of a “significant nexus” with navigable-in-fact waters under *Rapanos*. *See also Georgia v. Wheeler*, No. 2:15-cv-079, 2019 WL 3949922, at \*18 (S.D. Ga. Aug. 21, 2019) (finding that the 2015 Rule failed to show that the majority of waters within the 100-year floodplain have a significant nexus to navigable waters). To be sure, certain waters that meet the definition of “neighboring” in the 2015 Rule would meet Justice Kennedy’s “significant nexus” test; however, other features that would *not* meet Justice Kennedy’s test would nonetheless meet the definition of “neighboring” in the 2015 Rule and thus be jurisdictional *per se*.

The agencies therefore find that their interpretation of “adjacent” and “neighboring” exceeded the limits of federal CWA jurisdiction described by Justice Kennedy and ignored his intention that the significant nexus test be used to *prevent* categorical assertion of jurisdiction over all wetlands adjacent to all tributaries, broadly defined. The 2015 Rule misconstrued Justice Kennedy’s significant nexus standard to do exactly the opposite—*permit* categorical assertion of jurisdiction over all wetlands and waters “adjacent” or “neighboring” all “tributaries.” For the foregoing reasons, the agencies conclude that the 2015 Rule’s definition of (a)(6) waters exceeded their statutory authority.

- iv. *The 2015 Rule’s inclusion of (a)(7) and (a)(8) waters that could be jurisdictional under a case-specific significant nexus analysis exceeded the scope of CWA jurisdiction envisioned in Justice Kennedy’s significant nexus test*

The 2015 Rule established two types of jurisdictional waters “found after a case-specific analysis to have a significant nexus to traditional navigable waters, interstate waters, or the

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territorial seas, either alone or in combination with similarly situated waters in the region.” 80 FR 37058. The first category, (a)(7) waters, 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, (a)(8) waters, 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.* The rule established no distance limitation for the (a)(7) waters, *id.* at 37093, and the distance-based limitations for the (a)(8) waters were adopted without adequate notice in violation of the APA. *See Texas v. EPA*, No. 3:15-cv-162, 2019 WL 2272464, at \*5 (S.D. Tex. May 28, 2019).<sup>39</sup>

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 affects the chemical, physical, or biological integrity of a primary water. 80 FR 37106. Under the 2015 Rule, to determine whether a water, alone or in combination with similarly situated waters across a watershed, had a “significant nexus,” the agencies considered nine functions such as sediment trapping, runoff storage, provision of life cycle dependent aquatic habitat, among others. *Id.* Under the rule, it was sufficient for determining whether a water has a significant nexus if any single function performed by the water, alone or together with similarly situated waters in the watershed of the nearest primary water, contributed significantly to the chemical, physical, or biological integrity of the nearest primary water. *Id.*

The agencies conclude that the 2015 Rule’s categories of (a)(7) and (a)(8) waters exceeded the agencies’ CWA authority for several independent reasons. As described in Section III.C.1.a,

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<sup>39</sup> The agencies also note that the distance limitations in the 2015 Rule were included without sufficient record support.

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certain waters that fall within the scope of category (a)(8) are beyond the limits of federal authority. By establishing a jurisdictional category for (a)(8) waters to which the 2015 Rule’s case-specific significant nexus test applied, the rule would have swept certain “ponds that are not adjacent to open water”—like those isolated ponds and mudflats at issue in *SWANCC*—into the federal regulatory net despite the *SWANCC* Court’s conclusion that “the text of the statute will not allow this.” 531 U.S. at 168. Moreover, like the agencies’ interpretation of (a)(6) “adjacent” waters in the 2015 Rule, the baseline for determining if a water was subject to a case-specific significant nexus analysis under the 2015 Rule’s (a)(8) category was established, among other means, according to specified distances keyed to the definition of (a)(5) “tributaries.” The agencies established a distance up to 4,000 feet from the ordinary high water mark of even the most remote and insubstantial “tributary” within which all waters and wetlands would be subject to a case-specific significant nexus analysis based in large part on the expanded aggregation theory discussed in Section III.C.1.b.i.<sup>40</sup>

Further, while the 2008 *Rapanos* Guidance (at 1) limited the case-specific significant nexus inquiry to 1) non-navigable tributaries that are not relatively permanent, 2) wetlands adjacent to non-navigable tributaries that are not relatively permanent, and 3) wetlands adjacent to but that do not directly abut a relatively permanent nonnavigable tributary, the 2015 Rule asserted jurisdiction over such tributaries and adjacent wetlands categorically and then expanded the scope of the case-specific significant nexus test to non-adjacent waters and wetlands alone or in combination with “similarly situated” waters and wetlands anywhere within the same single point of entry watershed. In other words, the (a)(7) and (a)(8) categories were designed to capture waters that fall outside the 2015 Rule’s broad “adjacent” waters (a)(6) category. *See* 80

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<sup>40</sup> The 2015 Rule placed no distance limits on the scope of a significant nexus inquiry for waters within the 100-year floodplain of a primary water. *See* 80 FR 37088.



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FR 37080. Given the agencies' conclusion that the categorical assertion of jurisdiction over features meeting the 2015 Rule's definitions of "tributary" and "adjacent" contravened the limits of federal jurisdiction reflected in Justice Kennedy's opinion, it necessarily follows that the 2015 Rule's (a)(7) and (a)(8) categories—which apply to certain waters located *outside* the scope of those jurisdictional-by-rule categories—similarly exceeded the scope of the agencies' statutory authority. *See Georgia v. Wheeler*, No. 2:15-cv-079, 2019 WL 3949922, at \*20 (S.D. Ga. Aug. 21, 2019) (finding that the 2015 Rule's (a)(8) provision would "extend federal jurisdiction beyond the limits allowed under the CWA"). For example, because of the expansive significant nexus test in the 2015 Rule coupled with the breadth of certain key concepts and terms (*e.g.*, "tributaries," "adjacent," and "neighboring") relative to the prior regulatory regime, the agencies now conclude that the 2015 Rule's (a)(7) and (a)(8) categories would have permitted federal jurisdiction over waters and wetlands appearing "little more related to navigable-in-fact waters than were the isolated ponds held to fall beyond the Act's scope in *SWANCC*." 547 U.S. at 781-82 (Kennedy, J., concurring).

Relying on the concurring opinion of Justice Kennedy,<sup>41</sup> the 2015 Rule misapplied the significant nexus standard to subject similarly-situated waters (including small streams, ephemeral "tributaries," non-adjacent wetlands, and small lakes and ponds) across entire watersheds that were not already jurisdictional categorically under another provision of the 2015 Rule to federal purview. Indeed, taken together, the enumeration of the nine functions relevant to

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<sup>41</sup> The agencies note that they requested comment on the appropriate scope and application of Justice Kennedy's concurring opinion as part of their proposed new definition of "waters of the United States," including whether it is the controlling opinion from *Rapanos*, the application of the significant nexus standard to tributaries in addition to adjacent wetlands, and related topics. *See* 84 FR 4167, 4177. The agencies are evaluating comments submitted in response to that request and need not take positions on those questions to support or resolve the issues raised in this rulemaking.

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the “significant nexus” analysis and the more expansive interpretation of “similarly situated” and “in the region” in the 2015 Rule meant that the vast majority of water features in the United States would be *per se* jurisdictional or could come within the jurisdictional purview of the Federal government pursuant to the rule’s (a)(7) and (a)(8) provisions for case-specific waters.<sup>42</sup> As discussed in Section III.C.1.b.i, such a result is inconsistent with the limiting nature of Justice Kennedy’s significant nexus test.

Justice Kennedy also stated that “[a]bsent more specific regulations . . . 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 (emphasis added). In the 2015 Rule, the agencies provided more specific regulations for “tributaries” and “adjacent” waters and wetlands, both of which were based upon their misinterpretation of Justice Kennedy’s significant nexus standard. But the agencies then applied their overbroad interpretation of significant nexus to the evaluation of (a)(7) and (a)(8) waters on case-specific basis. The agencies are concerned that there is nothing in Justice Kennedy’s concurring opinion in *Rapanos* that indicates he envisioned a case-specific approach to establish adjacency-based jurisdiction *after* more specific regulations have been established that purported to establish the categorical limits of adjacency. And while the 2015 Rule preamble properly characterized Justice Kennedy’s acknowledgment that “the agencies could establish more specific regulations *or* establish a significant nexus on a case-by-case basis,” 80 FR 37058 (emphasis added), the 2015

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<sup>42</sup> The agencies noted in 2015 “that the 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.” 2015 Rule Economic Analysis at 11. As such, the agencies’ attempts to mitigate the expansive reach of (a)(8) waters through this distance limitation was illusory.

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Rule nevertheless “continue[d] to assess significant nexus on a case-specific basis” for (a)(7) and (a)(8) waters. *Id.*

The 2015 Rule also established different scopes of inquiry for determining whether an (a)(7) or (a)(8) water has a significant nexus to a primary water. “For practical administrative purposes, the rule [did] not require evaluation of all similarly situated waters under paragraph (a)(7) or (a)(8) when concluding that those waters have a significant nexus” to a primary water. 80 FR at 37094. “When a subset of similarly situated waters provides a sufficient science-based justification to conclude presence of a significant nexus, for efficiency purposes a significant nexus analysis need not unnecessarily require time and resources to locate and analyze all similarly situated waters in the entire point of entry watershed.” *Id.* In contrast, “[a] conclusion that significant nexus is lacking *may not be based on consideration of a subset of similarly situated waters* because under the significant nexus standard the inquiry is how the similarly situated waters in combination affect the integrity of the downstream water.” *Id.* (emphasis added). In other words, under the 2015 Rule, a significant nexus inquiry for (a)(7) and (a)(8) waters may be inconclusive until *all* similarly situated waters across the entire single point of entry watershed are analyzed and it is determined that such features do not have a significant nexus, when considered in combination, to the nearest downstream primary water. The agencies are concerned that the potential requirement for an analysis of all broadly defined “similarly situated waters in the region” until the agencies can determine that a feature does not possess a significant nexus to a primary water “raise[s] troubling questions regarding the Government’s power to cast doubt on the full use and enjoyment of private property throughout the Nation.” *Hawkes*, 136 S. Ct. 1807, 1812, 1816-17 (Kennedy, J., concurring). As a result, the agencies are concerned that the 2015 Rule potentially leaves “people in the dark,” *Sessions v. Dimaya*, No.

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15-1498, 2018 U.S. LEXIS 2497, at \*39, 42-43 (S. Ct. Apr. 17, 2018) (Gorsuch, J., concurring in part and concurring in judgment), about the jurisdictional status of individual isolated ponds and wetlands within their property boundaries until every last similarly situated feature within the watershed boundary of the nearest primary water is analyzed by the Federal government. The agencies find that these concerns provide further support for the agencies' decision to repeal the 2015 Rule.

In summary, the agencies conclude that the significant nexus test articulated in the 2015 Rule and the systemic problems associated with its use to justify the definition of "tributary" (which formed the baseline from which to extend the limits of "adjacent" waters and the scope of case-specific significant nexus analyses) resulted in a definition of "waters of the United States" that failed to respect the limits of the "significant nexus" standard articulated in *SWANCC* and Justice Kennedy's *Rapanos* concurrence. The agencies' conclusion is also supported by reasoning that has been adopted by various district courts reviewing requests for preliminary injunctions of the 2015 Rule and ruling on the merits of the 2015 Rule. The U.S. District Court for the District of North Dakota, for example, found that "[t]he Rule . . . likely fails to meet [Justice Kennedy's significant nexus] standard" and "allows EPA regulation of waters that do not bear any effect on the 'chemical, physical, and biological integrity' of any navigable-in-fact water." *North Dakota v. EPA*, 127 F. Supp. 3d 1047, 1056 (D.N.D. 2015). And the U.S. District Court for the Southern District of Georgia found that multiple provisions in the 2015 Rule were inconsistent with Justice Kennedy's significant nexus standard, including the rule's "tributary" definition, which the court held extended federal CWA jurisdiction "well beyond what is allowed under Justice Kennedy's interpretation of the CWA," and the rule's "adjacent" waters provision, which the court found "could include 'remote' waters . . . that have only a 'speculative or insubstantial' effect on the

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quality of navigable in fact waters.” *Georgia v. Wheeler*, No. 2:15-cv-079, 2019 WL 3949922, at \*14, 17 (S.D. Ga. Aug. 21, 2019) (quoting *Rapanos*, 547 U.S. at 778–81 (Kennedy, J., concurring)). Further, as discussed in Section III.C.3, the agencies find that the 2015 Rule leads to similar unreasonable applications of the CWA that *SWANCC* and Justice Kennedy both sought to prevent. The agencies now conclude that the 2015 Rule was flawed due to the systemic misapplication of the significant nexus standard, and the agencies therefore repeal the 2015 Rule in its entirety to “avoid the significant constitutional and federalism questions” it raises. 531 U.S. at 174.

*c. The 2015 Rule’s expansive interpretation of the significant nexus standard failed to give the word “navigable” in the CWA sufficient effect*

By applying an expansive interpretation of the significant nexus standard within the definitions and treatment of “tributaries,” “adjacent” waters, and waters subject to a case-specific “significant nexus” test, the agencies now believe and conclude that the 2015 Rule did not give the word “navigable” within the phrase “navigable waters” sufficient effect. The CWA grants the agencies jurisdiction over “navigable waters,” 33 U.S.C. 1311(a), defined as “the waters of the United States.” *Id.* at 1362(7). “Congress’ separate definitional use of the phrase ‘waters of the United States’ [does not] constitute[] a basis for reading the term ‘navigable waters’ out of the statute.” *SWANCC*, 531 U.S. at 172. Indeed, navigability was “what Congress had in mind as its authority for enacting the CWA.” *Id.*

As described in Section III.B.1, Congress intended to assert federal authority over more than just waters traditionally understood as navigable but rooted that authority in “its commerce power over navigation.” *Id.* at 168 n.3. Therefore, there must necessarily be a limit to that authority and to what waters are subject to federal jurisdiction. *See, e.g.*, 547 U.S. at 779

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(Kennedy, J., concurring) (“[T]he word ‘navigable’ in the Act must be given some effect.”); *see also id.* at 734 (Scalia, J., plurality) (“As we noted in *SWANCC*, the traditional term ‘navigable waters’—even though defined as ‘the waters of the United States’—carries some of its original substance: ‘[I]t is one thing to give a word limited effect and quite another to give it no effect whatever.’ 531 U.S., at 172.”).

