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

SECTION 5 – RULEMAKING PROCESS AND OTHER STATUTES' REQUIREMENTS

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.

5.0 Rulemaking Process

5.0.1 General

Many commenters expressed concerns about the agencies' compliance with requirements that the commenters asserted are applicable to the proposed rule. These commenters addressed the agencies' compliance with the Administrative Procedure Act (APA), certain executive orders, and/or other federal laws in promulgating the proposed rule. Some commenters emphasized the importance of providing opportunities for continual stakeholder engagement throughout the rulemaking process to ensure compliance with applicable rulemaking requirements.

Multiple commenters expressed general concerns about how the proposed rule relates to the National Environmental Policy Act (NEPA), the Endangered Species Act (ESA) (including section 7 consultation), and other federal statutes. Many of these commenters suggested that a change in the scope of Clean Water Act jurisdiction under the proposed rule would add to or duplicate regulatory requirements associated with existing federal, state, and local laws. For example, a commenter raised concerns about section 404 permitting triggering review under the ESA.

Another commenter expressed concern about potential conflicts between the proposed rule and the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). This commenter asserted that an expansion of jurisdiction under the proposed rule could "adversely affect the timely use of EPA-registered pesticides; expose pesticide users to unwarranted legal uncertainties; and interfere with well-established state pesticide and water programs and policies" by subjecting operators and applicators of FIFRA-registered pesticides to Clean Water Act requirements such as section 402 permitting. A few commenters stated that the proposed rule would create confusing enforcement requirements under FIFRA because it would blur requirements on pesticide label language and create additional instances in which pesticide application requires a permit and/or compliance with National Pollutant Discharge Elimination System (NPDES) performance requirements. One commenter stated that this could occur in areas that do not have visible water or have shallow subsurface flows and hyporheic zones but are deemed jurisdictional, which they stated would be burdensome for applicators and program inspectors.

One commenter asserted that the agencies failed to coordinate with the Fish and Wildlife Service (FWS) under the Fish and Wildlife Coordination Act (FWCA). The commenter claimed that this lack of coordination would likely result in an inadequately protective final rule for aquatic-dependent wildlife.

Another commenter argued that the agencies must comply with the direction in E.O. 13778 on "Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the 'Waters of the United States' Rule" to develop a definition of "waters of the United States" that "promot[es] economic growth, minimize[s] regulatory uncertainty, and show[s] due regard for the roles of the Congress and the States under the Constitution," 82 Fed. Reg. 12,497 (Mar. 3, 2017). This commenter suggested that the agencies

could satisfy this direction by receiving input from states and the regulated community on a revised definition.

One commenter asserted that the agencies should incorporate a requirement from E.O. 13956 on "Modernizing America's Water Resource Management and Water Infrastructure" into the proposed rule, even though the executive order was revoked by the current administration. Specifically, the commenter referenced incorporating into the proposed rule a provision in E.O. 13956 related to "developing state-of-the-art geospatial data tools, including maps, through Federal, State, tribal, and territorial partnerships to depict the scope of water regulated under the [Clean Water Act]" and asked that such information be made publicly available as soon as possible to provide regulated entities with "valuable information to determine regulatory requirements and permitting actions."

One commenter asserted that "to honor" the direction in E.O. 13990, the agencies must use their authority to "advance environmental justice and climate change mitigation and resilience."

See the remainder of Section 5 for a more detailed discussion of comments on the rulemaking process and related issues.

> **<u>Agencies' Response</u>: In this action, the agencies are finalizing a definition of "waters of the United States" that is within the agencies' authority under the Act; that advances the objective of the Clean Water Act; that establishes limitations that are consistent with the statutory text, supported by the scientific record, and informed by relevant Supreme Court decisions; and that is both familiar and implementable. See Final Rule Preamble Section IV.A. The agencies fully considered the public comments submitted on the proposal and have complied with all applicable laws, regulations, and other requirements in issuing this rule.**
>
> **This rule is largely based on and consistent with the agencies' regulatory structure and implementation of the definition of "waters of the United States" for several decades. As a result, the agencies disagree with the suggestion that this rulemaking would establish requirements duplicative of other federal or state laws. Furthermore, the agencies disagree with commenters who asserted that this rulemaking would create implementation challenges under FIFRA. The final rule does not establish any new regulatory requirements, nor does it affect any existing requirements that apply under other federal statutes. Rather, this final agency action is a definitional rule that addresses the scope of the federal Clean Water Act jurisdiction.**
>
> **The agencies acknowledge that the definition of "waters of the United States" is relevant to the scope of most federal programs to protect water quality under the Clean Water Act including the section 404 permitting program, and that a change in the number of projects that require a section 404 permit could potentially result in a change in the number of actions subject to certain requirements under federal laws such as the ESA.**
>
> **Nonetheless, the agencies disagree that the final rule generally represents an expansion beyond the pre-2015 regulatory regime that the agencies are currently implementing; rather, the agencies expect that there will be a slight and unquantifiable increase in waters being found to be jurisdictional under the final rule in comparison to the pre-2015 regulatory regime. Thus, as discussed in Section V.A of the Preamble to the Final Rule, the**

final rule will establish a regime that is generally comparable to current practice and is expected to generate *de minimis* costs and benefits as compared to the pre-2015 regulatory regime.

The agencies also disagree with the commenter who suggested that this rulemaking is subject to coordination or consultation requirements under the FWCA. The FWCA requires that "whenever the waters of any stream or other body of water *are proposed or authorized to be impounded, diverted, the channel deepened, or the stream or other body of water otherwise controlled or modified for any purpose whatever,* including navigation and drainage, by any department or agency of the United States, or by any public or private agency under Federal permit or license, such department or agency first shall consult with the United States Fish and Wildlife Service, Department of the Interior, and with the head of the agency exercising administration over the wildlife resources of the particular State *wherein the impoundment, diversion, or other control facility is to be constructed*." 16 U.S.C. 662(a) (emphasis added). The final rule does not propose or authorize the control or modification of the waters of any stream or other body of water or the construction of an impoundment, diversion, or other control facility. The final rule is thus not subject to the consultation requirement under FWCA section 662. Moreover, for the reasons discussed throughout Final Rule Preamble Section IV, the agencies disagree that the final rule will be inadequately protective for aquatic-dependent species.

Further, the agencies disagree that this rulemaking must comply with Executive Order 13778, as that executive order was expressly rescinded pursuant to section 7 of Executive Order 13990. *See* 86 FR 7037 (published January 25, 2021, signed January 20, 2021). As discussed in Final Rule Preamble Section III.C, the agencies conducted substantial co-regulator engagement and stakeholder outreach prior to developing the final rule, and these activities included opportunities to receive input directly from states and the regulated community.

Finally, the agencies acknowledge the request that the revised definition of "waters of the United States" advance environmental justice and contribute to climate change mitigation and resilience. While the agencies did not consider climate change in interpreting the scope of the statutory term "waters of the United States," there are ways the agencies can consider a changing climate under the significant nexus standard, but only to the extent it is relevant to the evaluation of whether the subject waters significantly affect the chemical, physical, or biological integrity of paragraph (a)(1) waters. See Final Rule Preamble Section IV.C.9.c.ii for further discussion of how the agencies can consider a changing climate under the significant nexus standard consistent with the best available science. Additionally, while impacts on communities with environmental justice concerns are not a basis for determining the scope of the definition of "waters of the United States," the agencies recognize that the burdens of environmental pollution and climate change often fall disproportionately on communities with environmental justice concerns (*e.g.*, minority (Indigenous peoples and/or people of color), and low-income populations, as specified in Executive Order 12898.) The agencies believe that this action does not have disproportionately high and adverse human health or environmental effects on Indigenous peoples, people of color, and/or low-income populations The documentation for this decision is contained in the Economic Analysis for the Final Rule.

For the agencies' response to comments on specific rulemaking issues related to the proposed rule, see the remainder of Section 5, including Section 5.1 (regarding compliance with the APA), Section 5.12 (regarding stakeholder engagement), Section 5.13 (regarding NEPA), and Section 5.14 (regarding the ESA). See also the agencies' response to comments in Section 18.1 for a discussion of mapping resources.

5.0.2 Timing

Many commenters provided input regarding timing for the adoption of a final rule. Several commenters asserted that the agencies should act quickly to adopt a final rule. In contrast, one commenter urged the agencies to take their time in finalizing the rulemaking. Specifically, this commenter recommended that the agencies take time to define categories of waters that would be jurisdictional by rule (*i.e.*, waters that would be categorically jurisdictional under the final rule) to address concerns regarding timeliness and consistency with jurisdictional determinations in this rulemaking, rather than waiting to address those concerns in a second rulemaking. Another commenter asserted that although the agencies have claimed that the 2020 Navigable Waters Protection Rule (2020 NWPR) was threatening widespread environmental harm, the commenter believes there is no urgency to justify proceeding along what the commenter described as an "abbreviated rulemaking timeframe." A few commenters suggested that there is no urgency to finalize the rule because the 2020 NWPR is no longer in effect following the Arizona and New Mexico district court vacatur orders.

Agencies' Response: The agencies acknowledge commenters' recommendations regarding the timing of promulgating the final rule and recognize that the 2020 NWPR has been vacated. The agencies note, however, that although the 2020 NWPR has been vacated, it is the text currently in the Code of Federal Regulations. The agencies disagree that the rulemaking timeframe has been abbreviated, as all rulemaking requirements—including full consideration of extensive public comment on the proposal—have been met. Rather, the agencies conclude that issuing the final rule at this time accomplishes the agencies' goals to promulgate a rule that advances the objective of the Clean Water Act, is consistent with Supreme Court decisions, is informed by the best available science, and promptly and durably restores vital protections to the nation's waters. See also Final Rule Preamble Section IV.B.3 for discussion of the agencies' finding that substantially fewer waters were protected by the Clean Water Act under the 2020 NWPR compared to under previous rules and practices.

The agencies also acknowledge the request that the agencies develop a rule at this time that identifies certain types of waters as categorically jurisdictional rather than waiting to do so in a second rulemaking. As an initial matter, the agencies note that, while they may consider further refinements to the definition of "waters of the United States" in a later rule, a potential second rulemaking would not necessarily identify more types of categorically jurisdictional (or non-jurisdictional) waters. Rather, as discussed in Final Rule Preamble Section IV.A.3.a.iii, the agencies have the discretion to consider defining waters as jurisdictional on a categorical basis where scientifically and legally justified (for example in this rule, paragraph (a)(1) waters and their adjacent wetlands) or on a case-specific, fact-based approach (for example, in this rule, tributaries and their adjacent wetlands that meet the relatively permanent standard or significant nexus standard). Although the need for

case-specific analyses will continue under the final rule for certain jurisdictional determinations, the agencies find that the clarifications in this rule, including the addition of exclusions that codify longstanding practice, and review of the advancements in implementation resources, tools, and scientific support address many of the concerns raised in the past about timeliness and consistency of jurisdictional determinations under the Clean Water Act. See also the agencies' response to comments on a potential second rulemaking in Section 5.0.3.

5.0.3 Second Rulemaking

The agencies received many comments regarding a potential second rulemaking to revise the definition of "waters of the United States."

Multiple commenters expressed general support for the agencies to develop a second rule that builds upon the regulatory framework of the proposed rule and/or requested that the agencies proceed quickly to a second rulemaking. With respect to a second rulemaking, several commenters suggested that the agencies consider developing a rule that is rooted in science, more broadly protects the nation's waters, is more durable than previous rules, provides for engagement with various stakeholders, and/or considers environmental justice and climate change.

A few commenters contended that the proposed rule does not go far enough to protect waters, asserting that a second rulemaking should establish a definition of "waters of the United States" that is more protective of water resources than the proposed rule. One commenter suggested that a second rulemaking would not be necessary if the agencies include clear direction on their interpretation of relevant Supreme Court cases in the current rulemaking.

Several commenters asserted that the agencies should not proceed with a second rulemaking and provided their reasoning.

- A few commenters claimed that it was unclear why a second rulemaking was needed.
- A commenter recommended that instead of proceeding with a second rulemaking, the agencies should withdraw the proposed rule until the Supreme Court issues a ruling in *Sackett v. Environmental Protection Agency*, 21-454 ("*Sackett*").[1] The commenter further recommended that the agencies focus on providing technical assistance and issuing timely permit decisions under the 2020 NWPR.
- A commenter expressed opposition to the notion of the agencies conducting two rulemakings. This commenter voiced their preference for a single rulemaking that includes the agencies' full views on jurisdiction. The commenter claimed that this would provide certainty to the regulated community and reduce costs of promulgating a rule.
- A commenter asserted that the agencies should reconsider the second rulemaking and instead focus on improving engagement with the public and co-regulators to ensure the current rulemaking "effectively accomplishes the goals of the [Act]."
- A commenter asserted that the agencies should prioritize working with states to develop a more durable and flexible final rule before proceeding to a potential second rulemaking. The

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

commenter recommended that during this time, the agencies could work on addressing the distinct differences in hydrologic regimes across the country.

- A commenter asserted that a second rulemaking would cast doubt on the durability and stability of the proposed "waters of the United States" definition.

