Revised Definition of "Waters of the United States" Response to Comments Document

SECTION 3 – REGULATORY REGIMES PRIOR TO THE 2020 NAVIGABLE WATERS PROTECTION RULE (2020 NWPR)

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

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3.0 Regulatory Regimes Prior to the 2020 NWPR

3.0.1 General Comments on Prior Regulatory Regimes

The agencies received multiple comments regarding the regulatory regimes governing the definition of "waters of the United States" that were in place prior to the 2020 Navigable Waters Protection Rule (NWPR), including the pre-2015 regulatory regime, the 2015 Clean Water Rule, and the 2019 Repeal Rule. Many commenters expressed concern that the changes in the definition of "waters of the United States" over time have contributed to regulatory uncertainty, particularly in the context of jurisdictional determinations[1] and permitting issues. Some of those commenters added that this uncertainty in the definition of "waters of the United States" does not serve the public interest or promote protection of the nation's waters. Several commenters stated that litigation over the agencies' recent rulemakings to revise the definition of "waters of the United States" has resulted in uncertainty and confusion. One commenter stated that states and tribes have had to repeatedly revisit their laws and programs to align with each new definition of "waters of the United States" and that this in itself has led to confusion and uncertainty. This commenter further asserted that the different definitions of "waters of the United States" that have been in place since 2015 have had varying degrees of clarity. Another commenter stated that they did not support any of the regulatory regimes prior to the 2020 NWPR.

> **Agencies' Response: The agencies acknowledge that the definition of "waters of the United States" has changed multiple times since the Clean Water Act was enacted and that such changes can contribute to regulatory uncertainty. The agencies also acknowledge that litigation over rules revising the definition of "waters of the United States" has at times contributed to regulatory uncertainty as well as confusion, especially where such litigation has resulted in different regulatory regimes being in effect in different parts of the country.**
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> **The agencies took this context into account in exercising their authority to interpret "waters of the United States" to mean the waters defined by the familiar 1986 regulations, with amendments to reflect the agencies' construction of limitations on the scope of the "waters of the United States" informed by the text of the relevant provisions of the Clean Water Act and the statute as a whole, the scientific record, relevant Supreme Court 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." Through this rulemaking process, the agencies have considered all public comments on the proposed rule, including changes that improve the clarity, implementability, and durability of the definition. 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 the record before the agencies, including the best available science, as well as the agencies' expertise and experience implementing the pre-2015 regulatory regime. In addition, the agencies find that the final rule increases clarity and implementability by streamlining and restructuring the 1986 regulations and providing implementation guidance informed by sound science, implementation tools, and other resources. Further,**

[1] For convenience, EPA decisions on jurisdiction are referred to as jurisdictional determinations throughout this document, but such decisions are not "approved jurisdictional determinations" as defined and governed by the Corps regulations at 33 CFR 331.2.

because this rule is founded on a longstanding regulatory framework and reflects the agencies' experience and expertise, as well as updates in implementation tools and resources, the agencies find that the final rule is generally familiar to the public and implementable. See Final Rule Preamble Section IV.A.4 for further discussion of the agencies' finding that the final rule is both familiar and implementable.

The agencies acknowledge the comment indicating lack of support for regulatory regimes prior to the 2020 NWPR. In developing the final rule, the agencies thoroughly considered alternatives to this rule, including the 2020 NWPR, and have concluded that the 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.

3.1 Pre-2015 Regulatory Regime

3.1.1 General

Some commenters stated that the agencies are currently implementing the pre-2015 regulatory regime following vacatur of the 2020 NWPR and that the proposed rule would, in essence, codify that regime. Several commenters questioned the need for amending the pre-2015 regulatory framework in the proposed rule, with a few commenters asserting that the proposed rule was unnecessary because the pre-2015 regulatory regime is already being implemented. One of these commenters asserted that the need for such revisions is unclear particularly because the agencies returned to the pre-2015 regulatory regime—without making any changes—after repealing the 2015 Clean Water Rule and justified returning to that regime in part by referencing the agencies' and regulated community's experience with that regulatory framework.

