Revised Definition of "Waters of the United States"
Response to Comments Document
SECTION 2 – LEGAL ARGUMENTS

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

2.0 OVERVIEW OF COMMENTS ON LEGAL ISSUES

The agencies received many comments expressing views on legal issues related to the proposed rule, including whether the proposed rule is consistent with the U.S. Constitution, the Clean Water Act, and relevant Supreme Court precedent. Comments on the rulemaking process for the proposed rule, including whether this rulemaking complies with the Administrative Procedure Act, are summarized and addressed in the agencies' response to comments, Section 5.

Some commenters expressed the view that the proposed rule is inconsistent with the U.S. Constitution, the Clean Water Act, and relevant Supreme Court precedent. A number of these commenters argued that the scope of jurisdiction under the proposed rule goes beyond Congress's Commerce Clause authority or is otherwise overly broad. Some commenters stated that the proposed rule is unconstitutionally vague and raises due process concerns or other constitutional issues. Multiple commenters also asserted that the proposed rule exceeds the agencies' statutory authority under the Clean Water Act, with some commenters suggesting that the proposed rule misinterpreted or misapplied relevant Supreme Court precedent interpreting the scope of the Act. Commenters also expressed concern regarding the proposed rule's consistency with Clean Water Act section 101(b), in addition to raising other issues involving the relationship between federal and state authority over water resources.

Other commenters asserted that the proposed rule is consistent with the Clean Water Act, including the Act's objective, text, and legislative history, as well as relevant Supreme Court precedent and the U.S. Constitution. In addition, many commenters suggested that the proposed rule is supported by a robust scientific record, including peer-reviewed scientific literature, and informed by the agencies' expertise. Several commenters expressly asserted that the agencies have discretionary authority to interpret the ambiguous phrase "waters of the United States" in a reasonable manner, with one commenter citing the Supreme Court's holding in *Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005) in arguing that the agencies are not bound by Supreme Court case law unless the Court's interpretation "follows from the unambiguous terms of the statute and thus leaves no room for agency discretion."

Finally, a few commenters asserted that the Clean Water Act requires broader protections than those afforded by the significant nexus and relatively permanent tests, suggesting that the breadth of the rule was insufficient to protect water quality consistent with the statute and/or congressional intent.

> **<u>Agencies' Response</u>: In this rule, the agencies are exercising their discretionary authority to interpret the key term "waters of the United States" to mean the waters defined by the familiar 1986 regulations, with amendments to reflect the agencies' determination 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 sum, 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. 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.C for a comprehensive description of the final rule.

The final rule's relatively permanent standard and significant nexus standard allow the agencies to fulfill the statute's and Congress's clearly stated objective in section 101(a) while also avoiding assertions of jurisdiction that raise federalism concerns. These jurisdictional limitations are informed by Supreme Court case law and designed to be well within the agencies' statutory and constitutional limits.

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.

See the remainder of Section 2 for the agencies' response to comments on specific legal issues related to the proposed rule, including Section 2.1 (regarding the Clean Water Act's statutory objective), Section 2.2 (regarding the relationship between federal and state authority under the Clean Water Act), Section 2.3 (regarding the agencies' legal authority to assert Clean Water Act jurisdiction over specific types of waters), Section 2.5 (regarding Supreme Court case law), and Section 2.7 (regarding constitutional arguments).

2.0.1 Significant Nexus Standard

Some commenters stated that the proposed rule's significant nexus standard is consistent with the broad congressional intent of the Clean Water Act, the Act's statutory objective, and Supreme Court precedent. Other commenters asserted that the proposed rule's significant nexus standard is inconsistent with the Clean Water Act and/or Supreme Court precedent, including *SWANCC*[1] and both the plurality's and Justice Kennedy's opinions in *Rapanos*.[2] One of these commenters expressed concern over the use of biological or ecological functions in assessing significant nexus, arguing that this approach ignores factors such as volume, duration, and frequency of flow that the commenter claimed both the plurality and Justice Kennedy found were "crucial" to asserting jurisdiction. A few commenters that objected to the proposed rule's significant nexus standard asserted that the agencies are not obligated under *Rapanos* to adopt the significant nexus standard.

Several commenters criticized the proposed rule's significant nexus standard as unlawfully *limiting* the scope of the Clean Water Act, suggesting that Congress intended the Act to protect more waters than would satisfy the proposed rule's significant nexus standard.

[1] *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) ("*SWANCC*")
[2] *Rapanos v. United States*, 547 U.S. 715 (2006) ("*Rapanos*")

One commenter suggested that the proposed rule's use of the phrase "similarly situated waters" represents a new and "alternative" category for asserting federal jurisdiction that is not supported by the Clean Water Act or Supreme Court precedent. Specifically, the commenter expressed concern that the proposed rule would allow the agencies to find jurisdiction wherever a water is "similarly situated."
Another commenter argued that application of the proposed rule's approach to "similarly situated" could result in the assertion of federal jurisdiction over "isolated water features," which the commenter stated has been found unlawful by "numerous federal courts," citing *San Francisco Baykeeper v. Cargill Salt Division*, 418 F.3d 700, 707 (9th Cir. 2007) and *Georgia v. Wheeler*, 418 F. Supp. 3d 1336 (S.D. Ga. 2019). The commenter further argued that the proposed rule's "similarly situated" provision would impermissibly expand federal jurisdiction "to features previously only regulated under the Migratory Bird Rule," which the commenter asserted was "struck down as . . . unconstitutional" in *SWANCC*.

Additionally, one commenter criticized the proposed rule's definition of "significantly affect" as "more than speculative or insubstantial" as being inconsistent with dictionary definitions indicating that "to be 'significant,' the thing described must meet or surpass some threshold degree of importance." This commenter suggested that the proposed rule's approach to the term "significant" sets too low a bar for satisfying the significant nexus standard and thereby impermissibly expands the scope of federal Clean Water Act jurisdiction.

<u>Agencies' Response</u>: As discussed in Section IV.A.3.a.i of the Preamble to the Final Rule, the agencies have concluded that the significant nexus standard, as the agencies have established it in this rule, is the best interpretation of the Clean Water Act because it is consistent with the text, including the Act's statutory objective and statutory structure, the legislative history and case law, and is supported by the best available science. For discussion of the final rule's significant nexus standard, including the agencies' findings that the standard is consistent with the Clean Water Act, see Final Rule Preamble Section IV.A and the agencies' response to comments in Section 2.1.

The agencies disagree with commenters' suggestions that the rule's significant nexus standard is inconsistent with Supreme Court case law. As discussed in Final Rule Preamble Section IV.A, the significant nexus standard is also consistent with prior Supreme Court decisions, and with every circuit decision that has gleaned a rule of law from that precedent. In fact, the relevant Supreme Court cases provide additional support for the agencies' construction of the Clean Water Act to protect waters that meet the significant nexus standard. Although *SWANCC* did not involve wetlands, the Court's reasoning in that case indicates that Clean Water Act coverage of waters, including wetlands, is within the statutory ambit to the extent that such coverage will protect traditional navigable waters, the territorial seas, and interstate waters. The significant nexus standard implements that understanding of the Clean Water Act. The standard recognizes both that protection of downstream traditional navigable waters, the territorial seas, and interstate waters is the ultimate objective of the Clean Water Act's discharge prohibition and that the protection of such waters requires restrictions on discharges into additional waters as well. Thus, the standard is grounded in Congress's stated intent to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." *Id*. at 759 (quoting 33 U.S.C. 1251(a)). Nonetheless, this final rule is not based on an application of the test for interpreting Supreme Court decisions found in *Marks v. United States*, 430 U.S. 188, 193 (1977) (*Marks*). In other words, while the agencies' interpretation of the statute is informed

by Supreme Court decisions, including *Rapanos*, it is not an interpretation of the multiple opinions in *Rapanos*, nor is it based on an application of the Supreme Court's principles to derive a governing rule of law from a decision of the Court in a case such as *Rapanos* where "no opinion commands a majority." *Rapanos*, 547 U.S. at 758 (Roberts, C.J., concurring) (citing *Marks v. United States*, 430 U.S. 188, 193 (1977)). Rather, with this rule, the agencies are interpreting the scope of the definition of "navigable waters," informed by relevant Supreme Court precedent, but also based on the text of the relevant provisions of the Clean Water Act and the statute as a whole, the scientific record, 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." See Final Rule Preamble Section IV.A.5.b and the agencies' response to comments in Section 2.5 for discussion of issues related to specific Supreme Court cases, including *SWANCC* and both the plurality's and Justice Kennedy's opinions in *Rapanos*.

The agencies have concluded that the significant nexus standard advances the objective of the Clean Water Act because it is linked to effects on the water quality of paragraph (a)(1) waters while also establishing an appropriate limitation on the scope of jurisdiction by requiring that those effects be significant. See Final Rule Preamble Section IV.A.3. for further discussion of the basis for the agencies' conclusion.

The agencies disagree with commenters concerned about the use of biological or ecological functions to assess a significant nexus. The objective of the Act, and, therefore, the scope of the significant nexus under the statute and under Justice Kennedy's standard is "to restore and maintain the chemical, physical, and *biological* integrity of the Nation's waters." Section 101(a)(emphasis added). Further, as is clear from the Clean Water Act's objective of protecting the "biological integrity" of the nation's waters and the interim goal of achieving wherever possible water quality that provides for the protection and propagation of fish, shellfish, and wildlife, protection of aquatic wildlife is an important aspect of protecting water quality and is addressed by the Clean Water Act. Among the many other provisions in which the Clean Water Act addresses biological integrity are Section 102, comprehensive programs for water pollution control, "[i]n the development of such comprehensive programs due regard shall be given to the improvements which are necessary to conserve such waters for the protection and propagation of fish and aquatic life and wildlife"; Section 104, the Administrator will conduct continuing "comprehensive studies of the effects of pollution, including sedimentation, in the estuaries and estuarine zones of the United States on fish and wildlife, on sport and commercial fishing, on recreation, on water supply and water power, and on other beneficial purposes"; section 301(h), providing that "[n]o permit issued under this subsection shall authorize the discharge of any pollutant into saline estuarine waters which at the time of application do not support a balanced indigenous population of shellfish, fish and wildlife"; section 302, requiring effluent limitations for, among other things, "protection and propagation of a balanced population of shellfish, fish and wildlife"; section 303(d) requiring states to "identify those waters or parts thereof within its boundaries for which controls on thermal discharges under section 301 are not stringent enough to assure protection and propagation of a balanced indigenous population of shellfish, fish, and wildlife"; section 304, requiring the Administrator to develop criteria for water quality accurately reflecting the latest scientific knowledge: "(A) on the kind and extent of all identifiable effects on health and

welfare including, but not limited to, plankton, fish, shellfish, wildlife, plant life, shorelines, beaches, esthetics, and recreation which may be expected from the presence of pollutants in any body of water, including ground water; (B) on the concentration and dispersal of pollutants, or their byproducts, through biological, physical, and chemical processes; and (C) on the effects of pollutants on biological community diversity, productivity, and stability, including information on the factors affecting rates of eutrophication and rates of organic and inorganic sedimentation for varying types of receiving waters"; and, section 404, authorizing the Administrator to prohibit the specification of any defined area as a disposal site, if, among other considerations, the discharge of dredged or fill material will have an unacceptable adverse effect on "shellfish beds and fishery areas (including spawning and breeding areas), wildlife." In addition, the agencies disagree that assessment of biological functions means that flow will not be considered. The definition of "significantly affect" in the final rule specifically identifies "hydrologic factors, such as the frequency, duration, magnitude, timing, and rate of hydrologic connections, including shallow subsurface flow" as a factor to be considered when making a significant nexus assessment. See Final Rule Preamble Section IV.C.9.

The agencies disagree that the use of the term "similarly situated waters" in the rule is new and disagree that the concept is unsupported by the Clean Water Act or Supreme Court decisions. See Final Rule Preamble Section IV.A.3. for further discussion of the basis for the agencies' conclusion that the significant nexus standard as codified in the rule is informed by relevant Supreme Court precedent, but also based on the text of the relevant provisions of the Clean Water Act and the statute as a whole, the scientific record, 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 concept of assessing similarly situated waters for purposes of jurisdiction is not new, as Justice Kennedy explicitly stated that similarly situated waters should be assessed for a significant nexus "alone, or in combination." *Rapanos*, 547 U.S. at 780. Assessing the functions of identified waters in combination is consistent not only with the significant nexus standard, as described in Section IV.A of the Final Rule Preamble, but with the science demonstrating how upstream waters affect downstream waters. Scientists routinely analyze the combined effects of groups of waters, aggregating the known effect of one water with those of ecologically similar waters in a specific geographic area, or to a certain scale. The agencies have assessed similarly situated waters for purposes of jurisdiction for almost 15 years. The agencies disagree that the use of similarly situated in the rule would impermissibly expand federal jurisdiction to features previously only regulated under the Migratory Bird Rule. A key concern the Court in *SWANCC* identified with the Migratory Bird Rule was that it asserted jurisdiction without any significant nexus whereas the similarly situated approach in the rule is clearly a part of the significant nexus assessment. In addition, the rule does not assert jurisdiction based on the presence of migratory birds.

The agencies have established a definition of "significantly affect" in this rule for purposes of determining whether a water meets the significant nexus standard to mean "a material influence on the chemical, physical, or biological integrity of" a paragraph (a)(1) water. Under this rule, waters, including wetlands, are evaluated either alone, or in combination with other similarly situated waters in the region, based on the functions the evaluated waters perform." This rule identifies specific functions that will be assessed and identifies

specific factors that will be considered when assessing whether the functions provided by the water, alone or in combination, have a material influence on the integrity of a traditional navigable water, the territorial seas, or an interstate water. The standard cannot be met by merely speculative or insubstantial effects on those aspects of those paragraph (a)(1) waters, but rather requires the demonstration of a "material influence." In this rule, the agencies have specified that a "material influence" is required for the significant nexus standard to be met. The phrase "material influence" establishes that the agencies will be assessing the influence of the waters either alone or in combination on the chemical, physical, or biological integrity of a paragraph (a)(1) water and will provide qualitative and/or quantitative information and articulate a reasoned basis for determining that the waters being assessed significantly affect a paragraph (a)(1) water. See Final Rule Preamble Section IV.C.9.

2.0.2 Relatively Permanent Standard

Some commenters expressed concern about the proposed rule's reliance on the relatively permanent standard. A few commenters suggested that the relatively permanent test should never be used alone, but rather as a subset of the significant nexus test to assure adequate water quality protection that is based in science. Another commenter asserted that a majority of the Supreme Court rejected the *Rapanos* plurality's relatively permanent standard, referencing the four-Justice dissent and Justice Kennedy's concurrence. This commenter cited *United States v. Davis* for the proposition that the Supreme Court has considered dissenting opinions when interpreting fragmented Supreme Court decisions.

Agencies' Response: **In the rule, the agencies have adopted the relatively permanent standard in conjunction with the significant nexus standard because the subset of waters that meet the relatively permanent standard will virtually always have the requisite connection to downstream traditional navigable waters, the territorial seas, or interstate waters to properly fall within the Clean Water Act's scope. The relatively permanent standard is also administratively useful as it more readily identifies a subset of waters that will virtually always significantly affect downstream paragraph (a)(1) waters. The final rule thus utilizes both standards. See Final Rule Preamble Section IV.A.3.**

The agencies agree with commenters who expressed concern regarding use of the relatively permanent standard as the sole test for Clean Water Act jurisdiction, however. The relatively permanent standard's extremely limited approach, standing alone, has no grounding in the Clean Water Act's text, structure, or history. It upends an understanding of the Clean Water Act's coverage that has prevailed for nearly half a century. The relatively permanent standard also seriously compromises the Clean Water Act's comprehensive scheme by denying any protection to tributaries that are not relatively permanent and adjacent wetlands that do not have a continuous surface water connection to other jurisdictional waters. The exclusion of these waters runs counter to the science demonstrating how such waters can affect the integrity of downstream waters, including traditional navigable waters, the territorial seas, and interstate waters. See Final Rule Section IV.A.3.

The agencies also agree with commenters who stated that only a minority of four Justices in *Rapanos* endorsed the agencies' authority to treat waters as jurisdictional *only* if they satisfy

the relatively permanent standard. By contrast, a majority of five Justices endorsed the agencies' authority to treat waters as jurisdictional if they satisfy the significant nexus standard. *See Rapanos*, 547 U.S. at 810 & n.14 (Stevens, J., dissenting). Because the four dissenting Justices would assert jurisdiction if either standard were met (or under the existing regulations), the agencies concluded shortly after *Rapanos* was decided that Clean Water Act coverage can be established under either standard. *See Rapanos* Guidance. [3]

2.1 Clean Water Act's Statutory Objective

Many commenters stated that the proposed rule is consistent with the Clean Water Act's objective in section 101(a) to restore and maintain the chemical, physical, and biological integrity of the nation's waters, with some suggesting that the Act's legislative history supports taking a broad approach in the proposed rule to meet that statutory objective. One commenter asserted that a majority of the Supreme Court (Justice Kennedy plus four dissenting justices) has agreed that water quality is the determining factor in defining the jurisdictional reach of the Clean Water Act, citing *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp*., 460 U.S. 1, 17(1983) and *Vasquez v. Hillery*, 474 U.S. 254, 262 n.4 (1986). Several commenters further agreed with the agencies' discussion of the Supreme Court's decisions in *Maui and National Association of Manufacturers v. U.S. Department of Defense*, 138 S. Ct. 617 (2018) ("*Maui*") and *National Association of Manufacturers v. U.S. Department of Defense*, 138 S. Ct. 617 (2018) in the preamble to the proposed rule as affirming that Congress used specific language in the definitions of the Clean Water Act to meet the Act's statutory objective and that the objective must be considered in interpreting the Act's key terms such as "waters of the United States."

Some commenters indicated that the proposed rule is a step in the right direction towards furthering the objective of the Clean Water Act but stated that they wanted the agencies to exert broader federal jurisdiction. Other commenters suggested that a regulatory scheme that is based on science and connectivity of waterbodies, not just the "foundational waters,"[4] is required to ensure the Clean Water Act's objective is met. One commenter asserted that the Clean Water Act's objective is not to restore the water quality of the "foundational waters" but to "completely eliminate water pollution in all of the waters of the United States," citing for support the Supreme Court's decisions in *City of Milwaukee v. Illinois*, 451 U.S. 304, 318 (1981); *United States v. Riverside Bayview Homes*, 474 U.S. 121, 131-35 (1985) ; *International Paper Co. v. Ouellette*, 479 U.S. 481, 486-94 (1987); *PUD No. 1 of Jefferson County v. Wash. Dep't of Ecology*, 511 U.S. 700, 717 (1994); *Arkansas v. Oklahoma*, 503 U.S. 91, 101 (1992).

A few commenters stated that the proposed 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. One of these commenters argued that in doing so, the proposed rule improperly allows for a finding of significant

[3] 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)

[4] In the proposed rule, the term "foundational waters" was used to refer to traditional navigable waters, the territorial seas, and interstate waters. In this response to comments, the agencies will preserve the use of the term "foundational waters" as used by commenters; however, responses will use "traditional navigable waters, the territorial seas, and interstate waters" or "paragraph (a)(1) waters," as the final rule does not use the term "foundational waters."

nexus based on a feature affecting only one of the parameters rather than all three; this commenter further argued that the Supreme Court has rejected the notion that a biological or ecological connection alone is sufficient to support a finding of significant nexus.

One commenter cited *Rodriguez v. United States*, 480 U.S. 522, 526 (1987) and the plurality's opinion in *Rapanos* in arguing that a statute's primary objective should not be turned into a "jurisdictional statement" and suggested that such an outcome frustrates legislative intent as well as traditional tools of statutory interpretation. Another commenter asserted that the text of the Clean Water Act's statutory objective does not "require" that the agencies rely on a significant nexus standard and stated that "[a]lmost any standard, broader or narrower" could be said to achieve the statutory objective "to some greater or lesser degree."

Several commenters stated that the agencies' reliance on the Clean Water Act's objective and associated policy goal of preserving water quality expands federal jurisdiction beyond the authority the Clean Water Act confers upon the agencies. Another commenter stated that the agencies cannot use science to expand jurisdiction beyond the scope of the Act. Some commenters asserted that it is unlawful to assert jurisdiction over non-navigable, intrastate, mostly dry features as "waters of the United States" in order to achieve the Clean Water Act's objective. Another commenter suggested that the proposed rule seeks to pursue the Act's statutory objective without regard to the distinction between federal and state authority or "important limits that Congress placed on federal authority," including by use of the term "navigable" in "navigable waters."

> **<u>Agencies' Response</u>: The agencies agree that the definition of "waters of the United States" must be designed to advance the objective of the Clean Water Act. This term is relevant to the scope of most federal programs to protect water quality under the Clean Water Act because the Clean Water Act uses the term "navigable waters" or "waters of the United States" in establishing such programs.**
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> **As discussed in Section IV.A.2 of the Preamble to the Final Rule, the agencies find that this 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, as well as ponds, streams, or wetlands that do not fall within the other categories to restore and maintain the water quality of downstream traditional navigable waters, the territorial seas, and interstate waters. This rule will thus 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.**
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> **For the reasons discussed in Sections IV.A.2 and IV.A.3 of the Preamble to the Final Rule, however, the agencies also interpret the Act based on factors other than the science and connectivity of waters, including the text of the statute as a whole and relevant Supreme Court decisions. In addition, while Congress stated a number of goals in the Clean Water Act, including that "it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985," section 101(a)(1) of the Clean Water Act, commenters citing that provision to argue that Congress intended to protect more than traditional navigable**

waters, the territorial seas, and interstate waters misunderstand the scope of the rule. While the definition of "waters of the United States" is designed to advance the objective of restoring and maintaining the chemical, physical, or biological integrity of traditional navigable waters, the territorial seas, and interstate waters—paragraph (a)(1) waters—this rule covers additional waters that must be protected to safeguard paragraph (a)(1) waters. All "waters of the United States" receive the full protections of the Clean Water Act.

The agencies disagree with commenters that argued 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 Final Rule Preamble Section IV.C.9.

Further, as discussed in the final rule preamble, the Supreme Court in *SWANCC* did not hold that the particular "ecological considerations upon which the Corps relied in *Riverside Bayview*," *Rapanos*, 547 U.S. at 741—*i.e.*, the potential importance of wetlands to the quality of adjacent waters—were irrelevant to Clean Water Act jurisdiction. Rather, the Court held that a different ecological concern, namely the potential use of the isolated ponds as habitat for migratory birds, could not justify treating those ponds as "waters of the United States." *See SWANCC*, 531 U.S. at 164-165, 171-172. That ecological concern was not cognizable because it was unrelated to "what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made." *Id.* at 172. In contrast, in this rule, the agencies, through the application of the significant nexus standard, provide federal protections for adjacent wetlands and other categories of waters based on their importance to the chemical, physical, or biological integrity of traditional navigable waters, the territorial seas, and interstate waters. In addition, the objective of the Clean Water Act is "to restore and maintain the chemical, physical, and *biological integrity* of the Nation's waters." 33 U.S.C. 1251(a) (emphasis added). Among the means to achieve the Clean Water Act's objective, Congress established an interim national goal to achieve wherever possible "water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water." 33 U.S.C. 1251(a)(2). Therefore, the agencies disagree that consideration of biological effects on paragraph (a)(1) waters is inconsistent with the Clean Water Act.

Additionally, the agencies disagree with commenters that suggested that the agencies are relying on the Clean Water Act's statutory objective or on science to expand federal jurisdiction beyond the authority granted to the agencies by Congress. The rule does not establish jurisdiction beyond the scope of the Clean Water Act. For the reasons discussed in Final Rule Preamble Section IV.A, the agencies conclude that the objective of the Clean Water Act must be considered in defining "waters of the United States" and that consideration of the objective of the Act for purposes of a rule defining "waters of the United States" must include substantive consideration of the effects of a revised definition on the integrity of the nation's waters. And since the objective of the Clean Water Act is to protect the water quality of the nation's waters, this rule must be informed by science relevant to water quality as discussed in Section IV.A.2.a of the Final Rule Preamble. At the same time, the agencies do not interpret the objective of the Clean Water Act to be the only factor relevant to determining the scope of the Act; rather the limitations established in this rule are based on the agencies' consideration of 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. By design, the significant nexus standard permits jurisdiction over waters only if they significantly affect the waters over which Congress has unquestioned authority. As a result, some waters that are non-navigable, intrastate, and flow only during certain time periods may be jurisdictional, but only if they meet the final rule's relatively permanent standard or the significant nexus standard.

Indeed, the agencies find that this rule both advances the objective of the Clean Water Act in section 101(a) and respects the role of tribes and states in section 101(b).[5] The rule appropriately draws the boundary of waters subject to federal protection by limiting the scope to the protection of upstream waters that significantly affect the integrity of waters where the federal interest is indisputable—the traditional navigable waters, the territorial seas, and interstate waters. Waters that do not implicate the federal interest in these paragraph (a)(1) waters are not included within the scope of federal jurisdiction. The scope and boundaries of the definition therefore reflect the agencies' considered judgment of both the Clean Water Act's objective in section 101(a) and the congressional policy relating to states' rights and responsibilities under section 101(b).

The agencies also disagree with commenters that stated "[a]lmost any standard, broader or narrower" could be said to achieve the statutory objective "to some greater or lesser degree." First, the Supreme Court in *Maui* clearly rejected some interpretations of the scope of Clean Water jurisdiction because they failed to advance the objective of the Act. Second, the agencies have concluded that the 2020 NWPR's rejection of the significant nexus standard while failing to adopt any alternative standard for jurisdiction that adequately addresses the effects of degradation of upstream waters on downstream waters, including paragraph (a)(1) waters, fails to advance the Clean Water Act's objective. See

[5] While Clean Water Act section 101(b) does not specifically identify tribes, the policy of preserving states' sovereign authority over land and water use is equally relevant to ensuring the primary authority of tribes to address pollution and plan the development and use of tribal land and water resources.

Final Rule Preamble Section IV.B.3. Finally, in the 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," supported by consideration of 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." Based on these considerations, the agencies have concluded that the significant nexus standard in this rule is the best interpretation of section 502(7) of the Act.

2.2 Federal-State Balance

2.2.1 Clean Water Act Section 101(b)

Many commenters asserted that the proposed rule would diminish the importance of and infringe on states' traditional authority to regulate their land and water resources, contrary to Congress's policy in Clean Water Act section 101(b) "to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources." These commenters argued that the language in Clean Water Act section 101(b) demonstrates that Congress recognized that states have a primary role in protecting their waters and that Congress sought to preserve and protect both the responsibilities and rights of states with respect to managing their land and water resources; as such, the commenters asserted, section 101(b) acts as a limit on federal Clean Water Act jurisdiction. Multiple commenters stated that the definition of "waters of the United States" must thus reflect and/or give appropriate weight to Congress's intent that states have primary authority over water resources. One commenter requested that the agencies include "a clear statement recognizing that states retain authority and primary responsibility over land and water resources to carry out the overall objectives of the Clean Water Act."

Some commenters asserted that an expansion in federal jurisdiction under the proposed rule would go against both Clean Water Act section 101(b) and the will of Congress. Other commenters stated that an expansion of federal jurisdiction under the proposed rule would contradict general federalism principles expressed in the Clean Water Act, which one commenter claimed would result in preempting and diminishing state statutes, rules, and enforcement related to water quality. Another commenter asserted that the proposed rule raises constitutional issues because it would encroach on the traditional power of states to regulate land and water resources. One commenter suggested that the proposed rule's approach to the "other waters" category—including the removal of language related to features having an effect on interstate or foreign commerce and the use of a "vague" significant nexus standard—would result in the assertion of jurisdiction over isolated waters and wetlands and "is clear evidence of the proposed rule's intrusion into state and local land use authority." In contrast, a different commenter asserted that the proposed rule "in no way impinges on the state authority reserved" in Clean Water Action section 101(b) and instead recognizes the partnership between the federal and state governments to protect water quality.

Other commenters argued generally that the agencies' interpretation of section 101(b) in the proposed rule conflicts with Supreme Court precedent. One commenter suggested that the *Rapanos* plurality's relatively

permanent test would properly respect states' responsibility and right to manage water resources within their borders, whereas a rule based on Justice Kennedy's significant nexus test would impinge on this traditional state authority. Another commenter asserted that the district court in *Georgia v. Pruitt*, 326 F. Supp. 3d 1356 (S.D. Ga. 2018) expressed concern that states would lose sovereignty over certain intrastate waters under the 2015 Clean Water Rule and argued that the proposed rule would "lead to a similar loss of sovereignty for states because there will be significantly more federal regulation of waters and wetlands under the broad jurisdictional categories in the proposed rule."

Multiple commenters expressed support for the view that Clean Water Act section 101(b) serves to recognize that states have an important role to play in implementing the Act's programs, with some commenters stating that section 101(b) also preserves the ability of states to regulate beyond standards established under the Clean Water Act.

Other commenters suggested that section 101(b) is not intended to serve as a limit on federal jurisdiction. One of these commenters claimed that the agencies improperly relied on section 101(b) to limit the scope of "waters of the United States" under the proposed rule in a manner that is contrary to the statute, Supreme Court precedent, congressional intent, and the agencies' longstanding interpretations of the Act.

> **<u>Agencies' Response</u>: The agencies disagree with commenters who asserted that the proposed rule was contrary to Congress's policy in Clean Water Act section 101(b). Like the proposed rule, the final rule reflects consideration of the statute as a whole, including the objective of the Clean Water Act in section 101(a) and the policies of the Act with respect to the role of states and tribes in section 101(b). The agencies find that this rule both advances the objective of the Clean Water Act in section 101(a) and respects the role of states and tribes in section 101(b).[6] The rule appropriately draws the boundary of waters subject to federal protection by limiting the scope to the protection of upstream waters that significantly affect the integrity of waters where the federal interest is indisputable—the traditional navigable waters, the territorial seas, and interstate waters. Waters that do not implicate federal interest in these paragraph (a)(1) waters are not included within the scope of federal jurisdiction. The scope and boundaries of the definition therefore reflect the agencies' considered judgment of both the Clean Water Act's objective in section 101(a) and the congressional policy relating to states' rights and responsibilities under section 101(b).**
>
> **The agencies have carefully, and appropriately, considered section 101(b) and have reasonably concluded that restoring and maintaining the chemical, physical, and biological integrity of the nation's waters is the Clean Water Act's primary goal, set forth in the first words of the first section of the statute. And the statute is designed to address that objective through a "comprehensive" federal program of pollution control. 33 U.S.C. 1252(a). Achieving Congress's purposes requires regulation of discharges both into traditional navigable waters, the territorial seas, and interstate waters and into other waters whose "interconnection[s]" with those waters make them an appropriate subject of federal concern. *See Rapanos*, 547 U.S. at 780 (Kennedy, J., concurring in the judgment); *see* 1971**

[6] While Clean Water Act section 101(b) does not specifically identify tribes, the policy of preserving states' sovereign authority over land and water use is equally relevant to ensuring the primary authority of tribes to address pollution and plan the development and use of tribal land and water resources.

Senate Report at 77 (noting that "[w]ater moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source") (quoted in *Riverside Bayview*, 474 U.S. at 133). Federal protection of the Chesapeake Bay, for example, would be fundamentally incomplete and ineffectual if polluters could discharge fill into the interconnected network of adjacent wetlands in the same watershed. The significant nexus standard identifies those wetlands that implicate the Clean Water Act's core concern of safeguarding traditional navigable waters, the territorial seas, and interstate waters.

The agencies also disagree with commenters who argued that the agencies' interpretation of Clean Water Act section 101(b) conflicts with Supreme Court precedent. The agencies' interpretation and consideration of section 101(b) in this rulemaking is consistent with Supreme Court precedent. The Supreme Court has described, on numerous occasions, section 101(b) as creating a partnership between the federal and state governments, in which the states administer programs under federally mandated standards and are allowed to set even more stringent standards. The final rule is consistent with Supreme Court case law. See Section IV.A.3.b of the Final Rule Preamble for further discussion of Supreme Court precedent related to Clean Water Act section 101(b) and Section IV.C.2.b.iii.2 of the Final Rule Preamble for further discussion of the decision in *Georgia v. Wheeler*, 418 F. Supp. 3d 1336 (S.D. Ga. 2019).

The agencies agree with commenters who stated that Clean Water Act section 101(b) recognizes that states have an important role to play in implementing the Act's programs and regulating beyond the standards established under the Clean Water Act.

