Revised Definition of "Waters of the United States"
Response to Comments Document
SECTION 1 – PROPOSED RULE GENERAL

See the Introduction to this Response to Comments Document for a discussion of the U.S. Environmental Protection Agency and the U.S. Department of the Army's (hereinafter, the agencies') comment response process and organization of the eighteen sections.

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1 PROPOSED RULE GENERAL

Some commenters provided general suggestions as to what the agencies should consider when establishing a revised definition of "waters of the United States." These commenters often asked the agencies to develop a definition that would protect water quality and the ecosystem services that features such as streams and wetlands provide. Further, many commenters requested that a rule defining "waters of the United States" be grounded in the best available science and be consistent with the U.S. Constitution and the Clean Water Act, as well as its objective, congressional intent, and relevant case law. One commenter suggested that the agencies "work with Congress to clarify the definition and goals of the [Clean Water Act]" to address uncertainties around the scope of the Act. Another commenter stated that the agencies should consider new technical information in developing a final rule. Other commenters suggested that the agencies prioritize public health and water quality over economic factors and consider climate change and environmental justice when defining "waters of the United States."

Many commenters asserted, generally, that protecting water resources has many benefits, including improving water quality, helping to ensure safe drinking water, improving public health and communities, supporting wildlife and fish habitat, addressing climate change, and generally improving the economy. Some commenters stated that the proposed rule would expand jurisdiction in a manner that would impact implementation of many Clean Water Act programs, particularly sections 404, 402, 303, and 311, with some suggesting that the agencies have not adequately evaluated the impact of expansion on those programs. Another commenter argued that expanding the scope of federal jurisdiction "does not necessarily correlate with improving water quality" because some projects create environmental benefits, and because projects that are not subject to federal Clean Water Act jurisdiction may be subject to other forms of regulation pursuant to state or local regulations.

Numerous commenters requested that the agencies develop a clear and easily implementable definition of "waters of the United States," with some asking that the definition reflect "pragmatic," "objective," "clear," or "commonsense" criteria to provide for consistent, predictable results or easily identifiable jurisdictional features. Some commenters asserted generally that a rule defining "waters of the United States" should not be unnecessarily burdensome and should provide regulatory certainty for the regulated community, with some commenters expressing concern about potential impacts from a revised definition on the agricultural sector specifically.

Some commenters addressed issues related to a potential second rulemaking on the definition of "waters of the United States." Other commenters asserted that the agencies should forgo rulemaking altogether pending the Supreme Court's review of *Sackett v. EPA*. Another commenter noted that the definition of "waters of the United States" is a contentious and often polarizing issue.

> **Agencies' Response: As discussed in Final Rule Preamble Section IV.A, in developing the final rule, the agencies considered the text of the relevant provisions of the Clean Water Act and the statute as a whole, the scientific record, relevant Supreme Court case law, and the agencies' experience and technical expertise after more than 45 years of implementing the longstanding pre-2015 regulations defining "waters of the United States." The final rule also reflects consideration of advancements in implementation resources and tools. The agencies find that the scope of "waters of the United States" defined in the final rule is supported by**

the Clean Water Act and relevant Supreme Court case law and remains well within the bounds of the agencies' statutory and constitutional limits.

In sum, the final rule generally restores the longstanding and familiar categories of the 1986 regulations and establishes jurisdictional limitations based on case-specific application of the relatively permanent standard and the significant nexus standard to certain categories of waters in the rule. The agencies have determined that the significant nexus standard is consistent with the text, objective, and legislative history of the Clean Water Act, as well as relevant Supreme Court case law and the best available science. The agencies find that the relatively permanent standard is administratively useful, as it more readily identifies a subset of waters that will virtually always significantly affect paragraph (a)(1) waters but standing alone is insufficient to meet the objective of the Clean Water Act. See Final Rule Preamble Section IV.A for a comprehensive discussion of the agencies' basis for the final rule.

In developing the final rule, the agencies reviewed and considered approximately 114,000 comments received on the proposed rule from a broad spectrum of interested parties, including, but not limited to, the regulated community; non-governmental organizations; professional societies; state, tribal, and local governments; other federal agencies; members of Congress; and private citizens. Commenters provided a wide range of feedback on the proposal, including: the legal basis for the proposed rule; the agencies' proposed treatment of categories of jurisdictional waters and those features that would not be jurisdictional; the Economic Analysis and Technical Support Document for the proposed rule; and the need for a clear and implementable rule that is easy for the public to understand.

The agencies agree that the definition of "waters of the United States" should be clear and implementable, should not be overly burdensome, and should promote regulatory certainty. Indeed, in response to comments on the proposal, the agencies revised the rule to improve the clarity, implementability, and durability of the definition. The agencies find that the final rule increases clarity and implementability by streamlining and restructuring the 1986 regulations and providing implementation guidance informed by sound science, implementation tools, and other resources. Further, because the final rule is founded upon a longstanding regulatory framework and reflects consideration of the agencies' experience and expertise, as well as updates in implementation tools and resources, the agencies find that the final rule is generally familiar to the public and implementable. The agencies also find that the clarifications in the final rule, including the addition of exclusions that codify longstanding practice and review of the advancements in implementation resources, tools, and scientific support address many of the concerns raised in the past about timeliness and consistency of jurisdictional determinations under the Clean Water Act. See Final Rule Preamble Sections IV.A.4 and IV.G for further discussion of the agencies' finding that the final rule is both familiar and implementable, as well as information about implementation tools. Additionally, to provide further clarity and certainty to the public, the agencies are codifying exclusions in the final rule's regulatory text for the features described in the proposed rule preamble as generally non-jurisdictional. Clearly identifying these exclusions in the rule will simplify the process of determining jurisdiction and is an important aspect of the agencies' policy goal of providing clarity and certainty. See Final Rule Preamble Section IV.C.7.

The agencies also agree with commenters who suggested that the definition of "waters of the United States" should protect water quality and be grounded in the best available science. Indeed, because the definition of "waters of the United States" should advance the objective of the Clean Water Act and that objective is focused on restoring and maintaining water quality, the best available science informs this final rule. See Final Rule Preamble Section IV.A.2.c. Further, the agencies agree that protecting water resources has many benefits, including economic benefits.

The agencies acknowledge commenters' requests that the revised definition of "waters of the United States" reflect consideration of climate change and environmental justice. While the agencies did not consider climate change in interpreting the scope of the statutory term "waters of the United States," there are ways the agencies can consider a changing climate under the significant nexus standard, but only to the extent it is relevant to the evaluation of whether the subject waters significantly affect the chemical, physical, or biological integrity of paragraph (a)(1) waters. See Final Rule Preamble Section IV.C.9.c.ii for further discussion of how the agencies can consider a changing climate under the significant nexus standard consistent with the best available science.

Moreover, while impacts on communities with environmental justice concerns are not a basis for determining the scope of the definition of "waters of the United States," the agencies recognize that the burdens of environmental pollution and climate change often fall disproportionately on communities with environmental concerns *e.g.*, minority (Indigenous peoples and/or people of color), and low-income populations, as specified in Executive Order 12898. The agencies conclude that this action does not have disproportionately high and adverse human health or environmental effects on Indigenous peoples, people of color, and/or low-income populations The documentation for this decision is contained in the Economic Analysis Section IV.

The agencies disagree that the final rule generally represents an expansion beyond the pre-2015 regulatory regime; rather, the agencies expect that there will be a slight and unquantifiable increase in waters found to be jurisdictional under the final rule in comparison to the pre-2015 regulatory regime. Indeed, as discussed in Section V.A of the Preamble to the Final Rule, the final rule will establish a regime that is generally comparable to current practice, and this final rule would generate *de minimis* costs and benefits as compared to the pre-2015 regulatory regime that the agencies are currently implementing.

The agencies also disagree with the suggestion that the rule's impacts have not been adequately evaluated. The agencies prepared an economic analysis pursuant to the requirements of Executive Orders 12866 and 13563. Because the final rule does not by itself impose costs or benefits. Potential costs and benefits would only be incurred as a result of actions taken under existing Clean Water Act programs that rely on the definition of "waters of the United States" (*i.e.*, sections 303, 311, 401, 402, and 404). For additional discussion of these issues, see the agencies' response to comments in Section 1.5 addressing Clean Water Act programs and Section 17 on the Economic Analysis. See also Economic Analysis for the Final Rule.

The agencies acknowledge that features that are not jurisdictional under the Act may be subject to water quality protections under state, local, or tribal law. The agencies also acknowledge that some projects may have environmental benefits.

Further, the agencies recognize the vital role played by farmers and others in the agricultural sector in providing the nation with food and fiber and considered the views of these and other interested stakeholders in developing the final rule. See Final Rule Preamble Section III.C. The agencies understand that the scope of Clean Water Act jurisdiction is an issue of great national importance and appreciate feedback and engagement from all stakeholders.

Regarding comments discussing a potential second rulemaking, see the agencies' response to comments in Section 5.0.3. For the agencies' response to comments relating to the Supreme Court's review in *Sackett v. Environmental Protection Agency, 8 F.4th 1075 (9th Cir. 2021), cert. granted, 142 S. Ct. 896 (Jan. 24, 2022) (No. 21-454)* , see Section 2.6.1.

1.1 General Expressions of Support for the Proposed Rule

Many commenters expressed support for the proposed rule because they believe it would be protective of water resources and the ecosystem services they provide, such as fish and wildlife habitat, recreation, drinking water protection, and support of public health. In addition, many of these commenters suggested that the proposed rule reflects the best available science and/or is consistent with recent court rulings and the objective of the Clean Water Act. Multiple commenters also supported the proposed rule as providing a familiar regulatory framework, with one commenter asserting that the significant nexus standard is a familiar analysis that the agencies and others have a long history of implementing and could provide predictability. Another commenter suggested that returning to the pre-2015 framework would reduce confusion.

Some commenters expressed support for specific elements of the proposed rule or advocated that the proposed rule should provide for protection of specific features such as ephemeral streams and isolated wetlands. Another commenter stated that the proposed rule would better accommodate the variable hydrology found in the arid West, particularly in light of climate change.

Several commenters that expressed support for the proposed rule requested that the agencies act quickly to finalize the rulemaking. One commenter was supportive of the proposed rule and suggested that, even though the 2020 NWPR was vacated, finalizing the proposed rule is essential to "codify this change."

<u>Agencies' Response</u>: The agencies agree with commenters who expressed support for the rule as protective of water resources, reflective of the best available science, and consistent with the law. The regulations established in the final rule are founded on the familiar framework of the 1986 regulations and are generally consistent with the pre-2015 regulatory regime. They are fully consistent with the statute, informed by relevant Supreme Court decisions, and reflect a reasonable interpretation based on the record before the agencies, including consideration of the best available science, as well as the agencies' expertise and experience implementing the pre-2015 regulatory regime. This final rule will

protect the quality of the nation's waters by restoring the important protections for jurisdictional waters provided by the Clean Water Act, including not only protections provided by the Act's permitting programs, but also protections provided by programs ranging from water quality standards and total maximum daily loads to oil spill prevention, preparedness, and response programs, to the tribal and state water quality certification programs. Further, the agencies find that the final rule advances the Clean Water Act's statutory objective as it is informed by the best available science provided by upstream tributaries, adjacent wetlands, and intrastate lakes, as well as lakes and ponds, streams, and wetlands that do not fall within the other jurisdictional categories to restore and maintain the water quality of traditional navigable waters, the territorial seas, and interstate waters (*i.e.,* paragraph (a)(1) waters). See Final Rule Preamble Section IV.A for more information on the final rule's legal and scientific basis; see also Final Rule Preamble Section IV.C.9.c.ii for a discussion of how the agencies can consider a changing climate under the significant nexus standard consistent with the best available science.