Other commenters stated that while the agencies purport to be restoring the pre-2015 regulatory regime, the proposed rule represents an expansion of federal jurisdiction over that regime, including because—as some commenters allege—the proposed rule's approach to aggregation under the significant nexus standard is broader than the approach to aggregation under the pre-2015 regulatory regime. Several of these commenters claimed that the proposed rule is broader than the pre-2015 regulatory regime because, according to the commenters, the agencies have taken a broader reading of Supreme Court precedent and relevant agency guidance documents. Further, some commenters suggested that the agencies have failed to explain how the proposed rule's changes to the pre-2015 regulations reflect developments in case law or are supported by the agencies' record.

Agencies' Response: Following a federal district court decision vacating the 2020 NWPR on August 30, 2021, the agencies halted implementation of the 2020 NWPR and began interpreting "waters of the United States" consistent with the pre-2015 regulatory regime. *See Pascua Yaqui Tribe v. EPA*, No. 20-00266 (D. Ariz. Aug. 30, 2021); U.S. EPA, Current Implementation of Waters of the United States, https://www.epa.gov/wotus/current-implementation-waters-united-states. While the final rule is founded on, and generally

returns to, the longstanding and familiar pre-2015 regulatory regime, it does not implement that regime unchanged. The final rule adds limitations to the scope of the definition of "waters of the United States," employs a definition of whether waters "significantly affect" paragraph (a)(1) waters that identifies the functions and factors to be evaluated as part of a significant nexus analysis, adds exclusions for features that were generally considered non-jurisdictional under the pre-2015 regulatory regime to the rule text, and, as explained in Section IV.G of the Preamble to the Final Rule, incorporates advancements in the implementation data, tools, and methods that have become available since the decision in *Rapanos v. United States, 547 U.S. 715 (2006) ("Rapanos")*. These changes are intended to improve upon the pre-2015 regulatory regime in part by promoting clarity and timely, consistent jurisdictional determinations. See Final Rule Preamble Section IV.A for further discussion of the need for revising the pre-2015 regulatory text.

Moreover, contrary to some commenters' assertions, the final rule does not represent an expansion beyond the text of the pre-2015 regulations and is narrower in some respects than the pre-2015 regulatory regime. As discussed in Section IV.C of the Preamble to the Final Rule, the final rule narrows the scope of jurisdiction from the text of the 1986 regulations by replacing the broad Commerce Clause basis for jurisdiction over paragraph (a)(5) waters with the narrower relatively permanent and significant nexus standards; by eliminating jurisdiction over tributaries and adjacent wetlands based on their connection to paragraph (a)(5) waters; and by explicitly excluding waters that were not expressly excluded in the text of the 1986 regulations. See also Sections IV.A.3, IV.C.1, and IV.C.6.a of the Preamble to the Final Rule, noting that because the final rule replaces the broad Commerce Clause basis for jurisdiction under the 1986 regulations with the relatively permanent and significant nexus standards (both of which require sufficient ties to a paragraph (a)(1) water, with the significant nexus standard also requiring that waters significantly affect paragraph (a)(1) waters), paragraph (a)(5) of the final rule is substantially narrower than the 1986 regulations.

With respect to the scope of aggregation under the significant nexus standard, the agencies have identified "in the region" for purposes of the significant nexus standard in the final rule as the catchment of the tributary. This region (*i.e.*, the catchment of the tributary) for the vast majority of tributaries is smaller, and usually substantially smaller, than the region identified by the watershed that drains to the nearest point of entry of a paragraph (a)(1) water, which was the "region" used to implement the 2015 Clean Water Rule. While this region is generally larger than the region assessed in the *Rapanos* Guidance[2] under which the agencies assessed the relevant reach of a tributary in combination with its adjacent wetlands, the catchment is an easily identified and scientifically defensible unit for identifying the scope of waters that together may have an effect on the chemical, physical, or biological integrity of a particular traditional navigable water, the territorial seas, or an interstate water.

[2] 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)

3.1.2 Support for the pre-2015 regulatory regime

Many commenters expressed general support for the proposed rule on the grounds that it restores the longstanding pre-2015 regulatory regime and is therefore familiar and provides clarity. One of these commenters suggested that returning to the pre-2015 regulatory regime would reduce confusion that the commenter claimed arose from implementing certain aspects of the 2020 NWPR, such as its "typical year" analysis.

Many commenters also asserted that returning to the pre-2015 regulatory regime would protect the nation's waters, including headwaters, headwater wetlands, and other unique wetland features, as well as aquatic and wildlife habitat.

