

Revised Definition of “Waters of the United States” Response to Comments Document

SECTION 4 – 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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4 NAVIGABLE WATERS PROTECTION RULE (2020 NWPR)

4.1 General Comments on the 2020 NWPR

4.1.1 General support for repealing, remanding, and/or replacing the 2020 NWPR

Many commenters expressed general support for replacing the 2020 NWPR. Further details provided are summarized in the subsections below.

Agencies' Response: The agencies agree with commenters who expressed support for replacing the 2020 NWPR. As discussed in Final Rule Preamble Section IV.B.3, the agencies conclude that the 2020 NWPR, which substantially departed from prior rules defining “waters of the United States,” is incompatible with the objective of the Clean Water Act, and inconsistent with the text of relevant provisions of the statute, the statute as a whole, relevant case law, and the best available science. Indeed, after conducting a thorough review of the 2020 NWPR, the agencies identified inherent omissions in its coverage that caused it to fail to advance the objective of the Clean Water Act. For instance, the 2020 NWPR eliminated the significant nexus standard without replacing it with an alternative jurisdictional standard that adequately addressed the effects of degradation of upstream waters on paragraph (a)(1) waters, and the 2020 NWPR categorically excluded ephemeral waters regardless of their impact on paragraph (a)(1) waters. These reduced federal protections, which the agencies have determined are inconsistent with the best available science, caused an even greater reduction in waters covered under the 2020 NWPR than predicted when that rule was promulgated. In addition, the 2020 NWPR proved unclear and difficult to implement. See Section IV.B.3 of the Preamble to the Final Rule for further discussion of the agencies' reasons for concluding that replacement of the 2020 NWPR is warranted.

4.1.2 General requests to retain the 2020 NWPR or general arguments in favor of the 2020 NWPR

Many commenters opposed the agencies' efforts to repeal or replace the 2020 NWPR. Further details are summarized in the subsections below.

Agencies' Response: The agencies disagree with commenters who opposed efforts to repeal or replace the NWPR. See the agencies' response to comments in the subsections below and Section IV.B.3 of the Preamble to the Final Rule for further discussion of the agencies' reasons for concluding that replacement of the 2020 NWPR is warranted.

4.1.2.1 *General statements regarding positive qualities of the 2020 NWPR*

Many commenters stated, in general terms, that they were in favor of the 2020 NWPR. These commenters described the 2020 NWPR as clear, pragmatic, reasonable, commonsense, protective, striking the proper balance between federal and state authority, workable, and/or broadly considerate of the needs of the agricultural industry and other members of the regulated community. Several commenters generally agreed with a variety of the definitions included in the 2020 NWPR, including, but not limited to,

definitions of jurisdictional ditches; tributaries; adjacent wetlands; prior converted cropland; waste treatment systems; lakes and ponds, and impoundments of jurisdictional waters; and upland.

One commenter stated they believed that the 2020 NWPR protected tribal sovereignty and properly limited the federal government's jurisdiction over tribal lands and water.

Agencies' Response: For the reasons set forth in Section 4.2 of the agencies' response to comments, the agencies disagree that the 2020 NWPR is clear and workable. In addition, the agencies disagree that the 2020 NWPR is protective; as set forth in Section 4.3 of the agencies' response to comments, the agencies have determined that the definitions in the 2020 NWPR significantly reduced Clean Water Act protections in a manner inconsistent with the objective of the Act. Accordingly, the final rule differs from the 2020 NWPR in that the final rule includes definitions and limitations that are consistent with the statutory text, is informed by the best available science on water quality, and is generally familiar and implementable. The agencies acknowledge that the 2020 NWPR included categorical language and definitions that the final rule does not. However, those definitions of jurisdictional features were underpinned by the "typical year" concept, which is difficult to implement as discussed in Section 4.2 of the agencies' response to comments. In the agencies' experience, the 2020 NWPR did not provide clarity and predictability for the regulated community as a whole.

The agencies disagree with the commenter who stated that the 2020 NWPR properly limited the federal government's jurisdiction over tribal lands and waters. In developing the final rule, the agencies considered how to promote the objective of the Clean Water Act expressed in section 101(a) while respecting the roles of states and tribes as set forth in section 101(b). See Final Rule Preamble Section IV.A.3.b and Section 4.1.5.4 of the agencies' response to comments for the agencies' discussion on the relationship between these sections of the Clean Water Act. The final rule is informed by the agencies' determination of the statutory limits on the scope of the "waters of the United States" contained in the Clean Water Act and informed by Supreme Court case law. In contrast, the 2020 NWPR contained exclusions and limits on jurisdiction that were inconsistent with the objective of the Clean Water Act and that the agencies have determined were not required by law or relevant precedent. During the rulemaking process for the 2020 NWPR, "many Tribes expressed concern that the proposed rule would or could adversely impact tribal waters." 85 FR 22336–22337 (April 21, 2020) (acknowledging that because the agencies "generally implement CWA programs on tribal lands, a reduced scope of CWA jurisdiction will affect Tribes differently than it will affect States," and that "many Tribes may lack the capacity to create a tribal water program under tribal law, to administer a program, or to expand programs that currently exist. Other tribes may rely on the Federal government for enforcement of water quality violations."). Further, the agencies engaged in tribal consultation and coordination in promulgating the final rule and found that tribes overwhelmingly indicated that they lack the independent resources and expertise to protect their waters and therefore rely on Clean Water Act protections. A summary report on the agencies' consultation and engagement efforts with tribes is available in the rulemaking docket.

4.1.2.2 *Argument that evaluation of the NWPR is premature*

Some commenters argued that the 2020 NWPR was not in place long enough to accurately assess its effectiveness and to determine if changes were warranted.

Agencies' Response: The agencies disagree that the period of time the 2020 NWPR was in effect was insufficient to draw conclusions about its adequacy. As described in Final Rule Preamble Section IV.B.3.a, the agencies have found that the 2020 NWPR failed to advance the statutory objective of the Clean Water Act. After over a year of experience implementing the 2020 NWPR, the agencies have determined that more waters lost federal protection in practice than they predicted when the rule was promulgated. As set forth in Section II.B.i of the Technical Support Document (TSD) and Section 4.3.1.2 of the agencies' response to comments, the agencies' analysis of the U.S. Army Corps of Engineers' (Corps') jurisdictional determinations¹ before and after the 2020 NWPR went into effect shows a precipitous decrease in the number of waters protected under the Clean Water Act. Continuing to implement the 2020 NWPR would result only in further degradation of the nation's waters.

In addition, during their year of implementation the agencies determined that the 2020 NWPR is difficult to implement and impracticable. For instance, available tools such as field visits, on which the 2020 NWPR discourages reliance, and aerial photography, which is limited in coverage, are insufficient to determine whether the jurisdictional "typical year" condition of the 2020 NWPR is met. In practice, the distinction in the 2020 NWPR between natural and artificial barriers in determining whether a wetland is adjacent is difficult to implement because many barriers have been in place for decades, so determining their origin requires extensive research. Similarly, it can be difficult or impossible to determine whether longstanding ditches were originally built in a tributary or adjacent wetland, as the 2020 NWPR requires to establish jurisdiction. See Final Rule Preamble Section IV.B.3 and the agencies' response to comments in Section 4.2 for further discussion of how the 2020 NWPR has proven difficult to implement.

4.1.2.3 *General requests to use the 2020 NWPR as a basis for any new rule*

Many commenters requested that the agencies, rather than reverting to the pre-2015 regulations, use the 2020 NWPR as the starting place for any new rulemaking. Many of these commenters added that 2020 NWPR could be modified as necessary to address court decisions (*e.g.*, *Sackett v. Environmental Protection Agency*, 8 F.4th 1075 (9th Cir. 2021), *cert. granted*, 142 S. Ct. 896 (Jan. 24, 2022) (No. 21-454)).

Agencies' Response: The agencies considered alternative rules, including the 2020 NWPR, during this rulemaking and have determined that the final rule, which is based on rather than identical to the pre-2015 regulatory regime, best advances the objective of the Clean Water Act while promptly and durably restoring vital protections to the nation's waters.

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.

See Final Rule Preamble Section IV.B for a discussion of alternatives to the final rule, including the 2020 NWPR. The pre-2015 regulatory regime, as clarified in and refined by the final rule, is generally familiar to the agencies, state and tribal co-regulators, and the regulated community; further, courts have also found that the 1986 regulations, implemented consistent with the Supreme Court’s decision in *Rapanos v. United States*, 547 U.S. 715 (2006) (“*Rapanos*”), provide an appropriate regulatory framework to implement the Clean Water Act. See, e.g., *In re EPA & Dep’t of Def. Final Rule*, 803 F.3d 804, 808 (6th Cir. 2015) (staying 2015 Clean Water Rule and restoring status quo of the “familiar, if imperfect” pre-2015 regime pending full judicial review); *Pascua Yaqui Tribe*, 557 F. Supp. 3d 949, 956 (D. Ariz. 2021) (vacating 2020 NWPR and restoring the pre-2015 regulatory regime, which “is familiar to the Agencies and industry alike”).

4.1.3 General discussion of environmental harm caused by the 2020 NWPR

A variety of commenters asserted that environmental harms occurred, or could have occurred, as a result of the 2020 NWPR. Detailed examples of environmental harms that occurred, or could have occurred, because of the 2020 NWPR are summarized in Topic 4.3.

4.1.3.1 *General comments about losses of protection under the 2020 NWPR and negative consequences*

Many commenters generally stated that the 2020 NWPR removed federal protection from uncontrolled discharges, including of dredged and fill material, for a significant number of water resources, including many ephemeral streams, headwater streams, and isolated, seasonal, or non-floodplain wetlands. Commenters argued that this loss of Clean Water Act protection caused, or had the potential to cause, significant environmental harm. Many commenters cited broad, national-scale assessments that they assert estimate the number of waterbodies that lost federal protection under the 2020 NWPR as evidence of environmental harm. Some commenters claimed that 51% of wetlands and 18% of streams lost federal protections. Other commenters alleged that up to half of the country’s stream miles and millions of acres of wetlands lost federal protections. Still other commenters characterized the losses as 4.8 million miles of streams and 16.3 million acres of non-floodplain wetlands, or “tens of millions of the nation’s remaining wetlands.”

Many commenters discussed the various ecosystem functions that were reduced or lost, or had the potential to be reduced or lost, because of the reduction in federal protection of water resources by the 2020 NWPR. For example:

- Many commenters asserted that the 2020 NWPR increased water pollution and degraded water quality, or could have done so, such as through reductions in nutrient and pollution filtering.
- Some commenters stated that the 2020 NWPR negatively impacted, or could have negatively impacted, fisheries or fish, bird, and wildlife habitat, including those of threatened and endangered species.
- Several commenters argued that the 2020 NWPR had, or could have had, negative impacts on drinking water quality.
- Several commenters stated that the 2020 NWPR had, or could have had, negative impacts on quality of life and public health.

- Several commenters argued that the 2020 NWPR’s reduction in federal water resource protection caused, or could have caused, increased flooding, decreased flood protection, and/or reduced water storage.
- Several commenters contended that the 2020 NWPR had, or could have had, negative impacts on recreation, including fishing and hunting.

Agencies’ Response: While the agencies are unable to confirm the estimates provided by commenters, EPA and the Army share the commenters’ concerns over the 2020 NWPR’s negative impacts on the nation’s waters. Degraded water quality adversely affects numerous critical functions and values cited by the commenters, including bird and wildlife habitat, drinking water supplies, flood protection, water storage, and human health. Accordingly, the significant reductions in federal water protection under the 2020 NWPR were inconsistent with the objective of the Clean Water Act. See Final Rule Preamble Section IV.A for a discussion of key functions provided by tributaries, wetlands, impoundments, lakes, ponds, streams, and other types of waters that restore and maintain the chemical, physical, and biological integrity of paragraph (a)(1) waters. See Sections I and III of the TSD for additional supporting information on this topic.

4.1.3.2 *General comments about the agencies’ evidence of harms from the 2020 NWPR*

Some commenters stated that the agencies’ own conclusions from their analysis of the 2020 NWPR presented in the December 2021 Notice of Proposed Rulemaking, as well as from public statements or reports put out by the agencies, demonstrate that the 2020 NWPR caused environmental harm. Some commenters noted that Administrator Regan stated that the 2020 NWPR “is leading to significant environmental degradation” and noted other related statements from the agencies.

Several other commenters argued that the agencies’ analysis of Corps jurisdictional determinations (JDs) made during the implementation of the 2020 NWPR showed a large drop in the amount and kind of surface water regulated by the Clean Water Act and that this was evidence of environmental harm. A few commenters added that the impact of the 2020 NWPR was likely even more significant because project proponents did not need to seek JDs for wetlands and ephemeral streams that were excluded under the 2020 NWPR. One commenter recognized the agencies’ determination that the 2020 NWPR inaccurately estimated the decrease in jurisdiction that would be caused by that rule.

Topic 4.3 summarizes comments that provided more detailed discussions of the agencies’ own analysis of Corps permitting data from the time period that the 2020 NWPR was in effect.

Agencies’ Response: The agencies share the commenters’ concerns over the failure of the 2020 NWPR to advance the objectives of the Clean Water Act. As described in Final Rule Preamble Section IV.B.3, the 2020 NWPR significantly reduced Clean Water Act protections over waters, as indicated by data on approved JDs and Corps section 404 permits that showed a large drop in the scope of waters protected. In one year of implementation of the 2020 NWPR, states and tribes did not fill the regulatory gap in water quality protection left by the 2020 NWPR. In fact, review of regulatory changes that states implemented during that one year of implementation showed a trend towards state

deregulation of surface water protections. See Chapter II of the Economic Analysis for the Final Rule and Section 4.3.1.2 of the agencies’ response to comments.

4.1.3.3 *General comments on region- and state-specific harms of the 2020 NWPR*

Some commenters stated generally that the 2020 NWPR’s exclusion for ephemeral streams had a disproportionate environmental impact on the arid West, where nearly all streams are ephemeral. One commenter asserted that in Arizona, as many as 94% of waters lost federal protection and were not regulated by the state.

Agencies’ Response: The agencies have found that categorically excluding ephemeral waters without due consideration of the impacts to traditional navigable waters, the territorial seas, and interstate waters is inconsistent with the objective of the Clean Water Act in section 101(a), and with the goal of the Act to create a comprehensive scheme for protecting the nation’s waters. The agencies have determined that this problem is particularly acute in the arid West and Southwest, which have higher proportions of ephemeral or intermittent channels than other regions of the United States. See Final Rule Preamble Section IV.A.2.c.i and Section III.A.v of the TSD for discussion of how ephemeral waters affect the chemical, physical, and biological integrity of larger downstream waters and Section 8.0.3 of the agencies’ response to comments for discussion of how the 2020 NWPR failed to protect many ephemeral and intermittent waters.