The agencies also agree that the final rule provides a familiar regulatory framework. Indeed, the final rule generally restores the longstanding and familiar categories of the 1986 regulations and establishes jurisdictional limitations based on case-specific application of the relatively permanent standard and the significant nexus standard to certain categories of waters in the rule. This final rule also increases clarity and implementability by streamlining and restructuring the 1986 regulations. Since the Supreme Court's decision in *Rapanos v. United States* and *Carabell v. United States* (June 5, 2007), the agencies have over a decade of nationwide experience in making decisions regarding jurisdiction under the pre-2015 regulatory regime consistent with the relatively permanent standard and the significant nexus standard. Regulated entities and other interested parties also have substantial experience with the 1986 regulations and the two *Rapanos* standards.

1.2 General Expressions of Opposition to the Proposed Rule

Many commenters expressed opposition to the proposed rule and/or recommended that the agencies withdraw the proposed rule, with many of these commenters asserting that the proposed rule is overly expansive and inconsistent with the Clean Water Act and/or Supreme Court precedent. In particular, commenters expressed concern that the proposed rule would expand jurisdiction to features such as ephemeral and intermittent features, isolated waters and wetlands, floodplain wetlands, and certain ditches (including those for stormwater control). Numerous commenters also argued that the proposed rule would improperly expand federal Clean Water Act jurisdiction over features that the commenters suggested should be subject solely to state jurisdiction.

Additionally, many commenters opposed to the proposed rule suggested that the rule is unreasonable, does not establish clear jurisdictional boundaries or predictability, and did not provide adequate clarity or certainty as to how it would be implemented. A commenter contended that the preamble to the proposed rule was unclear because it offered different alternatives for implementation, and other commenters criticized the proposed rule as establishing a "subjective" or "arbitrary" approach to determining jurisdiction. Commenters also expressed concern about the risk of enforcement, penalties, and/or citizen suits associated with a revised definition of "waters of the United States."

Multiple commenters argued that the proposed rule, rather than codifying the pre-2015 regulatory regime, is instead a novel approach to the definition of "waters of the United States." These commenters often asserted that the proposed rule would unlawfully expand the scope of Clean Water Act jurisdiction, with some stating that expanding jurisdiction relative to the pre-2015 regulatory regime would cause confusion and uncertainty.

Many commenters expressed concern that the scope of Clean Water Act jurisdiction under the proposed rule would negatively impact them and/or their industry or would otherwise be overly burdensome on the regulated community generally, in part due to the Clean Water Act's permitting requirements. Some of these commenters criticized the proposed rule as imposing requirements that the commenters viewed as duplicative of other regulatory programs or "bureaucratic" restrictions that the commenters asserted could hinder innovation and project implementation. A few commenters also expressed concern that they would need to incur costs associated with hiring outside experts in order to understand and/or meet the requirements of the proposed rule, including costs associated with hiring technical or legal consultants such as scientists, hydrologists, engineers, and lawyers. Another commenter stated that while trained professionals may be necessary in certain circumstances to evaluate the jurisdictional status of a feature, providing greater clarity for "the layperson" as to "the meaning of terms, processes, and procedures" associated with implementing the final rule could minimize reliance on outside experts.

Further, multiple commenters argued that the proposed rule would have a negative impact on the ability of farmers and ranchers to utilize their land. In addition, several commenters stated that the proposed rule would negatively impact the recreation industry, including off-road vehicles and golf courses. One commenter argued that the proposed rule would have unintended consequences for public health and safety by limiting the location of pesticide treatments. See the agencies' response to comments in Section 17 Economic Analysis for a more detailed discussions of economic impacts.

A couple of commenters opposed to the proposed rule raised concerns around the agencies' workload. A commenter expressed "concerns with the [agencies'] ability to meet their present workload and to handle the increased workload if this rule is put into place as currently written, due to being understaffed." Another commenter argued more generally that the regulatory change associated with the proposed rule and a potential second rulemaking would "lead to . . . more work for the agencies' staff."

Other commenters expressed concern that the scope of jurisdictional waters under the proposed rule would not provide for adequate water quality protection and/or meet the objective of the Clean Water Act. One of these commenters stated that the proposed rule "contains a myopically simplistic approach to assessing biological integrity that will undermine any ability for the agencies to achieve the goals of the Clean Water Act." Another commenter expressed concern that the proposed rule would not provide Clean Water Act protections for many ephemeral and intermittent streams and wetlands in the arid West, which the commenter stated are important for public drinking water, recreation, and agriculture.

> <u>**Agencies' Response**</u>**: The agencies disagree that the rule is overly expansive or inconsistent with the Clean Water Act or Supreme Court case law. In the final rule, the agencies are exercising their authority to interpret "waters of the United States" to mean the waters defined by the familiar 1986 regulations with amendments to reflect the agencies' construction of limitations on the scope of the "waters of the United States," informed by the text of the relevant provisions of the Clean Water Act and the statute as a whole, the**

scientific record, relevant Supreme Court decisions, and the agencies' experience and technical expertise after more than 45 years of implementing the longstanding pre-2015 regulations defining "waters of the United States." The agencies find that the scope of "waters of the United States" defined in the final rule is supported by the Clean Water Act and relevant Supreme Court case law and remains well within the bounds of the agencies' statutory and constitutional limits. See the agencies' response to comments in Section 2 for a discussion of the agencies' legal authority to assert jurisdiction over the specific categories of jurisdictional waters in the final rule. See also Final Rule Preamble Section IV.C for a description of the types of features that may be jurisdictional under the final rule.

The agencies also disagree that the final rule would expand Clean Water Act jurisdiction over features that should be subject solely to state jurisdiction. As discussed in Final Rule Preamble Section IV.A.3, this final rule reflects consideration of the statute as a whole, including the objective of the Clean Water Act and the policies of the Act with respect to the role of states and tribes. Where waters do not significantly affect the integrity of waters for which the federal interest is indisputable, the final rule leaves regulation to the states and tribes.

Moreover, through the final rulemaking process, the agencies have considered all timely public comments on the proposed rule, including changes that improve the clarity, implementability, and durability of the definition. Specifically, the agencies have provided more clarity in the final rule by: adding limitations to the scope of the definition to the rule text; adding a definition of "significantly affect" that identifies the functions and factors to be evaluated as part of a significant nexus analysis; adding exclusions to the rule; restructuring and streamlining the 1986 regulations; and drawing on more than a decade of post-*Rapanos* implementation experience to provide additional implementation guidance and resources. These improvements, taken together, substantially reduce any inefficiencies that may be presented by the rule's case-specific approach. The agencies also find that the clarifications in the final rule, including the addition of exclusions that codify longstanding practice and review the advancements in implementation resources, tools, and scientific support address many of the concerns raised in the past about timeliness and consistency of jurisdictional determinations under the Clean Water Act. Further, the agencies understand that landowners would like to be able to easily discern whether their property contains any "waters of the United States" such that they may need to apply for a relevant Clean Water Act permit. To that end, the agencies have included a section in the preamble to the final rule that provides additional clarity to landowners on how to know when a Clean Water Act permit is required; this guidance for landowners is available at Final Rule Preamble Section IV.C.10. See also Final Rule Preamble Section IV.A.4 for discussion of the agencies' finding that the final rule is both familiar and implementable and Final Rule Preamble Section IV.G for information about implementation tools. For implementation-related issues generally, see Final Rule Preamble Section IV.C.

With respect to comments expressing concern about the agencies' workload, the agencies reiterate—as discussed in this response above and throughout the preamble to the final rule—that this final rule reflects consideration of the agencies' experience and technical expertise after more than 45 years of implementing the 1986 regulations defining "waters of the United States," including more than a decade of experience implementing those

regulations consistent with the decisions in *United States v. Riverside Bayview Homes*, 474 U.S. 121, 131-35 (1985) , *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) ("*SWANCC*") , and *Rapanos* collectively. Notably, the agencies have extensive experience making jurisdictional determinations using the relatively permanent standard and the significant nexus standard.

Regarding some commenters' concerns that the rule may be too subjective or arbitrary, see the discussion of "significantly affect" in Section IV.C.9 of the Final Rule Preamble. For an explanation of how the final rule relates to the pre-2015 regulatory regime, see the agencies' response to comments in Section 3.1.

The agencies acknowledge that there are indirect costs—both monetary and temporal—associated with implementation of the final rule. Indeed, there are indirect costs associated with implementation of all prior rules defining "waters of the United States." As the final rule is very similar in scope to that of pre-2015 practice, there will be *de minimis* new indirect costs associated with the implementation of the final rule. Potential costs and benefits would only be incurred as a result of actions taken under existing Clean Water Act programs relying on the definition of "waters of the United States" (*i.e.*, sections 303, 311, 401, 402, and 404) that are not otherwise modified by this final rule. Entities currently are, and will continue to be, regulated under these programs that protect "waters of the United States" from pollution and destruction. Each of these programs may subsequently impose costs as a result of implementation of their specific regulations. Individuals uncertain about the status of waters on their property may obtain a jurisdictional determination from the Corps. *See* 33 CFR 325.1; Regulatory Guidance Letter 16-01 (2016). For additional discussion of these issues, see the agencies' response to comments in Section 1.4, Section 1.5, and Section 17. See also Economic Analysis for the Final Rule and Final Rule Preamble Section IV.C.10 (providing guidance to landowners on how to determine when a Clean Water Act permit is required).

Finally, with respect to comments expressing concern that the final rule's jurisdictional standards do not provide for adequate Clean Water Act protections, the agencies agree that the Clean Water Act requires broader protection than the relatively permanent standard, but have concluded, as explained in Section IV.A.3 of the Final Rule Preamble, that the significant nexus standard is the best construction of the scope of the Clean Water Act. Further, as discussed in Section IV.A.2 of the Preamble to the Final Rule, the agencies find that the final rule advances the Clean Water Act's statutory objective as it is informed by the best available science concerning the functions provided by upstream tributaries, adjacent wetlands, and intrastate lakes and ponds, streams, and wetlands that do not fall within the other jurisdictional categories to restore and maintain the water quality of traditional navigable waters, the territorial seas, and interstate waters (*i.e.*, the paragraph (a)(1) waters). See also Section III.E of the Technical Support Document for additional discussion of the significant nexus standard.

1.3 Durability and Regulatory Certainty

The agencies received many comments on the topic of the proposed rule's durability and/or regulatory certainty (or similar terms).

Some commenters discussed durability, regulatory certainty, or similar concepts in relation to previous and/or anticipated litigation around the agencies' rulemakings on the definition of "waters of the United States." These commenters generally argued that the agencies' rulemakings revising the definition and associated litigation had and/or would contribute to regulatory uncertainty or similar issues. Several of these commenters raised concerns about legal challenges and/or litigation arising from the present rulemaking to revise the definition of "waters of the United States."

A number of commenters asserted that the proposed rule's reliance on a case-by-case approach is contrary to or otherwise in tension with the agencies' goals around durability and regulatory certainty. Some of these commenters suggested that clearer exclusions, definitions of key terms such as "tributary," and/or more categorically jurisdictional types of waters would provide greater durability, clarity, and/or regulatory certainty and be less burdensome to comply with. Several commenters asserted that the proposed rule language was unclear, with one commenter stating that without definitions that are "specific, clear, reasonably concise, and enforceable," more case-by-case analyses would be needed.