Some commenters who wrote in support of returning to the pre-2015 regulatory regime asserted that the agencies should restore the pre-2015 regulations and guidance without any revisions to the regulatory text, with some of these commenters suggesting that such revisions would impermissibly expand the agencies' jurisdiction or lead to regulatory uncertainty. One of these commenters suggested that the pre-2015 regulatory regime provided sufficient water quality protections and argued that the pre-2015 regulations should not be revised to require that waters meet the significant nexus standard or relatively permanent standard because this would leave important waters unprotected. Another commenter contended that the agencies should update the definition of "waters of the United States" only to reflect current, longstanding practice under the *SWANCC*[3] and *Rapanos* Guidance documents to ensure clarity, particularly for water infrastructure construction and maintenance activities. In contrast, a commenter expressing support for the pre-2015 regulatory regime argued that implementation of the agencies' *SWANCC* Guidance and *Rapanos* Guidance nonetheless left categories of historically protected waters unprotected due to the agencies' allegedly inconsistent application of the guidance over the years.

A few commenters stated that they supported returning to the pre-2015 regulatory regime as an interim step prior to the agencies developing a subsequent rule, such as a rule based in science, to protect the nation's waters. One commenter stated that while they support a return to the pre-2015 regulatory regime, they do not view it as protective as the "science-based" 2015 Clean Water Rule, which they asserted should be the basis for a subsequent rule.

> **Agencies' Response: The agencies agree with commenters' statements that the final rule is familiar, provides clarity, and advances the objective of the Clean Water Act, in part because it is founded on the 1986 regulations that underpin the longstanding pre-2015 regulatory regime and it builds on and is generally consistent with that regulatory regime. Indeed, as discussed in Section IV.A.2.b of the Preamble to the Final Rule, the best available science confirms that the 1986 regulations remain a reasonable foundation for a definition of "waters of the United States" that furthers the water quality objective of the Clean Water Act.**
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> **The agencies disagree, however, with the suggestion that the agencies adopt the pre-2015 regulations or pre-2015 regulatory regime unchanged. As discussed in the preamble to the final rule, the agencies have revised the 1986 regulations to reflect the agencies' determination of the statutory limits on the scope of "waters of the United States" informed**

[3] 68 FR 1991, 1995 (January 15, 2003) ("SWANCC Guidance")

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." Additionally, as compared to the pre-2015 regulations or the pre-2015 regulatory regime, the final rule reflects updates and advances in implementation tools, resources, and scientific support, adds exclusions for features that were generally considered non-jurisdictional under the pre-2015 regulatory regime, and is streamlined and restructured for clarity. For further discussion of the agencies' revisions to the pre-2015 regulatory text, see Final Rule Preamble Sections IV.A and IV.C.

The agencies also disagree that updating the definition of "waters of the United States" to reflect longstanding practice under the *SWANCC* and *Rapanos* Guidance documents is a sufficient alternative to the final rule. 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 than 45 years of implementing the longstanding pre-2015 regulations defining "waters of the United States." Further, the *SWANCC* Guidance (otherwise referred to as a coordination memorandum) is outdated, and the agencies have entered into a new joint agency coordination memorandum to ensure the consistency and thoroughness of the agencies' implementation of the final rule. See Final Rule Preamble Sections IV.C.1 and IV.C.6. The *Rapanos* Guidance is likewise no longer in effect. Thus, revising the definition to reflect only the *SWANCC* and *Rapanos* Guidance documents is not a suitable or durable alternative to the final rule. The agencies thoroughly considered these alternatives in developing the final rule and have concluded that the 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 also the agencies' response to comments in Section 12.3.2.4 (discussing the relationship between the final rule and the *Rapanos* Guidance).

Additionally, the agencies acknowledge the commenter's concerns about consistent implementation of the *SWANCC* Guidance and *Rapanos* Guidance in the pre-2015 regulatory regime. As explained in Section IV of the Preamble to the Final Rule, the final rule includes clarifications meant to address concerns about timeliness and consistency of jurisdictional determinations. For instance, the final rule includes a definition of "significantly affect," provides additional guidance on applying the significant nexus standard, and identifies improved and new implementation tools and resources.

Finally, 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.