4.1.3.4 *General comments on harms caused by states’ regulatory responses to the 2020 NWPR*

As evidence of environmental harm, several commenters argued that the 2020 NWPR lowered the regulatory floor for water regulation in states that expressly preclude adoption of water protection standards more stringent than those of the federal government. They added that the 2020 NWPR prompted some states to remove broader state protections. A few commenters stated that the agencies acknowledged that the 2020 NWPR would result in discharges without any regulation in states and tribes where protection of waters beyond those covered by the Clean Water Act is not authorized. A few commenters also argued that environmental harm from the 2020 NWPR had been greater in areas that lack comparable state, tribal, or local regulations to protect clean water (*e.g.*, Arizona).

A few commenters stated that the 2020 NWPR’s removal of interstate waters as an independent basis for jurisdiction could have contributed to interstate water pollution because many upstream states have laws preventing the adoption of stricter water pollution controls than the minimum standards required under the Clean Water Act.

Agencies’ Response: The agencies agree that the net effect of the 2020 NWPR was deregulatory because many states match the protections of the Clean Water Act and do not currently have authority to enact more protective regulations. Further, the federalism approach used in developing the economic analysis for the 2020 NWPR concluded that states and tribes would address the regulatory gap, which they did not. See Final Rule Preamble Section IV.B.3.d.ii. Some tribes indicated they lacked the resources to enact provisions beyond the federal regulatory floor. Moreover, by eliminating interstate waters as an independent basis for Clean Water Act coverage, the 2020 NWPR did not address the

potential for interstate harm from the degradation of waterbodies spanning more than one state.

The agencies agree that, for the reasons set forth by the commenters, the 2020 NWPR reduced the ability of downstream states and tribes to control their water quality.

4.1.4 General rebuttal to claims of environmental harm by the 2020 NWPR

A variety of commenters rebutted claims that the 2020 NWPR caused, or had the potential to cause, environmental harm. Detailed rebuttals to claims of environmental harm are summarized in Topic 4.3.

4.1.4.1 *General comments on the agencies' rationale and process for replacing the 2020 NWPR*

Several commenters broadly claimed that the arguments concerning environmental harm being advanced in support of replacing the 2020 NWPR were factually incorrect, were “based on a political agenda, rather than a factual analysis of the costs and benefits of this rule,” or were otherwise not adequately grounded in data and evidence.

Several commenters argued that the agencies' review of the 2020 NWPR's environmental harm lacked transparency or input from state partners and stakeholders. A few commenters also added that there was not enough time or information for commenters to review the agencies' analysis. Several commenters from state and local government agencies stated that they were not aware of any specific situation where water quality had been negatively impacted as a result of the 2020 NWPR (and in which the state could not have taken appropriate action to enforce state law to protect such waters), or that there was no evidence that the 2020 NWPR resulted in any significant loss of protection for their state's waters.

Agencies' Response: On June 9, 2021, the agencies announced their intention to revise or replace the 2020 NWPR. The agencies subsequently embarked on an extensive stakeholder outreach process, including public meetings and federalism and tribal consultations. The agencies engaged state and local governments over a 60-day federalism consultation period during development of this rule, beginning with an initial federalism consultation meeting on August 5, 2021, and concluding on October 4, 2021. During the input period, the agencies convened several meetings with intergovernmental associations and their state or local government members to solicit feedback on the effort to revise the definition of “waters of the United States.” The agencies also engaged with state and local governments during the public comment period, including through two virtual roundtables in January 2022. A summary report on the agencies' consultation efforts with state and local governments is available in the docket for this action. For more information on the agencies' federalism and stakeholder consultations for this rulemaking, see Final Rule Preamble Sections III.C and VI.E and the agencies' response to comments in Section 5.5.

As set forth in the agencies' June 9, 2021, notice of intent to revise or replace the 2020 NWPR, the agencies considered both current and future harms to the chemical, physical, and biological integrity of the nation's waters due to the 2020 NWPR. See 86 FR 41911 (August 4, 2021). The agencies' analysis for this rule has confirmed their concern, which the

district court in *Pascua Yaqui Tribe* acknowledged, that the 2020 NWPR led to a “substantial reduction in waters covered under the NWPR,” sufficient to establish “the possibility of serious environmental harm.” 557 F. Supp. 3d at 956. In assessing environmental harms from the 2020 NWPR, the agencies considered the long-term implications of this reduction in federal protection for the “waters of the United States” should the 2020 NWPR continue to be implemented, not just those harms that had already occurred.

The agencies acknowledge that some commenters disagree with the agencies’ conclusion that the reduced scope of Clean Water Act jurisdiction under the 2020 NWPR would harm water quality, and that some commenters indicated they did not observe evidence of specific adverse impacts or a substantial loss of water quality protections under the 2020 NWPR. As discussed in Final Rule Preamble Section IV.B.3, however, the agencies have heard concerns from a broad array of co-regulators and stakeholders, including tribes, states, scientists, and non-governmental organizations, that corroborated the agencies’ data and indicated that the 2020 NWPR’s reduction in the jurisdictional scope of the Clean Water Act would cause substantial environmental harms, including to the quality of paragraph (a)(1) waters, that tribes and states lack the authority or resources to address. Moreover, though actual environmental harms were limited because the rule was only in place for one year, the agencies’ observations and feedback received during that first year indicate that retaining the 2020 NWPR would likely have led to far greater environmental harms over time. The 2020 NWPR’s removal of federal protections from the nation’s waters, and the resulting detriment to the services that such waters provide, undermines the Clean Water Act’s statutory objective. For discussion of the importance of the Act’s statutory objective and the agencies’ finding that this final rule advances that objective, see Final Rule Preamble Section IV.A.2.

4.1.4.2 General rebuttals to the agencies’ claims of environmental harm from the 2020 NWPR

Multiple commenters argued that the agencies’ analysis of jurisdictional determinations that were issued while the 2020 NWPR was in effect did not demonstrate that environmental harm actually occurred as a result of the 2020 NWPR. Some of these commenters further asserted that a lack of federal regulation does not necessarily correlate to environmental harm or a degradation in water quality and therefore cannot be used to justify replacing the 2020 NWPR.

Several commenters asserted that the agencies’ assessment of projects that would not require or would no longer require a Clean Water Act permit as a result of the 2020 NWPR included environmentally beneficial projects, such as the construction of grassed waterways, or other projects that would benefit members of the public.

One commenter stated that the data provided by the Agencies to justify the Proposed Rule is misleading, both because some of the projects the agencies cited as no longer subject to Clean Water Act protections may have been beneficial, as well as because the Agencies do not explain why such projects would have required a permit prior to the 2020 NWPR but no longer did under that rule. The commenter noted that the public does not have access to some of the data necessary to review this list of projects, because the Corps’ ORM2 website is currently unavailable. In addition, for those JDs that are available online through

Corps district web pages, most of them indicate that there are no prior JDs for these projects. The commenter asked how the Agencies could claim that those projects used to require a permit but no longer do so under the NWPR because no JDs had been completed under a prior regime.

Agencies' Response: As explained in Final Rule Preamble Section IV.B.3.d, the 2020 NWPR's removal of Clean Water Act protections for certain resources and any subsequent unregulated and unmitigated impacts to such resources would have caused cascading, cumulative, and substantial downstream harm. Though actual environmental harms were limited because the rule was only in place for one year, the agencies' observations and feedback received during that first year indicate that retaining the 2020 NWPR would likely have led to far greater environmental harms over time. The agencies heard concerns from a broad array of co-regulators and stakeholders, including tribes, states, scientists, and non-governmental organizations, that corroborated the agencies' data and indicated that the 2020 NWPR's reduction in the jurisdictional scope of the Clean Water Act would cause substantial environmental harms, including to the quality of paragraph (a)(1) waters, that tribes and states lack the authority or resources to address. See also the agencies' response to comments in Section 5.1.2 (addressing the agencies' rationale for replacing the 2020 NWPR).

The agencies acknowledge that removal of Clean Water Act protections does not necessarily cause direct environmental harm, particularly where states or tribes have established their own water quality protection programs that regulate waters as broadly or more broadly than the federal government. Yet many states and tribes do not regulate waters more broadly than the Clean Water Act, and in those cases removal of federal protections can lead more directly to water quality impacts. See Chapter II of the Economic Analysis for the Final Rule. The Clean Water Act thus ensures a federal baseline of water quality protection for the nation's waters.

The agencies also recognize that some potentially environmentally beneficial projects may not have required a Clean Water Act permit under the 2020 NWPR. Nonetheless, the record before the agencies reveals that the 2020 NWPR's removal of federal protections threatened the loss or degradation of waters critical to the protection of traditional navigable waters, the territorial seas, and interstate waters, among other concerns and thereby undermined the objective of the Clean Water Act. Though actual environmental harms were limited because the rule was only in place for a little over one year, the agencies' observations and feedback received during that first year indicate that retaining the 2020 NWPR would likely have led to far greater environmental harms over time. For discussion of the importance of the Act's statutory objective and the agencies' finding that this final rule advances that objective, see Final Rule Preamble Section IV.A.2.

Specifically in response to the comment asking how the Agencies could have known that the projects cited as no longer subject to the 2020 NWPR would have been previously jurisdictional, the Agencies note that, first, raw data that underlies many AJDs from the ORM2 database can contain sensitive information, so the agencies have not provided that information. Second, the agencies' basis for claiming that these projects would have required a permit under the pre-2015 regulatory regime but no longer do so is that agency staff determined when completing the AJD in question that the waters being assessed were

no longer jurisdictional based on the new definitions under the 2020 NWPR. The Agencies’ analysis of the environmental impacts associated with the 2020 NWPR focused on AJDs in which staff had determined that the AJD addressed “[a]ctivities that occur in waters that are no longer WOTUS under the 2020 NWPR.” For further information about the Agencies’ methods for determining the impacts of the 2020 NWPR, see Section II.B.i of the TSD.

4.1.4.3 General comments on the availability of state regulation to protect water quality

One commenter suggested that the agencies incorrectly conflate federal Clean Water Act jurisdiction with environmental protection and overlook that states, local governments, and tribes have a role to play in protecting water quality. Several commenters argued that the agencies’ review of the 2020 NWPR’s environmental harm failed to recognize that states and local governments have water quality regulations to protect waters that are not protected at the federal level.

Agencies’ Response: The agencies have determined that in practice, the 2020 NWPR does not fulfill the statutory objective of the Clean Water Act and is not consistent with Congress’s intent to provide a nationwide framework for protection of the quality of the nation’s waters. While the agencies agree that state, tribal, and local authorities play a key role in advancing the objective of the Clean Water Act through functions such as their participation in non-regulatory programs and state and tribal implementation of certain Clean Water Act programs (where approved), their actions complement the comprehensive scheme of regulation under the Clean Water Act rather than supplanting the federal role envisioned by Congress. Further, many states and tribes do not regulate waters beyond those covered by the Clean Water Act. As detailed in Section IV.B.3 of the Preamble to the Final Rule, the agencies have not observed states that previously lacked broader protections expanding them, and the agencies have no basis for believing this will change. See Chapter II of the Economic Analysis for the Final Rule. Some tribes have informed the agencies that they lacked the resources to enact provisions beyond the federal regulatory floor.

4.1.5 Legal arguments against the 2020 NWPR

A variety of commenters provided legal arguments against the 2020 NWPR.

4.1.5.1 Arguments that the 2020 NWPR violated the Administrative Procedure Act (APA)

Several commenters stated that the 2020 NWPR violated the APA by not providing good reasons for the 2020 NWPR’s drastic exclusions and/or departure from prior policy. A few commenters argued that the 2020 NWPR violated the APA by narrowing the Clean Water Act and limiting state and federal authority to control pollution. In addition, a few commenters claimed that the agencies admitted in the proposed rule and/or the proposed rule TSD that the 2020 NWPR was not based on information in the agencies’ scientific reports, economic analysis, or resource and programmatic assessment, and that this demonstrates one way in which the agencies failed to adequately evaluate the 2020 NWPR’s effects on water quality. Commenters argued that this failure also violated the APA. Other commenters stated that the 2020 NWPR violated the APA by failing to consider reliance interests and by failing to abide by executive branch policies with regards to environmental justice.

Agencies’ Response: The agencies agree that the 2020 NWPR was inconsistent with the APA in a number of ways and further recognize the commenters’ variety of concerns about how the 2020 NWPR departed from the best available science, including the 2015 EPA report *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence* (hereafter the Science Report).² In promulgating the final rule, the agencies have reconsidered the policies, interpretations, and conclusions of the 2020 NWPR, including how the 2020 NWPR resulted in reductions in federal water protection that had, or could have had, significant negative effects on water quality.

In promulgating the 2020 NWPR, the agencies concluded that there was no significant evidence of disproportionately high and adverse human health or environmental effects on minority populations, low-income populations, and/or indigenous peoples. See 85 FR 22337 (April 21, 2020). In developing the final rule, the agencies came to a different conclusion, noting that tribes and other population groups of concern were disproportionately affected by the burdens of increased water pollution.

4.1.5.2 Arguments that the 2020 NWPR was inconsistent with the objective of the Clean Water Act and applicable precedent

Several commenters broadly stated that the 2020 NWPR was contrary to congressional intent, constituted arbitrary and capricious agency action, had questionable legal propositions, and/or was plagued with procedural and substantive legal errors. A legal argument often cited by commenters was that the 2020 NWPR did not meet, was contrary to, or weakened 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.” These commenters often added that the 2020 NWPR was not consistent with applicable Supreme Court case law or precedent. A few commenters discussed court rulings that they claimed demonstrate that achieving the Clean Water Act’s objective requires protecting waters and wetlands that significantly affect the quality of downstream traditional navigable waters.

Several commenters argued that the 2020 NWPR was inconsistent with *Rapanos* and that the judiciary’s application of *Rapanos* “highlights that Justice Kennedy’s concurrence cannot be ignored.” A few commenters argued that a binding majority in *Rapanos* rejected Justice Scalia’s plurality interpretation as impermissible and claimed that because the 2020 NWPR codified that repudiated interpretation, it was unlawful. One commenter cited case law, including *Rapanos*, to support their claim that the 2020 NWPR is based on an interpretation of the Act rejected by a majority of the Supreme Court.

Several commenters cited the Supreme Court’s recent decision in *County of Maui v. Hawaii Wildlife Fund*, 140 S. Ct. 1462, 1477 (2020) (“*Maui*”), as evidence that courts must reject interpretations of the Clean Water Act that are inconsistent with its stated objectives, including language that statutory interpretations should not “creat[e] loopholes that undermine the statute’s basic federal regulatory objectives.” Some commenters stated that the 2020 NWPR is an example of a loophole that would be counter to the *Maui* decision.

² 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.”)