Another commenter criticized the proposed rule's reliance on the significant nexus and relatively permanent standards as establishing an "ambiguous and inefficient process" for determining Clean Water Act jurisdiction that would result in "inconsistent implementation [and] regulatory uncertainty." This commenter asserted that the proposed rule "does not achieve the agencies' goal of creating a foundation for an enduring and durable ['waters of the United States'] definition," adding that the process for determining whether a water is jurisdictional "should not be an exhaustive investigation that is only understood by select federal staff."

Numerous commenters called for "balance" or otherwise alluded to that concept in their comments, tying that idea to a sense of "certainty," "durability," and/or similar words. Most of these commenters highlighted the importance of environmental protection in their discussion of balance, with some emphasizing a need to balance between providing water quality protections and providing regulatory certainty. These commenters tended to call for a need to balance and respect the interests of various sectors and stakeholders, including for example:

- Businesses;
- Communities;
- Economic activity;
- Industry;
- Infrastructure;
- Farmers;
- Landowners,
- Private property rights;
- Ranchers;
- Regulated parties;
- State and local governments; and
- Water resources and supplies.

<u>**Agencies' Response**</u>**: The agencies acknowledge that the definition of "waters of the United States" has changed multiple times since the Clean Water Act was enacted and that such changes can contribute to regulatory uncertainty. The agencies also acknowledge that**

litigation over rules revising the definition of "waters of the United States" has at times contributed to regulatory uncertainty as well as confusion, especially where such litigation has resulted in different regulatory regimes being in effect in different parts of the country. In addition, 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 the final rule should not preclude the agencies from taking this final action.

Additionally, the agencies acknowledge that the final rule will result in the need for case-specific analyses for certain jurisdictional determinations and that some commenters expressly requested that the rule include more types of categorically jurisdictional or non-jurisdictional features as a means of potentially providing greater clarity or regulatory certainty. As discussed in Final Rule Preamble Section IV.A.3, however, the agencies find that fact-based standards for determining Clean Water Act jurisdiction are appropriate and are not unique to the definition of "waters of the United States." Indeed, the agencies have the discretion to consider defining waters as jurisdictional on a categorical basis where scientifically and legally justified (for example in the final rule, paragraph (a)(1) waters and their adjacent wetlands) or a case-specific, fact-based approach (for example, in the final rule, tributaries and their adjacent wetlands that meet the significant nexus standard or relatively permanent standard). While the latter does not necessarily provide the same certainty as defining waters as jurisdictional by category, case-specific determinations of the scope of Clean Water Act jurisdiction are not unusual—in fact, they are the norm. For a more comprehensive discussion of this issue, see Final Rule Preamble Section IV.A.3.a.iii.

Further, the agencies have provided greater clarity in this final rule by: adding limitations to the scope of the definition to the rule text; adding a definition of "significantly affect" that identifies the functions and factors to be evaluated as part of a significant nexus analysis; restructuring and streamlining the 1986 regulations; and drawing on more than a decade of post-*Rapanos* implementation experience to provide additional implementation guidance and resources. These improvements, taken together, substantially reduce any inefficiencies that may be presented by the final rule's case-specific approach. The agencies also find that the clarifications in the final rule, including the addition of exclusions that codify longstanding practice and review of the advancements in implementation resources, tools, and scientific support address many of the concerns raised in the past about timeliness and consistency of jurisdictional determinations under the Clean Water Act. See Final Rule Preamble Section IV.G for information about implementation data, tools, and methods that are relevant to jurisdictional determinations under the final rule.

Moreover, to provide further clarity and certainty to the public, the agencies are codifying exclusions in the final rule's regulatory text for the features described in the proposed rule preamble as generally non-jurisdictional. Clearly identifying these exclusions in the final rule will simplify the process of determining jurisdiction and is an important aspect of the agencies' policy goal of providing clarity and certainty.

For these reasons, among others discussed more fully in the preamble to the final rule, the agencies find that the final rule will achieve the agencies' goals of effectively and durably protecting the quality of the nation's waters.

See also the agencies' response to comments in Section 15 (addressing exclusions) and Section 18 (addressing other recommendations, including recommendations related to defining certain terms used in the rule).

1.3.1 Durability

Multiple commenters expressed general support for the agencies' interest in crafting a "durable" definition of "waters of the United States," with several commenters suggesting that the proposed rule was consistent with that goal. Other commenters expressed support for developing a durable definition in a second rulemaking.

A number of commenters suggested that a revised definition of "waters of the United States" would not be "durable" if it did not take regional considerations into account, such as regional variations in climate and hydrology, particularly in the arid West. Another commenter stated that a "durable" rule would be one that provides regulatory certainty without "unnecessarily hindering" the regulated community's ability to develop and manage projects such as those related to water infrastructure.

Several commenters called for a science-based approach to the definition of "waters of the United States" in discussing development of a "durable" rule, with one suggesting that a definition grounded in science could "stand the test of time." A few commenters further related the concept of "durability" to providing strong water quality protections. One of these commenters asserted that the proposed rule should be more protective regardless of the agencies' intentions to develop a more durable rule in a second rulemaking.

Other commenters expressed the view that the proposed rule would not advance the agencies' goal of developing a "durable" definition. Most of these commenters suggested that the proposed rule would not provide for durability due to the commenters' concerns with the proposed rule's potential impacts on a specific sector or sectors, particularly the agricultural sector. Commenters identified specific sectors and types of stakeholders, included the following (in alphabetical order):

- Agencies, co-regulators, and the regulated community, including for example states and tribes, municipalities, and the specific sectors listed below;
- Agricultural community and industry, including for example farmers, ranchers, cattle producers, livestock producers, soybean producers, and growers;
- Businesses (including small business)/companies/industries;
- Citizens/communities/the general public;
- Developers;
- Drinking water sector;
- Flood and stormwater managers;
- Foresters;
- Infrastructure sector(s);
- Invasives species management professionals;
- Land managers;
- Landowners/property owners;

- Mining operations;
- Municipalities;
- Pipeline operators;
- Private and/or public property managers;
- Public health sectors;
- Public interests (*e.g.*, drinking water);
- Public works agencies;
- Ready mix concrete industry;
- Small and rural communities, particularly in terms of drinking water and sanitation;
- Stakeholders generally;
- Taxpayers;
- Water managers (agricultural and municipal);
- Water supply and treatment facilities; and
- Wetland and stream mitigation and ecological restoration providers.

<u>Agencies' Response</u>: The agencies appreciate commenters' expressions of support around establishing a durable definition of "waters of the United States." For the reasons discussed in Final Rule Preamble Section IV.A, the agencies find that the final rule will achieve the agencies' goals of effectively and durably protecting the quality of the nation's waters. The effectiveness of the final rule is based, in part, on the familiarity of the regulatory framework to the agencies and stakeholders, with an array of readily available tools and resources. The final rule also is durable because it is founded on the familiar framework of the longstanding 1986 regulations, amended to reflect the agencies' interpretation of appropriate limitations on the geographic scope of the Clean Water Act in light of the law, the science, and agency expertise. The final rule also reflects the agencies' consideration of the extensive public comments. This final rule protects the quality of the nation's waters by restoring the important protections for jurisdictional waters provided by the Clean Water Act, including not only protections provided by the Act's permitting programs, but also protections provided by programs ranging from water quality standards and total maximum daily loads to oil spill prevention, preparedness, and response programs, to the tribal and state water quality certification programs. See also the agencies' response to comments in Section 5.0.3 (addressing a potential second rulemaking).

The agencies acknowledge the importance of regional variation and received substantial feedback on this issue in developing the final rule, including feedback on potential regional approaches to implementation. This final rule does not preclude the agencies from taking into account regional considerations as part of a significant nexus analysis, but the agencies are not explicitly including regional criteria in the rule to ensure they have the flexibility to address local conditions. The initial phase of implementing the final rule will require education and training for agency staff as well as co-regulators, stakeholders, and the regulated public, which will likely include regionally based training to ensure consistent and efficient implementation of the final rule. For additional discussion of issues related to regional variation, see the agencies' response to comments in Section 18.3.

Finally, the agencies acknowledge that there are indirect costs—both monetary and temporal—associated with implementation of the final rule. Indeed, there are indirect costs

associated with implementation of all prior rules defining "waters of the United States." As the final rule is very similar in scope to that of pre-2015 practice, there will be *de minimis* new indirect costs associated with the implementation of the final rule. Potential costs and benefits would only be incurred as a result of actions taken under existing Clean Water Act programs relying on the definition of "waters of the United States" (*i.e.*, sections 303, 311, 401, 402, and 404) that are not otherwise modified by this rule. Entities currently are, and will continue to be, regulated under these programs that protect "waters of the United States" from pollution and destruction. Each of these programs may subsequently impose costs as a result of implementation of their specific regulations. See the Economic Analysis for the Final Rule and the agencies' response to comments in Section 17 for more information on potential costs and benefits associated with the final rule.

1.3.2 Regulatory certainty

Many commenters expressed concern that the multiple changes to the definition of "waters of United States" over the years has led to regulatory uncertainty or similar issues. One of these commenters stated that frequent changes to the definition have had an adverse impact on small and rural communities, which the commenter stated "often have difficulty providing safe, affordable drinking water and sanitation due to limited economies of scale and a lack of technical expertise."

A few commenters specifically critiqued changes to the definition of "waters of the United States" that the commenters perceived as being associated with political administration changes. For example, one commenter asserted that it is unreasonable for the agencies to "constantly change regulations based on political headwinds," expressing the view that such an approach "is in direct contradiction of EPA's mission to administer and enforce Federal laws fairly and effectively." A few commenters used the term "whiplash" to critique the Clean Water Act's history and/or changes in the definition of "waters of the United States," with one commenter quoting a statement from Administrator Regan in an EPA press release that "[i]n recent years, the only constant with ['waters of the United States'] has been change, creating a whiplash in how to best protect our waters in communities across America." Another commenter opined that the proposed rule's apparent return to the pre-2015 regulatory regime would not be permanent and so would contribute to uncertainty and confusion.

Some commenters discussed regulatory certainty relative to prior regulatory regimes around "waters of the United States." Several commenters expressed support for the 2020 Navigable Waters Protection Rule (2020 NWPR) as providing regulatory certainty and/or clarity, with some stating that failing to implement the 2020 NWPR would contribute to regulatory uncertainty. One commenter asserted that the 1986 regulations represent the "only" durable definition of "waters of the United States," stating that it "has been in place for more than 40 years," "has never been overturned by any court or amended by Congress," and "represents the epitome of durable regulation." This commenter urged the agencies to restore the 1986 regulations without any of the regulatory revisions included in the proposed rule. In contrast, another commenter criticized the 1986 regulations as being ambiguous and providing insufficient clarity around which waters were jurisdictional; this commenter suggested that the proposed rule would similarly fail to provide regulatory certainty. A different commenter expressed concern that the proposed rule's revisions to the 1986 regulations would expand upon, rather than adhere to, the pre-2015 regulatory regime and that such an expansion would introduce new uncertainties for the regulated community.

Many commenters expressed concern that a lack of regulatory certainty under the proposed rule could interfere with various stakeholders' abilities to plan for and/or seek permits for activities, including development projects. One commenter argued that the proposed rule does not provide clear standards for farmers and ranchers and that this uncertainty would subject farmers and ranchers to costs and delays.

A few commenters raised concerns about the impact of regulatory uncertainty on what they characterized as beneficial projects, including, for example, flood and stormwater infrastructure, ecological restoration, and wetland and stream mitigation. Additionally, a few commenters suggested that regulatory uncertainty and burdens associated with the proposed rule's case-by-case approach to jurisdiction have no corresponding environmental benefit or do not actually improve water quality.