3.1.3 Opposition to the pre-2015 regulatory regime

3.1.3.1 Concerns that the pre-2015 regulatory regime was insufficiently protective

Some commenters did not support returning to the pre-2015 regulatory regime because they contended it was not protective of water resources. Some of these commenters suggested that the pre-2015 regulatory regime is not protective because they do not view it as based in science. One commenter asserted that the *SWANCC* Guidance did not provide adequate protection of "isolated" waterbodies important to wildlife habitat and other benefits, and that the *Rapanos* Guidance did not provide adequate protection of ephemeral and intermittent streams and adjacent wetlands. Another commenter stated that the agencies should clarify that under the pre-2015 regulatory regime, a significant portion of ephemeral features in the arid West were not jurisdictional and would continue not to be jurisdictional under the proposed rule.

Agencies' Response: As noted in the agencies' response to comments in Section 3.1.1, though the final rule is generally comparable to the pre-2015 regulatory regime, the rule also differs from the pre-2015 regulatory regime in several respects. To the extent the commenters' criticism of the pre-2015 regulatory regime is applicable to the final rule, the agencies disagree that the final rule is insufficiently protective and not based in science. As discussed in Section IV.A.2 of the Preamble to the Final Rule, the agencies have concluded that 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," and is informed by the best available science on the functions provided by upstream waters, including wetlands, to restore and maintain the integrity of paragraph (a)(1) waters. In particular, the final rule's use of both the relatively permanent standard and the significant nexus standard gives effect to the Act's text and environmentally protective objective as well as its limitations. The significant nexus standard, as codified in the final rule, is protective precisely because it is informed by the best available science: it is consistent with foundational scientific understanding about aquatic ecosystems, acknowledging that upstream waters can significantly affect the chemical, physical, and biological integrity of downstream traditional navigable waters, the territorial seas, and interstate waters. Indeed, the Science Report[4] presents evidence of connections for various categories of waters, evaluated singly or in combination, which affect downstream waters and the strength of those effects. The connections and mechanisms discussed in the Science Report include transport of physical materials and chemicals such as water, wood, sediment, nutrients, pesticides, and metals (*e.g.*, mercury); functions that streams, wetlands, and open waters perform, such as storing and cleansing water; and movement of organisms. The agencies considered these connections in developing the final rule. For these reasons, among others, the agencies find that the significant nexus standard, under which waters are assessed alone or in

[4] U.S. Environmental Protection Agency. 2015. *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence (Final Report)*. EPA/600/R-14/475F. U.S. Environmental Protection Agency, Washington, D.C. ("Science Report").

combination for the functions they provide to paragraph (a)(1) waters, is consistent with the foundational scientific framework and concepts of hydrology. For further discussion of how the final rule implements a science-based framework to protect waterbodies, see Section IV.A.3 of the Preamble to the Final Rule.

With respect to the *SWANCC* Guidance and *Rapanos* Guidance, and as explained in Final Rule Preamble Section IV.C, the agencies are not using those documents for purposes of implementing the final rule. The *SWANCC* Guidance will no longer be in effect in light of the revised definition of "waters of the United States" in the final rule, and the coordination aspects of that guidance are being replaced with a new coordination memorandum, as described in Final Rule Preamble Section IV.C.6. The *Rapanos* Guidance is also no longer in effect.

As to ephemeral streams, the final rule does not categorically include or exclude streams as jurisdictional based on their flow regime. 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 and Section IV.C.4.b.i of the Preamble to the Final Rule for more information on the agencies' rationale for the scope of tributaries covered by this rule.

3.1.3.2 Concerns that the pre-2015 regulatory regime was confusing

Many commenters expressed concern that the pre-2015 regulatory regime, while familiar, is confusing and inconsistent. Some of these commenters emphasized that the agencies acknowledged that the 2015 Clean Water Rule was promulgated in part because of uncertainty and inconsistent jurisdictional determinations under the pre-2015 regulatory regime. Specific comments on the lack of clarity of the pre-2015 regulatory regime included the following:

- One commenter stated they support the repeal of the 2020 NWPR but did not support the proposed rule because they thought the pre-2015 regulatory regime was confusing. This commenter claimed that even under the *Rapanos* Guidance, there was not enough clarity around which waters were "waters of the United States," which, they contended, resulted in a decline in inspections, investigations, and enforcement activities under the Clean Water Act.
- One commenter asserted that the *SWANCC* and *Rapanos* Guidance documents did not provide the needed information and direction to agency staff or the public to facilitate consistent and timely jurisdictional determinations. This commenter expressed concern that without appropriate implementation guidance, nearly all waters and wetlands could be subject to case-by-case determinations, making the need for such determinations unclear and unpredictable.
- One commenter stated that the pre-2015 regulatory regime was too much of a "one-size-fits-all" for their state, and that it created uncertainty and delayed development without protecting the environment.