The agencies find that in defining “tributary,” “adjacent,” “neighboring,” and “significant nexus” broadly so as to sweep within federal jurisdiction many ephemeral “tributaries” as defined in the 2015 Rule, certain remote ditches, and certain isolated ponds and wetlands that, like the isolated ponds and mudflats at issue in *SWANCC*, “bear[] no evident connection to navigable-in-fact waters,” 547 U.S. at 779 (Kennedy, J., concurring), the 2015 Rule did not give sufficient effect to the term “navigable” in the CWA. *See South Carolina v. Catawba Indian Tribe*, 476 U.S. 498, 510 n.22 (1986) (“It is our duty to give effect, if possible, to every clause and word of a statute[.]” (quoting *United States v. Menasche*, 348 U.S. 528, 538-39 (1955))) (internal quotations omitted). Many commenters expressed a similar concern. Other commenters asserted that the 2015 Rule did give sufficient effect to the term “navigable.”

Justice Kennedy’s concurring opinion in *Rapanos*, which the 2015 Rule sought to implement, recognized it is a “central requirement” of the Act that “the word ‘navigable’ in ‘navigable waters’ be given some importance.” 547 U.S. at 778 (Kennedy, J., concurring). If the word “navigable” has any meaning, the CWA cannot be interpreted to “permit federal regulation whenever wetlands lie along a ditch or drain, however remote and insubstantial, that eventually may flow into traditional navigable waters.” *Id.* at 778-79 (Kennedy, J., concurring). Yet the agencies find that the 2015 Rule did just that in certain cases, including sweeping the *SWANCC* ponds and similarly-situated waters within federal purview. *See* Section III.C.1.a, *supra*. The

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agencies conclude, therefore, that the 2015 Rule did not give sufficient effect to the word “navigable” in the phrase “navigable waters” in a manner consistent with *SWANCC*, Justice Kennedy’s concurring opinion in *Rapanos*, or the text of the CWA.

*d. Because the 2015 Rule misinterpreted the significant nexus standard, it misapplied the findings of the Connectivity Report to assert jurisdiction over waters beyond the limits of federal authority*

The 2015 Rule relied on a scientific literature review—the Connectivity Report—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.”). The report notes that connectivity “occur[s] on a continuum or gradient from highly connected to highly isolated,” and “[t]hese variations in the degree of connectivity are a critical consideration to the ecological integrity and sustainability of downstream waters.” *Id.* at 37057. The conclusions in this report, while informative, cannot be dispositive in interpreting the statutory reach of “waters of the United States.” The definition of “waters of the United States” must be grounded in a legal analysis of the limits on CWA jurisdiction that Congress intended by use of the term “navigable waters,” and a faithful understanding and application of the limits expressed in Supreme Court opinions interpreting that term.

In its review of a draft version of the Connectivity Report, EPA’s Science Advisory Board (“SAB”) noted, “[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.”<sup>43</sup> “Wetlands that

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<sup>43</sup> Science Advisory Board, U.S. EPA. Review of the EPA Water Body Connectivity Report at 60 (Oct. 17, 2014).

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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.”<sup>44</sup> 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.

Yet, as the SAB observed, “[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.”<sup>45</sup> “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. Although the agencies acknowledged that science cannot dictate where to draw the line of federal jurisdiction, *see, e.g.*, 80 FR 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.”).

In promulgating the 2015 Rule, the agencies stated that the science documented in the Connectivity Report showed that Justice Kennedy’s significant nexus standard was satisfied by the rule’s expansive definition of “water of the United States.” *See, e.g.*, 80 FR 37058 (“[T]ributaries’ and ‘adjacent’ waters, are jurisdictional by rule, as defined, because the science *confirms* that they have a significant nexus to traditional navigable waters, interstate waters, or

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<sup>44</sup> *Id.* at 55.

<sup>45</sup> *Id.* at 2.



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territorial seas.” (emphasis added)). Yet, as described previously, the definition failed to properly implement the fundamental limits of Justice Kennedy’s test. In doing so the agencies focused too heavily on the nexus component of the significant nexus test to define the scope of CWA jurisdiction without appropriate regard to the *significance* of that nexus. While this approach and the Connectivity Report correctly recognize that upstream waters are connected to downstream waters, the agencies now find that the approach failed to acknowledge that “[a]bsent some measure of the significance of the connection for downstream water quality, this standard [is] too uncertain” and “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.” *Rapanos*, 547 U.S. at 784-85 (Kennedy, J., concurring). By adopting an aggregated watershed-scale approach to CWA jurisdiction, as further described in Section III.C.1.b.i, the 2015 Rule interpreted too broadly a key element of Justice Kennedy’s significant nexus standard and greatly increased the scope of federal regulation.

A number of commenters expressed the view that the agencies relied too heavily on scientific principles in interpreting “significant nexus” in the 2015 Rule and did not adequately consider the legal constraints on federal jurisdiction inherent in the CWA’s statutory text and Supreme Court precedent. Commenters noted that the Connectivity Report did not provide the agencies with any “bright lines” as to where federal CWA jurisdiction begins and ends and that the report did not provide any guidance on how to apply Justice Kennedy’s significant nexus test to a waterbody. Other commenters suggested that the agencies appropriately relied on the Connectivity Report and the SAB’s review of its findings in developing the 2015 Rule’s significant nexus standard. Several commenters, in fact, argued that the science underlying the Connectivity Report should drive the limits of federal jurisdiction under the CWA.

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The agencies conclude that in establishing the limits of federal regulatory authority under the CWA in the 2015 Rule, the agencies placed too much emphasis on the information and conclusions of the Connectivity Report at the expense of the limits on federal jurisdiction reflected in the statutory text and decisions of the Supreme Court. According to the 2015 Rule, the Connectivity Report and the SAB review confirmed that:

Tributary streams, including perennial, intermittent, and ephemeral streams, are chemically, physically, and biologically connected to downstream waters, and influence the integrity of downstream waters. Wetlands and open waters in floodplains and riparian areas are chemically, physically, and biologically connected with downstream waters and influence the ecological integrity of such waters. Non-floodplain wetlands and open waters provide many functions that benefit downstream water quality and ecological integrity, but their effects on downstream waters are difficult to assess based solely on the available science.

80 FR 37057. Thus, despite Justice Kennedy’s description of the extent of “[t]he deference owed the Corps’ interpretation of the statute,” 547 U.S. at 778-79 (Kennedy, J., concurring), the agencies concluded that the Connectivity Report supported a “tributary” definition that included certain “remote and insubstantial” channels “that eventually may flow into traditional navigable waters,” *id.* at 778, an “adjacent” waters definition that included all “wetlands [and waters that] lie alongside” such channels, *id.*, and a case-specific significant nexus test that applied to non-adjacent waters and wetlands, either alone or in combination, within 4,000 feet of those channels. These aspects of the 2015 Rule, at a minimum, created substantial tension with Justice Kennedy’s opinion in *Rapanos*.

Of particular concern to the agencies today is the 2015 Rule’s broad application of Justice Kennedy’s phrase “similarly situated lands in the region.” As discussed in Section III.C.1.b.i, the agencies took an expansive reading of this phrase, in part based on “one of the main conclusions of the [Connectivity Report] . . . that the incremental contributions of individual streams and wetlands are cumulative across entire watersheds, and their effects on downstream waters should

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be evaluated within the context of other streams and wetlands in that watershed.” 80 FR 37066.

Yet, Justice Kennedy observed in *Rapanos* that what constitutes a “significant nexus” is not a solely scientific question and that it cannot be determined by environmental effects alone. *See, e.g.*, 547 U.S. at 777-78 (noting that although “[s]cientific evidence indicates that wetlands play a critical role in controlling and filtering runoff . . . *environmental concerns provide no reason to disregard limits in the statutory text*” (citations omitted) (emphasis added)); *see also Rodriguez v. United States*, 480 U.S. 522 (1987) (“[N]o legislation pursues its purposes at all costs.”). The 2015 Rule’s treatment of the phrase “similarly situated” to mean “waters that function alike and are sufficiently close to function together in affecting downstream waters” and “in the region” to mean “the watershed that drains to the nearest” primary water together expanded the potential jurisdictional purview of the Federal government to include the vast majority of the nation’s waters and contravened the limiting nature of Justice Kennedy’s description of the significant nexus standard. As a consequence, the 2015 Rule’s aggregation method for purposes of its significant nexus inquiry “raise[d] significant constitutional questions” similar to the Corps’ assertion of jurisdiction over the abandoned ponds at issue in *SWANCC*. *See* Section III.C.3, *infra* (addressing these constitutional questions in further detail).

The agencies also find that the 2015 Rule placed insufficient weight on the direction of the Court in *Riverside Bayview* regarding the limits of federal jurisdiction and instead relied heavily on the Connectivity Report to support its assertion of jurisdiction.<sup>46</sup> The 2015 Rule stated, “it is the agencies’ task to determine where along [the] gradient [of connectivity] to draw lines of jurisdiction under the CWA,” 80 FR 37057, yet in establishing those lines, the agencies did not

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<sup>46</sup> The agencies also note that the 2015 Rule was remanded back to the agencies because the final Connectivity Report, which served as the scientific foundation for the rule, was not made available to the public for review and comment. *See Texas v. EPA*, No. 3:15-cv-162, 2019 WL 2272464 (S.D. Tex. May 28, 2019).

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appropriately consider the *Riverside Bayview* Court’s discussion regarding the limits of jurisdiction lying within the “continuum” or “transition” “between open waters and dry land.” 474 U.S. at 132. Instead, the agencies appeared to follow the advice of the SAB<sup>47</sup> and issued a definition of “waters of the United States” that went far beyond that continuum to reach physically disconnected waters and wetlands under categories (a)(7) and (a)(8).

## 2. The 2015 Rule Did Not Adequately Consider and Accord Due Weight to Clean Water Act Section 101(b)

When Congress passed the CWA in 1972, it established the objective “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 provided a major role for the States in implementing the CWA and recognized the importance of preserving the States’ independent authority and responsibility in this area. *See* 33 U.S.C 1251(b) and 1370. As the Supreme Court has explained, the “Clean Water Act anticipates a *partnership* between the States and the Federal Government, animated by a *shared* objective: ‘to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.’” *Arkansas v. Oklahoma*, 503 U.S. 91, 101 (1992) (emphasis added).

The CWA balances the traditional power of States to regulate land and water resources within their borders with the need for federal water quality regulation to protect the “navigable waters” defined as “the waters of the United States, including the territorial seas.” 33 U.S.C.

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<sup>47</sup> *See, e.g.*, 80 FR 37064, citing *SAB Consideration of the Adequacy of the Scientific and Technical Basis of the EPA’s Proposed Rule titled “Definition of Waters of the United States under the Clean Water Act,”* U.S. EPA (2014) (In promulgating the 2015 Rule, the agencies noted that the SAB “expressed support for the proposed rule’s . . . inclusion of ‘other waters’ on a case-specific basis” and that the SAB “found it ‘appropriate to define ‘other waters’ as waters of the United States on a case-by-case basis, either alone or in combination with similarly situated waters in the same region.’”).

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1362(7). Section 101(b) of the Act establishes “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 . . . .” *Id.*

at 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.* The policy statement of 101(b) “was included in the Act as enacted in 1972 . . . prior to the addition of the optional state administration program in the 1977

amendments. Thus, the policy plainly referred to something beyond the subsequently added state administration program of 33 U.S.C. 1344(g)-(l).” 547 U.S. at 737 (Scalia, J., plurality) (citations omitted). Congress further 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.” 33 U.S.C.

1370. The court in *Georgia v. Wheeler* also recognized the important balance between States and the Federal government that Congress prescribed in the CWA, explaining that “[w]hile the CWA allows the federal government to regulate certain waters for the purposes of protecting the chemical, physical, and biological integrity of the nation’s waters, Congress also included within that statute a provision which states that the policy of Congress is to ‘recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources.’” *Georgia v. Wheeler*, No. 2:15-cv-079, 2019 WL 3949922, at \*22 (S.D. Ga. Aug. 21, 2019) (internal citation omitted).

The agencies must develop 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

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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 preserve state authority over their own land and water resources. *See 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”). The agencies therefore must recognize a distinction between the specific word choices of Congress, including the need to develop regulatory programs that aim to accomplish the objective of the Act while implementing the specific policy directives of Congress. See Section III.B.1 for additional discussion of this language in the CWA.

In promulgating the 2015 Rule, the agencies conclude that they did not adequately consider and accord due weight to the policy directive of the Congress in section 101(b) of the Act. The 2015 Rule acknowledged the language contained in section 101(b) and the vital role States and Tribes play in the implementation and enforcement of the Act, 80 FR 37059, but it did not appropriately recognize the important policy of 101(b) to preserve the traditional power of States to regulate land and water resources within their borders or the utility and independent significance of the Act’s non-regulatory programs.<sup>48</sup> In fact, the agencies failed to adequately acknowledge the meaning of perhaps the most important verb in 101(b), the direction to “preserve” existing State authority. That is, Congress recognized existing State authorities at the

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<sup>48</sup> The majority of the agencies’ discussion of section 101(b) in the preamble to the final 2015 Rule focused on the “particular importance” of States and Tribes administering the CWA permitting programs. 80 FR 37059.