Agencies' Response: The agencies acknowledge that the definition of "waters of the United States" has changed multiple times since the Clean Water Act was enacted and that such changes can contribute to regulatory uncertainty. In this final rule, the agencies are exercising their authority to construe "waters of the United States" to mean the waters defined by the familiar 1986 regulations with amendments to reflect the agencies' interpretation of the statutory limits on the scope of the "waters of the United States," informed by the text of the relevant provisions of the Clean Water Act and the statute as a whole, the scientific record, relevant Supreme Court precedent, and the agencies' experience and technical expertise after more than 45 years of implementing the longstanding pre-2015 regulations defining "waters of the United States."

In response to comments on the proposal, the agencies revised the rule to improve the clarity, implementability, and durability of the definition. The agencies find that the final rule increases clarity and implementability by streamlining and restructuring the 1986 regulations and providing implementation guidance informed by sound science, implementation tools, and other resources. Further, because the final rule is founded upon a longstanding regulatory framework and reflects consideration of the agencies' experience and expertise, as well as updates in implementation tools and resources, the agencies find that the final rule is generally familiar to the public and implementable. The agencies also find that the clarifications in the final rule, including the addition of exclusions for features that were generally considered non-jurisdictional under the pre-2015 regulatory regime, and the intervening advancements in implementation resources, tools, and scientific support address some of the concerns raised in the past about timeliness and consistency of jurisdictional determinations under the Clean Water Act. See Final Rule Preamble Sections IV.A.4 and IV.G for further discussion of the agencies' finding that the final rule is both familiar and implementable, as well as information about implementation tools. Moreover, to provide further clarity and certainty to the public, the agencies are codifying exclusions in the final rule's regulatory text for the features described in the proposed rule preamble as generally non-jurisdictional. Clearly identifying these exclusions in the rule will simplify the process of determining jurisdiction and is an important aspect of the agencies' policy goal of providing clarity and certainty. See Final Rule Preamble Section IV.C.7.

In developing the final rule, the agencies thoroughly considered alternatives to the rule, including the 2015 Clean Water Rule, the 2019 Repeal Rule, and the 2020 NWPR, and have concluded that this final rule best accomplishes the agencies' goals to promulgate a rule that advances the objective of the Clean Water Act, is consistent with Supreme Court decisions,

is informed by the best available science, and promptly and durably restores vital protections to the nation's waters. See Section IV.B of the Preamble to the Final Rule for a comprehensive discussion of the agencies' consideration of alternatives to the final rule. See also the agencies' response to comments in Section 3.1 (explaining how the final rule relates to the pre-2015 regulatory regime and addressing the agencies' decision to revise the 1986 regulations rather than adopt them unchanged).

The agencies acknowledge that a lack of regulatory certainty can adversely impact the ability to plan for development or other activities. The final rule generally restores the longstanding and familiar categories of the 1986 regulations and establishes jurisdictional limitations based on case-specific application of the relatively permanent standard and the significant nexus standard to certain categories of waters in the rule. Indeed, the agencies have over a decade of nationwide experience in making decisions regarding jurisdiction under the pre-2015 regulatory regime consistent with the relatively permanent standard and the significant nexus standard. Regulated entities and other interested parties have substantial experience with the 1986 regulations and the two *Rapanos* standards. Individuals uncertain about the status of waters on their property may obtain a jurisdictional determination from the Corps. The Corps does not charge a fee for this service. *See* 33 CFR 325.1; Regulatory Guidance Letter 16-01 (2016).

Additionally, the agencies acknowledge that the need for case-specific analyses will continue under this rule for certain jurisdictional determinations. Given the factual nature of the jurisdictional inquiry, any standard will require some case-specific factual determinations; as a result, all definitions of "waters of the United States"—including the pre-2015 regulatory regime, the 2015 Clean Water Rule, and the 2020 NWPR—have required some level of case-specific analysis. Nonetheless, the agencies find that the clarifications in this final rule, including the addition of exclusions that codify longstanding practice and review of the advancements in implementation resources, tools, and scientific support address many of the concerns raised in the past about timeliness and consistency of jurisdictional determinations under the Clean Water Act. Specifically, the agencies have provided greater clarity in this rule by: adding limitations to the scope of the definition to the rule text; adding a definition of "significantly affect" that identifies the functions and factors to be evaluated as part of a significant nexus analysis; restructuring and streamlining the 1986 regulations; and drawing on more than a decade of post-*Rapanos* implementation experience to provide additional implementation guidance and resources. These improvements, taken together, substantially reduce any inefficiencies that may be presented by the final rule's case-specific approach. See Final Rule Preamble Section IV.G for information about implementation data, tools, and methods that are relevant to jurisdictional determinations under the final rule.

Finally, the agencies acknowledge that there are indirect costs—both monetary and temporal—associated with implementation of the final rule. Indeed, there are indirect costs associated with implementation of all prior rules defining "waters of the United States." As the final rule is very similar in scope to that of pre-2015 practice, there will be *de minimis* new indirect costs associated with the implementation of the final rule. See the Economic Analysis for the Final Rule and the agencies' response to comments in Section 17 for information on potential costs and benefits associated with the final rule.

1.4 Jurisdictional Determinations and Permitting Issues

The agencies received many comments on jurisdictional determinations and permitting issues. Many commenters that provided feedback on jurisdictional determinations and permitting issues did so in the context of discussing regulatory certainty and related themes, such as a desire for greater efficiency. Multiple commenters expressed concerns about project and/or operational impacts such as costs and delays associated with obtaining jurisdictional determinations and necessary permits, in addition to the impact that delays associated with permitting requirements may have on project planning. Some of these commenters suggested that costs associated with the process of obtaining a jurisdictional determination and/or permit are overly burdensome, such as costs associated with hiring consultants and engineers, submitting permit applications, and additional mitigation and compliance costs that may arise where jurisdictional waters are found. Several commenters asserted that this process can amount to a $500/acre or greater decrease in value of the land and that mitigation costs to proceed with development can cost up to thousands of dollars per linear foot.

Some commenters discussed concerns around issuance of jurisdictional determinations and/or permitting issues with respect to particular sectors or stakeholder groups, including the following (in alphabetical order):

- Aggregates industry;
- Agriculture, including the "agricultural community," cattle producers, farmers, "leaders of rural communities," irrigated agriculture, producers, and ranchers;
- Builders (*e.g.*, homebuilders) and/or land developers;
- Businesses, business owners, small businesses, and large businesses;
- Communities;
- Construction businesses;
- Ditch owners;
- Electricity generation, transmission, distribution and operations, and utilities;
- Energy infrastructure, including clean energy and renewable energy;
- Environmental non-governmental organizations;
- Industries;
- Infrastructure;
- Institutions;
- Flood control managers;
- Foresters and forest owners;
- Housing;
- Landowners/property owners;
- Land improvement contractors;
- Mining;
- Oil and gas companies;
- Pesticides and aerial applicators;
- Pipeline and utility infrastructure;
- Power companies;
- The public;
- Recreation lands management organizations;
- Regulated community and regulated public;

- States, counties, local government, municipalities, tribal governments, and public agencies;
- "state wetland regulators and related non-governmental organizations;"
- Stormwater control entities;
- Transportation;
- Water management, including conservation, development, delivery, use, and resilience;
- Wetland mitigation and ecological restoration; and
- Wetlands management.

Further, a number of commenters expressed concern that the case-by-case approach to assessing jurisdiction under the proposed rule would be overly burdensome and lead to uncertainty in permitting for the regulated community or that the proposed rule's jurisdictional standards were unclear and would thus contribute to challenges in obtaining jurisdictional determinations or permits. Additionally, many commenters asserted that a case-by-case approach to assessing jurisdiction would result in increased costs and delays for the regulated community. Another commenter suggested that case-by-case analyses would burden the agencies and cause confusion.

Several commenters critiqued the proposed rule as creating an undesirable or unfair choice between paying for compliance costs (*e.g.*, permitting, consulting, delays) or dealing with enforcement risks (*e.g.*, penalties) associated with potential non-compliance. Another commenter voiced concerns about "increased risk of unintentional violations" as the regulated community adapts to changes in the definition of "waters of the United States."

Agencies' Response: The agencies acknowledge the need for case-specific analyses will continue under the final rule for certain jurisdictional determinations, potentially raising some timeliness and consistency issues that the agencies' rule in 2015 and 2020 were designed, in part, to reduce. Yet, as discussed in Final Rule Preamble Section IV.A.3, the agencies find that fact-based standards for determining Clean Water Act jurisdiction are appropriate and not unique to the definition of "waters of the United States." The agencies have provided more clarity in this rule by: adding limitations to the scope of the definition to the rule text; adding a definition of "significantly affect" that identifies the functions and factors to be evaluated as part of a significant nexus analysis; adding exclusions to the rule; restructuring and streamlining the 1986 regulations; and drawing on more than a decade of post-*Rapanos* implementation experience to provide additional implementation guidance and resources. These improvements, taken together, substantially reduce any inefficiencies that may be presented by the rule's case-specific approach. The agencies also find that the clarifications in the final rule, including the addition of exclusions for features that were generally considered non-jurisdictional under the pre-2015 regulatory regime, and the intervening advancements in implementation resources, tools, and scientific support address many of the concerns raised in the past about timeliness and consistency of jurisdictional determinations under the Clean Water Act.

The agencies also acknowledge that there are indirect costs—both monetary and temporal—associated with implementation of the final rule. Indeed, there are indirect costs associated with implementation of all prior rules defining "waters of the United States." As the final rule is very similar in scope to that of pre-2015 practice, there will be *de minimis* new indirect costs associated with the implementation of the final rule. See the Economic

Analysis for the Final Rule and the agencies' response to comments in Section 17 for information on potential costs and benefits associated with the final rule.

The agencies disagree that the final rule's reliance on case-specific analyses for certain jurisdictional determinations will be burdensome to the agencies. Since the Supreme Court's decision in *Rapanos*, the agencies have gained more than a decade of nationwide experience in making jurisdictional determinations under the pre-2015 regulatory regime consistent with the relatively permanent standard and the significant nexus standard. Moreover, the scientific and technical information available to inform the significant nexus analysis and identify waters that meet the relatively permanent standard has also markedly improved over time and become more readily available since the agencies first started implementing both standards. See Final Rule Preamble Section IV.G for information about implementation data, tools, and methods that are relevant to jurisdictional determinations under the final rule.

For additional clarity and guidance to assist in implementing the relatively permanent standard and significant nexus standard, see Section IV.C of the Preamble to the Final Rule. Specifically, see Final Rule Preamble Sections IV.C.4, IV.C.5, and IV.C.6 for additional information on how the agencies will implement these standards for tributaries, adjacent wetlands, and paragraph (a)(5) waters. These sections include guidance on identifying waterbodies on the landscape, determining which waters are "relatively permanent, standing or continuously flowing," identifying waters with a "continuous surface connection" under the relatively permanent standard, and which waters are "similarly situated" and "in the region" under the significant nexus standard. Further, individuals uncertain about the status of waters on their property may obtain a jurisdictional determination from the Corps. The Corps does not charge a fee for this service. *See* 33 CFR 325.1; Regulatory Guidance Letter 16-01 (2016).

See also the agencies' response to comments in Section 1.3 (addressing issues related to durability and regulatory certainty).

1.4.1 Jurisdictional determinations

Numerous commenters criticized the proposed rule's case-by-case approach to jurisdictional determinations, asserting that it could result in similar features being treated differently and that such inconsistency would be unfair to the regulated community by creating an unequal playing field. Additionally, many commenters expressed concern that case-by-case analyses would delay the overall process for obtaining jurisdictional determinations. Commenters also critiqued the case-by-case approach to jurisdictional determinations as contributing to a general lack of clarity or regulatory certainty. Another commenter asserted that the agencies should make clear that they bear the burden to justify an assertion of federal jurisdiction "in case-by-case determinations . . . as well as enforcement proceedings."