The agencies disagree with commenters who asserted that the agencies improperly relied on Clean Water Act section 101(b) to limit the scope of "waters of the United States." The final rule reflects consideration of the statute as a whole, including the objective of the Clean Water Act in section 101(a) and the policies of the Act with respect to the role of states and tribes in section 101(b). The policy in section 101(b) is both important and relevant to the agencies' defining an appropriate scope of "waters of the United States." Consistent with the text of the statute and as emphasized by the Supreme Court, federal jurisdiction under the Clean Water Act has limits. As explained in the preamble of the final rule, Clean Water Act jurisdiction encompasses (and is limited to) those waters that significantly affect the indisputable federal interest in the protection of the paragraph (a)(1) waters—*i.e.*, traditional navigable waters, the territorial seas, and interstate waters. And consistent with the section 101(b) policy, where protection (or degradation) of waters does not implicate this federal interest, such waters fall exclusively within state or tribal regulatory authority, should they choose to exercise it.

See Section IV.A.3.b of the Final Rule Preamble further discussion of the agencies' consideration of Clean Water Act sections 101(a) and 101(b).

2.2.2 Relationship between Sections 101(a) and 101(b)

Some commenters argued that the agencies must read sections 101(a) and 101(b) of the Clean Water Act together in a manner that recognizes states' traditional authority over their water resources. A few

commenters stated that when read together, section 101(b) is a policy (which they defined as an action to reach a goal) that informs the objective of section 101(a) (which they defined as something to aspire to, like a goal), and contended that the agencies have not put enough consideration into section 101(b) in developing the proposed rule. One commenter suggested that the existence of Executive Order 13132 on "Federalism" indicates that the agencies are incorrect in taking the position that the "federalism policies" in section 101(b) are secondary to the "environmental policies" in section 101(a). Another commenter asserted that the cooperative federalism principles underlying section 101(b) are more relevant to the jurisdictional inquiry associated with defining "waters of the United States" than the statutory objective in section 101(a).

One commenter criticized the agencies for, in the commenters' view, deciding to give more weight to section 101(a) over section 101(b) merely because it was cited more often in Supreme Court rulings. This commenter contended that the frequency with which a section is cited in case law does not provide a basis to prioritize congressional goals and that the agencies cite no legal authority to support doing so. The same commenter argued that the agencies cannot prioritize one congressional goal over another and that all goals must be addressed during the rulemaking process. Similarly, one commenter argued that the objective of the Clean Water Act in section 101(a) "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters" does not give the agencies authority to expand federal jurisdiction and infringe upon states' traditional authority over their waters expressed in section 101(b).

Other commenters expressed support for the agencies' approach to sections 101(a) and 101(b) in the proposed rule. One commenter suggested that the proposed rule properly balances the water quality objective of Clean Water Act section 101(a) with the state authority reserved in section 101(b). Another commenter stated that the proposed rule appropriately places greater emphasis on the Clean Water Act's objective rather than on section 101(b) of the Clean Water Act. A different commenter argued that the 2020 NWPR's dependence on restoring states' authority was misplaced and agreed with the agencies' interpretation of section 101(b) as supporting the objective of the Clean Water Act.

> **<u>Agencies' Response</u>: The agencies agree with commenters who supported the agencies' approach to Clean Water Act sections 101(a) and 101(b). Clean Water Act section 101(a) states: "[t]he objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." Clean Water Action section 101(b) states:**
>
> > **It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter. It is the policy of Congress that the States manage the construction grant program under this chapter and implement the permit programs under sections 1342 and 1344 of this title. It is further the policy of the Congress to support and aid research relating to the prevention, reduction, and elimination of pollution and to provide Federal technical services and financial aid to state and interstate agencies and municipalities in connection with the prevention, reduction, and elimination of pollution.**
>
> **The agencies have carefully considered the policy in section 101(b) as it relates to the Clean Water Act's objective in section 101(a) and carefully balanced both section of the Act in the**

final rule. See Section IV.A.3.b of the Final Rule Preamble for a thorough discussion of the agencies' approach to balancing Clean Water Act sections 101(a) and (b) in the final rule.

In addition to the discussion of this issue in the final rule preamble, the agencies also note that CWA section 101(b) further recognizes the very important role that the states play in achieving the Act's objective. "Pollution" is a defined term in the Act that means "man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water" (section 502(19)) and has a broader scope than the "discharge of a pollutant" subject to regulatory jurisdiction under the Clean Water Act (*e.g.*, nonpoint sources of pollution). The agencies conclude that Congress's use of the broad term "pollution" in section 101(b) indicates that the policy in this section is intended to recognize and preserve, among other things, states' authority to prevent, reduce, and eliminate all kinds of pollution, including pollution falling outside the scope of federal regulatory authority. Importantly, this includes all non-point sources, which indisputably may (and do) significantly affect the integrity of traditional navigable waters, the territorial seas, and interstate waters. The agencies' definition of "waters of the United States" does not implicate, let alone impinge, on such state authorities.

The first sentence of section 101(b) also refers to states' "*primary*" role in preventing, reducing, and eliminating pollution—a word that is not incompatible with overlapping federal and state authority over waters which, under the final rule, implicate core federal interests. Thus, the text of section 101(b) is best read not as a general policy in favor of preserving for states a zone of exclusive regulatory authority based on federalism principles to choose whether or not to regulate regardless of the impact of those decisions on achievement of the Act's objective.

In developing the final rule, the agencies also considered the language in section 101(b) referring to states' rights and responsibilities "to plan the development and use (including restoration, preservation, and enhancement) of land and water resources." Planning the development, use, and protection of land and water resources is indisputably a traditional state function (*e.g.*, zoning, allocation and administration of water rights, exercise of eminent domain, preservation of lands and waters). Congress's recognition of the states' primary role in this domain does not state or even suggest a policy to limit Clean Water Act jurisdiction over waters, as would be covered under the final rule, implicating the core federal interest in protecting traditional navigable waters, the territorial seas, and interstate waters.

Indeed, any implication to the contrary is dispelled by the remainder of section 101(b), which, among other things, expressly recognizes states' role in administering the federal permitting programs under section 402 of the Act:

It is the policy of Congress that the states manage the construction grant program under this Act and implement the permit programs under sections 402 and 404 of this Act. It is further the policy of the Congress to support and aid research relating to the prevention, reduction, and elimination of pollution, and to provide Federal technical services and financial aid to state and interstate agencies and municipalities in connection with the prevention, reduction, and elimination of pollution.

Thus, in the agencies' view, the text of section 101(b) as a whole reflects not a general policy of deference to state regulation to the exclusion of Federal regulation, but instead a policy focused on preserving the responsibilities and rights of states to work to achieve the objective of the Act by preventing, reducing and eliminating pollution generally, including, but not limited to, through their authority over any source of pollution subject to state law, consulting with the Administrator in the exercise of his Clean Water Act authority, and implementing the Act's regulatory permitting programs, in partnership and with technical and financial support from the Federal government.

Further, CWA section 101(b) should not be read in isolation from the rest of the Clean Water Act. Reviewing the statute as a whole reveals that Congress itself gave direction to the agencies on how it expected them to achieve section 101(a)'s objective and implement section 101(b)'s policy. Following section 101, the remainder of the Act provides extensive and detailed instruction on how Congress expected its objective, goals, and policies to be met through the Act. Specifically, with regard to its objective and goals in section 101(a), Congress laid out a series of detailed programs (*e.g.*, the section 303 water quality standards program, the section 402 discharge elimination program, and the section 404 dredge and fill program) designed to meet that objective. So too, Congress gave detailed instructions on how it intended to apply its policy of preserving the primary role of the states. Specifically, as referenced explicitly in section 101(b), it authorized states to implement the key permitting programs under sections 402 and 404 of the Act—*i.e.*, their authority to assume administration of the federal regulatory program for discharges of pollutants under sections 402(b) and 404(g). The Clean Water Act likewise delineates a role for states in implementing numerous other Clean Water Act programs central to achieving the Act's objective, including the water quality standards program and impaired waters and total maximum daily load program in section 303. Section 401 grants primary authority to states and authorized tribes to grant, deny, or waive certification of proposed federal licenses or permits that may discharge into "waters of the United States" within their borders. And under section 510, unless expressly stated, nothing in the Clean Water Act precludes or denies the right of any state or tribe to establish more protective standards or limits than the Act. As described above, the Clean Water Act further assigns exclusive authority to the states to regulate non-point sources.

Thus, the agencies choose not to read the policy of section 101(b) as essentially a free-floating instruction or license for the agencies to interpret or implement other sections of the Act in a manner that impedes achievement of its overall objective, in particular definitional provisions like "waters of the United States" which are central to administration of the entire statute and therefore achieving that objective. To the contrary, Congress itself defined the contours of how it expected the agencies to both achieve its objective in section 101(a) and implement its policy in section 101(b) through the rest of the provisions of the Act. Notably, a narrow definition of "waters of the United States" would not uniformly boost state authority as that definition is foundational to the scope of all of these programs in which the states are assigned authority. Indeed, with regard to section 401, a narrow definition would actually *limit* states' ability to protect waters within their borders.

In addition, section 101(a) has also been "oft-quoted" by the courts, including the U.S. Supreme Court, thus further demonstrating the importance of that section. *See, e.g., National Association of Manufacturers v. Department of Defense, et al*, 138 S. Ct. at 624 ("Congress enacted the Clean Water Act in 1972 'to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.' 33 U.S.C. 1251(a)."); *see* section IV.A.2 of the final rule preamble (summarizing Supreme Court case law surrounding the Act's statutory objective).

Further, in passing the 1972 Amendments, Congress itself acted to rebalance its approach to protecting water quality—shifting from a statutory scheme dependent on state action to one rooted in a federal foundation, providing a uniform floor of water quality protection and leaving space for states to choose whether to regulate more stringently. *See Dubois v. U.S. Dep't of Agriculture*, 102 F.3d 1273, 1300 (1st Cir. 1996) ("Simply put, the CWA provides a federal floor, not a ceiling, on environmental protection."). The agencies in the final rule interpret section 101(b) in the context of this history and Congress's deliberate choice to restructure the statute to move away from its previous reliance on state-led water pollution control.

An overly narrow definition of jurisdictional waters threatens a return to pre-1972 days excluding from federal protection waters that significantly affect traditional navigable waters, the territorial seas, and interstate waters and risks removing from the statutory scheme instances of interstate pollution the 1972 amendments were designed to address. In response to concerns expressed by commenters regarding protection of downstream states from out-of-state pollution, the agencies in the 2020 NWPR simply stated: "The CWA provides a number of opportunities for the EPA to mediate disputes among states, though the remedies available for cross-boundary water pollution disputes over non-jurisdictional waters depends upon the parties and the issues of the case. As they do today, under the final rule remedies for pollution disputes among states that do not implicate CWA sections 319(g), 401, or 402 would likely derive from federal common law under the Supreme Court's original jurisdiction. Remedies for disputes between a state and a public or private party would likely derive from state or federal common law and be heard by state or federal courts." NWPR, Response to Comments, Topic 1 Legal Arguments at 26. But directing states and other parties to utilize state or federal common law to resolve such disputes overlooks "Congress' intent in enacting the [1972] Amendments . . . to establish an all-encompassing program of water pollution regulation," *City of Milwaukee*, 451 U.S. at 318, and that "the need for such an unusual exercise of lawmaking by federal courts disappears" when Congress passes legislation that "speak[s] directly" to the question at issue, as Congress did in passing the Clean Water Act. *Id.* at 317-18.

The agencies conclude that the jurisdictional line-drawing reflected in the final rule better aligns with sections 101(a) and 101(b) of the Act than the 2020 NWPR. The preamble to the final 2020 NWPR cited section 101(b) as a justification, in part, for its specific definitions of jurisdictional tributaries and adjacent wetlands. One of the most environmentally significant decisions in the 2020 NWPR was its categorical exclusion of all ephemeral streams from Clean Water Act jurisdiction. The agencies cited section 101(b) as a basis for this exclusion as "respecting State and Tribal land use authority over features that are only episodically wet during and/or following precipitation events." 85 FR 22319. The agencies'

explanation, however, did not link the agencies' line-drawing to the text or purpose of section 101(b). Nor do the agencies, at this time, see any linkage between the flow regime of ephemeral waters and the nature or extent of state authorities referenced in section 101(b). Indeed, as discussed elsewhere, available science unequivocally demonstrates that ephemeral tributaries can implicate the important federal interest in the protection of the integrity of traditional navigable waters, the territorial seas, and interstate waters. Likewise, in categorically excluding ephemeral waters, the agencies in the NWPR cited section 101(a), but again did not explain how their decision related to or advanced the Act's objective. 85 FR 22277. In contrast, informed by the policy in section 101(b) and the Act's objective in section 101(a), the final role appropriately distinguishes between jurisdictional and non-jurisdictional tributaries based on whether a tributary implicates core federal interests, in which case it is covered by the rule, or fails to do so, in which case its protection and management is left to states and tribes.

The NWPR similarly relied upon section 101(b) as a basis for its definition of adjacent wetlands, in particular the decision to exclude from consideration subsurface hydrologic connection between a wetland and an adjacent water when determining jurisdiction, stating: "[B]alancing the policy in CWA section 101(a) with the limitations on federal authority embodied in CWA section 101(b), the agencies are finalizing the definition of 'adjacent wetlands' that does not include subsurface hydrologic connectivity as a basis for determining adjacency." *Id.* at 22313. Again, the NWPR did not explain how excluding consideration of subsurface hydrologic connections related to or derived from section 101(b), and the agencies do not now discern such a linkage. And as with the definition of tributaries, the NWPR did not explain how this choice related to or advanced the objective of the Act. In contrast, the final rule's approach to adjacent wetlands, like its approach to jurisdictional tributaries, gives due consideration to the policy in section 101(b) and the objective in section 101(a) by tethering jurisdiction to whether the wetland implicates traditional navigable waters, the territorial seas, and interstate waters with a demonstrated federal interest.

2.2.3 Cooperative Federalism

Several commenters suggested that the proposed rule would expand federal jurisdiction in a manner that would conflict with principles of cooperative federalism. One commenter stated that through cooperative federalism, states partner with the agencies to protect water quality and argued that the proposed rule does not support this partnership. Another commenter asserted that "Congress conceived of the CWA as a partnership between the states and the federal government, with the federal government primarily playing a supporting role in the states' efforts to protect their waters." A few commenters stated that the Clean Water Act is based on cooperative federalism and that the agencies should thus draft a rule with these principles in mind. Some commenters suggested that improving and maintaining water quality is best achieved through partnerships and that the agencies should work with state and local governments in developing a definition of "waters of the United States."

Other commenters asserted that the proposed rule supports cooperative federalism. As an example, one of these commenters argued that the agencies' interpretation of section 101(b) correctly identifies states as active partners in implementing the Clean Water Act, such as through issuing state certifications under section 401. Another commenter contended that codifying the pre-2015 regulatory regime would provide

stability to regulatory programs and thereby support cooperative federalism in a manner that they felt was lacking under implementation of the Navigable Water Protection Rule in their state. This commenter contended that a broad definition of "waters of the United States" is important in protecting certain types of waters because their state relies on the staff and expertise of the Corps to review permits.

> **Agencies' Response: The agencies disagree with commenters who contended that the proposed rule conflicted with principles of cooperative federalism. The 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 tribes and states. Contrary to the assertion of one commenter, the final rule supports partnerships between states and the agencies to protect water quality. The final rule continues the agencies' work with states to implement the Act and the agencies' practice of providing states with technical and financial assistance. The agencies disagree with commenters who asserted that Congress conceived of the Clean Water Act as a partnership where the federal government played a supporting role to the states. Such an interpretation would be inconsistent with Congress's enactment of the Clean Water Act which was driven by the failures of the prior statutory scheme that relied primarily on state enforcement of state water quality standards and proved to be inadequate.**
>
> **See Section IV.A.3.b of the Final Rule Preamble for further discussion of the agencies' balancing of federal and state roles under the Clean Water Act.**

2.2.4 State Authority over Aquatic Resources

Many commenters argued that the agencies misinterpret Supreme Court decisions in the proposed rule in a manner that expands federal jurisdiction over waters and features that should be or are regulated by states or local governments, including isolated wetlands, flood control features, ephemeral and intermittent streams, ditches, canals, irrigation systems, stormwater features and management, and other waters. Some commenters further asserted that states are best positioned to regulate and manage water resources because they have a better understanding of local conditions, such as water resource needs and regional variations (*e.g.*, geography, weather, climate, hydrology, topography). One commenter argued that EPA's refusal to withdraw any state's authority to administer the NPDES permitting program, despite numerous petitions to the agency to do so, shows that EPA "unquestionably recognizes that states are already capable stewards of water quality and proven partners in furtherance of the CWA's objectives."

Additionally, some commenters asserted that states are better situated to regulate waters within their borders because states' standards and policies are consistent with or more stringent than the Clean Water Act. Several states also described how their regulations and standards are consistent with or more restrictive than the Clean Water Act, including Alaska, Montana, Nevada, North Dakota, Oklahoma, Texas, and Wyoming. A few commenters suggested that states and local governments should adopt more stringent regulations than the Clean Water Act.

Multiple commenters argued that a water that is not under federal jurisdiction does not necessarily lack environmental protections because such waters may be subject to state, local, or tribal regulations. One commenter stated the Clean Water Act does not claim jurisdiction over agricultural features distant from relatively permanent flowing tributaries, rather the water quality in these features is protected through

other programs. Several commenters asserted that the agencies need to work with state authorities to reduce redundancy and should respect state and local jurisdictions' authority to manage their own water resources. A few commenters stated that the Commerce Clause, Tenth Amendment, and section 510 of the Clean Water Act protect a state's authority over its waters.

Other commenters stated that some states need to rely on federal jurisdiction to protect their waters. One of these commenters asserted that the 2020 NWPR reduced the scope of waters subject to federal jurisdiction and that as a result, the state could not exercise its authority under Clean Water Act section 401 to address water quality impacts from a hydropower project licensed by the Federal Energy Regulatory Commission. Another commenter argued that states have limited budgets and need the support of the agencies to help regulate waters cost-effectively.

One commenter asserted that 36 states have laws that prevent state-level environmental agencies from developing regulations that are more restrictive than federal standards and thus rely on the federal. Another commenter contended, however, that it is the responsibility of states to regulate their waters and suggested that states that do not have this authority should look to their state legislatures, not the federal government.

A different commenter suggested that the Prior Appropriation Doctrine gives states jurisdiction over waters within their boundaries and precludes federal jurisdiction over waters that are *not* navigable.

Finally, some commenters stated that the state of Florida continues to apply the vacated 2020 Navigable Waters Protection Rule (NWPR) in the implementation of its Clean Water Act section 404 dredge and fill permitting program and that this is having adverse environmental effects; these commenters contended that this demonstrates that the state is not protecting its waters effectively. Other commenters argued that the 2020 NWPR recognized the authority of states to regulate their waters and the limits of federal jurisdiction over these waters.

> **<u>Agencies' Response</u>: This rule does not diminish any state authorities with respect to regulation of water bodies. States and tribes may establish more protective standards or limits than the Clean Water Act to manage waters subject to Clean Water Act jurisdiction or waters that fall beyond the jurisdictional scope of the Act and may choose to address special concerns related to the protection of water quality and other aquatic resources within their borders. Nothing in this final rule limits or impedes any existing or future state or tribal efforts to further protect their waters.**
>
> **The agencies agree with commenters that states are co-partners with EPA and the Corps under the Clean Water Act. This partnership is evident in the many provisions that incorporate or rely on state authorities, such as water quality standards, state NPDES programs, and section 401 state water quality certifications. This rule complements state authorities by clearly establishing, consistent with Congressional intent under the Clean Water Act, which waters are subject to federal protections due to their significant impact on traditional navigable waters, the territorial seas, and interstate waters, and leaving other waters subject to decision making by state, tribal and local authorities. Many states and tribes, for example, regulate groundwater, and some others protect wetlands that are vital to their environment and economy but that are outside the scope of the Clean Water Act.**

EPA thus agrees with commenters that this rule enhances state authorities under Section 401 of the Act.

The agencies also agree with commenters that noted that a lack of federal jurisdiction does not necessarily mean that a water body is completely unprotected. As evidenced by the comments, state, tribal and local protections for water bodies vary considerably. This rule ensures that there is certainty provided in protections for those water bodies for which the federal interest is significant and leaves other water bodies to the more variable protections of state, tribal or local law. As discussed in the preamble, the rule that this rule replaces, the NWPR, did not provide an appropriate dividing line between these authorities. In developing the final rule, the agencies thoroughly considered alternatives to this rule, including 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.3 of the Preamble to the Final Rule and the agencies' response to comments in Section 4 for further discussion of the agencies' grounds for concluding that the 2020 NWPR is not a suitable alternative to the final rule.

The agencies disagree that the Prior Appropriation Doctrine has any relevance to this rule. That doctrine pertains to water rights, and this rule does not address or impact water rights under state law. This rule defines water bodies that are subject to permitting and other protections under the Clean Water Act and thus is about water quality, not about who has the rights to use any water in particular water bodies. See also the agencies' response to comments in Section 2.8.1, below, further discussing water quantity issues and *PUD No. 1 of Jefferson County v. Washington Dept. of Ecology*, 511 U.S. 700, 720, 114 S. Ct. 1900, 1913, 128 L.Ed.2d 716, 733 (1994).

2.3 Legal Authority over Waters

Many commenters addressed the agencies' legal authority to assert jurisdiction over the categories of waters that may fall within the definition of "waters of the United States." This sub-topic summarizes comments that were general in nature or those that included discussion of multiple water types. The subsections that follow summarize comments on this sub-topic that were specific to the different categories of waters. Note that comments addressing the legal arguments or analysis provided in the 2020 NWPR are addressed in Section 4.

Several commenters argued that the proposed rule exceeds Congress's authority under the Commerce Clause as well as the scope of the Clean Water Act.

Other commenters suggested that the scope of "waters of the United States" defined in the proposed rule is supported by the Clean Water Act and relevant Supreme Court case law. One of these commenters asserted that it is "beyond dispute" that Congress intended to provide broad federal Clean Water Act protections, citing to the Supreme Court's discussion of legislative history in *Riverside Bayview* that "[p]rotection of aquatic ecosystems, Congress recognized, demanded broad federal authority to control pollution."

<u>Agencies' Response</u>: The agencies agree that the scope of "waters of the United States" defined in the rule is supported by the Clean Water Act and relevant Supreme Court case law. The agencies disagree that the rule exceeds Congress's authority under the Commerce Clause. The significant nexus standard included in the final rule ensures that the definition of "waters of the United States" remains well within the bounds of the Commerce Clause, consistent with the text of the statute and the intent of Congress, and informed by the decision in *SWANCC*. The agencies also disagree that the rule exceeds the scope of the Clean Water Act. This rule is grounded in the Clean Water Act's objective "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters," 33 U.S.C. 1251(a). This rule advances the Clean Water Act's objective by defining "waters of the United States" to include waters that significantly affect the chemical, physical, or biological integrity of traditional navigable waters, the territorial seas, and interstate waters, and waters that meet the relatively permanent standard. The limitations in the definition ensure that the agencies will not assert jurisdiction where the effect on traditional navigable waters, the territorial seas, and interstate waters—*i.e., the p*aragraph (a)(1) waters—is not significant. See Final Rule Preamble Sections IV.A.2 and IV.A.3 for further discussion of the rule's consistency with the Clean Water Act and the U.S. Constitution.

2.3.1 <u>Traditional Navigable Waters and the Territorial Seas</u>

2.3.1.1 General

Many commenters asserted that the Clean Water Act's statutory language, including the Act's use of the term "navigable," and relevant Supreme Court precedent supports including traditional navigable waters and the territorial seas within the agencies' scope of federal jurisdiction. Some of these commenters expressed the view that the scope of "waters of the United States" is *not* limited to navigable-in-fact waters. As support, one of these commenters cited the Supreme Court's statement in *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 486 n.6 (1987), that the term "navigable waters" has been interpreted "expansively to cover waters that are not navigable in the traditional sense," as well as the district court's decision in *NRDC v. Callaway*, 392 F. Supp. 685, 686 (D.D.C. 1975), finding that the term "is not limited to the traditional tests of navigability." The commenter asserted that this position is consistent with legislative history indicating that Congress intended "the term 'navigable waters' be given the broadest possible constitutional interpretation."

Several commenters further suggested that the Supreme Court's opinions in *Riverside Bayview*, *SWANCC*, and *Rapanos* cannot be interpreted as precluding the assertion of Clean Water Act jurisdiction over waters that are not navigable-in-fact. One of these commenters emphasized that the Supreme Court has found that "the term 'navigable' is of 'limited import' and that Congress evidenced its intent to 'regulate at least some waters that would not be deemed "navigable" under the classical understanding of that term,'" *SWANCC*, 531 U.S. at 183 (quoting *Riverside Bayview*, 474 U.S. at 133). Additionally, a few commenters discussing the effects of water pollution on interstate commerce stated that preventing pollution in non-navigable waters is within Congress's Commerce Clause authority.

In contrast, a few commenters stated that the scope of "waters of the United States" should be limited to traditional navigable waters and the territorial seas, including because limiting the scope of federal

jurisdiction in this manner would recognize states' primary role in regulating waters within their borders and give meaning to the statute's use of the term "navigable."

One commenter argued that intrastate waters may only be jurisdictional if they are navigable and if they have a substantial economic effect on interstate commerce. As support for this position, the commenter cited the Supreme Court's discussion in *SWANCC*, 531 U.S. at 172, regarding the importance of giving meaning to the Clean Water Act's use of the term "navigable," as well as *United States v. Lopez*, 514 U.S. 549, 558-59 (1995) and *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 551 (2012). The commenter further asserted that, "to remain true" to the Clean Water Act's "stated purposes" in 33 U.S.C. 1251, a navigable, intrastate water may only be jurisdictional where the necessary substantial economic effect on interstate commerce arises out of (1) their use by interstate travelers for recreational purposes; (2) their habitat for fish or shellfish that are taken and sold in interstate commerce; or (3) their use for industrial purposes by industries in interstate commerce.

> **Agencies' Response: The agencies agree that traditional navigable waters and the territorial seas are within the scope of "waters of the United States" and also agree that that the scope of "waters of the United States" is not limited to navigable-in-fact waters. The agencies disagree that Clean Water Act jurisdiction is limited to traditional navigable waters as it would render the Clean Water Act more narrow than the Rivers and Harbors Act of 1899. The argument is also contrary to the views of all nine Justices in *Rapanos* and would undo Congress's considered and deliberate choice to expand Clean Water Act jurisdiction beyond the traditional navigable waters because it found the prior statutes limited to those waters insufficient. The agencies also disagree that intrastate waters may only be jurisdictional if they are navigable and if they have a substantial economic effect on interstate commerce; there is no such requirement in the case law establishing the standards for traditional navigable waters; nor is there such a requirement in the text of the Clean Water Act. See Final Rule Preamble Section IV.A.3 for further discussion of the final rule's consistency with 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 agree that Congress's authority under the Commerce Clause is broader than traditional navigable waters. See Final Rule Preamble Section IV.A.3.b.**

2.3.1.2 Determining "navigability"

Multiple commenters argued that the proposed rule's approach to traditional navigable waters is overly broad and should include only those waters that meet the Supreme Court's two-part test for navigability as set forth in *The Daniel Ball*, 77 U.S. 557 (1870) and its progeny. In particular, many commenters expressed concern that the proposed rule unlawfully expands the traditional navigable waters category to include waters used for commercial waterborne recreation. One of these commenters stated that non-Clean Water Act cases "undercut assertions of jurisdiction based on experimental canoe or kayak outings," citing *United States v. Oregon*, 295 U.S. 1, 23-24 (1935); *North Dakota v. United States*, 972 F.2d 235 (8th Cir. 1992); and *Alford v. Appalachian Power Co.*, 951 F.2d 30, 33 (4th Cir. 1991).

Another commenter asserting that the agencies' approach to "navigable" should align with the Supreme Court's approach in *The Daniel Ball* added that the agencies should be mindful of the Court's holding in

National Federation of Independent Business v. Sebelius, 567 U.S. 519 (2012), which the commenter characterized as establishing a "heightened-scrutiny standard for legislation based on the Commerce Clause." The commenter suggested that under this heightened standard, Clean Water Act jurisdiction is limited to traditional navigable waters.

Other commenters asserted that the agencies could find that a water is "navigable" based on evidence that the water is used, or is susceptible to being used, for navigation by recreational watercraft. One of these commenters argued that the Supreme Court "has confirmed 'that navigability does not depend on the particular mode in which such use is or may be had—whether by steamboats, sailing vessels or flat-boats' . . . and that the 'lack of commercial traffic [is not] a bar to a conclusion of navigability where personal or private use by boats demonstrates the availability of the stream for the simpler types of commercial navigation,'" citing *United States v. Utah*, 283 U.S. 64, 76 (1931) and *United State v. Appalachian Electric Power Co.*, 311 U.S. 377, 416 (1940).

Another commenter, citing the Supreme Court's opinions in *Kaiser Aetna v. United States*, 444 U.S. 164, 174 (1979) and *Oklahoma ex rel. Phillips v. Guy F. Atkinson Co.*, 313 U.S. 508, 522–23 (1941), stated that Congress has "paramount" power over navigable waters that may be invoked "irrespective of whether navigation . . . is used" and "includes the power to regulate water for purposes beyond navigation." This commenter suggested that as a result, even if Congress intended to exert only its Commerce Clause authority over navigation in promulgating the Clean Water Act, the Act's jurisdiction is not limited to navigable-in-fact waters and may include waters used in recreation.

Other commenters asserted generally that the legislative history of the Clean Water Act demonstrates congressional intent to expand the Clean Water Act's jurisdiction to all water bodies, not just those that fit within prior narrow definitions of navigability.

> **<u>Agencies' Response</u>: The agencies are not making changes to their longstanding interpretation of traditional navigable waters for purposes of Clean Water Act jurisdiction. The agencies disagree that their longstanding interpretation is overly broad or inconsistent with Supreme Court precedent. The agencies also disagree with commenters stating that the rule unlawfully expands the traditional navigable waters category to include waters used for commercial waterborne recreation. The Supreme Court has been clear that "[e]vidence of recreational use, depending on its nature, may bear upon susceptibility of commercial use." *PPL Montana v. Montana,* 565 U.S. 576, 600-01 (2012) (in the context of navigability at the time of statehood). See Final Rule Preamble Section IV.C.2.b. for further discussion of Supreme Court case law. The agencies are not asserting jurisdiction over waters and adjacent wetlands that support plants and animals traditionally harvested by indigenous people as traditional navigable waters on the basis that such waters "are susceptible of supporting waterborne commerce," as that is not a basis recognized in the case law for determining whether a water is a traditional navigable water. The agencies have also concluded that asserting jurisdiction over waters based solely on whether the use, degradation, or destruction of the water could affect interstate or foreign commerce pushes the limit of the Clean Water Act where those waters do not significantly affect paragraph (a)(1) waters. See Final Rule Preamble Section IV.C.6. The final rule is well within the limits of the Commerce Clause. See Final Rule Preamble Section IV.A.3.**

2.3.2 Interstate Waters

2.3.2.1 General

Multiple commenters argued that the categorical inclusion of all interstate waters as jurisdictional is inconsistent with the Clean Water Act, including because a categorical approach unlawfully reads "navigable" out of the Act. Several of these commenters added that legal issues associated with the proposed rule's categorical approach are further exacerbated by the proposed rule's treatment of interstate waters as one of the "foundational waters" that can form the basis for asserting jurisdiction over other types of waters, including tributaries, adjacent wetlands, and "other waters."

A few commenters asserted that the Clean Water Act's legislative history—particularly the revision in the 1972 amendments to remove the term "interstate waters" from the phrase "interstate or navigable waters"—supports the position that Congress did not intend the agencies to assert jurisdiction over interstate waters without regard to navigability. One of these commenters further asserted that the reference to interstate waters in Clean Water Act section 303(a) does not indicate that Congress intended to exert federal jurisdiction over all interstate waters, regardless of navigability. This commenter also argued that Congress did not "acquiesce" to treating interstate waters as a standalone jurisdictional category because it did not include interstate waters or interstate wetlands among those waters that are not assumable under Clean Water Action section 404(g).

Multiple commenters contended that the categorical inclusion of interstate waters is inconsistent with *Riverside Bayview*, *SWANCC*, and/or *Rapanos*, including because the relatively permanent and significant nexus standards were formulated around connections to *navigable* waters, not non-navigable waters that happen to cross state lines. Indeed, numerous commenters argued that Clean Water Act jurisdiction cannot be premised solely on the fact that a water feature crosses a political boundary. Another commenter stated that the agencies' reliance on *City of Milwaukee v. Illinois*, 451 U.S. 304, 317 (1981) and *Arkansas v. Oklahoma*, 503 U.S. 91, 95 (1992) to assert categorical jurisdiction over interstate waters is misplaced, as those cases only addressed interstate waters that were navigable themselves.