Additionally, several commenters provided general input regarding a potential second rulemaking. A few commenters asserted that the agencies should clarify what would be included in a second rulemaking, including any potential limitations or expansions of federal jurisdiction, because they asserted that federal jurisdiction is unclear and is creating regulatory uncertainty at this time. A commenter asserted that the agencies should develop a second rulemaking that would not need to be revised given the effort required for the first rulemaking. Another commenter recommended that if the agencies go forward with the second rulemaking, the agencies should include a thorough explanation of specific goals they hope to achieve when they issue the final rule. Another commenter asserted that the second rulemaking, rather than the first rulemaking, should contain significant adjustments and regional guidance. A commenter asserted that the fact that the agencies were considering a second rulemaking created uncertainty regarding the value of the proposed rule. A commenter asserted that the agencies should not develop a second rulemaking that introduces new concepts, standards, or requirements that go beyond the case law. The commenter asserted that doing so would increase the probability of confusion, lawsuits, and changes in the future and thereby harm the commenter's ability to plan for future projects.

Several commenters provided more specific recommendations regarding the scope of and process for a second rulemaking.

- A few commenters provided input regarding how the second rulemaking should incorporate relevant Supreme Court decisions. These commenters asserted that the second rulemaking should incorporate relevant interpretations of Supreme Court decisions, but that the proposed rule should not include any additional interpretation of those decisions.
- A commenter expressed concern that the proposed rule would leave wetlands, particularly in the Southeast, unprotected and recommended that subsequent rulemaking include additional wetlands and water types that satisfy the significant nexus standard as categorically jurisdictional.
- A commenter asserted that a subsequent rule should avoid determining jurisdiction of waters that have a minimal impact on downstream foundational waters[2], suggesting that doing so would create additional regulatory burdens on the regulated community.
- A commenter indicated that the agencies would benefit from wider stakeholder consultation in subsequent rulemaking efforts. This commenter also suggested that the agencies consider alternative options in subsequent rulemaking.
- A commenter urged the agencies to more thoroughly consider how to fully respect the sovereignty of tribes, fully meet their trust responsibilities to tribes, and ensure that tribal waters are not at disproportionate risk of water pollution if they proceed with a second rulemaking.

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

- A few commenters suggested that if the agencies do move forward with the second rulemaking, they should consider all case law, not just *SWANCC*[3] and *Rapanos*,[4] but also *Riverside Bayview*[5] and other relevant Clean Water Act cases.
- A commenter recommended that the agencies use the time between the first and second rulemaking to work with states on an effective regional approach to develop a more durable and flexible proposed rule. The commenter asserted that they believe substantial changes from one administration to the next create uncertainty, inconsistencies, and indecision for states and the regulated community.
- Another commenter requested that the agencies provide pre-rulemaking engagement before issuing the second rulemaking so that states and regulatory agencies can provide input and work with federal authorities on a lasting definition of "waters of the United States."

Additionally, multiple commenters provided input regarding timing for the development of a potential second rulemaking after finalization of the proposed rule. Many of these commenters recommended that the agencies move quickly to develop a second rulemaking, with some stating that a second rulemaking should provide greater or more robust environmental protection and be based on the best available science. A few commenters asserted that the agencies should then quickly proceed to developing a more protective secondary rulemaking that is consistent with science and the law. A commenter urged the agencies to promptly move to a second rulemaking and to define "waters of the United States" in a way that would provide strong protections not only for the nation's waters, but also for its most vulnerable communities. Another commenter expressed concern that the public comment period for and stakeholder engagement around a potential second rulemaking would be rushed.

> **Agencies' Response: In the preamble to the proposed rule, the agencies stated that they would consider changes through a second rulemaking that they anticipated proposing in the future, which would build upon the foundation of this rule. The agencies have concluded that this rule is durable and implementable because it is founded on the familiar framework of the 1986 regulations, fully consistent with the statute, informed by relevant Supreme Court decisions, and reflects the record before the agencies, including consideration of the best available science, as well as the agencies' expertise and experience implementing the pre-2015 regulatory regime. See Final Rule Preamble Section IV.A. The agencies may consider further refinements in a future rule to address implementation or other issues that may arise. Comments on the content of any such future rule are outside the scope of this rule.**
>
> **For the agencies' response to comments on tribal consultation and coordination, see Section 5.6. For the agencies' response to comments on stakeholder engagement, see Section 5.12.**

5.0.4 Infrastructure and Permitting Timelines

Many commenters addressed the potential effects of the proposed rule on infrastructure efforts. Some commenters argued that the proposed rule could threaten infrastructure projects and/or investments, with many of these commenters specifically mentioning the Biden Administration's goals, "Build Back

[3] *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) ("*SWANCC*")
[4] *Rapanos v. United States*, 547 U.S. 715 (2006) ("*Rapanos*")
[5] *United States v. Riverside Bayview Homes*, 474 U.S. 121, 131-35 (1985)

Better," and/or the Infrastructure Investment and Jobs Act (IIJA). These commenters generally expressed support for the IJIA and other infrastructure efforts. Some of the commenters generally mentioned other Biden Administration priorities, for example infrastructure priorities related to energy, climate, water, and the environment. Many commenters asserted that unclear regulatory definitions that depend on case-by-case analyses or overly expansive definitions would increase costs and make it more difficult to build badly needed housing and infrastructure. The commenters asserted that this could undermine the President's goal to improve resiliency of infrastructure and improve access to clean water, transportation, and electricity for low-income communities. Some commenters stated that the proposed rule would make it difficult for companies to meet the needs of their customers who depend on a supply of aggregate for essential public works projects. Another commenter stated that the proposed rule would make it more difficult to obtain permit coverage for mining projects essential to the Biden Administration's goals. A few commenters stated that the agencies should develop a rule that provides for timely and cost-effective investment in infrastructure, such as infrastructure needed to meet local water supply and treatment needs.

A commenter cited a 2002 study to support their argument that project delays can be substantial and may be even larger if an influx of new projects is not offset by additional staff and processing infrastructure. The commenter also stated that delays may be exacerbated by the subjectivity of the proposed rule in jurisdictional determinations relative to the 2020 NWPR. The commenter stated that these impacts hinder economic output and prevent businesses from operating at their full potential.
A commenter asserted that by codifying the One Federal Decision policy, the IIJA seeks to complete the project review and approval process within two years (*citing* IIJA, Sec. 11301). The commenter stated that the proposed rule would create a competing policy objective, ultimately triggering additional permitting requirements, increasing time, and increasing costs. The commenter also stated that an increase in individual permit applications could overwhelm federal agency staff and further exacerbate the delays in permitting. The commenter asserted that these delays would be largely avoidable by leaving the 2020 NWPR in place.

In the context of the IIJA, another commenter argued that "returning to the longstanding definition of 'waters of the United States,' updated to reflect Supreme Court precedent, and then moving swiftly to adopt a new rule that is rooted in science and more broadly protects the country's waterways, as Congress intended, reinforces these historic investments in clean water."

A commenter expressed concern that the proposed rule would lead to more activities requiring individual Clean Water Act permits. The commenter stated that aggregating features under the proposed rule's significant nexus standard would result in some projects exceeding the maximum acreage limit to qualify for use of a nationwide permit. The commenter further asserted that the need for more individual permits would result in higher permitting costs and longer processing times, which the commenter suggested could deter parties from obtaining permits, and thus lead to unlawful discharges and an accompanying rise in enforcement actions and citizen suits. The commenter anticipated the need for additional regulatory compliance under NEPA, the National Historic Preservation Act, ESA, and the Coastal Zone Management Act. The commenter also argued that the apparent expanded jurisdiction could interfere with development of green infrastructure because of an increased need for section 404 permits.

<u>Agencies' Response</u>: In this action, the agencies are finalizing a definition of "waters of the United States" that is within the agencies' authority under the Act; that advances the objective of the Clean Water Act; that establishes limitations that are consistent with the statutory text, supported by the scientific record, and informed by relevant Supreme Court

decisions; and that is both familiar and implementable. See Final Rule Preamble Section IV.A. The agencies disagree that the final rule generally represents an expansion beyond the pre-2015 regulatory regime; rather, the agencies expect that there will be a slight and unquantifiable increase in waters being found to be jurisdictional under the final rule in comparison to the pre-2015 regulatory regime. Indeed, as discussed in Section V.A of the Preamble to the Final Rule, this final rule is generally comparable in scope to the pre-2015 regulatory regime that the agencies are currently implementing. As such, the agencies disagree with commenters who asserted that the "broadened scope of jurisdiction" in the proposed rule would lead to increased requirements under other federal or state laws.

The agencies disagree with commenters who asserted that the proposed rule would lead to delays in infrastructure projects. The agencies find that the clarifications in this rule, including the addition of exclusions for features that were generally considered non-jurisdictional under the pre-2015 regulatory regime, and the intervening advancements in implementation resources, tools, and scientific support address many of the concerns raised in the past about timeliness and consistency of jurisdictional determinations under the Clean Water Act. See Final Rule Preamble Section IV.C.7 and IV.G.

The agencies further disagree with commenters who stated that the proposed rule would result in an increase in individual permits due to the agencies' approach to aggregation under the significant nexus standard. The agencies' approach to aggregation does not affect the eligibility of subject water(s) for a nationwide permit. This is because the determination of jurisdiction applies only to the subject waters located in the area of interest. The determination does not apply to all of the waters that are aggregated as part of the significant nexus analysis. See Final Rule Preamble Section IV.C.9 for additional discussion.

The agencies acknowledge commenters who expressed concern that the proposed rule would result in increased permitting costs. The agencies acknowledge that there are indirect costs—both monetary and temporal—associated with implementation of the final rule. Indeed, there are indirect costs associated with implementation of all prior rules defining "waters of the United States." As the final rule is very similar in scope to that of pre-2015 practice, there will be *de minimis* new indirect costs associated with the implementation of the final rule. See also the agencies' response to comments in Section 17.

For the agencies' response to comments on NEPA and ESA, see Sections 5.13 and 5.14, respectively.

5.1 Compliance with the Administrative Procedure Act (APA)

5.1.1 Length of Comment Period

Many commenters requested an extension to the public comment period. Multiple commenters asserted that the agencies violated the APA by failing to provide the public with a meaningful opportunity to comment on the proposed rule—including the economic analysis and technical support document for the proposed rule—due to the length of time of the public comment period. Several of these commenters

emphasized that the 2015 Clean Water Rule's comment period spanned more than 200 days. Further, some commenters asserted that the COVID-19 pandemic necessitated an extension of the comment period; that additional time to review the proposed rule would lead to improvements and significant changes; and that the proposed rule is complex and would make substantial changes to the pre-2015 regulatory regime, thereby warranting additional time to review.

One commenter suggested that the agencies could not refuse to extend the proposed rule's comment period on the grounds that it would "delay their ability to issue a temporary replacement rule" because the 2020 NWPR is no longer in effect. Another commenter suggested that the overlap between the proposed rule's comment period and the timing of the regional roundtables limited commenters' ability to provide meaningful input on the proposed rule. A different commenter asserted that the agencies should either significantly extend the comment period or halt the comment period altogether until after the Supreme Court issues a decision in the *Sackett* case.

Agencies' Response: The APA requires agencies to "give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation." 5 U.S.C. § 553(c). The APA does not specify a minimum number of days for accepting comments on a proposed rule. Agencies must, however, provide the public with a "meaningful opportunity" to comment on a proposed rule. *Rural Cellular Ass'n v. FCC*, 588 F.3d 1095, 1101 (D.C. Cir. 2009). For the reasons described below, the agencies satisfied the APA requirement to provide the public with a meaningful opportunity to comment on the proposed rule.

As an initial matter, the agencies note that though the length of the comment period may be a factor in determining whether the public was afforded a meaningful opportunity to comment, it is not determinative. Nonetheless, the agencies provided a reasonable length of time for interested parties to comment on the proposed rule. On December 7, 2021, the agencies published the proposed rule in the *Federal Register*, 86 FR 69372, which initiated a 62-day public comment period that lasted through February 7, 2022. The proposed rule's approximately 60-day public comment period is consistent with the 60-day public comment period recommended in Executive Order 12866. Further, courts have routinely found that comment periods of less than 60 days provide a meaningful opportunity to comment; as such, the agencies find that this rulemaking's 60-day public comment period satisfies the APA's requirements. *See, e.g.*, *Conn. Light & Power Co. v. Nuclear Reg. Comm'n*, 673 F.2d 525, 534 (D.C. Cir. 1983); *Nat'l Lifeline Ass'n v. FCC*, 915 F.3d 19, 34 (D.C. Cir. 2019) ("When substantial rule changes are proposed, a 30-day comment period is generally the shortest time period sufficient for interested persons to meaningfully review a proposed rule and provide informed comment.").

Additionally, contrary to some commenters' assertions that the proposed rule was complex, the proposed rule did not warrant a longer public comment period. Although the agencies requested comment on numerous aspects of the proposed rule, these requests for comment did not necessitate a longer comment period. Indeed, during the time allotted, numerous individuals and entities submitted comments discussing the agencies' legal rationale and myriad aspects of the proposed rule. Ultimately, the agencies received approximately 114,000 comments on the proposed rule, many of which analyzed a host of issues relevant to the proposed rule, including: the legal basis for the proposed rule; the proposed rule's

approach to categories of jurisdictional and non-jurisdictional features; the economic analysis and technical support document for the proposed rule; and the need for a clear and implementable rule that is easy for the public to understand.

The agencies also disagree that the proposed rule reflected substantial changes to the pre-2015 regulatory regime. At this time, although the agencies expect that there will be a slight and unquantifiable increase in waters found to be jurisdictional under the final rule in comparison to the pre-2015 regulatory regime, the agencies have determined that this rule will establish a regime that is generally comparable to current practice and is expected to generate *de minimis* costs and benefits as compared to the pre-2015 regulatory regime.