Multiple commenters expressed concern that the process of receiving a jurisdictional determination is costly and lengthy, with some commenters claiming that the process may take between six months to a year to complete. One commenter expressed support for "strategies to reduce the demand for federal jurisdictional determinations and delays for project proponents." A different commenter requested that the jurisdictional determination process be streamlined so local governments would not spend limited

financial resources to hire outside professionals. Another commenter called for "standardized processing of JDs" in the context of different Corps districts' approaches to approved jurisdictional determinations (AJDs), preliminary jurisdictional determinations (PJDs), communications, timelines, and tracking, emphasizing that a more standardized or streamlined approach would "ensure regulators are organized and efficiently using their time to reach a timely JD decision." One commenter stated that it is important that federal agencies dedicate necessary resources to ensure efficient jurisdictional determinations.

Additionally, a commenter suggested that AJDs should not be subject to a five-year expiration period. The commenter argued that requiring project proponents to request a new jurisdictional determination after five years presents an unnecessary regulatory burden because, according to the commenter, "watercourses do not typically change character" in a five-year timeframe. The commenter asserted that instead of a five-year expiration period, AJDs should remain valid until the Corps receives a request for a new jurisdictional determination. Another commenter asserted that EPA should use Corps' jurisdictional determinations for Clean Water Act section 402 purposes. This commenter argued that it is confusing and inefficient to limit usage of jurisdictional determinations to the Clean Water Act section 404 program. Another commenter requested that the rule include reasonable and enforceable time limits on review of requests for AJDs.

Finally, one commenter expressed the view that the proposed rule is "setting the stage" for the agencies to "go back to desktop jurisdictional determinations."

> **Agencies' Response: Regarding the consistency of jurisdictional determinations under the final rule and related issues such as clarity and regulatory certainty, see the agencies' response to comments in Section 1.4. For information about implementation data, tools, and methods that are relevant to jurisdictional determinations under the final rule, see Final Rule Preamble Section IV.G. See also Final Rule Preamble Section IV.C.10 (providing guidance to landowners on how to determine when a Clean Water Act permit is required). Moreover, as with any final regulation, the agencies will consider developing new guidance to facilitate implementation of the final rule should questions arise in the field regarding application of the final rule. Nevertheless, the agencies conclude that the final rule, together with the preamble and existing tools, provides sufficient clarity to allow consistent implementation of the final rule.**
>
> **The agencies acknowledge that they will continue to bear the burden of proof for determinations of whether or not a water is jurisdictional. Further, the agencies note that while a requestor is not required to provide information regarding applicability of the exclusions to the agencies during the jurisdictional determination process, it is to their benefit to do so because the person asserting that a water is excluded or that a person's activities are exempt under the Clean Water Act bears the burden of proving that the exclusion or exemption applies. *See, e.g.*, *United States v. Akers*, 785 F.2d 814, 819 (9th Cir. 1986).**
>
> **The agencies also acknowledge that there are indirect costs—both monetary and temporal—associated with implementation of the final rule. Indeed, there are indirect costs associated with implementation of all prior rules defining "waters of the United States." As the final rule is very similar in scope to that of pre-2015 practice, there will be *de minimis* new indirect costs associated with the implementation of the final rule. See the Economic**

Analysis for the Final Rule and the agencies' response to comments in Section 17 for information on potential costs and benefits associated with the final rule.

Comments regarding the regulations governing approved jurisdictional determinations (AJDs), including comments on the five-year expiration period of AJDs or timeframes associated with review of requests for AJDs, are outside the scope of this rulemaking.

Finally, with respect to the use of "desktop jurisdictional determinations," the agencies note that they have been using remote sensing and desktop tools to assist with identifying jurisdictional waters for many years, and that such tools are particularly critical where field data is unavailable or where a field visit is not possible. Due to limitations associated with some remote tools, field verification for accuracy may be necessary (*e.g.*, due to scale or vegetative cover, not all tributaries may be visible in satellite and aerial photographs or mapped in the National Hydrography Dataset. See Final Rule Preamble Section IV.G for a detailed discussion of tools and data used in jurisdictional decisionmaking, including aerial photography, U.S. Geological Survey maps, and National Wetland Inventory data, among others.

1.4.2 Status of pre-existing approved jurisdictional determinations

A number of commenters expressed confusion or concern over the status of approved jurisdictional determinations (AJDs) issued under prior rules, particularly the status of AJDs issued under the 2020 NWPR before it was vacated. Some commenters requested that the agencies expressly state in the preamble that these pre-existing AJDs will remain valid under a new final rule—including AJDs issued under the 2020 NWPR while it was in effect. This concept is sometimes referred to as "grandfathering." Many commenters asserted that grandfathering pre-existing AJDs would promote regulatory certainty and fairness and suggested that the agencies address the status of pre-existing AJDs in the preamble to avoid confusion and potential costs that could arise in the absence of clarity as to whether such AJDs would be honored.

In asking the agencies to "grandfather" prior AJDs, several commenters cited case law such as *U.S. Army Corps of Engineers v. Hawkes Co., Inc.*, 136 S. Ct. 1807 (2016) and administrative documents such as Regulatory Guidance Letters 05-02 and 16-01. Commenters also referenced the agencies' public statements on the impact of the vacatur of the 2020 NWPR on pre-existing AJDs, as well as the agencies' statements in prior rulemakings revising the definition of "waters of the United States." One of these commenters asserted that the agencies' decision not to rely on AJDs issued under the 2020 NWPR for new permit decisions has eroded stakeholders' confidence in the value of jurisdictional determinations and resulted in adverse financial impacts and project delays, cancellations, and/or modifications associated with the need to obtain a new jurisdictional determination. This commenter stated that, to restore stakeholder confidence in AJDs, the agencies should solicit public comment on "narrow and specific criteria" that would be used to reopen or revise AJDs.

A few commenters asserted that in prior rulemakings, the agencies stated that changes to the definition would not apply retroactively and that existing AJDs (and permits) would not be reopened for reconsideration under the revised definition. One of these commenters asked that, in addition to honoring pre-existing AJDs, the agencies refrain from applying the pre-2015 regulatory regime or the new revised

definition to AJDs associated with pending permit applications that had been deemed complete on or before the August 30, 2021 district court order vacating the 2020 NWPR. The commenter stated that this approach would be consistent with statements in a 2008 rulemaking wherein the agencies indicated that applying new requirements to a permit applicant that has invested time and effort into complying with prior requirements would impose a substantial hardship, citing 73 FR 19594, 19608 (Apr. 10, 2008). Further, the commenter requested that the agencies clarify that both vacatur of the NWPR and issuance of a new revised definition does not constitute "new information" that can be used to reopen an existing AJD pursuant to Regulatory Guidance Letter 05-02. The commenter argued that such an approach would be consistent with the agencies' prior practice as well as the Supreme Court's finding in *Hawkes* that an AJD is a final agency action. A different commenter argued that the agencies must honor AJDs issued under the 2020 NWPR, rather than applying the vacatur of the 2020 NWPR retroactively, citing *Landgraf v. USI Film Prods.*, 511 U.S. 244, 264 (1994) (quoting *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988)).

> **Agencies' Response: The agencies recognize that promulgation of the final rule could lead to questions regarding AJDs issued under prior rules defining "waters of the United States" and the utility of such AJDs to support actions, such as requests for permits, following the effective date of this rule. The agencies address the effect of the final rule on previously issued AJDs and the extent to which AJDs issued under prior rules may be relied upon, as well as the status of AJDs issued under the 2020 NWPR, in Final Rule Preamble Section IV.F.**
>
> **The Corps' approach to determining whether to reopen an AJD, including the suggestion that the agencies solicit public comment on what criteria to use, is outside the scope of this rulemaking.**

1.4.3 Project and/or operational impacts

A number of commenters expressed concern about potential project and/or operational impacts related to the process of obtaining jurisdictional determinations and/or permits and their associated requirements, including the need for additional fieldwork. Some commenters suggested that an expansive and/or unclear definition of "waters of the United States" would lead to more projects requiring permits, which the commenters stated would increase project expenses, timelines, and general regulatory uncertainty. A few of these commenters asserted that such compliance costs have no corresponding environmental benefit.

One commenter expressed concern that the proposed revised definition would result in disproportionate impacts to their state and be unreasonably burdensome to oil and gas operations, maritime operations, tribal corporations, and rural communities. Another commenter suggested that the proposed rule would hinder surface water supply projects in their state, such as new reservoirs, stormwater retention ponds, and storage basins. Another commenter raised concerns about "wildfire impacted drainages" becoming jurisdictional, including "isolated waters, as aggregated, intermittent or ephemeral streams, or even all tributaries," which the commenter argued would "impede entities' ability to timely respond to the devastating impacts of the forest fires ravaging the west."

Multiple commenters who discussed project and/or operational impacts argued that the proposed rule could or would hinder environmentally beneficial projects. Some commenters provided the following types of projects as examples:

- “Climate, clean energy, resilience, and water management projects”;
- “Water resiliency projects”;
- Flood control projects;
- Forestry “best management practices such as buffers alongside features such as roadside ditches and ephemeral streams”;
- Water treatment and erosion control;
- “Voluntary conservation efforts”; and
- General ecological and water quality benefitting projects, including innovative approaches.

Some commenters discussed consequences beyond the project- or industry-specific scale that they argued would result from the proposed rule due in part to potential project-, industry-, or sector-specific scale impacts. These commenters argued that these impacts would lead to consequences related to the following:

- Economy and/or competitiveness, including for example, related to COVID-19 recovery, supply chain, or others;
- Utility, energy, and/or other public services and/or associated rates, including for example, costs for taxpayers or ratepayers;
- Public agency (*e.g.*, federal, state, municipal) resources;
- Public health;
- Environmental issues, including stewardship, justice, and restoration;
- Climate and/or clean energy;
- Recreation lands and trails access and management;
- Homebuilding and homeownership, such as by making it more expensive for developers so that there is a more costly and higher bar to becoming a homeowner;
- Jobs;
- “Farmers’ ability to provide safe, affordable, and abundant food, fuel, and fiber to the citizens of this nation and the world”; and
- “Energy security.”

Additionally, several commenters discussed the proposed rule’s impacts and consequences related to infrastructure (including energy and transportation infrastructure), as well as projects that require the provision of building materials from the mining and aggregates industries. These commenters tended to argue that the proposed rule would delay or otherwise interfere with infrastructure development, including by impacting projects related to energy (as well as clean energy), transportation, water (*e.g.*, supply, wastewater, flood control), mining, construction, and/or the supply chain generally. A few commenters further asserted that the proposed rule’s potential impacts could interfere with or undermine the Biden administration’s priorities around infrastructure improvements and economic recovery.

> **<u>Agencies’ Response</u>: The agencies find that the final rule increases clarity and implementability by streamlining and restructuring the 1986 regulations and providing implementation guidance informed by sound science, implementation tools, and other resources. As discussed in Section V.A of the Preamble to the Final Rule, the final rule will establish a regime that is generally comparable to current practice and will thus generate *de minimis* costs and benefits as compared to the pre-2015 regulatory regime that the agencies are currently implementing. The agencies expect that there will be a slight and**

unquantifiable increase in waters being found to be jurisdictional under the final rule as compared to the pre-2015 regulatory regime.