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time it enacted the 1972 CWA amendments and directed the agencies to preserve and protect those authorities, which includes the authority to regulate certain waters as the States deem appropriate, without mandates from the Federal government. It is true that the agencies noted that “States and federally-recognized tribes, consistent with the CWA, retain full authority to implement their own programs to more broadly and more fully protect the waters in their jurisdiction,” *id.* at 37060, but the agencies did not include a discussion in the 2015 Rule preamble of the meaning and importance of section 101(b) in guiding the choices the agencies make in setting the outer bounds of CWA jurisdiction. Instead of considering this aspect of the 101(b) congressional policy directive, the agencies reduced the number of waters subject solely to State jurisdiction by broadening their interpretation of “waters of the United States.” Several commenters offered interpretations of section 101(b) of the Act similar to the interpretation that the agencies offered in the 2015 Rule and asserted that the import of section 101(b) is Congress’ policy that States implement the Act and have authority to impose conditions that are more stringent than the conditions the agencies impose under the Act. As described above, however, the policy directive from Congress in section 101(b) is not so limited.

The agencies now conclude that, at a minimum, the 2015 Rule’s case-specific significant nexus provisions stretched the bounds of federal jurisdiction to cover certain waters that more appropriately reside in the sole jurisdiction of States. In describing those provisions, the agencies stated that “the 100-year floodplain and 4,000 foot boundaries in the rule will sufficiently capture for analysis those waters that are important to protect to achieve the goals of the Clean Water Act.” 80 FR 37090; *see also id.* at 37091 (“[P]roviding for case-specific significant nexus analysis for waters that are not adjacent but within the 4,000 foot distance limit, as well as those within the 100-year floodplain of a traditional navigable water, interstate water, or the territorial

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seas . . . will ensure protection of *the important waters* whose protection will advance the goals of the Clean Water Act . . .”) (emphasis added). Such statements—and indeed naming the 2015 Rule the “Clean Water Rule”—imply that waters that are not “waters of the United States” (*i.e.*, the subset of the “Nation’s waters” subject solely to State and tribal authority) are *not* important to protect to meet the objective of the Act. In other words, when they finalized the 2015 Rule, the agencies believed the rule’s definition of “waters of the United States” covered all waters necessary for regulation under the CWA in order to meet the objective of the Act in section 101(a), and in turn neglected to incorporate the policy of the Congress in section 101(b). And as the plurality warned in *Rapanos*, “the expansive theory [of jurisdiction] advanced by the Corps, rather than ‘preserv[ing] the primary rights and responsibilities of the States,’ would have brought virtually all ‘plan[ning of] the development and use . . . of land and water resources’ by the States under federal control.” *Rapanos*, 547 U.S. at 737 (Scalia, J., plurality). The 2015 Rule generated the same result, and the agencies now conclude that its definition was “therefore an unlikely reading of the phrase ‘the waters of the United States.’” *Id.* The agencies’ conclusion is consistent with the court’s holding in *Georgia v. Wheeler* that the 2015 Rule inappropriately encroached on traditional state power. The court in that case found that the 2015 Rule increased the scope of federal jurisdiction “to a significant degree” and that this “significant increase in jurisdiction takes land and water falling traditionally under the states’ authority and transfers them to federal authority.” *Georgia v. Wheeler*, No. 2:15-cv-079, 2019 WL 3949922, at \*23 (S.D. Ga. Aug. 21, 2019) (footnote omitted).

Several commenters criticized the agencies for not articulating the precise limits that the agencies understand section 101(b) to impose. The agencies are not concluding in this rulemaking that section 101(b) of the Act establishes a precise line between waters that are



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subject to Federal and State regulation, on the one hand, and subject to State regulation only, on the other. Instead, they find that the 2015 Rule failed to adequately consider and accord due weight to the policy directive in section 101(b) and, as a result, asserted jurisdiction over certain waters that are more appropriately left solely in the jurisdiction of States. For example, as described in Section III.C.1.b.iii, the 2015 Rule’s definition of “adjacent” established *per se* coverage of all waters and wetlands within the 100-year floodplain and within 1,500 feet of the ordinary high water mark of a primary water, jurisdictional impoundment, or tributary. As a result, the rule extended federal jurisdiction to certain isolated ponds, wetlands, and ditches categorically simply because they might have a hydrologic connection with such waters only during an infrequent storm event. Further, the agencies find that the policy directive from the Congress in section 101(b) indicates that certain types of isolated waters are more appropriately left solely under the jurisdiction of States, including those waters the Supreme Court found beyond the statute’s reach in *SWANCC* and *Rapanos*. Leaving these types of waters in the sole jurisdiction of States will give due regard to the CWA’s numerous non-regulatory programs designed to protect and restore the Nation’s waters, not just its navigable waters, the utility of which would be diminished if the “vast majority”<sup>49</sup> of the Nation’s waters are subject to federal purview under the 2015 Rule.

Finally, the 2015 Rule upset the Federal-State balance of the Act by “mistaken[ly] . . . assum[ing] . . . that whatever might appear to further the statute’s primary objective must be the law.” *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1725 (2017); *see also 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.

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<sup>49</sup> 2015 Rule Economic Analysis at 11.

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§ 1251(b).”) (original emphasis). Several commenters emphasized the importance of the objective in section 101(a) to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters” and asserted that the policy directive in section 101(b) does not supersede that objective. The agencies recognize the importance of the objective in section 101(a), but they also must recognize the specific policy directives from Congress in section 101(b).<sup>50</sup> As the Supreme Court has explained, “an administrative agency’s power to regulate in the public interest must always be grounded in a valid grant of authority from Congress,” and “in [its] anxiety to effectuate the congressional purpose,” an agency “must take care not to extend the scope of the statute beyond the point where Congress indicated it would stop.” *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 161 (2000) (citations omitted).

The agencies conclude that the 2015 Rule did not fully recognize the “partnership between the States and the Federal Government” in meeting the “shared objective” of the Act. *Arkansas v. Oklahoma*, 503 U.S. 91, 101 (1992); *see also Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (“Normally, an agency rule would be arbitrary and capricious if the agency has . . . entirely failed to consider an important aspect of the problem[.]”). As discussed in more detail below, by over-emphasizing the importance of CWA section 101(a) while not adequately considering and according due weight to section 101(b), the agencies extended federal jurisdiction over waters that “raise[d] significant constitutional questions,” 531 U.S. at 173, and “intru[ded] into traditional state authority” without “a ‘clear and

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<sup>50</sup> *See, e.g.*, 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). (Quoting Justice Kennedy, “[T]he Congress in 1972 . . . 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.”).

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manifest' statement from Congress." 547 U.S. at 738 (Scalia, J., plurality) (quoting *BFP v. Resolution Trust Corporation*, 511 U.S. 531, 544 (1994)).

### 3. In Repealing the 2015 Rule, the Agencies Seek to Avoid Constitutional Questions Relating to the Scope of CWA Authority

The agencies now find that the 2015 Rule raised significant questions of Commerce Clause authority and encroached on traditional State land-use regulation without a clear statement from Congress. As explained in Section III.B.2, the Supreme Court has stated that "[w]here an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result." *SWANCC*, 531 U.S. at 172-73. The Court has further stated that this is particularly true "where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power." *Id.* at 173; *see also Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242-43 (1985) ("If 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[.]'"); *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").

Congress relied on the broad authority of the Commerce Clause when it enacted the CWA, but it limited the exercise of that authority to its power over navigation. *SWANCC*, 531 U.S. at 168 n.3. In doing so, the Supreme Court has explained that Congress specifically sought to avoid "federal encroachment upon a traditional state power." *Id.* at 172. The Court in *SWANCC* found that "[r]ather 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

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and rights of States . . . to plan the development and use . . . of land and water resources . . .” *Id.*

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.* Similarly, the plurality in *Rapanos* stated that “[w]e ordinarily expect a ‘clear and manifest’ statement from Congress to authorize an unprecedented intrusion into traditional State authority. The phrase ‘the waters of the United States’ hardly qualifies.”

*Rapanos*, 547 U.S. at 737-38 (Scalia, J., plurality) (citations omitted).

In *SWANCC*, the Court rejected the argument that the use of nonnavigable, isolated, intrastate waters 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 targeted use of the ponds at issue as a municipal landfill was commercial in nature. 531 U.S. at 173. Such arguments, the Court noted, “raise[d] significant constitutional questions,” *id.*, and “would result in a significant impingement of the States’ traditional and primary power over land and water use.” *Id.* at 174. Similarly, in *Rapanos*, the plurality applied the clear statement rule when it rejected the Corps’ attempt to extend CWA jurisdiction to the waters at issue in that case. 547 U.S. at 737-38 (Scalia, J., plurality). The plurality concluded that any attempt by the Federal government to regulate such water would not only be “an unprecedented intrusion into traditional state authority,” but would also “stretch[] the outer limits of Congress’ commerce power and raise[] difficult questions about the ultimate scope of that power.” *Id.* at 738.

As described in Section III.C.1, and as several commenters noted, the 2015 Rule extended federal jurisdiction to waters similar to those at issue in *SWANCC*. As a result, the agencies conclude that, like the application of the federal rule giving rise to the *SWANCC* decision, the

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2015 Rule pressed the outer bounds of Congress' Commerce Clause authority and encroached on traditional State rights without a clear statement from Congress. Under the 2015 Rule, certain nonnavigable, isolated, intrastate waters like those at issue in *SWANCC* would be deemed federally jurisdictional as "adjacent" waters or other waters found on a case-specific basis to have a "significant nexus" with primary waters. The agencies' expansive interpretation of Justice Kennedy's significant nexus standard, and in particular the agencies' broad interpretation of the phrase "similarly situated lands in the region," resulted in a definition of "waters of the United States" that included certain isolated ponds and wetlands nearly a mile from the nearest ephemeral "tributary" or that connect only once in a century to waters more traditionally understood as navigable, and thereby pressed the boundaries of federal jurisdiction.

The 2015 Rule reached so far into the landscape that, as commenters noted, it is difficult for private property owners to know whether their lands are subject to federal jurisdiction. This is particularly evident in the agencies' discussion of the (a)(7) and (a)(8) categories. For example, the agencies noted in 2015 that it is possible to assert federal jurisdiction over a single wetland feature if the agencies determine that a subset of similarly situated waters in the watershed have, in combination, a significant nexus to the primary waters. But the agencies expressly rejected the ability to determine that a single wetland feature is *not* subject to jurisdiction unless and until all similarly situated waters in the watershed of the nearest primary watershed are evaluated. *See* 80 FR 37094-95 ("A conclusion that significant nexus is lacking may not be based on consideration of a subset of similarly situated waters because under the significant nexus standard the inquiry is how the similarly situated waters in combination affect the integrity of downstream waters."). Effectively, under the 2015 Rule, a single landowner with an isolated wetland located within a large watershed could not receive a negative approved jurisdictional determination unless the

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Federal government is satisfied that all “similarly situated” wetlands within that watershed do not significantly affect the integrity of the downstream primary water.

This expansive and uncertain cloud of potential federal regulation over all or potentially all water features within an entire watershed raises the very concerns that the constitutional avoidance doctrine and clear statement rule are designed to address. As Justice Kennedy observed in 2016, “the reach and systemic consequences of Clean Water Act jurisdiction remain a cause for concern” and “continues to raise troubling questions regarding the Government’s power to cast doubt on the full use and enjoyment of private property throughout the Nation.” *Hawkes*, 136 S. Ct. at 1816-17 (Kennedy, J., concurring) (also describing the Act’s reach as “ominous”). The agencies conclude that the 2015 Rule amplified those concerns by misapplying the significant nexus standard established in *SWANCC* and further described by Justice Kennedy in *Rapanos*. Just as Justice Kennedy wrote in summary of *SWANCC*, the 2015 Rule likewise “would raise significant questions of Commerce Clause authority and encroach on traditional state land-use regulation,” *Rapanos*, 547 U.S. at 776 (Kennedy, J., concurring), while generating “problematic applications of the statute.” *Id.* at 783. The agencies’ conclusion is consistent with the court’s holding in *Georgia v. Wheeler*. There, the court found that “like the majority in *SWANCC* and the plurality in *Rapanos* concluded, the [2015] Rule’s vast expansion of jurisdiction over waters and land traditionally within the states’ regulatory authority cannot stand absent a clear statement from Congress in the CWA. Since no such statement has been made, the [2015 Rule] is unlawful under the CWA.” *Georgia v. Wheeler*, No. 2:15-cv-079, 2019 WL 3949922, at \*23 (S.D. Ga. Aug. 21, 2019). To avoid questionable applications of the Act and a “theory of jurisdiction that presses the envelope of constitutional validity,” 547 U.S. at 738 (Scalia, J., plurality), the agencies repeal the 2015 Rule in its entirety.

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4. The Distance-Based Limitations Were Not a Logical Outgrowth of the Proposed Rule and Were Not Supported by an Adequate Record

The agencies inserted the distance limitations into the final 2015 Rule for the stated purpose of increasing CWA program predictability and consistency and reducing the instances in which permitting authorities would need to make jurisdictional determinations on a case-specific basis. 80 FR 37054. These distance limitations therefore were important in achieving the stated purposes of the rulemaking and were employed in two specific ways. First, the 2015 Rule defined “neighboring” to encompass all waters located within 100 feet of the ordinary high water mark of a category (a)(1) through (a)(5) “jurisdictional by rule” water; all waters located within the 100-year floodplain of a category (a)(1) through (a)(5) “jurisdictional by rule” water and not more 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 (a)(1) through (a)(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 agencies’ proposed rule did not include these distance limitations in the definition of “adjacent” or “neighboring.” *See* 79 FR 22263. By defining “neighboring” within (a)(6) “adjacent” waters in the final rule to include these distance limitations, however, the 2015 Rule categorically defined waters within large swaths of land within the distance limits as jurisdictional. Second, the 2015 Rule applied distance limitations when identifying 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. Waters in section (a)(8) of the 2015 Rule were subject to a case-by-case jurisdictional determination if they are located within the 100-year floodplain of any category (a)(1) through (a)(3) “jurisdictional by rule” water or within 4,000 feet of the high tide line or ordinary high water mark of any category (a)(1) through (a)(5)

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“jurisdictional by rule” water. *Id.* These quantitative measures did not appear in the proposed rule nor did they have adequate record support.