A few commenters stated that the agencies themselves have expressed “substantial concerns” regarding the lawfulness of the 2020 NWPR. Some commenters quoted the agencies’ statement that “the NWPR did not appropriately consider the water quality impacts of its approach to defining ‘waters of the United States,’ in contravention of Congress’s objective in the Clean Water Act ‘to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.’” 86 FR 69373 (December 7, 2021).

Agencies’ Response: The agencies agree that the 2020 NWPR failed to advance the objective of the Clean Water Act, which the Supreme Court recently emphasized is an important aspect of defining the jurisdictional scope of the Act. *See, e.g., Maui*, 140 S. Ct. at 1468-69 (emphasizing the importance of considering the Clean Water Act’s objective when determining the scope of the Act and finding that “[t]he Act’s provisions use specific definitional language to achieve this result,” including the phrase “navigable waters”). One critical example of the 2020 NWPR’s failure to advance the Clean Water Act’s objective is its removal of the significant nexus standard without considering an alternative approach to protecting waters that significantly affect paragraph (a)(1) waters. The significant nexus inquiry reflects and furthers the objective of the Clean Water Act by allowing for a scientific evaluation of the effect of wetlands, tributaries, and other types of waters on paragraph (a)(1) waters. For that reason, evolving forms of this inquiry are present in *United States v. Riverside Bayview Homes*, 474 U.S. 121, 131-35 (1985) (*Riverside Bayview*), *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) (*SWANCC*), and Justice Kennedy’s concurring opinion in *Rapanos*. The 2020 NWPR rejected this scientific approach and instead, for example, categorically excluded ephemeral features without appropriately considering scientific information about their important effects on the integrity of paragraph (a)(1) waters.

See Section IV.B.3.a of the Preamble to the Final Rule for additional discussion of the agencies’ finding that the 2020 NWPR failed to advance the Clean Water Act’s statutory objective.

4.1.5.3 *Arguments that the 2020 NWPR was insufficiently protective of interstate waters*

A few commenters argued that the 2020 NWPR lacked sufficient justification for eliminating categorical protections for interstate waters. One commenter stated that the 2020 NWPR attempted to justify this change by citing *SWANCC*, which, the commenter argued, says nothing about the jurisdictional status of interstate waters. Another commenter argued that the agencies’ failure to protect all interstate waters in the 2020 NWPR “was an abdication of a core premise of the Clean Water Act’s cooperative federalism.”

Agencies’ Response: The agencies agree that the 2020 NWPR’s elimination of the categorical protection of interstate waters is inconsistent with the text of the Clean Water Act and the historical context in which it was enacted. The agencies agree that nothing in the *SWANCC* opinion supports categorically eliminating interstate waters from Clean Water Act protection. See Section IV.B.3 of the Preamble to the Final Rule for discussion of how the 2020 NWPR failed to advance the objective of the Clean Water Act and Section IV.C.2 of the Preamble to the Final Rule for discussion of how the final rule protects interstate waters consistent with the objective of the Clean Water Act and relevant Supreme Court precedent.

4.1.5.4 Arguments concerning section 101(a) and section 101(b) of the Clean Water Act

Several commenters argued that the 2020 NWPR wrongly suggested that the Clean Water Act section 101(a) objective must yield to the “policy” described in section 101(b). Others argued that the 2020 NWPR was based on a misreading of section 101(b). One commenter argued that the Clean Water Act was passed in 1972 because of failures of state-based regulatory systems, and that the cooperative federalism approach outlined in section 101(b) has nothing to do with excluding surface waters from jurisdiction.

Agencies’ Response: The agencies agree that the 2020 NWPR was based on a misreading of section 101(b). In developing the final rule, the agencies considered the comprehensive nature, historical context, and objective of the Clean Water Act set forth in section 101(a), as well as the role of states recognized in section 101(b). The agencies read sections 101(a) and 101(b) in harmony with each other, looking to the text and structure of the statute in giving greater weight to section 101(a) than did the 2020 NWPR and interpreting section 101(b) as supporting that objective. In arriving at this reading, the agencies considered section 101(a) in light of the precise language of the definitions in the Act, the importance of water quality to the statute as a whole, and Supreme Court decisions affirming that consideration of the objective of the Act is of primary importance in defining its scope. Section 101(a) is labeled the “objective” and is the first section of the statute, while section 101(b) is placed alongside several other congressional priorities and labelled as a policy. The agencies agree with the comment that the cooperative federalism approach outlined in section 101(b) does not reflect a general policy of deference to state regulation to the exclusion of federal regulation but is instead about sharing responsibilities for protecting our nation’s waters.

In addition, the agencies noted that the Clean Water Act was passed after Congress found that the then-existing statutory scheme, which primarily called on states to establish and administer water quality regulations, had proven inadequate to address the nationwide challenge of water pollution. The agencies have employed their judgment based on experience and expertise implementing the Clean Water Act to determine that the final rule better achieves Congress’s objective than the 2020 NWPR, while still preserving the responsibilities and rights of the states. See Section IV.A.2.a of the Preamble to the Final Rule for discussion of the objective set forth in section 101(a) of the Clean Water Act and courts’ recognition of the importance of that objective and Final Rule Preamble Section IV.A.3.b for further discussion of how the final rule reflects consideration of the statute as a whole, including sections 101(a) and 101(b).

4.1.5.5 Arguments that the agencies wrongly anticipated states’ response to the 2020 NWPR

Several commenters argued that, with implementation of the 2020 NWPR, no structures or resources were put in place to allow local, state, or tribal governments to fill the gap lost in federal protection. The commenters contended that the 2020 NWPR impeded the abilities of governments to protect waters, ecosystems, and the people and wildlife that depend on them. In addition, some commenters argued that the 2020 NWPR’s reduction in protection was based on mistaken assumptions that states would fill the gap. For example:

- A commenter stated that “there is no evidence to suggest that during the period in which the NWPR was implemented, any states or tribes protected their waters beyond what was required by the NWPR.”
- A commenter asserted that the agencies stated that the 2020 NWPR incorrectly considered states’ actions to reduce their own clean water protections in response to the reductions in jurisdiction from the 2020 NWPR. The commenter added that some states sought to reduce the scope of state Clean Water Act protections after the 2020 NWPR was finalized.
- One commenter stated that the 2020 NWPR relied on unwarranted optimism that states would themselves protect and maintain the integrity of the nation’s waters.
- A commenter from an arid Western state indicated that the 2020 NWPR left the state with no federal protection for nearly all of the state’s waters. The commenter indicated that federal protections were necessary, because the state did not have the same robust protections as other states.
- One commenter indicated that many states had laws that limited their ability to enact water quality regulations that were more protective than federal law, so in order to achieve the pre-2015 level of protection of drinking water sources while the 2020 NWPR was in effect, those states would need to undergo legislative and regulatory actions, a process that would require considerable resources and lead to increased variability in state requirements.
- Another commenter suggested that though they believed that the 2020 NWPR provided clarity, they also believed that the 2020 NWPR left too much responsibility over water quality protection to the states.

Agencies’ Response: The agencies share the commenters’ concerns that in promulgating the 2020 NWPR the agencies wrongly anticipated states’ response to that rule. In fact, the agencies found that during the year the 2020 NWPR was in effect, two states that had previously protected state waters beyond the scope of “waters of the United States” removed at least some of those expanded protections, and no state that had previously lacked broader protections established them. In addition, during the agencies’ stakeholder outreach as part of the rulemaking process for the final rule, some tribes stated that the 2020 NWPR disadvantaged tribes because, unlike states, many tribes lack resources to enforce a definition of “Tribal waters” that is broader than the federal “waters of the United States.” See Chapter II of the Economic Analysis for the Final Rule for a review of regulatory changes that states implemented during the one year of the 2020 NWPR’s implementation, which showed a trend towards state deregulation of surface water protections. For further discussion of how the states and tribes did not fill the regulatory gap left by the 2020 NWPR, see Final Rule Preamble Section IV.B.3.d.ii.

4.1.5.6 Arguments specific to tribal issues

Several comments provided legal arguments against the 2020 NWPR specific to tribal issues. A few commenters stated that the 2020 NWPR was unlawful because the agencies failed to follow their own policies on tribal consultation requirements or conduct meaningful consultation and failed to adequately consider or address tribal comments during the development of the 2020 NWPR. For example, a tribe stated the agencies did not address:

- how tribes were to fill in the gaps in enforcement left by implementation of the 2020 NWPR;
- how the 2020 NWPR satisfied the agencies’ requirement to fulfill their federal trust responsibilities to tribes; and
- comments that the agencies maintain broader federal Clean Water Act jurisdiction for tribes.

A few commenters stated that the 2020 NWPR was unlawful because, in their view, the agencies breached their federal trust responsibility by failing to protect tribes and tribal resources due to limiting the agencies' jurisdiction over waters that the commenters asserted are necessary to protect the tribes. One commenter argued that the 2020 NWPR undermined the authority of tribal nations to regulate waters within their boundaries, which increased the potential for harmful effects of pollution by adjacent non-tribal jurisdictions and entities. In addition, one commenter stated that the 2020 NWPR disadvantaged tribal nations because they do not have the financial resources or technical assistance to enforce a definition of "Tribal waters" that is broader than the definition of "waters of the United States."

Agencies' Response: The agencies conducted tribal consultation and engagement efforts before promulgating the 2020 NWPR. See 85 FR 22336-22337 (April 21, 2020). However, the agencies acknowledge tribal commenters' concerns that deficiencies in the 2020 NWPR could have led, or did lead, to disproportionate adverse impacts to tribes. For example, some tribes do not have the resources to enforce water protection rules beyond the protections of the Clean Water Act, so were therefore disproportionately disadvantaged by adoption of the 2020 NWPR. See Final Rule Preamble Section III.B.5 for further discussion of the way the 2020 NWPR disproportionately impacted population groups of concern, including tribes.

4.1.5.7 *Arguments that courts have pointed out fatal flaws in the 2020 NWPR*

A few commenters argued that the 2020 NWPR should be repealed because it was remanded and vacated by two federal district courts, in Arizona and New Mexico. The commenters stated that the District Court for the District of Arizona held that the 2020 NWPR involved "fundamental, substantive flaws that cannot be cured without revising or replacing the NWPR's definition of 'waters of the United States.'" *Pascua Yaqui Tribe v. EPA*, 557 F. Supp. 3d 949, 955 (D. Ariz. 2021). The commenters also cited *Navajo Nation v. Regan*, 563 F. Supp. 3d 1164, 1168 (D.N.M. 2021), which they stated agreed with the other court's conclusion.

Agencies' Response: In developing the final rule, the agencies considered these two district court decisions and the concerns those courts identified regarding the 2020 NWPR. In the final rule, the agencies have concluded that the 2020 NWPR had fundamental substantive flaws. For further discussion of legal challenges to the 2020 NWPR, see Section IV.B.4 of the Preamble to the Final Rule.

4.1.5.8 *Arguments that the 2020 NWPR was inconsistent with the Endangered Species Act (ESA)*

A few commenters argued that the agencies did not consider the purpose of the ESA when crafting the 2020 NWPR. They argued that many listed species depend on waters that were or may have been non-jurisdictional under the 2020 NWPR, such as Steelhead Trout, Chinook Salmon, and Bull Trout.

Agencies' Response: Comments concerning the purpose of the Endangered Species Act are outside the scope of this rulemaking, which addresses only the definition of "waters of the United States" within the meaning of the Clean Water Act.

4.1.6 Legal arguments in favor of the 2020 NWPR

4.1.6.1 *Arguments that the 2020 NWPR was consistent with the objective of the Clean Water Act and applicable precedent*

Many commenters asserted that the 2020 NWPR was consistent with the objectives of the Clean Water Act, aligned with related Supreme Court decisions (including *Rapanos*, *Riverside Bayview*, and *SWANCC*), captured congressional intent, and/or stayed within the limits of the agencies' authority in the Commerce Clause. One commenter argued that the proposed rule does not make a reasoned argument that the text of the Clean Water Act unambiguously prohibits the 2020 NWPR.

Agencies' Response: The agencies disagree that the 2020 NWPR was consistent with the objective of the Clean Water Act and that it captured congressional intent. See Section IV.B.3 of the Preamble to the Final Rule for additional discussion of the deficiencies of the 2020 NWPR and Section 4.1.5.2 of the agencies' response to comments for discussion as to how the 2020 NWPR was inconsistent with *Riverside Bayview*, *SWANCC*, and Justice Kennedy's concurring opinion in *Rapanos*. As set forth in Section IV.A.3 of the Preamble to the Final Rule, the agencies have determined based on their expertise and experience in implementing the Clean Water Act that the final rule is consistent with the statutory text, advances the objective of the Act, is consistent with the Commerce Clause and Supreme Court case law, is informed by the scientific record, and appropriately considers the policies of the Act.

4.1.6.2 *Arguments that the 2020 NWPR promoted cooperative federalism*

Some commenters argued that the 2020 NWPR appropriately recognized states' authority to regulate water quality and/or respected cooperative federalism. A few state and local governments also asserted that the 2020 NWPR gave state and local authorities more flexibility to determine how to best manage their waters. One commenter argued the 2020 NWPR correctly interpreted the relationship between the goals of the Clean Water Act and section 101(b).

One commenter argued that the 2020 NWPR rulemaking included sufficient consultation and input from a broad set of stakeholders, including state and local governments, and that stakeholders will submit the same comments in response to the current proposed rule.

Agencies' Response: The agencies disagree that the 2020 NWPR gave state and local governments appropriate flexibility to manage their waters. In fact, by departing from the objective of the Clean Water Act and lowering the level of federal protection for the nation's waters, the 2020 NWPR reduced the ability of downstream states and tribes to control their water quality. The final rule recognizes states' and tribes' interests by preserving their authority over all waters, including those that do not significantly affect paragraph (a)(1) waters, and preserves their role in implementation and enforcement of the Clean Water Act. Nothing in this final rule limits or impedes any existing or future state or tribal efforts to further protect their waters.

The final rule is fully consistent with the policy of section 101(b) of the Clean Water Act to “recognize, preserve and protect the primary responsibilities and rights of states to prevent, reduce, and eliminate pollution.” The agencies have engaged with state, tribal, and local governments during the rulemaking process and will continue to do so as the final rule is implemented. These partnerships further a comprehensive scheme of water quality protection as contemplated by the Clean Water Act, including the objective set forth in section 101(a). The final rule is sufficiently protective to support that comprehensive scheme, while the 2020 NWPR, for reasons set forth in Section 4.3 of the agencies’ response to comments, was not. See Section 4.1.5.4 of the agencies’ response to comments for discussion of how the agencies have construed section 101(b) in the context of the Clean Water Act as a whole.