With respect to the Supreme Court's review of the *Sackett* case, and how that case relates to the timing of this rulemaking, see the agencies' response to comments in Section 2.6.1.

5.1.2 Rationale for the Proposed Rule

5.1.2.1 General comments on the rationale for the proposed rule

Some commenters stated that the agencies have failed to provide a reasoned explanation in support of the proposed rule consistent with the Supreme Court's holding in *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 516 (2009) that agencies must engage in reasoned decisionmaking to satisfy the APA's substantive requirements. In particular, many of these commenters asserted that the agencies failed to provide a reasoned explanation in support of their decision to replace the 2020 NWPR, with a few commenters objecting to the agencies' statements in the preamble to the proposed rule that the 2020 NWPR does not advance the Clean Water Act's objective and was difficult to implement. Additionally, several commenters stated that the agencies' interpretation of the Clean Water Act and relevant Supreme Court case law set forth in the proposed rule is flawed and so does not constitute a reasoned explanation in support of the rule.

Several commenters asserted that the proposed rulemaking violated the APA as arbitrary and capricious because, according to the commenters, the agencies failed in the proposed rule to adequately acknowledge, characterize, or address the proposed rule's revisions to the previous regulations and practice for various categories of aquatic resources and features, as well as the costs associated with those proposed changes.

Another commenter criticized as flawed the agencies' finding in the proposed rule preamble that the 2020 NWPR did not adequately consider or address effects of degredation of upstream waters on downstream waters because, per the commenter, the agencies "actually broadened the approach to jurisdiction between proposal and final" for the 2020 NWPR and did so "specifically with an eye toward protecting downstream waters." As support, the commenter referenced certain differences between the proposed and final 2020 NWPR, including the agencies' decision in the final 2020 NWPR not to sever jurisdiction for waters upstream of ephemeral features, which were categorically excluded under the 2020 NWPR.

The same commenter suggested that the agencies' finding that the 2020 NWPR is inconsistent with the best available science does not provide a "sufficient ground for repealing the rule" because "[s]cience does not establish where the constitutional or statutory line is between federal and state authority." This

commenter also asserted that the agencies' concerns about implementation issues under the 2020 NWPR are unfounded and expressed the view that "EPA staff objected to the [2020] NWPR because it required a higher burden of proof to establish jurisdiction, which resulted in fewer water resources being considered jurisdictional"—not because there was "uncertainty over what the [2020] NWPR meant."

Agencies' Response: Consistent with the APA and applicable case law, the agencies have provided a reasoned explanation for this rulemaking, including a rational basis for replacing the 2020 NWPR. The Supreme Court has found that "agencies are free to change their existing policies as long as they provide a reasoned explanation for the change." *See Encino Motorcars v. Navarro*, 579 U.S. 211, 221 (2016) (citations omitted). As reflected in the preamble to the final rule and this response to comments document, the agencies have carefully analyzed their statutory and constitutional authority—along with relevant case law, legislative history, and the best available science—and have provided a detailed and reasoned explanation in support of their decision to promulgate the final rule. This reasoned explanation is reflected in but not limited to Final Rule Preamble Section IV, which provides a thorough discussion of how the final rule is informed by the agencies' consideration of the text of the relevant provisions of the Clean Water Act and the statute as a whole, the scientific record, relevant Supreme Court decisions, and the agencies' experience and technical expertise after more than 45 years of implementing the longstanding pre-2015 regulatory regulations defining "waters of the United States."

The agencies also provided a reasoned explanation in support of the proposed rule and disagree that the proposed rule's legal analysis was flawed. The agencies thoroughly explained their interpretation of the Clean Water Act and the additional considerations that informed the basis of the proposed rule. *See, e.g.*, 86 FR 69385-69433. The agencies also described each category of waters that would or would not be jurisdictional as "waters of the United States" under the proposed rule, including supporting legal rationale, potential approaches to implementation, and specific issues upon which the agencies sought comment. *See id.* at 69385-69445. For each category of waters that would or would not be jurisdictional, the agencies also explained how the proposed rule's approach compared to the approach taken under prior rules and practice, including the 2020 NWPR. *See id.* The agencies thus disagree that they failed to adequately acknowledge, characterize, or address the proposed rule's revisions to the previous regulations and practice for various categories of aquatic resources and features. Indeed, in response to the proposed rule, the agencies received and considered many comments addressing these issues, including but not limited to comments related to the legal basis for the proposed rule and the proposed rule's approach to categories of jurisdictional and non-jurisdictional features. With respect to the costs associated with the proposed rule's changes, see the Economic Analysis for the Proposed Rule. See also the agencies' response to comments in Section 2, addressing specific legal arguments raised in comments on the proposed rule.

The agencies disagree with the position that the proposed rule did not provide a rational basis for replacing the 2020 NWPR. The preamble to the proposed rule clearly identified and thoroughly explained the agencies' specific concerns with the 2020 NWPR and provided a comprehensive discussion of the agencies' bases for finding that the 2020 NWPR was not a suitable alternative to the proposed rule. *See* 86 FR 69407-69416. Specifically, the agencies concluded that the 2020 NWPR was not a suitable alternative to the proposed rule

"because it failed to advance the objective of the Act, including through its elimination of the significant nexus standard and the absence of any alternative standard that would protect the chemical, physical, and biological integrity of the nation's waters; it is inconsistent with scientific information about protecting water quality; its implementation proved confusing, difficult, and often infeasible; and it drastically reduced the numbers of waters protected by the Clean Water Act, including waters that affect the integrity of downstream traditional navigable waters, interstate waters, and the territorial seas." *Id.* at 69416. The agencies' statements in the preamble to the proposed rule regarding the 2020 NWPR were further supported by the information in the proposed rule's technical support document. See, e.g., Technical Support Document for the Proposed Rule at Section II.B.

The agencies have also provided a reasoned explanation in support of replacing the 2020 NWPR in the final rule. As discussed in Section IV.B.3 of the Preamble to the Final Rule, the agencies considered many factors and conducted their own evaluation of the 2020 NWPR through which they identified numerous deficiencies. Thus, contrary to some commenters' contentions, the agencies' conclusion that the 2020 NWPR is not a suitable alternative to the final rule is based on the collective reasons articulated in Final Rule Preamble Section IV.B.3 and does not hinge on any one individual consideration discussed therein.

The agencies acknowledge that the jurisdictional scope of the 2020 NWPR changed in some ways between the proposed and final rule, including in ways that expanded the scope of the 2020 NWPR to cover certain upstream waters. Nonetheless, as explained in both the proposed and final rule preambles for this rulemaking, the agencies find that the 2020 NWPR's rejection of the significant nexus standard while failing to adopt any alternative standard for jurisdiction that adequately addresses the effects of degradation of upstream waters on downstream waters, including paragraph (a)(1) waters, fails to advance the Clean Water Act's objective. *See* 86 FR 69407-09; Final Rule Preamble Section IV.B.3.

The agencies also recognize that science alone cannot dictate where to draw the line defining "waters of the United States," 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. Only by relying upon scientific principles to understand the way waters affect one another can the agencies know whether they are achieving that objective. As discussed in the proposed and final rule preambles, the 2020 NWPR's exclusion of major categories of waters from the protections of the Clean Water Act, specifically in the definitions of "tributary" and "adjacent wetlands," runs counter to the scientific record demonstrating how such waters can affect the integrity of downstream waters, including paragraph (a)(1) waters. *See* 86 FR 69408-09; Final Rule Preamble Section IV.B.3.b. The agencies find that the 2020 NWPR is thus not a suitable alternative to the final rule because, among other reasons, it cannot advance the objective of the Act given its lack of scientific support.

The agencies disagree that the concerns discussed in the proposed rule preamble regarding implementation of the 2020 NWPR are unfounded. In the proposed rule preamble, the agencies provided a thorough and clear explanation, informed by the agencies' experience

implementing the 2020 NWPR for over a year, of specific implementation challenges imposed by the 2020 NWPR. *See* 86 FR 69409-12. The agencies also received comments on the proposed rule identifying similar concerns and challenges regarding implementation of the 2020 NWPR. See Final Rule Preamble Section IV.B.3.c. Further, the agencies disagree that there was no confusion or uncertainty regarding implementation of certain aspects of the 2020 NWPR. For example, the 2020 NWPR's standard of inundation by flooding in a typical year was not tied to any commonly calculated flood interval, such as flood recurrence intervals, and the agencies are not aware of a tool capable of collecting the type of inundation data the 2020 NWPR required. See also Final Rule Preamble Section IV.B.3.c and the agencies' response to comments in Section 4.2 for additional discussion of these implementation issues.

In sum, after carefully considering the 2020 NWPR in light of the text, objective, and legislative history of the Clean Water Act, Supreme Court case law, the best available scientific information, and the agencies' experience in implementing it for over a year, the agencies do not find that the 2020 NWPR is a suitable alternative to this rule. See also Technical Support Document Section II.B.iv and the agencies' response to comments in Section 4 for additional discussion of the agencies' evaluation of the 2020 NWPR.

5.1.2.2 Rationale for replacing the 2020 NWPR due to potential environmental harm

One commenter argued that the agencies' decision to replace the 2020 NWPR based on data indicating that the 2020 NWPR substantially reduced the scope of waters protected under the Clean Water Act and thus posed a risk of environmental harm is inconsistent with the Supreme Court's holding in *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) that agencies must provide a more detailed justification when a change in policy "rests upon factual findings that contradict those which underlay its prior policy." This commenter also argued that the agencies failed to provide a reasoned explanation "supported by facts, rather than specious conjecture and supposition," to replace the 2020 NWPR.

The same commenter asserted that the agencies' claims of potential environmental harm from the 2020 NWPR are not supported by the record for the proposed rule. Referencing the agencies' assessment of projects that would have required a Clean Water Act section 404 permit before the 2020 NWPR but no longer did after the 2020 NWPR, the commenter stated that the agencies did not explain why the projects would have required a section 404 permit but no longer did under the 2020 NWPR. The commenter also stated that the agencies failed to "account for the status of individual projects," including whether projects on sites involving aquatic resources that would have been jurisdictional prior to the 2020 NWPR "would actually have been subject to any mitigation or permit restrictions." This commenter further asserted that the agencies failed to prove that "any activities moved forward that otherwise would not have" while the 2020 NWPR was in effect, "much less that any concrete environmental harms or impacts on water quality resulted."

Additionally, this commenter stated that the agencies implied in the proposed rule that replacing the 2020 NWPR is necessary because it may result in some states having fewer water resources covered under the Clean Water Act than other states and argued that it "stands to reason" that different states may be impacted by the 2020 NWPR, or any replacement rule, differently based on their unique geography. The commenter also suggested that the agencies mischaracterized the 2020 NWPR's impact on states in the arid West.

Another commenter asserted that the agencies claim that the 2020 NWPR reduced Clean Water Act protections over various waters is not a legitimate ground for rescission, arguing that this position creates an arbitrary determination that any interpretation of the Clean Water Act that reduces federal jurisdiction in any way, and for any reason, is illegal *per se*. In addition, the commenter stated that whether the extent of federal jurisdiction is smaller or larger is not a factor that Congress intended the agencies to consider in defining "waters of the United States."

Agencies' Response: The agencies disagree with the suggestion that the agencies' claims of environmental harm from the 2020 NWPR are not supported by the record for the proposed rule. The agencies also disagree that the record for the proposed rulemaking did not provide a sufficiently detailed justification in support of the decision to replace the 2020 NWPR. In the preamble to the proposed rule, the agencies provided a summary of their assessment of the 2020 NWPR, including the agencies' review and comparison of data related to jurisdictional determinations issued during certain time periods under the 2020 NWPR and certain time periods under the pre-2015 regulatory regime. *See, e.g.*, 86 FR 69413-15. In addition to this summary, the preamble to the proposed rule clearly explained the agencies' specific findings derived from reviewing the jurisdictional determination data. *See id.* The proposed rule's technical support document provided additional information about the agencies' assessments and explained that while exact numbers for all analyses were not obtainable from the data, there was more than sufficient volume and accuracy of the data to demonstrate clear trends. Technical Support Document for the Proposed Rule Section II.B. The agencies thus disagree with the suggestion that the proposed rule relied on mere conjecture or speculation rather than facts.

Ultimately, the agencies' assessments of the jurisdictional determination and permitting data indicated that the 2020 NWPR led to a substantial reduction in the scope of waters subject to the Clean Water Act. *See* 86 FR 69413-15. The agencies found that "[g]iven the limited authority of many states and tribes to regulate waters more broadly than the Federal government, the narrowing of federal jurisdiction [under the 2020 NWPR] would mean that discharges into the newly non-jurisdictional waters would in many cases 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." *Id.* at 69415. The agencies further found that the absence of federal protections over certain aquatic 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, thereby undermining the objective of the Clean Water Act" and threatening to affect the integrity of downstream traditional navigable waters, the territorial seas, and interstate waters. *Id.* at 69415-16. For these and other reasons, the agencies find that the proposed rule's record adequately supported the agencies' claims of environmental harm from the 2020 NWPR and provided a sufficiently detailed justification in support of the decision to replace the NWPR.

The record for the final rule provides further support for the agencies' claims of environmental harm from the 2020 NWPR. Indeed, as discussed in Final Rule Preamble Section IV.B.3, 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.