In the SNPRM, the agencies requested public comment regarding the distance-based limitations in the 2015 Rule. 83 FR 32241. The agencies “solicit[ed] comment on whether these distance-based limitations mitigated or affected the agencies’ change in interpretation of the similarly situated waters in the 2015 Rule.” *Id.* The SNPRM also noted “the concerns raised by some commenters and the federal courts,” and that “the agencies have reviewed data previously relied upon to conclude that the 2015 Rule would have no or ‘marginal at most’ impacts on jurisdictional determinations.” *Id.* at 32243. The agencies thus specifically “solicit[ed] comment on whether the agencies appropriately characterized or estimated the potential scope of CWA jurisdiction that could change under the 2015 Rule, including whether the documents supporting the 2015 Rule appropriately considered the data relevant to and were clear in that assessment.” *Id.* Furthermore, the agencies sought comment on “any other issues that may be relevant to the agencies’ consideration of whether to repeal the 2015 Rule, such as whether any potential procedural deficiencies limited effective public participation in the development of the 2015 Rule.” *Id.* at 32249.

The agencies received a number of comments in response to the NPRM and SNPRM regarding the distance-based limitations in the 2015 Rule. While some commenters suggested that the 2015 Rule’s distance-based limitations were adequately supported and represented a permissible exercise of agency experience and expertise, other commenters asserted that the distance-based limitations were arbitrary and lacked support in the administrative record for the 2015 Rule. Multiple commenters also expressed concern that the public did not have an opportunity to comment on the distance limitations used in the 2015 Rule and argued that those



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specific measures were not a logical outgrowth of the proposal. Other commenters disagreed that the 2015 Rule was not a logical outgrowth of the proposal and suggested that the agencies had provided adequate notice of the use of distance limitations in the final rule.

After the public comment period on the SNPRM closed, the U.S. District Court for the Southern District of Texas remanded the 2015 Rule to the agencies for failing to comply with the APA, and the U.S. District Court for the Southern District of Georgia remanded the 2015 Rule to the agencies after identifying substantive and procedural errors with respect to numerous provisions, including the rule's distance limitations. In response to these remands, this final rule addresses many of the errors identified by those courts as well as the concerns raised by some commenters regarding the distance-based limitations used in the 2015 Rule.

*a. The distance-based limitations were not a logical outgrowth of the proposed rule*

The agencies are aware that litigants challenging the 2015 Rule alleged various APA deficiencies, including allegations that the distance-based limitations were inserted into the final rule without adequate notice and that they were not a logical outgrowth of the proposal. The agencies recognize that the U.S. District Court for the Southern District of Texas and the U.S. District Court for the Southern District of Georgia held that the distance-based limitations in the final rule were not a logical outgrowth of the proposal in violation of the APA's public notice and comment requirements. *See Texas v. EPA*, No. 15-cv-162, 2019 WL 2272464 (S.D. Tex. May 28, 2019); *Georgia v. Wheeler*, No. 2:15-cv-079, 2019 WL 3949922, at \*23 (S.D. Ga. Aug. 21, 2019). The Southern District of Texas found this error "significant" because the specific distance-based limitations "alter[ed] the jurisdictional scope of the Act." *Texas*, 2019 WL 2272464, at \*5. The agencies recognize that the Federal government, in prior briefing in *Texas*,

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*Georgia*, and other cases, defended the procedural steps the agencies took to develop and support the 2015 Rule. Having considered all of the public comments and relevant litigation positions, and the decisions of the Southern District of Texas and the Southern District of Georgia on related arguments, the agencies now agree with the reasoning of the Southern District of Texas and the Southern District of Georgia and conclude that the proposal for the 2015 Rule did not provide adequate notice of the specific distance-based limitations that appeared for the first time in the final rule. The agencies should have sought public comment on the distance-based limitations before including them in the final rule.

*b. The distance-based limitations were not supported by an adequate record*

The agencies are aware that litigants challenging the 2015 Rule alleged additional APA deficiencies, such as the lack of record support for the distance-based limitations inserted into the final rule without adequate notice. The agencies also recognize that the U.S. District Court for the Southern District of Georgia held that several provisions in the 2015 Rule, including certain distance-based limitations, were arbitrary and capricious in violation of the APA. *Georgia v. Wheeler*, No. 2:15-cv-079, 2019 WL 3949922, at \*29 (S.D. Ga. Aug. 21, 2019). 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. Having considered the public comments and relevant litigation positions, the decisions of the Southern District of Texas and Southern District of Georgia, and other decisions staying or enjoining the 2015 Rule, the agencies now conclude that the record for the 2015 Rule did not contain sufficient record support for the distance-based limitations that appeared for the first time in the final rule.

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*i. The 100-year floodplain limitation in (a)(6) and (a)(8) lacked adequate record support*

In the record for the 2015 Rule, the agencies included information supporting the conclusion that certain waters within a floodplain or riparian area have a connection to downstream waters. For example, the agencies stated that “[t]he body of literature documenting connectivity and downstream effects was most abundant for perennial and intermittent streams, and for riparian/floodplain wetlands.” 2015 TSD at 104; *see also id.* at 350. The agencies concluded that “science is clear that wetlands and open waters in riparian areas individually and cumulatively can have a significant effect on the chemical, physical, or biological integrity of downstream waters.” 80 FR 37089. The agencies attempted to substantiate the addition of the 100-year floodplain interval on these general scientific conclusions and their desire to “add the clarity and predictability that some commenters requested” to the definition of “neighboring.” 2015 TSD at 300. However, upon review of the record supporting the distance limitations in the 2015 Rule, the agencies now conclude that the record did not include adequate support for the specific floodplain interval—the *100-year* floodplain—included in the final rule, even though the agencies understood that “identifying the 100-year floodplain is an important aspect of establishing jurisdiction under the rule.” 80 FR 37081. The agencies’ conclusion is consistent with the finding of the U.S. District Court for the Southern District of Georgia that “the [2015] Rule’s use of the 100-year floodplain based on FEMA flood maps to define adjacent and case-by-case waters is arbitrary and capricious.” *Georgia v. Wheeler*, No. 2:15-cv-079, 2019 WL 3949922, at \*30 (S.D. Ga. Aug. 21, 2019).

In the proposed rule, the agencies referenced the 100-year floodplain in just one passage, stating:

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It should be noted that “floodplain” as defined in today’s proposed rule does not necessarily equate to the 100-year floodplain as defined by the Federal Emergency Management Agency (FEMA). However, the FEMA defined floodplain may often coincide with the current definition proposed in this rule. Flood insurance rate maps are based on the probability of a flood event occurring (e.g., 100-year floods have a 1% probability of occurring in a given year or 500 year-floods have a 0.2% probability of occurring in a particular year). *Flood insurance rate maps are not based on an ecological definition of the term “floodplain,” and therefore may not be appropriate for identifying adjacent wetlands and waters for the purposes of CWA jurisdiction.*

79 FR 22236 (emphasis added). Notwithstanding these important limitations identified in the proposal, in the final rule, the agencies relied on the availability of FEMA flood insurance rate maps depicting 100-year floodplains to substantiate the use of that interval. 80 FR 37083 (“[T]he agencies chose the 100-year floodplain in part because FEMA and NRCS together have generally mapped large portions of the United States, and these maps are publicly available, well-known and well-understood.”). While the agencies acknowledged the limited practical import of these maps for setting a floodplain interval in the rule, given that “much of the United States has not been mapped by FEMA and, in some cases, a particular map may be out of date and may not accurately represent existing circumstances on the ground,” they did not grapple with these limitations. 80 FR 37081. In explaining its finding that the agencies’ use of the 100-year floodplain to define “adjacent” and “case-by-case” jurisdictional waters in the 2015 Rule was arbitrary and capricious, the U.S. District Court for the Southern District of Georgia similarly noted the deficiencies in the FEMA floodplain maps, stating that “the Agencies’ justification for the 100-year floodplain interval was based on an incomplete and in some cases inaccurate flood-map scheme.” *Georgia v. Wheeler*, No. 2:15-cv-079, 2019 WL 3949922, at \*30 (S.D. Ga. Aug. 21, 2019).

Moreover, the agencies did not adequately explain or provide adequate record support for why the agencies believed that the 100-year floodplain interval was more appropriate than

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another floodplain interval—for instance, the 10-year floodplain, 50-year floodplain, or 500-year floodplain—in the definition of “neighboring” for (a)(6) and in (a)(8). In the proposal, the agencies indicated that they were considering a more-frequent flood recurrence interval than the 100-year flood (and, in turn, a typically smaller floodplain area than the 100-year floodplain) to implement the proposed “floodplain” definition. 79 FR 22209 (“When determining whether a water is located in a floodplain, the agencies will use best professional judgment to determine which flood interval to use (*for example, 10 to 20 year flood interval zone*).” (emphasis added)). Upon review of the record, the agencies now acknowledge that they did not materially explain or substantiate selection of the 100-year flood interval over, for example, the 10- to 20-year flood interval, or any other interval. Additionally, although the agencies’ technical support document for the 2015 Rule alluded to “the scientific literature, the agencies’ technical expertise and experience” as supporting the inclusion of the 100-year floodplain, 2015 TSD at 301, the agencies provided no further explanation for why the 100-year floodplain and not another floodplain interval was appropriate. Nor did the agencies adequately describe why such an interval was appropriate for setting the threshold for *per se* jurisdictional coverage as a “navigable water,” rather than a case-specific coverage. Using a 100-year floodplain interval instead of a 10-year or 50-year interval would typically subject the waters and wetlands within a larger landmass to *per se* regulation. The Southern District of Georgia similarly found that “[w]hile the [2015] Rule provides reasons for using floodplains generally to define jurisdiction, it does not provide any other basis for choosing a 100-year interval as opposed to a different interval (such as a 50-year or 200-year floodplain).” *Georgia v. Wheeler*, No. 2:15-cv-079, 2019 WL 3949922, at \*30 (S.D. Ga. Aug. 21, 2019).

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The agencies' conclusion today echoes court decisions that have reviewed the 2015 Rule on the merits and at a preliminary stage. *See, e.g., Id.* at \*30; *In re EPA*, 803 F.3d at 807 (“Even assuming, for present purposes, as the parties do, that Justice Kennedy’s opinion in *Rapanos* represents the best instruction on the permissible parameters of ‘waters of the United States’ as used in the Clean Water Act, it is far from clear that the new Rule’s distance limitations are harmonious with the instruction.”).

ii. *The 1,500 foot distance limitation from the ordinary high water mark of an (a)(1)-(a)(5) water in (a)(6) lacked adequate record support*

In the 2015 Rule, the agencies concluded as a general matter that physical proximity between two waters was a critical—if not the most critical—factor to determine whether those two waters had a nexus. “The science is clear that a water’s proximity to downstream waters influences its impact on those waters. The Science Report states, ‘[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.’ Generally, waters that are closer to a jurisdictional water are more likely to be connected to that water than waters that are farther away.” 80 FR 37089 (quoting the Connectivity Report at ES–11). These conclusions formed the principal record basis for the inclusion of a distance limitation in the definition of “neighboring.” The agencies stated 1,500 feet from the ordinary high water mark of an (a)(1) through (a)(5) water and within the 100-year floodplain of such waters would be categorically jurisdictional “to protect vitally important waters while at the same time providing a practical and implementable rule.” 2015 TSD at 351. However, the agencies now acknowledge that they did not provide sufficient record support or an adequate explanation for selecting 1,500 feet, as compared to another distance, from the

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ordinary high water mark of an (a)(1) through (a)(5) water, 1,500 feet from the high tide line of a category (a)(1) through (a)(3) “jurisdictional by rule” water, or 1,500 feet from the ordinary high water mark of the Great Lakes as the boundary within which all wetlands and waters would be jurisdictional categorically. Indeed, the agencies did not explain why the 1,500-foot distance, as compared to 500 feet, 1,000 feet, or another distance, was the appropriate demarcation between categorically jurisdictional waters and those waters that could be jurisdictional on a case-specific basis under the 2015 Rule. The agencies thereby subjected waters and wetlands within a larger landmass to *per se* regulation compared to other smaller distances that may have been selected. For these reasons, the agencies conclude that this distance limitation in the 2015 Rule lacked adequate record support. The agencies’ conclusion is consistent with the U.S. District Court for the Southern District of Georgia’s holding that “the 1,500-foot limit for adjacent waters is arbitrary and capricious because the Agencies did not give reasons beyond mere conclusory statements for why this limit was selected” and that “the Agencies failed to give specific reasons grounded in science and the significant-nexus analysis under the CWA for why this [1,500-foot] limit was chosen as opposed to any other distance.” *Georgia v. Wheeler*, No. 2:15-cv-079, 2019 WL 3949922, at \*30 (S.D. Ga. Aug. 21, 2019). In concluding that the 1,500-foot distance limitation in the 2015 Rule lacked adequate record support, the agencies are not modifying their inherent rulemaking authority to draw a line between jurisdictional and non-jurisdictional waters on the “continuum” “between open waters and dry land.” *Riverside Bayview*, 474 U.S. at 132. Rather, the agencies are simply acknowledging that their prior rulemaking did not include sufficient record support and justification to adequately satisfy the procedural mandates of the APA.