Some commenters contended that the pre-2015 regulatory regime was problematic and unclear for the agricultural community. One of these commenters asserted that the proposed rule would expand upon this

regime in a manner that would create further uncertainty around land management practices such as maintaining irrigation structures.

<u>Agencies' Response</u>: The agencies find that the clarifications in this rule, including the addition of exclusions for features that were generally considered non-jurisdictional under the pre-2015 regulatory regime, and the intervening advancements in implementation resources, tools, and scientific support, address many of the concerns raised in the past about consistency and timeliness of jurisdictional determinations under the Clean Water Act. See Final Rule Preamble Sections IV.C.7 and IV.G. Indeed, as described in Final Rule Preamble Section IV.A.4 and in Section 3.1 of the agencies' response to comments, the agencies used their experience implementing the familiar pre-2015 regulatory regime to clarify and refine how jurisdiction is determined in the final rule. For instance, the agencies have added a definition of "significantly affect" for purposes of applying the significant nexus standard. See Final Rule Preamble Section IV.C. Additionally, the agencies are codifying the two familiar and longstanding exclusions from the definition of "waters of the United States" for prior converted cropland and waste treatment systems, and adding exclusions for features that were generally considered non-jurisdictional in practice under the pre-2015 regulatory regime and each of the subsequent rules defining "waters of the United States." Further, the scientific and technical information available to inform the significant nexus analysis and identify waters that meet the relatively permanent standard has also markedly improved over time and become more readily available since the agencies first started implementing both standards. Section IV.G of the Preamble to the Final Rule describes the improved and new resources and tools available to aid in jurisdictional determinations.

The agencies acknowledge commenters' concerns that the *SWANCC* and *Rapanos* Guidance documents were insufficiently clear or did not provide for consistent implementation of the definition of "waters of the United States." As discussed in Final Rule Preamble Section IV, the agencies have identified a variety of implementation guidance, tools, and methods available for use. The agencies are not mandating specific data or tools to implement the final rule. The agencies will assess jurisdiction based on the most applicable methods and best available sources of information for the specific site under evaluation. As with any final regulation, the agencies will consider developing additional tools to promote consistent implementation of the final rule's approach. Nevertheless, the agencies conclude that the final rule, together with the preamble and existing tools, provides sufficient clarity to allow consistent implementation of the final rule.

The agencies also acknowledge that the final rule, like the pre-2015 regulatory regime, will require case-specific analyses for certain jurisdictional decisions. Yet, as discussed in Final Rule Preamble Section IV.A.3, the agencies find that fact-based standards for determining Clean Water Act jurisdiction are appropriate and not unique to the definition of "waters of the United States." The agencies have provided more clarity in this rule by adding limitations to the scope of the definition to the rule text, adding a definition of "significantly affect" that identifies the functions and factors to be evaluated as part of a significant nexus analysis, adding exclusions to the rule, restructuring and streamlining the 1986 regulations, and drawing on more than a decade of post-*Rapanos* implementation experience to provide additional implementation guidance and resources. These improvements, taken together,

substantially reduce any inefficiencies that may be presented by the final rule's case-specific approach.

See *also* agencies' response to comments Section 3.1.1 (explaining that the final rule is narrower than the pre-2015 regulatory regime in several respects) and Section 4 (regarding the 2020 NWPR).

3.1.3.3 Concerns that the pre-2015 regulatory regime was too broad

Multiple commenters asserted that they did not support a return to the pre-2015 regulatory regime because they claimed that it expanded federal jurisdiction. One commenter argued that the pre-2015 regulatory regime did not take into account the "human environment," and, in their opinion, resulted in federal overreach that limited public access to waterways that "promote safety, health, welfare, and economic viability." Another commenter argued that the agencies should revoke the *SWANCC* and *Rapanos* Guidance documents and claimed that the *Rapanos* Guidance has led to the agencies asserting jurisdiction over waters "that are not navigable-in-fact and not even remotely related to such waters, such as Prairie Potholes and certain floodplains." This commenter asserted that the agencies should codify only Justice Scalia's *Rapanos* plurality opinion in the final rule because the commenter believes that opinion provides a test that could be consistently applied by federal and state regulators.