Note that while the agencies find it clear on the face of the administrative record that the 2020 NWPR provided Clean Water Act protections for fewer waters than under the pre-2015 regulatory regime, the agencies have provided numerous reasoned bases for the final rule and its changes from the 2020 NWPR. Indeed, in developing the final rule, the agencies considered the text of the relevant provisions of the Clean Water Act and the statute as a whole, the scientific record, relevant Supreme Court case law, and the agencies' experience and technical expertise after more than 45 years of implementing the longstanding pre-2015 regulations defining "waters of the United States." See Final Rule Preamble Section IV.A (discussing the basis of the final rule). And, after carefully considering the 2020 NWPR in light of the text, objective, and legislative history of the Clean Water Act, Supreme Court case law, the best available scientific information, and the agencies' experience in implementing it for over a year, the agencies do not find that the 2020 NWPR is a suitable alternative to this rule. See Final Rule Preamble Section IV.B.3 (discussing the agencies' conclusion that the 2020 NWPR is not a suitable alternative to the final rule). These findings satisfy the agencies' obligations under the APA to provide a reasoned explanation for the final rule, including the agencies' decision to replace the 2020 NWPR. *See FCC v. Fox*, 556 U.S. 502, 514-15 (2009) ("We find no basis in the Administrative Procedure Act or in our opinions for a requirement that all agency change be subjected to more searching review. The Act mentions no such heightened standard. And our opinion in *State Farm* neither held nor implied that every agency action representing a policy change must be justified by reasons more substantial than those required to adopt a policy in the first instance. That case, which involved the rescission of a prior regulation, said only that such action requires 'a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance.' . . . The statute makes no distinction, however, between initial agency action and subsequent agency action undoing or revising that action." (citation omitted)). See also the agencies' response to comments in Section 5.1.2.1 (addressing general comments on the rationale for the rulemaking).

Regarding the agencies' review of projects that would have required a Clean Water Act section 404 permit before the 2020 NWPR but no longer did after the 2020 NWPR, the agencies explained in the preamble to the proposed rule as well as the proposed rule's technical support document that those instances involved projects where 100% of the aquatic resources located on the project site were found non-jurisdictional under the 2020 NWPR's definition of "waters of the United States" and at least some portion of those resources would have been jurisdictional prior to the 2020 NWPR's revised definition. *See* 86 FR 69414; Technical Support Document for the Proposed Rule Section II.B.i. Moreover, the agencies explained that based on available information, they expected projects located on sites involving aquatic resources that had become non-jurisdictional under the 2020 NWPR's revised definition "could have resulted in discharges without any regulation or mitigation from federal, state, or tribal agencies," including because some states and tribes

do not regulate waters beyond those covered under the Clean Water Act. *See* Technical Support Document for the Proposed Rule Section II.B.i.

The agencies acknowledge that the preamble to the proposed rule discussed the 2020 NWPR's disproportionate impacts on the arid West, *see, e.g.*, 86 FR 69414, and find that this loss of Clean Water Act coverage would have carried 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.

The agencies disagree with the suggestion that they have taken the position that any reduction in the scope of Clean Water Act jurisdiction is unlawful *per se*. Rather, after carefully considering the 2020 NWPR in light of the text, objective, and legislative history of the Clean Water Act, Supreme Court case law, the best available scientific information, and the agencies' experience in implementing it for over a year, the agencies do not find that the 2020 NWPR is a suitable alternative to this rule. The agencies also disagree that the scope of federal jurisdiction is irrelevant to defining "waters of the United States." For the reasons discussed in Final Rule Preamble Section IV.A, the agencies conclude that the objective of the Clean Water Act must be considered in defining "waters of the United States" and that consideration of the objective of the Act for purposes of a rule defining "waters of the United States" must include substantive consideration of the effects of a revised definition on the integrity of the nation's waters. And since the objective of the Clean Water Act is to protect the water quality of the nation's waters, this rule must be informed by science relevant to water quality as discussed in Section IV.A.2.a of the Final Rule Preamble. At the same time, the agencies do not interpret the objective of the Clean Water Act to be the only factor relevant to determining the scope of the Act; rather the limitations established in the final rule are based on the agencies' consideration of the text of the relevant provisions of the Clean Water Act and the statute as a whole, the scientific record, relevant Supreme Court case law, and the agencies' experience and technical expertise after more than 45 years of implementing the longstanding pre-2015 regulations defining "waters of the United States.

Regarding the agencies' characterization of the 2020 NWPR's impact on the arid West, see the agencies' response to comments in Section 4.3.3. See also Final Rule Preamble Section IV.B.3 and the agencies' response to comments in Section 4 for further discussion of the agencies' review of the 2020 NWPR.

5.1.3 Miscellaneous APA Issues

A few commenters expressed concern that the public did not have an opportunity to provide meaningful comment on the proposed rule due to what the commenters asserted were undefined terms and vague concepts. In particular, one of these commenters suggested that the agencies did not provide an opportunity for meaningful comment on the phrase "similarly situated," asserting that the term lacked a clear definition or sufficient context.

A commenter suggested that the agencies should not be relying on the two district court orders vacating the 2020 NWPR as a basis to stop implementing the rule nationwide, asserting that the district court orders do not comply with the APA's requirements for courts setting aside rules, such as making a finding

on the merits of the rule. Similarly, another commenter asserted that it violates the APA to halt implementation of the 2020 NWPR nationwide and suggested that implementation should be limited to the state where the relevant district court is located. This commenter further stated that halting implementation of the 2020 NWPR nationwide is contrary to previous positions taken by the federal government and a Department of Justice memorandum, citing U.S. Office of the Attorney General, Memorandum: Litigation Guidelines for Cases Presenting the Possibility of Nationwide Injunctions (Sept. 13, 2018).

Agencies' Response: The agencies provided adequate notice of the proposed rule consistent with the APA. The APA requires that a notice of proposed rulemaking include either the terms or substance of the proposed rule or a description of the subjects and issues involved. 5 U.S.C. 553(b)(3). Courts have explained that a notice of proposed rulemaking must "'adequately frame the subjects for discussion' . . . so that the notice 'affords exposure to diverse public comment, fairness to affected parties, and an opportunity to develop evidence in the record.'" *Nat'l Rest. Ass'n v. Solis*, 870 F. Supp. 2d 42, 52 (D.D.C. 2012) (quoting *Conn. Light & Power Co.*, 673 F.2d at 533; *Nat'l Mining Ass'n v. Mine Safety & Health Admin.*, 116 F.3d 520, 531 (D.C. Cir. 1997)).

The preamble to the proposed rule clearly and consistently described the proposed rule, including underlying terms and related concepts, in a manner that provided the public with a meaningful opportunity to comment. *See, e.g.*, 86 FR 69416-17 (describing "traditional navigable waters"), 69418 (describing "interstate waters"), 69422 (discussing the definition of "adjacent"), 69428-30 (discussing other defined terms used in the proposed rule), 69430 (discussing the proposed rule's definition of "significantly affect"). With respect to "similarly situated," the preamble to the proposed rule provided a clear explanation of the origins of this term as well as the agencies' approach to this term for purposes of implementing the significant nexus standard under previous practice. *See id.* at 69436-40. The proposed rule preamble then proceeded to walk through and solicit comment on options for how the agencies could approach implementing "similarly situated" with respect to specific categories of aquatic features, such as adjacent wetlands and tributaries. *Id.* This discussion of "similarly situated," along with the proposed rule preamble's discussion of other components of the significant nexus standard, provided the public with a meaningful opportunity to comment on this aspect of the proposed rule.

Comments related to the agencies' decision to halt implementation of the 2020 NWPR nationwide following district court orders vacating the 2020 NWPR are outside the scope of this rulemaking.

5.2 Executive Order 12866: Regulatory Planning and Review

A commenter asserted that the agencies did not satisfy the requirements of E.O. 12866 in issuing the proposed rule. The commenter stated that it is clear from the language of E.O. 12866 that comment periods longer than 60 days may be necessary for the public to have a meaningful opportunity to comment. The commenter further stated that the proposed rule's 60-day comment period did not provide a meaningful opportunity for interested stakeholders and the public to review the supporting documents in the docket, which they asserted were not all available when the comment period was opened, and comment on the proposed regulation, the proposed rule Economic Analysis, and the proposed rule

Technical Support Document. The commenter claimed that E.O. 12866 indicates that the obligation to provide the public with a meaningful opportunity to comment on a proposed regulation is separate from, and in addition to, other forms of public engagement during the rulemaking process. The commenter asserted that competing invitations to participate in overlapping public engagement processes impeded meaningful input on the proposed rule from diverse stakeholders or stakeholders with limited resources. The commenter stated that an extension to the comment period would allow the public to focus on reviewing the proposed regulatory text and docket separate from preparing for and participating in the regional roundtables.

Another commenter asserted that under E.O. 12866 and E.O. 13563, the agencies "must fully consider the cost implications of the ["waters of the United States"] definition and the burdens it imposes on commerce and on the states. This includes ensuring that any regulation is simple, with no uncertainty in its application. Compliance should not require the retention of hydrogeological experts but should be comprehensible to the average landowner."

<u>Agencies' Response</u>: The agencies disagree with commenters who asserted that the agencies did not satisfy the requirements of E.O. 12866 to provide the public with meaningful participation in the regulatory process. E.O. 12866 requires agencies to provide the public with a meaningful opportunity to comment on any proposed regulation, which in most cases should include a comment period of not less than 60 days. The agencies provided a 62-day public comment period on the proposed rule; specifically, the proposed rule's comment period was open from December 7, 2021, through February 7, 2022.

The agencies disagree with commenters who asserted that not all supporting documents were available for the public to review at the beginning of the public comment period. The proposed rule notice published in the *Federal Register* on December 7, 2021, and a pre-publication version of the notice had been available on EPA's website since November 18, 2021. The proposed rule Technical Support Document was available in the docket on December 7, 2021 and on EPA's website on December 6, 2021. An economic analysis was available in the docket and on EPA's website on December 7, 2021. The agencies acknowledge that the correct version of the Economic Analysis for the proposed rule was posted to the docket on December 9, 2021, but the agencies disagree that impeded the public's ability to review the Economic Analysis. Even with this two-day delay in posting the correct economic analysis, the agencies provided the public with a meaningful opportunity to review the proposed rule, as well as its supporting documents, including the economic analysis. As discussed in the agencies' response to comments in Section 5.1, the public comment period for the proposed rule was open for 62 days, from December 7, 2021 to February 7, 2022. Even though the correct economic analysis was not posted to the docket until December 9, 2021, the public still had a full 60-day time period to review that document in conjunction with the proposed rule. Such a 60-day time period is consistent with the 60-day public comment period recommended in Executive Order 12866.

The agencies acknowledge commenters who expressed concern about the ability of stakeholders to comment on multiple regulatory actions at the same time. The agencies provided various opportunities for public input to ensure all stakeholders and the public had adequate opportunity to comment on the proposed rule. See Final Rule Preamble Section III.C for a description of the agencies' stakeholder outreach for this rulemaking.

The Economic Analysis for the final rule fulfills the requirements of E.O. 12866 and E.O. 13563. The agencies prepared the economic analysis pursuant to the requirements of Executive Orders 12866 and 13563 to provide information to the public. The economic analysis was done for informational purposes, and the agencies' final decisions on the scope of "waters of the United States" in this rulemaking are not based on consideration of the potential benefits and costs in the economic analysis. See also the agencies' response to comments in Section 17 and Final Rule Preamble Section V.A for further discussion of the Economic Analysis. As discussed in the Final Rule Preamble Section IV.A.4, the agencies are establishing a final rule that is both familiar and implementable.

Finally, the agencies note that E.O. 12866 imposes procedural rather than substantive requirements and "does not create any right or benefit, substantive or procedural, enforceable at law or equity by a party against the United States, its agencies or instrumentalities, its officers or employees, or any other person." E.O. 12866, section 10 (addressing judicial review). In other words, E.O. 12866 does not augment or limit the agencies' statutory authorities and does not create any right to judicial review. The executive order itself states that it is "intended only to improve internal management of the Federal Government." *See id.*

5.3 Paperwork Reduction Act

No comments were submitted for this subtopic.

5.4 Unfunded Mandates Reform Act

A commenter provided input regarding the requirements of the Unfunded Mandates Reform Act (UMRA). The commenter stated that the UMRA requires an assessment of costs to state, local, and tribal governments; the extent to which costs to those governments may be paid by the federal government; disproportionate budgetary effects on particular regions or communities; and estimates of the effect on the national economy. The commenter asserted that this requirement focuses the agencies' attention on the costs and effects of regulation on the states and the economy. The commenter stated that this cost and benefit analysis should be a part of every federal regulation, particularly for interpreting the definition of "waters of the United States."

<u>Agencies' Response</u>: This action does not contain any unfunded mandate as described in UMRA, 2 U.S.C. 1531–1538, and does not significantly or uniquely affect small governments. The final definition of "waters of the United States" applies broadly to Clean Water Act programs. The action imposes no enforceable duty on any tribal, state, or local governments, or the private sector.

5.5 Executive Order 13132: Federalism

Many commenters recommended that the agencies continue to engage and work closely with state entities as co-regulators in developing and implementing the proposed rule. Several of the commenters elaborated on this recommendation.