The agencies acknowledge that many co-regulators and stakeholders submitted comments on the 2020 NWPR when that rule was proposed, including as part of consultation periods, and that many of those same co-regulators and stakeholders submitted comments on the current rulemaking that raised similar themes and concerns. In promulgating the final rule, the agencies considered consultation comments and timely public comments regarding the current rulemaking, as well as the agencies’ experience in implementing the 2020 NWPR and their observations that the 2020 NWPR substantially reduced the number of aquatic resources protected by the Clean Water Act. Final Rule Preamble Section IV.B.3.c discusses how the 2020 NWPR proved difficult to implement, and Section IV.B.3.d discusses how it resulted in an even greater reduction in federal water protections than expected.

4.1.6.3 Arguments that states’ responses to the 2020 NWPR do not justify its repeal

A commenter argued that the fact that some waters left up to state authority by the 2020 NWPR may significantly affect downstream waters does not justify repeal of the 2020 NWPR, because the agencies were not required to define those waters as jurisdictional. The commenter argued that science does not establish where the constitutional or statutory line is between federal and state authority, so science cannot demonstrate that the agencies struck the wrong balance between environmental goals and federalism, clarity, and due process concerns when developing the 2020 NWPR. The commenter further stated that the agencies’ reliance on the Science Advisory Board’s (SAB’s) criticisms of the proposed 2020 NWPR was used to extend the limits of the agencies’ authority.

Agencies’ Response: In the final rule, the agencies define some waters as jurisdictional that were left to state authority under the 2020 NWPR because those waters have a significant impact on the chemical, physical, or biological integrity of paragraph (a)(1) waters. This decision is consistent with the objective of the Clean Water Act, which requires the agencies to consider the effect of their definition of “waters of the United States” on the chemical, physical, and biological integrity of the nation’s waters. Further, as described in Final Rule Preamble Section IV.B.3, the 2020 NWPR significantly reduced Clean Water Act protections over waters, as indicated by data on approved jurisdictional determinations and Corps section 404 permits that showed a large drop in the scope of waters protected. In one year of implementation of the 2020 NWPR, states and tribes did not fill the regulatory gap in water quality protection left by the 2020 NWPR. In fact, review of regulatory changes that states implemented during that one year of implementation showed a trend towards

state deregulation of surface water protections. See Chapter II of the Economic Analysis for the Final Rule.

The agencies' use of science as a factor in evaluating jurisdiction over features such as wetlands and tributaries that may affect downstream (a)(1) waters is supported by relevant Supreme Court precedent, including *Riverside Bayview*, *SWANCC*, and Justice Kennedy's opinion in *Rapanos*. In reaching the scientific conclusions that inform the final rule, the agencies drew on resources that included scientific and technical advice provided by the SAB. To the extent the commenter is asserting that the agencies exceeded their authority in deciding to replace the 2020 NWPR because of scientific concerns raised by the SAB,³ the agencies disagree. Indeed, as discussed in Section IV.B.3 of the Preamble to the Final Rule, the agencies considered additional factors and conducted their own evaluation of the 2020 NWPR through which they identified numerous deficiencies. See also Section 16 of the agencies' response to comments for further discussion of the agencies' use of science in developing the final rule.

The agencies agree that science is not the only consideration in developing a definition of "waters of the United States." In addition to considering the best available science, the agencies considered factors such as the text and objective of the Clean Water Act, legislative history, relevant Supreme Court decisions, and the agencies' experience and expertise in implementing the pre-2015 regulatory regime in developing the final rule. See Final Rule Preamble Section IV.A for further discussion of the agencies' basis for the final rule.

4.1.6.4 *Arguments that drawing conclusions from litigation over the 2020 NWPR would be premature*

Several commenters argued that the two district court decisions that vacated the 2020 NWPR did so without reaching a ruling on the merits or meaningfully scrutinizing the agencies' claims that the 2020 NWPR was threatening environmental harm.

Agencies' Response: Although the agencies considered these two district court decisions in developing the final rule, the agencies also considered additional factors set forth in Section IV.B.3 of the Preamble to the Final Rule and conducted their own evaluation of the 2020 NWPR, through which they identified numerous deficiencies, as identified in Section IV.B.3 of the Preamble to the Final Rule. For further discussion of legal challenges to the 2020 NWPR, see Section III.B.4 of the Preamble to the Final Rule.

4.1.7 Science and the 2020 NWPR

Many commenters stated that the 2020 NWPR, including exclusions under that rule, did not take science into account, lacked scientific support, or was not based on the agencies' scientific record (*e.g.*, the

³ U.S. Environmental Protection Agency Science Advisory Board. 2020. "Commentary on the Proposed Rule Defining the Scope of Waters Federally Regulated Under the Clean Water Act" (February 27, 2020). EPA-SAB-20-0002. U.S. Environmental Protection Agency, Washington, D.C.
[https://yosemite.epa.gov/sab/sabproduct.nsf/LookupWebReportsARsLastMonthBOARD/729C61F75763B8878525851F00632D1C/\\$File/EPA-SAB-20-002+.pdf](https://yosemite.epa.gov/sab/sabproduct.nsf/LookupWebReportsARsLastMonthBOARD/729C61F75763B8878525851F00632D1C/$File/EPA-SAB-20-002+.pdf). ("SAB Commentary").

Science Report). Many commenters argued that the 2020 NWPR contradicted the scientific community's understanding of hydrologic connections and how headwater and/or ephemeral streams and wetlands are critical to the health of waterways and communities. A few commenters who supported the 2020 NWPR asserted that the 2020 NWPR was based on science, and that the claims that the 2020 NWPR were inconsistent with science are based on mischaracterizations of the record supporting the 2020 NWPR.

A few commenters contended that the agencies have admitted, including in the proposed rule TSD, that the 2020 NWPR failed to adequately consider science. Several commenters argued that the SAB concluded that the 2020 NWPR as proposed did not incorporate the best available science, and that the scientific basis for the 2020 NWPR, and its consistency with the objectives of the Clean Water Act, was lacking.

Another commenter argued that the agencies must recognize that, while informed by science, the definition of "waters of the United States" is a policy decision that cannot be based upon science alone.

Agencies' Response: The agencies agree with those commenters who argued that the 2020 NWPR was inconsistent with the best available science and that the final rule has better scientific support and disagree with those who contend the 2020 NWPR was consistent with the science. The agencies agree that the 2020 NWPR contained exclusions of ephemeral streams and excluded large categories of wetlands in ways that overlooked those features' effects on the chemical, physical, and biological integrity of traditional navigable waters, the territorial seas, and interstate waters. The agencies note, as do several commenters, that the SAB found that the 2020 NWPR as proposed was inconsistent with the scientific information in the record. The SAB in their commentary emphasized that the 2020 NWPR's proposal does not "fully incorporate the body of science on connectivity" that the SAB had reviewed in the Draft Science Report and offers "no scientific justification for disregarding the connectivity of waters accepted by current hydrological science." SAB Commentary at 2. See Section IV.B.3.b of the Preamble to the Final Rule and TSD Section II.B.iii for further discussion of how the 2020 NWPR did not properly take into account the scientific record.

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, informed by the scientific record, and informed by relevant Supreme Court decisions, and that is both generally familiar and implementable. The agencies agree with the commenter who stated that science alone cannot dictate where to draw the line defining "waters of the United States." Determining where to draw the boundaries of federal jurisdiction to ensure that the agencies advance Congress's objective while preserving and protecting the responsibilities and rights of the states is a matter of judgment assigned by Congress to the agencies. But science is critical to determining how to attain Congress's plainly stated objective to restore and maintain the chemical, physical, and biological integrity of the nation's waters and properly evaluating which waters are the subject of federal jurisdiction due to their effects on paragraph (a)(1) waters. The agencies have exercised their discretionary authority as informed by relevant precedent and the agencies' experience and technical expertise, including consideration of the best available

science. See Final Rule Preamble Section IV.A.2 for further discussion of how the agencies exercised their discretion under the Clean Water Act in developing the final rule.

4.1.8 Climate change and environmental justice impacts of the 2020 NWPR

Several commenters contended that the 2020 NWPR did not appropriately take into account the impacts of climate change on the chemical, physical, and biological integrity of the nation’s waters, especially in the West where climate change is driving long-term aridification. A few commenters argued that the 2020 NWPR would have intensified the vulnerability of water resources to climate change. One commenter stated that while wetlands offer effective natural protection against flooding and climate change impacts, the agencies acknowledged in the Economic Analysis for the 2020 NWPR that “increased flood risk would result from the loss of wetlands protection under the [2020 NWPR].” One commenter argued that if the 2020 NWPR continued to be in effect, the resulting loss and degradation of previously federally protected waters would result in ongoing increases in releases of carbon from soil and vegetation into the atmosphere, further jeopardizing the Biden Administration’s climate goals.

Several commenters said that the 2020 NWPR did not adequately consider environmental justice concerns for disadvantaged communities, including tribes, and other populations of concern, as required by Executive Order 12898. A few commenters generally stated that the 2020 NWPR disproportionately impacted disadvantaged communities. More specific environmental justice arguments included:

- One tribe stated that, due to a lack of personnel and resources, they relied on the agencies to protect the tribe’s waters through Clean Water Act programs and that the tribe therefore would suffer the impacts of the 2020 NWPR disproportionately compared to states. The tribe stated that this was contrary to the EPA’s stated goal “to understand definitions of human health and the environment from the perspective of federally recognized tribes.”
- A few commenters stated that exclusion of ephemeral streams and wetlands under the 2020 NWPR disproportionately disadvantaged tribes and populations of concern in the arid West, as well as other areas of the country. They added that extreme heat and drought due to climate change have exacerbated these impacts.
- One commenter asserted that environmental justice concerns for low-income communities were high under the 2020 NWPR because many of these communities are in flood-prone areas and that flood risk increased under the 2020 NWPR as federal protections were withdrawn.
- One commenter noted, “the prior administration devoted but a single sentence to the environmental justice analysis, simply stating that no significant evidence of a disproportionate impact existed, while the NWPR placed a larger burden on low-income and indigenous communities, and communities of color.” This same commenter claimed that the agencies took a different approach to environmental justice issues when promulgating the 2015 Clean Water Rule. The commenter explained that the agencies had identified the requirements of E.O. 12898, found that the proposed rule would not disproportionately impact vulnerable populations, and explained their reasoning for this conclusion.

Agencies’ Response: The agencies agree that the 2020 NWPR did not appropriately acknowledge or take account of the effects of a changing climate on the chemical, physical, and biological integrity of the nation’s waters. See Section II.C of the TSD for a discussion of how climate change will impact aquatic resources. The agencies have concluded that considering the strength and importance of functions provided by aquatic resources that

contribute to the resilience of the integrity of downstream paragraph (a)(1) waters to climate change on a case-specific basis is consistent with the policy and goals of the Clean Water Act, case law, and the policy goals of this administration as articulated in Executive Order 13990. See Final Rule Preamble Section IV.C.9.c.ii for a discussion of how the agencies can consider a changing climate under the significant nexus standard consistent with the best available science.

The agencies acknowledge the commenter who stated that there was no separate analysis of the potential environmental justice impacts of the 2020 NWPR in that rule’s record aside from that rule’s preamble statement that the rule did not raise environmental justice concerns, so was not subject to E.O. 12898. See Section 4.1.5.1 of the agencies’ response to comments. In developing this final rule, the agencies concluded that implementation of the 2020 NWPR did have environmental justice impacts; as noted in Section III.B.5 of the Preamble to the Final Rule, the change in jurisdiction under the 2020 NWPR may have disproportionately affected tribes and other populations of concern in the arid West. See also Section IV.B.3.d of the Preamble to the Final Rule. The agencies acknowledge several tribes’ comments that the final rule should consider environmental justice concerns and have concluded that the change in jurisdiction under the 2020 NWPR may have disproportionately exposed tribes to increased pollution and health risks. In particular, the agencies agree that the 2020 NWPR’s categorical exclusion of ephemeral streams from jurisdiction disproportionately impacts tribes and other communities of concern in the arid West. See the Economic Analysis for the Final Rule Chapter IV for additional information on the agencies’ environmental justice analysis.

The agencies have concluded that aquatic resources not protected by the 2020 NWPR provide numerous ecosystem services. The absence of protections for such resources and any subsequent unregulated and unmitigated impacts to such resources would have caused cascading, cumulative, and substantial downstream harm, including damage connected to water supplies, water quality, flooding, drought, erosion, and habitat integrity. The agencies recognize that the burdens of environmental impacts often fall disproportionately on population groups of concern. In the final rule, the agencies have expanded upon the environmental justice analysis in the proposed rule by including additional indicators of vulnerability to environmental risk in screening for potential environmental justice concerns.

4.2 2020 NWPR – Implementation

4.2.1 Arguments that the 2020 NWPR was clear and/or easy to implement

4.2.1.1 *Arguments generally that the 2020 NWPR provided certainty, clarity, and predictability*

Many commenters expressed the view that the 2020 NWPR was clear, was easy to implement, promoted consistency, and aided regulators and the public in understanding where the federal Clean Water Act applies and where it does not. They often added that the 2020 NWPR was predictable and provided “bright lines” as to what was jurisdictional and what was not. Many commenters from the agricultural

industry and government agricultural agencies asserted that the 2020 NWPR provided clear definitions, worked in the field, improved efficiency by reducing bureaucratic barriers, and/or provided certainty to farmers and ranchers. A number of commenters pointed to the project and/or operational impacts of repealing the 2020 NWPR, arguing in general terms that they believed it provided certainty and clarity within their industries and that the proposed rule would result in uncertainty, delays, and inconsistent interpretations. Similarly, many commenters from the regulated community argued that the 2020 NWPR was understandable, was more efficient than previous rules, and provided clarity for permitting and project implementation. In addition, some state and local government agencies also stated that the 2020 NWPR was easy to implement, particularly when determining federal versus state jurisdiction.

Some commenters stated that the 2020 NWPR was easier to implement “on the ground” because the rule was largely based on readily observable surface features. They claimed that the 2020 NWPR could be practically implemented by landowners without the need to hire lawyers and consultants. One commenter argued that under the proposed rule, unlike the 2020 NWPR, pesticide applicators would be left uncertain about whether waters were covered by the Clean Water Act.

Agencies’ Response: The agencies’ experience implementing the 2020 NWPR demonstrated that the rule did not provide simplicity, clarity, or predictability. Implementing the 2020 NWPR posed significant technical challenges for federal, state, and tribal agency staff as well as stakeholders because foundational concepts of the rule were confusing and difficult to implement. While any rule that draws lines between jurisdictional waters and non-jurisdictional waters will involve some implementation challenges, the agencies found the challenges imposed by the 2020 NWPR to be impracticable in important respects.

For example, the 2020 NWPR’s “bright lines” and surface connection tests relied upon the concept of a “typical year” which, based on the agencies’ experience, as described in Section IV.B.3.c.i of the Final Rule Preamble and Section 4.2.3 of the agencies’ response to comments, was extremely challenging to implement and led to arbitrary results.