Additionally, several commenters contended that the proposed rule's categorical approach to asserting jurisdiction over all interstate waters, without requiring any findings related to water quality impacts or navigability, is inconsistent with the holding in *Georgia v. Wheeler*, 416 F. Supp. 3d. 1336 (S.D. Ga. 2019) that a categorical approach to interstate waters reads the term "navigability" out of the Act. A few commenters suggested that the proposed rule would not be durable given the district court's holding in *Georgia v. Wheeler* regarding asserting categorical jurisdiction over interstate waters. Another commenter stated that asserting categorical jurisdiction over interstate waters is inconsistent with *The Daniel Ball*, 77 U.S. 557, 563 (1870).

In contrast, many other commenters suggested that asserting categorical jurisdiction over interstate waters is required or otherwise legally permissible, with some arguing that the statutory language clearly demonstrates that the Clean Water Act protects all interstate waters—including because certain statutory provisions explicitly reference interstate waters. Several of these commenters cited to the water quality standards provisions of Clean Water Act section 303(a) in asserting that the Act's longstanding history supports regulating interstate waters "in their own right," regardless of navigability. Another commenter

stated that the "primary goal of the CWA to restore and maintain the chemical, physical, and biological integrity of the nation's waters cannot be met unless interstate waters are protected at the federal level." Moreover, numerous commenters expressed views consistent with the discussion in the preamble to the proposed rule regarding the relationship between the 1972 Clean Water Act amendments and the agencies' authority to assert jurisdiction over interstate waters. One of these commenters asserted that a key purpose of the 1972 amendments was to expand—not narrow—federal jurisdiction and argued that the Act thus "necessarily continued to protect interstate waters" following the 1972 amendments since interstate waters were already considered jurisdictional prior to the amendments.

Another commenter expressly agreed with the proposed rule's interpretation that interstate waters encompasses "all waters that Congress sought to protect since 1948." This commenter disagreed, however, with the proposed rule's treatment of tributaries to interstate waters, arguing that tributaries to interstate waters should—like interstate waters themselves—be categorically jurisdictional, rather than subject to the relatively permanent or significant nexus standards, because Congress provided protections for tributaries to interstate waters in the 1948 Water Pollution Control Act.

Several commenters cited the Supreme Court's decisions in *Riverside Bayview*, *SWANCC*, and *Rapanos* to buttress their arguments on behalf of including interstate waters as jurisdictional. One of these commenters cited Justice Scalia's opinion in *Rapanos* to support the proposition that federal jurisdiction over interstate waters protects state sovereignty, rather than threatening it, *Rapanos v. United States*, 547 U.S. 715, 777 (2006) (plurality opinion) (acknowledging state amici's arguments that "the Act protects downstream States from out-of-state pollution that they cannot themselves regulate"). Another commenter suggested that failing to protect interstate waters contradicts the Clean Water Act's cooperative federalism principles. Commenters also cited the Supreme Court's decisions in *City of Milwaukee v. Illinois*, 451 U.S. 304, 209 (1981); *Hodel v. Virginia Surface Water Mining & Reclamation Ass'n*, 452 U.S. 264, 282 (1981); and *Arkansas v. Oklahoma*, 503 U.S. 91, 106 (1992) as support for the assertion of jurisdiction over interstate waters, in addition to circuit court decisions such as *Am. Farm Bureau Fed'n v. EPA*, 792 F.3d 281, 304 (3d Cir. 2015) (referencing relevant Supreme Court case law including *Gibbons v. Ogden*, 22 U.S. 1, 190 (1824); *Missouri v. Illinois*, 200 U.S. 496 (1906); and *Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907)).

Finally, some commenters stated that a categorical approach to interstate waters is supported by Congress's general power under the Commerce Clause to regular interstate commerce—as compared to its narrower power to regulate navigable waters—and argued that pollutants discharged to interstate waters likely have a substantial effect on interstate commerce. Another commenter asserted that interstate water pollution is intrinsically a federal concern.

> **<u>Agencies' Response</u>: The agencies agree with commenters that the statutory language demonstrates that the Clean Water Act protects interstate waters. The agencies also agree that the statutory history and context support coverage of interstate waters regardless of navigability. Additionally, the agencies agree that the final rule's approach to interstate waters is not inconsistent with Supreme Court decisions. The agencies agree with commenters that quoted Justice Scalia's opinion in *Rapanos* for the proposition that federal jurisdiction over interstate waters protects state sovereignty, rather than threatening it, *Rapanos*, 547 U.S. 715, 777 (2006) (acknowledging state amici's arguments that "the Act protects downstream States from out-of-state pollution that they cannot themselves**

regulate"). The agencies also agree that protecting interstate waters is intrinsically a federal concern and is consistent with the Clean Water Act's cooperative federalism principles.

The agencies disagree with commenters that argued that the categorical inclusion of all interstate waters as jurisdictional is inconsistent with the Clean Water Act, or that such an approach unlawfully reads "navigable" out of the Act. For the reasons discussed in more detail below, the agencies have concluded that the text of the Act and the statutory history of federal water pollution control places the terms of the Clean Water Act in context and establish congressional intent to include interstate waters within the scope of the "navigable waters" protected by the Act.

Further, the agencies disagree that the Clean Water Act's legislative history—particularly the revision in the 1972 amendments to remove the term "interstate waters" from the phrase "interstate or navigable waters"—supports the position that Congress does not intend for the agencies to assert jurisdiction over interstate waters without regard to navigability. The legislative history and Supreme Court case law demonstrate that Congress's revisions were in furtherance of broadening the scope of the Clean Water Act in comparison to its predecessor statutes, not narrowing it as commenters' argument would do.

While commenters are correct that the agencies are not categorically including all tributaries to interstate waters in the rule, the agencies are including such tributaries if they meet the relatively permanent standard or the significant nexus standard and have concluded that a case-specific approach to the jurisdiction of these tributaries is reasonable.

The agencies disagree with commenters that argued that the agencies' position is based on congressional "acquiescence" to interstate waters as a standalone jurisdictional category and further argued that because Congress did not include interstate waters or interstate wetlands among those waters that are not assumable under Clean Water Act section 404(g) there is no indication that Congress intended to protect interstate waters and interstate wetlands. While the scope of section 404(g) is informative of the fact that adjacent wetlands are "waters of the United States" it is not determinative of the scope of "waters of the United States." Rather, the textual basis for the agencies' conclusion that interstate waters are "navigable waters" is the text of section 502(7) and section 303 of the Act, as well as the Act's statutory history.

Notably, in Clean Water Act section 502(7), Congress defined "navigable waters" as "the waters *of the United States*, including the territorial seas" (emphasis added). The most straightforward reading of this language is that "of the United States" encompasses, at the very least, waters that cross state boundaries. The breadth of the definition of "navigable waters" reflects a deliberate choice by Congress to both enact a statute with a broad scope of waters protected by federal law and to delegate the authority to interpret the specialized term and its definition to the expert agencies. The relevant House bill would have defined "navigable waters" as the "navigable waters of the United States, including the territorial seas." H.R. Rep. No. 911, 92d Cong., 2d Sess. 356 (1972) (emphasis omitted). But the House was concerned that the definition might be given an unduly narrow interpretation. The House Report observed: "One term that the Committee was reluctant to define was the

term 'navigable waters.' The reluctance was based on the fear that any interpretation would be read narrowly. However, this is not the Committee's intent. The Committee fully intends that the term 'navigable waters' be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes." H.R. Rep. No. 92-911, at 131 (1972). The Senate Report also expressed disapproval of the narrow construction by the Corps of the scope of waters protected under prior water protection statutes, stating "[t]hrough a narrow interpretation of the definition of interstate waters the implementation [of the] 1965 Act was severely limited. Water moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source." S. Rep. No. 92-414, at 77 (1971). Thus, in conference the word "navigable" was deleted from that definition, and the conference report again urged that the term "be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes." S. Conf. Rep. No. 1236, 92d Cong., 2d Sess. 144 (1972).

The agencies disagree with commenters that contended that the categorical inclusion of interstate waters is inconsistent with *Riverside Bayview, SWANCC,* and/or *Rapanos* because the relatively permanent and significant nexus standards were formulated around connections to *navigable* waters, not non-navigable waters that happen to cross state lines. None of those cases involved interstate waters, and the Supreme Court has not addressed this longstanding provision of the agencies' regulations.

The agencies disagree with commenters that stated that the agencies' reliance on *City of Milwaukee v. Illinois,* 451 U.S. 304, 317 (1981) and *Arkansas v. Oklahoma,* 503 U.S. 91, 95 (1992) to assert categorical jurisdiction over interstate waters is misplaced simply because those cases only addressed interstate waters that were navigable themselves. Nothing in the language or the reasoning of the cases limits the applicability of these protections of interstate waters to navigable interstate waters or interstate waters connected to navigable waters. If these protections only applied to navigable interstate waters, a downstream state would be unable to protect many of its waters from out-of-state water pollution. This would hardly constitute a comprehensive regulatory scheme that occupied the field of interstate water pollution.

The agencies have concluded that the holding in *Georgia v. Wheeler,* 416 F. Supp. 3d. 1336 (S.D. Ga. 2019) regarding the agencies' authority over interstate waters articulated in *Georgia v. Wheeler* is inconsistent with both the text and the history of the Clean Water Act, as well as Supreme Court case law. *See* Final Rule Preamble Section IV.C.2.b.iii.

The agencies disagree that asserting categorical jurisdiction over interstate waters is inconsistent with *The Daniel Ball,* 77 U.S. 557, 563 (1870). *The Daniel Ball* is not relevant to the question of whether or not interstate waters are jurisdictional under the Clean Water Act enacted 100 years later.

The language of the Clean Water Act is clear that Congress intended the term "navigable waters" to include interstate waters. The Clean Water Act was enacted in 1972. EPA's contemporaneous regulatory definition of "waters of the United States," promulgated in 1973, included interstate waters. The definition has been EPA's interpretation of the

geographic jurisdictional scope of the Clean Water Act for approximately 40 years. To the extent there is ambiguity, the agencies' interpretation, promulgated contemporaneously with the passage of the Clean Water Act, is consistent with the statute and legislative history. The Supreme Court's decisions in *SWANCC* and *Rapanos* did not address the interstate waters provision of the existing regulation.

The following sections provide additional context regarding the agencies' legal authority to regulate interstate waters.

A. The language of the Clean Water Act, the statute as a whole, and the statutory History demonstrate congress's intent to include interstate waters as "navigable waters" subject to the Clean Water Act.

While as a general matter, aspects of the terms "navigable waters" and "waters of the United States" are ambiguous, the language of the Clean Water Act, particularly when read as a whole, demonstrates that Congress intended to continue to subject interstate waters to federal regulation. The statutory history of federal water pollution control places the terms of the Clean Water Act in context and provides further evidence of Congressional intent to include interstate waters within the scope of the "navigable waters" protected by the Act. Congress intended to subject interstate waters to Clean Water Act jurisdiction without imposing a requirement that such waters be navigable for purposes of federal regulation under the Commerce Clause themselves or be connected to water that is navigable for purposes of federal regulation under the Commerce Clause.[7] The Clean Water Act is clear that interstate waters that were previously subject to federal regulation remain subject to federal regulation. The text of the Clean Water Act, specifically the Act's provision with respect to interstate waters and their water quality standards, in conjunction with the definition of navigable waters, evidences Congress's intent. Thus, interstate waters are "navigable waters" protected by the Clean Water Act.

A.i The plain language of the Clean Water Act and the statute as a whole establish Congress's intent to include interstate waters within the scope of "navigable waters" for purposes of the Clean Water Act

Under well-settled principles, the phrase "navigable waters" should not be read in isolation from the remainder of the statute. As the Supreme Court has explained:

> **The definition of words in isolation, however, is not necessarily controlling in statutory construction. A word in a statute may or may not extend to the outer limits of its definitional possibilities. Interpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and**

[7] For purposes of the Clean Water Act, EPA and the Corps have interpreted the term "traditional navigable waters" to include all of the "navigable waters of the United States," defined in 33 CFR Part 329 and by numerous decisions of the federal courts, plus all other waters that are navigable-in-fact (*e.g.*, the Great Salt Lake, Utah and Lake Minnetonka, Minnesota). This section explains why EPA and the Corps do not interpret the Clean Water Act or the Supreme Court's decisions in *Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) and *Rapanos v. United States*, 547 U.S. 715 (2006), to restrict Clean Water Act jurisdiction over interstate waters to only those interstate waters that are traditional navigable waters or that connect to traditional navigable waters.

> **context of the statute, and consulting any precedents or authorities that inform the analysis.**

***Dolan v. U.S. Postal Service*, 546 U.S. 481, 486 (2006)*; see also United States Nat'l. Bank of Oregon v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 455 (1993).**

While aspects of the term "navigable waters" are ambiguous, interstate waters are waters that are clearly covered by the plain language of the definition of "navigable waters."[8] Congress defined "navigable waters" to mean "the waters of the United States, including the territorial seas." 33. U.S.C. 1362(7). Interstate waters are waters of the several states and, thus, the United States.

Other provisions of the statute provide additional textual evidence of the scope of this term of the Act. Most importantly, there is a specific provision in the 1972 Clean Water Act establishing requirements for those interstate waters which were subject to the prior Water Pollution Control acts. This provision requires states to establish water quality standards for navigable waters and submit them to the Administrator for review.[9]

> **Under section 303(a) of the Act, *in order to carry out the purpose of this [Act]*, any water quality standard applicable to *interstate waters* which was adopted by any state and submitted to, and approved by, or is awaiting approval by, the Administrator pursuant to this Act as in effect immediately prior to [the date of enactment of the Federal Water Pollution Control Act Amendments of 1972,] *shall remain in effect* unless the Administrator determined that such standard is not consistent with the applicable requirements of the Act as in effect immediately prior to the [date of enactment of the Federal Water Pollution Control Act Amendments of 1972.] If the Administrator makes such a determination he shall, within three months after [the date of enactment of the Federal Water Pollution Control Act Amendments of 1972,] notify the state and specify the changes needed to meet such requirements. If such changes are not adopted by the state within ninety days after the date of such notification, the Administrator shall promulgate such changes in accordance with subsection (b) of this section.**

Clean Water Act section 303(a)(1) (emphasis added).

Under the 1965 Act, as discussed in more detail below, states were directed to develop water quality standards establishing water quality goals for interstate waters. By the early 1970s, all the states had adopted such water quality standards. Advanced Notice of Proposed

[8] The Supreme Court has found that the term "waters of the United States" is ambiguous in some respects. *Rapanos*, 547 U.S. at 752 (plurality opinion), 804 (dissent).

[9] Section 303 of the Act requires the states to submit revised and new water quality standards to the Administrator for review. Clean Water Act section 303(c)(2)(A). Such revised or new water quality standards "shall consist of the designated uses of the navigable waters involved and the water quality criteria for such waters." *Id*. If the Administrator determines that a revised or new standard is not consistent with the Act's requirements, or determines that a revised or new standard is necessary to meet the Act's requirements, and the state does not make required changes, "[t]he Administrator shall promptly prepare and publish proposed regulations setting forth a revised or new water quality standard for the navigable waters involved." Clean Water Act section 303(c)(4).

Rulemaking, Water Quality Standards Regulation, 63 FR 36742, 36745, July 7, 1998. In section 303(a), Congress intended for existing federal regulation of interstate waters to continue under the amended Clean Water Act. Water quality standards for interstate waters were not merely to remain in effect, but EPA was required to actively assess those water quality standards and even promulgate revised standards for interstate waters if states did not make necessary changes. By the plain language of the statute, these water quality standards for interstate waters were to remain in effect "in order to carry out the purpose of this Act." The objective of the Act is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." Clean Water Act section 101(a). It would contravene Congressional intent for a court to impose an additional jurisdictional requirement on all rivers, lakes, and other waters that flow across, or form a part of, state boundaries ("interstate waters" as defined by the 1948 Act, section 10, 62 Stat. 1161), such that interstate waters that were previously protected were no longer protected because they lacked a connection to a water that is navigable for purposes of federal regulation under the Commerce Clause. Nor would all the existing water quality standards be "carry[ing] out the purpose of this Act," if the only water quality standards that could be implemented through the Act (through, for example, National Pollutant Discharge Elimination System permits under section 402) were those water quality standards established for interstate waters that are also waters that are navigable for purposes of federal regulation under the Commerce Clause or that connect to waters that are navigable for purposes of federal regulation under the Commerce Clause. Nowhere in section 303(a) does Congress make such a distinction.

A.ii The Federal Water Pollution Control statute that became the Clean Water Act covered interstate waters

Prior to 1972, two federal statutes addressed discharges of pollutants into interstate waters and water that is navigable for purposes of federal regulation under the Commerce Clause, and tributaries of each: the Water Pollution Control Act of 1948, as amended, and section 13 of the Rivers and Harbors Act of 1899 (section 13 is known as the "Refuse Act"). The Water Pollution Control Act extended federal authority over interstate waters and their tributaries, while the Refuse Act extended federal jurisdiction over the "navigable waters of the United States" and their tributaries. These two separate statutes demonstrate that Congress recognized that interstate waters and "navigable waters of the United States" were independent lawful bases of federal jurisdiction.

A.ii.a The Federal Water Pollution Control Act Prior to 1972

From the outset, and through all the amendments pre-dating the 1972 Amendments, the federal authority to abate water pollution under the Water Pollution Control Act, and the Federal Water Pollution Control Act (FWPCA) as it was renamed in 1956, extended to interstate waters. In addition, since first enacted in 1948, and throughout all the amendments, the goals of the Act have been, *inter alia*, to protect public water supplies, propagation of fish and aquatic life, recreation, agricultural, industrial, and other legitimate uses. *See* 62 Stat. 1155 and 33 U.S.C. 466 (1952), 33 U.S.C. 466 (1958), 33 U.S.C. 466 (1964), 33 U.S.C. 1151 (1970).

In 1948, Congress enacted the Water Pollution Control Act in connection with the exercise of jurisdiction over the waterways of the Nation and in the consequence of the benefits to public health and welfare by the abatement of stream pollution. *See* Pub. L. No. 80-845, 62 Stat. 1155 (June 30, 1948). The 1948 Act authorized technical assistance and financial aid to states for stream pollution abatement programs and made discharges of pollutants into interstate waters and their tributaries a nuisance, subject to abatement and enforcement by the United States. *See id.* section 2(d)(1),(4), 62 Stat. at 1156-1157 (section 2(d)(1) of the Water Pollution Control Act of 1948, 62 Stat. at 1156, stated that the "pollution of *interstate waters*" in or adjacent to any state or states (whether the matter causing or contributing to such pollution is discharged directly into such waters or reaches such waters after discharge into a tributary of such waters), which endangers the health or welfare of persons in a state other than that in which the discharge originates, is declared to be a public nuisance and subject to abatement as provided by the Act. (emphasis added)); section 2(a), 62 Stat. 1155 (requiring comprehensive programs for "interstate waters and tributaries thereof"); section 5, 62 Stat. 1158 (authorizing loans for sewage treatment to abate discharges into "interstate waters or into a tributary of such waters"). Under the statute, "interstate waters" were defined as all rivers, lakes, and other waters that flow across, or form a part of, state boundaries. Section 10, 62 Stat. 1161.

In 1956, Congress strengthened measures for controlling pollution of interstate waters and their tributaries. Pub. L. No. 84-660, 70 Stat. 498 (1956) (directing further cooperation between the federal and state governments in development of comprehensive programs for eliminating or reducing "the pollution of interstate waters and tributaries" and improving the sanitary condition of surface and underground waters, and authorizing the Surgeon General to make joint investigations with states into the conditions of and discharges into "any waters of any state or states.").

In 1961, Congress amended the FWPCA to substitute the term "interstate or navigable waters" for "interstate waters." *See* Pub. L. No. 87-88, 75 Stat. 208 (1961). Accordingly, beginning in 1961, the provisions of the FWPCA applied to all interstate waters and navigable waters and the tributaries of each, *see* 33 U.S.C. 466a, 466g(a) (1964).[10]

In 1965, Congress approved a second set of major legislative changes, requiring each state to develop water quality standards for interstate waters within its boundaries by 1967. Pub. L. No. 89-234, 79 Stat. 908 (1965).[11] Failing establishment of adequate standards by the state, the FWPCA authorized establishment of water quality standards by federal regulation. *Id.* at 908. The 1965 Amendments provided that the discharge of matter "into such interstate waters or portions thereof," which reduces the quality of such waters below the water quality standards established under this subsection (whether the matter causing or contributing to such reduction is discharged directly into such waters or reaches such waters after discharge into tributaries of such waters), is subject to abatement through

[10] Congress did not define the term "navigable waters" in the 1961 Amendments, or in subsequent FWPCA Amendments, until 1972.

[11] In 1967, the state of Arizona created the Water Quality Control Council (Council) to implement the requirements of the 1965 FWPCA. The Council adopted water quality standards for those waters that were considered "interstate waters" pursuant to the existing federal law. The Council identified the Santa Cruz River as an interstate water and promulgated water quality standards for the river in accordance with federal law.

procedures specified in the Act, including (after conferences and negotiations and consideration by a Hearing Board) legal action in the courts. *Id.* at 909.[12]

A.ii.b The Refuse Act of 1899

Since its original enactment in 1899, the Refuse Act (also known as section 13 of the Rivers and Harbors Act of 1899) has prohibited the discharge of refuse matter "into any navigable water of the United States, or into any tributary of any navigable water." Ch. 425, 30 Stat. 1152 (1899). It also has prohibited the discharge of such material on the bank of any tributary where it is liable to be washed into a navigable water. *Id.* Violators are subject to fines and imprisonment. *Id.* at 1153 (codified at 33 U.S.C. 412). In 1966, the Supreme Court upheld the Corps' interpretation of the Refuse Act as prohibiting discharges that pollute the navigable waters, and not just those discharges that obstruct navigation. *United States v. Standard Oil Co*., 384 U.S. 224, 230 (1966). In 1970, President Nixon signed an Executive Order directing the Corps (in consultation with the Federal Water Pollution Control Administration[13]) to implement a permit program under section 13 of the Rivers and Harbors Act of 1899 "to regulate the discharge of pollutants and other refuse matter into the navigable waters of the United States or their tributaries and the placing of such matter upon their banks." E.O. 11574, 35 FR 19627, Dec. 25, 1970. In 1971, the Corps promulgated regulations establishing the Refuse Act Permit Program. 36 FR 6564, 6565, April 7, 1971. The regulations made it unlawful to discharge any pollutant (except those flowing from streets and sewers in a liquid state) into a navigable waterway or tributary, except pursuant to a permit. Under the permit program, EPA advised the Corps regarding the consistency of a proposed discharge with water quality standards and considerations, and the Corps evaluated a permit application for impacts on anchorage, navigation, and fish and wildlife resources. *Id*. at 6566.

A.iii The Federal Water Pollution Control Act Amendments of 1972

When Congress passed the Federal Water Pollution Control Act Amendments of 1972 (referred to hereinafter as the "Clean Water Act"), it was not acting on a blank slate. It was amending existing law that provided for a federal/state program to address water pollution. The Supreme Court has recognized that Congress, in enacting the Clean Water Act in 1972, "intended to repudiate limits that had been placed on federal regulation by earlier water pollution control statutes and to exercise its powers under the Commerce Clause to regulate at least some waters that would not be deemed 'navigable' under the classical understanding of that term." *Riverside Bayview Homes*, 474 U.S. at 133; *see also International Paper Co. v. Ouellette*, 479 U.S. 481, 486, n.6 (1987).

The amendments of 1972 defined the term "navigable waters" to mean "the waters of the United States, including the territorial seas." 33 U.S.C. 1362(7). While earlier versions of the

[12] The 1966 Amendments authorized civil fines for failing to provide information about an alleged discharge causing or contributing to water pollution. Pub. L. No. 89-753, 80 Stat. 1250 (1966); *see also* S. Rep. No. 414, 92d Congress, 1st Sess. 10 (1972) (describing the history of the FWPCA).

[13] In December 1970, administration of the Federal Water Pollution Control Administration was transferred from the Secretary of the Interior to EPA. S. Rep. No. 414, 92d Congress, 1st Sess. (1972).

1972 legislation defined the term to mean "the navigable waters of the United States," the Conference Committee deleted the word "navigable" and expressed the intent to reject prior geographic limits on the scope of federal water-protection measures. Compare S. Conf. Rep. No. 1236, 92d Cong., 2d Sess. 144 (1972), with H.R. Rep. No. 911, 92 Cong., 2d Sess. 356 (1972) (bill reported by the House Committee provided that "[t]he term 'navigable waters' means the navigable waters of the United States, including the territorial seas"); *see also* S. Rep. No. 414, 92d Cong., 1st Sess. 77 ("Through a narrow interpretation of the definition of interstate waters the implementation of the 1965 Act was severely limited . . . . Therefore, reference to the control requirements must be made to the navigable waters, portions thereof, and their tributaries."). Thus, Congress intended the scope of the 1972 Act to include, at a minimum, the waters already subject to federal water pollution control law—both interstate waters and waters that are navigable for purposes of federal regulation under the Commerce Clause. Those statutes covered interstate waters, defined interstate waters without requiring that they be a traditional navigable water or be connected to water that is a traditional navigable water, and demonstrated that Congress knew that there are interstate waters that are not navigable for purposes of federal regulation under the Commerce Clause.

In fact, Congress amended the Federal Water Pollution Control Act in 1961 to substitute the term "interstate or navigable waters" for "interstate waters," demonstrating that Congress wanted to be very clear that it was asserting jurisdiction over both types of waters: interstate waters even if they were not navigable for purposes of federal regulation under the Commerce Clause, and traditional navigable waters even if they were not interstate waters. At no point were the interstate waters already subject to federal water pollution control authority required to be navigable or to connect to a traditional navigable water. Further, as discussed above, the legislative history clearly demonstrates that Congress was expanding jurisdiction—not narrowing it—with the 1972 amendments. Thus, it is reasonable to conclude that by defining "navigable waters" as "the waters of the United States" in the 1972 amendments, Congress included not just traditionally navigable waters, but all waters previously regulated under the Federal Water Pollution Control Act, including non-navigable interstate waters.

Based on the statutory definition of navigable waters, the requirement of Clean Water Act section 303(a) for water quality standards for interstate waters to remain in effect, the purposes of the 1972 Act, and the more than three decades of federal water pollution control regulation that provides a context for reading those provisions of the statute, the intent of Congress is clear that the term "navigable waters" includes "interstate waters" as an independent basis for Clean Water Act jurisdiction, whether or not they themselves are traditional navigable waters or are connected to a traditional navigable water.

B. Supreme Court precedent supports Clean Water Act jurisdiction over interstate waters without respect to navigability.

The Supreme Court established in *Illinois v. Milwaukee*, 406 U.S. 91 (1972) and *City of Milwaukee v. Illinois*, 451 U.S. 304 (1981) that resolving interstate water pollution issues was a matter of federal law and that the Clean Water Act was the comprehensive regulatory scheme for addressing interstate water pollution. In both these decisions, the Court held

that federal law applied to interstate waters. Moreover, these cases analyzed the applicable federal statutory schemes and determined that the provisions of the FWPCA and the Clean Water Act regulating water pollution applied generally to interstate waters. The *City of Milwaukee* further recognized that Clean Water Act jurisdiction extends to interstate waters without regard to navigability.

In *Illinois v. Milwaukee*, the Court considered a public nuisance claim brought by the state of Illinois against the city of Milwaukee to address the adverse effects of Milwaukee's discharges of inadequately treated sewage into Lake Michigan, "a body of interstate water," 406 U.S. at 93, and held that the federal common law of nuisance was an appropriate mechanism to resolve disputes involving interstate water pollution. 406 U.S. at 107 (observing that "federal courts will be empowered to appraise the equities of suits alleging creation of a public nuisance by water pollution"). The Court further noted that in such actions, the Court could consider a state's interest in protecting its high water quality standards from "the more degrading standards of a neighbor." *Id*.

In reaching this conclusion, the Court examined in detail the scope of the federal regulatory scheme as it existed prior to the October 1972 FWPCA amendments, concluding that the FWPCA "makes clear that it is federal, not state, law that in the end controls the pollution of *interstate or navigable waters*." 406 U.S. at 102 (*emphasis added*). The Court specifically noted that section 10(a) of the FWPCA "makes pollution of *interstate or navigable waters* subject 'to abatement'" 406 U.S. at 102 (*emphasis added*). The Court also acknowledged that it was essential for federal law to resolve interstate water pollution disputes, citing with approval the following discussion from *Texas v. Pankey*:

> **Federal common law and not the varying common law of the individual states is, we think, entitled and necessary to be recognized as a basis for dealing in uniform standard with the environmental rights of a State against improper impairment by sources outside its domain . . . . Until the field has been made the subject of comprehensive legislation or authorized administrative standards, only a federal common law basis can provide an adequate means for dealing with such claims as alleged federal rights.**

406 U.S. at 107 n. 9, *citing Texas v. Pankey*, 441 F.2d 236, 241-242. However, the Court noted that the plaintiff was seeking relief outside the scope of the FWPCA and that statute explicitly provided that independent "state and interstate action to abate pollution of interstate or navigable waters shall be encouraged and shall not . . . be displaced by Federal enforcement action." 406 U.S. at 104 (citing section 10(b) of the FWPCA).

In *City of Milwaukee*, the Court revisited this dispute and addressed the expanded statutory provisions of the Clean Water Act regulating water pollution. The scope of the Clean Water Act amendments led the Court to reverse its decision in *Illinois v. Milwaukee*.

> **Congress has not left the formulation of appropriate federal standards to the courts through application of often vague and indeterminate nuisance concepts and maxims of equity jurisprudence, but rather has occupied the field through the**

establishment of a comprehensive regulatory program supervised by an expert administrative agency. The 1972 Amendments to the Federal Water Pollution Control Act were not merely another law "touching interstate waters". . . . Rather, the Amendments were viewed by Congress as a "total restructuring" and "complete rewriting" of the existing water pollution legislation considered in that case.

451 U.S. at 317.

The Court's analysis in *Illinois v. Milwaukee* made clear that federal common law was necessary to protect "the environmental rights of States against improper impairment by sources outside its domain." 406 U.S. at 107 n.9. In the context of interstate water pollution, nothing in the Court's language or logic limits the reach of this conclusion to only navigable interstate waters. In *City of Milwaukee*, the Court found that the Clean Water Act was the "comprehensive regulatory program" that "occupied the field" (451 U.S. 317) with regard to interstate water pollution, eliminating the basis for an independent common law of nuisance to address interstate water pollution. Since the federal common law of nuisance (as well as the statutory provisions regulating water pollution in the FWPCA) applied to interstate waters whether navigable or not, the Clean Water Act could only occupy the field of interstate water pollution if it too extended to non-navigable as well as navigable interstate waters.

With regard to the specifics of interstate water pollution, the *City of Milwaukee* Court noted that, in *Illinois v. Milwaukee*, it had been concerned that Illinois did not have a forum in which it could protect its interests in abating water pollution from out of state, absent the recognition of federal common law remedies. 451 U.S. at 325. The Court then went on to analyze in detail the specific procedures created by the Clean Water Act "for a State affected by decisions of a neighboring State's permit-granting agency to seek redress." 451 U.S. at 326. The Court noted that "any State whose waters may be affected by the issuance of a permit" is to receive notice and the opportunity to comment on the permit. *Id.* (citing to Clean Water Act section 402(b)(3)(5)). In addition, the Court noted provisions giving EPA the authority to veto and issue its own permits "if a stalemate between an issuing and objecting state develops." *Id.* (citing to Clean Water Act sections 402(d)(2)(A) and (d)(4)). In light of these protections for states affected by interstate water pollution, the court concluded that

> **[t]he statutory scheme established by Congress provides a forum for the pursuit of such claims before expert agencies by means of the permit-granting process. It would be quite inconsistent with this scheme if federal courts were in effect to "write their own ticket" under the guise of federal common law after permits have already been issued and permittees have been planning and operating in reliance on them.**

451 U.S. at 326.

Nothing in the language or the reasoning of this discussion limits the applicability of these protections of interstate waters to navigable interstate waters or interstate waters connected

to navigable waters. If these protections only applied to navigable interstate waters, a downstream state would be unable to protect many of its waters from out-of-state water pollution. This would hardly constitute a comprehensive regulatory scheme that occupied the field of interstate water pollution.

For these reasons, the holdings and the reasoning of these decisions establish that the regulatory reach of the Clean Water Act extends to all interstate waters without regard to navigability.[14]

C. The Supreme Court's decisions in SWANCC and Rapanos do not limit or constrain Clean Water Act jurisdiction over non-navigable interstate waters.