The agencies acknowledge that there are indirect costs—both monetary and temporal—associated with implementation of the final rule. As noted above, however, because the final rule is very similar in scope to that of pre-2015 practice, there will be *de minimis* new indirect costs associated with implementation of the final rule. Instead, potential costs and benefits would only be incurred as a result of actions taken under existing Clean Water Act programs relying on the definition of "waters of the United States" (*i.e.*, sections 303, 311, 401, 402, and 404) that are not otherwise modified by this final rule. Entities currently are, and will continue to be, regulated under these programs that protect "waters of the United States" from pollution and destruction. Each of these programs may subsequently impose costs as a result of implementation of their specific regulations. See the Economic Analysis for the Final Rule and the agencies' response to comments in Section 17 for more information on potential costs and benefits associated with the final rule; see also the agencies' response to comments on regulatory certainty in Section 1.3.

The agencies disagree with commenters who suggested that the final rule fails to provide corresponding environmental benefits. In the Economic Analysis for the Final Rule, the benefit estimates, in particular, do not reflect the full scope of benefits of the rule, as they omit known sources of benefits that are inherently difficult to quantify. Many of the benefits provided by potentially jurisdictional water features can be episodic and highly dispersed, making them inherently difficult to accurately quantify their aggregate effect over time and across landscapes. Examples of these benefit categories include the ability to sequester carbon, reduce soil erosion, and retain flood waters. See Section III.C.3 of the Economic Analysis for the Final Rule for further discussion of the final rule's unquantified benefits.

With respect to concerns that the rule will hinder environmentally beneficial projects, the agencies emphasize that the final rule will protect the quality of the nation's waters by restoring the important protections for jurisdictional waters provided by the Clean Water Act, including not only protections provided by the Act's permitting programs, but also protections provided by programs ranging from water quality standards and total maximum daily loads to oil spill prevention, preparedness, and response programs, to the tribal and state water quality certification programs. Indeed, this final rule advances the Clean Water Act's statutory objective as it is informed by the best available science concerning the functions provided by upstream tributaries, adjacent wetlands, and interstate lakes and ponds, streams, and wetlands that do not fall within the other jurisdictional categories to restore and maintain the water quality of traditional navigable waters, the territorial seas, and interstate waters (*i.e.*, the paragraph (a)(1) waters). See also Final Rule Preamble Section IV.C.9.c.ii for a discussion of how the agencies can consider a changing climate under the significant nexus standard consistent with the best available science.

Further, as discussed in Final Rule Preamble Section III.A.1.b, the fact that a resource meets the definition of "waters of the United States" does not mean that activities such as farming, construction, infrastructure development, or resource extraction, cannot

occur in or near the resource at hand. For example, the Clean Water Act exempts a number of activities from permitting or from the definition of "point source," including agricultural storm water and irrigation flows. *See* 33 U.S.C. 1342(*l*)(2), 1362(14). Since 1977, the Clean Water Act in section 404(f) has exempted activities such as many "normal farming, silviculture, and ranching activities" from the section 404 permitting requirement, including seeding, harvesting, cultivating, planting, and soil and water conservation practices *See* 33 U.S.C. 1342(*l*)(2), 1362(14). The final rule does not affect these statutory exemptions. In addition, permits are routinely issued under sections 402 and 404 of the Clean Water Act to authorize certain discharges to "waters of the United States." The permitting authority generally works with permit applicants to ensure that activities can occur without harming the integrity of the nation's waters.

Moreover, regarding some commenters' concerns that the final rule will increase permitting delays, the agencies note that where waters are covered by the Clean Water Act, the agencies have adopted measures to simplify compliance with the Act such as general permits and tools for expediting the permitting process (*e.g.*, mitigation banks, in-lieu fee programs, and functional/conditional assessment tools). The agencies intend to continue to develop general permits and other simplified procedures to ensure that projects, particularly those that offer environmental or public benefits, can proceed with the necessary environmental safeguards while minimizing permitting delays.

See also the agencies' response to comments in Section 5.0.4 (addressing infrastructure-related issues) and Section 5.10 (addressing environmental justice issues).

1.5 Clean Water Act Programs

Numerous commenters noted concerns related to Clean Water Act programs. Though some commenters referenced Clean Water Act programs generally, many commenters discussed specific Clean Water Act sections and their respective programs, permits, and regulations, including the following (in numeric order):

- Section 106;
- Sections 303(a), 303(c), and 303(d) (state water quality standards and total maximum daily load (TMDL) programs);
- Section 311 (oil pollution prevention and response, spill prevention, control, and countermeasures program);
- Section 316(b) (related to cooling water intake structures);
- Section 401 (water quality certification program);
- Section 402 (national pollutant discharge elimination system (NPDES) permitting program, including individual, general, and municipal separate storm sewer system (MS4) and other stormwater permits; also relates to wet weather issues);
- Section 404 (including nationwide permits, particularly nationwide permits 44, 57, and 58).

Some commenters suggested that ambiguity in the definition of "waters of the United States" would contribute to ambiguity or related challenges in implementing Clean Water Act programs. Another commenter emphasized that in revising the definition, the agencies should minimize potential impacts to state permitting programs and voluntary conservation efforts.

Multiple commenters asserted that the proposed rule would expand federal jurisdiction in a manner that would burden the regulated community or specific industries. Some of these commenters suggested that the significant nexus standard in particular would expand the scope of Clean Water Act jurisdiction and that the regulated community's associated compliance costs would result in substantial economic impacts on small businesses, including those in the construction industry. One commenter indicated that the agencies did not "meaningfully evaluate" potential implications stemming from the difference between the proposed rule's approach to significant nexus and the approach embodied in the *Rapanos* Guidance, particularly with respect to aggregating similarly situated features in the region.

Another commenter asserted that if percolation ponds and constructed wetlands are designated as "waters of the United States," then normal maintenance operations may require a Clean Water Act section 404 permit and trigger an Environmental Site Assessment, which would obstruct the purpose of the facility.

A few commenters asserted that the proposed rule would increase resources needs (*e.g.*, Clean Water Act section 106 funds; Clean Water Act State Revolving Funds), with one of these commenters urging the Corps to request appropriate funding to process permits. Some commenters suggested that the agencies failed to account for potential economic impacts to states that could arise from implementing Clean Water Act programs and/or complying generally with Clean Water Act requirements under a broader scope of jurisdiction; these commenters mentioned costs such as setting water quality standards, administering stormwater permits, and issuing water quality certifications.

Agencies' Response: The agencies acknowledge that the definition of "waters of the United States" is relevant to the scope of most federal programs to protect water quality under the Clean Water Act—for example, water quality standard, permitting to address discharges of pollutants, including discharges of dredged or fill material, processes to address impaired waters, oil spill prevention, preparedness and response programs, and tribal and state water quality certification programs—because the Clean Water Act uses the term "navigable waters" in establishing such programs. A revised definition of "waters of the United States" can affect these Clean Water Act programs at both the federal and state level.

As discussed in Final Rule Preamble Section IV.A, this rule generally restores the longstanding and familiar categories of the 1986 regulations and establishes jurisdictional limitations based on case-specific application of the relatively permanent standard and the significant nexus standard to certain categories of waters in the rule. Yet, while the final rule is founded on, and generally returns to, the longstanding and familiar pre-2015 regulatory regime, it does not implement that regime unchanged. For example, the final rule adds limitations to the scope of the definition of "waters of the United States," employs a definition of whether waters "significantly affect" paragraph (a)(1) waters that identifies the functions and factors to be evaluated, adds exclusions for features that were generally considered non-jurisdictional under the pre-2015 regulatory regime to the rule text, and, as explained in Section IV.G of the Preamble to the Final Rule, incorporates advancements in the implementation data, tools, and methods that have become available since the *Rapanos* decision.

Indeed, contrary to some commenters' assertions, the final rule does not represent an expansion beyond the text of the pre-2015 regulations and is narrower in some respects than the pre-2015 regulatory regime. As discussed in Section IV.C of the Preamble to the Final Rule, the final rule narrows the scope of jurisdiction from the text of the 1986 regulations by replacing the broad Commerce Clause basis for jurisdiction over paragraph (a)(5) waters with the narrower relatively permanent and significant nexus standards, eliminating jurisdiction over tributaries and adjacent wetlands based on their connection to paragraph (a)(5) waters, and eliminating jurisdiction by rule over impoundments of paragraph (a)(5) waters.; and by explicitly excluding waters that were not expressly excluded in the text of the 1986 regulations. Further, the agencies disagree that the final rule generally represents an expansion beyond the pre-2015 regulatory regime; rather, the agencies expect that there will be a slight and unquantifiable increase in waters being found to be jurisdictional under the final rule in comparison to the pre-2015 regulatory regime. Thus, as discussed in Section V.A of the Preamble to the Final Rule, the final rule will establish a regime that is generally comparable to current practice and this rule would generate *de minimis* costs and benefits as compared to the pre-2015 regulatory regime that the agencies are currently implementing.

With respect to evaluating the difference between the proposed rule's approach to the significant nexus standard and the approach used in the *Rapanos* Guidance[1], the agencies sought comment on how to implement the proposed rule's significant nexus standard, including with respect to aggregation. *See* 86 FR 69431. As described in Final Rule Preamble Section IV.C, the agencies have considered public comments on approaches to implementing the significant nexus standard, including comments related to aggregation, and have provided clarity around how the agencies intend to implement the significant nexus standard in the final rule.

The agencies disagree with commenters that asserted that the agencies failed to account for potential economic impacts to states that could arise from a change in the scope of Clean Water Act jurisdiction under the proposed rule. The economic analysis for the proposed rule included an assessment of potential effects to Clean Water Act programs that rely on the definition of "waters of the United States," including the effect of a change in the scope of Clean Water Act jurisdiction on programs related to water quality standards, issuance of general permits including stormwater permits, and the section 401 water quality certification program.

The agencies acknowledge that there are indirect costs—both monetary and temporal—associated with implementation of the final rule. Indeed, there are indirect costs associated with implementation of all prior rules defining "waters of the United States." Yet, as discussed above, because the final rule is very similar in scope to that of pre-2015 practice, there will be *de minimis* new indirect costs associated with the implementation of the final rule. Potential costs and benefits would only be incurred as a result of actions taken under existing Clean Water Act programs relying on the definition of "waters of the United

[1] 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* and *Carabell v. United States* (June 5, 2007)

States" (*i.e.*, sections 303, 311, 401, 402, and 404) that are not otherwise modified by this rule. Entities currently are, and will continue to be, regulated under these programs that protect "waters of the United States" from pollution and destruction. Each of these programs may subsequently impose costs as a result of implementation of their specific regulations. See the Economic Analysis for the Final Rule and the agencies' response to comments in Section 17 for more information on potential costs and benefits associated with the final rule.

Further, the final rule does not subject any entities of any size to any specific regulatory burden. This rule codifies a regulatory regime very similar to the one being implemented nationwide following the vacatur of the 2020 NWPR definition of "waters of the United States." The final rule is designed to clarify the statutory term "navigable waters," defined as "waters of the United States," which defines the scope of Clean Water Act jurisdiction. 33 U.S.C. 1362(7). For further discussion on the impacts of the final rule on programs under Clean Water Act sections 303, 311, 301, 402, and 404, see Chapter III of the Economic Analysis for the Final Rule. For further discussion on the final rule's impact on different sectors, see Chapter VI of the Economic Analysis for the Final Rule, as well as the agencies' response to comments in Section 17. See also the agencies' response to comments in Section 1.3 on regulatory certainty.

Comments regarding funding for processing Clean Water Act permits is outside the scope of this rulemaking; but see the agencies' response to comments expressing concerns about the agencies' workload in Section 1.2.