- A few commenters asserted that in addition to working with state partners, the agencies should work towards a "waters of the United States" rule which provides durability, clarity, predictability, stability, and integrates legal precedent and science.
- A commenter recommended that the agencies provide guidance for states for the final rule in the final rule itself. The commenter stated that if future guidance is deemed necessary after promulgation, this guidance should be made publicly available for review and comment prior to finalization.
- Another commenter asserted that state involvement is essential to create buy-in, reduce litigation, and reduce future changes to the "waters of the United States" definition. The commenter stated that more engagement with states is needed to ensure that the rulemakings achieve the goals of the Clean Water Act. The commenter stated that they believe the definition of "waters of the United States" must be flexible to adjust for the complexity of site-specific circumstances, and not too prescriptive to undermine state laws aimed at providing additional protections for surface water, groundwater, and drinking water sources. The commenter asserted that they believe reverting to the pre-2015 regulatory regime with the proposed rule will necessitate action by some states to make substantial statutory and regulatory changes.

A few commenters asserted that states are well positioned as partners to provide expertise and guidance to the agencies because of their experience with implementing prior rules locally, which the commenters asserted would be useful in developing and implementing the proposed rule. A commenter stated that the agencies should conduct regular, interactive, meaningful dialogue with state agencies through workgroups, focus groups, forums, calls, and other communication as the proposed rule is drafted. The commenter requested that the agencies provide an early draft of regulatory text for state agencies to provide feedback on the proposal and evaluate the regulatory text in terms of technical details, implementation challenges and barriers, and unintended consequences.

A few commenters expressed support for increased engagement with states on the proposed rule based on federalism related concerns and explained why.

- A commenter stated that to remain compliant with the Clean Water Act's concept of cooperative federalism and the APA's notice-and-comment requirements, the agencies must engage the states and the regulated community throughout a rulemaking. The commenter recommended that the agencies respond in writing to all the comments received, hold further meetings with the public and the states, and then reopen another comment period.
- Another commenter asserted that "information-sharing" does not equate to meaningful consultation, and the uncertainty that exists regarding Clean Water Act jurisdiction requires the agencies to develop Clean Water Act jurisdiction efforts in partnership with the states. The commenter recommended that the agencies develop a robust state participation and consultation process in the development and implementation of any rule, and the commenter stated that the rule has inherent federalism implications. The commenter also recommended that the agencies engage a representative number of states, as co-regulators, with diverse perspectives and regions to work with the agencies to provide feedback on implementing the proposed rule.

A few commenters provided input on how the agencies should engage states as co-regulators in consideration of the pending Supreme Court decision on the *Sackett* case.

- A commenter recommended that as soon as the Supreme Court rules on *Sackett,* the agencies should convene a meeting with the states to discuss any regulatory clarifications of the "waters of the United States" definition that may be necessary.

- Another commenter recommended that the agencies continue their outreach after publication of the final rule to ensure implementation is efficient, collaborative, and minimizes unintended consequences to the nation's fish and wildlife resources. The commenter recommended that this outreach include sustained collaboration with states in the areas of jurisdictional determination training and promotion of consistency within regions; consideration of staffing and resource needs in light of ongoing constraints from the COVID-19 pandemic and simultaneous increases in infrastructure permitting and development; effects of frequent regulatory changes over the past several years on section 402 permitting and on state assumptions of the section 404 program; and effects of a broader "waters of the United States" definition on implementation of statutes for species conservation, including section 7 consultation and section 10 permitting under the Endangered Species Act. The commenter also stated that they believe in the event that rulemaking after the final issuance of the proposed rule is affected by a ruling from the Supreme Court on the *Sackett* case, the agencies should increase consultation efforts with states affected by a revised interpretation of the Clean Water Act to advance the dual needs of regulatory clarity and ecological integrity of covered and non-covered waters.
- Another commenter asserted that the agencies should continue to engage with state co-regulators to build a process to appropriately assess the jurisdictional status of state ephemeral and isolated waters. The commenter recommended that the agencies continue to engage with a variety of stakeholders to better develop the discussion on how to best arrive at the appropriate jurisdictional determination for these waters. The commenter asserted that these discussions would assist with implementation of post-*Sackett* determinations.
- Another commenter asserted that they believe the proposed rule should be deferred for the second rulemaking. The commenter claimed that the proposed rule would codify a vague and broad significant nexus test and does not improve clarity or transparency. The commenter offered to participate in the roundtable stakeholder process proposed by the agencies. The commenter stated that further work with the states and stakeholders should continue before another regulatory change is implemented. The commenter stated that they believe that avoiding a shifting regulatory landscape is critical since the Supreme Court has granted review in *Sackett.*

In addition to supporting efforts to engage states, a few commenters recommended that the agencies undertake robust public outreach, including collaborative discussions with tribes, when finalizing the proposed rule and the second rulemaking. Another commenter asserted that changes in the definition of "waters of the United States" and the scope of federal jurisdiction have significant direct and indirect impacts on states and tribes. The commenter argued that input from states and tribes is critical to ensure the revised definition of "waters of the United States" developed under the proposed rule is defensible, durable, and informed by science and implementation experience. The commenter recommended that the agencies reach out to state governors and tribal leaders to invite them to participate in a future workshop focused on regional challenges in advance of initiating the second rulemaking process. The commenter offered to assist the agencies in organizing co-regulator meetings similar to the workshops held at EPA headquarters on March 8-9, 2018, for states and March 10-11, 2018, for tribes. The commenter asserted that those meetings stood out as an "unusually open and frank discussion" about possible paths forward in writing a new rule.

A few commenters asserted that the agencies should continue to expand upon engagement efforts with local governments. A commenter stated that federal, state, and local governments must work together to craft reasonable and practicable rules and regulations. The commenter asserted that as partners in

protecting America's water resources, it is essential that local governments understand the impact that a change to the definition of "waters of the United States" will have on all aspects of the Clean Water Act. Another commenter recommended that the proposed rule should include language that would require coordination between federal agencies and local government.

A few commenters recommended that the agencies specifically engage counties in developing the proposed rule. For example, a commenter stated that while they supported the agencies' outreach efforts over the last several months, they recommended that the agencies conduct additional consultation with county leaders from across the country, stating that county leaders are able to provide unique insight on the impacts of the proposed "waters of the United States" definition. The commenter stated that county leaders have asked for a transparent and straightforward rulemaking process, including federalism consultations under E.O. 13132. Another commenter recommended that the agencies recognize local governments as co-owners and operators of key public safety and water infrastructure and as an intergovernmental partner in implementing federal regulations under the Clean Water Act.

Several commenters asserted that the agencies should engage both state and local governments as significant partners in the development of the proposed rule.

- A commenter asserted that state and local governments are crucial in prioritizing implementation projects and initiatives that protect local water resources.
- Another commenter recommended that the agencies consult and coordinate with co-regulatory states to the maximum extent possible on any proposed rule revision to ensure that any changes to the proposed rule have been adequately considered by the jurisdiction affected, stating that any revisions directly impact both state and local governments' economic viability. The commenter also recommended that the agencies work with state and local governments for data collection, mapping, and distribution.
- Another commenter asserted that engaging with local and state agencies to gather information and input may be helpful before finalizing "waters of the United States" determinations where the significant nexus determination is used.

Many commenters expressed support for the agencies' efforts to obtain input from the states during the rulemaking process and several indicated a desire for communication to continue with states as the proposed rule moves forward.

- A commenter expressed appreciation for the agencies' response to their letter offering to help organize and host regional meetings in anticipation of the promulgation of the second rule.
- Another commenter expressed support for the agencies' engagement opportunities for the proposed rule, in addition to the agencies' commitment to implement a second rulemaking to provide clarity and to develop a durable rule grounded in science and informed by public engagement.
- Another commenter stated support for the initial federalism consultation on August 5, 2021, and the subsequent state-and-local official and association roundtables in January 2022 which provided states and local government officials an early opportunity to weigh in on potential changes.
- Another commenter expressed support for the agencies' outreach to date, in particular the focus on identifying regional issues through regional meetings.
- Another commenter asserted that while the agencies received input from communities and various government organizations to ensure that the proposed rule accounted for the nation's best interests, they believe the proposed rule could be made stronger by listing actions taken because

of these meetings and specific groups that attended consultations, allowing readers to see the wide range of organizations involved in the rulemaking process.

Several commenters expressed concerns regarding the agencies' engagement with co-regulators during the proposed rulemaking process.

- A commenter asserted that they believe coordination of opportunities for public comment for co-regulators has been confusing and poorly timed. The commenter stated that it was unclear how the agencies have included public and co-regulator input received from the August 4, 2021, solicitation and state dialogue meetings held in the fall of 2021. The commenter asserted that opportunities for public engagement, and recommendations specifically solicited by the agencies, have focused on potential revisions anticipated to be included in a second rulemaking, rather than the proposed rule. The commenter provided an example of the agencies' notice published on August 4, 2021, stating that the notice solicited recommendations on specific topics that are largely omitted from the proposed rule. The commenter also asserted that regionally focused roundtables had not taken place and they were confused as to why co-regulators were described as "participants." The commenter expressed concern that the proposed rule does not contain specific information about co-regulator engagement opportunities.
- Another commenter asserted that they believe the proposed rule warrants, but has not achieved, the same level of co-regulator involvement as described for the second rulemaking.
- Another commenter asserted that compliance with Executive Order 13132 "includes not only involving the states in crafting a workable definition, but exploring whether state regulation would equally, if not more so, satisfy the Agencies' clean water objectives."
- Another commenter claimed that since the notice of intent to issue a revised rule was published this past fall, they had yet to see a concerted effort from the agencies to conduct in-depth consultation with co-regulating states. The commenter stated that without purposeful consultation with state governors, the agencies cannot develop an appropriate rule.

A few commenters specifically expressed concerns regarding the agencies' compliance with E.O. 13132.

- A commenter asserted that they believe the proposed rule violates the concept of federalism and that implementing the proposed regulations within their county conflicts with E.O. 13132. The commenter asserted that they did not see any documentation that construes that federal statutes preempt their state water laws. The commenter also questioned whether local officials in their county were contacted about the proposed rule. The commenter asserted that there are no navigable waters located within the boundaries of their county and therefore the proposed regulations do not apply to waters within their county.
- Another commenter argued that the proposed rule does not adhere to the federalism principles and criteria outlined in E.O. 13132, providing an example of section 2(f) of E.O. 13132. The commenter recommended that the agencies withdraw the proposed rule and complete the state and local consultation process; include state and local entities in the development of the "waters of the United States" definition; and consider ways to provide states additional flexibility consistent with the Clean Water Act section 101(b) policies and E.O. 13132. The commenter asserted that while the "Federalism Summary Report" provides an overview of the comments the agencies received through letters and meetings, they believe it fails to describe how the agencies incorporated the feedback into the proposed rule. The commenter expressed concern that they believe the agencies submitted the draft proposed rule to the Office of Management and Budget for interagency review more than a week before the final regional meeting with stakeholders took place. The commenter expressed skepticism that the outreach to states and local governments was meaningful and that the agencies incorporated the feedback they received. The commenter asserted that they believe the agencies seem intent on devising a definition for "waters of the

United States" that maximizes federal jurisdiction, instead of one that respects regional variability and recognizes that federal jurisdiction should be narrowly drawn.

Another commenter asserted that the agencies must comply with various Executive Orders (E.O.), including E.O. 13132.

Agencies' Response: The agencies agree with commenters who support a clear and durable definition of "waters of the United States." The agencies disagree with commenters who asserted that the scope of jurisdiction under the proposed rule would be too broad. In this rule, the agencies are exercising their authority to interpret "waters of the United States" to mean the waters defined by the familiar 1986 regulations, with amendments to reflect the agencies' construction of limitations on the scope of the "waters of the United States" informed by the text of the relevant provisions of the Clean Water Act and the statute as a whole, the scientific record, relevant Supreme Court precedent, and the agencies' experience and technical expertise after more than 45 years of implementing the longstanding pre-2015 regulations defining "waters of the United States." Through this rulemaking process, the agencies have considered all timely public comments on the proposed rule, including changes that improve clarity, implementability, and long-term durability of the definition. The regulations established in this rule are founded on the familiar framework of the 1986 regulations and are generally consistent with the pre-2015 regulatory regime. They are fully consistent with the statute, informed by relevant Supreme Court decisions, and reflect the record before the agencies, including the best available science, as well as the agencies' expertise and experience implementing the pre-2015 regulatory regime. In addition, the agencies find that this rule increases clarity, implementability, and durability by streamlining and restructuring the rule and providing implementation guidance informed by sound science, implementation tools, and other resources. Further, because this rule is founded upon a longstanding regulatory framework and reflects consideration of the agencies' experience and expertise, as well as updates in implementation tools and resources, the agencies find that the final rule is generally familiar to the public and implementable. See Final Rule Preamble Section IV.A.4 for further discussion of the agencies' finding that the final rule is both familiar and implementable.

The agencies disagree with commenters who claimed that the agencies' federalism outreach efforts were insufficient, or that the agencies did not comply with E.O. 13132. The agencies acknowledge the important role of states as co-regulators, as well as the important perspectives of counties and local governments. Consulting with state and local government officials, or their representative national organizations, is an important step in the process prior to proposing regulations that may have federalism implications under the terms of Executive Order 13132. Thus, 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 consultation for this rulemaking, see Final Rule Preamble Section V.E.

The agencies acknowledge the importance of regional differences when creating and implementing a durable definition of "waters of the United States." The agencies have considered public comments regarding regional approaches and regional variations. The final rule will provide increased clarity and certainty regarding the identification of "waters of the United States." The agencies received many helpful comments on the proposed rule that resulted in refinement of the final rule to provide further clarity and certainty to the regulated public. The initial phase of implementing the rule will require education and training for agency staff as well as co-regulators, stakeholders, and the regulated public, which will likely include regionally based training to ensure consistent and efficient implementation of the rule. See also the agencies' response to comments in Section 18.3.