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iii. *The 4,000-foot distance limitation from the high tide line or ordinary high water mark of any (a)(1) through (a)(5) water in (a)(8) lacked adequate record support*

For waters that were not jurisdictional categorically under the 2015 Rule, the rule required a case-specific significant nexus analysis if those waters are within 4,000 feet of the high tide line or ordinary high water mark of any (a)(1) through (a)(5) water. The agencies supported their selection of the 4,000-foot outer boundary with general statements about the science, the goals of the Act, and administrative convenience. *See* 2015 TSD at 358 (“[D]ue to the many functions that waters located within 4,000 feet of the high tide line of a traditional navigable water or the territorial seas provide and their often close connections to the surrounding navigable in fact waters, science supports the agencies’ determination that such waters are rightfully evaluated on a case-specific basis for significant nexus to a traditional navigable water or the territorial seas.”); *see also id.* at 357 (stating that the agencies concluded that this limitation would “sufficiently capture for analysis those waters that are important to protect to achieve the goals of the Clean Water Act”). The agencies also stated that, in their experience, “the vast majority of waters where a significant nexus has been found, and which are therefore important to protect to achieve the goals of the Act, are located within the 4,000 foot boundary.” 80 FR 37089; *see also* 2015 EA/FONSI at 22-23 (“[T]he vast majority of wetlands with a significant nexus are located within the 4,000 foot boundary.”). Upon reconsideration of this part of the 2015 Rule, the agencies now conclude that they did not provide an adequate record basis or adequate explanation for the selection of the 4,000-foot distance limitation in (a)(8). Indeed, the agencies provided no explanation for why 4,000 feet—and not another distance closer to or farther from a category (a)(1) through (a)(5) water—is the appropriate limitation for case-specific jurisdictional



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determinations. The agencies also provided insufficient explanation for how they determined that the vast majority of waters where a significant nexus has been found are located within the 4,000 foot boundary, citing in subsequent litigation only to general statements about the agencies' experience in conducting jurisdictional determinations and an analysis of 199 jurisdictional determinations<sup>51</sup> that was not made available for public review and comment.<sup>52</sup> The agencies

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<sup>51</sup> U.S. EPA. Supporting Documentation: Analysis of Jurisdictional Determinations for Economic Analysis and Rule (Docket ID: EPA-HQ-OW-2011-0880-20877), *available at* <https://www.regulations.gov/document?D=EPA-HQ-OW-2011-0880-20877>.

<sup>52</sup> In the SNPRM, the agencies described and sought comment on the 199 JD analysis and six case studies drawn from it that were analyzed as part of the 2015 rulemaking. 83 FR 32244-45. The 199 JD analysis concluded that, of the JDs analyzed, “four sites included wetlands or waters that are located further than 4,000 feet from a jurisdictional tributary,” two of which were jurisdictional under the pre-existing regulatory regime. The agencies also concluded that all four of these sites would “not be jurisdictional” under the 2015 Rule. Upon further review of the 199 JD analysis and the public comments received, the agencies now conclude that any reliance on the 199 JD analysis to support setting a distance limit of 4,000 feet was misplaced and provided an insufficient record basis for this limitation. First, the analysis considered only one distance limit: 4,000 feet. It made no attempt to determine the change in jurisdiction that would result if a different numeric limitation had been selected or to explain why 4,000 feet was more appropriate than another numeric limitation (e.g., 3,000 feet) for capturing the majority of waters likely to possess a significant nexus. Second, the analysis did not involve performing a case-specific review of jurisdiction under the 2015 Rule, but rather entailed applying the 2015 Rule’s parameters to facts contained in existing jurisdictional determinations conducted under the pre-existing regulatory regime. The agencies now conclude that this approach limits the utility of this analysis for determining appropriate distance limits under the criteria of the 2015 Rule. Third, the agencies considered only the change in jurisdiction of waters *beyond 4,000 feet*, even though the analysis contained certain examples where the agencies concluded that the 2015 Rule likely modified jurisdiction over waters *within 4,000 feet* that were deemed not jurisdictional under the pre-existing regulatory regime. *See* AR-20877 at 2 (2004-001914); *id.* (LRC-2015-31); *id.* (LRE-1998-1170040-A14); *id.* at 3 (MVM-2014-460); *id.* at 4 (NAE-2012-1813); *id.* (NAO-2014-2269). The agencies did not explain the importance, if any, of the estimated increase in jurisdiction among these six JDs as part of using this analysis. Lastly, while the agencies explained how this analysis was conducted, the agencies did not fully explain how they used or relied upon this analysis. To be sure, in its brief filed in the U.S. Court of Appeals for the Sixth Circuit, the United States stated that “Based on [the 199 JD] analysis and their general experience implementing the Act since *Rapanos*, the Agencies concluded that setting a distance limit of 4,000 feet would encompass those waters that are most likely to have a significant nexus

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now conclude that this distance limitation was procedurally deficient and based on an insufficient record.

*iv. The agencies conclude the lack of adequate record support for the distance limitations warrants repeal*

The agencies conclude that the procedural errors and lack of adequate record support associated with the distance-based limitations described in this section are a sufficient basis, standing alone, to warrant repeal of the 2015 Rule. The distance limitations were a central aspect of the 2015 Rule, and necessary for the rule to accomplish its goal of increasing consistency and predictability. The agencies have determined that the notice and record deficiencies associated with the distance limitations are fundamental flaws in central provisions of the 2015 Rule, and thus the agencies have concluded that it would not be appropriate to remediate these errors merely by removing the unsupported limitations, as this approach would not maintain consistency with the agencies' stated purposes and findings in the 2015 Rule. The agencies are considering the possible use of distance limitations in the separate rulemaking to establish a proposed revised definition of "waters of the United States." *See, e.g.*, 84 FR 4189 (requesting comment on potential interpretations of adjacency, such as including a distance limit to establish the boundaries between Federal and State waters). Pending any final action on the separate rulemaking, the agencies conclude that this final rule will provide greater certainty by reinstating nationwide a longstanding regulatory framework that is familiar to and well-understood by the agencies, States, Tribes, local governments, regulated entities, and the public. For these reasons,

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while also providing the certainty sought by the public." Br. at 123. But the agencies did not provide an adequate explanation as to how they used or relied upon this analysis in the 2015 Rule's preamble, technical support document, response to comments document, or economic analysis.

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and in response to the remand of the 2015 Rule from the U.S. District Court for the Southern District of Texas, including its concern that the procedural errors altered the scope of CWA jurisdiction, and the remand of the U.S. District Court for the Southern District of Georgia, including its concerns with the substantive and procedural adequacy of the distance-based limitations in the final rule, the agencies repeal the 2015 Rule.

In summary, the deficiencies of the 2015 Rule stem in part from the agencies' application of an overly broad significant nexus standard and their inadequate consideration of section 101(b) of the Act in developing the 2015 Rule. In particular, the agencies find that the broad interpretation of Justice Kennedy's significant nexus standard adopted in the 2015 Rule was a foundational error that propagated throughout the 2015 Rule, misinforming the rule's definitions of "significant nexus," "similarly situated," "in the region," "tributary," "adjacent," and "neighboring." As a result, these flaws pervaded the 2015 Rule's entire structure and scope and resulted in a definition of "waters of the United States" that covered waters outside the limits on federal CWA jurisdiction intended by Congress and reflected in Supreme Court cases, in addition to raising significant constitutional questions. The agencies have determined that the substantial problems that are discussed throughout Section III, when considered collectively in the context of the 2015 Rule, were both fundamental and systemic and cannot be addressed individually. Instead, the agencies conclude that the 2015 Rule must be repealed in its entirety.

#### **IV. Basis for Restoring the Pre-Existing Regulations**

In the NPRM and SNPRM, the agencies proposed to recodify the pre-2015 regulations to provide regulatory certainty for the agencies, their co-regulators, regulated entities, and the public. *See, e.g.*, 82 FR 34899; 83 FR 32237. The agencies explained that this rulemaking was "intended to ensure certainty as to the scope of CWA jurisdiction on an interim basis as the

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agencies proceed to engage in . . . [a] substantive review of the appropriate scope of ‘waters of the United States.’” 82 FR 34901. The agencies expressly sought comment on whether recodifying the prior regulations would provide for greater regulatory certainty, *see* 83 FR 32240, and also solicited comment on “whether it is desirable and appropriate to re-codify [the pre-existing regulations] as an interim first step pending a substantive rulemaking to reconsider the definition of ‘waters of the United States.’” 82 FR 34903.

The agencies received a significant number of comments discussing the impact of this rulemaking on regulatory certainty. Many commenters asserted that the 2015 Rule failed to increase predictability and consistency under the CWA, instead creating confusion and uncertainty. Some commenters stated that the 2015 Rule broadened the scope of federal jurisdiction to include waters that were previously not covered under the CWA, which the commenters argued further contributes to uncertainty and confusion. Other commenters found that the 2015 Rule increased regulatory certainty compared to the pre-existing regulatory regime; these commenters asserted that recodifying the pre-existing regulations would thus reduce regulatory certainty. After a thorough review of the comments received on the NPRM and SNPRM, the agencies conclude that this final rule will provide greater regulatory certainty and national consistency while the agencies consider public comments on the proposed revised definition of “waters of the United States.” *See* 84 FR 4154 (Feb. 14, 2019).

This final rule returns implementation of the definition of “waters of the United States” under the CWA to the regulatory regime that existed for many years before the agencies issued the 2015 Rule and that still exists in more than half the States at the time of the publication of this final rule. The agencies have maintained separate regulations defining the statutory term “waters of the United States,” but the text of the regulations have been virtually identical since the Corps’

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and the EPA's 1986 and 1988 rulemakings, respectively. *See* 51 FR 41206 (Nov. 13, 1986)

(revising Corps regulations to align more closely with EPA regulations defining “waters of the United States”); *see also* 53 FR 20764 (June 6, 1988) (including language from the preamble to the Corps' 1986 regulations to provide “clarity and consistency” regarding the EPA's regulatory definition of “waters of the United States”). Following the promulgation of the 2015 Rule, the agencies have continued to implement those pre-existing regulations (commonly referred to as the “1986 regulations”) in a shifting patchwork of States subject to federal court stays of and injunctions against the 2015 Rule. In response to court orders regarding the agencies' “waters of the United States” rulemakings, the EPA has maintained a webpage with a map reflecting which regulatory regime is applicable in each State (<https://www.epa.gov/wotus-rule/definition-waters-united-states-rule-status-and-litigation-update>).

For over 30 years, challenges to the agencies' application of the 1986 regulations have yielded a significant body of case law that has helped to define the scope of the agencies' CWA authority and shaped the agencies' approach to implementing the pre-2015 regulations. In particular, the Supreme Court's decisions in *SWANCC* and *Rapanos* inform the agencies' implementation of the 1986 regulations. After those decisions, the agencies issued interpretive guidance in 2003 and 2008 that is now longstanding and familiar.<sup>53</sup> As such, though the text of the 1986 regulations has remained largely unchanged,<sup>54</sup> the agencies have refined their application of the 1986 regulatory text consistent with Supreme Court decisions and informed by

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<sup>53</sup> Joint Memorandum, 68 FR 1991, 1995 (Jan. 15, 2003) (providing clarifying guidance regarding the *SWANCC* decision); U.S. EPA & U.S. Army Corps of Engineers, Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States & Carabell v. United States* (Dec. 2, 2008), available at [https://www.epa.gov/sites/production/files/2016-02/documents/cwa\\_jurisdiction\\_following\\_rapanos120208.pdf](https://www.epa.gov/sites/production/files/2016-02/documents/cwa_jurisdiction_following_rapanos120208.pdf).

<sup>54</sup> In 1993, the agencies added an exclusion for prior converted cropland to the definition of “waters of the United States.” *See* 58 FR 45008 (Aug. 25, 1993).

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the agencies' guidance and their technical experience implementing the Act pursuant to those pre-existing regulations.

The agencies have been applying the 1986 regulations consistent with the Supreme Court's decisions in *SWANCC* and *Rapanos* and informed by the agencies' corresponding guidance for over a decade. The agencies, their co-regulators, and the regulated community are thus familiar with the pre-2015 Rule regulatory regime and have amassed significant experience operating under those pre-existing regulations. Agency staff in particular have developed significant technical expertise in implementing the 1986 regulations. For example, between June 2007 and August 2019, the Corps issued 220,169 approved jurisdictional determinations under the pre-2015 Rule regulatory regime.<sup>55</sup>

While some commenters agreed that returning to the pre-2015 Rule regulatory regime would promote regulatory certainty, other commenters asserted that recodifying the pre-existing regulations would reduce regulatory certainty by reinstating the prior regulatory regime's case-specific significant nexus analysis for certain jurisdictional determinations, which the commenters characterized as inconsistent and burdensome. In addition, some commenters argued that the agencies' proposal to repeal the 2015 Rule and recodify the pre-existing regulations disregards the substantial uncertainty, confusion, and inconsistencies under the prior regime that the agencies had sought to address in developing the 2015 Rule.

The agencies acknowledge that in issuing the 2015 Rule, the agencies intended to "make the process of identifying waters protected under the CWA easier to understand." 80 FR 37054, 37057 (June 29, 2015). Yet, as explained in Section III.C. of this notice, the agencies find that the 2015 Rule exceeded the agencies' statutory authority and that the agencies did not adequately

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<sup>55</sup> Data from the U.S. Army Corps of Engineers' Operation and Maintenance Business Information Link, Regulatory Module (ORM2) database, May 2019.

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consider and accord due weight to Congress' policy directive in CWA section 101(b) in promulgating the 2015 Rule. The agencies have concluded that, as a result of those fundamental issues, the 2015 Rule must be repealed. At the same time, the agencies recognize that the pre-existing regulations pose certain implementation challenges, particularly because significant nexus analyses continue to be required for certain waters consistent with the agencies' still-effective *Rapanos* Guidance. Following the Supreme Court's decisions in *SWANCC* and *Rapanos*, which the agencies note did not vacate or remand the 1986 regulations, the Corps published a guidebook to assist district staff in issuing approved jurisdictional determinations.<sup>56</sup> In particular, the guidebook outlines procedures and documentation used to support significant nexus determinations. This guidebook has been and continues to be publicly available and will continue to serve as a resource in issuing jurisdictional determinations under this final rule.

In May 2019, the U.S. District Court for the Southern District of Texas 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 draft of the Connectivity Report, which served as the technical basis for the final rule. *See Texas v. EPA*, No. 3:15-cv-162, 2019 WL 2272464 (S.D. Tex. May 28, 2019). As the court noted, "the Final Connectivity Report was the technical basis for the Final Rule and was instrumental in determining what changes were to be made to the definition of the phrase [the

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<sup>56</sup> U.S. Army Corps of Engineers Jurisdictional Determination (JD) Form Instructional Guidebook, available at <https://www.usace.army.mil/Missions/Civil-Works/Regulatory-Program-and-Permits/Related-Resources/CWA-Guidance/>.