As noted above, the Supreme Court recognized that Congress, in enacting the Clean Water Act, "intended to repudiate limits that had been placed on federal regulation by earlier water pollution control statutes and to exercise its powers under the Commerce Clause to regulate at least some waters that would not be deemed 'navigable' under the classical understanding of that term." *Riverside Bayview*, 474 U.S. at 133; *see also International Paper Co. v. Ouellette*, 479 U.S. 481, 486 n.6 (1987). In *Riverside Bayview*, and subsequently in *SWANCC* and *Rapanos*, the Court addressed the construction of the Clean Water Act terms "navigable waters" and "the waters of the United States." In none of these cases did the Supreme Court address interstate waters, nor did it overrule prior Supreme Court precedent which addressed the interaction between the Clean Water Act and federal common law to address pollution of interstate waters. Therefore, the statute, even in light of *SWANCC* and *Rapanos*, does not impose an additional requirement that interstate waters must be water that is navigable for purposes of federal regulation under the Commerce Clause or connected to water that is navigable for purposes of federal regulation under the Commerce Clause to be jurisdictional waters for purposes of the Clean Water Act.

At the outset, it is worth noting that neither *SWANCC* nor *Rapanos* dealt with the jurisdictional status of interstate waters. Repeatedly in the *SWANCC* decision the Court emphasized that the question presented concerned the jurisdiction status of non-navigable *intrastate* waters located in two Illinois counties. *SWANCC* 531 U.S. at 165-166, 171 ("we thus decline to... hold that isolated ponds, some only seasonal, wholly located within two Illinois counties fall under [section] 404(a) definition of navigable waters . . . ."). Nowhere in *SWANCC* does the majority discuss the Court's interstate water case law. The Court does not even discuss the fact that Clean Water Act jurisdictional regulations identify interstate waters as regulated "waters of the United States." In fact, the repeated emphasis on the intrastate nature of the waters at issue can be read as an attempt to distinguish *SWANCC* from the Court's interstate water jurisprudence.

[14] Nothing in subsequent Supreme Court case law regarding interstate waters in any way conflicts with the agencies' interpretation. *See International Paper v. Ouellette*, 479 U.S. 481 (1987); *Arkansas v. Oklahoma*, 503 U.S. 91 (1992). In both these cases, the Court detailed how the Clean Water Act had supplanted the federal common law of nuisance to establish the controlling statutory scheme for addressing interstate water pollution disputes. Nothing in either decision limits the applicability of the Clean Water Act to interstate water pollution disputes involving navigable interstate waters or interstate waters connected to navigable waters.

In *Rapanos*, the properties at issue were located entirely within the state of Michigan. 547 U.S. 715, 762-764. Thus, the Court had no occasion to address the text of the Clean Water Act with respect to interstate waters or the agencies' regulatory provisions concerning interstate waters. In addition, neither Justice Kennedy nor the plurality discusses the impact of their opinions on the Court's interstate waters jurisprudence. The plurality decision acknowledges that Clean Water Act jurisdictional regulations include interstate waters. 547 U.S. 715, 724. However, the plurality did not discuss in any detail its views as to the continued vitality of regulations concerning such waters.

Moreover, one of the analytical underpinnings of the *SWANCC* and *Rapanos* decisions is irrelevant to analysis of regulations asserting jurisdiction over interstate waters. In *SWANCC*, the Court declined to defer to agency regulations asserting jurisdiction over isolated waters because

> **[w]here an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result . . . . This requirement stems from our prudential desire not to needlessly reach constitutional issues and our assumption that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of Congressional authority . . . . This concern is heightened where the administrative interpretation alerts the federal-state framework by permitting federal encroachment upon a traditional state power.**

531 U.S. at 172-173 (citations omitted).

However, the Court's analysis in *Illinois v. Milwaukee* and *City of Milwaukee* makes clear that Congress has broad authority to create federal law to resolve interstate water pollution disputes. As discussed above, the Court in *Illinois v. Milwaukee* invited further federal legislation to address interstate water pollution, and in so doing concluded that state law was not an appropriate basis for addressing interstate water pollution issues. 406 U.S. at 107 n.9 (citing *Texas v. Pankey*, 441 F.2d 236, 241-242). In *City of Milwaukee*, the Court indicated that central to its holding in *Illinois v. Milwaukee* was its concern "that Illinois did not have any forum to protect its interests [in the matters involving interstate water pollution]." 451 U.S. 325. As discussed above, the Court cited with approval the statutory provisions of the Clean Water Act regulating water pollution as an appropriate means to address that concern.

The *City of Milwaukee* and *Illinois v. Milwaukee* decisions make clear that assertion of federal authority to resolve disputes involving interstate waters does not alter "the federal-state framework by permitting federal encroachment on a traditional state power." 531 U.S. at 173. "Our decisions concerning interstate waters contain the same theme. Rights in interstate streams, like questions of boundaries, have been recognized as presenting federal questions." *Illinois v. Milwaukee*, 406 U.S. at 105 (internal quotations and citations omitted). The Supreme Court's analysis in *SWANCC* and *Rapanos* addressed the criteria for analyzing Clean Water Act jurisdictional issues for wholly *intrastate* waters. However, these decisions by their terms did not affect the body of case law developed to address interstate waters. The holdings in the Supreme Court's interstate waters jurisprudence, in particular

***City of Milwaukee*, apply Clean Water Act jurisdiction to interstate waters without regard to, or discussion of, navigability. In *City of Milwaukee*, the Court held that the Clean Water Act provided a comprehensive statutory scheme for addressing the consequences of interstate water pollution. Based on this analysis, the Court *expressly* overruled its holding in *Illinois v. Milwaukee* that the federal common law of nuisance would apply to resolving interstate water pollution disputes, instead holding that such disputes would now be resolved through application of the statutory provisions of the Clean Water Act regulating water pollution.**

Moreover, *SWANCC* and *Rapanos* acknowledge that Clean Water Act jurisdiction extends to at least some non-navigable waters. *See, e.g.*, 547 U.S. at 779 (Kennedy, J.). Neither the *SWANCC* Court nor the plurality or Kennedy opinions in *Rapanos* purports to set out the complete boundaries of Clean Water Act jurisdiction. *See, e.g.*, 547 U.S. at 731 ("[w]e need not decide the precise extent to which the qualifiers 'navigable' and 'of the United States' restrict the coverage of the Act.") (plurality opinion).

As the Supreme Court has repeatedly admonished, if a Supreme Court precedent has direct application in a case yet appears to rest on a rationale rejected in some other line of decisions, lower courts should follow the case which directly controls, leaving to the Supreme Court the prerogative of overruling its precedents. *Agostino v. Felton*, 521 U.S. 203, 237 (1997); *United States v. Hatter*, 532 U.S. 557, 566-567 (1981). Moreover, when the Supreme Court overturns established precedent, it is explicit. *See Lawrence v. Texas*, 539 U.S. 558, 578 ("*Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should be and now is overruled.").

D. The agencies' longstanding interpretation of the term "navigable waters" includes "interstate waters."

EPA, the agency charged with implementing the Clean Water Act, has always interpreted the 1972 Act to cover interstate waters, until the change in position in the 2020 NWPR. Final Rules, 38 FR 13528, May 22, 1973 (the term "waters of the United States" includes "interstate waters and their tributaries, including adjacent wetlands"). To the extent that there is ambiguity about whether interstate waters are "waters of the United States," the agencies' longstanding interpretation is consistent with the text and structure of the statute, the statutory and legislative history, and advances the objective of the Act.

While the Corps in 1974 limited the scope of coverage for purposes of section 404 of the Clean Water Act to those waters that were subject to the Rivers and Harbors Act of 1899, the Corps amended its regulations through interim final regulations in 1975 to provide for the same definition of "waters of the United States" that EPA's regulations had always established. The Corps' revised regulations defined "navigable waters" to include "[i]nterstate waters landward to their ordinary high water mark and up to their headwaters." In its final rules promulgated in 1977, the Corps adopted EPA's definition and included within the definition of "waters of the United States" "interstate waters and their tributaries, including adjacent wetlands." The preamble provided an explanation for the inclusion of interstate waters:

> **The affects [sic] of water pollution in one state can adversely affect the quality of the waters in another, particularly if the waters involved are interstate. Prior to the FWPCA amendments of 1972, most federal statutes pertaining to water quality were limited to interstate waters. We have, therefore, included this third category consistent with the Federal government's traditional role to protect these waters from the standpoint of water quality and the obvious effects on interstate commerce that will occur through pollution of interstate waters and their tributaries.**

42 FR 37122 (July 19, 1977).

The legislative history similarly provides support for the agencies' interpretation. Congress concluded in 1972 that the mechanism for controlling discharges and, thereby abating pollution, under the FWPCA and Refuse Act "has been inadequate in every vital aspect." S. Rep. No. 414, 92d Cong., 1st Sess. 7 (1972). The Senate Committee on Public Works reported that development of water quality standards, assigned to the states under the 1965 FWPCA Amendments, "is lagging" and the "1948 abatement procedures, and the almost total lack of enforcement," prompted the search for "more direct avenues of action against water polluters and water pollution." *Id.* at 5. The Committee further concluded that although the Refuse Act permit program created in 1970 "seeks to establish this direct approach," it was too weak because it applied only to industrial polluters and too unwieldy because the authority over each permit application was divided between two Federal agencies. *See id.* at 5; *see also id.* at 70-72 (discussing inadequacies of Refuse Act program).

In light of the poor success of those programs, the Committee recommended a more direct and comprehensive approach which, after amendment in conference, was adopted in the 1972 Act. The text, legislative history and purpose of the 1972 Amendments all show an intent—through the revisions—to broaden, improve and strengthen, not to curtail, the federal water pollution control program that had existed under the Refuse Act and FWPCA.[15] The 1972 Amendments were "not merely another law 'touching interstate waters'" but were "viewed by Congress as a 'total restructuring' and 'complete rewriting' of the existing water pollution legislation."[16]

[15] *See id.* at 9 ("The scope of the 1899 Refuse Act is broadened; the administrative capability is strengthened."); *id.* at 43 ("Much of the Committee's time devoted to this Act centered on an effort to resolve the existing water quality program and the separate pollution program developing under the 1899 Refuse Act."). Congress sought "to weave" the Refuse Act permit program into the 1972 Amendments, *id.* at 71, as the statutory text shows. *See* 33 U.S.C. 1342(a) (providing that each application for a permit under 33 U.S.C. 407, pending on October 18, 1972, shall be deemed an application for a permit under 33 U.S.C. 1342(a)).

[16] *City of Milwaukee v. Illinois*, 451 U.S. at 317; *see also id.* at 318 (holding that the Clean Water Act precluded federal common-law claims because "Congress' intent in enacting the [Clean Water Act] was clearly to establish an all-encompassing program of water pollution regulation"); *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 22 (1981) (existing statutory scheme "was completely revised" by enactment of the Clean Water Act).

As the legislative history of the 1972 Act confirms, Congress's use of the term "waters of the United States" was intended to repudiate earlier limits on the reach of federal water pollution efforts: "The conferees fully intend that the term 'navigable waters' be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes." *See* S. Conf. Rep. No. 1236, 92d Cong., 2d Sess. 144 (1972). The House and Senate Committee Reports further elucidate the Conference Committee's rationale for removing the word "navigable" from the definition of "navigable waters," in 33 U.S.C. 1362(7). The Senate report stated:

> **The control strategy of the Act extends to navigable waters. The definition of this term means the navigable waters of the United States, portions thereof, tributaries thereof, and includes the territorial seas and the Great Lakes. Through a narrow interpretation of the definition of interstate waters the implementation of the 1965 Act was severely limited. Water moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source. Therefore, reference to the control requirements must be made the navigable waters, portions thereof, and their tributaries.**

***See* S. Rep. 414, 92d Cong., 1st Sess. 77 (1971); *see also* H.R. Rep. No. 911, 92d Cong., 2d Sess. 131 (1972) ("The Committee fully intends that the term "navigable waters" be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes."). These passages strongly suggest that Congress intended to expand federal protection of waters. There is no evidence that Congress intended to exclude interstate waters, which were protected under federal law, if they were not water that is navigable for purposes of federal regulation under the Commerce Clause or connected to water that is navigable for purposes of federal regulation under the Commerce Clause. Such an exclusion would be contrary to all the stated goals of Congress in enacting the sweeping amendments which became the Clean Water Act.**

The Clean Water Act was enacted in 1972. EPA's contemporaneous regulatory definition of "waters of the United States," promulgated in 1973, included interstate waters. The definition has been EPA's interpretation of the geographic jurisdictional scope of the Clean Water Act for approximately 40 years. Congress has also been aware of and has supported the Agency's longstanding interpretation of the Clean Water Act. "Where 'an agency's statutory construction has been fully brought to the attention of the public and the Congress, and the latter has not sought to alter that interpretation although it has amended the statute in other respects, then presumably the legislative intent has been correctly discerned.'" *North Haven Board of Education v. Bell*, 102 456 U.S. 512, 535 (1982) (*quoting United States v. Rutherford*, 442 U.S. 544 n. 10 (1979) (internal quotes omitted)).

The 1977 amendments to the Clean Water Act were the result of Congress's thorough analysis of the scope of Clean Water Act jurisdiction in light of EPA and Corps regulations. The 1975 interim final regulations, promulgated by the Corps in response to *NRDC v.*

Callaway,[17] aroused considerable congressional interest. Hearings on the subject of section 404 jurisdiction were held in both the House and the Senate.[18] An amendment to limit the geographic reach of section 404 to waters that were navigable and their adjacent wetlands for purposes of federal regulation under the Commerce Clause was passed by the House, 123 Cong. Rec. 10434 (1977), but defeated on the floor of the Senate, 123 Cong. Rec. 26728 (1977), and eliminated by the Conference Committee, H.R. Conf. Rep. 95-830, 95th Cong., 1st Sess. 97-105 (1977). Congress rejected the proposal to limit the geographic reach of section 404 because it wanted a permit system with "no gaps" in its protective sweep. 123 Cong. Rec. 26707 (1977) (remarks of Sen. Randolph). Rather than alter the geographic reach of section 404, Congress amended the statute by exempting certain activities—most notably certain agricultural and silvicultural activities—from the permit requirements of section 404. _See_ 33 U.S.C. 1344(f).

Other evidence supports the conclusion that when Congress rejected the attempt to limit the geographic reach of section 404, it was well aware of the jurisdictional scope of EPA and the Corps' definition of "waters of the United States." For example, Senator Baker stated (123 Cong. Rec. 26718 (1977)):

> **Interim final regulations were promulgated by the [C]orps [on] July 25, 1975 . . . . Together the regulations and [EPA] guidelines established a management program that focused the decision-making process on significant threats to aquatic areas while avoiding unnecessary regulation of minor activities. On July 19, 1977, the [C]orps revised its regulations to further streamline the program and correct several misunderstandings . . . .**
>
> **Continuation of the comprehensive coverage of this program is essential for the protection of the aquatic environment. The once seemingly separable types of aquatic systems are, we now know, interrelated and interdependent. We cannot expect to preserve the remaining qualities of our water resources without providing appropriate protection for the entire resource.**
>
> **Earlier jurisdictional approaches under the [Rivers and Harbors Act] established artificial and often arbitrary boundaries . . . .**

This legislative history leaves no room for doubt that Congress was aware of the agencies' definition of navigable waters. While there was controversy over the assertion of jurisdiction over all adjacent wetlands and some non-adjacent wetlands, the agencies' assertion of Clean Water Act jurisdiction over interstate waters was uncontroversial.

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[17] 40 FR 31320, 31324 (July 25, 1975).

[18] *Section 404 of the Federal Water Pollution Control Act Amendments of 1972: Hearings Before the Senate Comm. on Public Works*, 94th Cong., 2d Sess. (1976); *Development of New Regulations by the Corps of Engineers, Implementing Section 404 of the Federal Water Pollution Control Act Concerning Permits for Disposal of Dredge or Fill Material: Hearings Before the Subcomm. on Water Resources of the House Comm. on Public Works and Transportation*, 94th Cong., 1st Sess. (1975).

Finally, the constitutional concerns that led the Supreme Court to decline to defer to agency regulations in *SWANCC* and *Rapanos* are not present where the agency is asserting jurisdiction over interstate waters. In *SWANCC*, the Court declined to defer to agency regulations asserting jurisdiction over non-adjacent, non-navigable, intrastate waters because the Court felt such an interpretation of the statute invoked the outer limits of Congress's power. The Court's concern "is heightened where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power." 531 U.S. at 172-73 (citations omitted). Authority over interstate waters is squarely within the bounds of Congress's Commerce Clause powers.[19] Further, the federal government is in the best position to address issues which may arise when waters cross state boundaries, so this interpretation does not disrupt the federal-state framework in the manner the Supreme Court feared that the assertion of jurisdiction over a non-adjacent, non-navigable, intrastate body of water based on the presence of migratory birds did. The Supreme Court's analysis in *Illinois v. Milwaukee* and *City of Milwaukee* makes clear that Congress has broad authority to create federal law to resolve interstate water pollution disputes. Therefore, as discussed above, it is appropriate for the agencies to adopt an interpretation of the extent of Clean Water Act jurisdiction over interstate waters that gives full effect to *City of Milwaukee* unless and until the Supreme Court elects to revisit its holding in that case.

The final rule does not change the pre-2015 regulation's provision that defines "waters of the United States" to include "interstate waters including interstate wetlands," and also included, for example, tributaries to interstate waters. While the Supreme Court did not specifically address the status of interstate waters for purposes of the Clean Water Act in *Riverside Bayview Homes*, *SWANCC*, or *Rapanos*, as discussed above, the agencies conclude that the Supreme Court provided guidance on the status of interstate waters for purposes of the Clean Water Act in earlier decisions. The agencies have looked to Congress and the language of the Clean Water Act in concluding that interstate waters are "waters of the United States," and in the final rule, based on the language of the statute, the statutory history, the legislative history, and the caselaw, the agencies' continue their longstanding interpretation of "navigable waters" to include interstate waters. In addition, since the Supreme Court's decision in *SWANCC* identified a significant nexus to the waters clearly covered by the Clean Water Act—in those cases, the traditional navigable waters—as the basis for Clean Water Act jurisdiction, the agencies are promulgating a final rule that similarly protects the interstate waters that the agencies concluded were similarly clearly covered by the Clean Water Act.

The agencies are not providing a definition for "interstate waters" in the final rule. This provision remains unchanged from the pre-2015 rule which does not contain a definition of interstate waters. As discussed above, the assertion of jurisdiction over interstate waters is based on the statute and under predecessor statutes "interstate waters" were defined as all rivers, lakes, and other waters that flow across, or form a part of, state boundaries. Section 10, 62 Stat. 1161 (1948). The agencies will continue to implement the provision consistent with the intent of Congress.

[19] In *Illinois v. Milwaukee*, the Supreme Court noted that "Congress has enacted numerous laws touching interstate waters." 406 U.S. at 101.

E. The 2020 NWPR's exclusion of the category of "interstate waters" from the definition of "waters of the United States" is inconsistent with the Act and reduced the agencies' ability to effectively advance the objective of the Act.

The 2020 NWPR removed interstate waters as an independent category of "waters of the United States" for the first time in the history of the Clean Water Act. As discussed above, this change cannot be reconciled with the structure, history, and objective of the statute, as well as judicial interpretations of the Act. The 2020 NWPR asserted that Congress's replacement of the term "navigable or interstate waters" with "navigable waters" in 1972 was an "express rejection" of the regulation of interstate waters as an independent category, reflecting Congress's intent to protect interstate waters only to the extent that they are navigable. 85 FR 22583 (April 21, 2020). In support of its rationale, the 2020 NWPR cited the order of the U.S. District Court for the Southern District of Georgia remanding the 2015 Clean Water Rule. *Id.*; *citing Georgia v. Wheeler*, 418 F. Supp. 3d 1336 (S.D. Ga. 2019). That order found that the categorical inclusion of interstate waters exceeds the agencies' authority under the Clean Water Act because it "reads the term navigability out of the CWA," and would assert jurisdiction over waters that are not navigable-in-fact and otherwise have no significant nexus to any other navigable-in-fact water. *Id.* at 1358-59. The court also found the 2015 Clean Water Rule's approach overly broad because it would result in Clean Water Act jurisdiction over tributaries, adjacent waters, and case-by-case waters based on their relationship to non-navigable interstate waters. *Id.* at 1359-60.

The interpretation of the agencies' authority over interstate waters articulated in the 2020 NWPR and in *Georgia v. Wheeler* is inconsistent with both the text and the history of the Clean Water Act, as well as Supreme Court caselaw, for all of the reasons discussed above. While the term "navigable waters" is ambiguous in some respects, interstate waters are waters that are clearly covered by the plain language of the definition of "navigable waters." Congress defined "navigable waters" to mean "the waters of the United States, including the territorial seas."

The text of the 1972 Act specifically addresses "interstate waters" regardless of their connection to navigability. The 1972 statute retains the term "interstate waters" in 33 U.S.C. 1313(a), which provides that pre-existing water quality standards for "interstate waters" remain in effect unless EPA determined that they were inconsistent with any applicable requirements of the pre-1972 version of the Act. The 2020 NWPR disputes the importance of the reference to "interstate waters" in section 303(a), pointing to references to water quality standards for "interstate navigable waters" in the legislative history of the 1972 Act as indicating that section 303(a) was referring to "interstate navigable waters," not "interstate waters" more broadly. *See* 85 FR 22284 (April 21, 2020), citing S. Rep. No. 92-414, at 2, 4 (1971) (referring to standards for "interstate navigable waters"); 118 Cong. Reg. 10240 (1972) (same). However, the Act ultimately incorporated the term "interstate waters" in section 303(a), and the agencies interpret that plain language as a clear indication that Congress intended the agencies to continue to protect the water quality of interstate waters without reference to their navigability. Excluding "interstate waters" as an independent category of Clean Water Act jurisdiction disregards the plain language of section 303(a).

The 2020 NWPR's approach left parties affected by out-of-state pollution into interstate waters not captured by one of the other categories of jurisdictional waters with no recourse but to litigate, once again relying on the "vague and indeterminate" principles of "State or Federal common law." *City of Milwaukee,* 451 U.S. at 325-326; 85 FR 22286 (April 21, 2021). While Lake Michigan would have been a jurisdictional traditional navigable water under the 2020 NWPR regardless of its interstate status, and therefore protected by the Clean Water Act's regulatory program, interstate waters that do not fall into another category of regulated waters lacked protections under the 2020 NWPR. For example, commenters on the 2020 NWPR indicated that closed basins in New Mexico that straddle the state's borders with Texas or Mexico serve as essential sources of water for drinking and irrigation for tribes and other communities, but waters within these basins would no longer be jurisdictional under the 2020 NWPR if there is no traditional navigable water in the watershed. *See* Comment Letter from National Wildlife Federation on the proposed Revised Definition of Waters of the United States, Docket ID No. EPA-HQ-OW-2018-0149-6880, pp. 33-36 (April 15, 2019).

The 2020 NWPR's exclusion of non-navigable interstate waters from the Clean Water Act's protections reduced the agencies' ability to efficiently and effectively protect the quality of waters shared by more than one state, and therefore "of the United States." In the agencies' judgment, restoring categorical protection of interstate waters is more consistent with the text, structure, and history of the statute, as well as Supreme Court caselaw, than the 2020 NWPR, and better fulfills the agencies' charge to implement a "comprehensive regulatory program" that protects the chemical, physical, and biological integrity of the nation's waters.

2.3.2.2 State-tribal boundaries

Some commenters addressed whether interstate waters should include waters that cross a state-tribal boundary.

Several commenters expressed concern with a state-tribal boundary giving rise to an "interstate water." A couple commenters argued that the history of the Clean Water Act does not support treating waters that cross a state-tribal boundary as "interstate waters," asserting that the term "interstate waters" as used in the 1948 Federal Water Pollution Control Act and a 1956 amendment was defined with respect to state boundaries, not tribal boundaries. These commenters also suggested that it is relevant and significant that the Clean Water Act does not include tribes in the statutory definition of "State."

Other commenters, including tribal commenters, expressed support for treating waters that cross a state-tribal boundary as interstate waters, with some commenters asserting that waters that cross or serve as boundaries between the lands of different tribes (*i.e.*, tribal/tribal boundaries) should also be deemed interstate waters under the rule. One of these commenters asserted that waters that cross a state-tribal boundary may be regulated as interstate waters because a water that crosses the boundary between state and tribal lands "will be regulated by two different sovereign entities on either side of that boundary," and thus these types of waters "present the same regulatory issues as waters that form or cross the boundary between two states" such that "it is appropriate for the agencies to regulate them in the same manner." This commenter added that the Indian Commerce Clause also gives the agencies authority to regulate such waters as interstate waters. As support, the commenter asserted that "the 'broad power to regulate

tribal affairs' contained in the Indian Commerce Clause is delegated to the executive branch where, as here, federal agencies are given a mandate to regulate in a particular area, such as to ensure clean water," citing *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142 (1980). The commenter further asserted that "[b]ecause the 'Interstate Commerce and Indian Commerce Clauses have very different applications,' [quoting *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989)] . . . the agencies must consider the unique needs of Indian Tribes and the unique authority to address those needs that is provided by the Indian Commerce Clause" in revising the definition of "waters of the United States."

A few commenters stated that establishing federal Clean Water Act protections over waters that cross a state-tribal boundary by designating them categorically jurisdictional interstate waters is important because not all tribes have their own permitting programs due to a lack of resources and other issues. These commenters suggested that upstream pollution may raise environmental justice concerns that the agencies should examine.

With respect to what "tribal boundary" the agencies should use for purposes of implementing the interstate waters provision, many commenters recommended that the agencies rely on the definition of "Indian country" as provided in 18 U.S.C. § 1151. A few commenters, however, urged the agencies not to use this definition to determine which waters flow across, or form a part of, state-tribal boundaries. One of these commenters asserted that the definition of "Indian country" is too narrow and was specifically designed to limit the areas where tribes have exclusive criminal enforcement jurisdiction, arguing that there is no basis for the agencies to use that definition to determine whether a water crosses or forms the boundary between a tribe and a state. Another commenter stated that the agencies should adopt the most expansive understanding of tribal lands that the Commerce Clause and the Clean Water Act allow.

> **<u>Agencies' Response</u>: The agencies appreciate the feedback commenters provided on whether interstate waters should include waters that cross a state-tribal boundary and how to identify "tribal boundaries" for purposes of implementing the interstate waters provision. As discussed in Final Rule Preamble Section IV.C.2.b.iii, the agencies have considered the input received during pre-proposal tribal consultation and the public comment period for the proposed rule and, at this time, are continuing to evaluate the issue of interstate waters and tribal boundaries, including what should appropriately be considered "tribal boundaries" for purposes of identifying interstate waters under the Clean Water Act. The agencies have weighed the benefits of addressing this issue now, based on the record currently before them, versus undertaking additional analysis and outreach to tribes to gain a better understanding of tribal boundaries as related to interstate waters and related implications via a separate process to avoid delaying the entire rule. Based on the agencies' evaluation of the comments received and the benefits of further analysis and outreach, the agencies have decided to conduct additional analysis and outreach to inform a future action related to considering designating waters that cross a state-tribal boundary as interstate waters under the definition of "waters of the United States." The agencies recognize the importance of this issue to tribes and are fully committed to directly engaging with tribal governments as the agencies continue to evaluate this aspect of the scope of "waters of the United States." Accordingly, the agencies will address this issue in a subsequent action after completing additional analysis and essential outreach and engagement activities with tribes and interested stakeholders.**

2.3.3 Impoundments

A few commenters addressed the issue of the agencies' legal authority to assert jurisdiction over impoundments.

One commenter argued that asserting categorical jurisdiction over impoundments of "waters of the United States" lacks support in law or science, citing *S.D. Warren Co. v. Maine Board of Environmental Protection*, 547 U.S. 370 (2006) and *United States v. Moses*, 496 F.3d 984 (9th Cir. 2007), and stated that the agencies should instead make case-by-case determinations of jurisdiction over impounded waters. This same commenter expressed support for not treating impoundments of "other waters" as jurisdictional impoundments and suggested that there may be other types of impoundments that should not be considered jurisdictional, such as "an impoundment of a tributary to an impounded wetland."

Conversely, one commenter argued that there is no reasonable basis for excluding impoundments of "other waters" from jurisdiction, citing *SWANCC*, *S.D. Warren Co.*, and *Jefferson City v. Washington Dep't of Ecology*, 511 U.S. 700 (1994).

> **Agencies' Response: The agencies disagree that that asserting categorical jurisdiction over impoundments of "waters of the United States" lacks support in law or science. The agencies have concluded that *S.D. Warren Co. v. Maine Board of Environmental Protection*, 547 U.S. 370 (2006) and *United States v. Moses*, 496 F.3d 984 (9th Cir. 2007) provide support for their longstanding regulations establishing jurisdiction of impoundments of "waters of the United States. See Final Rule Preamble Section IV.C.3. The agencies agree with commenters that impoundments of waters not identified in paragraphs (a)(1) through (a)(4) of the rule should not be jurisdictional by rule under paragraph (a)(2) of the final rule. See Final Rule Preamble Section IV.C.6.**

2.3.4 Tributaries

2.3.4.1 General

Many commenters addressed the issue of the agencies' legal authority to assert jurisdiction over tributaries. A few commenters asserted generally that the proposed rule's approach to tributaries is overly broad and inconsistent with *Rapanos*.

Some commenters discussed the agencies' authority to assert jurisdiction over different types of tributaries—*i.e.*, ephemeral, intermittent, and perennial tributaries. Some commenters asserted that the inclusion of ephemeral and intermittent streams in the definition of "waters of the United States" exceeds the scope of the Clean Water Act and/or is not supported by *Rapanos*. Several commenters argued specifically that the proposed rule's aggregation of ephemeral features under the significant nexus standard goes beyond the scope of the Clean Water Act and is inconsistent with *Rapanos* and congressional intent. Another commenter stated that it is inconsistent with Justice Kennedy's concurring opinion in *Rapanos* to apply the significant nexus test to tributaries.

Additionally, multiple commenters suggested that, pursuant to Supreme Court precedent and the Clean Water Act, jurisdiction over non-navigable tributaries should be limited to tributaries containing clearly

discernible features and contributing consistent flow into traditional navigable waters. A few commenters stated that case law, the Clean Water Act, and constitutional limits require jurisdictional tributaries to either carry a volume of water needed for navigable capacity of an adjacent traditional navigable water or be of a quality needed for interstate commerce, where impairment to water quality would have a negative effect on interstate commerce.

In contrast, several commenters suggested that tributaries should be categorically jurisdictional, akin to traditional navigable waters, and that the *Rapanos* decision supports this categorical approach. Some of these commenters argued that such an approach is supported by the Clean Water Act's text and legislative history. As support, one of the commenters asserted that the agencies "state[d] that they intend to protect all waters that were protected under predecessor laws to the 1972 CWA Amendments," citing to the proposed rule at 86 FR 69375. Another commenter suggested that any tributary that contributes flow to another "water of the United States" should be regulated as a point source under the Clean Water Act.