The agencies agree with commenters that if future implementation guidance is required, the agencies should make the guidance publicly and widely available to states and stakeholders. As with any final regulation, the agencies will consider developing new guidance to facilitate implementation of the final rule should questions arise in the field regarding application of the final rule for states and stakeholders. Nevertheless, the agencies conclude that the final rule, together with the preamble and existing tools, provides sufficient clarity to allow consistent implementation of the final rule.

The agencies acknowledge commenters who requested continued outreach and training opportunities to facilitate implementation, as well as commenters who requested outreach as part of a second rulemaking process or outreach after the *Sackett* Supreme Court ruling. In the preamble to the proposed rule, the agencies stated that they would consider changes through a second rulemaking that they anticipated proposing in the future, which would build upon the foundation of this rule. The agencies have concluded that this rule is durable and implementable because it is founded on the familiar framework of the 1986 regulations, fully consistent with the statute, informed by relevant Supreme Court decisions, and reflects the record before the agencies, including consideration of the best available science, as well as the agencies' expertise and experience implementing the pre-2015 regulatory regime. The agencies may consider further refinements in a future rule to address implementation or other issues that may arise. The agencies will continue to evaluate outreach needs to facilitate stakeholder engagement and implementation consistency in the definition of "waters of the United States."

See also the agencies' response to comments in Section 5.1 (discussing the APA) and Section 2.2 (discussing federal-state balance).

5.6 Executive Order 13175: Consultation and Coordination with Indian Tribal Governments

Many commenters provided input regarding the agencies' consultation with tribes pursuant to E.O. 13175 in developing the proposed rule. A few commenters stated that the agencies have an obligation pursuant to E.O. 13175 to consult with tribes when they formulate policies that have tribal implications, as is the case with the proposed rule. Some commenters expanded on this statement.

- A commenter stated that meaningful consultation with tribes must occur prior to any decision on the proposed rule. The commenter also stated that the agencies must respect tribal self-government and sovereignty, honor tribal treaty and other rights, and strive to meet the responsibilities that arise from the unique legal relationship between the federal government and Indian tribal governments.
- Another commenter expressed support for participating in the agencies' intended plans for further engagement and requested that the agencies keep in mind the COVID-19 mitigation measures and Tribal Executive Health Orders currently in place.
- Another commenter recommended that the agencies conduct tribal consultation separate from public hearings to seek and incorporate tribal nation guidance as the agencies finalize the proposed rule.
- Another commenter stated that the Corps has made specific commitments to indigenous peoples through its U.S. Army Corps of Engineers Tribal Policy Principles.
- A commenter urged the agencies to consider the impacts that any revisions to the proposed rule would have on their tribe as well as any other tribes as required by law.

Several commenters expressed concern regarding tribal engagement in the proposed rulemaking process, and made the following points:

- A commenter asserted that they did not see any recognition of the tribes' and native peoples' interests represented in the proposed rule. The commenter stated that there is a specific need for Clean Water Act protections for wetlands that support tribal "First Foods" resources. The commenter stated that traditional harvest methods of aquatic plants put people into direct contact with wetland sediments, making it another route of exposure to toxic chemicals that may be found at these locations. In addition, the commenter claimed that because of the status of tribes as sovereign nations, tribal uses are federal uses under the interstate Commerce Clause. The commenter recommended that all waters that have identified tribal uses be included in the definition of "waters of the United States."
- Another commenter stated that they believe the January 20, 2022, "Tribal Roundtable Discussion on WOTUS" did not resemble effective and meaningful engagement with the tribes. The commenter stated that they believe the demeanor of the meeting demonstrated "the continued treatment by your agencies that tribes are deserving of being talked at, and by being asked to answer questions."
- Another commenter asserted that while the agencies conducted tribal consultations on the initial development of the proposed rule, further tribal consultation should have been initiated by the agencies once the rule was published. The commenter asserted that instead of initiating tribal consultation on the proposed rule to revise the definition of "waters of the United States," the agencies hosted public hearings to receive input from the public and "stakeholders." The commenter stated that tribal nations should not be incorporated into the definition of "stakeholder" due to the federal government's trust and treaty obligations. The commenter stated that they believe the public hearings offered by the agencies did not focus on issues of concern to tribal nations. The commenter also recommended that the agencies provide tribal-specific updates to the comments received during the 2021 consultations and indicate how those comments informed the development of the proposed rule.
- Another commenter urged the agencies to participate meaningfully in consultation with pueblos and tribes. The commenter asserted that they often make and submit comments that are routinely not incorporated into rulemakings, and they further claimed that they rarely hear back from the agencies about why input was excluded. The commenter stated that the proposed rule will have profound impacts on their pueblo because exclusions of Clean Water Act protections for ephemeral or intermittent streams on tribal lands will result in additional pollution and

environmental impacts. The commenter requested that the agencies provide a definition for "meaningful and regular consultation" in the rulemaking because the commenter believed that this concept was unclear. The commenter stated that their pueblo can offer technical and cultural resource knowledge unknown to the agencies, which would be helpful for the proposed rule.

A commenter asserted that the agencies did an excellent job accounting for various communities and concerns, stating that the agencies ensured that the proposed rule was not overly burdensome for any single population. The commenter stated that the agencies discussed the proposed rule with tribal officials under the "U.S. Environmental Protection Agency Policy on Consultation and Coordination with Indian Tribes" and the "Department of the Army American Indian and Alaska Native Policy" and asserted that allowing these groups to give important feedback includes them in the process. A commenter stated that that they support the extensive consultation and consideration given to tribal needs in the proposed rule.

Agencies' Response: The agencies disagree with commenters who asserted that tribal nations were treated as "stakeholders" during the agencies' engagement on the proposed rule. The agencies acknowledge commenters who recommended that the agencies consider the impacts of the proposed rule on tribes, as well as commenters who recommended that the agencies incorporate tribal uses in the rule. Consistent with the federal trust responsibility, the agencies are committed to maintaining their longstanding work with federally recognized tribes on a government-to-government basis. This final rule reflects the agencies' consideration of the wide range of comments received from tribes and tribal entities throughout the tribal consultation and coordination process and in additional engagements with tribes, as well as comments submitted by tribes during the public comment period for the proposed rule. The agencies recognize the federal government's trust responsibility to federally recognized Indian tribes that arises from treaties, statutes, executive orders, and the historical relations between the United States and tribes. The agencies' federal trust responsibility, however, does not expand Congress's grant of authority to the agencies in the Clean Water Act. As discussed in Final Rule Preamble Section IV.A, in developing this rule, the agencies considered the text of the relevant provisions of the Clean Water Act and the statute as a whole, the scientific record, relevant Supreme Court case law, and the agencies' experience and technical expertise after more than 45 years of implementing the longstanding pre-2015 regulations defining "waters of the United States." The agencies find that the scope of "waters of the United States" defined in the final rule is supported by the Clean Water Act and relevant Supreme Court case law and remains well within the bounds of the agencies' statutory and constitutional limits. See also the agencies' response to comments in Section 2.4.1.

The agencies disagree with commenters who asserted that the agencies' tribal consultation was insufficient, and the agencies acknowledge commenters who suggested that further consultation occur after the proposed rule. EPA and the Army consulted with tribal officials under the "EPA Policy on Consultation and Coordination with Indian Tribes" and the "Department of the Army American Indian and Alaska Native Policy" early in the process of developing this regulation to permit them to have meaningful and timely input into this development. The tribal consultation period extended from July 30, 2021, to October 4, 2021. During the input period, the agencies convened several meetings with tribes, intertribal associations, and their members to solicit feedback on the effort to revise the definition of "waters of the United States." The agencies also met with individual tribes

requesting consultation at a staff-level or leader-to-leader level, consistent with their requests. A summary report on the agencies' consultation and engagement efforts with tribes is available in the rulemaking docket. The agencies presented information, responded to questions, and listened to tribal perspectives during these meetings. Additionally, the agencies reviewed and considered all feedback received during the consultation period and the public comment period in developing the final rule.

E.O. 13175 defines "policies that have tribal implications" as "regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes." In May 2011, the EPA issued the "EPA Policy on Coordination and Consultation with Indian Tribes." This policy establishes national guidelines and institutional controls for consultation across the EPA. It also reflects the principles expressed in the 1984 "EPA Policy for the Administration of Environmental Programs on Indian Reservations" and takes a broader view of the need for consultation than does E.O. 13175. The policy provides that consultation with federally recognized tribes may be appropriate when EPA actions and decisions may affect tribal interests. The Corps issued its Tribal Consultation Policy in November 2012. As discussed in Final Rule Preamble Section V.F, the agencies have determined that although the final rule has tribal implications, it does not have tribal implications as prescribed in E.O. 13175 as it does not impose substantial direct compliance costs on Indian tribal governments and does not preempt tribal law. Therefore, the agencies have conducted tribal consultation consistent with their tribal consultation policies.

The agencies acknowledge commenters who expressed concern regarding protections for intermittent and ephemeral streams. The agencies are not categorically including or excluding streams as jurisdictional based on their flow regime in this rule. The agencies agree that streams can provide many important functions for paragraph (a)(1) waters. Streams that are tributaries, regardless of their flow regime, will be assessed under the relatively permanent or significant nexus standard per paragraph (a)(3) of this rule, and streams that are not tributaries will be assessed under the relatively permanent or significant nexus standard per paragraph (a)(5) of this rule. See Section III.A of the Technical Support Document for more information on the agencies' rationale for the scope of tributaries covered by this rule.

5.7 Executive Order 13045: Protection of Children from Environmental Health and Safety Risks

A commenter stated that it appeared that the agencies considered widespread concerns, including children's health, in their proposed rulemaking process. The commenter claimed that this strategy was a persuasive tool and leaves the public with fewer questions about potential negative implications for the proposed rule. The commenter also stated that it would be beneficial to use scientific data to explain why there would be no health risks among children under the proposed rule.

<u>Agencies' Response</u>: The agencies acknowledge that protection of children from environmental health and safety risks is addressed under E.O. 13045. E.O. 13045 applies to

any rule that: (1) is determined to be "economically significant" as defined under E.O. 12866, and (2) concerns an environmental health or safety risk that an agency has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, the agency must evaluate the environmental health or safety effects of the planned rule on children and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the agency. The final rule is not subject to E.O. 13045 because the environmental health or safety risks addressed by this action do not present a disproportionate risk to children. It is a definitional rule. The final revised definition does not affect the Corps' enforcement regulations (33 CFR part 326). The agencies will continue to regulate "waters of the United States" by, among other things, discouraging unauthorized activities, permitting discharges, and using a range of available enforcement resources to maintain the integrity of the agencies' Clean Water Act programs. The agencies point out that other statutes protect waters outside of the Clean Water Act, such as the Safe Drinking Water Act, the Resource Conservation and Recovery Act, and various state and local laws.

5.8 Executive Order 13211: Actions Concerning Regulations that Significantly Affect Energy Supply, Distribution or Use

A commenter asserted that the agencies stated that the proposal should not harm energy supply or distribution. The commenter interpreted this statement as an apprehension of large power companies and asserted that addressing these energy concerns will help people who are unsure of the proposed rule begin to trust that the agencies acted in the people's best interest.

Agencies' Response: The agencies acknowledge that the effect of regulations on energy supply, distribution or use is addressed under E.O. 13211. This final rule is not subject to E.O. 13211 because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy.

5.9 National Technology Transfer and Advancement Act

No comments were submitted for this subtopic.

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

Several commenters indicated that it is important that the agencies meet requirements for preparing an environmental justice analysis pursuant to E.O. 12898.

A commenter argued that the proposed rule does not create any regulatory requirements or direct environmental impacts and that E.O. 12898 does not require additional environmental justice review. This commenter asserted that E.O. 12898 is narrow in scope and should not be interpreted as a requirement for environmental justice analysis in every federal action or rulemaking decision.

A few commenters urged the agencies to restore strong clean water protections in the proposed rule for vulnerable populations.

- A commenter recommended that the agencies identify and address the impacts of pollution and flooding on communities, and that the agencies understand the concerns from marginalized, underserved, underrepresented, and disadvantaged communities.
- A commenter asserted that the 2020 NWPR harmed waters across the United States, but the effects of the withdrawal of federal clean water protections were disproportionately felt by low-income communities and communities of color. The commenter asserted that only with strong federal clean water protections can the Administration and the agencies ensure that everyone has access to clean, safe water.
- A commenter recommended that in the proposed rulemaking, and any subsequent rulemakings, the agencies prioritize the advancement of environmental justice and the protections of tribal interests.

A few commenters expressed concern that any narrowing of the scope of "waters of the United States" would need to first consider environmental justice impacts, a consideration that they asserted is mandated by E.O. 13990. A commenter further asserted that an unduly restrictive definition of "waters of the United States" would disproportionately harm environmental justice communities. A few commenters expressed concern that any decision by the agencies to limit protections under the Clean Water Act can have significant, disproportionate impacts on environmental justice communities, including tribes. The commenters stated that because tribal governments rely to a much greater extent than states on the agencies' water pollution prevention programs, any narrowing of federal government jurisdiction would have a disproportionate impact on tribes. Some commenters asserted that without the Clean Water Act, tribes have little or no authority to regulate waters within or upstream of their reservations, and they lack the legal tools to protect their waters from upstream discharges stemming from mining activities, or the destruction of ephemeral washes caused by upstream development and agricultural practices. These commenters recommended that the agencies address these considerations as they finalize the proposed rule.