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waters of the United States’].” *Id.* at 12; *see also* 80 FR 37057 (explaining that the Connectivity Report “provides much of the technical basis for [the] [R]ule.”). The court found that, because the Connectivity Report was an important basis for the 2015 Rule, interested parties should have had an opportunity to comment on the final version of the Report. Recodifying the prior regulations restores a regulatory regime that is not based on the conclusions in the Connectivity Report and remedies the infirmities that the Southern District of Texas and the Southern District of Georgia identified in the 2015 Rule, including the lack of notice for the distance-based limitations in the definition of “adjacent” waters and other procedural and substantive deficiencies in the rule.

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

A number of commenters supported repealing the 2015 Rule and recodifying the prior regulations due to the commenters’ concerns that litigation over the 2015 Rule creates significant regulatory uncertainty. Commenters noted that the 2015 Rule litigation has led to different regulatory regimes being in effect in different States, thereby burdening regulated entities that operate in multiple States. In contrast, some commenters asserted that regulatory uncertainty associated with legal challenges to the 2015 Rule is not an adequate basis for this rulemaking. Several of these commenters argued that the agencies have failed to consider that this rulemaking could also generate litigation and contribute to uncertainty.



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For periods of time over the last four years, the agencies have applied different regulatory regimes throughout the country as the result of preliminary injunctions against the 2015 Rule. By reinstating the 1986 definition of “waters of the United States” nationwide, this final rule will alleviate inconsistencies, confusion, and uncertainty arising from the agencies’ application of two different regulatory regimes across the country. The agencies recognize that this final rule may itself be subject to legal challenges, and that this gives rise to the possibility of a return to the application of different regulatory definitions in different States. Yet, the agencies cannot predict the outcome of any future challenges, and the possibility of courts enjoining this rule should not preclude the agencies from taking this final action. At this time, due to preliminary injunctions against the 2015 Rule, it is only by finalizing this rule to codify the pre-existing regulations that the agencies can return to implementing a uniform definition of “waters of the United States” nationwide.

Though this final rule is intended to be the first step in a comprehensive, two-step rulemaking process, the agencies acknowledge that they cannot prejudge the outcome of the separate rulemaking on a proposed revised definition of “waters of the United States.” Regardless of whether the agencies finalize a new definition, the agencies conclude that restoring the pre-existing regulations is appropriate because, as implemented, those regulations adhere more closely than the 2015 Rule to the jurisdictional limits reflected in the statute and case law. For example, the agencies find that the prior regulatory regime is consistent with the agencies’ view that Justice Kennedy did not intend for the significant nexus standard to be applied in a manner that would result in assertion of jurisdiction over waters deemed non-jurisdictional in *SWANCC*. Moreover, by leaving certain types of isolated waters and certain ephemeral streams under the sole jurisdiction of States, the pre-existing regulatory framework also provides a more

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appropriate balancing of CWA sections 101(a) and 101(b). With this final rule, the regulations defining “waters of the United States” will be those portions of 33 CFR part 328 and 40 CFR parts 110, 112, 116, 117, 122, 230, 232, 300, 302, and 401 as they existed immediately prior to the 2015 Rule’s amendments.<sup>57</sup> The agencies will continue to implement those regulations informed by applicable agency guidance documents and consistent with Supreme Court decisions and longstanding agency practice. Given the longstanding nature of the pre-2015 Rule regulatory framework, its track record of implementation and extensive body of related case law, and thus its familiarity to regulators, the regulated community and other stakeholders, the agencies conclude that this final rule to recodify the 1986 regulations will provide greater regulatory certainty and nationwide consistency while the agencies consider public comments on the proposed revised definition of “waters of the United States.” *See* 84 FR 4154.

## **V. Alternatives to the Final Rule**

After thoroughly considering comments received on the NPRM and SNPRM regarding alternatives to this action, the agencies conclude that repealing the 2015 Rule and restoring the pre-2015 Rule regulatory regime is the most effective and efficient way to remedy the fundamental and systemic flaws of the 2015 Rule, achieve the objectives of the Act, and provide

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<sup>57</sup> The agencies observe that this final rule to repeal the 2015 Rule and restore the prior regulations is consistent with the broadly accepted practice of courts to reinstate a prior rule where the current regulation is invalid. *See, e.g., Paulsen v. Daniels*, 413 F. 3d 999, 1008 (9th Cir. 2005) (“The effect of invalidating an agency rule is to reinstate the rule previously in force.”); *Action on Smoking & Health v. Civil Aeronautics Bd.*, 713 F.2d 795, 797 (D.C. Cir. 1983) (“Thus, by vacating or rescinding the [rule], the judgment of this court had the effect of reinstating the rules previously in force.”). Indeed, were a court to find the 2015 Rule unlawful, the presumptive remedy would be to reinstate the pre-existing regulations. While the agencies recognize and fully acknowledge that their authority differs from that of a federal court, the agencies find that this common judicial practice further illustrates the reasonableness of the agencies’ decision to replace the unlawful 2015 Rule with the prior regulations.

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regulatory certainty as the agencies consider public comments on a proposed revised definition of “waters of the United States.” *See* 84 FR 4154.

Under the APA, a reviewing court will “hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. 706(2)(A). In promulgating a rule to repeal existing regulations, agencies must address and consider alternative ways of achieving the relevant statute’s objectives and must provide adequate reasons for abandoning those alternatives. *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 48 (1983). Agencies are not required, however, to consider “all policy alternatives in reaching a decision.” *Id.* at 50-51. Indeed, an agency rulemaking “cannot be found wanting simply because the agency failed to include every alternative device and thought conceivable by the mind of man . . . regardless of how uncommon or unknown that alternative may have been.” *Id.* (quoting *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 551 (1978)).

The agencies considered alternatives to the final rule throughout the rulemaking process. In the preamble to the NPRM, the agencies explained that they considered alternatives to the proposed action, including simply withdrawing or staying the 2015 Rule, but did not identify any alternatives that would provide stability as effectively and efficiently as the proposed action pending the conclusion of the agencies’ two-step rulemaking process. *See* 82 FR 34899, 34903 (July 27, 2017). Similarly, in the preamble to the SNPRM, the agencies explained that they considered several alternatives to the proposed action, including revising specific elements of the 2015 Rule, issuing revised implementation guidance, and further extending the applicability date of the 2015 Rule. *See* 83 FR 32227, 32249 (July 12, 2018). The agencies then requested comments on “whether any of these alternative approaches would fully address and ameliorate

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potential deficiencies in and litigation risk associated with the 2015 Rule.” *Id.* The agencies also requested comment on “whether this proposal is the best and most efficient approach to address the potential deficiencies [with the 2015 Rule] identified in this notice and to provide the predictability and regulatory certainty that alternative approaches may not provide.” *Id.*

The agencies received comments suggesting four categories of alternatives to the agencies’ proposal to repeal the 2015 Rule and recodify the pre-existing regulations. Commenters suggested (1) revising the 2015 Rule; (2) repealing the 2015 Rule and then maintaining or revising the pre-2015 Rule regulatory regime; (3) repealing the 2015 Rule but not recodifying the pre-existing regulations; and (4) pursuing alternative actions to rulemaking.

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

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a rule that exceeds the agencies' statutory authority—especially a rule of this magnitude—pending a separate rulemaking process.

Similarly, the agencies find that repealing the 2015 Rule, reinstating the pre-2015 Rule regulatory regime, and either maintaining that regime or using it as a basis for further rulemaking would provide less regulatory certainty than the agencies' current two-step rulemaking approach. The agencies find that reinstating the longstanding and familiar pre-2015 Rule regulatory regime will provide regulatory certainty in this interim period, but they also acknowledge that the pre-existing regulations pose certain implementation difficulties. The agencies thus find that proceeding through the agencies' two-step rulemaking process is preferable to maintaining the “familiar, if imperfect” pre-existing regulations. *See In re EPA*, 803 F.3d at 808. If the agencies do not finalize a new definition of “waters of the United States” as part of their two-step rulemaking process or if a new definition is overturned by a court in the future, it is appropriate for the pre-2015 Rule regulatory regime to remain in place because, as implemented, it adheres more closely than the 2015 Rule to the limits imposed by the Act and is longstanding and familiar. The agencies conclude that it is appropriate to codify the pre-existing regulations as an interim step pending the agencies' separate rulemaking to establish a definition of “waters of the United States” that better effectuates the language, structure, and purposes of the Act.

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

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

## **VI. Economic Analysis**

The agencies conducted an economic analysis (EA) for the proposed rule in 2017 to provide information on the potential changes to the costs and benefits of various CWA programs that could result from a change in the number of positive jurisdictional determinations when repealing the 2015 Rule and recodifying the pre-existing regulations. The agencies have since updated their analysis for both the proposed rule to revise the definition of “waters of the United States” and for this final rule. The agencies note that the final decision to repeal the 2015 Rule and recodify the pre-existing regulations in this rulemaking is not based on the information in the agencies’ economic analysis. *See, e.g., NAHB*, 682 F.3d at 1039–40.

Filings in litigation against the 2015 Rule and comments submitted in response to the 2017 proposed repeal of that rule have critiqued the methods used to estimate the costs and benefits of these actions. After assessing the input provided, the agencies have concluded that significant

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flaws in the economic analyses supporting the 2015 Rule and the 2017 proposed repeal led to likely overstatements of costs and benefits. The agencies have therefore made changes to their methodologies in support of this final rule. As a result of these changes, the economic analysis for this final rule explores in greater depth the role the States play in regulating their water resources, corrects and updates the wetland valuation methodology, and more clearly acknowledges the uncertainties in the agencies' calculations.

The most significant reason that costs and benefits of the economic analyses accompanying the 2015 Rule and the 2017 proposed repeal may have been overestimated is that they did not consider the different ways in which State governments could react to a change in CWA jurisdiction. Both analyses assumed that States always adjust regulatory regimes to match the federal jurisdictional level in response to a change in federal jurisdiction. The analysis for this final rule responds to the concerns raised by commenters by incorporating a more balanced and robust characterization of possible State responses to a change in jurisdiction and evaluates a series of scenarios that quantify the sensitivity of the costs and benefits to varying assumptions about State responses. These changes in analytic approach build on the agencies' detailed review of State programs and the literature on environmental federalism.

As described in the EA for this final rule and in the EA for the "Proposed Revised Definition of 'Waters of the United States,'" December 14, 2018, the agencies' revised analysis indicates that 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 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 or more broadly than the 2015 Rule, independently of the scope of the federal CWA,

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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, and therefore the costs and benefits presented in the analyses of the 2015 Rule and its proposed repeal may have been overstated for those States. 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 a 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 “fiscal 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 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. In considering a number of scenarios in which States may retain regulatory oversight no longer required by the federal regulations implementing the CWA, the revised analysis lowers the estimated cost savings and forgone benefits of final rule.



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Litigants and commenters on the 2015 Rule and 2017 proposed repeal, respectively, also identified concerns with the methods the agencies used for the 2015 Rule to value wetlands which the agencies described qualitatively in the 2017 proposal. Application of the agencies' wetlands valuation studies on a national level led to potentially inflated willingness to pay (WTP) estimates and thus an overestimate of the expected benefits from the 2015 Rule. The 2015 analysis relied on estimates of WTP for wetland preservation or expansion from ten studies, but as discussed in the EA for this final rule, the agencies have concluded that only five of the ten studies relied upon satisfy standard benefit transfer selection criteria established in the EPA's own guidelines.

To correct for the prior use of inappropriate studies and concerns with benefit transfer methods used for the 2015 Rule, the agencies developed more appropriate methodologies to estimate the value of forgone wetland benefits that could arise as a result of this final rule. For example, the agencies applied a meta-analysis of wetland valuation studies, which combined and synthesized the results from multiple valuation studies to estimate a new transfer function. Meta-analyses control for the confounding attributes of underlying studies, so this analysis was able to make use of a larger number of studies than the agencies could use for the unit value benefit transfer in the analysis supporting the 2015 Rule.

Even after correcting the approaches taken to estimate State responses and value wetlands, the agencies identified a number of sources of uncertainty in the economic analyses of the 2015 Rule and 2017 proposed repeal. For example, in assessing categories of waters that the 2015 Rule made newly jurisdictional, the agencies did not remove waters subject to that rule's expanded set of exclusions. *See* 2015 Rule Economic Analysis at 8. The economic analysis in support of the 2015 Rule and its proposed repeal therefore likely considered the costs and

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benefits of regulating waters that would have been subject to exclusions and consequently likely overestimated the costs and benefits of the rule.

Similarly, the estimated benefits and costs from the 2015 Rule and the 2017 proposed repeal may have incorrectly assumed that the percentage increase in costs and benefits of increased positive jurisdictional determinations was equal to the percentage increase in regulated activities. The analyses assumed that the 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.

While the agencies have striven to make the economic analysis supporting this final rule as transparent and accurate as possible, their goal in doing so is solely for informational purposes. The agencies are repealing the 2015 Rule to ensure that they do not exceed their statutory authority, not based on analyses of the economic impacts of the 2015 Rule. The economic analyses do, however, provide some helpful information about the 2015 Rule and its repeal. The agencies developed several scenarios using different assumptions about potential State regulation of waters to provide a range of costs and benefits. Under the scenario that assumes the fewest number of States regulating newly non-jurisdictional waters, the agencies estimate the final rule would produce annual avoided costs ranging between \$116 and \$174 million and annual forgone benefits ranging between \$69 to \$79 million. When assuming the greatest number of States are already regulating newly non-jurisdictional waters, the agencies estimate there would be avoided annual costs ranging from \$61 to \$104 million and annual forgone benefits are estimated to be approximately \$37 to \$39 million. Under the scenario that assumes no States will regulate newly non-jurisdictional waters, an outcome the agencies believe would be unlikely, the agencies

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estimate the final rule would produce annual avoided costs ranging from \$164 to \$345 million and annual forgone benefits ranging from \$138 to \$149 million.