The “typical year” concept was fundamental to many of the 2020 NWPR’s definitions. Under the 2020 NWPR, tributaries and lakes, ponds, and impoundments of jurisdictional waters were jurisdictional only if they had surface water connections with a traditional navigable water or the territorial seas at least once in a typical year. Two of four categories of “adjacent wetlands” satisfied the adjacency test for jurisdiction only if they had certain surface water connections with other jurisdictional waters in a typical year. Ditches were jurisdictional (1) if they were traditional navigable waters or the territorial seas, (2) if they were constructed in or relocate a “tributary” as defined in the 2020 NWPR (a river, stream, or similar naturally occurring surface water channel that contributes perennial or intermittent surface water flow to a traditional navigable water or the territorial seas in a typical year) or constructed in an “adjacent wetland” as defined in that rule and continue to meet the flow conditions of the “tributary” definition, or (3) those portions of ditches that were constructed in an “adjacent wetland” as defined in that rule and that continue to satisfy the conditions of the “adjacent wetlands” definition.

The agencies have concluded based on their experience with implementing the “typical year” metric that it is difficult and sometimes impossible to identify the presence of a surface water connection in a typical year. The methods identified in the preamble to the

2020 NWPR for determining a “typical year” did not address whether surface water flow might connect a particular stream to a downstream traditional navigable water or the territorial seas, whether a particular wetland was inundated or connected to a jurisdictional water as required under the 2020 NWPR, or how uncertainties at different locations and in different months affected the accuracy of condition estimates.

For some waters that were jurisdictional under the 2020 NWPR, such as intermittent streams flowing only several weeks or months per year or wetlands in arid areas infrequently inundated by flooding from another jurisdictional water, it would be very unlikely for an observer to detect the surface flows during a particular visit. Even where surface water flow is observed, it is difficult to use the data to inform jurisdiction as required under the 2020 NWPR. Under the 2020 NWPR’s methodology, only 40% of observations over a rolling 30-year period of record are considered “normal,” while 30% are considered to be “wetter” and 30% “drier” than normal. Thus, observing a surface flow during the “wetter” period, or not observing it during the “drier” period would fail to provide information upon which the agencies could rely.

Other data are unlikely to provide sufficient information to support a “typical year” analysis: hydrologic gages are not common outside of streams with perennial flow, aerial photographs are generally taken at most yearly, and satellite imagery is not consistently available and is limited by factors such as cloud cover and land cover.

The agencies found it difficult to implement the 2020 NWPR’s provision that a wetland is “adjacent” if a jurisdictional water inundates it by flooding in a typical year. Inundation by flooding in a typical year is not a normally recorded metric; available models generally focus instead on flood recurrence intervals. Moreover, under the 2020 NWPR, wetlands being flooded *from* a jurisdictional water were jurisdictional, but wetlands flooding *to* a jurisdictional water were not. Photographs and other available data do not readily indicate the direction in which inundation occurs, compounding the difficulty in implementing the 2020 NWPR’s adjacency requirement. For more information on the difficulty in implementing the 2020 NPWR’s definition of “adjacent wetlands,” see Sections IV.B.3.c.i and ii of the Preamble to the Final Rule.

In addition, under the 2020 NWPR, it was difficult to determine if ditches were “waters of the United States.” For a ditch to be jurisdictional, the 2020 NWPR required a demonstration that at the ditch was constructed in a “tributary” as defined in that rule (*i.e.*, requiring contribution of intermittent or perennial flow in a typical year to a traditional navigable water or the territorial seas) and that the ditch continued to meet the flow conditions of the “tributary” definition. Alternatively, the portions of a ditch that had been originally built in an “adjacent wetland” as defined in the 2020 NWPR (*i.e.*, that either abutted or had certain surface hydrologic connections to a jurisdictional water in a “typical year”) could be jurisdictional if it continued to meet the flow conditions of the “tributary” definition or if it continued to meet the definition of “adjacent wetlands.” Finding this degree of information for construction that occurred decades or even centuries in the past was exceedingly difficult. In addition, under the 2020 NWPR, a ditch could be jurisdictional if it relocated 100% of a tributary and continued to meet the flow conditions of the “tributary” definition, but the determination of whether the entire flow of the tributary was

relocated was very difficult in practice. For further discussion of how the 2020 NWPR's requirements for jurisdictional ditches were difficult to implement, see Final Rule Preamble Section IV.B.3.c.iii.

Finally, the 2020 NWPR's "typical year" concept did not account for the increasing number of recurrent heat waves, droughts, storms, and other extreme weather events in many parts of the country, which can have profound impacts on local and regional hydrology, including streamflow. In view of the rapid changes in climate, the National Oceanic and Atmospheric Administration has developed alternative approaches for estimating normal climate scenarios that are based on shorter time frames than the 2020 NWPR's 30-year rolling average. The rigid rolling thirty-year approach to determining typical year in the 2020 NWPR did not allow the agencies to use these updated methods. See Section II.B.iv of the TSD for additional discussion of challenges associated with implementing the 2020 NWPR.

4.2.1.2 *Arguments that exclusions in the 2020 NWPR provided clarity*

Many commenters from the regulated community argued that the exclusions in the 2020 NWPR provided clarity.

Agencies' Response: The agencies agree that categorical exclusions can provide clarity. The proposed rule provided exclusions for waste treatment systems and prior converted cropland, as described in proposed 33 CFR 328.3(a)(8) and (9) and 40 CFR 120.2(a)(8) and (9). The final rule retains these two familiar and longstanding exclusions. In addition, after considering comments requesting that the agencies codify bright line exclusions, the agencies have codified exclusions for features that were generally considered non-jurisdictional under the pre-2015 regulatory regime but were not expressly incorporated as exclusions in the 1986 regulations themselves. These include exclusions for ditches (including roadside ditches) excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water; artificially irrigated areas which would revert to upland if the irrigation ceased; artificial lakes or ponds created by excavating or diking dry land to collect and retain water and which are used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing; artificial reflecting or swimming pools or other small ornamental bodies of water created by excavating or diking dry land to retain water for primarily aesthetic reasons; waterfilled depressions created in dry land incidental to construction activity and pits excavated in dry land for the purpose of obtaining fill, sand, or gravel unless and until the construction or excavation operation abandoned and the resulting body of water meets the definition of "waters of the United States"; and swales or erosional features (*e.g.*, gullies, small washes characterized by low volume, infrequent, or short duration flow). The agencies are listing these exclusions in the final regulatory text in a new paragraph (b), which consolidates the exclusions together in a single regulatory section. The agencies have clarified in the final rule that exclusions do not apply to paragraph (a)(1) waters. Several of the exclusions that the agencies have added to the final rule are similar in nature to exclusions that were in the 2020 NWPR. The final rule's categorical exclusions from Clean Water Act jurisdiction simplify the process of defining jurisdiction, thus providing regulatory certainty and clarity. For more information on exclusions, see Section IV.C.7 of the Final Rule Preamble and Section 15 of the agencies' response to comments.

The agencies have also concluded that the 2020 NWPR’s definition of “prior converted cropland” extended prior converted cropland status beyond those areas the U.S Department of Agriculture (USDA) defines as prior converted cropland for purposes of the Food Security Act. In contrast, the final rule maintains consistency and compatibility between the agencies’ implementation of the Clean Water Act and the USDA’s implementation of the Food Security Act by providing that prior converted cropland under the Clean Water Act encompasses areas designated by USDA as prior converted cropland. The agencies find that the final rule’s treatment of prior converted cropland will add greater certainty and clarity compared to the 2020 NWPR.

Some commenters voiced support for exemptions (as opposed to exclusions). The 2020 NWPR did not provide exemptions, nor does the final rule. Section 404(f) of the Clean Water Act exempts certain activities from the prohibition against unpermitted discharges in section 301(a) of the Clean Water Act. This final rule does not make any changes to the Clean Water Act’s permitting exemptions, which are outside the scope of this rulemaking. See also Section 15.13 of the agencies’ response to comments.

4.2.1.3 Arguments that the 2020 NWPR limited the need for case-specific assessments of jurisdiction

Several commenters stated that the 2020 NWPR limited the need for widespread case-by-case determinations by providing clear jurisdictional categories of waters. Relatedly, multiple commenters asserted that the 2020 NWPR provided greater regulatory certainty than the case-by-case approach to determining jurisdiction under the pre-2015 regulatory regime, which the commenters generally described as confusing and/or inefficient.

Agencies’ Response: All definitions of “waters of the United States,” including the 2020 NWPR, have required some level of case-specific analysis. Consistent implementation of the final rule will be aided by improved and increased scientific and technical information and tools that both the agencies and the public can use to assist in determining whether waters are “waters of the United States.” See Final Rule Preamble Section IV.G.

Despite the claim that the 2020 NWPR improved clarity and predictability, for instance, by eliminating case-specific application of the significant nexus test (see 85 FR 22273), the agencies agree with the commenter who pointed out that the 2020 NPWR in fact inserted case-by-case analyses into every jurisdictional determination. This is due to the 2020 NWPR’s “typical year” metric, which was foundational to determining whether tributaries, wetlands, and lakes, ponds, and impoundments of jurisdictional waters were jurisdictional.

In addition, the 2020 NWPR provided that any ephemeral reaches that did not carry surface water flow once in a typical year along a pathway from a stream reach to a downstream traditional navigable water or territorial sea would render all upstream waters non-jurisdictional (see 85 FR 22277). Therefore, that rule often required the agencies to assess great lengths of tributary systems, which imposed an extraordinarily high burden of proof on the agencies.

For further discussion of the challenges associated with implementing the “typical year” concept, see Section IV.B.3.c.i of the Preamble to the Final Rule and the agencies’ response to comments in Section 4.2.3. See also the agencies’ response to comments in Section 1.3 (addressing regulatory certainty) and in Section 12.1.1 (addressing the final rule’s case-specific approach for certain jurisdictional determinations).

4.2.1.4 Arguments that the 2020 NWPR’s definitions facilitated ease of implementation

A commenter asserted that the definitions of “perennial,” “intermittent,” and “ephemeral” provided in the 2020 NWPR should be maintained because they were practical, could be applied consistently, and aligned with the Corps’ 1987 Wetlands Delineation Manual. The commenter also suggested that these definitions relied on agreed-upon scientific principles to establish a practical distinction, while at the same time recognizing that such distinction is ultimately a legal question since it delineates federal and state jurisdiction and impacts private property rights.

Agencies’ Response: While the agencies generally do not take issue with the regulatory definitions of “perennial,” “intermittent,” and “ephemeral” in the 2020 NWPR, the agencies have found that the use of the “typical year” metric made implementation of those terms as applied to that rule’s categories of “waters of the United States” difficult in practice. See Final Rule Preamble Section IV.B.3.i for more information about how the “typical year” metric was difficult to implement in practice under the 2020 NWPR. In addition, the Corps’ 1987 Wetlands Delineation Manual does not define the terms “perennial,” “intermittent,” or “ephemeral.”

As discussed in Final Rule Preamble Section IV.C.4.c.ii, the agencies have decided to explain directly the way that the relatively permanent standard should be implemented, rather than defining the phrase with the terms “perennial,” “intermittent,” and “ephemeral.” Adding these terms themselves to this rule could cause confusion and uncertainty, as there are many different definitions of these terms, some incorporating concepts involving seasonal flow or sources of flow, which the agencies decided not to incorporate into this rule. See also Final Rule Preamble Section IV.C.4.c and IV.G for further discussion about which tributaries are relatively permanent under the final rule.

4.2.1.5 Comments relating to EPA internal implementation survey

A commenter who disagreed with the agencies’ claims that the 2020 NWPR was difficult to implement stated that the Proposed Rule TSD’s discussion of an internal survey of 27 regional EPA staff lacked transparency and contained no discussion of Corps experience implementing the 2020 NWPR. The commenter encouraged the agencies to conduct outreach with Corps staff and the regulated community to better inform their assessment of the 2020 NWPR’s implementation.

Agencies’ Response: The difficulties with implementing the 2020 NWPR are inherent to that rule’s requirements. The implementation issues described in section 4.2.3 of the agencies’ response to comments and Final Rule Preamble Section IV.B.3.c. are based on feedback from EPA personnel, as documented in the TSD Section II.B.4, as well as feedback from Corps personnel and members of the public. The agencies conducted extensive public outreach on the proposed rule and provided opportunities for public comment. The

agencies’ decision to replace the 2020 NWPR was due in part to difficulties that both agencies experienced implementing that rule, as well as for the reasons articulated in Section IV.B.3 of the Preamble to the Final Rule.

4.2.1.6 *Arguments that the 2020 NWPR reduced burdens under the Clean Water Act*

Several commenters indicated that the 2020 NWPR led to fewer delays for their industries, reduced their permitting requirements, or made the permitting process more efficient. Other commenters stated that the 2020 NWPR reduced regulatory uncertainty and the financial burdens caused by that uncertainty. One commenter added that Corps interactions and site visits were more productive under the 2020 NWPR because Corps staff clearly understood the rule. A few commenters argued that the reduced permitting burden and improved efficiency they experienced under the 2020 NWPR helped their projects remain on schedule and within budget. In addition, one commenter stated that the 2020 NWPR returned the Clean Water Act section 401 certification process back to its original purpose, which they argued was to review potential impacts that discharges from federally permitted projects may have on water resources. They claimed that, under previous rules, the section 401 process hindered the agriculture industry and delayed or blocked critically important infrastructure projects. A municipal commenter stated that while the 2020 NWPR was in effect they were required to seek fewer permits, saving time and money.

Agencies’ Response: The agencies acknowledge that some commenters found the 2020 NWPR carried a lower administrative burden than previous regulatory regimes. The fact that substantially fewer waters were protected under the 2020 NWPR may have simplified compliance for many commenters, but in doing so it failed to achieve 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, as well as the goal of the Act to create a comprehensive scheme for protecting the nation’s waters.

As discussed in Final Rule Preamble Section IV.B.3.c, the agencies have found that the 2020 NPWR was difficult to implement and yielded inconsistent results. Moreover, even if the 2020 NWPR may in some respects have been perceived as easier to administer than some alternatives, this cannot—as the Supreme Court recently emphasized—result in consequences that are inconsistent with major congressional objectives, as revealed by the Clean Water Act’s language, structure, and objective. *See County of Maui v. Hawaii Wildlife Fund*, 140 S. Ct. 1462, 1477 (2020). See also the Economic Analysis for the Final Rule (discussing the final rule’s costs and benefits) and the agencies’ response to comments in Section 4.1.5.2 and Section 4.3.

4.2.2 Arguments that the 2020 NWPR was not clear or easy to implement

Several commenters asserted that the 2020 NWPR was not easy to implement and that it resulted in confusion or was applied inconsistently. A few commenters added that the 2020 NWPR increased uncertainty surrounding the permitting process.