> **<u>Agencies' Response</u>: The agencies disagree with the commenters who stated that the proposed rule asserted overly broad jurisdiction over tributaries, including those who recommended limiting jurisdiction to those tributaries that carry a volume of water necessary to ensure the navigable capacity of an adjacent traditional navigable water or to protect interstate commerce. As the Corps explained in 1977, its regulations necessarily encompassed "the many tributary streams that feed into the tidal and commercially navigable waters" because "the destruction and/or degradation of the physical, chemical, and biological integrity of each of these waters is threatened by the unregulated discharge of dredged or fill material." 42 FR 37123. See Final Rule Preamble Section IV.A.2.b.i. Tributaries play an important role in the transport of water, sediments, organic matter, nutrients, and organisms to paragraph (a)(1) waters. For example, tributaries slow and attenuate floodwaters; provide functions that help maintain water quality; trap and transport sediments; transport, store, and modify pollutants; and sustain the biological productivity of paragraph (a)(1) waters. The agencies would not be able to protect paragraph (a)(1) waters if it did not protect their tributaries, regardless of whether the tributaries themselves carry a sufficient volume of water to ensure navigable and commercial capacity of adjacent traditional navigable waters. See further discussion in the Final Rule Preamble Section IV.A.2.c.i and in the Technical Support Document section III.A.**
>
> **In response to the commenters who objected to the inclusion of ephemeral and intermittent streams in the definition of "waters of the United States," the agencies would like to clarify that they are not categorically including or excluding streams as jurisdictional based on their flow regime in this rule. Streams that are tributaries, regardless of their flow regime, will be assessed under the relatively permanent or significant nexus standard per paragraph (a)(3) of this rule, and streams that are not tributaries will be assessed under the relatively permanent or significant nexus standard per paragraph (a)(5) of this rule. See Section III.A of the Technical Support Document for more information on the agencies' rationale for the scope of tributaries covered by this rule.**
>
> **Furthermore, nothing in the text of the statute or its legislative history excludes some categories of tributaries based on their flow regime. Indeed, the best available science demonstrates that ephemeral and intermittent streams can significantly affect the chemical,**

physical, and biological integrity of paragraph (a)(1) waters. See Final Rule Section IV.A.5.c. All tributary streams, including perennial, intermittent, and ephemeral streams, are chemically, physically, and biologically connected to larger downstream waters via channels and associated alluvial deposits where water and other materials are concentrated, mixed, transformed, and transported. For example, in Arizona, most of the stream channels—96% by length—are classified as ephemeral or intermittent. The functions that streams provide to benefit downstream waters occur even when streams do not flow constantly. Ephemeral headwater streams shape larger downstream river channels by accumulating and gradually or episodically releasing stored materials such as sediment and large woody debris. Due to the episodic nature of flow in ephemeral and intermittent channels, sediment and organic matter can be deposited some distance downstream in the arid Southwest in particular, and then moved farther downstream by subsequent precipitation events. Over time, sediment and organic matter continue to move downstream and influence larger downstream waters. These materials help structure downstream river channels by slowing the flow of water through channels and providing substrate and habitat for aquatic organisms. See Final Rule Section IV.A.2.c.i.

The agencies disagree with commenters who stated that the significant nexus standard should not apply to tributaries. The significant nexus standard is consistent with the plain language of the Act's objective because it is based upon effects on the water quality of paragraph (a)(1) waters and limits the scope of jurisdiction based on the text of that objective. Moreover, protection of waters that significantly affect the paragraph (a)(1) waters—*i.e., tradi*tional navigable waters, the territorial seas, and interstate waters—is consistent with the scope of Commerce Clause authority that the Supreme Court in *SWANCC* concluded Congress was exercising, while also fulfilling Congress's intent in exercising that authority in enacting the Clean Water Act. See Final Rule Preamble Section IV.A.3.a.i. The requirement that a significant nexus exist between upstream waters, including tributaries, and "navigable waters in the traditional sense" thus clearly advances Congress's stated objective in the Act while fulfilling "the need to give the term 'navigable' some meaning." *Rapanos*, 547 U.S. at 779 (Kennedy, J., concurring). See Final Rule Preamble Section IV.A.2.c.i. Indeed, in *Rapanos*, Justice Kennedy reasoned that *Riverside Bayview* and *SWANCC* "establish the framework for" determining whether an assertion of regulatory jurisdiction constitutes a reasonable interpretation of "navigable waters," according to which, with respect to both the connection from wetlands *and* nonnavigable waters to navigable waters, "[a]bsent a significant nexus, jurisdiction under the Act is lacking." 547 U.S. at 767. See Final Rule Preamble Section IV.A.3.a.i.

In response to the concerns about aggregating ephemeral features under the significant nexus standard, streams and wetlands must sometimes be evaluated in context with other streams because the incremental effects of individual streams and wetlands are cumulative across entire watersheds. Downstream waters are the time-integrated result of all waters contributing to them. For example, the amount of water or biomass contributed by a specific ephemeral stream in a given year might be small, but the aggregate contribution of that stream over multiple years, or by all ephemeral streams draining that watershed in a given year or over multiple years, can have substantial consequences on the integrity of the downstream waters. Similarly, the downstream effect of a single event, such as pollutant discharge into a single stream or wetland, might be negligible but the cumulative effect of

multiple discharges could degrade the integrity of downstream waters. See Section I.A.i of the Technical Support Document. The significant nexus standard, under which waters are assessed alone or in combination for the functions they provide downstream, is consistent with the foundational scientific framework and concepts of hydrology. See Final Rule Preamble Section IV.A.3.a.i.

The agencies agree with the commenters who stated that they have the discretion to consider defining waters as jurisdictional on a categorical basis where scientifically and legally justified (for example in this rule, paragraph (a)(1) waters and their adjacent wetlands), or a case-specific, fact-based approach (for example, in this 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. In the Supreme Court's most recent decision addressing a question about the jurisdictional scope of the Clean Water Act, although not the scope of "waters of the United States," the Court established a standard for determining jurisdiction that does not establish bright lines marking the bounds of federal jurisdiction. Instead, like the significant nexus standard, the standard in *Maui* requires an inquiry focused on the specific facts at issue and is guided by the purposes Congress sought to achieve under the Clean Water Act. See Final Rule Preamble Section IV.A.3.a.iii.

The question as to whether a creek on one property flows into a paragraph (a)(1) water some distance away inevitably requires some ability to consider specific flow patterns, soil, climate, or other facts. Imposing a bright line jurisdictional threshold, as the NWPR did in attempting to implement the *Rapanos* plurality decision, only makes this determination more challenging, not less, as was the agencies' experience during the year in which it attempted to implement this rule. For example, one test that the NWPR implemented was the requirement that, to be jurisdictional, a tributary must flow into a downstream (a)(1) water at least once in a typical year. The typical year test was deemed necessary to implement the plurality's surface connection requirement, because without it, the jurisdictional status of many tributaries would change every year depending on whether the year was wet or dry. Yet this bright line standard often proved unworkable, as discussed in the Final Rule Section IV.B.3.c. Many landowners do not keep records demonstrating flow of particular streams at least once per year. If the creek flowed through a neighbor's property on its way to the traditional navigable water, the landowner might not know whether and how the tributary flowed into the (a)(1) water. Like the Supreme Court's "functional equivalent" standard, the significant nexus standard accommodates and considers the specific facts available in particular instance.

With respect to commenters who argued that tributaries should be categorically jurisdictional, as explained in section IV.A.3.a.iii of Final Rule Preamble, the agencies have concluded that adjudication of which tributaries are within Clean Water Act protections, through case-specific application of the significant nexus standard or the relatively permanent standard under this rule, is appropriate.

The agencies disagree with the commenter who asserted that the agencies "state[d] that they intend to protect all waters that were protected under predecessor laws to the 1972 CWA Amendments" at 86 FR 69375. Nothing in the language that the commenter cited provides that the agencies would protect all waters protected under predecessor laws to the 1972 CWA Amendments. The proposed rule did state that it "would restore the longstanding categorical protections for interstate waters, regardless of their navigability, that were established by the earliest predecessors to the 1972 Clean Water Act," 86 FR 69417, but this discussion focuses on interstate waters rather than tributaries.

In response to the commenter who stated that any tributary that contributes flow to another "water of the United States" should be regulated as a point source under the Clean Water Act, the agencies note that the rule reestablishes the agencies' historic position that a feature can be both a point source and a "water of the United States."[20] That position dates back to 1975 in an opinion of the General Counsel of EPA interpreting the Clean Water Act. That opinion stated: "it should be noted that what is prohibited by section 301 is '*any addition* of *any pollutant* to navigable waters from any point source.' It is therefore my opinion that, even should the finder of fact determine that any *given* irrigation ditch is a navigable water, it would still be permittable as a point source where it discharges into another navigable water body, provided that the other point source criteria are also present." *In re Riverside Irrigation District,* 1975 WL 23864, at *4 (June 27, 1975) (emphasis in original). The opinion stated that "to define the waters here at issue as navigable waters and use that as a basis for exempting them from the permit requirement appears to fly directly in the face of clear legislative intent to the contrary." *Id.* See Final Rule Section IV.C.7.c.i. The same reasoning applies to tributaries other than irrigation ditches.

2.3.4.2 Reach analysis

Several commenters specifically criticized the proposed rule's approach to evaluating the "reach" of a tributary as being inconsistent with the *Rapanos* plurality's opinion and Justice Kennedy's concurrence. In general, these commenters expressed concern that the agencies could deem the entire reach of a tributary to be jurisdictional so long as one portion of the tributary satisfies either the proposed rule's relatively permanent or significant nexus standard. The commenters argued that this approach could allow for a finding of jurisdiction "based on little more than a mere hydrological connection" and that such an approach was rejected by the *Rapanos* plurality and Justice Kennedy, with one commenter citing *Rapanos*, 547 U.S. at 716, 784-85, as support. A couple of these commenters stated that neither the *Rapanos* plurality's or Justice Kennedy's opinion "supports the exercise of jurisdiction over broad expanses of waters simply because of their proximity to, or hydrological connection with a *single point* of water found to satisfy either standard" (emphasis in original). The commenters further asserted that the proposed rule's reach analysis "raises the very same concern that Justice Kennedy expressed when he

[20] The agencies considered that a district court has reached a contrary conclusion, but the agencies decline to adopt the decision's reasoning in this rule, including because it relies on the change in interpretation articulated for the first time in the 2020 NWPR and which the agencies reject in this 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.").

rejected the Corps' definition of tributary in *Rapanos*" because it would cover waters "remote from any navigable-in-fact water" and carrying "only minor volumes."

Likewise, several commenters expressed concern that the proposed rule's reach analysis is contrary to Justice Kennedy's opinion because it could result in the assertion of jurisdiction over features "far upstream" from a traditional navigable water and that have "insubstantial" volumes of flow, suggesting that Justice Kennedy expressed concern about including such features as jurisdictional.

A different commenter expressed concern that the proposed rule's reach analysis would allow the agencies "to assert jurisdiction over these uppermost reaches of an unlimited daisy chain of waters in a stream system irrespective of whether those different segments or streams share a relatively permanent surface connection to navigable waters and without ever examining whether those reaches share a significant nexus with navigable waters," which the commenter asserted would be inconsistent with the *Rapanos* plurality's opinion and Justice Kennedy's concurrence. The commenter added that such an "intermittent, physically remote connection" to navigable waters would also be inconsistent with *Riverside Bayview* and *SWANCC*.

> **Agencies' Response: In implementing the rule, to determine the flow characteristics of a tributary, the agencies will evaluate the entire reach of the tributary that is of the same Strahler stream order (*i.e., from* the point of confluence, where two lower order streams meet to form the tributary, downstream to the point such tributary enters a higher order stream; see Technical Support Document IV.A.ii.1). The flow characteristics of lakes, ponds, and impoundments that are part of the tributary network will be assessed in conjunction with the stream with which they connect. Consistent with the pre-2015 regulatory regime, the agencies will assess the flow characteristics of a particular tributary at the farthest downstream limit of such tributary (*i.e., the p*oint the tributary enters a higher order stream). *Rapanos* Guidance at 6 n.24. Where data indicate the flow characteristics at the downstream limit do not represent the entire reach of the tributary, the flow characteristics that best characterize the entire tributary reach will be used. See Final Rule Section IV.C.4.c.i; Technical Support Document IV.A.ii. This approach is not inconsistent with the *Riverside Bayview Homes, SWANCC,* or *Rapanos* opinions, none of which opined on the most appropriate way to measure stream reach. The approach in the final rule is consistent with longstanding agency practice under the *Rapanos* Guidance and with the science of stream flow. It is also the most intuitive and implementable approach to assessing stream reach because it is based on the hydrology and landscape of particular streams. Similarly, it accommodates regional differences rather than imposing a nationwide bright line to measure stream reach (*e.g.*, distance). For these reasons, the agencies' approach is reasonable.**
>
> **Contrary to the concerns expressed by a commenter, the approach to measuring stream reach in this rule would not deem jurisdictional the "uppermost reaches of an unlimited daisy chain of waters in a stream system" irrespective of whether those different segments or streams share a relatively permanent surface connection to navigable waters and without ever examining whether those reaches share a significant nexus with navigable waters." Nor would it deem waters jurisdictional based on an "intermittent, physically remote connection" to paragraph (a)(1) waters. A stream reach would only be jurisdictional if it meets either the relatively permanent or significant nexus standard. The relatively**

permanent standard encompasses tributaries that have flowing or standing water year-round or continuously during certain times of the year. In evaluating tributaries under the significant nexus standard, the agencies will determine whether the tributaries, either alone or in combination with similarly situated waters in the region, significantly affect the chemical, physical, or biological integrity of paragraph (a)(1) waters. See Final Rule Section IV.C.4.a, IV.C.4.c.

2.3.5 Adjacent Wetlands

Many commenters addressed the issue of the agencies' legal authority to assert jurisdiction over adjacent wetlands. Some commenters argued that the agencies' use of the relatively permanent standard in the proposed rule is inconsistent with the *Rapanos* plurality's opinion because it does not require a continuous connection for adjacent wetlands to be jurisdictional, with one commenter referencing the agencies' statement in the proposed rule that a continuous surface connection "does not require surface water to be continuously present between the wetland and the tributary." Another commenter asserted that the proposed rule's approach to adjacent wetlands is inconsistent with the *Rapanos* plurality's opinion because it allows for the "continuous surface connection requirement to be satisfied by physical connections such as non-jurisdictional ditches with irregular flow surface connection requirement."

Some commenters contended that the agencies do not have legal authority over adjacent wetlands because the aggregation of wetlands and/or the reach approach are contrary to Justice Kennedy's requirement that each wetland be judged in its own right, using the significant nexus test. Some commenters argued that the proposed rule does not adequately look to the significance of the connection pursuant to *Rapanos* and that this demonstrates the agencies' overreach of authority over adjacent wetlands.

One commenter questioned a statement in the proposed rule's preamble in which the commenter claimed that the agencies had asserted that in *Riverside Bayview*, the Supreme Court held that it was appropriate for the U.S. Army Corps of Engineers to regulate "all wetlands, even though some might not have any impacts on traditional navigable waters." The commenter suggested that viewing the scope of jurisdiction for isolated wetlands in a vacuum, including wetlands that are not intertwined with the ecosystem of navigable water, is not supported by *Rapanos.*

Several commenters argued that the agencies should assert jurisdiction only over those wetlands that are directly abutting other "waters of the United States." They contended that doing otherwise exceeds the constitutional limits of the agencies' Clean Water Act jurisdiction. Similarly, one commenter contended that the word "adjacent" should be given its plain meaning for the sake of regulatory certainty, adding that the term "neighboring" within the definition of "adjacent" goes "beyond the ordinary understanding" of adjacency. The same commenter argued that the proposed rule's approach to adjacent wetlands exceeds the scope of the agencies' statutory authority and is inconsistent with Supreme Court case law and the Clean Water Act's cooperative federalism structure.

Other commenters suggested that the proposed rule's approach to adjacent wetlands is legally defensible and is supported by relevant Supreme Court precedent, particularly *Riverside Bayview*, as well as available science. Several commenters argued that *all* wetlands adjacent to other "waters of the United States"—not just those adjacent to the "foundational waters"—should be categorically jurisdictional. Some of these commenters asserted that providing categorical protection for such wetlands is necessary to achieve the Clean Water Act's statutory objective. Others asserted that categorical jurisdiction over

adjacent wetlands is supported by the Clean Water Act's text and legislative history. Another commenter argued that the Supreme Court upheld the agencies' assertion of jurisdiction over wetlands adjacent to other "waters of the United States" in *Riverside Bayview*. Some commenters asserted that the significant nexus standard and the relatively permanent standard should not apply to adjacent wetlands because such features should be categorically jurisdictional under the Act pursuant to the best available science.

Agencies' Response: The agencies agree with commenters that the rule's approach to adjacent wetlands is legally defensible and is supported by relevant Supreme Court precedent as well as available science.

The agencies disagree with commenters that the use of the relatively permanent standard in the rule is inconsistent with the plurality in *Rapanos*. See Final Rule Preamble Section IV.C.5. In any case, this final rule is not based on an application of the *Marks* test for interpreting Supreme Court decisions. In other words, while the agencies' interpretation of the statute is informed by Supreme Court decisions, including *Rapanos*, it is not an interpretation of the multiple opinions in *Rapanos*, nor is it based on an application of the Supreme Court's principles to derive a governing rule of law from a decision of the Court in a case such as *Rapanos* where "no opinion commands a majority." *Rapanos*, 547 U.S. at 758 (Roberts, C.J., concurring) (citing *Marks v. United States*, 430 U.S. 188, 193 (1977)). Rather, this final rule codifies the agencies interpretation of "navigable waters," informed by the relevant revisions of the Clean Water Act and the statute as a whole, as well as the scientific record, relevant Supreme Court case law, input from public comment, 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" including more than a decade of implementing regulations after *Rapanos*. See Final Rule Preamble Section IV.A.

The agencies disagree with commenters that argued that Justice Kennedy required that each wetland be judged in its own right, using the significant nexus test. Again, this final rule is not based on an application of the *Marks* test for interpreting Supreme Court decisions. See Final Rule Preamble Section IV.A. Justice Kennedy explicitly stated that similarly situated waters should be assessed for a significant nexus "alone, or in combination." 547 U.S. at 780. Assessing the functions of identified waters in combination is consistent not only with the significant nexus standard, as described in section IV.A of the Final Rule Preamble, but with the science demonstrating how upstream waters affect downstream waters. Scientists routinely analyze the combined effects of groups of waters, aggregating the known effect of one water with those of ecologically similar waters in a specific geographic area, or to a certain scale.

The agencies disagree with commenters that state that the rule does not adequately look to the significance of the connection. The agencies have established a definition of "significantly affect" in this rule for purposes of determining whether a water meets the significant nexus standard to mean "a material influence on the chemical, physical, or biological integrity of" a paragraph (a)(1) water. This rule identifies specific functions that will be assessed and identifies specific factors that will be considered when assessing whether the functions provided by the water, alone or in combination, have a material influence on the integrity of a traditional navigable water, the territorial seas, or an interstate water. The standard cannot be met by merely speculative or insubstantial effects

on those aspects of those paragraph (a)(1) waters, but rather requires the demonstration of a "material influence." In this rule, the agencies have specified that a "material influence" is required for the significant nexus standard to be met. The phrase "material influence" establishes that the agencies will be assessing the influence of the waters either alone or in combination on the chemical, physical, or biological integrity of a paragraph (a)(1) water and will provide qualitative and/or quantitative information and articulate a reasoned basis for determining that the waters being assessed significantly affect a paragraph (a)(1) water. See Final Rule Preamble Section IV.C.9.
The Supreme Court's statement in *Riverside Bayview* that "the Court went on to note that to achieve the goal of preserving and improving adjacent wetlands that have significant ecological and hydrological impacts on traditional navigable waters, it was appropriate for the Corps to regulate all adjacent wetlands, even though some might not have any impacts on traditional navigable waters," speaks for itself. *Riverside Bayview* at 135 n.9.

The agencies disagree with commenters stating that the scope of adjacent waters covered by the rule exceeds constitutional limits. See Final Rule Preamble Section IV.A.3.

The agencies disagree that the term "neighboring" within the definition of "adjacent" goes "beyond the ordinary understanding" of adjacency. The definition of adjacent is a longstanding and familiar definition that is supported by the text of the statute, Supreme Court case law, and science. See Final Rule Preamble Section IV.C.8.b. The well-established definition of adjacent also accords with the term's plain meaning. See Final Rule Preamble Section IV.A.2.b.ii.

Finally, the agencies agree that providing categorical protection of adjacent wetlands can be a means of achieving the objective of the Clean Water Act, but disagree that it is the only means. As noted by Justice Kennedy, the agencies can reasonably proceed to determine which tributaries and their adjacent wetlands are jurisdictional through regulations or adjudication. *See* 547 U.S. at 780-81; *see also NLRB v. Bell Aerospace Co.*, 416 U.S. at 294. With respect to wetlands adjacent to tributaries, the agencies are requiring case-specific determinations of whether such wetlands meet the relatively permanent standard or the significant nexus standard in this rule.

2.3.6 "Other Waters"

Many commenters addressed the agencies' legal authority to assert jurisdiction over the category of waters described in paragraph (a)(3) of the proposed rule; *i.e.*, the "other waters" category. Some commenters suggested that the proposed rule's approach to "other waters" is legally defensible. Other commenters suggested that per the Supreme Court's decision in *SWANCC*, the agencies lack authority to assert jurisdiction over "other waters" altogether. Some commenters contended that the proposed rule's inclusion of "other waters" is also inconsistent with *Rapanos*.

Multiple commenters stated that the proposed rule's inclusion of the "other waters" category would impermissibly assert jurisdiction over a wide range of features that are far from navigable-in-fact and that have only minor volumes of flow. A few commenters expressed concern that although the proposed rule recognizes the importance of the strength of a feature's connection to downstream waters, as well as the distance of "other waters" to navigable waters, the preamble to the proposed rule indicates that the

agencies may rely too much on scientific principles when making jurisdictional determinations in a manner that improperly expands the scope of the agencies' authority. Other commenters, however, suggested that the proposed rule should provide broader protections for "other waters." Several of these commenters argued that such an approach would not be inconsistent with *Rapanos*, *SWANCC*, or *Maui*.

Additionally, several commenters argued that the significant nexus test is only applicable to tributaries and/or adjacent wetlands and cannot be applied to "other waters," including because Justice Kennedy's *Rapanos* concurrence discussed significant nexus only in the context of wetlands. One of these commenters asserted that the agencies "should not assume that a test devised in the context of wetlands should also apply to determine the jurisdictional status of other types of waters that may not perform the same functions (or to the same degrees) as do wetlands," citing Justice Kennedy's statements about the importance of wetlands, *Rapanos*, 547 U.S. at 777 ("Important public interests are served . . . by the protection of wetlands in particular."); *id.* ("Scientific evidence indicates that wetlands play a critical role in controlling and filtering runoff."). This commenter further noted that "[a]t least one lower court has . . . concluded that the significant nexus test does not automatically apply to every class of waters," referencing *San Francisco Baykeeper v. Cargill Salt Division*, 418 F.3d 700, 707 (9th Cir. 2007).

Moreover, one commenter indicated that applying the significant nexus standard to "other waters" that are similarly situated is not the intention of Congress nor of the Supreme Court. Another commenter argued that the agencies should not consider water functions that indicate isolation between water features as a basis for finding a significant nexus for "other waters." The commenter cited *Maui v. Hawaii Wildlife Fund*, 140 S. Ct. 1462, 1470 (2020), for the proposition that, while recognizing the connection of all water, the Supreme Court still declined to grant jurisdiction over all waters—even water that could influence downstream water quality—for Clean Water Act purposes.

Finally, multiple commenters criticized the agencies' removal of references to interstate or foreign commerce in the proposed rule's paragraph (a)(3) provision as arbitrary, capricious, and/or not supported by law. Other commenters criticized this change to the 1986 regulations based on the argument that the Supreme Court in *SWANCC* did not strike down or invalidate that element of the regulations. One of these commenters argued that alternative grounds for asserting jurisdiction based on effects on interstate or foreign commerce thus remained viable post-*SWANCC*.

A few commenters stated that failing to require an effect on interstate commerce would unlawfully expand federal jurisdiction over "other waters" to features such as ephemeral and isolated waters and wetlands. Another commenter suggested that the agencies could not fulfill the Clean Water Act's statutory objective without providing for jurisdiction over "other waters" that could affect interstate and foreign commerce. This commenter emphasized that the Commerce Clause does not limit Congress to regulating only navigable waters and referenced the statement in *United States v. Holland*, 373 F. Supp. 665, 673 (M.D. Fla. 1974) that "[i]t is beyond question that water pollution has a serious effect on interstate commerce and that the Congress has the power to regulate activities . . . which cause such pollution." A different commenter similarly urged the agencies to retain the "commerce-based" provisions of the "other waters" category based on the grounds that Congress was exercising its "full" Commerce Clause power—not just its power over navigation—in promulgating the Clean Water Act.

<u>Agencies' Response</u>: The agencies agree with commenters that the rule's approach to "other waters" is legally defensible. The agencies disagree with commenters that stated that the agencies lack authority based on Supreme Court decisions to assert jurisdiction over waters

not identified in paragraphs (a)(1) through (a)(4) of the rule. First, as explained further in Final Rule Preamble Section IV.A.1, in this rule the agencies are exercising the authority granted to them by Congress to construe and implement the Clean Water Act and to interpret an ambiguous term and its statutory definition. Therefore, while the agencies' interpretation of the statute is informed by Supreme Court decisions, including *Rapanos*, it is not an interpretation of *SWANCC* or the multiple opinions in *Rapanos*, nor is it based on an application of the Supreme Court's principles to derive a governing rule of law from a decision of the Court in a case such as *Rapanos* where "no opinion commands a majority."

The agencies disagree that asserting jurisdiction over any waters that meet the significant nexus standard, including any paragraph (a)(5) waters, is inconsistent with *SWANCC* or *Rapanos*. Based on the law, the science, and agency expertise, the agencies conclude that the significant nexus standard applies to tributaries, adjacent wetlands, and intrastate lakes, as well as ponds, streams, or wetlands not covered by other categories (*i.e.*, paragraph (a)(3), (a)(4), and (a)(5) waters under the final rule). In addition, the Court in *SWANCC* did not hold that "other waters" (a category that has been modified and codified in this rule as paragraph (a)(5) waters) could never be jurisdictional; rather it held that the potential use of isolated ponds as habitat for migratory birds could not be used as the sole basis to justify treating those ponds as "waters of the United States." *See* 531 U.S. at 164-65, 171-72. Indeed, the *SWANCC* Court in describing *Riverside Bayview* stated that "it was the significant nexus between the wetlands and 'navigable waters' that informed our reading of the CWA" in that case. *Id*. at 167. The agencies also disagree with commenters' characterization of a statement by the Ninth Circuit in *San Francisco Baykeeper v. Cargill Salt Division*, 481 F.3d 700,707 (9th Cir. 2007) as a holding that the significant nexus standard does not apply to all types of waters. First, it is clear that Justice Kennedy's significant nexus standard is not limited to wetlands. Justice Kennedy stated: "to constitute 'navigable waters' under the Act, a water or wetland must possess a 'significant nexus' to waters that are or were navigable in fact or that could reasonably be so made." *Rapanos* at 759 (citing *SWANCC*, 531 U.S. at 167, 172) (emphasis added).

Second, in the context of the case, the statement is about the interplay between the 1986 regulatory definition of "waters of the United States" and the *Rapanos* case. The adjacency provision of the 1986 regulations applies only to wetlands and the water at issue in the case was a pond. The Ninth Circuit's decisions after *Baykeeper* further demonstrate that commenters' view of the decision is erroneous; the Ninth Circuit has applied the Kennedy standard to non-wetland waters. For example, in *United States v. Vierstra*, 2012 U.S. Appeal LEXIS 16876, **3 (9th Cir. Aug. 9, 2012), the Ninth Circuit upheld a finding of jurisdiction over a tributary based on the significant nexus standard.

The agencies disagree with commenters who stated that "failing to require an effect on interstate commerce" would unlawfully expand federal jurisdiction over "other waters." First, the rule is well within the bounds of the Commerce Clause, in part because the agencies have deleted the broad Commerce Clause bases for jurisdiction in the 1986 regulations. See Final Rule Preamble Section IV.A.3 and IV.C.6. Second, the replacement of those interstate commerce bases for jurisdiction with the relatively permanent standard and the significant nexus standard narrows the scope of the rule rather than broaden it.

Other commenters stated that the rule does not go far enough in protecting paragraph (a)(5) waters and the agencies should retain the broad Commerce Clause jurisdictional factors. While the agencies agree that the Supreme Court in *SWANCC* did not vacate (a)(3) of the 1986 regulation, the Court did conclude that Congress was utilizing an aspect of its Commerce Clause authority, so the agencies have concluded that this rule's reliance on the relatively permanent standard and significant nexus standard properly balances the Clean Water Act's broad statutory objective, while giving meaning to the word "navigable." Accordingly, the agencies are not asserting jurisdiction over waters and wetlands simply because "the use, degradation or destruction of which could affect interstate or foreign commerce."

2.3.7 Ditches

A few commenters addressed the issue of the agencies' legal authority to assert jurisdiction over ditches. Several commenters argued that the proposed rule would improperly assert jurisdiction over ditches by not requiring the continuous connections required by *Rapanos*. A few commenters stated that, to provide clarity and consistency with the agencies' historical treatment of ditches, most ditches should be excluded.

One commenter argued that the proposed rule classified a ditch as both a "water of the United States" and a point source contrary to the Water Transfers Rule, 40 CFR 122.3.

Other commenters suggested that the proposed rule's approach to ditches is legally defensible and supported by case law, particularly where a ditch functions as a tributary. As support, one of these commenters stated that the proposed rule's treatment of ditches and other channels as tributaries is consistent with the authority granted by the Clean Water Act and as interpreted by district and appeals courts and all Supreme Court precedent, except the *Rapanos* plurality.

Agencies' Response: The agencies disagree with commenters who argued that the proposed rule would improperly assert jurisdiction over ditches by not requiring the continuous connections described by *Rapanos.* As discussed in the final rule preamble, the scope of the ditch exclusion is consistent with the agencies' longstanding practice and technical judgment that certain waters and features are not subject to regulation under the Clean Water Act. The exclusion is also informed by *Rapanos*. The agencies have concluded that the relatively permanent standard in *Rapanos* on its own is insufficient to achieve the objective of the Act. See Section IV.A of the Final Rule Preamble. However, the relatively permanent standard is generally consistent with the agencies' longstanding practice of finding certain ditches that lack important hydrogeomorphic features to be non-jurisdictional. The agencies also disagree with commenters who asserted that to provide clarity and consistency with the agencies' historical treatment of ditches, most ditches should be excluded from jurisdiction. Importantly, the agencies' treatment of ditches in the final rule is consistent with the agencies' historical treatment of ditches under the pre-2015 regulatory regime and the 2019 Repeal Rule. In accordance with this historical treatment, the final rule excludes certain ditches from jurisdiction. In addition, where a ditch is not excluded from jurisdiction, it is only jurisdictional if it satisfies the terms of the categories of waters that are considered jurisdictional under this rule. For example, a ditch that is not

excluded, but does not satisfy either the relatively permanent or significant nexus standard would not be jurisdictional under this rule.

The agencies disagree with the commenter who argued that finding that a ditch can be both a "water of the United States" and a point source is contrary to the Water Transfer Rule. The agencies have historically taken the position that a ditch can be both a "water of the United States" and a point source and are returning to that longstanding position.[21] See Section IV.C.7.c.i.3 of the Final Rule Preamble for further discussion of this issue. EPA's regulations exclude from section 402 permitting requirements discharges from a water transfer. Water transfer means an activity that conveys or connects waters of the United States without subjecting the transferred water to intervening industrial, municipal, or commercial use. This exclusion does not apply to pollutants introduced by the water transfer activity itself to the water being transferred. 40 CFR 122.3(i). There is no contradiction between these two rules. The conveyance or connection of "waters of the United States" from a ditch that is both a "water of the United States" and a "point source" is exempt from 402 permitting requirements under the water transfers regulation. The conveyance or connection of "waters of the United States" from a ditch that is not a "water of the United States" and is a "point source" is not exempt under the water transfers regulation and may require a permit.

The agencies agree with commenters who suggested that the proposed rule's approach to ditches was legally defensible and supported by case law. See Section IV.C.7.c.i of the Final Rule Preamble for further discussion of the agencies' approach to determining jurisdiction over ditches.

2.3.8 "Foundational Waters"

A commenter argued that "foundational waters" must "encompass waters that were already federally protected at the time of the Federal Water Pollution Control Act Amendments of 1972," quoting the agencies' statement in the preamble to the proposed rule that there is an "indisputable federal interest in the protection of the foundational waters that prompted Congress to enact the various incarnations of the Act," 86 FR 69400.

One commenter stated that the proposed rule should cover waters and adjacent wetlands that support plants and animals traditionally harvested by indigenous people as categorically jurisdictional "foundational waters" on the basis that such waters "are susceptible of supporting waterborne commerce."

Another commenter claimed that the proposed rule would allow for the assertion of jurisdiction over too many water features because the relatively permanent and significant nexus standards each tie back to overly broad categories of "foundational waters."