## **VII. The Effect of this Rule and the Agencies' Next Steps**

In defining the term “waters of the United States” under the CWA, Congress gave the agencies broad discretion to articulate reasonable limits on the meaning of that term, consistent with the Act’s text and its policies as set forth in CWA section 101. *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). In light of the substantial litigation regarding the 2015 Rule and based on the agencies’ experience and expertise in administering the definition of “waters of the United States” under the CWA under the prior regulations, the agencies proposed to repeal the 2015 Rule and put in place the pre-existing regulations. This proposal was based on the concerns articulated in the NPRM and SNPRM, and the agencies’ concern that there may be significant disruption to the implementation of the Act and to the public, including regulated entities, if the 2015 Rule were vacated in part. With this final rule, the agencies exercise their discretion and policy judgment and repeal the 2015 Rule permanently and in its entirety because the agencies believe that this approach is the most appropriate means to remedy the deficiencies of the 2015 Rule identified above, address the extensive litigation surrounding the 2015 Rule, and restore a regulatory process that has been in place for years.

The 2015 Rule amended longstanding regulations contained in portions of 33 CFR part 328 and 40 CFR parts 110, 112, 116, 117, 122, 230, 232, 300, 302, and 401 by revising, removing, and re-designating certain paragraphs and definitions in those regulations. With this final rule,

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the agencies repeal the 2015 Rule and restore the regulations in existence immediately prior to the 2015 Rule. As such, the regulatory definitions of “waters of the United States” in effect beginning on the effective date of this final rule are those portions of 33 CFR part 328 and 40 CFR parts 110, 112, 116, 117, 122, 230, 232, 300, 302, and 401 as they existed immediately prior to the 2015 Rule’s amendments. *See, e.g., API v. EPA*, 883 F.3d 918, 923 (D.C. Cir. 2018) (regulatory criterion in effect immediately before enactment of criterion that was vacated by the court “replaces the now-vacated” criterion); *see also supra* at note 58.

With this final rule, the agencies recodify the prior regulations in the CFR, which avoids creating a regulatory vacuum with the repeal of the 2015 Rule, and the agencies need not consider the potential consequences of such a regulatory vacuum in light of this. The agencies will apply the prior definition consistent with Supreme Court decisions and longstanding practice, as informed by applicable guidance documents, training, and experience, while the agencies consider public comments on the proposed revised definition of “waters of the United States.” *See* 84 FR 4154.

The current regulatory scheme for determining CWA jurisdiction is “familiar, if imperfect,” *In re EPA*, 803 F.3d at 808, and the agencies and regulated public have significant experience operating under the longstanding regulations that were replaced by the 2015 Rule. Apart from a roughly six-week period when the 2015 Rule was in effect in 37 States and the period since the August 16, 2018 U.S. District Court for the District of South Carolina decision enjoining the applicability date rule nationwide, which placed the 2015 Rule into effect in 26 States (at that

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time), the District of Columbia, and U.S. Territories, the agencies have continued to implement the pre-existing regulatory definitions in more than half of the States.

The agencies acknowledge that the pre-existing regulations have been criticized and their application has been narrowed by various legal decisions, including *SWANCC* and *Rapanos*; however, the longstanding nature of the regulatory framework and its track record of implementation makes it preferable at this time. The agencies believe that, until a new definition is completed, it is important to retain the regulations that have been implemented for many years rather than the 2015 Rule, which has been and continues to be mired in litigation and recently was remanded back to the agencies for extending the agencies' delegated authority beyond the limits of the CWA and violating the APA when promulgating it.

Restoration of the prior regulatory text in the CFR, interpreted in a manner consistent with Supreme Court decisions, and informed by applicable agency guidance documents and longstanding practice, will ensure that the scope of CWA jurisdiction will be administered in the same manner as it has been in those States where the 2015 Rule has been enjoined and as it was for many years prior to the promulgation of the 2015 Rule. To be clear, the agencies are not finalizing a revised definition of "waters of the United States" in this specific rulemaking different from the definition that existed immediately prior to the 2015 Rule. The agencies also are not finalizing this rule in order to fill a regulatory gap because no such gap exists today. *See* 83 FR 5200, 5204. Rather, the agencies solely repeal the 2015 amendments to the above-referenced portions of the CFR and recodify the pre-existing regulatory text as it existed immediately prior to the 2015 Rule's amendments.

The agencies recognize that approved jurisdictional determinations (AJDs) issued under the 2015 Rule could potentially be affected by this final rule. An AJD is a document issued by the

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Corps stating the presence or absence of “waters of the United States” on a parcel. *See* 33 CFR 331.2. As a matter of policy, AJDs are valid for a period of five years from the date of issuance unless new information warrants revision before the expiration date or a District Engineer identifies specific geographic areas with rapidly changing environmental conditions that merit re-verification on a more frequent basis. *See* U.S. Army Corps of Engineers, Regulatory Guidance Letter No. 05–02, § 1(a), p. 1 (June 2005) (RGL 05-02). Additionally, the possessor of a valid AJD may request the Corps reassess a parcel and grant a new AJD before the five-year expiration date. An AJD constitutes final agency action pursuant to the agencies’ definition of “waters of the United States” at the time of its issuance, *see Hawkes*, 136 S. Ct. at 1814, and therefore, this final rule does not invalidate an AJD that was issued under the 2015 Rule. As such, an AJD issued under the 2015 Rule will remain valid until its expiration date unless one of the criteria for revision is met under RGL 05-02, or the recipient of such an AJD requests a new AJD be issued under the pre-2015 regulations and guidance pursuant to this final rule.

Preliminary jurisdictional determinations (PJDs), however, are merely advisory in nature, make no legally binding determination of jurisdiction, and have no expiration date. *See* 33 CFR 331.2; *see also* U.S. Army Corps of Engineers, Regulatory Guidance Letter No. 16–01 (October 2005). As such, PJDs are unaffected by this final rule because they do not definitively state whether there are “waters of the United States” on a parcel. *See Hawkes*, 136 S. Ct. at 1812. However, as with AJDs, a recipient of a PJD issued under the 2015 Rule may request a new PJD be issued under the pre-2015 regulations and guidance.

The agencies note that repealing the 2015 Rule and restoring the pre-existing regulatory definition of “waters of the United States” does not affect the scope of waters that the Corps retains in States that have assumed the CWA section 404 dredged or fill material permit

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program, or the waters the Corps would retain 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 entirely distinct from the scope of waters over which the Corps retains authority following State or tribal assumption of the section 404 program. The 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).<sup>58</sup> 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 agencies proposed a revised definition of “waters of the United States” on February 14, 2019, *see* 84 FR 4154, as the second step of the comprehensive two-step process 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.’” 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 public comment period for the proposed revised definition of “waters of the United States” closed on April 15, 2019, and the agencies are reviewing and considering approximately 620,000 comments they received. If finalized, the

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<sup>58</sup> The memorandum is available at <https://www.army.mil/e2/c/downloads/525981.pdf>.

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revised definition of “waters of the United States” will replace the regulations that the agencies are finalizing in this notice.

## **VIII. 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.

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 Regulations and Controlling Regulatory Cost*

This rule is an Executive Order 13771 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 rule does not impose any new information collection burdens under the Paperwork Reduction Act.

### *D. Regulatory Flexibility Act*

The Regulatory Flexibility Act generally requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements unless the agency certifies that the rule will not have a significant economic impact on a substantial number



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of small entities. Small entities include small businesses, small not-for-profit enterprises, and small governmental jurisdictions.

The repeal of the 2015 Rule and recodification of the prior regulations is a deregulatory action because the 2015 Rule exceeded the agencies' statutory authority. This action avoids the imposition of potentially significant adverse economic impacts on small entities in the future. Details on the estimated cost savings of this rule can be found in the economic analysis published with this rule. Accordingly, after considering the potential economic impacts of the final rule on small entities, we certify that this action will not have a significant economic impact on a substantial number of small entities.

#### *E. Unfunded Mandates Reform Act*

Under section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA), signed into law on March 22, 1995, an agency must prepare a budgetary impact statement to accompany any proposed or final rule that includes a federal mandate that may result in estimated cost to State, local, or tribal governments in the aggregate, or to the private sector, of \$100 million or more. Under section 205 of the UMRA, the agency must select the most cost-effective and least burdensome alternative that achieves the objectives of the rule and is consistent with statutory requirements. Section 203 requires the agency to establish a plan for informing and advising any small governments that may be significantly or uniquely impacted by the rule. This action does not contain any unfunded mandate as described in the UMRA and does not significantly or uniquely affect small governments. The definition of "waters of the United States" applies broadly to CWA programs. The 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.

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F. *Executive Order 13132: Federalism*

Executive Order 13132 requires the agencies to develop an accountable process to ensure “meaningful and timely input by state and local officials in the development of regulatory policies that have federalism implications.” “Policies that have federalism implications” is defined in the Executive Order to include regulations that have “substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.” Under Executive Order 13132, the agencies may not issue a regulation that has federalism implications, that imposes substantial direct compliance costs, and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by State and local government, or the agencies consult with State and local officials early in the process of developing the proposed regulation. The agencies also may not issue a regulation that has federalism implications and that preempts state law unless the agencies consult with State and local officials early in the process of developing the proposed regulation.

This final rule will not have substantial direct effects on the States, on the relationship between the national government and States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132, because it returns the relationship between the Federal government and the States to the longstanding and familiar distribution of power and responsibilities established in the CWA for many years prior to the 2015 Rule. Thus, the requirements of section 6 of the Executive Order do not apply to this final rule.

G. *Executive Order 13175: Consultation and Coordination with Indian Tribal Governments*

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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 final rule does not have tribal implications, as specified in Executive Order 13175. This final rule will not have substantial direct effects on tribal governments, on the relationship between the Federal government and Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes, because it returns the relationship between the Federal government and the Tribes to the longstanding and familiar distribution of power and responsibilities that existed under the CWA for many years prior to the 2015 Rule. Thus, Executive Order 13175 does not apply to this final rule. Consistent with Executive Order 13175, however, the agencies have consulted with tribal officials, as appropriate, as part of the separate rulemaking on a proposed revised definition of “waters of the United States.” As part of the tribal consultation process for the proposed revised definition, some Tribes commented on this rulemaking to repeal the 2015 Rule and restore the pre-existing regulations, including in letters to the agencies and during outreach and consultations meetings.

H. *Executive Order 13045: Protection of Children from Environmental Health Risks and Safety Risks*

Executive Order 13045, “Protection of Children from Environmental Health Risks and Safety Risks” (62 FR 19885, Apr. 23, 1997), applies to any rule that: (1) is determined to be “economically significant” as defined under Executive Order 12866, and (2) concerns an environmental health or safety risk that an agency has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, the agency must

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evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the agency. This rule is not subject to Executive Order 13045 because it does not involve decisions intended to mitigate environmental health or safety risks.

I. *Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use*

This rule is not subject to Executive Order 13211, “Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use” (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*

Section 12 of the National Technology Transfer and Advancement Act of 1995 requires federal agencies to evaluate existing technical standards when developing a new regulation. This rule does not involve technical standards.

K. *Executive Order 12898: Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations*

This final rule repealing the 2015 Rule and recodifying the pre-2015 regulations currently in effect in those States where the 2015 Rule is enjoined will maintain the longstanding regulatory framework that was in place nationwide for many years prior to the promulgation of the 2015 Rule. The agencies therefore believe that this action does not have disproportionately high and adverse human health or environmental effects on minority, low-income populations, and/or indigenous peoples, as specified in Executive Order 12898 (59 FR 7629, Feb. 16, 1994).

L. *Congressional Review Act (“CRA”)*

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This action is subject to the CRA, 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 it is a “major rule” as defined by 5 U.S.C. 804(2).

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## **List of Subjects**

### *33 CFR Part 328*

Environmental protection, Administrative practice and procedure, Navigation (water), Water pollution control, Waterways.

### *40 CFR Part 110*

Environmental protection, Oil pollution, Reporting and recordkeeping requirements.

### *40 CFR Part 112*

Environmental protection, Oil pollution, Penalties, Reporting and recordkeeping requirements.

### *40 CFR Part 116*

Environmental protection, Hazardous substances, Reporting and recordkeeping requirements, Water pollution control.

### *40 CFR Part 117*

Environmental protection, Hazardous substances, Penalties, Reporting and recordkeeping requirements, Water pollution control.

### *40 CFR Part 122*

Environmental protection, Administrative practice and procedure, Confidential business information, Hazardous substances, Reporting and recordkeeping requirements, Water pollution control.

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*40 CFR Part 230*

Environmental protection, Water pollution control.

*40 CFR Part 232*

Environmental protection, Intergovernmental relations, Water pollution control.

*40 CFR Part 300*

Environmental protection, Air pollution control, Chemicals, Hazardous substances, Hazardous waste, Intergovernmental relations, Natural resources, Occupational safety and health, Oil pollution, Penalties, Reporting and recordkeeping requirements, Superfund, Water pollution control, Water supply.

*40 CFR Part 302*

Environmental protection, 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*

Environmental protection, Waste treatment and disposal, Water pollution control.

**Definition of “Waters of the United States”—Recodification of Pre-Existing Rules**  
**Page 152 of 172**

Dated: \_\_\_\_\_.

---

Andrew R. Wheeler,  
Administrator,  
Environmental Protection Agency.

Dated: \_\_\_\_\_.

---

R.D. James,  
Assistant Secretary of the Army (Civil Works).

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### **Title 33—Navigation and Navigable Waters**

For the reasons set out 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. The authority citation for part 328 is revised to read as follows:

**Authority:** 33 U.S.C. 1344.

2. Section 328.3 is amended by revising paragraphs (a) through (e) and adding paragraph (f) to read as follows:

##### **§ 328.3 Definitions.**

\* \* \* \* \*

(a) The term *waters of the United States* means

(1) All waters which 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;

(2) All interstate waters including interstate wetlands;

(3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:

(i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or

(ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

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(iii) Which are used or could be used for industrial purpose by industries in interstate commerce;

(4) All impoundments of waters otherwise defined as waters of the United States under the definition;

(5) Tributaries of waters identified in paragraphs (a)(1) through (4) of this section;

(6) The territorial seas;

(7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a)(1) through (6) of this section.

(8) Waters of the United States do not include prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 CFR 423.11(m) which also meet the criteria of this definition) are not waters of the United States.

(b) The term *wetlands* means 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.

(c) The term *adjacent* means bordering, contiguous, or neighboring. 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."

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(d) 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.