In addition, a few commenters stated that the 2020 NWPR included definitions of stream flow (*i.e.*, “ephemeral,” “intermittent,” “perennial”) that were difficult to implement and required previous monitoring data and other hydrologic observations to establish jurisdiction and/or required Corps field

personnel to determine jurisdiction. One of these commenters stated that they observed “confusion and inconsistency resulting from these definitions.” A commenter added that this need for information and data was contrary to the prior administration’s claims that people could determine whether a stream or wetland was jurisdictional by “standing on their property.”

One commenter indicated that states and tribes experienced difficulties applying the “precipitation normalcy” concept and had expressed concerns over the limitations of documenting one-time conditions at the time of observation, accelerated changes in climate, and the need for extensive additional work using hydrologic modelling tools and advanced statistical analyses to conduct analysis in these complex conditions. The commenter also stated that based on their on-the-ground experience, states and tribes had indicated they lacked data, aerial photography, and access to other investments required to support the use of these tools in many locations, including (and perhaps especially) those in underserved/under-resourced communities.

A state agency asserted that the 2020 NWPR created potential complications in the state’s interactions with the Corps regarding implementation of the state general permit.

Another commenter indicated that a preliminary review of approved jurisdictional determinations (AJDs) issued by the Corps showed that the “typical year” concept was not applied in a consistent manner between Corps districts and that data to evaluate it was not readily available.

Agencies’ Response: The agencies agree with the commenters who stated that the 2020 NWPR was not easy to implement, that it resulted in confusion or was inconsistently applied, and that it added to uncertainty in the permitting process. The agencies recognize that the “typical year” requirements for tributaries under the 2020 NWPR made it difficult in practice to implement the definitions relating to stream flow and required previous monitoring and other hydrologic observations and/or Corps field visits, undermining any claims that the 2020 NWPR enabled people to determine if a stream or wetland was jurisdictional merely from “standing on their property.” The agencies also acknowledge the 2020 NWPR’s potential for complications regarding implementation of state general permits.

For more details on the difficulties of implementing the 2020 NWPR, see Section IV.B.3 of the Final Rule Preamble, Sections 4.2.1.1 and 4.2.3 of the agencies’ response to comments, and Section II.B.iv of the TSD.

4.2.3 Typical Year Analysis

A few commenters expressed general support for the definition and/or use of the typical year analysis as presented in the 2020 NWPR, stating that it created a workable foundation for the regulated community. They added that the “typical year” analysis allowed for differences in regional climatology and hydrology to be applied. One commenter stated that the “typical year” definition was “acceptable,” while recommending that a statistical element could add certainty to the phrase “normal range of precipitation” and that the phrase “particular geographic area” should include reference to distances and/or ecoregions or a combination of the two.

Several commenters generally opposed the typical year analysis, suggesting that it was unclear, difficult to apply, and applied inconsistently. A few commenters added that the typical year analysis required extensive additional work using hydrologic models and advanced statistical analyses, arguing that these tools, expertise, and data were not readily available to many landowners, particularly in underserved communities.

Several commenters argued that the definition of “typical year” lacked specificity and led to uncertainty or inconsistent application. For example, they stated that the definition for “typical year” failed to specify which time period was to be averaged (*e.g.*, seasonal, annual, other) in calculating the normal periodic range and, consequently, a given stream could qualify as intermittent or not depending on whether a given year’s (or season’s) precipitation was deemed typical or not. One commenter asserted that the uncertainty involved in the typical year analysis under the 2020 NWPR led to the need for case-by-case analyses for many JDs. Another commenter argued that the use of the typical year metric for surface water connection would have allowed many ephemeral and intermittent waters with sufficient connection at limited times of year to go unidentified, and therefore fail to qualify for federal jurisdiction.

One commenter contended that what matters to water quality and ecosystem health are the extreme values, not the average used in the typical year analysis. They asserted that other regulations rely on low stream flow to determine limits of pollution (*e.g.*, National Pollutant Discharge Elimination System (NPDES) and Total Maximum Daily Loads (TMDLs)). Therefore, the commenter argued, the typical year analysis is “irrelevant to the threshold determination of jurisdiction under the Clean Water Act and has no significant relationship to the purposes of the Act.”

Several commenters asserted that the rolling 30-year approach to determining typical year does not allow flexibility to account for climate change.

Agencies’ Response: The agencies agree with the commenters who have concluded that the “typical year” analysis is not workable in practice. The agencies have concluded that the methodology described in the 2020 NWPR’s preamble for determining precipitation in a typical year makes it difficult to use these data to inform jurisdiction. For example, surface water flow observed during the “wetter than normal” conditions described in the methodology would not reveal whether flow would occur during a typical year. Further, when flow is not observed, precipitation data from the previous three months would not indicate whether flow under typical year conditions may be met at a different point in the year, so the agencies could not rely on that data to make a jurisdictional determination. The agencies have also found that the use of NOAA precipitation data to assess whether surface water flow occurs in a typical year presents implementation challenges when the nearest available weather stations are not close to the site in question. The agencies agree that surface water connections are often not apparent from visual field observation alone and that to assess the presence of a surface water connection as specified in the 2020 NWPR, agency staff must often expend substantial time and resources to try to obtain ancillary data to determine flow conditions at a particular site in a typical year.

For the same reasons, the agencies disagree with the commenters who have concluded that the typical year analysis presented in the 2020 NWPR created a workable foundation for the regulated community. The agencies agree that the concept of precipitation normalcy is valid in certain contexts, such as to inform determinations as to the presence of a wetland.

However, in many important contexts the available tools, including the tools the 2020 NWPR recommends, cannot reliably demonstrate the presence of surface water connections in a typical year.

The agencies agree that it is important to consider extreme flows and not just average flows, and that the typical year standard is irrelevant to the threshold determination of jurisdiction under the Clean Water Act and has no significant relationship to the purposes of the Act.

The agencies agree that, although the concept of “typical year” factors in long-term climatic changes over time to some degree by considering a thirty-year rolling period of data, the 2020 NWPR did not allow the agencies flexibility to consider other time intervals when appropriate to reflect effects of a rapidly changing climate, including positive trends in temperature, increasing storm events, and extended droughts.

For more details on the difficulties of implementing the “typical year” metric, see Section IV.B.3.c.i of the Final Rule Preamble, and Section II.B.iv of the TSD.

4.3 2020 NWPR – Environmental Harms and Cultural Impacts

4.3.1 Examples of environmental harm

Many commenters provided examples of environmental harms that they indicated occurred, or could have occurred, under the 2020 NWPR. Examples of environmental and cultural harms that impacted, or could have impacted tribes, are summarized in Section 4.3.2.

4.3.1.1 Comments regarding specific losses of federal protection under the 2020 NWPR

One commenter indicated they had conducted an analysis that estimated that 2.4 million stream miles (23% of stream channels by length in the conterminous United States) did not have Clean Water Act protection under the 2020 NWPR. The commenter stated that this percentage is much higher in certain areas, such as the Southwestern United States. This commenter provided a specific example from their analysis for Colorado, with a map showing that over half of Colorado’s streams are ephemeral and therefore were excluded under the 2020 NWPR. The commenter also provided a map of Colorado wetlands that were at risk under the 2020 NWPR and stated that non-floodplain wetlands, which they claimed were also excluded under the 2020 NWPR, cover 449,428 acres in Colorado (22% of the state’s remaining wetlands).

One commenter estimated that the 2020 NWPR denied federal protection for approximately 200 acres of wetlands near the Savannah National Wildlife Refuge in South Carolina.

One commenter indicated they had calculated that the following water resources in the Southeast likely lost protection under the 2020 NWPR:

- In the Charleston Harbor watershed, nearly 160,000 acres of wetlands likely lost protection under the 2020 NWPR, with 60,000 acres of wetlands left vulnerable in the Caluda and Congaree River watersheds.
- In North Carolina’s Cape Fear and Neuse River watersheds, more than 800,000 acres of wetlands were vulnerable to losing coverage.
- Some 162,149 acres of wetlands were similarly vulnerable in Georgia’s Chattahoochee River watershed, as were over 100,000 acres in Virginia’s James River and Rappahannock River watersheds, which the commenter stated are vital to water quality in the Chesapeake Bay.
- In Alabama’s Black Warrior River basin, over 121,000 acres of wetlands most likely lost coverage, as did nearly 54,000 acres in the Cahaba River watershed.
- Over 23,400 acres were made vulnerable in Tennessee’s Wolf River basin, as were more than 17,000 acres in the Duck River watershed.

The commenter concluded that more than 217 million Americans depend for their drinking water on sources threatened by the 2020 NWPR, including 35 million people in the South, or three out of four Southerners.

A commenter indicated they had modeled the potential impact of the 2020 NWPR on five watersheds. The commenter asserted that their study showed that nearly 94% of all wetlands and flowlines in Arizona’s Upper San Pedro Watershed would lose protection under the 2020 NWPR, and more than 80% of all wetlands and nearly 25% of all flowlines within the Upper James River Watershed in South and North Dakota could have been classified as non-jurisdictional under the 2020 NWPR. This study was also cited by another commenter.

A few commenters indicated they had conducted an analysis to determine the areal extent of wetlands not protected under the 2020 NWPR, as well as potential implications for ecosystem services. The commenters estimated that approximately 3.5 million acres (55%) of Wisconsin’s wetlands were not protected under the 2020 NWPR, including: 48% of wetlands important for flood mitigation, 56.5% of wetlands important for phosphorous retention, 79% of wetlands important for nutrient transformation, and 19% of wetlands important for surface water provision.

One commenter cited an analysis that estimated that 40-90% of streams in multiple southeastern watersheds lost protection.

One commenter estimated that as much as 202,244 acres of wetlands located behind levees in Missouri were excluded from jurisdiction under the 2020 NWPR because they are separated from jurisdictional waters by “upland or by dikes, barriers, or similar structures.” The commenter indicated that state laws offered no additional protection. The commenter also discussed the ecological functions of these wetlands, including providing flood control, habitats, and improving water quality.

One commenter provided maps that they indicated show the impacts of the 2020 NWPR in Colorado, which the commenter stated, “highlight that the 2020 Rule leaves a significant federal protection gap for critical water ecosystems such as ephemeral and headwater streams, riparian areas, wetlands, fens, and prairie potholes.”

A commenter outlined additional environmental harms they indicated had been caused by the 2020 NWPR in other states, including the following arguments/estimates made by the commenter for various states/regions:

- In Missouri, large numbers of streams that briefly flow subsurface and then reemerge would have lost protection and their exclusion could impact downstream waterways such as the Missouri and Meramec Rivers.
- Texas coastal prairie wetlands, which are crucial the health of Lower Galveston Bay, would have lost protection.
- Colorado would have lost protection for ephemeral streams, reservoirs, ditches, and canals that receive pollution discharges and flow into Boulder Creek. The commenter added that Boulder Creek is the primary drinking water supply for the communities of Boulder, Louisville, Lafayette, Erie, Superior, and Nederland, Colorado.
- In the Great Lakes Region, protection would have been lost for an estimated 500 to 1,000 miles of ephemeral and ditched streams that flow into the Niagara River, the channel that connects Lake Erie and Lake Ontario.
- In North Carolina’s Cape Fear Basin, protection would have been lost for pocosins, Carolina Bays, and ditched and ephemeral streams that receive animal waste pollution discharges.
- In Washington, ephemeral streams that the commenter stated provide habit and water supply for species listed as threatened under the Endangered Species Act, such as Chinook salmon, coho salmon, chum salmon, and steelhead trout, as well as ditched streams that the commenter stated receive animal waste, industrial, and municipal pollution discharges in the Puget Sound Basin, would have lost protection.
- In Oregon, an estimated 9,165 miles of ephemeral streams in the Rogue River Basin that the commenter stated provide drinking water for the region, as well as habitat and spawning grounds for federal threatened Southern Oregon/Northern California Coast coho salmon and steelhead, would have lost protection. In addition, the commenter estimated that numerous canals and ditches that they believe receive pollution discharges that are hydrologically connected to, and influence the quality of, the Rogue River would have lost federal protection. The commenter added that the Agate Desert vernal pools would have lost protection; the commenter stated these are the only vernal pools in Oregon and they support unique species, such as the vernal pool fairy shrimp listed as threatened under the Endangered Species Act.
- In California, the commenter stated more than 40% of the streams that flow into and influence the water quality of San Francisco Bay and provide spawning grounds for endangered Chinook salmon would have lost protection.
- In Idaho, all of the waters located within a 5,185-square-mile “closed basin” area in the upper Snake River Basin, as well as 14,866 miles of ditches, ditched streams, and canals that the commenter stated receive pollution discharges and flow into the Snake River, would have lost protection. The commenter stated that these waters are connected to the Snake River by subsurface flows and springs and include premiere trout streams and critical habitat for federally-threatened bull trout.
- In Montana, an estimated 30,297 miles (85%) of the streams in the Upper Missouri River Basin that the commenter stated feed into and impact water quality in the Big Hole River (world-class trout fishery), Beaverhead River (premiere brown trout fishery), Jefferson River (Westslope cutthroat habitat and drinking water supply), Madison River (Yellowstone cutthroat and

Westslope cutthroat trout habitat), and the Gallatin River (Yellowstone Park and Downstream Recreation) would have lost protection.

One commenter provided several examples of environmental harms that they indicated had impacted, or potentially impacted, various states from the 2020 NWPR. These examples are summarized below:

- The commenter estimated that because of the 2020 NWPR, 25-45% of New Mexico's stormwater general permits and 50% of its individual permits were no longer required. As a result, the commenter asserted that pesticides, paint solvents, acidic wastewater, and other pollutants could be discharged into New Mexico waters—including the Tijeras Arroyo, Gila River, and Rio Hondo watersheds—without regulatory limit or oversight.
- In an example of how the 2020 NWPR increased risks of pollution from upstream states, the commenter asserted that upstream pollution may have affected Maryland because the health of Maryland's Chesapeake Bay relies upon water protection in six upstream jurisdictions—including states where the 2020 NWPR created a regulatory gap in protection, as well as other states such as West Virginia and Delaware.
- As another example of potential interstate pollution, the commenter asserted that New York State does not regulate smaller wetlands because it relies on the Clean Water section 404 program. The commenter added that many of New York's wetlands could be subject to filling and, if filled, would no longer function as filters to reduce pollution before water flows from New York into New Jersey.
- The commenter also claimed that California was subject to harm from increased pollution in upstream states flowing to California via interstate waters, such as the Colorado River, which they stated is an important source of drinking water, and the Amargosa River, which they claimed is ephemeral for the majority of its length and is subject to land use activities that may discharge pollutants, such as Nevada's largest working dairy farm and hazardous waste disposal.
- The commenter argued that the 2020 NWPR subjected Michigan to harm given that its water quality depends on adequate protection in other Great Lakes states. As an example, the commenter stated that, following the promulgation of the 2020 NWPR, at least two Great Lakes states, Ohio and Indiana, initiated legislative action to further reduce state water quality protection for waters excluded by the 2020 NWPR.
- The commenter argued that habitats for scores of threatened and endangered species in California and other states faced increased degradation under the 2020 NWPR. They stated that this injured California because wildlife is “publicly owned” and it is the “state's policy to conserve and maintain wildlife for citizens' use and enjoyment [and] for their intrinsic and ecological values.”
- The commenter also claimed that North Carolina was faced with a potentially large loss of wetlands under the 2020 NWPR and the resulting decline of in-state water quality and loss of wildlife habitat put at risk both the 70% of rare and endangered plants and animals statewide that rely on these wetlands, as well as North Carolina's valuable commercial and recreational fish stocks.