Agencies' Response: The agencies are not using the term "foundational waters" in the final rule preamble or rule text. The agencies used the phrase "foundational waters" in the preamble to the proposed rule simply for convenience and readability rather than writing the phrase "traditional navigable waters, the territorial seas, and interstate waters"

[21] *See supra* note 20.

repeatedly. The agencies are not categorically covering all waters that were already federally protected at the time of the Federal Water Pollution Control Act Amendments of 1972, but are providing that certain waters—not including paragraph (a)(1) waters—are only jurisdictional if they meet either the relatively permanent standard or the significant nexus standard. The agencies have discretionary authority to determine jurisdiction either through categorical rulemaking or through informal adjudication. The agencies are also not establishing in the rule all waters and adjacent wetlands that support plants and animals traditionally harvested by indigenous people as categorically jurisdictional "foundational waters" on the basis that such waters "are susceptible of supporting waterborne commerce" because the agencies are mindful of the Supreme Court's decision in *SWANCC* regarding the specific Commerce Clause authority Congress was exercising in enacting the Clean Water Act—"its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made." The agencies disagree that the relatively permanent standard and significant nexus standard tie back to overly broad categories of waters: the Clean Water Act fundamentally protects these three categories of waters: traditional navigable waters are clearly encompassed within the defined term "navigable waters"; the territorial seas are explicitly mentioned in the definition of "navigable waters"; and, interstate waters are waters of the several states and therefore unambiguously "waters of the United States." See Final Rule Preamble Sections IV.A. and IV.C.2.

2.4 Tribal Issues

2.4.1 Federal Trust Responsibility

Multiple commenters stated that the United States has a federal trust responsibility to recognize and protect tribal lands, assets, and resources, which the commenters asserted may include the water that flows over and through tribal lands and the natural resources that depend on that water. One commenter asserted that adopting a broad approach to the significant nexus standard, such as interpreting "in the region" to mean "in a watershed or subwatershed," would fulfill the agencies' federal trust responsibility by recognizing "the interrelatedness of tribal resources and the impacts of water on other tribal resources." Another commenter stated that the federal trust responsibility includes an obligation to consult with tribes when jurisdictional determinations are made in ceded territories. This commenter asserted that tribes have specific traditional knowledge and other information about waterbodies that could help inform a connection to interstate or foreign commerce or aid in the determination of a significant nexus.

One commenter asserted that the agencies must interpret the Clean Water Act as broadly as possible under the Commerce Clause in order to fulfill their federal trust responsibility. Several commenters suggested that federal Clean Water Act jurisdiction is necessary to implement the federal trust responsibility and comply with treaty and reserved rights tied to water quality.

Finally, one commenter urged the agencies to review the record of proceedings related to tribal provisions in the Clean Water Act, stating that strengthening these provisions would uphold trust and treaty obligations and support tribal sovereignty.

Agencies' Response: The agencies acknowledge the federal government's trust responsibility to federally recognized Indian tribes that arises from treaties, statutes,

executive orders, and the historical relations between the United States and tribes. Consistent with this federal trust responsibility, the agencies are committed to maintaining their longstanding work with federally recognized tribes on a government-to-government basis. The agencies' federal trust responsibility, however, does not expand Congress's grant of authority to the agencies in the Clean Water Act. As discussed in Final Rule Preamble Section IV.A, in developing this 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 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. The final rule also reflects the agencies' consideration of the wide range of comments received from tribes and tribal entities throughout the tribal consultation and coordination process and in additional engagements with tribes, as well as comments submitted by tribes during the public comment period for the proposed rule.

The agencies also recognize the value of tribes' indigenous knowledge (also known as traditional knowledge)—which includes information derived from a tribe's direct contact with the environment and long-term experiences, as well as extensive observations, lessons, and skills passed from generation to generation—and the importance of considering this knowledge as part of decision-making processes. Indeed, the Army is currently in the midst of reviewing its tribal consultation policy and evaluating issues such as whether to engage in the tribal consultation process for all draft approved jurisdictional determinations. 87 FR 33756.[22]

See also the agencies' response to comments in Section 2.4.2 regarding tribal treaty rights and in Section 2.4.3 regarding the importance of water to tribes.

2.4.2 Tribal Treaty Rights and Water Rights

A few commenters expressed concern around tribal treaty rights that are dependent on water, including treaty rights to hunt and fish, as well as the attendant water rights necessary to protect the habitat supporting those treaty rights. One commenter specifically listed tribal watersheds that they asserted should be protected, including Escavado Wash, Largo Canyon Wash, and the Chaco Wash on the Navajo Nation. Another commenter asserted that it is important that the agencies protect all waters within the tribe's treaty-protected usual and accustomed fishing areas, adding that fishing has been the foundation on which their tribe's culture, economy, and ceremonial life has been based. The commenter further stated that the Supreme Court has recognized the importance of fishing for tribes, quoting language providing that it is "not much less necessary to the existence of the Indians than the air they breathed," *United States v. Winans*, 198 U.S. 371, 381 (1905).

[22] *See also* U.S. Army, *Army Civil Works announces publication of policy initiatives to modernize the Corps' Civil Works program* (June 2, 2022), available at https://www.army.mil/article/257208/army_civil_works_announces_publication_of_policy_initiatives_to_modernize_the_corps_civil_works_program.

Another commenter asserted that clean water is necessary to fulfill their reserved ceded territory rights that guarantee that the tribe continue hunting, fishing, and gathering in a manner that meets their subsistence, economic, cultural, medical, and spiritual needs. A different commenter stated that it is critical that the definition of "waters of the United States" be defined expansive enough to uphold treaty-reserved rights.

Additionally, several commenters stated that tribal water rights are held in trust by the United States on behalf of the tribes and that there is no distinction in federal Indian water law as to whether these water courses are perennial, ephemeral, intermittent, or connected to navigable waters. These commenters further asserted that tribes are entitled to receive the benefit of their water rights in sufficient quantity and at a sufficient quality necessary to support the tribe. A couple commenters stated that federal reserved water rights are founded when a reservation is established for the benefit of a tribe and that typically these waters that are appurtenant or adjacent to the reservation are the sources of water that satisfy these reserved water rights and thus require federal protection.

> **Agencies' Response: The agencies acknowledge tribes' comments regarding the importance of specific local or regional aquatic resources. The agencies also recognize that tribal treaty rights constitute federal law. However, treaty rights do not expand Congress's grant of authority to the agencies in the Clean Water Act. As discussed in Final Rule Preamble Section IV.A, in developing this 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 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 also the agencies' response to comments in Section 2.4.1 regarding the federal trust responsibility and in Section 2.4.3 regarding the importance of water to tribes.**

2.4.3 Importance of Water to Tribes

Multiple commenters discussed the importance of clean water quality to tribes' cultural and traditional values and uses of water and expressed general opposition to reducing water quality protections. One of these commenters suggested that the revised definition of "waters of the United States" needs to protect tribes' cultural and traditional values and uses of water. Another commenter stated that when water quality is degraded, the tribal community and resources that the community depends upon are threatened.

> **Agencies' Response: The agencies recognize the importance to tribes of protecting water resources and the importance of water resources to tribal life generally. As discussed in Final Rule Preamble Section IV.A, the agencies find that the final rule advances the Clean Water Act's statutory objective in section 101(a) to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters" as it is informed by the best available science concerning the functions provided by upstream tributaries, adjacent wetlands, and paragraph (a)(5) waters to restore and maintain the water quality of paragraph (a)(1) waters. Further, the term "waters of the United States" is relevant to the scope of most federal programs to protect water quality under the Clean Water Act because**

the Clean Water Act uses the term "navigable waters" or "waters of the United States" in establishing such programs. This rule will thus 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.

The agencies also note that Congress has provided for eligible tribes to administer Clean Water Act programs over their reservations and expressed a preference for tribal regulation of surface water quality on reservations to ensure compliance with the goals of the statute. *See* 33 U.S.C. 1377; 56 FR 64876, 64878-79 (December 12, 1991). In addition, tribes may establish more protective standards or limits under tribal law that may be more stringent than the federal Clean Water Act. Indeed, section 510 of the Clean Water Act provides that, unless expressly stated, nothing in the Clean Water Act precludes or denies the right of any state or tribe to establish more protective standards or limits than the Clean Water Act. For example, many states and tribes regulate groundwater, and some others protect vital wetlands that may be outside the scope of the Clean Water Act.

2.4.4 Miscellaneous Tribal Issues

Some commenters discussed the Treaty of 1855 and how it relates to the definition of "waters of the United States," with one commenter suggesting that the agencies define "waters of the United States" in a manner that is consistent with not only the Clean Water Act but also the Treaty of 1855. A few commenters stated that the Treaty of 1855 requires that water quality be maintained such that harvested fish are free from toxic pollutants and that the Clean Water Act provides a regulatory mechanism for achieving those requirements. One of these commenters added that the effectiveness of the Clean Water Act to maintain adequate water quality is limited by the statute's jurisdictional scope.

Several commenters voiced support for creating a separate jurisdictional category of "waters of the United States" known as "waters of the tribe." A couple of these commenters stated that establishing this category would recognize tribes' important role in achieving the Clean Water Act's objective. These commenters suggested that such waters should be jurisdictional even if they do not meet the significant nexus standard, arguing that the agencies have special obligations to tribes that may not be fully satisfied by limiting the definition of "waters of the United States" to only those waters that meet the significant nexus standard.

Agencies' Response: As discussed in the agencies' response to comments in Section 2.4.2, treaty rights—including the Treaty of 1855—do not expand Congress's grant of authority to the agencies in the Clean Water Act. The agencies acknowledge, however, that the jurisdictional scope of the Clean Water Act has a relationship to water quality, and that water quality itself may be relevant to policies, goals, or requirements set forth in other federal laws, such as treaties. Indeed, as explained in Final Rule Preamble Section IV.A.2, the agencies must consider the Clean Water Act's objective "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters" in interpreting the scope of the statutory term "waters of the United States," and protecting the chemical, physical, and biological integrity of the nation's waters means protecting their water quality.

Nonetheless, the agencies are precluded from exceeding their statutory authority under the Clean Water Act to achieve specific scientific, policy, or other outcomes.

The agencies acknowledge that both states and tribes have a vital role to play in implementing and enforcing the Clean Water Act and thereby advancing the Act's statutory objective. The agencies disagree, however, with commenters who requested creation of a separate jurisdictional category for "waters of the tribe." States and tribes may elect to implement their own water quality protection programs more broadly than the scope of federal jurisdiction, interpreting "waters of the state" or "waters of the tribe" as exceeding the scope of "waters of the United States." For example, where authorized by tribal law, tribes may establish more protective water quality standards or choose to address special hydrologic or aquatic concerns within their borders. Nothing in the Clean Water Act nor the final rule affects or diminishes tribal authorities to establish protections for their aquatic resources or from determining what kinds of aquatic resources to regulate under tribal law to protect the interests of their tribal members.

See also the agencies' response to comments in Section 2.4.1 and Section 2.4.3, regarding the agencies' federal trust responsibility and the importance of water to tribes, respectively.

2.5 Supreme Court Decisions

The agencies received many comments addressing Supreme Court decisions related to the definition of "waters of the United States."

Several commenters asserted that the agencies' focus on *Riverside Bayview*, *SWANCC*, and *Rapanos* to the exclusion of other Supreme Court precedent unjustifiably narrows the scope of the proposed rule, with a few commenters stating that the agencies should review all relevant Supreme Court case law in developing a revised definition of "waters of the United States"—including cases beyond *Riverside Bayview*, *SWANCC*, and *Rapanos*. One of these commenters stated that a broad review of relevant case law would aid the agencies in their goal of developing a "durable" definition and specifically suggested that the agencies review *ONRC Action v. U.S. Bureau of Reclamation*, 798 F.3d 933 (9th Cir. 2015), which the commenter characterized as a case that "acknowledge[s] the complex hydrologic conditions" of the Lost and Klamath River basins. In contrast, other commenters suggested that the agencies' consideration of relevant Supreme Court precedent in developing a jurisdictional standard in the proposed rule was excessive.

Some commenters stated that the Supreme Court's decisions in *Riverside Bayview*, *SWANCC*, and *Rapanos* provides support for the notion that the agencies should interpret the term "waters of the United States" broadly. One of these commenters suggested that Congress intended to exert broad federal jurisdiction in promulgating the Clean Water Act and argued that *SWANCC* and *Rapanos* do not preclude the agencies from fulfilling this congressional intent. This commenter added that *SWANCC* and *Rapanos* together stand for the proposition that nonnavigable waters with a significant nexus to traditional navigable waters may jurisdictional. A few commenters asserted that additional Supreme Court precedent, including *International Paper Company v. Ouellette*, 479 U.S. 481, 492 (1987), as well as decisions of the courts of appeals and federal district courts, likewise supports establishing broad jurisdiction under the Clean Water Act.

Other commenters suggested that relevant Supreme Court precedent does not support a broad assertion of Clean Water Act jurisdiction. Some of these commenters asserted that the intent of *Riverside Bayview*, *SWANCC*, and *Rapanos* is to limit federal jurisdiction under the term "navigable waters" and emphasized that the term "navigable" must be given import. One commenter stated that the Supreme Court would likely reject a rule based on connectivity to navigable waters as too broad. Another commenter expressed support for the agencies' statement in the preamble to the proposed rule that the Supreme Court's interpretations of "waters of the United States" do not require adoption of the significant nexus standard.

Finally, one commenter urged the agencies to codify the Supreme Court's guidance from *SWANCC* and *Rapanos* in the proposed rule and asserted that doing so would help the agencies construct a legally defensible regulation that ensures consistent implementation across different regions of the country.

> **Agencies' Response: The agencies disagree with commenters that assert the agencies focused too narrowly on the Supreme Court decisions in *Riverside Bayview*, *SWANCC*, and *Rapanos*. The preamble to the final rule demonstrates that the agencies considered a wide range of relevant Supreme Court cases. The agencies disagree that the relevant cases do not support the assertion of jurisdiction in the final rule, but to be clear, in this rule the agencies are exercising the authority granted to them by Congress to construe and implement the Clean Water Act and to interpret an ambiguous term and its statutory definition. Therefore, while the agencies' interpretation of the statute is informed by Supreme Court decisions, including *Riverside Bayview*, *SWANCC*, and *Rapanos*, it is not an interpretation of the cases, including the multiple opinions in *Rapanos*. Rather, this rule codifies the agencies' interpretation of "navigable waters" informed by the text of the relevant provisions of the Clean Water Act and the statute as a whole, as well as the scientific record, relevant Supreme Court case law, input from public comment, 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," including more than a decade of implementing the regulations after *Rapanos*. Based on these considerations, the agencies have concluded that the significant nexus standard in this rule is the best interpretation of section 502(7) of the Clean Water Act.**

2.5.1 *Riverside Bayview*

Many commenters asserted that the proposed rule is consistent with the Supreme Court's decision in *Riverside Bayview*. Several of these commenters suggested that the Supreme Court in *Riverside Bayview* recognized that the agencies may exert a broad scope of jurisdiction under the Clean Water Act. Further, some commenters suggested that the Court in *Riverside Bayview* deferred to the agencies as technical experts in determining the bounds of Clean Water Act jurisdiction.

Other commenters suggested that the proposed rule is not consistent with the Supreme Court's decision in *Riverside Bayview*. One of these commenters specifically referenced the proposed rule's approach to wetlands adjacent to relatively permanent waters. The commenter referenced the proposed rule's discussion that a "continuous surface connection" does not require surface water to be continuously present between the wetland and the tributary and referenced the example of a man-made ditch that drains from the wetland to the relatively permanent water, arguing that this "provides an opportunity for regulating under the relatively permanent standard wetlands that are quite distant (maybe miles) from the relatively permanent water under the guise of adjacency" and "that such wetlands do not present the

boundary-drawing problem addressed in *Riverside Bayview*." Another commenter similarly argued that "it plainly is not enough for wetlands to have 'only an intermittent, physically remote hydrologic connection to "waters of the United States"' because such wetlands 'do not implicate the boundary-drawing problem of *Riverside Bayview*'" (citing *Rapanos*, 547 U.S. at 742 (plurality)).

Finally, a different commenter asserted that though the Court in *Riverside Bayview* found that Congress intended "navigable waters" to include "at least some waters that would not be deemed 'navigable' under the classical understanding of that term," the Court "repudiated the idea that Congress abandoned the concept of navigability altogether." This commenter argued that the proposed rule does not give enough meaning to the term "navigable."

Agencies' Response: The agencies agree that the rule is consistent with *Riverside Bayview*.

The agencies disagree with commenters that assert that the rule does not give enough meaning to the term "navigable." The Clean Water Act delegates authority to the agencies to construe the key term "navigable waters," which Congress broadly defined to mean "the waters of the United States, including the territorial seas." 33 U.S.C. 1362(7) (Clean Water Act section 502(7)). The text of the statute, including in particular sections 501 and 502(7), and congressional intent provide that delegation of authority. And the Supreme Court has affirmed the conclusion that the agencies have the authority to define the bounds of "waters of the United States." In this rule, the agencies are using the traditional tools of statutory construction to exercise their delegated authority. Further, the rule is founded upon the longstanding 1986 regulations, familiar to Congress and the Court, while incorporating important limitations based on the text of the statute. The breadth of the definition of "navigable waters" reflects a deliberate choice by Congress to both enact a statute with a broad scope of waters protected by federal law and to delegate the authority to interpret the specialized term and its definition to the expert agencies. See Final Rule Preamble Section IV.A.1.

The agencies disagree with commenters' characterization of *Riverside Bayview*'s view of the role of the agencies and with commenters' characterization of the boundary drawing problem. In *Riverside Bayview,* the Supreme Court affirmed the conclusion that it is the agencies' role to interpret the term "waters of the United States." As the Court explained in *Riverside Bayview,* Congress delegated a "breadth of federal regulatory authority" and expected the agencies to tackle the "inherent difficulties of defining precise bounds to regulable waters." 474 U.S. at 134. In addition, the *Riverside Bayview* Court identified "shallows, marshes, mudflats, swamps, [and] bogs" as examples of "areas that are not wholly aquatic but nevertheless fall far short of being dry land," and it observed that "[w]here on this continuum to find the limit of 'waters' is far from obvious." 474 U.S. at 132. The line-drawing problem in *Riverside Bayview* did *not* involve identifying the boundary between a jurisdictional stream and an adjacent wetland. Rather, the line-drawing problem involved the criteria that should be used to determine whether particular types of hydrogeographic features should be regarded as "waters" under the Clean Water Act. That line-drawing problem—in essence, determining how wet is wet enough—can arise even when a particular swamp or marsh is separated by a barrier from a nearby lake or stream. After discussing at some length the regulatory definition of "wetlands" and its application to the property at issue in that case, *see id*. at 129-131, the *Riverside Bayview*

Court upheld as reasonable "the Corps' approach of defining adjacent wetlands as 'waters' within the meaning of" the Clean Water Act. *Id*. at 132. Final Rule Preamble Section IV.A.3.

2.5.2 *SWANCC*

Multiple commenters expressed the view that *SWANCC* removed or at least limited the agencies' ability to assert federal jurisdiction over non-navigable, "isolated," intrastate waters. Some commenters argued that the agencies should interpret *SWANCC* broadly as limiting jurisdiction over tributaries, ditches, wetlands, and other bodies of water not at issue in *SWANCC*. One commenter characterized the decision as "[laying] the groundwork for the basic proposition that federalism, states' rights, and the limits of the Commerce Clause define the outer bounds of federal CWA authority."

Other commenters argued that the *SWANCC* decision was specific to an abandoned sand and gravel pit and addressed only the agencies' authority to assert jurisdiction over a water based solely on its use by migratory birds. As such, these commenters contended that *SWANCC* does not provide any basis for removing protections for tributaries, adjacent waters, or "other waters" covered under the pre-2015 definition.

Some commenters asserted that the proposed rule is inconsistent with *SWANCC*. A few of these commenters argued that retention of the "other waters" category would be inconsistent with *SWANCC*. Another commenter expressed concern that the suggestion in the proposed rule that a significant nexus could be found even where there is a lack of hydrologic connection was contrary to *SWANCC* because, according to the commenter, "the lack of a hydrologic connection was central to the holding that isolated ponds are not 'waters of the United States.'" Finally, several commenters argued that the proposed rule would lead to overly broad federal jurisdiction over potentially all state waters, contrary to the Supreme Court's holding in *SWANCC* that the Clean Water Act must be construed in a manner that avoids federalism and constitutional questions.

Agencies' Response: The agencies disagree that the rule is inconsistent with *SWANCC* and disagree with commenters' characterization of the holding in *SWANCC.* A 5-4 Court in *SWANCC* held that the use of "nonnavigable, isolated, intrastate waters" by migratory birds was not by itself a sufficient basis for the exercise of federal authority under the Clean Water Act. *SWANCC*, 531 U.S. at 172. By placing traditional navigable waters, the territorial seas, and interstate waters at the center of the agencies' jurisdiction and covering additional waters only where those waters significantly affect (a)(1) waters, this rule reflects the Court's guidance in *SWANCC*. While the agencies agree that the *SWANCC* decision focused on rejecting the agencies' authority to assert jurisdiction over a water based solely on its use by migratory birds, the agencies conclude that it is reasonable to inform their interpretation of the Clean Water Act in this rule by the concerns and limitations identified by the Court in *SWANCC* and discussed in section IV.A.3 of this preamble. In addition, to be clear, in this rule the agencies are exercising the authority granted to them by Congress to construe and implement the Clean Water Act and to interpret an ambiguous term and its statutory definition, they are not interpreting Supreme Court decisions.

The agencies disagree that the rule would lead to overly broad federal jurisdiction over potentially all state waters or is contrary to *SWANCC*. The agencies find that the rule

appropriately draws the boundary of waters subject to federal protection by limiting the scope to the protection of upstream waters that significantly affect the integrity of waters where the federal interest is indisputable—the traditional navigable waters, the territorial seas, and interstate waters. Waters that do not implicate federal interest in these paragraph (a)(1) waters are not included within the scope of federal jurisdiction. The scope and boundaries of the definition therefore reflect the agencies' considered judgment of both the Clean Water Act's objective in section 101(a) and the congressional policy relating to states' rights and responsibilities under section 101(b). See Final Rule Preamble Section IV.A.3.b.

2.5.3 *Rapanos*

Numerous commenters argued that the proposed rule would cover waters outside the scope of the Clean Water Act as interpreted in *Rapanos* and thus exceeds the agencies' statutory authority. Several of these commenters asserted that the proposed rule misinterprets both the plurality's and Justice Kennedy's opinions in a way that impermissibly expands federal Clean Water Act jurisdiction.

Other commenters argued that the agencies must "reconcile" the *Rapanos* plurality's opinion and Justice Kennedy's concurring opinion by developing a jurisdictional standard that relies on "points of commonality" between the two opinions rather than adopting what the commenters characterized as the proposed rule's "either/or" approach to jurisdiction, which the commenters asserted is indefensible. In contrast, some commenters expressed support for including both the relatively permanent and significant nexus standard from *Rapanos* in the proposed rule, including because the four dissenting Justices in *Rapanos* stated that they would uphold jurisdiction under either test. Several commenters disagreed with this position, suggesting that it is improper to invoke the dissent's opinion in *Rapanos*.

Many commenters discussing *Rapanos* cited *Marks v. United States*, 430 U.S. 188 (1977) to support arguments around what controlling legal principles may be derived from the opinion of five or more Supreme Court justices when there is no majority opinion, such as in *Rapanos*. Some of these commenters asserted that the *Rapanos* plurality's opinion is controlling under the standard set forth in *Marks*, with a few arguing that the plurality's opinion is controlling because it represents a narrower holding than Justice Kennedy's concurrence. Other commenters stated that under *Marks*, either the relatively permanent or significant nexus tests could be used to determine Clean Water Act jurisdiction. Still other commenters argued that only those limited principles to which both the *Rapanos* plurality and Justice Kennedy agreed should be followed.

Some commenters discussing *Marks* asserted that neither the plurality's nor Justice Kennedy's opinion could be viewed as controlling. A few of these commenters suggested that the holding in *Marks* could not be applied to *Rapanos* because neither opinion is a logical subset of the other. Another commenter, however, argued that the significant nexus standard is supported by *Rapanos* and binding because a majority of Justices supported it, citing *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp*., 460 U.S. 1, 17 (1983).

Agencies' Response: While this rule, and the standards articulated in this rule, are informed by the opinions in *Rapanos*, they are not dictated by those opinions. Instead, the standards articulated in the rule represent the agencies' interpretation of the statute as a whole, consideration of the best available science, and application of the agencies' experience and technical expertise. Thus, while the agencies disagree that the standards as

codified in this rule are inconsistent with the opinions in *Rapanos*, the agencies have exercised their authority and concluded that the standards as they have articulated them in this rule are the best interpretation of the statute based on their conclusions in section IV.A of this preamble. Further, while the agencies' disagree with commenters that the plurality opinion is controlling or that a rule must be based commonalities between the Kennedy opinion and the plurality opinion, the rule is not an interpretation of the multiple opinions in *Rapanos*, nor is it based on an application of the Supreme Court's principles to derive a governing rule of law from a decision of the Court in a case such as *Rapanos* where "no opinion commands a majority." *Rapanos*, 547 U.S. at 758 (Roberts, C.J., concurring) (citing *Marks v. United States*, 430 U.S. 188, 193 (1977) ("*Marks*")). The Clean Water Act delegates authority to the agencies to construe the key term "navigable waters," which Congress broadly defined to mean "the waters of the United States, including the territorial seas." 33 U.S.C. 1362(7) (Clean Water Act section 502(7)). See Final Rule Preamble Section IV.A.1.

2.5.3.1 Plurality's opinion

Multiple commenters asserted that the proposed rule is inconsistent with Justice Scalia's plurality opinion in *Rapanos*. Several of these commenters argued that the proposed rule misconstrues the plurality opinion by relying on a test of whether water flows at least seasonally to meet the relatively permanent standard and by failing to require relatively permanent waterways to be connected to traditional navigable waterways.

Some commenters argued that Justice Scalia's plurality opinion in *Rapanos* should control the definition of "waters of the United States" such that the proposed rule should include only the relatively permanent standard.

A few commenters asserted that the proposed rule's reliance on the plurality's relatively permanent test as an alternative to the significant nexus test is appropriate so long as the test is not too narrowly applied. One of these commenters urged the agencies to clarify that relatively permanent waters need not flow perennially and include waters that contain continuous flow during some months of the year but no flow during dry months; the commenter claimed that this approach would be consistent with the plurality's opinion. This commenter further argued that the proposed rule's relatively permanent standard should not require that waters be fed by any particular source, asserting that this approach has no basis in the plurality's opinion. The commenter also stated that it would be inconsistent with the Clean Water Act's statutory objective, precedential case law, and relevant science to rely on the relatively permanent standard as the *sole* standard for assessing jurisdiction.

<u>Agencies' Response</u>: The agencies' interpretation of the statute is informed by and consistent with Supreme Court decisions, including *Rapanos*, but it is not an interpretation of the plurality opinion or other opinions in *Rapanos*. "Only a judicial precedent holding that the statute unambiguously forecloses the agency's interpretation, and therefore contains no gap for the agency to fill, displaces a conflicting agency construction," and the fractured decision in *Rapanos* provides no such precedent. *See Brand X*, 545 U.S. at 982-83. Rather, this rule codifies the agencies' interpretation of "navigable waters" as well as the scientific record, relevant Supreme Court case law, input from public comment, 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," including more

than a decade of implementing the regulations after *Rapanos.* The Chief Justice emphasized the breadth of the agencies' discretion in defining "waters of the United States" through rulemaking; indeed, the agencies' interpretations under the Clean Water Act, Chief Justice Roberts emphasized, are "afforded generous leeway by the courts." 547 U.S. at 758. With this rulemaking, the agencies are taking the path prescribed by the Chief Justice. See Final Rule Section IV.A.1.

The agencies have decided to implement the relatively permanent standard because it is consistent with the *Rapanos* plurality opinion, it reflects and accommodates regional differences in hydrology and water management, and it can be implemented using available, easily accessible tools. It will therefore be a straightforward approach for the agencies and the regulated community to implement. In addition, maintaining an interpretation that encompasses the tributaries considered relatively permanent under the pre-2015 regulatory regime and the 2020 NWPR addresses the many comments from stakeholders emphasizing the need for clarity and certainty in the scope of "waters of the United States." See Final Rule Section IV.C.4.c.ii. However, the relatively permanent standard is insufficient as the sole standard because it is inconsistent with the Act's text and objective and runs counter to the scientific principles underlying protection of water quality. See Final Rule Section IV.A.3.a.ii.

The agencies' interpretation of relatively permanent tributaries to include surface waters that have flowing or standing water year-round or continuously during certain times of the year is consistent with the *Rapanos* plurality's interpretation of "waters of the United States." The *Rapanos* plurality interpreted "waters of the United States" as encompassing "relatively permanent, standing or continuously flowing bodies of water," including streams, rivers, oceans, lakes, and other bodies of waters that form geographical features. 547 U.S. at 732-33, 739, 742. The plurality noted that its reference to "relatively permanent" waters did "not necessarily exclude streams, rivers, or lakes that might dry up in extraordinary circumstances, such as drought," or "*seasonal* rivers, which contain continuous flow during some months of the year but no flow during dry months." *Id*. at 732 n.5 (emphasis in original); *see also* 85 FR 22289 (citing the same language from the plurality in support of the 2020 NWPR's interpretation of relatively permanent waters). The agencies therefore agree with the commenter who stated that the relatively permanent standard can include waters that do not flow during dry seasons, consistent with the plurality opinion. The agencies also agree with the commenter who stated that nothing in the plurality opinion limits the sources of relatively permanent waters. Under the rule relatively permanent waters can be fed by any source. See Final Rule Section IV.C.4.c.ii.

Tributaries, including relatively permanent tributaries, are only jurisdictional if they flow directly or indirectly into paragraph (a)(1) waters. There is no text in the Clean Water Act supporting a more stringent requirement, such as for "direct" flow, and the agencies have never interpreted the Act to cover only tributaries with "direct" flow. The *Rapanos* plurality opinion did not so limit the scope of tributaries covered by the Act. 547 U.S. at 742. Moreover, the science is clear that the chemical, physical, and biological integrity of paragraph (a)(1) waters depends on the many tributaries, including headwater streams, that feed such waters. It would be impossible to restore and maintain the chemical, physical, and biological integrity as required by the Clean Water Act with a definition of "waters of

the United States" that included solely the last tributary that flows "directly" into paragraph (a)(1) waters. Waters that are part of a system that never reaches a paragraph (a)(1) water, however, such as a small system of streams that ultimately flow to a non-navigable stream in an intrastate basin with no outlet, are not jurisdictional under the tributaries provision of this rule.

2.5.3.2 Justice Kennedy's concurrence

Numerous commenters asserted that the proposed rule's significant nexus standard is broader than or otherwise inconsistent with Justice Kennedy's concurring opinion in *Rapanos*. Some of these commenters suggested that Justice Kennedy's opinion does not provide support for applying the significant nexus standard to features other than tributaries and adjacent wetlands. Several commenters stated that the proposed rule's significant nexus standard is inconsistent with and thus contrary to Justice Kennedy's opinion because it uses "or" instead of "and" in referencing the "chemical, physical, or biological integrity" of downstream waters. Relatedly, a few commenters argued that Justice Kennedy rejected the notion that a biological or ecological connection alone is sufficient to support a finding of significant nexus and that the proposed rule thereby expands jurisdiction beyond Justice Kennedy's interpretation of the Act. Another commenter criticized the proposed rule's significant nexus standard as allowing for a finding of jurisdiction based on a single function, including contribution of flow, claiming that this is inconsistent with language in Justice Kennedy's opinion suggesting that a "mere hydrologic connection" is insufficient to establish jurisdiction. In contrast, another commenter argued that the agencies misinterpreted Justice Kennedy's significant nexus test in the proposed rule in a manner that reduces jurisdiction over historically protected waters.

Other commenters asserted that the proposed rule's significant nexus standard is not as stringent as Justice Kennedy's test, including because it does not require that a significant nexus be demonstrated through "substantial evidence," a term used in Justice Kennedy's opinion. One commenter argued that the agencies should apply the legal principles of proximate causation and foreseeability in developing "objective and measurable criteria as to the extent of scientific evidence needed to identify and assess similarly situated wetlands in the region to support asserting jurisdiction over a particular wetland" and to thereby "give meaning to Justice Kennedy's limiting principles." Another commenter stated that federal courts have found that "significant" does not require statistical significance or specific quantitative data.

A different commenter criticized the proposed rule's approach to aggregation under the significant nexus standard as being inconsistent with the approach articulated in Justice Kennedy's opinion. This commenter asserted that Justice Kennedy's approach "focuses on making a significant nexus call for a particular wetland . . . and then possibly concluding that other similar wetlands also possess a significant nexus" while, according to the commenter, the proposed rule "would reverse that approach, assessing the presence or absence of significant nexus for entire groups of waters (not just wetlands) collectively, then applying that conclusion to each individual water in the class."

Several commenters asserted that Justice Kennedy's significant nexus standard was only intended to be a check on unreasonable application of the statute rather than justification to extend the reach of Clean Water Act jurisdiction.

Finally, some commenters argued that Justice Kennedy's opinion is not controlling, arguing in part that it was not adopted by a majority of the Court, and thus should not dictate Clean Water Act jurisdiction.