(e) 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 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.

(f) The term *tidal waters* means 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 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.

## **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:

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**Authority:** 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 adding the definition of “Wetlands” in alphabetical order to read as follows:

**§110.1 Definitions.**

\* \* \* \* \*

*Navigable waters* means the waters of the United States, including the territorial seas.

The term includes:

(a) All waters that are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters that are subject to the ebb and flow of the tide;

(b) Interstate waters, including interstate wetlands;

(c) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, and wetlands, the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce including any such waters:

(1) That are or could be used by interstate or foreign travelers for recreational or other purposes;

(2) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce;

(3) That are used or could be used for industrial purposes by industries in interstate commerce;

(d) All impoundments of waters otherwise defined as navigable waters under this section;

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(e) Tributaries of waters identified in paragraphs (a) through (d) of this section, including adjacent wetlands; and

(f) Wetlands adjacent to waters identified in paragraphs (a) through (e) of this section:

Provided, That waste treatment systems (other than cooling ponds meeting the criteria of this paragraph) are not waters of the United States;

Navigable waters do not include prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

\* \* \* \* \*

*Wetlands* means those areas that are inundated or saturated by surface or ground water at a frequency or 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 playa lakes, swamps, marshes, bogs and similar areas such as sloughs, prairie potholes, wet meadows, prairie river overflows, mudflats, and natural ponds.

## **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.*; 33 U.S.C. 2720; E.O. 12777 (October 18, 1991), 3 CFR, 1991 Comp., p. 351.

6. Section 112.2 is amended by revising the definition of “Navigable waters” and adding the definition of “Wetlands” in alphabetical order to read as follows:

### **§112.2 Definitions.**

\* \* \* \* \*

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*Navigable waters* of the United States means “navigable waters” as defined in section 502(7) of the FWPCA, and includes:

(1) All navigable waters of the United States, as defined in judicial decisions prior to passage of the 1972 Amendments to the FWPCA (Pub. L. 92–500), and tributaries of such waters;

(2) Interstate waters;

(3) Intrastate lakes, rivers, and streams which are utilized by interstate travelers for recreational or other purposes; and

(4) Intrastate lakes, rivers, and streams from which fish or shellfish are taken and sold in interstate commerce.

\* \* \* \* \*

*Wetlands* means those areas that are inundated or saturated by surface or groundwater at a frequency or 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 playa lakes, swamps, marshes, bogs, and similar areas such as sloughs, prairie potholes, wet meadows, prairie river overflows, mudflats, and natural ponds.

\* \* \* \* \*

## **PART 116—DESIGNATION OF HAZARDOUS SUBSTANCES**

7. The authority citation for part 116 is revised to read as follows:

**Authority:** Secs. 311(b)(2)(A) and 501(a), Federal Water Pollution Control Act (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.**

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\* \* \* \* \*

*Navigable waters* is defined in section 502(7) of the Act to mean “waters of the United States, including the territorial seas,” and includes, but is not limited to:

(1) All waters which are presently used, or were used in the past, or may be susceptible to use as a means to transport interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide, and including adjacent wetlands; the term *wetlands* as used in this regulation shall include 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; the term *adjacent* means bordering, contiguous or neighboring;

(2) Tributaries of navigable waters of the United States, including adjacent wetlands;

(3) Interstate waters, including wetlands; and

(4) All other waters of the United States such as intrastate lakes, rivers, streams, mudflats, sandflats and wetlands, the use, degradation or destruction of which affect interstate commerce including, but not limited to:

(i) Intrastate lakes, rivers, streams, and wetlands which are utilized by interstate travelers for recreational or other purposes; and

(ii) Intrastate lakes, rivers, streams, and wetlands from which fish or shellfish are or could be taken and sold in interstate commerce; and

(iii) Intrastate lakes, rivers, streams, and wetlands which are utilized for industrial purposes by industries in interstate commerce.

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Navigable waters do not include prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

\* \* \* \* \*

## **PART 117—DETERMINATION OF REPORTABLE QUANTITIES FOR HAZARDOUS SUBSTANCES**

9. The authority citation for part 117 is revised to read as follows:

**Authority:** Secs. 311 and 501(a), Federal Water Pollution Control Act (33 U.S.C. 1251 *et seq.*), (“the Act”) 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.”

This term includes:

(1) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(2) Interstate waters, including interstate wetlands;

(3) All other waters such as intrastate lakes, rivers, streams, (including intermittent streams), mudflats, sandflats, and wetlands, the use, degradation or destruction of which would affect or could affect interstate or foreign commerce including any such waters:



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(i) Which are or could be used by interstate or foreign travelers for recreational or other purposes;

(ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce;

(iii) Which are used or could be used for industrial purposes by industries in interstate commerce;

(4) All impoundments of waters otherwise defined as navigable waters under this paragraph;

(5) Tributaries of waters identified in paragraphs (i)(1) through (4) of this section, including adjacent wetlands; and

(6) Wetlands adjacent to waters identified in paragraphs (i)(1) through (5) of this section (“Wetlands” means 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 included playa lakes, swamps, marshes, bogs, and similar areas such as sloughs, prairie potholes, wet meadows, prairie river overflows, mudflats, and natural ponds): *Provided*, That waste treatment systems (other than cooling ponds meeting the criteria of this paragraph) are not waters of the United States.

Navigable waters do not include prior converted cropland. Notwithstanding the determination of an area’s status as prior converted cropland by any other federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

\* \* \* \* \*

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**PART 122—EPA ADMINISTERED PERMIT PROGRAMS: THE NATIONAL  
POLLUTANT DISCHARGE ELIMINATION SYSTEM**

11. The authority citation for part 122 continues to read as follows:

**Authority:** The Clean Water Act, 33 U.S.C. 1251 *et seq.*

12. 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. Suspending the last sentence of the definition of “Waters of the United States” published July 21, 1980 (45 FR 48620).
- d. Adding the definition of “Wetlands”.

The revision and addition read as follows:

**§122.2 Definitions.**

\* \* \* \* \*

*Waters of the United States* or *waters of the U.S.* means:

- (a) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
- (b) All interstate waters, including interstate “wetlands;”
- (c) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, “wetlands,” sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce including any such waters:

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(1) Which are or could be used by interstate or foreign travelers for recreational or other purposes;

(2) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

(3) Which are used or could be used for industrial purposes by industries in interstate commerce;

(d) All impoundments of waters otherwise defined as waters of the United States under this definition;

(e) Tributaries of waters identified in paragraphs (a) through (d) of this definition;

(f) The territorial sea; and

(g) “Wetlands” adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a) through (f) of this definition.

Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 CFR 423.11(m) which also meet the criteria of this definition) are not waters of the United States. This exclusion applies only to manmade bodies of water which neither were originally created in waters of the United States (such as disposal area in wetlands) nor resulted from the impoundment of waters of the United States. [See Note 1 of this section.] Waters of the United States do not include prior converted cropland. Notwithstanding the determination of an area’s status as prior converted cropland by any other federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

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Note: At 45 FR 48620, July 21, 1980, the Environmental Protection Agency suspended until further notice in §122.2, the last sentence, beginning “This exclusion applies . . .” in the definition of “Waters of the United States.” This revision continues that suspension.

*Wetlands* means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

\* \* \* \* \*

#### **PART 230—SECTION 404(b)(1) GUIDELINES FOR SPECIFICATION OF DISPOSAL SITES FOR DREDGED OR FILL MATERIAL**

13. The authority citation for part 230 is revised to read as follows:

**Authority:** Secs. 404(b) and 501(a) of the Clean Water Act of 1977 (33 U.S.C. 1344(b) and 1361(a)).

14. Section 230.3 is amended by:

- a. Redesignating paragraph (o) as paragraph (s).
- b. Revising newly redesignated paragraph (s).
- c. Redesignating paragraph (n) as paragraph (r).
- d. Redesignating paragraph (m) as paragraph (q-1).
- e. Redesignating paragraphs (h) through (l) as paragraphs (m) through (q).
- f. Redesignating paragraphs (e) and (f) as paragraphs (h) and (i).
- g. Redesignating paragraph (g) as paragraph (k).
- h. Redesignating paragraphs (b) through (d) as paragraphs (c) through (e).
- i. Adding reserved paragraphs (f), (g), (j), and (l).

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j. Adding paragraphs (b) and (t).

The revision and additions read as follows:

### § 230.3 Definitions.

\* \* \* \* \*

(b) The term *adjacent* means bordering, contiguous, or neighboring. 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.”

\* \* \* \* \*

(s) The term *waters of the United States* means:

(1) All waters which 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;

(2) All interstate waters including interstate wetlands;

(3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:

(i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or

(ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

(iii) Which are used or could be used for industrial purposes by industries in interstate commerce;

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(4) All impoundments of waters otherwise defined as waters of the United States under this definition;

(5) Tributaries of waters identified in paragraphs (s)(1) through (4) of this section;

(6) The territorial sea;

(7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (s)(1) through (6) of this section; waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 CFR 423.11(m) which also meet the criteria of this definition) are not waters of the United States.

Waters of the United States do not include prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

(t) The term *wetlands* means 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.

## **PART 232—404 PROGRAMS DEFINITIONS; EXEMPT ACTIVITIES NOT REQUIRING 404 PERMITS**

15. The authority citation for part 232 is revised to read as follows:

**Authority:** 33 U.S.C. 1344.

16. Section 232.2 is amended by revising the definition of “Waters of the United States” and adding the definition of “Wetlands” to read as follows:

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## **§232.2 Definitions.**

\* \* \* \* \*

*Waters of the United States* means:

All waters which are currently used, were used in the past, or may be susceptible to us in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide.

All interstate waters including interstate wetlands.

All other waters, such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation, or destruction of which would or could affect interstate or foreign commerce including any such waters:

Which are or could be used by interstate or foreign travelers for recreational or other purposes; or

From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

Which are used or could be used for industrial purposes by industries in interstate commerce.

All impoundments of waters otherwise defined as waters of the United States under this definition;

Tributaries of waters identified in paragraphs (g)(1)–(4) of this section;

The territorial sea; and

Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (q)(1)–(6) of this section.

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Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the Act (other than cooling ponds as defined in 40 CFR 123.11(m) which also meet the criteria of this definition) are not waters of the United States.

Waters of the United States do not include prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

*Wetlands* means 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.

## **PART 300—NATIONAL OIL AND HAZARDOUS SUBSTANCES POLLUTION CONTINGENCY PLAN**

17. The authority citation for part 300 is revised to read as follows:

**Authority:** 33 U.S.C. 1321(c)(2); 42 U.S.C. 9601-9657; E.O. 13626, 77 FR 56749, 3 CFR, 2013 Comp., p.306; E.O. 12777, 56 FR 54757, 3 CFR, 1991 Comp., p.351; E.O. 12580, 52 FR 2923, 3 CFR, 1987 Comp., p.193.

18. Section 300.5 is amended by revising the definition of “Navigable waters” to read as follows:

### **§ 300.5 Definitions.**

\* \* \* \* \*

*Navigable waters* as defined by 40 CFR 110.1, means the waters of the United States, including the territorial seas. The term includes:



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(1) All waters that are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters that are subject to the ebb and flow of the tide;

(2) Interstate waters, including interstate wetlands;

(3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, and wetlands, the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce including any such waters;

(i) That are or could be used by interstate or foreign travelers for recreational or other purposes;

(ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce;

(iii) That are used or could be used for industrial purposes by industries in interstate commerce;

(4) All impoundments of waters otherwise defined as navigable waters under this section;

(5) Tributaries of waters identified in paragraphs (a) through (d) of this definition, including adjacent wetlands; and

(6) Wetlands adjacent to waters identified in paragraphs (a) through (e) of this definition: Provided, that waste treatment systems (other than cooling ponds meeting the criteria of this paragraph) are not waters of the United States.

(7) Waters of the United States do not include prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

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\* \* \* \* \*

19. In appendix E to part 300, section 1.5 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* as defined by 40 CFR 110.1 means the waters of the United States, including the territorial seas. The term includes:

(a) All waters that are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters that are subject to the ebb and flow of the tide;

(b) Interstate waters, including interstate wetlands;

(c) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, and wetlands, the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce including any such waters:

(1) That are or could be used by interstate or foreign travelers for recreational or other purposes;

(2) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; and

(3) That are used or could be used for industrial purposes by industries in interstate commerce.

(d) All impoundments of waters otherwise defined as navigable waters under this section;

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(e) Tributaries of waters identified in paragraphs (a) through (d) of this definition, including adjacent wetlands; and

(f) Wetlands adjacent to waters identified in paragraphs (a) through (e) of this definition: Provided, that waste treatment systems (other than cooling ponds meeting the criteria of this paragraph) are not waters of the United States.

(g) Waters of the United States do not include prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

\* \* \* \* \*

## **PART 302—DESIGNATION, REPORTABLE QUANTITIES, AND NOTIFICATION**

20. The authority citation for part 302 continues to read as follows:

**Authority:** 42 U.S.C. 9602, 9603, and 9604; 33 U.S.C. 1321 and 1361.

21. Section 302.3 is amended by revising the definition of “Navigable waters” to read as follows:

### **§ 302.3 Definitions.**

\* \* \* \* \*

*Navigable waters or navigable waters of the United States* means waters of the United States, including the territorial seas;

\* \* \* \* \*

## **PART 401— GENERAL PROVISIONS**

22. The authority citation for part 401 is revised to read as follows:

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**Authority:** Secs. 301, 304 (b) and (c), 306 (b) and (c), 307 (b) and (c) and 316(b) of the Federal Water Pollution Control Act, as amended (the “Act”), 33 U.S.C. 1251, 1311, 1314 (b) and (c), 1316 (b) and (c), 1317 (b) and (c) and 1326(c); 86 Stat. 816 *et seq.*; Pub. L. 92-500.

23. Section 401.11 is amended by revising paragraph (l) to read as follows:

**§ 401.11 General definitions.**

\* \* \* \* \*

(l) The term *navigable waters* includes: All navigable waters of the United States; 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. Navigable waters do not include prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

\* \* \* \* \*