One commenter cited a study that they indicated had found that at least 30% of streams in each Montana ecoregion are ephemeral, claiming that these waters were not jurisdictional under the 2020 NWPR.

One commenter stated that the 2020 NWPR caused, or could cause, environmental harm to the country's national parks because of loss of protection for waterbodies upstream of the parks. The commenter

asserted that many national parks already have degraded water quality and the 2020 NWPR could have exacerbated those problems. For example:

- The commenter stated that Lowell National Historic Park in Massachusetts is threatened by upstream wastewater discharges, as well as urban and suburban land use, on the Merrimack River. The commenter cited an analysis that estimated that 30-51% of the streams and 25% of the wetlands in the Merrimack River Watershed lost Clean Water Act protection under the 2020 NWPR. The commenter argued that this loss of protection exposed Lowell National Historic Park to an increased risk of upstream water quality impairments.
- The commenter asserted that John H. Chafee Blackstone River Valley National Heritage Corridor (the Corridor), in Massachusetts and Rhode Island, was also put at risk from potential upstream pollution because 26-46% of the streams and 16% of the wetlands in the watershed are ephemeral and lost protection under the 2020 NWPR. The commenter argued that this loss of protection exposed the Corridor to increased risk of water quality degradation.
- The commenter stated that the St. Croix National Scenic Riverway in Wisconsin and Minnesota was put at significant risk of additional water pollution as a result of the 2020 NWPR. The commenter estimated that 64-77% of the streams in the watershed of the Namekagon River (a St. Croix tributary in the Wisconsin part of the Scenic Riverway) that were protected before the 2020 NWPR are ephemeral, and 26% of the watershed's wetlands were unprotected under the 2020 NWPR.
- The commenter stated that Everglades National Park and Big Cypress National Preserve in Florida, where waters are nearly 100% impaired, were detrimentally affected by the 2020 NWPR due to upstream land development and agricultural practices. The commenter stated the parks were also threatened by the 2020 NWPR because that rule failed to protect 81% of the wetlands in the parks' watershed.
- The commenter stated that the Corps issued AJDs that classified ephemeral streams near Chaco Culture National Historic Park in New Mexico as non-jurisdictional. The commenter stated that the Bureau of Land Management had previously warned that there may be negative impacts to surface water quality from oil and gas development within the park's watershed. The commenter argued that, by allowing developers to move forward with projects in ephemeral streams in the watershed, water quality in the park could be harmed.
- The commenter stated that degradation of park waters by the 2020 NWPR could have threatened wildlife habitats and species, including in the Obed Wild and Scenic River, which provides habitat for the federally endangered Alabama lampshell mussel and the federally threatened spotfin chub.

One commenter argued that the categorical exclusion of ephemeral streams under the 2020 NWPR was particularly harmful in states such as Kentucky, because ephemeral streams can account for as much as 55-80% of total channel length in mountainous areas such as the Appalachians. The commenter argued that these headwater streams are often ephemeral and contribute substantially to aquatic biodiversity and create unique habitats, among other important functions.

One commenter estimated that approximately 30.6% (1.3 million acres) of wetlands in North Carolina may have lost federal protection under the 2020 NWPR, adding that these isolated wetlands provide habitat for many rare state- and federally-listed species as well as Species of Greatest Conservation Need across North Carolina.

One commenter cited a 2019 estimate by New York City that 26% of freshwater wetlands, 58% of lakes and ponds, 17 miles of streams in parks, and 14 miles of streams on private property in New York City would be excluded under the 2020 NWPR as proposed. The commenter argued that, because of the City's highly developed landscape, small ephemeral and headwater streams play an outsized role in flood mitigation, water quality, temperature regulation, and wildlife habitat in downstream traditional navigable waters.

This commenter also stated that the watersheds that support New York City's drinking water supply were negatively impacted by the 2020 NWPR. The commenter cited estimates that under the 2020 NWPR, 45% of streams and rivers and 5,300 acres of wetlands and waterbodies adjacent to them lost protection in the New York City Watershed and that 30% (3,800 acres) of wetlands and waterbodies in the West of Hudson Watershed and 14% (3,600 acres) of wetlands and waterbodies in the East of Hudson Watershed were non-jurisdictional or under uncertain regulatory status under the 2020 NWPR.

One group of commenters cited an article stating that half of Florida's twelve million acres of wetlands were jeopardized under the 2020 NWPR.

Agencies' Response: The agencies share the commenters' concerns that substantial portions of the nation's waters were not federally protected by the 2020 NWPR. As described in Final Rule Preamble Section IV.B.3, the 2020 NWPR significantly reduced Clean Water Act protections over waters, as indicated by data on approved jurisdictional determinations and Corps section 404 permits that showed a large drop in the scope of waters protected.

The waters that lost Clean Water Act protection under the 2020 NWPR included ephemeral streams and many streams, wetlands, and other types of waters that serve a variety of important functions for protection of water quality in downstream traditional navigable waters, the territorial seas, or interstate waters. See Final Rule Preamble Section IV.A for a discussion of key functions provided by tributaries, wetlands, impoundments, lakes, ponds, streams, and other types of waters that restore and maintain the chemical, physical, and biological integrity of paragraph (a)(1) waters. See Sections I and III of the TSD for additional supporting information on this topic. The agencies caution that determinations regarding the jurisdictional status of any specific water are outside the scope of this rulemaking. The agencies will assess jurisdiction under the final rule on a case-specific basis.

The agencies have not conducted an independent analysis to verify each of the comments on specific mileage, acreage, or percentages of aquatic resources that lost federal protection under the 2020 NWPR but have carefully reviewed the concerns identified and the underlying analyses that commenters cited and found them generally consistent with the agencies' own findings about the impacts of the 2020 NWPR. These examples illustrate the quality and importance of the waters that lost federal protection under the 2020 NWPR. As commenters emphasized, waters that the 2020 NWPR categorically excluded, such as ephemeral streams and their associated wetlands and wetlands that did not meet the 2020 NWPR's adjacency criteria, provide critical ecosystem services. The absence of Clean Water Act protections for such resources and any subsequent unregulated and unmitigated

impacts to such resources would have caused cascading, cumulative, and substantial downstream harm. See also the agencies’ response to comments in Section 4.1.4.1.

4.3.1.2 Comments regarding jurisdictional determinations (JDs), including approved jurisdictional determinations (AJDs)

A commenter indicated that an analysis of a sample of 2020 NWPR-era Corps AJDs found that 563 of those determinations resulted in the elimination of Clean Water Act protection from 11,371 acres of wetlands and 580 miles of streams. The commenter also indicated that the analysis had concluded that the 2020 NWPR generated hundreds of AJDs for waters that were determined to be non-jurisdictional located within watersheds that flow across state boundaries, threatening downstream states with out-of-state pollution that they are unable to regulate.

Another commenter discussed environmental harms in New Mexico that they indicated resulted from the 2020 NWPR. As of June 30, 2021, the commenter stated, 195 of 197 AJDs in New Mexico under the 2020 NWPR found that the subject waters were not “waters of the United States,” providing several examples:

- The commenter stated that one of those AJDs excluded an ephemeral stream from Clean Water Act protection at the Los Alamos National Laboratory, which, the commenter stated, may threaten the water supply for the City of Santa Fe.
- The commenter stated that another of those AJDs in New Mexico excluded ephemeral streams and two open water mine pits at the United Nuclear Corporation St. Anthony Uranium Mine, which the commenter argued degrades the water quality of the Rio Grande and its tributaries.
- The commenter also stated that the 2020 NWPR excluded all waters within a 14,605 square mile “closed basin” within the Rio Grande Basin, as well as roughly 90% of streams and rivers in New Mexico outside of that “closed basin.” The commenter contended that these waters contribute significant flows to, and influence the water quality of, the Rio Grande and its tributaries.

The same commenter indicated they had reviewed an agency database showing Clean Water Act AJDs. As evidence of environmental harm, the commenter stated their review of these sources showed that many waters were not protected under the 2020 NWPR. Specifically, the commenter stated that:

- As of June 29, 2021, the database showed that out of the 14,435 waters associated with Clean Water Act AJDs under the 2020 NWPR nationwide, 13,290 waters were found to be non-jurisdictional and only 1,145 were found to be jurisdictional. The commenter also stated that, as of June 30, 2021, the database showed that out of the 31,520 waters associated with Clean Water Act AJDs under the 2020 NWPR nationwide, 23,819 waters were found to be non-jurisdictional and only 7,701 were found to be jurisdictional.
- As of June 29, 2021, in California, there were 2,129 waters associated with AJDs made under the 2020 NWPR, with 2,107 waters found to be non-jurisdictional and only 22 waters found to be jurisdictional. The commenter went on to say that 1,717 waters were from AJDs that were made between January 20, 2021, and June 16, 2021, and resulted in the exclusion of large numbers of wetlands, ephemeral streams, and other aquatic resources from Clean Water Act protection. The commenter added that, as of June 30, 2021, there were 2,368 total waters associated with 2020

NWPR determinations, with 2,292 waters found to be non-jurisdictional and 76 found to be jurisdictional.

- As of June 29, 2021, in Missouri, there were 191 total waters associated with AJDs under the 2020 NWPR, with 170 waters found non-jurisdictional and only 21 waters found to be jurisdictional. The commenter stated that 106 of those waters were from AJDs that were made between January 20, 2021, and June 16, 2021, and resulted in the exclusion of large numbers of wetlands, ephemeral streams, and other aquatic resources from Clean Water Act protections. The commenter added that, as of June 30, 2021, there were 473 total waters associated with 2020 NWPR determinations, with 374 waters found non-jurisdictional and 99 waters found jurisdictional.

One commenter argued that developers and other project proponents applied for AJDs at a “record-setting pace” while the 2020 NWPR was in effect. As an example, the commenter stated that, as of July 21, 2021, Georgia’s Savannah Army Corps District had received over 400 requests for AJDs since June 22, 2020, when the 2020 NWPR went into effect, but that prior to implementation of the 2020 NWPR, the Savannah District had received approximately 50 requests for AJDs per year. The commenter added that, just in the Coastal Branch, Savannah District staff reviewed over 3,300 acres of wetlands and determined that they were non-adjacent under the 2020 NWPR’s definition of that term and therefore were non-jurisdictional.

Several commenters referenced the Twin Pines heavy metal sand strip mine as an example of environmental harm that could result from the 2020 NWPR. The commenters noted that the Twin Pines mine, proposed on the border of the Okefenokee National Wildlife Refuge in Georgia, sought and obtained new AJDs shortly after the 2020 NWPR took effect. The commenters stated that the new AJDs excluded hundreds of acres of wetlands from Clean Water Act protection. The commenters stated that the destruction of these wetlands would likely cause irreparable damage to the hydrology and habitats of the refuge and a nearby National Wilderness area.

One commenter reviewed AJDs posted on the agencies’ websites and provided descriptions for the following examples of potential environmental harm from projects that were given AJDs under the 2020 NWPR. The commenter also generated a table with additional examples in the table attached to the letter. The commenter cited determinations including:

- A determination excluding multiple ephemeral streams for the Double E Pipeline between New Mexico and Texas. The commenter stated that one of the entities involved in this project was a defendant in an enforcement action brought by the United States and North Dakota after a pipeline spill of more than 700,000 gallons of produced water.
- A determination excluding a 350-acre wetland in Walworth County, South Dakota identified as an electric transmission structure.
- A determination excluding seven wetlands totaling 43.9 acres in Hardeeville, South Carolina, described as the largest development in the town’s history, including 9,500 homes and 1.2 million square feet of commercial space.
- A determination excluding six wetlands totaling 179.56 acres in Fort Myers, Florida, identified as the Youngquist Trade Center. In 2018, a public notice for a permit application for this project indicated that approximately 85 acres of onsite wetlands were avoided as part of the permit application review process. The commenter stated that, presumably, for any of those avoided

wetlands covered by the new JD, the AJD would have enabled them to be destroyed without Corps review.

- A determination excluding 355 acres of wetlands in Fairbanks, Alaska. The commenter stated that the Corps had denied protection of these waters, despite a prior determination that the wetland “directly abutted” a relatively permanent tributary to the Chena River (a traditional navigable water that runs through downtown Fairbanks and is used for salmon fishing) and a finding that the wetland had a “significant nexus” to the river. The commenter stated that the basis for the determination under the 2020 NWPR was that the wetland is separated from the river by an artificial berm that does not allow a direct surface water connection in a typical year.
- A determination excluding 117 acres of wetlands in McKinley, Minnesota as part of the ArcelorMittal Minorca Mine, an open pit ore mine. The commenter cited a media report stating that the Minorca Mine had paid over \$300,000 in fines for tailings spills in 2013-14.

One commenter indicated they had surveyed data from two Midwestern Corps districts and found an increase in the number of applications for AJDs as opposed to Preliminary Jurisdictional Determinations (PJDs), and likewise found a substantial increase in findings that waters were not jurisdictional.

Some commenters asserted that the agencies’ analyses showed that there was a rush by project proponents to take advantage of the 2020 NWPR’s reduced protections. Commenters often restated the statistics from the agencies’ analysis, including, but not limited to: that the agencies found there was an increase of 183% to 326% in determinations carried out as AJDs rather than PJDs; that the agencies acknowledged that at least 333 projects that would have been subject to Clean Water Act section 404 permitting requirements prior to the 2020 NWPR promulgation no longer were; that the agencies found a tenfold increase in non-jurisdictional findings for individual streams in Arizona and a thirtyfold increase in New Mexico; or that the agencies stated that categorical exclusion of ephemeral streams from jurisdiction by the 2020 NWPR “disproportionately impacts tribes and population groups of concern in the arid West” and “may have disproportionately exposed tribes to increased pollution and health risks.”

Some commenters stated that the agencies’ data show that the rate of waters found to be non-jurisdictional was approximately 39% higher under the 2020 NWPR than it was in the approximately two-year period prior to the 2020 NWPR. In addition, some commenters stated that the agencies found that, under the 2020 NWPR, there had been a threefold (338%) increase from 2019-2020 and a fourfold (412%) increase from 2018-2019 in the number of projects being determined to not require Clean Water Act section 404 permits. The commenters contended that these metrics would not capture all projects that were non-jurisdictional because of the categorical exclusions established under the 2020 NWPR.