Another commenter, focusing on the proposed rule's reliance on the significant nexus standard, asserted that the agencies should not base their interpretation of "waters of the United States" on the opinion of a single Supreme Court Justice.

Agencies' Response: The agencies disagree with commenters that asserted that the rule's significant nexus standard is broader than or otherwise inconsistent with Justice Kennedy's concurring opinion in *Rapanos*. First, the agencies are not basing the rule on the opinion of a single Justice, and this final rule is not based on an application of the *Marks* test for interpreting Supreme Court decisions. In other words, while the agencies' interpretation of the statute is informed by Supreme Court decisions, including *Rapanos*, it is not an interpretation of the multiple opinions in *Rapanos*, nor is it based on an application of the Supreme Court's principles to derive a governing rule of law from a decision of the Court in a case such as *Rapanos* where "no opinion commands a majority." *Rapanos*, 547 U.S. at 758 (Roberts, C.J., concurring) (citing Marks v. United States, 430 U.S. 188, 193 (1977)). Rather, with this rule, the agencies are interpreting the scope of the definition of "navigable waters," informed by relevant Supreme Court precedent, but also based on the text of the relevant provisions of the Clean Water Act and the statute as a whole, the scientific record, 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." See Final Rule Preamble Section IV.A.5.b. In addition, the elements of the significant nexus test are each consistent with the elements as articulated in Justice Kennedy's opinion: Waters possess the requisite significant nexus if the wetlands "either alone or in combination with similarly situated [wet]lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" *Id*. at 780. Justice Kennedy's opinion notes that to be jurisdictional, such a relationship with traditional navigable waters must be more than "speculative or insubstantial." *Id*.

The agencies disagree that Justice Kennedy's opinion does not provide support for applying the significant nexus standard to features other than tributaries and adjacent wetlands. Justice Kennedy concluded that "to constitute 'navigable waters' under the Act, *a water or* wetland must possess a 'significant nexus' to waters that are or were navigable in fact or that could reasonably be so made." *Id*. at 759 (citing *SWANCC*, 531 U.S. at 167, 172) (emphasis added).

The agencies disagree that the proposed rule's significant nexus standard is inconsistent with and thus contrary to Justice Kennedy's opinion because it uses "or" instead of "and" in referencing the "chemical, physical, or biological integrity" of downstream waters. 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. As the agencies stated in the *Rapanos* Guidance: "Consistent with Justice Kennedy's instruction, EPA and the Corps will apply the significant nexus standard in a manner that restores and maintains any of these three attributes of traditional navigable waters." *Rapanos* Guidance at 10 & n.35. See Final Rule Preamble Section IV.C.9.

The agencies disagree that Justice Kennedy rejected the notion that a biological or ecological connection alone is sufficient to support a finding of significant nexus and that the proposed rule thereby expands jurisdiction beyond Justice Kennedy's interpretation of the Act since Justice Kennedy's significant nexus standard refers to effects on "biological" integrity. The agencies disagree with commenters' criticism of the rule's significant nexus standard allowing for a finding of jurisdiction based on a single function, including contribution of flow, claiming that this is inconsistent with language in Justice Kennedy's opinion suggesting that a "mere hydrologic connection" is insufficient to establish jurisdiction. Commenters misunderstand; the significant nexus standard in the rule does not establish jurisdiction simple based on a hydrologic connection, but rather requires an assessment of whether the water, alone or in combination with other similarly situated waters in the region, significantly affects the chemical, physical, or biological integrity of a paragraph (a)(1) water. The agencies disagree with a commenter that argued that the agencies misinterpreted Justice Kennedy's significant nexus test in the rule in a manner that reduces jurisdiction over historically protected waters; the rule protects those waters that significantly affect paragraph (a)(1) waters. The 1986 regulations historically protected some waters that would not meet the significant nexus standard.

The agencies disagree that the rule's approach to aggregation under the significant nexus standard is inconsistent with the approach articulated in Justice Kennedy's opinion. The commenter's assertion that Justice Kennedy's approach "focuses on making a significant nexus call for a particular wetland . . . and then possibly concluding that other similar wetlands also possess a significant nexus" is inconsistent with Justice Kennedy's opinion which explicitly stated that the test was whether wetlands "alone or in combination" significantly affected chemical, physical, or biological integrity of downstream waters.

The agencies disagree with commenters who asserted that Justice Kennedy's significant nexus standard was only intended to be a check on unreasonable application of the statute. In *Rapanos*, Justice Kennedy reasoned that *Riverside Bayview* and *SWANCC* "establish the framework for" determining whether an assertion of regulatory jurisdiction constitutes a reasonable interpretation of "navigable waters," according to which, with respect to both the connection from wetlands *and* nonnavigable waters to navigable waters, "[a]bsent a significant nexus, jurisdiction under the Act is lacking." 547 U.S. at 767. See Final Rule Preamble Section IV.A.3.a.i.

2.6 Miscellaneous Court Cases

2.6.1 *Sackett v. EPA*

Many commenters discussed *Sackett v. Environmental Protection Agency*[23], a case that is currently pending before the Supreme Court. Most commenters who discussed that case argued that the agencies should withdraw or pause this rulemaking until there is a ruling in *Sackett.* Many of these commenters argued that the final opinion in *Sackett* will likely provide relevant information to inform the agencies'

[23] *Sackett v. Environmental Protection Agency*, 8 F.4th 1075 (9th Cir. 2021), *cert. granted*, 142 S. Ct. 896 (Jan. 24, 2022) (No. 21-454)

current rulemaking, particularly with respect to the scope of Clean Water Act jurisdiction, including whether and how the significant nexus standard should still apply in assessing jurisdiction. Some commenters asserted generally that waiting for the Supreme Court's opinion in *Sackett* before completing the rulemaking would provide greater clarity and reduce confusion. Further, several commenters suggested the agencies wait for the Supreme Court's decision in *Sackett* before undertaking a second rulemaking process. One commenter suggested that the fact that the Supreme Court has decided to hear the *Sackett* case over the Biden Administration's objections is a strong indication of the Court's leaning.

In contrast, other commenters stated that the agencies should continue the rulemaking to develop a definition of "waters of the United States" that relies on science rather than leaving the definition "in the hands of the judiciary." Another commenter urged the agencies to move forward promptly in issuing a new definition of "waters of the United States" ahead of the Supreme Court's ruling in *Sackett*, arguing that issuing a final rule by Spring 2023 could enable the agencies to request that the Supreme Court defer their decision to the agencies, which the commenter argued would prevent a narrow interpretation of Clean Water Act jurisdiction. This commenter also expressed the view that the agencies had engaged in sufficient outreach and provided a sufficient opportunity to comment on the proposed rule such that it was appropriate for the agencies to move forward in finalizing the rule without providing additional opportunities for public comment.

Finally, a commenter stated that if the agencies decide to continue with the current rulemaking, they should forgo making material changes to the pre-2015 regulatory regime so as to avoid subjecting the regulated community to "yet another interim definition" that may be superseded by the Supreme Court's decision in *Sackett*.

> **<u>Agencies' Response</u>: The agencies disagree with commenters that stated that the agencies should withdraw or pause this rulemaking until there is a decision in *Sackett*. The *Sackett* case is not a challenge to any of the rules defining "waters of the United States," but presents the question of the Act's jurisdictional standard for adjacent wetlands in the context of a challenge to an EPA administrative compliance order for the unauthorized discharge of a pollutant into a "water of the United States." In this rulemaking, the agencies are exercising the authority granted to them by Congress under the Clean Water Act. See Final Rule Preamble Section IV.A.1. The final rule increases clarity and reduces confusion. The agencies agree that they have provided sufficient notice and opportunity to comment to finalize the rule.**
>
> **In the preamble to the proposed rule, the agencies stated that they would consider changes through a second rulemaking that they anticipated proposing in the future, which would build upon the foundation of this rule. The agencies have concluded that this rule is durable and implementable because it is founded on the familiar framework of the 1986 regulations, fully consistent with the statute, informed by relevant Supreme Court decisions, and reflects 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. The agencies may consider further refinements in a future rule to address implementation or other issues that may arise. The agencies thus disagree that the final rule is "interim" and have made targeted changes to the pre-2015 regime consistent with the law, the science and agency expertise.**

2.6.2 *County of Maui v. Hawaii Wildlife Fund*

Multiple commenters discussed *County of Maui v. Hawaii Wildlife Fund*, 140 S. Ct. 1462, 1476 (2020) ("*Maui*"), where the Supreme Court held that the Clean Water Act "requires a permit when there is a direct discharge from a point source into navigable waters or when there is the functional equivalent of a direct discharge," 140 S. Ct. at 1476.

A few commenters suggested that the Supreme Court's ruling in *Maui* lends general support to the notion of relying on science to make decisions on a case-by-case basis. One of these commenters asserted that the proposed rule "aligns" with the Supreme Court's articulation in *Maui* of "a multi-factor test designed for factual case-by-case analyses."

In contrast, a couple commenters criticized the proposed rule's significant nexus standard as being less clear than the *Maui* functional equivalent standard. Another commenter asserted that *Maui*'s functional equivalent standard provides greater protection for "waters of the United States" than the proposed rule's significant nexus standard, which the commenter stated would "dramatically reduce the scope of protected waters."

Several commenters expressed concern that the *Maui* test could adversely impact farmers and ranchers, stating that many agricultural activities could result in the "functional equivalent" of a direct discharge. One of these commenters suggested that *Maui* underscores the importance of determining whether a permit is needed for certain activities because, according to the commenter, historically exempt discharges may now be covered under *Maui*. Another commenter agreed that *Maui* would "expand the range of discharges, including from agricultural operations," that require permitting under the Act.

Moreover, a commenter asked the agencies to add an explicit exclusion for groundwater to the regulatory text of the definition of "waters of the United States" to avoid the potential for future confusion over whether Clean Water Act jurisdiction extends to groundwater. A different commenter asserted that *Maui*'s recognition that groundwater can convey pollutants from point sources to jurisdictional surface waters does not give the agencies authority to expand Clean Water Act jurisdiction over groundwater.

Finally, a couple commenters, citing *Maui*, expressed the view that allowing unregulated pollution of "other waters" that significantly affect downstream navigable waters is the functional equivalent of polluting those navigable waters themselves.

> **Agencies' Response: The agencies agree with commenters who stated that the Supreme Court's ruling in *Maui* supports the agencies' approach in the final rule of using case-specific analyses to determine jurisdiction over certain waters. As described in the final rule preamble, the Supreme Court's "functional equivalent" standard in *Maui* has several key characteristics in common with the significant nexus standard and the agencies' approach in the final rule. Notably, both the "functional equivalent" standard and the significant nexus standard are multi-factor, case-specific standards that should be applied while keeping in mind the purposes of the Clean Water Act. *See* section IV.A.3.a.iii of the final rule preamble for further discussion of the similarities between these two standards.**
>
> **The agencies disagree with commenters who asserted that the significant nexus standard is less clear than the *Maui* functional equivalent standard. The final rule clarifies the significant nexus standard by defining the term "significantly affect" for purposes of**

determining whether a water meets the significant nexus standard, and identifying specific functions that will be assessed and identifies specific factors that will be considered when determining whether the functions provided by the water, either alone or in combination, have a material influence on the integrity of a traditional navigable water, the territorial seas, or an interstate water. These aspects of the final rule add clarity to the significant nexus standard. The agencies also disagree with the commenter who asserted that *Maui*'s functional equivalent standard provides greater protection for "waters of the United States" than the significant nexus standard. These two standards address different jurisdictional questions—the "functional equivalent" standard evaluates whether a *discharge* is jurisdictional while the significant nexus standard evaluates whether a *water* is jurisdictional—so it is not appropriate to compare whether one is more protective than the other.

Comments regarding the impact of *Maui* on farmers and ranchers are outside the scope of this rulemaking. The Supreme Court decision in *Maui* addresses which *discharges* are jurisdictional under the Clean Water Act while the final rule addresses which *waters* are jurisdictional under the Act. While both questions are important, they are distinct. The final rule does not alter or otherwise address how *Maui* applies to various factual scenarios.

The agencies disagree with the commenter who suggested adding an explicit exclusion for groundwater to the final rule regulatory text. The agencies are not adding an exclusion for groundwater to the regulatory text because groundwater is not surface water and therefore does not fall within the possible scope of "navigable waters." There is thus no need for a regulatory exclusion. This position is longstanding and consistent with Supreme Court case law. *See* section IV.C.7 of the final rule preamble for further discussion of the jurisdictional status of groundwater. The agencies agree with the commenter who asserted that *Maui* does not give the agencies authority to expand Clean Water Act jurisdiction over groundwater and the final rule does not do so.

In response to comments regarding the pollution of "other waters" (*i.e.*, waters not identified in paragraphs (a)(1) through (a)(4) of the final rule), the agencies note that certain of these waters are jurisdictional under the final rule and thus unauthorized discharges into those waters are prohibited. *See* section IV.C.6 of the final rule preamble for discussion of waters not identified in paragraphs (a)(1) through (a)(4) of the final rule. The agencies also note that discharges of pollutants do not need to be directly to "waters of the United States" to be subject to the prohibition in section 301 of the Clean Water Act or require a permit under section 402 of the Act. In addition, discharges into tributaries that are no longer "waters of the United States" can themselves become point sources triggering potential liability for all upstream pollution for the last landowner before the "water of the United States."

2.6.3 Other Cases

One commenter asserted that the proposed rule's "expansive definitions" are in tension with "recent guidance" the Supreme Court provided for EPA "when defining the limits of its authority," citing the Supreme Court's opinion in *Utility Air Regulatory Group v. EPA*, 573 U.S. 302, 324 (2016) ("When an agency claims to discover in a long-extant statute an unheralded power to regulate 'a significant portion of the American economy,' we typically greet its announcement with a measure of skepticism.").

One commenter argued that the agencies have misinterpreted *Natural Resources Defense Council v. Callaway*, 392 F. Supp. 685 (D.D.C. 1975) and *United States v. Holland*, 373 F. Supp. 665 (M.D. Fla. 1974), suggesting that neither case supports the notion that the agencies' regulations at that time were too narrow. With respect to *Callaway*, the commenter emphasized that it was a "one-page decision issued without any explanatory justification" and "involved one narrow aspect of a rule that itself was an outlier in the evolution of ['waters of the United States']," referencing 39 FR 12119 (Apr. 3, 1974) and stating that this definition "was inconsistent" with both earlier and later regulations. Regarding *Holland*, the commenter criticized the agencies' description of the case as pertaining to the Corps' regulations, asserting that the court did not opine on the Corps' regulations and instead agreed with the United States that the features at issue were jurisdictional. This commenter asserted that neither case justifies *not* returning to the agencies' early 1970s regulations, which the commenter characterized as the "last valid" interpretation of "waters of the United States," citing 38 FR 34164, 34165 (Dec. 11, 1973); 38 FR 13528, 13529 (May 22, 1973); 39 FR 4532, 4533 (Feb. 4, 1974).

Agencies' Response: The agencies disagree that the rule conflicts with recent Supreme Court precedent or reflects any transformative new assertion of agency authority. The regulations established in this 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 the best available science, as well as the agencies' expertise and experience implementing the pre-2015 regulatory regime. Contrary to some commenters' suggestions, 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. Further, 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, including by replacing the broad Commerce Clause basis for jurisdiction under the former paragraph "(a)(3)" or "other waters" provision with the narrower relatively permanent and significant nexus standards in paragraph (a)(5) in the final rule. The rule also codifies numerous exclusions from the definition of "waters of the United States" that had previously only been generally treated as not jurisdictional through guidance and practice. See also Final Rule Preamble Section V.A, explaining that the final rule will 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 commenters suggesting that the rule is in tension with the guidance of the Supreme Court in *Utility Air Regulatory Group v. EPA*. 573 U.S. 302, 324 (2016) ("When an agency claims to discover in a long-extant statute an unheralded power to regulate 'a significant portion of the American economy,' we typically greet its announcement with a measure of skepticism."). The final rule is far from an exercise of newly discovered authority in the Clean Water Act, nor is the scope of "waters of the United States" unheralded. Rather, the definition of "waters of the United States" is fundamental to the Clean Water Act, Congress fully intended to establish a comprehensive water quality protection statute that would affect the American economy by regulation pollution at its source, Congress clearly delegated the authority to define the term "waters of the United States" to the expert agencies and is well-aware of the scope of that definition, and this rule is narrower in scope than the rules the agencies promulgated nearly 50 years ago. In fact,

the Supreme Court has at least twice concluded that the agencies have the authority to interpret the scope of "waters of the United States." As the Court explained in *Riverside Bayview*, Congress delegated a "breadth of federal regulatory authority" and expected the agencies to tackle the "inherent difficulties of defining precise bounds to regulable waters." 474 U.S. at 134. In concurring with the *Rapanos* plurality opinion, the Chief Justice likewise explained that, given the "broad, somewhat ambiguous, but nonetheless clearly limiting terms Congress employed in the Clean Water Act, the Corps and the EPA would have enjoyed plenty of room to operate" if they had addressed the relevant interpretive questions through rulemaking. 547 U.S. at 758 (Roberts, C.J., concurring). The Chief Justice emphasized the breadth of the agencies' discretion in defining "waters of the United States" through rulemaking; indeed, the agencies' interpretations under the Clean Water Act, Chief Justice Roberts emphasized, are "afforded generous leeway by the courts." *Id*. at 758

One of the Clean Water Act's principal tools in protecting the integrity of the nation's waters is section 301(a), which prohibits "the discharge of any pollutant by any person" without a permit or other authorization under the Act. Other substantive provisions of the Clean Water Act that use the term "navigable waters" and are designed to meet the statutory objective include the section 402 permit program, the section 404 dredged and fill permit program, the section 311 oil spill prevention and response program, the section 303 water quality standards and total maximum daily load programs, and the section 401 state and tribal water quality certification process. Each of these programs is designed to protect water quality and, therefore, further the objective of the Clean Water Act. The question of federal jurisdiction is foundational to most programs administered under the Clean Water Act. In *National Association of Manufacturers*, the Supreme Court confirmed the importance of the specific definitional language of the Act to achieving the objective of the Act, and in particular the definitional language "waters of the United States." The Court identified section 301's prohibition on unauthorized discharges as one of the Clean Water Act's principal tools for achieving the objective and then identified the definition of "waters of the United States" as key to the scope of the Act: "Congress enacted the Clean Water Act in 1972 'to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.' [33 U.S.C.] 1251(a). One of the Act's principal tools in achieving that objective is [section] 1311(a), which prohibits 'the discharge of any pollutant by any person,' except in express circumstances. . . . Because many of the Clean Water Act's substantive provisions apply to 'navigable waters,' the statutory phrase 'waters of the United States' circumscribes the geographic scope of the Act in certain respects." 138 S. Ct. 617, 624. In *Maui*, the Supreme Court again recognized the importance of the specific definitional language of the Act and of the Act's objective and instructed that "[t]he object in a given scenario will be to advance, in a manner consistent with the statute's language, the statutory purposes that Congress sought to achieve." 140 S. Ct. at 1476. The Court, in recognizing that Congress's purpose to "'restore and maintain the . . . integrity of the Nation's waters'" is "reflected in the language of the Clean Water Act," also found that "[t]he Act's provisions use specific definitional language to achieve this result," noting that among that definitional language is the phrase "navigable waters." *Id*. at 1468-69 (quoting 33 U.S.C. 1251(a)).

The Clean Water Act was not "merely another law 'touching interstate waters,'" but rather "a 'total restructuring' and 'complete rewriting' of [then] existing water pollution

legislation.” *City of Milwaukee v. Illinois*, 451 U.S. 304, 317 (1981) (citations omitted); *EPA v. California ex rel. State Water Resources Control Bd.*, 426 U.S. 200, 203, 205 n.12 (1976) (“In 1972, prompted by the conclusion of the Senate Committee on Public Works that ‘the Federal water pollution control program . . . has been inadequate in every vital aspect,’ Congress enacted the [Clean Water Act], declaring ‘the national goal that the discharge of pollutants into the navigable waters be Eliminated by 1985.’”); *Int’l Paper Co. v. Ouellette*, 479 U.S. 481, 492-93 (1987) (“Congress intended the 1972 Act amendments to ‘establish an all-encompassing program of water pollution regulation.’ . . . The Act applies to all point sources and virtually all bodies of water, and it sets forth the procedures for obtaining a permit in great detail.”). Thus, Congress was, as the Supreme Court has frequently recognized, fully cognizant that the Clean Water Act’s “all-encompassing program of water pollution regulation” would affect the American economy. Indeed, when President Nixon vetoed the 1972 Clean Water Act, he cited its estimated cost: “I am compelled to withhold my approval from S. 2770, the Federal Water Pollution Control Act Amendments of 1972--a bill whose laudable intent is outweighed by its unconscionable $24 billion price tag.” A Legislative History of The Clean Water Act, 93rd Cong., 1st Sess. at p.137 (Comm. Print 1973). Congress overrode President Nixon’s veto.

Congress established a broad definition of a term foundational to advancing the Act’s clear objective which requires additional interpretation to implement ~~of~~ that term by the expert agencies charged with administering the statute. The breadth of the definition of “navigable waters” reflects a deliberate choice by Congress to both enact a statute with a broad scope of waters protected by federal law and to delegate the authority to interpret the specialized term and its definition to the expert agencies. The relevant House bill would have defined “navigable waters” as the “navigable waters of the United States, including the territorial seas.” H.R. Rep. No. 911, 92d Cong., 2d Sess. 356 (1972) (emphasis omitted). But the House was concerned that the definition might be given an unduly narrow interpretation. The House Report observed: “One term that the Committee was reluctant to define was the term ‘navigable waters.’ The reluctance was based on the fear that any interpretation would be read narrowly. However, this is not the Committee’s intent. The Committee fully intends that the term ‘navigable waters’ be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes.” H.R. Rep. No. 92-911, at 131 (1972). The Senate Report also expressed disapproval of the narrow construction by the Corps of the scope of waters protected under prior water protection statutes, stating “[t]hrough a narrow interpretation of the definition of interstate waters the implementation [of the] 1965 Act was severely limited. Water moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source.” S. Rep. No. 92-414, at 77 (1971). Thus, in conference the word “navigable” was deleted from that definition, and the conference report again urged that the term “be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes.” S. Conf. Rep. No. 1236, 92d Cong., 2d Sess. 144 (1972). Congress thus intended the agencies to which it granted authority to implement the Clean Water Act to interpret the scope of the definition of “navigable waters” consistent with Congress’s intent and objective in enacting the Act.

Congress is also well-aware of the scope of the agencies' definition. In 1975, the Corps promulgated interim final regulations providing for a phased-in expansion of its section 404 jurisdiction. 40 FR 31320 (July 25, 1975); see 33 CFR 209.120(d)(2), (e)(2) (1976). In this phased approach, all of the waters in the final regulation were "waters of the United States," but the Corps would begin regulating activities within each type of "water of the United States" in phases: Phase I, which was effective immediately, covered "coastal waters and coastal wetlands contiguous or adjacent thereto or into inland navigable waters of the United States [a term for waters protected under the Rivers and Harbors Act] and freshwater wetlands contiguous or adjacent thereto"; Phase II, effective after July 1, 1976, covered "primary tributaries, freshwater wetlands contiguous or adjacent to primary tributaries, and lakes"; and Phase III, effective after July 1, 1977, covered "discharges . . . into any navigable water" including intrastate lakes and rivers and their adjacent wetlands. 40 FR 31320, 31324, 31326 (July 25, 1975). The Corps defined "adjacent" to mean "bordering, contiguous, or neighboring," and specified that "[w]etlands 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.'" 42 FR 37122, 37144 (July 19, 1977). The regulations also defined "wetlands" to mean "those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions." *Id*. Leading up to the 1977 Amendments, Congress considered proposals to limit the geographic reach of section 404. "In both Chambers, debate on the proposals to narrow the definition of navigable waters centered largely on the issue of wetlands preservation." *SWANCC*, 531 U.S. at 170. A version of that legislation, passed by the House, would have redefined "navigable waters" for purposes of section 404 to mean a limited set of traditional navigable waters and their adjacent wetlands. H.R. 3199, 95th Cong. section 16 (1977). But many legislators objected to the proposed changes. Congress instead modified the Clean Water Act in other ways to respond to concerns about the scope of federal authorities. Congress exempted certain agricultural and silvicultural activities from the section 404 permitting program. *See* 1977 Act section 67(b), 91 Stat. 1600 (33 U.S.C. 1344(f)(1)(A)). In addition, Congress authorized the Corps to issue general permits to streamline the permitting process. *Id*. (33 U.S.C. 1344(e)(1)). And importantly for understanding the scope of "waters of the United States," Congress modified section 404 in a way that incorporated into the statutory text an explicit endorsement of the Corps' regulation defining "waters of the United States," including its inclusion of adjacent wetlands. Specifically, the 1977 Act section 67(b), 91 Stat. 1601, establishing section 404(g), allowed states and tribes to assume responsibility for the issuance of section 404 permits. As Congress explained in the legislative history, under section 404(g) states could administer a permitting program for the discharge of dredged or fill material into "phase II and III waters" following EPA approval, but the Corps would retain jurisdiction over "those waters defined as the phase I waters in the Corps . . . 1975 regulations, with the exception of waters considered navigable solely because of historical use." 123 Cong. Rec. 38,969 (Dec. 15, 1977); H.R. Rep. No. 95-830, at 101 (1977) reprinted in 3 Legis. History 1977, at 185, 285.

The text of the agencies' longstanding regulations, in effect at the time of the 1977 amendments, are far broader than this rule. A key change is the deletion of the provision in the 1986 regulations that defines "waters of the United States" as all paragraph (a)(3)

"other waters" such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters: which are or could be used by interstate or foreign travelers for recreational or other purposes; from which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or which are used or could be used for industrial purposes by industries in interstate commerce. Under this rule, a broad interstate commerce connection is not sufficient to meet the definition of "waters of the United States." Instead, waters must meet either the relatively permanent standard or the significant nexus standard. Further, waters in a watershed in which there is no connection to a traditional navigable water, the territorial seas, or an interstate water, would not be "waters of the United States." In addition, this rule would explicitly exclude some features and waters over which the agencies have not generally asserted jurisdiction, but which are not excluded in the text of the 1986 regulations, and in so doing eliminates the authority of the agencies to determine in case-specific circumstances that some such waters are jurisdictional "waters of the United States." This rule also provides new limitations on the scope of jurisdictional tributaries and most adjacent wetlands by establishing a requirement that they meet either the relatively permanent standard or the significant nexus standard. Together, these changes serve to narrow the scope of this rule in comparison to the text of the regulation in effect. Furthermore, the economic analysis for this rule concludes that the final rule will generate *de minimis* costs and benefits as compared to the pre-2015 regulatory regime that the agencies are currently implementing. See also Final Rule Preamble Section V.A.

Additionally, the agencies disagree that that they have misinterpreted the opinions in *Callaway* and *Holland*. Regardless of the length of its decision, the district court in *Callaway* was clear in expressing its finding that Congress intended to assert jurisdiction under the Clean Water Act "to the maximum extent permissible under the Commerce Clause" and that the term "'navigable waters' . . . is not limited to the traditional tests of navigability." 392 F. Supp. at 686. The court in *Holland* likewise found that "Congress had the power to go beyond the 'navigability' limitation in its control over water pollution and that it intended to do so in the [Clean Water Act]." 373 F. Supp at 673. Moreover, the agencies do not rely on these decisions to support a decision not to return to the 1970s regulations defining "waters of the United States." Rather, the agencies discuss these cases in the preamble to both the proposed and final rule simply in summarizing the history surrounding the agencies' interpretation of the statutory term "waters of the United States."

2.7 Constitutional Arguments

2.7.1 Giving sufficient effect to the term "navigable"

Multiple commenters stated that the Supreme Court has found that the Clean Water Act's use of the term "navigable" indicates that Congress intended to exercise its traditional Commerce Clause power over navigable waters in promulgating the Act and that as such, the term "navigable" must be given some effect. Many of these commenters asserted that this term is intended to act as a limit on federal

jurisdiction and expressed concern that the proposed rule reads the term "navigable" out of the statute, including by extending jurisdiction to waters that are not navigable-in-fact, and that the rule thus exceeds Congress's traditional commerce authority over navigation. One commenter argued that it is only by giving full effect to the term "navigable" that the agencies can stay within the limits on federal authority that flow from the Commerce Clause and respect Congress's choice to preserve and protect states' traditional and primary authority over land and water resources.

Several commenters asserted specifically that the proposed rule's significant nexus standard reads "navigable" out of the Act. One of these commenters criticized the standard because it does not consider "navigability" as a factor in determining jurisdiction and argued that the assertion of jurisdiction over nonnavigable features exceeds the agencies' statutory authority. A different commenter asserted generally that the proposed rule's "similarly situated" provision is so ambiguous that it risks reading "navigable" out of the Act.

> **Agencies' Response: The agencies disagree that the rule reads "navigable" out of the statute or exceeds Congress's authority under the Commerce Clause. See Final Rule Preamble Section IV.A.3. The agencies also disagree that Congress's traditional authority over navigation is limited to waters that are navigable-in-fact and disagree that the Clean Water Act is limited to waters that are navigable-in-fact. The Supreme Court has long held that authority over traditional navigable waters is not limited to either protection of navigation or authority over only the traditional navigable water. Rather, "the authority of the United States is the regulation of commerce on its waters . . . [f]lood protection, watershed development, [and] recovery of the cost of improvements through utilization of power are likewise parts of commerce control." *United States v. Appalachian Electric Power Co.*, 311 U.S. 377, 426 (1940); *see also Oklahoma ex rel. Phillips v. Guy F. Atkinson Co.*, 313 U.S. 508, 525–526 (1941) ("[J]ust as control over the non-navigable parts of a river may be essential or desirable in the interests of the navigable portions, so may the key to flood control on a navigable stream be found in whole or in part in flood control on its tributaries. . . . [T]he exercise of the granted power of Congress to regulate interstate commerce may be aided by appropriate and needful control of activities and agencies which, though intrastate, affect that commerce."). The significant nexus standard included in this rule ensures that the definition of "waters of the United States" remains within the bounds of the Clean Water Act and addresses the concerns raised by the Court in *SWANCC* while also fulfilling the directive of Congress enacting the Clean Water Act. See Final Rule Preamble Sections IV.A.5 and IV.A.3. In addition, the agencies disagree that the "similarly situated" provision is ambiguous and disagree that the language risks reading "navigable" out of the Act because the limitations in the definition ensure that the agencies will not assert jurisdiction where the effect on traditional navigable waters, the territorial seas, and interstate waters—*i.e.*, the paragraph (a)(1) waters—is not significant. See Final Rule Preamble Sections IV.A.2 and IV.A.3 for further discussion of the rule's consistency with the Clean Water Act and the Constitution.**

2.7.2 Commerce Clause

Numerous commenters asserted that Congress, in enacting the Clean Water Act, intended to rely solely on authority rooted in "its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made," citing *SWANCC*, 531 U.S. at 172, with a few commenters referring

to this as Congress's authority to regulate the "channels of interstate commerce." Several of these commenters, again citing *SWANCC*, argued that Congress's decision to exercise its traditional commerce power over navigation demonstrates that it did not intend to exert federal jurisdiction to the maximum extent possible under the Commerce Clause.

In contrast, other commenters suggested that Congress did intend to exert Clean Water Act jurisdiction to the fullest extent possible under the Commerce Clause, citing cases such as *NRDC v. Callaway*, 392 F. Supp. 685, 686 (D.D.C. 1975) ("Congress, by defining the term 'navigable waters' . . . to mean 'the waters of the United States, including the territorial seas,' asserted federal jurisdiction over the nation's waters to the maximum extent permissible under the Commerce Clause of the Constitution."). One of these commenters asserted that Congress sought to regulate to the full extent of its Commerce Clause authority in order to achieve the Act's "broad and ambitious" goals. Another commenter stated that in enacting the Clean Water Act, "Congress intended to repudiate the traditional navigability tests and limitations on federal authority, and to instead utilize the full authority of the federal government to regulate water pollution in 'virtually all surface water in the country' under its Commerce Clause authority" and that Congress's Commerce Clause authority is not limited to traditional navigable waters or traditional tests of navigability, citing *Int'l Paper Co. v. Ouellette*, 479 U.S. at 489; *Env't Prot. Agency v. California ex rel. State Water Res. Control Bd*, 426 U.S. 200, 206–08 & n.16 (1976); and *New York v. United States*, 505 U.S. 144, 167 (1992).