Several commenters recommended that the agencies take meaningful action and expand their stakeholder engagement efforts with particularly vulnerable populations to ensure that the agencies involve and understand the concerns from these communities. A few of the commenters expanded on this recommendation.

- A commenter recommended that the agencies engage environmental justice communities, including indigenous tribes and environmental justice organizations. The commenter asserted that creating more opportunities for engagement and feedback would help the agencies better understand the disproportionate impacts of the 2020 NWPR and the potential impacts of the proposed rule.
- Another commenter recommended that the agencies ensure input is received by environmental justice communities by offering input opportunities in multiple languages. The commenter recommended that the agencies work to ensure that communities of color most affected by water pollution, flooding, and related infrastructure injustices are at the forefront of the decision-making process. The commenter further recommended developing metrics to provide routine audits that increase transparency and streamline risk communication. The commenter also recommended that the agencies work to ensure that all parties come to the table with a mutual interest in advancing solutions for communities burdened with environmental racism and environmental justice, incorporating their feedback into actionable solutions from the very initial stages of the rulemaking process.

A few commenters expressed support for the agencies' efforts to recognize the role that the proposed rule can play in promoting consideration of environmental justice and the disproportionate impacts on low-income, minority, indigenous, and underserved communities.

However, several commenters expressed concern that the proposed rule did not include complete consideration of environmental justice impacts. Several commenters argued that pursuant to Executive Orders 12898 and 14008, the agencies must conduct a comprehensive environmental justice analysis of the proposed rule to identify and mitigate the impacts of the proposed rule. A commenter claimed that while the agencies' emphasis on environmental justice is commendable, the proposed rule also applies to people who live in rural communities under E.O. 13985. The commenter asserted that the agencies have not followed the direction of E.O. 13985, stating that the proposed rule ignores the concerns of rural America and imposes burdens on farmers and ranchers. Additionally, a few commenters asserted that E.O. 12898 and E.O 14008 direct the agencies to identify and address environmental effects of programs and policies on disadvantaged, historically marginalized, and overburdened communities, but the commenters asserted that the proposed rule does not meet the requirements because it relies on a flawed and incomplete analysis of environmental justice impacts.

A few commenters provided suggestions for additional measures to incorporate in the proposed rule in consideration of environmental justice.

- A commenter stated that cultural traditions in tribal and low-income communities are an important policymaking consideration.
- Another commenter recommended that the agencies protect the most vulnerable communities by investing in tools and methodologies to protect coastal wetlands. They also recommended that the agencies incorporate the conservation efforts in the Justice40 Initiative and leverage the current Administration's agenda to prioritize environmental justice and climate change.

A few commenters expressed specific concerns regarding how environmental justice was included in the proposed rule.

- One commenter stated that, consistent with the Administration's environmental justice emphasis, the agencies should not promulgate a rule that can only be complied with through substantial expenditures to hire experts.
- A commenter asserted that the proposed rule does not make clear how environmental justice will be factored into jurisdictional determinations. The commenter asserted that the agencies' claims about the results of the economic analysis and their claims regarding a need for further environmental justice analysis (citing page 69447 of the proposed rule) are in contradiction with one another. The commenter recommended that if there is a need for further environmental justice analysis, it should be provided before a final rule so that it is clear how environmental justice issues apply to jurisdictional determinations, and so that the public has the opportunity to comment.
- A commenter stated that some state agencies responsible for implementing the "waters of the United States" at the local level recommended that the agencies should not include environmental justice components in the proposed rule. The commenter asserted that the foundational rule is not the appropriate vehicle to address environmental justice.
- A commenter asserted that environmental justice cannot be used as a scientific or legal basis for defining jurisdictional waters. The commenter claimed that the agencies are limited by their

statutory authority, and as such are not able to decide "abstract philosophical questions" or solutions for environmental justice.

- A commenter asserted that tribes have provided numerous examples of the deleterious effects of limiting the reach of the Clean Water Act, noting examples of how the 2020 NWPR revoked protection for certain waters. The commenter asserted that they believe the agencies failed to undertake a robust analysis of the environmental justice impacts of the 2020 NWPR. The commenter stated that the agencies must undertake an analysis of the environmental justice impacts of the 2020 NWPR and take steps to address impacts to environmental justice communities.
- A commenter asserted that the 1980s definition of "waters of the United States" that the agencies proposed to return to did not consider environmental justice because the 1980s regulations were put in place before E.O. 12898. The commenter also claimed that the agencies' assertions regarding the negative impacts of the 2020 NWPR on environmental justice communities are unsupported. The commenter asserted that the agencies' proposed rule Economic Analysis indicates that the proposed rule would not provide benefits to the environment and environmental justice communities as the agencies have claimed. The commenter also argued that E.O. 13990 and E.O. 14008 link economic growth and job creation with advancing the cause of environmental justice. The commenter claimed that the environmental justice section of the preamble to the proposed rule, the Technical Support Document, and the Economic Analysis all fail to address how job growth in rural areas, low-income and minority populations, and indigenous communities will be advanced by the proposed rule. The commenter further asserted that the discussion of potential impacts suggests permitting costs and other regulatory burdens will increase as a result of replacing the 2020 NWPR, which they claimed will undermine the Biden Administration's infrastructure agenda, as well as its commitment to environmental justice. The commenter recommended that the agencies withdraw the proposed rule and conduct an analysis of how replacement of the 2020 NWPR with the proposed pre-2015 regulatory regime benefits both environmental justice and job creation, which they asserted is required by E.O. 13990.

Agencies' Response: The agencies disagree with commenters who asserted that the agencies did not satisfy the requirements of Executive Order 12898 or other Executive Orders related to environmental justice. The agencies conclude that this action does not have disproportionately high and adverse human health or environmental effects on Indigenous peoples, people of color, and/or low-income populations as specified in Executive Order 12898 (59 FR 7629, February 16, 1994). The documentation for this decision is contained in in the Economic Analysis for the Final Rule Chapter IV, which can be found in the docket for this action. See also the agencies' response to comments on the environmental justice analysis in Section 17.6.

The agencies acknowledge commenters who supported the consideration of environmental justice in the definition of "waters of the United States," as well as commenters who asserted that environmental justice cannot service as a basis for defining jurisdictional waters. While impacts on communities with environmental justice concerns are not a basis for determining the scope of the definition of "waters of the United States," the agencies recognize that the burdens of environmental pollution and climate change often fall disproportionately on communities with environmental justice concerns (*e.g.,* minority (Indigenous peoples and/or people of color) and low-income populations, as specified in Executive Order 12898). The agencies have qualitatively assessed impacts to these groups in the Economic Analysis for the Final Rule. Compared to the average population, these

groups are more likely to experience water-related environmental and social stressors such as contaminated drinking water, limited access to clean water, and inadequate water infrastructure—all of which increase their risk of exposure to pollutants. In addition to external stressors, behavioral and cultural characteristics of these groups, such as subsistence fishing and consuming higher rates of fish from polluted waters, increases their vulnerability to pollution. Taken together, these environmental, social, and behavioral factors often increase these groups' exposure to environmental contaminants and resulting risk of negative health outcomes. See the Economic Analysis for the Final Rule Chapter IV for additional information on the agencies' environmental justice analysis.

The agencies acknowledge commenters who stated the importance of clean water, including commenters who cautioned that narrowing the scope of jurisdiction would disproportionately impact population groups of concern. In this action, the agencies are finalizing a definition of "waters of the United States" that is within the agencies' authority under the Act; that advances the objective of the Clean Water Act; that establishes limitations that are consistent with the statutory text, supported by the scientific record, and informed by relevant Supreme Court decisions; and that is both familiar and implementable. See Final Rule Preamble Section IV.A. As discussed in Section V.A of the Preamble to the Final Rule, this final rule is generally comparable in scope to the pre-2015 regulatory regime that the agencies are currently implementing.

The agencies agree with commenters who asserted that the 2020 NWPR narrowed the scope of jurisdiction and had disproportionate impacts on population groups of concern. The agencies disagree with commenters who asserted that the agencies' analysis regarding the impacts of the 2020 NWPR were insufficient. See Final Rule Preamble Sections III.B.5 and IV.B.3 and the Economic Analysis for the Final Rule for additional information.

The agencies acknowledge commenters who expressed concern about any rule that can only be complied with through substantial expenditures to hire experts. However, the final rule does not require substantial expenditures to hire experts; *see* Final Rule Preamble Section IV.C.10 for additional discussion.

See Final Rule Preamble Section III.C for a description of the agencies' stakeholder engagement for the proposed rule. The agencies acknowledge commenters' recommendations for how to expand outreach to environmental justice communities.

5.11 Small Business Regulatory Enforcement Fairness Act (SBREFA)/Regulatory Flexibility Act (RFA)

Several commenters asserted that the agencies did not adequately analyze the implications and additional costs of the proposed rule on small entities, including in the proposed rule Economic Analysis, and these commenters asserted that the proposed rule must respect the legal limits of authority placed on the scope of "waters of the United States." A few of the commenters expanded upon this assertion, urging the agencies to withdraw the proposed rule and engage in more meaningful dialogue with small businesses and regulated entities.

Many commenters expressed concerns that they believed the proposed rule would have significant impacts on a substantial number of small entities. Several commenters asserted that the proposed rule would increase permitting costs for small entities because the proposed rule would expand jurisdiction with unclear rules. A few of the commenters expanded on this assertion, indicating that the following small entities would be particularly impacted by the proposed rule:

- Aquatic industries;
- Pest control businesses;
- Building material sector businesses;
- Small businesses; and
- Farmers.

A commenter claimed that costs to small entities with the proposed rule's expansion of jurisdiction under the Clean Water Act would be hundreds of millions of dollars, and the commenter stated that therefore the agencies' certification of "no small entity impact" was incorrect. The commenter recommended that the agencies include exclusions for stormwater controls, farm and stock watering ponds, puddles, and most ditches to minimize costs. The commenter also asserted that the agencies have obligations under the U.S. Office of Management and Budget (OMB) guidance and the Regulatory Flexibility Act (RFA) to measure and communicate cost increases.

Many commenters requested that the agencies form a panel under the Small Business Regulatory Enforcement Fairness Act (SBREFA). Some of these commenters explained this request in further detail.

- A few commenters claimed that the agencies failed to comply with the RFA by failing to hold a SBREFA panel. The commenters also asserted that the agencies did not develop a sufficient record to support their certification of "no significant impact" on a substantial number of small entities. The commenters further asserted that the roundtable with the agencies conducted with the small business community was insufficient in terms of the outreach that is needed for the proposed rule.
- A commenter recommended that the agencies hold the proposed rule in "abeyance," stating that the agencies should consider alternative approaches for small entities by convening a Small Business Advocacy Review (SBAR) panel prior to promulgating any further rule on this issue.
- Another commenter asserted that the agencies misrepresented the proposed rule as reinstating the status quo, that the agencies have not engaged in thorough small business review, and that the proposed rule Economic Analysis does not reflect the breadth of the proposed rule changes. The commenter claimed that a SBREFA panel is warranted in addition to a more thorough economic analysis.
- A commenter asserted that a SBREFA analysis is necessary to assess the impact of the proposed rule on small producers already harmed by COVID-19 and facing other federal mandates.

Several commenters asserted that the agencies did not meet the procedural requirements under the RFA. Some of the commenters further expanded upon this assertion.

- A few commenters asserted that the agencies improperly certified the proposed rule under the RFA because they stated that the rule would likely have direct significant impacts on a substantial number of small entities.
- A commenter argued that an RFA analysis for the proposed rule must assess the impact on small entities and evaluate whether less burdensome alternatives are available. The commenter stated that the agencies must publish this analysis in initial form, along with the proposed and final rule.

The commenter also claimed that under the 2015 Clean Water Rule, the agencies did not conduct an RFA analysis.

- A commenter contended that the agencies failed to state a factual basis in their RFA certification for the "primary baseline" used by the agencies. The commenter further claimed that the agencies failed to identify the differences between the proposed rule and the rule currently being enforced. The commenter asserted that the agencies cannot certify using the "secondary baseline" because the agencies have not properly quantified the full direct costs to small entities in transitioning from the 2020 NWPR to the proposed rule, and the commenter asserted that the agencies must conduct an "IRFA" for notice and comment.
- A commenter asserted that the proposed rule fails to take account of the needs and property rights of small businesses under the RFA. The commenter recommended that the agencies consider whether they can achieve their environmental goals without imposing burdens on small businesses through exemptions of small businesses or offering a simpler alternative for small businesses than the agencies require of big businesses, particularly with regard to permit requirements and issuing permits. The commenter also recommended that the agencies protect small business owners by allowing them to come into compliance without fines or enforcement action, except in cases of willful or repeated violations.