1.5.1 Section 303

Several commenters stated that expanding the definition of "waters of the United States" would affect Clean Water Act section 303 requirements around developing total maximum daily loads (TMDLs) and/or establishing new state water quality standards, asserting that these impacts would adversely affect or otherwise burden the agencies and stakeholders. For example, one commenter asserted that newly jurisdictional waters would be subject to new water quality standards and TMDLs, which could in turn diminish property values for stakeholders such as forest owners.

Another commenter suggested that the agencies did not sufficiently evaluate or explain potential impacts of the proposed revised definition on Clean Water Act section 303 programs, including potential costs associated with establishing water quality standards for newly jurisdictional waters, monitoring and assessing whether newly jurisdictional waters are attaining water quality standards, and developing TMDLs where such waters are not attaining standards. This same commenter also asserted that an expanded definition of "waters of the United States" has the potential to introduce new litigation risk, such as citizen suits asking EPA to establish federal water quality standards or TMDLs where states fail to take timely action on newly jurisdictional waters.

One commenter stated that if the intent of the proposed rule is to include and manage short-term stormwater flow condition events, then EPA needs to explain how they intend to establish applicable, defensible water quality standards and monitoring requirements at the source (*e.g.*, ephemeral stream areas under short-term wet weather conveyance conditions). This commenter further asserted that if

stormwater conveyances are now considered point sources, then prior TMDL determinations (*i.e.*, waste load and load allocations) will need to be re-examined.

<u>Agencies' Response</u>: **The agencies acknowledge that the definition of "waters of the United States" is relevant to the scope of programs that protect water quality under the Clean Water Act, including the section 303 programs related to water quality standards and TMDLs. If a feature is not jurisdictional under the Clean Water Act, states and authorized tribes are not required to develop water quality standards for it or assess it for impairments. See also the agencies' response to comments in Section 1.5 (addressing general comments on the proposed rule's potential effects on Clean Water Act programs).**

The agencies disagree with comments suggesting that the final rule generally represents an expansion beyond the pre-2015 regulatory regime; rather, the agencies expect that there will be a slight and unquantifiable increase in waters being found to be jurisdictional under the final rule in comparison to the pre-2015 regulatory regime. Indeed, as discussed in Section V.A of the Preamble to the Final Rule, the final rule will establish a regime that is generally comparable to current practice and will generate *de minimis* costs and benefits as compared to the pre-2015 regulatory regime that the agencies are currently implementing. Nonetheless, the agencies recognize that a change in the scope of Clean Water Act jurisdiction has the potential to increase the number of waters that are assessed and added to the impaired waters list (and subsequent TMDL development) under Clean Water Act section 303(d). The potential effect of the definitional change on the number of waterbodies added to the impaired waters list (and subsequent total maximum daily load (TMDL) development) is uncertain. See the Economic Analysis for the Final Rule and the agencies' response to comments in Section 17 for more information on potential costs and benefits associated with the final rule, including specific discussion of the Clean Water Act section 303 program.

The agencies disagree that the economic analysis for the proposed rule did not adequately explain the potential impacts of the proposed rule on programs under Clean Water Act section 303. Specifically, Chapter III of the economic analysis for the proposed rule described how a revised definition of "waters of the United States" could impact programs under Clean Water Act section 303 and explained that "the agencies were unable to project additional costs related to development or revision of water quality standards as a consequence of the proposed rule relative to the secondary baseline of the NWPR." For the final rule, indirect costs associated with the implementation of Clean Water Act programs could not be quantified and are instead qualitatively discussed in the Economic Analysis for the Final Rule. Additionally, variables representing unknown costs and benefits are noted within the final calculations of costs and benefits listed within the economic analysis.

See also Chapter III of the Economic Analysis for the Final Rule.

1.5.2 <u>Section 311</u>

A number of commenters wrote about spill prevention, control, and countermeasures (SPCC) plans, section 311 of the Clean Water Act, and/or related issues more generally. A couple of these commenters argued that more facilities will require SPCC Plans and compliance with section 311 under the proposed

rule. One commenter asserted that failure to exempt waters typically associated with dry drainage features with no significant nexus to flowing waterbodies, including constructed ponds and ditches, natural depressions, clean-water diversions, wetlands not adjacent to navigable water, and drainage ditches, will result in oil and gas operators preparing and implementing unnecessary SPCC plans. Another commenter asserted that the proposed rule's approach to significant nexus will make "other waters" jurisdictional for the first time, which will subject more facilities to Clean Water Act section 311 SPCC requirements. The commenter also asserted that it was unreasonable for the agencies to claim that the proposed rule's impact on Clean Water Act section 311 would be small.

> **<u>Agencies' Response</u>: The agencies acknowledge that the definition of "waters of the United States" affects the implementation of Clean Water Act programs, including the section 311 oil spill prevention and preparedness program. As discussed in Chapter III of the Economic Analysis for the Final Rule, changes in the scope of jurisdictional waters could result in additional facilities being subject to SPCC requirements, as compared to the secondary baseline of the 2020 NWPR.**
>
> **The agencies disagree that the final rule will have significant impact on the Clean Water Act section 311.The agencies have found no evidence that the 2020 NWPR caused a substantive change in the universe of facilities or change to the compliance costs for facilities subject to EPA's SPCC and FRP requirements. The agencies similarly have found no evidence that the 2020 NWPR caused a substantive change to the number of pipelines or rail operators that are required to prepare and maintain oil spill response plans. The agencies conclude that most facilities still chose to continue to implement spill prevention measures that are considered good engineering practices for their industry, such as secondary containment, overfill prevention, practices to ensure the safe transfer of oil to bulk storage containers, and visual inspections of bulk storage containers. The agencies also did not observe that changes in the scope of "waters of the United States" under the 2020 NWPR had a material effect on spill notification and response. Accordingly, the agencies anticipate that the impact of the final rule on the Clean Water Act section 311 program will not be significant.**
>
> **The agencies disagree that the final rule will result in oil and gas operators preparing and implementing unnecessary SPCC plans. See Chapter III of the Final Rule Economic Analysis for further discussion of the final rule's potential impacts on the SPCC program, including the benefits and costs for facilities.**

1.5.3 <u>Section 401</u>

A number of commenters discussed section 401 of the Clean Water Act and/or water quality certifications. One commenter suggested that vacatur of the 2020 NWPR, and any effect that it may have on approved jurisdictional determinations issued under the 2020 NWPR, should not impact related section 401 certifications because such certifications "are for the purpose of determining compliance with state water quality standards and not WOTUS."

Several commenters argued that an increase in jurisdictional waters will lead to an increase in section 402 and/or section 404 permitting requirements and section 401 certifications. One of these commenters asserted that an increase in certifications would delay important infrastructure projects and undermine

state efforts to restore and maintain water quality. Another commenter expressed support for the proposed rule's scope of jurisdiction because it would provide "greater ability for state agencies to require water quality certifications under section 401."

> <u>Agencies' Response</u>: **Comments regarding the impact of vacatur of the 2020 NWPR are outside the scope of this rulemaking.**
>
> **As discussed in Chapter III of the Economic Analysis for the Final Rule, the agencies acknowledge that an increase in the number of EPA-issued Clean Water Act section 402 permits and Clean Water Act section 404 permits would lead to an increase in the number of section 401 certification actions. However, the agencies disagree that an increase in the number of Clean Water Act section 401 certifications will undermine state efforts to restore and maintain their water quality. Rather, Clean Water Act section 401 provides states with an important tool to help protect the water quality of federally regulated waters within their borders, in collaboration with federal agencies. As noted in Chapter III of the EA, certifications may potentially enhance environmental benefits. Furthermore, the agencies disagree that an increase in certifications would necessarily delay important infrastructure projects. Clean Water Act section 401 provides temporal limits on the certification process and any timing delays will be case-specific (*e.g.*, depend on the project type, size, etc.). Project applicants and certifying states may also leverage the pre-filing meeting request process to facilitate a timely certification decision. *See* 40 CFR 121.4.**

1.5.4 <u>Section 402</u>

Many commenters wrote about section 402 of the Clean Water Act and/or National Pollutant Discharge Elimination System (NPDES) permits, such as individual, general, and Municipal Separate Storm Sewer System (MS4) and other stormwater permits. These commenters tended to discuss increased permitting burdens under section 402 related to their particular sector(s) and associated impacts (*e.g*., cost, time, public health, state resources, uncertainty).

A commenter asserted that public utilities, the regulated community, and state and federal permit writers will be impacted if industrial water features become jurisdictional, because it will alter the point of compliance. The commenter noted that internal water features at electric facilities have repeatedly been determined non-jurisdictional. Another commenter noted that the "waters of the United States" definition would determine the applicability of EPA's Clean Water Act section 316(b) rules and advised the agencies to consider the impacts of the proposal on the electric power industry, whose industrial water features historically have been excluded (*e.g.*, cooling ponds and impoundments, active and inactive ash ponds).

Another commenter asked whether the proposal intended to provide EPA with direct NPDES permitting authority over non-point pollution sources.

Another commenter provided three recommendations to reduce the burden on MS4s. First, the commenter suggested limiting "adjacent" waters to those that are bordering or contiguous to other jurisdictional

waters. Second, the commenter suggested that the waste treatment system exclusion include ditches, canals, and other waterways that convey stormwater to or from where treatment occurs, or where water is stored, or flood protection occurs. Lastly, the commenter recommended revising the definition of "significantly affect" to be "chemical, physical, and biological integrity of waters" instead of "or." This commenter ultimately asserted that Florida's regulatory regime and the commenter's three recommendations would protect surface water resources while avoiding the impacts that the 2015 Clean Water Rule would have had on entities subject to the NPDES and MS4 permit programs. A different commenter asked that the agencies provide further discussion on the relationship between "significantly affect" and the section 402 permitting program, asserting that the preamble to the proposed rule mentioned section 402 only "tangentially and occasionally." This commenter added that states with "robust groundwater protection regulations should not be adversely affected by interpretation of definitions that appear to focus more on the Clean Water Act [section 404]."

Another commenter argued that the proposed approach to significant nexus would expand jurisdiction to ditches and non-navigable waters, and lead to some waters being regulated as both point sources and "waters of the United States." The commenter asserted that this would lead to additional permits, duplicative regulatory requirements, and increased risk of citizen suits, which would slow down infrastructure development or other job-creating economic activity. The commenter also asserted that expanded jurisdiction would require construction projects to comply with the Construction General Permit in more waters, which would make it increasingly difficult and costly to design and construct projects.

Another commenter argued that the proposed definition would create more opportunities for citizen suits seeking to halt forestry operations, alleging certain forestry activities involve point sources that are not exempt under Clean Water Act sections 402(l) and 404(f).

> **Agencies' Response: The agencies acknowledge that the definition of "waters of the United States" affects the implementation of Clean Water Act programs, including the section 402 NPDES permit program. However, the final rule does not impact the scope of a Clean Water Act section 402 permit, which authorizes the discharge of pollutants from point sources to "waters of the United States," in compliance with applicable requirements and conditions.**
>
> **As discussed in the Chapter III of the EA, under the 2020 NWPR, any permitted entity that was discharging to an ephemeral feature or other non-jurisdictional water was still required to have an NPDES permit if their discharge conveys to a jurisdictional water. Moving the compliance point for NPDES permits upstream may result in lower effluent limitations given the difference in pollutant dilution or attenuation. However, regulated industrial sectors that are likely located near ephemeral streams represent a minority of the regulated industrial stormwater universe. Additionally, these types of facilities are generally large and due to their scale, may be more likely to discharge into perennial streams (outside of the arid West) that are jurisdictional under both the secondary baseline of the 2020 NWPR and the final rule. Therefore, the agencies expect no benefits or costs for industrial facilities with stormwater discharges regulated under the Phase I rule.**
>
> **The agencies disagree that the final rule will create an increased permitting burden. As discussed in Final Rule Preamble Section IV.C, the agencies are codifying a number of**

exclusions from the definition of "waters of the United States," including longstanding exclusions for prior converted cropland and waste treatment systems, and exclusions for features that were generally considered non-jurisdictional under the pre-2015 regulatory regime. See Final Rule Preamble Section IV.C.7 and the agencies' response to comments in Section 15 for further discussion of the final rule's exclusions. See also Chapter VI of the Economic Analysis for the Final Rule and the agencies' response to comments in Section 17 for further discussion of sector-specific impacts.