As evidence of environmental harm, several commenters also cited the Corps’ assessment that found 76% of the AJDs to be non-jurisdictional while the 2020 NWPR was in effect.

Agencies’ Response: The agencies agree that, according to a review of jurisdictional determinations completed before and during the period in which the 2020 NWPR was in effect, the probability of finding water resources to be non-jurisdictional increased greatly while the 2020 NWPR was in effect, and that the harmful effects of that rule were more severe for certain water features and in certain geographic areas. While the agencies are not opining here on the jurisdictional status of particular sites or locations, they acknowledge the many examples provided by commenters that described actual and potential harms from the 2020 NWPR while that rule was in effect. The agencies agree that the arid West,

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including Arizona and New Mexico, suffered disproportionate harms from losses of protection under the 2020 NWPR because in that region, many waters flow only in direct response to precipitation. This loss of protection carries concerning implications for water quality and for the agencies' ability to accomplish the objective of the Clean Water Act through a "comprehensive" federal program of pollution control. Section IV.B.3 of the Preamble to the Final Rule outlines the harms the agencies found when the 2020 NWPR was reviewed as a part of this rulemaking process and in response to the E.O. 13990 review process. TSD Section II.B.1.c provides more details on the environmental harms caused, and potentially caused, by the 2020 NWPR and discussion of how the agencies have concluded that the arid West was particularly at risk.

Some commenters provided data and analysis related to JDs issued by the Corps after the 2020 NWPR was effective, such as data sets comparing JDs under the 2020 NWPR and prior regulatory regimes, including the pre-2015 regulatory regime. The agencies have not conducted an independent analysis to verify each of the comments providing their own estimates of the numbers or percentages of aquatic resources that lost federal protection under the 2020 NWPR. However, the agencies have carefully reviewed the concerns identified and the underlying analyses cited and found them generally consistent with the agencies' own findings about the impacts of the 2020 NWPR. These examples illustrate the quality and importance of the waters that lost protection under the 2020 NWPR. As commenters emphasized, waters that the 2020 NWPR categorically excluded, such as ephemeral streams and their associated wetlands and wetlands that did not meet the 2020 NWPR's adjacency criteria, provide critical ecosystem services. The absence of Clean Water Act protections for such resources and any subsequent unregulated and unmitigated impacts to such resources would have caused cascading, cumulative, and substantial downstream harm.

The agencies also generally agree with commenters that the 2020 NWPR could potentially have made it difficult for downstream states to protect their water quality. Given the limited capacity of many states and tribes to regulate waters more broadly than the federal government and limited authority under state and tribal law, the narrowing of federal jurisdiction would mean that many discharges into the newly non-jurisdictional waters would no longer be subject to regulation, including permitting processes and mitigation requirements designed to protect the chemical, physical, and biological integrity of the nation's waters. The agencies have heard concerns from a broad array of co-regulators and stakeholders, including states, tribes, scientists, and non-governmental organizations, that corroborated the agencies' data and indicated that the 2020 NWPR's reduction in the jurisdictional scope of the Clean Water Act would cause substantial environmental harms, including to the quality of paragraph (a)(1) waters, that states lack the authority or resources to address.

4.3.2 Examples of environmental and cultural harms to tribes

Some commenters provided examples of environmental harm or cultural impacts to tribes that occurred, or could have occurred, under the 2020 NWPR. A summary of these impacts and harms is provided below.

Several commenters emphasized that tribes place greater significance on protecting and maintaining water quality than the general population and that tribes rely on water and water-dependent resources for cultural and traditional purposes. The commenters stated that tribes require water quality protection for wildlife, plants, and habitats because subsistence fishing, hunting, and foraging are part of tribal culture. The commenters also indicated that tribes require water quality protection to support habitats that allow them to continue cultural practices, such as fashioning implements from bone, making baskets from specific trees, using leather from specific animals, and using specific plants for traditional medicine, food, and ceremonies.

Several commenters provided examples of environmental harms that they indicated occurred, or could have occurred, under the 2020 NWPR that impacted, or could have impacted, tribes.

- One commenter estimated that the 2020 NWPR removed protection for 86% of New Mexico’s water and over 90% of the Pueblo of San Felipe’s waters.
- One commenter stated that the 2020 NWPR removed protections from 94% of stream miles in the Jemez watershed and 87% of stream miles on Pueblo of Jemez trust lands. The commenter argued that, without Clean Water Act protection, the Pueblo is subject to pollution from permitted and unpermitted upstream activities, including wastewater treatment systems and recreational activities.
- One commenter stated that the 2020 NWPR removed protections from 79-97% of the Pueblo of Laguna’s waters. The commenter contended that without Clean Water Act protection, the Pueblo is subject to pollution from permitted and unpermitted upstream activities such as mining and wastewater treatment systems.
- One commenter stated that, under the 2020 NWPR, Clean Water Act protection was revoked for the waters on the Rosemont Mine site in the Santa Rita Mountains of southern Arizona. The commenter stated that this loss of protection “threatens irreparable harm” to the Tohono O’odham Nation and the Pascua Yaqui Tribe.

Agencies’ Response: The agencies recognize that water and water-dependent resources are critical for many tribes for all the reasons the commenters describe, and that losses of protection under the 2020 NWPR had, or could have had, detrimental impacts on the resources on which tribes depend. The agencies have not conducted an independent analysis to verify each of the commenters providing their own estimates of the numbers or percentages of aquatic resources that lost federal protection under the 2020 NWPR but have carefully reviewed the concerns identified and the underlying analyses that commenters cited and found them generally consistent with the agencies’ own findings about the impacts of the 2020 NWPR. These examples illustrate the quality and importance of the waters that lost protection under the 2020 NWPR. The absence of Clean Water Act protections for such resources and any subsequent unregulated and unmitigated impacts to such resources would have caused cascading, cumulative, and substantial downstream harm, including the potential for environmental and cultural impacts to tribes.

During the agencies’ tribal consultation and coordination for this rulemaking process, tribes overwhelmingly indicated they lack the independent resources and expertise to protect their waters and therefore rely on Clean Water Act protections. See Summary of Tribal Consultation and Coordination, available in the docket for this rule. This feedback is

consistent with the concerns expressed during the 2020 NWPR rulemaking process. *See, e.g.,* 85 FR 22336-22337 (“[M]any Tribes may lack the capacity to create a tribal water program under tribal law, to administer a program, or to expand programs that currently exist. Other tribes may rely on the Federal government for enforcement of water quality violations . . .”). Given the limited capacity of many tribes to regulate waters more broadly than the federal government and limited authority under tribal law, the narrowing of federal jurisdiction would mean that many discharges into the newly non-jurisdictional waters would no longer be subject to regulation, including permitting processes and mitigation requirements designed to protect the chemical, physical, and biological integrity of the nation’s waters. The agencies have heard concerns from a broad array of commenters, including tribes, that corroborated the agencies’ data and indicated that the 2020 NWPR’s reduction in the jurisdictional scope of the Clean Water Act would cause significant environmental harms that states and tribes lack the authority or resources to address.

4.3.3 Examples that question, contest, or criticize the agencies’ assertions of environmental harm

A few commenters provided specific examples that question, contest, or criticize the agencies’ assertions of environmental harm under the 2020 NWPR. These examples are summarized below. Many commenters provided generalized criticism of the agencies’ assertions of environmental harm under the 2020 NWPR, and those comments are summarized in Section 4.1.

One commenter pointed to the construction of a farm pond in Illinois to illustrate their argument that the agencies’ claims of environmental harm from the 2020 NWPR were speculative and misleading. The farm pond was one of 333 projects analyzed by the agencies that did not require a permit. The commenter stated that the agencies’ reliance on this pond as part of their justification was “mystifying” because: (1) the agencies did not explain why they believed construction of this pond would have required a permit before the 2020 NWPR, but no longer did under the 2020 NWPR, and (2) the farmer who owned the land coordinated with USDA and Corps staff over an extended period of time and eventually rescoped his proposed project to avoid impacting water resources.

One commenter cited 12 Iowa projects on the agencies’ list of 333 projects that the commenter stated would have required section 404 permitting prior to the 2020 NWPR but would not have required a permit under the 2020 NWPR. The commenter stated that their examination exposed that “this assertion was based on the absence of federal control over the activities rather than any actual evaluation of the projects for actual water quality degradation.” The commenter estimated that half of the 12 Iowa projects were water quality projects, including such features as grassed waterways, isolated wetlands, and ephemeral drains, and projects such as constructed conservation wetlands, grade stabilization, and sediment control basins. The commenter argued that the use of these examples as justification for the proposed rule demonstrates the “capriciousness of the agencies’ decision rather than any semblance of reasoned scientific analysis.”

One commenter asserted that the agencies mischaracterized the impact of the 2020 NWPR on arid states such as New Mexico and Arizona. This commenter stated that the agencies suggested in the proposed rule’s TSD that the 2020 NWPR removed Clean Water Act jurisdiction over certain waters in New

Mexico, including nine closed basins, despite New Mexico’s previous comments that certain waters, including the nine closed basins, had historically been treated as non-jurisdictional. In addition, the commenter asserted that the proposed rule’s TSD confirms that the majority of water resources in Arizona and New Mexico were deemed non-jurisdictional in AJDs under the pre-2015 regulatory regime, but that the agencies maintain that the 2020 NWPR was disproportionately impacting these states because of the “ten-fold increase in the total number of individual resources documented as non-jurisdictional in the AJDs.” The commenter argued: “Given the high percentage of negative JDs under the pre-2015 regulatory regime (just below 94%), it begs the question what percentage of the 1,525 AJDs that were completed during the first year of the [2020] NWPR would have resulted in findings of non-jurisdictional resources under the pre-2015 regulatory regime.”

One commenter stated that the agencies erroneously described the 2020 NWPR’s effect on arid regions. The commenter argued that what the agencies claimed to be a ten-fold increase in the number of stream features in Arizona determined to be non-jurisdictional under an AJD, along with the “95% decrease in individual stream reaches being considered via PJDs,” was in fact due to landowners in Arizona finally having the opportunity to efficiently determine the Clean Water Act jurisdictional status of the “dry drainage features on their property.” The commenter added that landowners and public entities who had previously been willing to make use of PJDs to facilitate project schedules were no longer afforded that opportunity. The commenter stated that this information directly contradicts the suggestion by the agencies that the 2020 NWPR disproportionately affected arid regions of the country.

A few commenters stated that the agencies’ justification for withdrawing the 2020 NWPR was unclear or unfounded. They restated the agencies’ findings that in the five years leading up to the 2020 NWPR, there were between 27% and 45% of non-jurisdictional AJD findings in any given year, compared to 75% non-jurisdictional findings under the 2020 NWPR. Some commenters stated that the agencies found that in New Mexico and Arizona, 100% and 99.5% of the 1,525 (New Mexico) and 1,518 (Arizona) streams were found non-jurisdictional in year one of the 2020 NWPR. A few commenters also stated that the agencies found in the five preceding years, on average about 94% of streams in Arizona (138 out of 147) were found to be non-jurisdictional under the significant nexus test.

Agencies’ Response: The agencies appreciate the analyses and comments addressing examples of harm, or lack of harm, associated with the 2020 NWPR. While the agencies have not conducted an independent analysis to verify each of the examples provided, they have reviewed all examples and analyses and have incorporated feedback into the preamble to the final rule as appropriate, particularly in Final Rule Preamble Section IV.B.3. In some cases, the agencies cannot verify the analyses or examples provided, whether due to a lack of evidence or data provided by commenters or a mischaracterization of differences in scope of jurisdiction between the pre-2015 regulatory regime and the 2020 NWPR. The agencies caution that determinations regarding the jurisdictional status of any specific water are outside the scope of this rulemaking. The agencies will assess jurisdiction under the final rule on a case-specific basis. See Section 4.1.4.2 of the agencies’ response to comments and 40 CFR part 230.

Under the 2020 NWPR, more project proponents across the country, including in the arid West, sought AJDs rather than PJDs, particularly for ephemeral features. Many more streams were evaluated and determined to be non-jurisdictional through AJDs in the arid West under the 2020 NWPR, while the number of individual stream reaches considered

under PJDs declined precipitously in this area under that rule. A decline in the proportion of PJDs being requested under the 2020 NWPR suggests that fewer project proponents requested that aquatic resources on their project site be treated as if they were jurisdictional. The Agencies appreciate that many projects found non-jurisdictional may have been projects intended to improve water quality, as commenters have noted. Other projects may have been undertaken for purposes such as mining, electricity transmission, gas pipeline development, and housing development, as noted in the comment summary of Section 4.3.1.2. The Agencies recognize that many projects that serve beneficial environmental and other important purposes may be subject to the requirements of the Clean Water Act. However, the Agencies are bound to implement the requirements of the Clean Water Act to require permits for discharges into “waters of the United States.” As set forth in Section IV.A.3 of the Preamble to the Final Rule, the agencies have interpreted the scope of “waters of the United States” based on their expertise and experience in implementing the Clean Water Act, as well as based on the statutory text, its objective and policies, their best reading of the Commerce Clause and Supreme Court case law, and the scientific record.

The agencies understand the drastic decline in the number of PJDs requested compared to AJDs in the arid West, and the simultaneous increase in the number of AJD non-jurisdictional findings in the arid West, to have been driven largely by the categorical exclusion of ephemeral streams from jurisdiction. PJDs treat a feature as jurisdictional without making a formal determination and, under the 2020 NWPR, project proponents were less likely to assume that ephemeral streams were jurisdictional.

Regarding the proposed rule TSD’s discussion of New Mexico’s closed basins, the agencies note that this discussion related to the implications of the 2020 NWPR’s removal of categorical protections for interstate waters, particularly where such waters would not otherwise be jurisdictional under a different provision of the rule.

Finally, the agencies agree that the Corps found high percentages of streams in Arizona to be non-jurisdictional between 2016 and 2020 after a case-specific significant nexus analysis and that, proportionally, the non-jurisdictional findings via AJDs between 2016-2020 and under the 2020 NWPR are similar. However, because the *volume* of streams assessed under AJDs in the arid West increased so substantially, following implementation of the 2020 NWPR there was a 10-fold increase in non-jurisdictional findings for streams in Arizona and a 36-fold increase in non-jurisdictional findings for streams in New Mexico. Indeed, as noted above, project proponents were more likely to obtain a PJD, including for ephemeral streams, under the pre-2015 regulatory regime, and these are not reflected in the AJD data. The agencies have found that the 2020 NWPR’s categorical exclusion of ephemeral streams from federal protections as “waters of the United States” and any subsequent unregulated and unmitigated impacts to those resources would have caused cascading, cumulative, and substantial downstream harm. See Sections IV.B.3 and IV.A.2.c.i of the Final Rule Preamble and Section IV.A.v of the Final Rule TSD for more information on the importance of ephemeral streams within watershed systems.