Agencies' Response: As discussed in the agencies' response to comments in Section 3.1.1, although the final rule is generally comparable to the pre-2015 regulatory regime, the rule also differs from and is narrower than the pre-2015 regulatory regime in several respects. Additionally, as compared to the pre-2015 regulatory regime, the final rule reflects updates and advances in implementation tools, resources, and scientific support, codifies exclusions for features that were generally considered non-jurisdictional under the pre-2015 regulatory regime, and is streamlined and restructured for clarity.

With respect to the *SWANCC* Guidance and *Rapanos* Guidance, and as explained in Final Rule Preamble Section IV.C, the agencies are not using those documents for purposes of implementing the final rule. Upon the final rule's effective date, the coordination procedures in the *SWANCC* Guidance will be replaced, as described in Final Rule Preamble Section IV.C.6, and the *Rapanos* Guidance will no longer be in effect, as noted in Final Rule Preamble Section IV.C.2.b.i.2.

Finally, the agencies disagree with commenters who stated that the pre-2015 regulatory regime was an expansion of federal jurisdiction or that it resulted in federal overreach. The pre-2015 regulatory regime represents a reduction in jurisdiction compared to the 1986 regulations, and similarly fewer waters will be subject to the Clean Water Act under this rule than fall within the scope of the text of the 1986 regulations. See also the agencies' response to comments in Section 3.1.3.4. The agencies also disagree with the suggestion that the rule codify only the *Rapanos* plurality's opinion, which sets forth the relatively permanent standard. As discussed in Final Rule Preamble Section IV.A.3, the agencies find that the relatively permanent standard—while administratively useful—is insufficient on its own to meet the objective of the Clean Water Act. To give effect to the Clean Water Act's terms and environmentally protective objective, as well as its limitations, the final rule thus provides for utilization of the relatively permanent standard and the significant nexus

standard. Moreover, as explained in Section IV of the Preamble to the Final Rule, the final rule includes clarifications meant to address concerns about timeliness and consistency of jurisdictional determinations.

3.1.3.4 Concerns that the pre-2015 regulations were inconsistent with the Clean Water Act and Supreme Court precedent

Finally, a few commenters contended that the pre-2015 regulations were inconsistent with the Clean Water Act and the limits established by the Supreme Court.

Agencies' Response: The agencies' historic regulations, eventually promulgated and referred to as the 1986 regulations, were based on the agencies' construction of the scope of the Clean Water Act and their scientific and technical judgment about which waters needed to be protected to restore and maintain the chemical, physical, and biological integrity of traditional navigable waters, the territorial seas, and interstate waters. For more information on the considerations behind the 1986 regulations, see Final Rule Preamble Section IV.A.2.b. Though the final rule is founded on those regulations, the rule differs from and is narrower than the pre-2015 regulations in several respects, as explained in the agencies' response to comments in Section 3.1.1.

In addition, the agencies note that although the final rule is not based on an application of the *Marks* test for interpreting Supreme Court decisions, the final rule has been updated to reflect the agencies' interpretation of the limits on the scope of "waters of the United States," which is informed by, among other things, relevant Supreme Court precedent. See Section IV.A.5.b of the Preamble to the Final Rule.

3.2 2015 Clean Water Rule

Some commenters argued that the agencies are, in essence, repromulgating the 2015 Clean Water Rule with the proposed rule. For instance, the commenters note, the proposed rule relies on the same scientific support that formed the basis of the 2015 Clean Water Rule. Another commenter critiqued the proposed rule for allegedly expanding Clean Water Act jurisdiction beyond the 2015 Clean Water Rule.

One commenter expressed support for Administrator Michael Regan's statements indicating that the agencies would not be repromulgating the 2015 Clean Water Rule in the proposed rule. A different commenter wrote in support of the agencies' decision not to repromulgate the 2015 Clean Water Rule because—even though the commenter had supported the 2015 Clean Water Rule—they were concerned about the significant amount of litigation surrounding it. Another commenter asserted that the 2015 Clean Water Rule and 2020 NWPR provided more certainty as to which waters were jurisdictional than the framework laid out in the proposed rule.