The agencies note that MS4s often rely on a drainage network consisting of jurisdictional waters as well as constructed conveyance structures to transport stormwater. Where MS4s have incorporated jurisdictional waters, including otherwise jurisdictional creeks, streams, or rivers, which may be channelized, ditched, or otherwise modified within their drainage network, the agencies' longstanding approach is to view those incorporated water features as jurisdictional waters even if they are considered to be a part of the MS4. Under the final rule, the agencies retain this approach.

The agencies disagree with commenters that the definition of "adjacent" should be changed in the final rule. The agencies have retained their longstanding definition of "adjacent" in the final rule. "Adjacent" is defined as "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.'" See Final Rule Preamble Section IV.A and Section IV.C.8.b.

The agencies disagree with the suggestion that the rule's significant nexus standard is inconsistent with the Clean Water Act's statutory objective because it uses the phrase "restore or maintain the chemical, physical, OR (emphasis added) biological integrity of the Nation's waters" rather than the language in the statutory objective to "restore or maintain the chemical, physical, AND (emphasis added) biological integrity of the Nation's waters" and that this inconsistency creates vagueness and confusion. Congress intended the Clean Water Act to "restore and maintain" all three forms of "integrity," section 101(a), so if any one of them is compromised, then the statute's stated objective would be contravened. It would be contrary to the plain language of the statute and subvert the law's objective if the Clean Water Act only protected paragraph (a)(1) waters upon a showing that there were effects on every attribute of their integrity. The agencies also disagree that this creates vagueness or confusion as it is consistent with longstanding practice and clear in the text of the definition of "significantly affect" in the final rule. As the agencies stated in the *Rapanos* Guidance: "Consistent with Justice Kennedy's instruction, EPA and the U.S. Army Corps of Engineers (Corps) will apply the significant nexus standard in a manner that restores and maintains any of these three attributes of traditional navigable waters." *Rapanos* Guidance at 10 & n.35. See also Final Rule Preamble Section IV.C.9.

The agencies agree that some waters may be regulated as both a "water of the United States" and a point source.[2] For example, where a ditch is jurisdictional, the agencies have

[2] A district court has reached a contrary conclusion, but the agencies conclude the decision is poorly reasoned, relies on the change in interpretation articulated for the first time in the 2020 NWPR and which the agencies reject in this

historically taken the position that the ditch can be both a "water of the United States" and a point source and are reinstating this position in this rule. See Final Rule Preamble Section IV.C.7 for further discussion. However, the agencies disagree that this approach will slow down infrastructure activity or other job-creating economic activity. Rather, the agencies are establishing a final rule that is both familiar and implementable. Therefore, to the extent that the definition affects the implementation of Clean Water Act programs, the final rule will allow for a familiar and implementable approach. See the agencies' response to comments in Section 5 for further discussion of the final rule's impacts on infrastructure.

The agencies also disagree that compliance with construction general permits in more waters will make it increasingly difficult and costly to design and construct projects. Procedures typically required by construction stormwater general permits have been widely adopted as normal practices in the construction industry and are frequently required by local ordinances. As a result, the requirements are not usually considered to impose a significant burden. An increase in jurisdictional waters is not likely to change these circumstances for most areas of the country. The exception may be for stormwater discharges from construction sites in arid states where many streams are ephemeral (*e.g.*, Arizona, Nevada, and New Mexico). See Chapter III of the Final Rule Economic Analysis for further discussion on the final rule's potential impact to construction general permits.

Finally, as discussed in Final Rule Preamble Section III.A.1.b, the Clean Water Act exempts a number of activities from permitting or from the definition of "point source," *see* 33 U.S.C. 1342(*l*)(2), 1362(14), and the final rule does not affect these statutory exemptions.

1.5.5 Section 404

Many commenters discussed section 404 of the Clean Water Act and/or Nationwide Permits (NWP), including numbers 44, 57, and 58. A number of these commenters discussed general and/or covered topics discussed elsewhere in this summary, including themes on activities, sectors, and/or waterbody types. A few commenters voiced their support for use of NWPs and/or expressed concerns that apparent jurisdictional expansion would threaten their use.

A commenter noted that power companies rely on NWP 57 and will configure their project to avoid the need for an individual section 404 permit and accompanying requirements (*e.g.*, water quality certification, NEPA, ESA), which the commenter asserted are timely and costly. The commenter also referred to the Sunding and Zilberman study[3], which showed that an average applicant for an individual permit spends 788 days and $271,596 to complete the process, while the average NWP applicant spends 313 days and $28,915. Those figures were cited by a few other commenters as well.

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rule, and is inconsistent with the position of five Justices in *Rapanos*. *See Toxics Action Center, Inc. & Conservation Law Found. v. Casella Waste Systems, Inc.*, 2021 WL 3549938, *8 (D.N.H. Aug. 11, 2021) ("If a waterway can simultaneously be a navigable water (that is, a water of the United States) and a point source, the distinction the statute draws between the two categories using the prepositions 'from' and 'to' would be rendered meaningless.").

[3] David Sunding & David Zilberman, The Economics of Environmental Regulation by Licensing: An Assessment of Recent Changes to the Wetland Permitting Process, 42 Nat. Resources J. 59, 74-76 (2002)

A few commenters discussed state assumption of Clean Water Act section 404. One commenter noted that a clear "waters of the United States" definition is important for states that have assumed the Clean Water Act section 404 program and asserted that the 2020 NWPR resulted in greater certainty in jurisdictional determinations than previous regulations. Another commenter asserted that the uncertainty surrounding the legal status of "waters of the United States" due to the vacatur of the 2020 NWPR has created a permitting delay in Florida and claimed that the agencies failed to meet 40 CFR 233.16.

Another commenter advised the agencies to consider specific regionalized issues, specifically noting that it is important to consider the impact of changes to the federal regulatory structure to wetland permitting review in New England states that use Corps general permits.

> **Agencies' Response: See Chapter III of the Final Rule Economic Analysis for discussion of potential effects on the Clean Water Act section 404 permitting program. See also Appendix H of the Final Rule Economic Analysis for discussion of the Sunding and Zilberman.**
>
> **The agencies acknowledge the importance of providing a clear definition of "waters of the United States," including for states that have assumed implementation of the Clean Water Act section 404 program. As only waters jurisdictional under the Clean Water Act can be assumed, this rule does affect the scope of waters a state or tribe can assume. As discussed in Final Rule Preamble Section IV.A.4, the agencies are establishing a final rule that is both familiar and implementable. The agencies find that the clarifications in this rule, including the addition of exclusions that codify longstanding practice, and review of the advancements in implementation resources, tools, and scientific support address many of the concerns raised in the past about timeliness and consistency of jurisdictional determinations under the Clean Water Act. See also Final Rule Preamble Section IV.C.7 and Section IV.D.**
>
> **Comments regarding the impact of vacatur of the 2020 NWPR and 40 CFR 233.16 are outside the scope of this rulemaking.**
>
> **The agencies have considered public comments regarding regional approaches and regional variations. The final rule will result in increased clarity and certainty regarding the identification of "waters of the United States." The agencies received many helpful comments on the proposed rule that resulted in refinement of the final rule to provide further clarity and certainty to the regulated public. The initial phase of implementing the final rule will require education and training for agency staff as well as co-regulators, stakeholders, and the regulated public, which will likely include regionally based training to ensure consistent and efficient implementation of the final rule. See also the agencies' response to comments in Section 18.3.**

1.6 Federal Agency Coordination and Capacity

Many commenters discussed agency coordination and/or capacity. Several of these commenters raised concerns about adequate agency capacity (*e.g.*, workload, staffing levels) to implement the proposed rule. Among these commenters, there was a common concern that such issues would lead to delays and other project-based and/or operational issues. Other commenters in this group more generally voiced concerns about experienced or anticipated agency coordination issues, including for example related to mapping,

jurisdictional determinations, field implementation between the U.S. Environmental Protection Agency (EPA), the U.S. Army Corps of Engineers (Corps), and/or U.S. Geological Survey (USGS).

One commenter stated that they "recognize that some implementation challenges stem from underfunding of the Corps' Regulatory Program to sufficiently staff and train regulators. The reductions in staffing and training protract permitting and approval timelines, which negatively impacts the economy and the environment. Without a targeted funding increase for the Regulatory Program, the Corps will continue to fall short in meeting their own stated timelines and success criteria, and will be ill-equipped to support forthcoming infrastructure investments."

Many commenters—including many in the context of agency coordination and/or capacity—discussed state and federal—and in some cases, local—coordination with regard to permitting and/or jurisdictional issues. These commenters tended to raise concerns about lack of coordination. A few of these commenters called on the agencies to consider impacts on state funding or budgets. A number of commenters critiqued what they characterized as a shift from local or state control to federal control or otherwise voiced concerns about negative impacts on state programs. For example, a commenter wrote, "The agencies should enhance the co-regulator partnership by providing States with a meaningful role in making determinations. The collective human resources that can be brought to bear on a decision would make the process more informed and more efficient. State staff have local knowledge of climactic, hydrologic, and legal land use and water use factors. Information sharing during the process would provide valuable resources and help avoid misinterpretations, delays, and unintended consequences."

A few commenters cited approaches from state programs that they referred to as models, for example:

- A commenter discussed Florida's basin management action plan (BMAP), through which it implements total maximum daily loads (TMDLs) with involvement of MS4 permit holders.
- Another commenter called for "efficiency" and discussed Florida's "streamlined process for obtaining both a Clean Water Act Section 404 permit and a state environmental resource permit for changes to the landscape that affect surface water flows."
- A commenter highlighted its coordination with the Corps, providing the example of their joint application process.

<u>Agencies' Response</u>: The agencies acknowledge that there are indirect costs—both monetary and temporal—associated with implementation of the final rule. Indeed, there are indirect costs associated with implementation of all prior rules defining "waters of the United States." As the final rule is very similar in scope to that of pre-2015 practice, there will be *de minimis* new indirect costs associated with the implementation of the final rule.

With respect to comments expressing concern about the agencies' workload, the agencies reiterate—as discussed in this response above and throughout the preamble to the final rule—that this final rule reflects consideration of the agencies' experience and technical expertise after more than 45 years of implementing the 1986 regulations defining "waters of the United States," including more than a decade of experience implementing those regulations consistent with the decisions in *Riverside Bayview*, *SWANCC*, and *Rapanos* collectively. Notably, the agencies have extensive experience making jurisdictional determinations using the relatively permanent standard and the significant nexus standard.

Comments regarding the agencies' approach to coordinating with each other or with other federal agencies are outside the scope of this rulemaking, which is related to the definition of "waters of the United States." Similarly, comments related to streamlining various permitting processes or similar efficiency measures are outside the scope of this rulemaking. See also the agencies' response to comments in Section 18 for additional discussion of commenters' recommendations, some of which are outside the scope of this rulemaking.