One commenter emphasized that in finding that Congress relied only on its power to regulate the channels of interstate commerce in promulgating the Act, the Supreme Court in *SWANCC* rejected the argument that the agencies may assert jurisdiction over a feature based on whether it has a substantial effect on interstate commerce. Other commenters, however, argued that the agencies have authority to assert Clean Water Act jurisdiction based on whether a water has substantial effects on interstate commerce. One of these commenters suggested that the proposed rule is unlawful because it does *not* require the agencies to assess whether a feature has substantial effects on interstate commerce in determining jurisdiction, citing *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 551 (2012) and *United States v. Wilson*, 133 F.3d 251 (4th Cir. 1997).

Another commenter, citing the Supreme Court's decision in *Gonzales v. Raich*, 545 U.S. 1, 22 (2005), asserted that Congress has authority to regulate individual activities when it has a "rational basis" to conclude that the "activities, taken in the aggregate, substantially affect interstate commerce" and that "[t]his type of analysis is particularly relevant when considering a 'comprehensive regulatory regime'" like the Clean Water Act. This commenter added that "[e]ven before" Congress enacted the Clean Water Act, the Supreme Court in *Oklahoma ex rel. Phillips v. Guy F. Atkinson*, 313 U.S. 508, 523, 525 (1941), found that Congress could exercise control over "the non-navigable stretches of a river in order to preserve or promote commerce on the navigable portions," even if a project would have only "an incidental effect in protecting or improving the navigability" of such waters; the commenter suggested that in reaching this decision, "the Court recognized federal power over non-navigable tributaries for purposes other than directly regulating navigation."

Some commenters asserted generally that the proposed rule exceeds Congress's authority under the Commerce Clause.

<u>Agencies' Response</u>: The agencies are mindful of the Supreme Court's decision in *SWANCC* regarding the specific Commerce Clause authority Congress was exercising in enacting the

Clean Water Act—"its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made." 531 U.S. at 172. The decision in *SWANCC* in 2001 was issued by the Supreme Court after the decisions cited by commenters. The agencies disagree with commenters asserting that the rule exceeds Congress's authority under the Commerce Clause or is inconsistent with *SWANCC.* By placing traditional navigable waters, the territorial seas, and interstate waters at the center of the agencies' jurisdiction and covering additional waters only where those waters significantly affect (a)(1) waters, this rule reflects the Court's guidance in *SWANCC.* As set forth in this rule, the relatively permanent standard and the significant nexus standard allow the agencies to fulfill the statute's and Congress's clearly stated objective, while being carefully crafted to fall well within the authority granted to the agencies by Congress and to Congress by the Constitution. Moreover, the *SWANCC* Court noted that the statement in the Conference Report for the Clean Water Act that the conferees "intend that the term 'navigable waters' be given the broadest possible constitutional interpretation," S. Conf. Rep. No. 92-1236, at 144 (1972), signifies Congress's intent with respect to its exertion of its commerce power over navigation. Thus, while the agencies must be mindful that Congress was utilizing an aspect of its commerce power, they must be similarly mindful that Congress intended to fully exercise that authority in order to comprehensively address water pollution. The agencies have concluded that the legislative history concerning the intent of Congress regarding the scope of the Clean Water Act's protections under its power over navigation confirms the appropriateness of the agencies' construction of the Clean Water Act in this rule. See Final Rule Preamble Sections IV.A.3 and IV.A.5.

2.7.3 Due Process Clause

Multiple commenters expressed concern that the proposed rule violates the Due Process Clause of the U.S. Constitution because it is impermissibly vague and thus does not provide the requisite fair notice of what conduct is lawful. Some commenters referenced this concept as the "void for vagueness" doctrine. Relying on the Supreme Court's opinion in *Sessions v. Dimaya*, 138 S. Ct. 1204, 1212 (2018), numerous commenters stated that the doctrine is intended to guarantee that ordinary people have "fair notice" of the conduct a statute requires, in addition to protecting against "arbitrary or discriminatory law enforcement by insisting that a statute provide standards to govern the actions of police officers, prosecutors, juries, and judges." Another commenter quoted Justice Gorsuch's concurrence in *Sessions v. Dimaya* providing that "vague laws . . . can invite the exercise of arbitrary power . . . by leaving the people in the dark about what the law demands and allowing prosecutors and courts to make it up," 138 S. Ct. at 1223-24.

A different commenter described the doctrine as requiring that "a law carrying criminal sanctions must be readily understandable by the average person without legal advice," adding that "[a] statute that is unduly vague and so indefinite that the average person can only guess as its meaning undermines the constitutional right to due process." This commenter argued that under the proposed rule, "parties would be unable to reliably discern the scope of federal jurisdiction," asserting that "no common person," for example, would expect "remote and ordinarily dry features" to constitute "waters of the United States" and that the proposed rule thus fails to provide fair notice.

Additionally, a number of commenters expressed concern that the proposed rule's significant nexus standard does not provide sufficient clarity as to which waters may be jurisdictional, including because it does not provide "objective criteria to evaluate agency assertions of federal jurisdiction," and that the

proposed rule thus fails to provide the requisite fair notice to private property owners and is unconstitutionally vague. In particular, some commenters suggested that the proposed rule's aggregation of "similarly situated waters in the region" raises due process concerns. Several of these commenters asserted that a significant nexus determination that relies on aggregation is, in essence, a finding that *all* the waters that were aggregated in that region possess a significant nexus, and argued that this outcome is unfair to landowners in that region because it means that the jurisdictional status of waters on their property would be determined without their knowledge or participation. One of these commenters further asserted that a landowner in that scenario may have no recourse to challenge the agencies' finding because it is unclear whether an approved jurisdictional determination can be appealed as to waters not specifically covered by the determination (*i.e.*, those "similarly situated waters in the region" that were aggregated for purposes of the significant nexus determination but were not the subject of the approved jurisdictional determination).

Another commenter stated that the agencies should provide landowners "in the region" with "due process notice" where an entire class of wetlands or waters are deemed jurisdictional. A different commenter suggested that the proposed rule raises "void for vagueness" concerns because the significant nexus standard does not appear in the text of the Clean Water Act.

One commenter referenced a case involving application of Justice Kennedy's significant nexus test, *United States v. Bailey*, 516 F. Supp. 2d 998, 1009 (D. Minn. 2007), in arguing that the proposed rule's significant nexus standard fails to provide fair notice. The commenter stated that in that case, the court found that neither the defendant property owner or the state environmental agency had sufficient expertise to determine whether the defendant's property contained jurisdictional wetlands. The commenter then asserted that "[w]here a court rules as a matter of law that, not only is a defendant incapable of knowing whether or not the law applies, but that state environmental agencies are incapable of knowing either, then the law cannot provide fair notice." The commenter concluded that the agencies should withdraw the proposed rule given these due process concerns.

Several commenters suggested that the lack of clarity around which features would be jurisdictional under the proposed rule is particularly problematic given the potential imposition of civil and criminal penalties for noncompliance under the Clean Water Act, which commenters emphasized is a strict liability statute. Commenters further asserted that the lack of certainty or predictability around implementation of the proposed rule, especially the rule's significant nexus standard, could lead to arbitrary enforcement.

> **<u>Agencies' Response</u>: The agencies disagree with commenters stating that the rule violates the Due Process Clause of the U.S. Constitution because it is impermissibly vague and thus does not provide the requisite fair notice of what conduct is lawful. The rule comports with the Due Process Clause. By identifying categories of waters that are jurisdictional and waters that are excluded, and by providing clear guidelines for identifying waters that may be jurisdictional under the relatively permanent standard or the significant nexus standard, the rule provides fair notice to regulated parties and appropriate parameters for enforcement. Moreover, parties have ample opportunity to request an approved jurisdictional determination from the Corps and seek judicial review of such determination. The agencies also disagree with a commenter stating that the proposed rule raises "void for vagueness" concerns, arguing that the significant nexus standard does not appear in the text of the Clean Water Act. See Final Rule Preamble Section IV.A. for discussion of the rule's consistency with the text and structure of the Act.**

The agencies disagree with commenters stating that the rule's significant nexus standard does not provide sufficient clarity as to which waters may be jurisdictional, including because it does not provide "objective criteria to evaluate agency assertions of federal jurisdiction," and that the proposed rule thus fails to provide the requisite fair notice to private property owners and is unconstitutionally vague. The rule in fact adds clarity to the 1986 regulations and to the significant nexus standard. See Final Rule Preamble Section IV.C.9. While the presence of a "water of the United States" may contain an element of discretion, that discretion is bounded by the definitions and factors set forth in the rule. *See Grayned v. City of Rockford*, 408 U.S. 104, 114 (1972) ("As always, enforcement requires the exercise of some degree of police judgment, but, as confined, that degree of judgment here is permissible."). The rule allows regulators sufficient flexibility to address different circumstances that may be present in different parts of the country, while providing at least the "minimal guidelines" necessary to comport with due process. *United States Telecom Ass'n v. FCC*, 825 F.3d 674, 737 (D.C. Cir. 2016) (citation omitted) ("a regulation is not impermissibly vague because it is 'marked by flexibility and reasonable breadth, rather than meticulous specificity'").

The agencies disagree with commenters stating that the rule's aggregation of "similarly situated waters in the region" raises due process concerns based on arguments that the jurisdictional status of waters on other landowners property would be determined without their knowledge or participation. Corps approved jurisdictional determinations (AJDs) are provided in response to a specific request and are only for aquatic resources within a specific geographic area associated with that request. Completing an AJD that requires an assessment under the significant nexus standard may require gathering information on aquatic resources within a geographic area (*e.g.*, the catchment) that is beyond the scope of the specific geographic area associated with the AJD. While this may occur, the conclusions reached on the jurisdictional status of aquatic resources is limited to only those within the geographic area defined by the requestor and associated with the AJD and does not include the similarly situated waters in the catchment area that lies outside the geographic area associated with the AJD. Landowners of aquatic resources that were related to, but not included as part of an AJD (*e.g.*, aquatic resources determined to be similarly situated waters in the geographic area beyond that specific to an AJD) are always free to request an AJD to obtain a definitive determination of the jurisdictional status of those same aquatic resources.

The agencies disagree with commenters that a lack of certainty or predictability around implementation of the proposed rule, especially the rule's significant nexus standard, could lead to arbitrary enforcement. An enactment does not violate the Due Process Clause merely because it allows regulators some discretion to enforce the law. "[S]tatutes are not automatically invalidated as vague simply because difficulty is found in determining whether certain marginal offenses fall within their language." *United States v. Nat'l Dairy Prods. Corp.*, 372 U.S. 29, 32 (1963). The rule is neither too vague for ordinary people to understand, nor so standardless that it fails to provide adequate guidelines for agency discretion. *0*, 553 U.S. 285, 304 (2008). The rule provides notice of what waters are subject to the CWA's prohibition on discharges of pollutants: all paragraph (a)(1) waters and their adjacent wetlands; all paragraph (a)(2) waters; and waters that fall within paragraphs (a)(3), (a)(4), and (a)(5) that meet the relatively permanent standard or the significant nexus standard. The rule further clarifies permissible and impermissible conduct by identifying

waters that are categorically excluded from the definition of "waters of the United States." The rule clarifies these categories by defining relevant terms, including "wetland," and "adjacent." And, although the rule requires a case-specific assessments under the relatively permanent standard or the significant nexus standard analysis for certain categories of waters, it provides a clear definition about what qualifies as a significant nexus. The rule thus provides fair notice to the ordinary person of where the Clean Water Act's restrictions on discharges of pollutants apply and clear standards for agency personnel and courts to apply in determining whether violations of the prohibition have occurred. That is what the Due Process Clause requires. Moreover, a person who is uncertain about the jurisdictional status of an aquatic feature may seek a formal determination from the Corps, which is subject to judicial review.

2.7.4 Fifth Amendment

Numerous commenters expressed concern that the proposed rule would result in regulatory takings in violation of the Fifth Amendment of the U.S. Constitution or otherwise fail to respect private property rights. Several commenters stated that the agencies' revised definition of "waters of the United States" must stay within the bounds of the Clean Water Act, relevant legal precedent, and the U.S. Constitution in order to respect private property rights. Some commenters asserted specifically that the inclusion of ephemeral and intermittent streams in the revised definition would violate private property rights.

Relatedly, some commenters cited language in Justice Kennedy's concurring opinion in *Hawkes* suggesting that Clean Water Act jurisdiction "continues to raise troubling questions regarding the Government's power to cast doubt on the full use and enjoyment of private property throughout the Nation," *U.S. Army Corps of Eng'rs v. Hawkes*, 578 U.S. 590, 603 (2016). One commenter cautioned that "the regulation of private property should be undertaken with a light hand," and a few others asserted that the Clean Water Act does not grant jurisdiction over private property.

Agencies' Response: The agencies agree that the revised definition of "waters of the United States" must stay within the bounds of the Clean Water Act, relevant legal precedent, and the U.S. Constitution and have concluded that the final rule does. See Final Rule Preamble Sections IV.A.2 and IV.A.3 for further discussion of the rule's consistency with the Clean Water Act and the Constitution. The final rule does not constitute a taking of private property in violation of the Fifth Amendment. Under the Clean Water Act, any person discharging a pollutant from a point source into navigable waters must obtain authorization under the Act. The rule clarifies which navigable waters trigger a permit requirement and that does not constitute a taking. *See, e.g., United States v. Riverside Bayview Homes*, 474 U.S. 121, 127 (1985) ("A requirement that a person obtain a permit before engaging in a certain use of his or her property does not itself 'take' the property in any sense: after all, the very existence of a permit system implies that permission may be granted, leaving the landowner free to use the property as desired. Moreover, even if the permit is denied, there may be other viable uses available to the owner. Only when a permit is denied and the effect of the denial is to prevent 'economically viable' use of the land in question can it be said that a taking has occurred.").

2.7.5 Constitutional avoidance

Multiple commenters asserted that the proposed rule would impermissibly expand federal jurisdiction over states' land and water resources, contrary to the policy expressed in Clean Water Act section 101(b) and contrary to the Supreme Court's holding in *SWANCC*, 531 U.S. at 172-74, that the Act must be read to avoid federalism and constitutional questions. Commenters argued, citing *SWANCC*, that the Clean Water Act contains no clear statement indicating that Congress intended to authorize the agencies to intrude upon traditional state authority over regulation of land and water resources.

> **Agencies' Response: The agencies disagree that the rule is contrary to the policy expressed in Clean Water Act Section 101(b) or contrary to the holding in *SWANCC*. See section IV.A.3.b of the final rule preamble further discussion of the agencies' balancing of federal and state roles under the Clean Water Act. By placing traditional navigable waters, the territorial seas, and interstate waters at the center of the agencies' jurisdiction and covering additional waters only where those waters significantly affect (a)(1) waters, this rule reflects the Court's guidance in *SWANCC*. See Final Rule Preamble Section IV.A.3.**

2.7.6 Miscellaneous

One commenter argued that waters located within the borders of a state cannot be regulated as "waters of the United States" and stated that, at most, navigable "rivers" that are "commonly recognized as use for commercial transportation" may fall within the jurisdiction of the Department of Transportation. This commenter further suggested that broad federal jurisdiction under the Clean Water Act would constitute an infringement on state sovereignty and individual property rights.

> **Agencies' Response: The agencies disagree that waters located within the borders of a state cannot be "waters of the United States." No decision of the Supreme Court has ever held that Congress's Commerce Clause power is so limited or that Congress intended to so limit the Clean Water Act. The agencies disagree that the Clean Water Act or the rule constitute an infringement on state sovereignty or individual property rights. See also the agencies' response to comments in Sections 2.2, 2.74, and 2.8.3.**

2.8 Other Statutory Arguments

2.8.1 Section 101(g)

The agencies received several comments regarding the relationship between the proposed rule and Clean Water Act section 101(g), which provides that "[i]t is the policy of Congress that the authority of each state to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this Act" and that "[i]t is the further policy of Congress that nothing in this Act shall be construed to supersede or abrogate rights to quantities of water which have been established by any State." 33 U.S.C. 1251(g).

A state commenter requested that that final rule expressly recognize the language in Clean Water Act section 101(g) regarding the primary authority of states over water management, asserting that the scope of federal jurisdiction is "subordinate to the authority of states to allocate water resources" pursuant to

section 101(g). The commenter stated that the Supreme Court has recognized these limits on the jurisdictional reach of the Act, citing *PUD No. 1 of Jefferson Cty. v. Wash. Dept. of Ecology*, 511 U.S. 700, 720–21 (1994), adding that these "clear and recognizable limits" on Clean Water Act jurisdiction "should be recognized in the rule."

Another state commenter asserted that the proposed rule's inclusion of ephemeral waters, intermittent waters, and "other waters" as potentially jurisdictional "attempts to erode [the state's] primary authority over low flow, remote, headwater stream channels and isolated ponds and wetlands by expanding the concept of national significance" and suggested that this may be in tension with section 101(g).

> **Agencies' Response: The agencies disagree with commenters who stated that the rule is inconsistent with Clean Water Act section 101(g) because it would interfere with states' rights over waters or would impinge upon allocation and movement of state waters. Section 101(g) of the Clean Water Act provides that "[i]t is the policy of Congress that the authority of each State to allocate quantities of its water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by [the Clean Water Act and] that nothing in [the Clean Water Act] shall be construed to supersede or abrogate rights to quantities of water which have been established by any State." Similarly, section 510(2) provides that nothing in the Act shall "be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters . . . of such States." The final rule is entirely consistent with these policies. The rule does not impact or diminish state authorities to allocate water rights or to manage their water resources. Nor does the rule alter the Clean Water Act's underlying regulatory process. Having been enacted with the objective of restoring and maintaining the chemical, physical, and biological integrity of our nation's waters, the CWA serves to protect water quality. While Section 101(a) of the Act, which this rule implements, states an overall objective that precedes the policy set in Section 101(g), neither the Clean Water Act nor the rule impair the authorities of states to allocate quantities of water. Instead, the Clean Water Act and the rule serve to enhance the quality of the water that the states allocate.**
>
> **Even if the rule were to have an incidental effect on water quantity or allocation, the rule would still be consistent with section 101(g) of the CWA. In *PUD No. 1 of Jefferson County v. Washington Dept. of Ecology*, 511 U.S. 700, 720, 114 S. Ct. 1900, 1913, 128 L.Ed.2d 716, 733 (1994), the United States Supreme Court held, "Sections 101(g) and 510(2) [of the CWA] preserve the authority of each State to allocate water quantity as between users; they do not limit the scope of water pollution controls that may be imposed on users who have obtained, pursuant to state law, a water allocation." First, the Court stated: "The Federal Water Pollution Control Act, commonly known as the Clean Water Act, 86 Stat. 816, as amended, 33 U.S.C. § 1251 *et seq.*, is a comprehensive water quality statute designed to 'restore and maintain the chemical, physical, and biological integrity of the Nation's waters.' § 1251(a). The Act also seeks to attain 'water quality which provides for the protection and propagation of fish, shellfish, and wildlife.' § 1251(a)(2). To achieve these ambitious goals, the Clean Water Act establishes distinct roles for the Federal and State Governments. Under the Act, the Administrator of the Environmental Protection Agency (EPA) is required, among other things, to establish and enforce technology-based limitations on individual discharges into the country's navigable waters from point sources. See §§ 1311, 1314. Section 303 of the Act also requires each State, subject to federal**

approval, to institute comprehensive water quality standards establishing water quality goals for all intrastate waters. §§ 1311(b) (1)(C), 1313. These state water quality standards provide 'a supplementary basis . . . so that numerous point sources, despite individual compliance with effluent limitations, may be further regulated to prevent water quality from falling below acceptable levels.' *EPA* v. *California ex rel. State Water Resources Control Bd.*, 426 U.S. 200, 205, n. 12, 48 L. Ed. 2d 578, 96 S. Ct. 2022 (1976)." 511 U.S. at 704.

Petitioners in the case argued that the Clean Water Act is only concerned with water "quality," and does not allow the regulation of water "quantity." The Court held: "This is an artificial distinction. In many cases, water quantity is closely related to water quality; a sufficient lowering of the water quantity in a body of water could destroy all of its designated uses, be it for drinking water, recreation, navigation or, as here, as a fishery. In any event, there is recognition in the Clean Water Act itself that reduced stream flow, *i.e.*, diminishment of water quantity, can constitute water pollution. First, the Act's definition of pollution as 'the man-made or man induced alteration of the chemical, physical, biological, and radiological integrity of water' encompasses the effects of reduced water quantity. 33 U.S.C. § 1362(19). This broad conception of pollution—one which expressly evinces Congress's concern with the physical and biological integrity of water—refutes petitioners' assertion that the Act draws a sharp distinction between the regulation of water 'quantity' and water 'quality.' Moreover, § 304 of the Act expressly recognizes that water 'pollution' may result from 'changes in the movement, flow, or circulation of any navigable waters . . ., including changes caused by the construction of dams.' 33 U.S.C. § 1314(f)." 511 U.S. at 719-20.

Petitioners also argued that sections 101(g) and 510(2) exclude the regulation of water quantity from the coverage of the Act. In contrast, the Supreme Court held: "we read these provisions more narrowly than petitioners. Sections 101(g) and 510(2) preserve the authority of each State to allocate water quantity as between users; they do not limit the scope of water pollution controls that may be imposed on users who have obtained, pursuant to state law, a water allocation. In *California v. FERC*, 495 U.S. 490, 498, 109 L. Ed. 2d 474, 110 S. Ct. 2024 (1990), construing an analogous provision of the Federal Power Act, we explained that "minimum stream flow requirements neither reflect nor establish 'proprietary rights'" to water. Cf. *First Iowa Hydro-Electric Cooperative v. FPC*, 328 U.S. 152, 176, 90 L. Ed. 1143, 66 S. Ct. 906, and n. 20 (1946). Moreover, the certification itself does not purport to determine petitioners' proprietary right to the water of the Dosewallips. In fact, the certification expressly states that a "State Water Right Permit (Chapters 90.03.250 RCW and 508-12 WAC) must be obtained prior to commencing construction of the project." App. to Pet. for Cert. 83a. The certification merely determines the nature of the use to which that proprietary right may be put under the Clean Water Act, if and when it is obtained from the State. Our view is reinforced by the legislative history of the 1977 amendment to the Clean Water Act adding § 101(g). See 3 Legislative History of the Clean Water Act of 1977 (Committee Print compiled for the Committee on Environment and Public Works by the Library of Congress), Ser. No. 95-14, p. 532 (1978) ('The requirements [of the Act] may incidentally affect individual water rights. . . . It is not the purpose of this amendment to prohibit those incidental effects. It is the purpose of this amendment to insure that State allocation systems are not subverted, and that effects on individual rights, if any, are prompted by legitimate and necessary water quality considerations')." 511 U.S.

at 720-21. The rule is consistent with the Supreme Court's reading of these provisions and the objective of the Act.

2.8.2 Legislative History

One commenter asserted broadly that the agencies cannot rely on the Clean Water Act's legislative history to support the proposed rule. In criticizing the agencies' discussion in the preamble to the proposed rule of a 1977 legislative proposal that would have limited the waters subject to the Corps' permitting authority under section 404 to only navigable-in-fact waters and their adjacent wetlands, the commenter quoted language in *SWANCC* providing that "failed legislative proposals are a particularly dangerous ground on which to rest an interpretation of a prior statute," as "[a] bill can be proposed for any number of reasons, and it can be rejected for just as many others," 531 U.S. at 170. The commenter added that the agencies have failed to explain "how the failure to pass a 1977 bill amounts to Congressional acquiescence to a radically expanded view of 'waters of the United States' that first appeared in 2006 and was adopted by the Agencies in 2015."

The same commenter also criticized the agencies' discussion of a 1972 Conference Report and asserted that "[a]lthough the meaning of 'navigable' may be ambiguous, its presence in the statute is not—unlike the 'tributaries thereof' language relied upon so heavily by the Agencies." The commenter further argued that Congress's removal of a reference to tributaries in prior versions of the Act "only affirms that it intended a much narrower definition than the Agencies have historically used or that the Proposed Rule uses."

In contrast, a different commenter supported the view that legislative history demonstrates that Congress intended to exert broad, comprehensive jurisdiction under the Clean Water Act. This commenter emphasized that Congress chose to define "navigable waters" as "the waters of the United States" rather than "the navigable waters of the United States." The commenter added that "[f]or decades, the [Clean Water Act] was understood to protect the vast majority of the nation's surface waters consistent with Congress's intent."

Agencies' Response: The agencies disagree with commenters who suggested that the scope of jurisdiction provided under the rule is inconsistent with the legislative history of the Act. As noted in the preamble to the final rule, the "major purpose" of the Clean Water Act was "to establish a *comprehensive* long-range policy for the elimination of water pollution." S. Rep. No. 92-414, at 95 (1971), 2 Legislative History of the Water Pollution Control Act Amendments of 1972 (Committee Print compiled for the Senate Committee on Public Works by the Library of Congress), Ser. No. 93–1, p. 1511 (1971) (emphasis added). "No Congressman's remarks on the legislation were complete without reference to [its] 'comprehensive' nature." *City of Milwaukee*, 451 U.S. at 318. In passing the 1972 Act, Congress "intended to repudiate limits that had been placed on federal regulation by earlier water pollution control statutes and to exercise its powers under the Commerce Clause to regulate at least some waters that would not be deemed 'navigable' under the classical understanding of that term." *Riverside Bayview*, 474 U.S. at 133; *see also Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 486 n.6 (1987).

Nor do the agencies agree that the rule is a radical expansion of Clean Water Act jurisdiction. Rather, in this 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' determination 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 than45 years of implementing the longstanding pre-2015 regulations defining "waters of the United States. Moreover, as discussed in Section V of the Preamble to the Final Rule, this final rule is generally comparable in scope to the pre-2015 regulatory regime that the agencies are currently implementing.

2.8.3 Miscellaneous

One commenter stated that statutes must be construed according to their plain meaning at the time of their enactment, citing the Supreme Court's opinion in *Wisconsin Central Ltd v. United States*, 138 S. Ct. 2067, 2074 (2018) providing that it is a "'fundamental canon of statutory construction' that words generally should be 'interpreted as taking their ordinary, contemporary, common meaning . . . at the time Congress enacted the statute'" (citation omitted). This commenter argued that the proposed rule fails to interpret "waters of the United States" consistent with the "plain meaning" of those words at the time Congress promulgated them in the Clean Water Act. The commenter added that "at an absolute minimum," a feature cannot be jurisdictional "if it lacks water" and expressed support for the *Rapanos* plurality's opinion as providing "the only plausible interpretation" of the phrase.

The same commenter argued that the proposed rule would expand the federal government's power over private property beyond the Clean Water Act's grant of authority to the agencies, citing *Louisiana Public Service Commission v. Federal Communications Commission*, 476 U.S. 355, 374 (1986) ("[A]n agency literally has no power to act . . . unless and until Congress confers power upon it."). This commenter stated that the Supreme Court has held that Congress must "enact exceedingly clear language if it wishes to significantly alter . . . the power of the Government over private property," *U.S. Forest Service v. Cowpasture River Preservation Ass'n*, 140 S. Ct. 1837, 1849-50 (2020), and asserted that the Clean Water Act does not provide a clear grant of power to expand federal control over private property.

Several commenters asserted generally that the definition of "waters of the United States" may be informed by science but that the statutory text ultimately dictates jurisdiction. One of these commenters added that "[t]he importance of groundwater (and protecting groundwater resources) is perhaps the clearest example of why the science cannot dictate the definition."

Agencies' Response: The agencies disagree that the rule is inconsistent with the plain meaning of the text of the statute. In the rule, the agencies are using well-established tools of statutory construction of an ambiguous statutory term to define the meaning of "waters of the United States," starting with the text of the statute and informed by the statute as a whole, as well as 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. The categories of water bodies subject to federal protection under this rule are all within a plain reading of the term "waters of the United States." Furthermore, it is unreasonable to define "waters of the United States" as suggested by the commenter in a manner that excludes a water body

that has a significant effect on traditional navigable waters, the territorial seas, or interstate waters simply because it lacks water some of the time.

The agencies disagree with the suggestion that Congress in 1972 thought that this jurisdictional term would be interpreted more narrowly. As noted in the preamble to the final rule, the "major purpose" of the Clean Water Act was "to establish a *comprehensive* long-range policy for the elimination of water pollution." S. Rep. No. 92-414, at 95 (1971), 2 Legislative History of the Water Pollution Control Act Amendments of 1972 (Committee Print compiled for the Senate Committee on Public Works by the Library of Congress), Ser. No. 93–1, p. 1511 (1971) (emphasis added). "No Congressman's remarks on the legislation were complete without reference to [its] 'comprehensive' nature." *City of Milwaukee*, 451 U.S. at 318. In passing the 1972 Act, Congress "intended to repudiate limits that had been placed on federal regulation by earlier water pollution control statutes and to exercise its powers under the Commerce Clause to regulate at least some waters that would not be deemed 'navigable' under the classical understanding of that term." *Riverside Bayview*, 474 U.S. at 133; *see also Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 486 n.6 (1987). As explained in Section IV.A.3.a.ii of the Preamble to the Final Rule, the agencies disagree that the plurality opinion provides a reasonable reading of the scope of "waters of the United States."

Because this rule is firmly grounded in the text of the statute and informed by Supreme Court precedent, it does not represent an unwarranted expansion of authority over private property. It is fundamentally a rule about protecting water quality, not about private property interests. Moreover, the fact that a resource is a "water 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 return 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. *Id.* at 1344(f)(1). This rule does not affect these statutory exemptions. In addition, permits are routinely issued under Clean Water Act sections 402 and 404 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. Thus, the permitting programs allow for discharges to "waters of the United States" to occur while also ensuring that those discharges meet statutory and regulatory requirements designed to protect water quality.

The agencies agree that the rule is appropriately informed by science but cannot be based solely on scientific principles; instead, as discussed in Final Rule Preamble Section IV.A., the agencies are finalizing a definition of "waters of the United States" that is within the agencies' authority under the Act; that advances the objective of the Clean Water Act; that establishes limitations that are consistent with the statutory text, supported by the scientific record, and informed by relevant Supreme Court decisions; and that is both familiar and implementable.

2.9 Miscellaneous Comments on Legal Issues

Several commenters discussed water rights and/or the prior appropriation doctrine and expressed concern about the proposed rule infringing upon state water rights, landowners' existing water rights, and traditional water uses.

A number of state commenters asserted that the proposed rule attempts to expand the agencies' jurisdiction in the name of "climate change," the "climate crisis" and "environmental justice," citing 86 FR 69382-86, 69393, 69446-47. The commenters stated that the Clean Water Act does not include these terms and that addressing these concepts by substituting the purpose of the statute for its text would be impermissible. The commenters further asserted that both the *Rapanos* plurality and concurrence "recognized that such policy aims have nothing to do with the jurisdictional limits Congress set," citing Justice Kennedy's statement that "environmental concerns provide no reason to disregard limits in the statutory text," 547 U.S. at 778, and the plurality's statements that an "exclusive focus on ecological factors, combined with [a] total deference" to the agencies' "ecological judgments" would let the agencies "regulate the entire country as 'waters of the United States," *id.* at 749.

One commenter asked the agencies to clarify in the final rule that statements in the preamble are not legally binding and cannot be relied upon by regulators or litigants to support claims of jurisdiction.

> **Agencies' Response: The agencies disagree that the Prior Appropriation Doctrine or water rights generally have any relevance to this rulemaking, as the final rule does not address or impact water rights under state law. Rather, the final rule defines water bodies that are subject to permitting and other protections under the Clean Water Act and thus relates to water quality—not about who has the rights to use any water in particular water bodies. For further discussion of water quantity issues, see the agencies' response to comments in Section 2.8.1.**
>
> **The agencies also disagree with the suggestion that the rule impermissibly relies on climate change or environmental justice issues to expand the scope of Clean Water Act jurisdiction. As the agencies acknowledged in the preamble to the proposed rule, climate change can have a variety of impacts on water resources. 86 FR 69382. 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 upstream 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.**
>
> **Further, 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 justice 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 minority**

populations, low-income populations, and/or indigenous peoples, as specified in Executive Order 12898 (59 FR 7629, February 16, 1994). The documentation for this decision is contained in in the Economic Analysis for the Final Rule Chapter IV, which can be found in the docket for this action.

Regarding the function of the final rule's preamble language, the agencies note that preamble language should be used for purposes of understanding the scope, requirements, and basis of the final rule. The preamble to the final rule is the agencies' definitive statement of the rationale for the final rule, including the rationale for any revisions to the proposed rule, and should be used to assist in interpreting the final rule and providing guidance on implementing the final rule. The supporting scientific, policy, and legal rationales are contained in the preamble and the technical support document. Preamble language is published in the *Federal Register* and provides additional background and detail regarding the associated rule text.