Agencies' Response: As discussed in Section IV.B.1 of the Final Rule Preamble, the agencies are not repromulgating the 2015 Clean Water Rule. For instance, the final rule, unlike the 2015 Clean Water Rule, is not based on categorical significant nexus determinations. Instead, the final rule is founded on the longstanding and familiar 1986 regulations and includes a framework for applying the relatively permanent and significant nexus standards

to certain categories of waters in the rule. See Final Rule Preamble Section IV.B.1 for a discussion of the agencies' conclusion that the 2015 Clean Water Rule, while designed to advance the objective of the Clean Water Act, is not the best alternative to meet the policy goals of the agencies; see also Final Rule Preamble Section IV.B for the agencies' consideration of alternatives to the final rule.

The agencies acknowledge concerns that litigation surrounding the 2015 Clean Water Rule weighs against repromulgating that rule. In considering alternatives to the final rule, the agencies assessed the procedural posture of the 2015 Clean Water Rule, which remains subject to preliminary injunctions barring its implementation in roughly half the states. After taking that litigation into account, the agencies concluded that re-adopting the 2015 Clean Water Rule would not meet the agencies' policy goal of providing durable protections for the nation's waters. Accordingly, while the agencies recognize that aspects of the 2015 Clean Water Rule would provide greater certainty than the final rule, re-adopting the 2015 Clean Water Rule would not provide the regulatory certainty necessary to further the objective of the Clean Water Act.

The agencies disagree that the 2020 NWPR provides more certainty than the final rule for the reasons set forth in Section 4.2 of the agencies' response to comments and Final Rule Preamble Section IV.B.3.

3.2.1 Support for the 2015 Clean Water Rule

Many commenters expressed support for the 2015 Clean Water Rule because they viewed it as informed by science, specifically by the Science Report. One of these commenters noted that under the 2015 Clean Water Rule, certain types of waters were categorically jurisdictional, which eliminated the need for extensive case-specific jurisdictional determinations. This commenter suggested that the agencies likewise consider including certain types of waters as categorically jurisdictional in the current rulemaking, which the commenter believed would facilitate a "smooth and equitable application" of Clean Water Act jurisdiction.

A tribal commenter stated that they supported the 2015 Clean Water Rule because, unlike the 2020 NWPR, it provided federal jurisdiction over many of the tribe's waters, thereby allowing the tribe to implement water quality standards, establish permit requirements, and receive funding to implement water quality programs for those waters.

Agencies' Response: The agencies agree that the 2015 Clean Water Rule was informed by science and designed to advance the objective of the Clean Water Act. However, the agencies have determined that the 2015 Clean Water Rule is not the best alternative to meet the goals of the agencies to promptly restore the protections of the longstanding regulations and avoid current and future harm to aquatic resources, as informed by the best available science and the agencies' determination of the statutory limits on the scope of the "waters of the United States." While the final rule does contain some categories of waters that are categorically jurisdictional (traditional navigable waters, the territorial seas, and interstate waters; wetlands adjacent to the previous three categories of waters; and impoundments of jurisdictional waters), unlike the 2015 Clean Water Rule, it does not determine that all

tributaries and all adjacent waters are categorically jurisdictional for this and the additional reasons stated in Final Rule Preamble Section IV.B.1.

The agencies acknowledge tribes' concerns about the jurisdictional effects of the 2020 NWPR, as noted in Section 4.1.5.6 of the agencies' response to comments and Final Rule Preamble Section III.B.5, as well as tribes' comments around having insufficient resources to develop or implement regulations more protective than the Clean Water Act.

3.2.2 Opposition to the 2015 Clean Water Rule

Many commenters asserted that they did not support the 2015 Clean Water Rule, including the commenters' view that the rule expanded federal jurisdiction over waters they thought should not be jurisdictional. Multiple commenters argued specifically that the 2015 Clean Water Rule expanded federal jurisdiction in a manner that impacted land used for farming activities and claimed that the rule was implemented inconsistently and thereby created uncertainty for and imposed a financial burden on the agricultural community. A tribal commenter suggested that the 2015 Clean Water Rule impermissibly expanded federal jurisdiction over tribal land and waters, created uncertainty and unpredictability regarding the jurisdictional status of such waters, and "subject[ed] Tribal waters to state standards for interstate waters," which led to "delays and increased costs for economic and industrial development." Another commenter alleged that the 2015 Clean Water Rule "would have exposed nearly 97 percent of Iowa land under expensive, cumbersome, and unworkable rules."

Some commenters contended that the purported jurisdictional overreach of the 2015 Clean Water Rule was a result of the agencies' interpretation of the significant nexus standard. A number of these commenters argued that the significant nexus standard, as expressed in the 2015 Clean Water Rule, used vague and ambiguous terms and definitions that resulted in this expansion; these include the 2015 Clean Water Rule's definitions of "tributary" and "neighboring," as well as new terms like "similarly situated" that some commenters asserted subjected non-navigable, isolated wetlands to federal jurisdiction. Several commenters expressed concern that these terms and definitions made the 2015 Clean Water Rule complex, led to inconsistent application of the rule in the field, and sparked litigation over the rule across the country. A few commenters suggested that the 2015 Clean Water Rule's approach to aggregation under the significant nexus standard made it such that practically all waters could be subject to federal jurisdiction.

Additionally, several commenters argued that the 2015 Clean Water Rule exceeded Congress's Commerce Clause authority and was thus unconstitutional. One of these commenters asserted specifically that the 2015 Clean Water Rule violated the limits of the Commerce Clause by subjecting waters that do not have a substantial effect on interstate commerce to federal jurisdiction, citing *United States v. Darby*, 312 U.S. 100, 119-20 (1941) for the holding that Congress may regulate intrastate activity only where the activity has a substantial effect on interstate commerce. In contrast, a different commenter asserted that the 2015 Clean Water Rule wrongly excluded waters that had been historically protected and were within the limits of Congress's Commerce Clause authority.

One commenter criticized the agencies' economic analysis of the 2015 Clean Water Rule, stating that it did not include any discussion of potential "takings" of private property or the costs to the public and industry when a permit is denied within areas newly determined to be jurisdictional under the rule. The

commenter also expressed concerns that the 2015 Clean Water Rule did not provide sufficient deference to state water protection laws or adequately consider the costs the rule could impose on state programs.

One commenter asserted that the agencies should incentivize and promote more "environmentally-conscientious practices" to achieve the goals of the Clean Water Act, rather than develop "expansive" regulations such as the 2015 Clean Water Rule, which "contained a number of new terms, which were imprecise, broad, and largely left up to agency discretion," and so resulted in "a host of confusing situations," and subjective determinations and "an unnecessary patchwork" of enforcement.

> **Agencies' Response: In developing the final rule, the agencies thoroughly considered alternatives to this rule, including the 2015 Clean Water Rule, 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.1 of the Preamble to the Final Rule for further discussion of the agencies' grounds for concluding that the 2015 Clean Water Rule is not a suitable alternative to the final rule. See also the agencies' response to comments in Section 3.2.1.**
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> **Comments on the economic analysis for the 2015 Clean Water Rule are outside the scope of this rulemaking. In addition, this rule concerns the definition of "waters of the United States" for purposes of the Clean Water Act, so the promotion of "environmentally-conscientious practices" to generally further the aims of the Act is outside the scope of this rulemaking. The agencies find that promoting "environmentally-conscientious practices" is not an appropriate or acceptable alternative to issuing a rule defining "waters of the United States" given the significance of this term to the agencies' implementation and enforcement of the Clean Water Act.**

3.3 2019 Repeal Rule

The agencies received relatively few comments on the 2019 Repeal Rule. A few commenters expressed support for the 2019 Repeal Rule, with one commenter specifically agreeing with the legal analysis in the 2019 Repeal Rule, particularly the agencies' statements around Clean Water Act section 101(b). One commenter stated that the 2019 Repeal Rule "largely accomplished" what the agencies proposed in the current rulemaking and is "now operative" after the vacatur of the 2020 NWPR. The commenter suggested that the agencies thus need not proceed with the ongoing rulemaking and can instead wait until after the Supreme Court issues a decision in the *Sackett v. EPA* matter.

> **Agencies' Response: In developing the final rule, the agencies thoroughly considered alternatives to the proposed rule, including the 2019 Repeal Rule. Notably, the agencies' reading of the Clean Water Act in the 2019 Repeal Rule is inconsistent with the agencies' considered interpretation, at this time, of the Act. For this reason, among others, the agencies 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.2 of the Preamble to the Final Rule for further discussion of the agencies' grounds for concluding that the 2019 Repeal Rule is not a suitable alternative to the final rule.**

As noted in Section 3.1.1 of the agencies' response to comments, after the 2020 NWPR was vacated, the agencies began implementing the pre-2015 regulatory regime. Although the 2020 NWPR has been vacated, it is the text currently in the Code of Federal Regulations. With respect to the Supreme Court's review of the *Sackett v. EPA* case, see the agencies' response to comments in Section 2.6.