<u>Agencies' Response</u>: The agencies disagree with commenters who asserted that the agencies' outreach to small businesses and small entities was insufficient. The agencies conducted extensive stakeholder outreach in developing the final rule, beginning with soliciting pre-proposal recommendations from members of the public for a 30-day period from August 4, 2021, to September 3, 2021. In July 2021, the agencies also announced a schedule for initial public meetings to hear from interested stakeholders on their perspectives on defining "waters of the United States." 86 FR 41911 (August 4, 2021). In total, the agencies received over 32,000 recommendation letters from the public during the pre-proposal period and held six public meeting webinars between August and September 2021. During the proposed rule's 60-day public comment period, the agencies proceeded to hold three virtual public hearings in January 2022, in addition to participating in a Small Business Environmental Roundtable hosted by the Office of Advocacy of the U.S. Small Business Administration and engaging in federalism and tribal consultation, among other activities. See Final Rule Preamble Section III.C. The agencies ultimately received over 114,000 comments on the proposed rule during the public comment period. The agencies greatly appreciate and thoroughly considered the feedback received in developing the final rule, made changes to the rule to address that feedback, and intend to continue to engage with stakeholders to facilitate implementation of the rule moving forward

The agencies disagree with commenters who asserted that the agencies did not provide sufficient justification for their certification under the RFA in the proposed rule, or that the agencies did not analyze the implications and additional costs of the proposed rule on small entities. The agencies further disagree with commenters who asserted that a SBREFA or SBAR panel is required for this rule. In Final Rule Preamble Section V.C, the agencies certify that this rule will not have a significant economic impact on a substantial number of small entities under the RFA for several reasons. First, as demonstrated in Chapter I of the Economic Analysis for the Final Rule, this rule would codify a regulatory regime with *de minimis* differences from the one currently being implemented nationwide due to the

vacatur of the 2020 NWPR. See Final Rule Preamble Section V.C for additional rationale regarding the agencies' certification.

The agencies acknowledge commenters who expressed concern regarding the impact of the proposed rule on small businesses and small entities, but the agencies disagree with commenters who asserted the scope of jurisdiction under the proposed rule would be too broad, or broader than the pre-2015 regulatory regime. In this action, the agencies are finalizing a definition of "waters of the United States" that is within the agencies' authority under the Act; that advances the objective of the Clean Water Act; that establishes limitations that are consistent with the statutory text, supported by the scientific record, and informed by relevant Supreme Court decisions; and that is both familiar and implementable. See Final Rule Preamble Section IV.A. The agencies disagree that the final rule generally represents an expansion beyond the pre-2015 regulatory regime; rather, the agencies expect that there will be a slight and unquantifiable increase in waters being found to be jurisdictional under the final rule in comparison to the pre-2015 regulatory regime. Indeed, as discussed in Section V.A of the Preamble to the Final Rule, this final rule is generally comparable in scope to the pre-2015 regulatory regime that the agencies are currently implementing.

In response to commenters who requested specific exclusions in the final rule, see Section 15 of the agencies' response to comments for additional information on exclusions.

5.12 Stakeholder Engagement

Many commenters recommended that the agencies develop a continuous, meaningful, and robust dialogue with affected stakeholders moving forward with the proposed rule, second rulemaking, and implementation of this and any future rules by conducting additional outreach. In particular, some commenters recommended specific stakeholders be consulted extensively in ongoing and future discussions. These included:

- Vulnerable communities disproportionately impacted by ongoing environmental injustices of compromised drinking water and increased flooding;
- Tribes;
- Small businesses;
- Agricultural community, including farmers, producers, and ranchers;
- Regulated entities;
- Mining industry;
- Conservation districts (particularly in regard to federal land management decisions that impact water quality, water yields and timing of those yields, impacts on facilities such as dams, reservoirs, delivery systems, or monitoring facilities, and other water-related issues);
- Local partners;
- Regional partners;
- State partners;
- Federal partners;
- Stakeholders such as hunters, anglers, outdoor businesses, and outdoor enthusiasts who depend on access to clean water;
- Conservationists; and
- Foresters.

Many commenters provided detailed explanations for why and how stakeholders should be engaged in the proposed rulemaking.

- A commenter asserted that the agencies must listen to stakeholders to develop a durable rule that protects small streams and wetlands, while also ensuring the predictability and stability that stakeholders need to thrive.
- A commenter stated that the agencies should conduct meaningful technical discussion with all impacted sectors associated guidance is prepared and timely implementation can begin once the rule is finalized.
- Another commenter asserted that they believe because the comment period was only 60 days, the agencies should have been willing to hold meaningful dialogue with affected stakeholder groups to fully discuss the rule and welcome a meaningful engagement with the public.
- Another commenter recommended that the agencies develop a "capstone national roundtable" if any work on the proposed rule continues.
- Another commenter requested that in addition to improving engagement with stakeholders, the agencies should include sufficient time for public analysis and comment.
- Another commenter asserted that the Clean Water Act, in addition to other federal laws and orders, requires meaningful and transparent engagement with the states and the public in the rulemaking process from the very beginning, including engagement with regulated entities, the scientific community, legal experts, and other government agencies. The commenter suggested that the agencies under the Obama administration only considered comments from stakeholders aligned with their ideology and expressed concern that if the agencies follow a similar process, the result will be a definition that is legally indefensible, unworkable, and lacks predictability for the regulated community. The commenter asserted that state expertise is invaluable in developing federal standards and that input from the regulated community is essential to ensuring that the agencies' rules are transparent, lawful, and predictable. The commenter expressed concern that the agencies have not been sufficiently transparent in the process thus far.

Several commenters expressed appreciation for the opportunity to engage with the agencies on the proposed rule. In particular, a few of the commenters expressed appreciation for the stakeholder outreach that the agencies conducted for the proposed rule, including the listening sessions.

Many commenters expressed concerns that the agencies' stakeholder engagement efforts for the proposed rule were insufficient. Several commenters explained this concern.

- A commenter indicated that the agencies would benefit from wider stakeholder consultation in the proposed rule.
- Several commenters stated that seeking input from stakeholders within a reasonable timeframe should be standard practice.
- Another commenter stated that they were disappointed by what they believed to be the lack of meaningful outreach prior to the agencies' issuance of the proposed rule, as well as by the abbreviated comment period.
- Another commenter asserted that they believe the proposed rule's approach to hydrologic characteristics were confusing and necessitated additional discussion between the agencies and stakeholders in several areas including, but not limited to, ephemeral rivers and streams, tributaries, ditches, adjacent waters, and wetlands. The commenter also recommended a western regional roundtable to continue discussion about the proposed rule.

- A commenter recommended that the agencies withdraw the proposed rule and instead engage in an open dialogue with the regulated community, including mining, to formulate a rule that provides necessary protections for "waters of the United States," conforms to the limits placed by Congress and the Supreme Court, and allows the industrial minerals sector to continue to operate.
- Another commenter asserted that they believe the agencies conducted insufficient outreach to small businesses that will be impacted by the proposed rule.
- Another commenter asserted that they believe that when the agencies assessed the 2020 NWPR, stakeholders and state officials were shut out of the review and approval processes. The commenter claimed that at the start of the regulatory process for the proposed rule, the agencies moved forward without requesting input from stakeholders. The commenter asserted that they believe that had the agencies collaborated with stakeholders, local, and state officials in conducting a transparent and fact-based review, there would have been no need to begin the regulatory process for the proposed rule.
- Another commenter expressed concern that they believe the agencies did not include consideration of regulated entities as well as direction from the Supreme Court in the proposed rule, stating that the rule could have extremely far-reaching implications.
- Another commenter recommended that in addition to engaging in more robust and meaningful dialogue with stakeholders, the agencies should focus on developing a rule that adheres to Congress' intent and respects the limits that Congress and the Supreme Court have placed on the Clean Water Act's reach.
- Another commenter recommended that the agencies seriously consider the comments and feedback from stakeholders from the proposed rule before moving forward with the second rulemaking.

Several commenters provided input on the agencies' regional roundtables.

- Several commenters asserted that the agencies' "regional roundtables" focused not on the proposed rule, but on identifying regional similarities and differences that would be considered as part of a separate rulemaking.
- A commenter asserted that the agencies' regional roundtables left stakeholders without an opportunity to provide input to the agencies on the proposed rule. The commenter claimed that if the previously announced roundtables did not occur due to COVID-19 related concerns, that only exemplifies the importance of extending the comment period for the proposed rule. The commenter stated that rulemakings must take pandemic-related difficulties into consideration and that the agencies cannot use the pandemic as an excuse to limit public input opportunities.
- A commenter asserted that while they supported the agencies' plans to host roundtables across diverse geographies, they felt that the agencies should do more to ensure everyone who would like to be heard can have a voice in the development of these regulations.
- A commenter recommended that the agencies reconsider the roundtable process. The commenter asserted that the agencies should retain previous public input processes that include all stakeholders.

A few commenters asserted that any future comment period should be longer than 60-days, specifically:

- A commenter requested that any future comment period for "waters of the United States" be at least 90-days due to the high importance of this issue, and the economic impact that the proposed rule and any future actions may have on local landowners and producers.

- Another commenter requested an additional opportunity to comment on material changes made following receipt of public comment and the future anticipated decisions of the Supreme Court.

One commenter requested that the agencies provide written responses to feedback received during stakeholder outreach activities.

Agencies' Response: The agencies agree with commenters who emphasized the value of stakeholder outreach, including outreach to diverse stakeholder groups, in the rulemaking process. 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. See Final Rule Preamble Section III.C. The agencies received over 32,000 recommendation letters from the public during pre-proposal outreach and over 114,000 comments on the proposed rule during the public comment period. The agencies also held a public hearing and listening sessions with tribal, state, and local governments during the public comment period to listen to feedback on the proposed rule from coregulators and a variety of stakeholders. The agencies acknowledge that the scope of Clean Water Act jurisdiction is an issue of great national importance and appreciate feedback and engagement from all stakeholders.

The agencies acknowledge commenters who asserted that the regional roundtables that took place in May and June 2022 did not allow for stakeholders to provide comment on the proposed rule. The May and June 2022 regional roundtables took place after the 60-day public comment period, thus the agencies were unable to consider any comments regarding the proposed rule. The purpose of the May and June 2022 regional roundtables was to provide stakeholders and coregulators the opportunity to discuss geographic similarities and differences and site-specific feedback about the ongoing implementation of "waters of the United States" by the agencies.

The agencies disagree with commenters who asserted that the agencies conducted insufficient stakeholder outreach, or that the agencies' rulemaking process lacked transparency. The agencies conducted extensive stakeholder outreach in developing the final rule, beginning with soliciting pre-proposal recommendations from members of the public for a 30-day period from August 4, 2021, to September 3, 2021. In July 2021, the agencies also announced a schedule for initial public meetings to hear from interested stakeholders on their perspectives on defining "waters of the United States." 86 FR 41911 (August 4, 2021). In total, the agencies received over 32,000 recommendation letters from the public during the pre-proposal period and held six public meeting webinars between August and September 2021. During the proposed rule's 60-day public comment period, the agencies proceeded to hold three virtual public hearings in January 2022, in addition to participating in a Small Business Environmental Roundtable hosted by the Office of Advocacy of the U.S. Small Business Administration and engaging in federalism and tribal consultation, among other activities. See Final Rule Preamble Section III.C. The agencies ultimately received over 114,000 comments on the proposed rule during the public comment period. The agencies greatly appreciate and thoroughly considered the feedback received in developing the final rule, made changes to the rule to address that feedback, and intend to continue to engage with stakeholders to facilitate implementation of the rule moving forward.

The agencies acknowledge commenters who expressed the desire for continued outreach and training opportunities to facilitate implementation. The agencies will continue to assess the need for outreach and training to facilitate consistent implementation of the final rule. See Section 5.0.3 for the agencies' response to comments regarding a second rulemaking.

The agencies acknowledge the importance of developing an implementable rule that is informed by a variety of stakeholder perspectives. As discussed further in Final Rule Preamble Section IV.A.4, the agencies have determined the final rule is both familiar and implementable. All definitions of "waters of the United States," including the pre-2015 regulatory regime, the 2015 Clean Water Rule, and the 2020 NWPR have required some level of case-specific analysis. 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 determine whether waters are "waters of the United States." See Final Rule Preamble Section IV.G.

The agencies disagree with commenters who stated that the agencies should not have proposed the revised definition of "waters of the United States" because the 2020 NWPR was a suitable alternative. In developing the final rule, the agencies thoroughly considered alternatives to this rule, including the 2020 NWPR, and have concluded that this rule is the best path forward to meet the agencies' goals to promulgate a rule that advances the objective of the Clean Water Act, is consistent with Supreme Court decisions, is informed by the best available science, and promptly and durably restores vital protections to the nation's waters. See Section IV.B.3 of the Preamble to the Final Rule and the agencies' response to comments in Section 4 for further discussion of the agencies' grounds for concluding that the 2020 NWPR is not a suitable alternative to the final rule.

In response to commenters who stated that the length of the comment period was insufficient, see Section 5.1 of the agencies' response to comments on the APA.

5.13 National Environmental Policy Act (NEPA)

5.13.1 Proposed Rule's Compliance with NEPA

Several commenters provided input regarding the proposed rule's compliance with the National Environmental Policy Act (NEPA).

- A commenter asserted that they believe the proposed rule fails to comply with basic NEPA requirements for the development of a new regulation. The commenter claimed that a NEPA regulatory review would provide analysis of the economic impacts, that the proposed rule fails to provide guidance on how the final rule may be applied, and that the proposed rule fails to address basic norms of sampling and "good management decision-making."
- Another commenter claimed that the agencies have not prepared either an environmental assessment or an environmental impact statement for the proposed rule as required by NEPA. The commenter asserted that there is little doubt that the proposed rule will significantly affect the quality of the human environment. The commenter claimed that there is no indication in the

Federal Notice that the agencies conducted any NEPA analysis or engaged in reasoned decision-making regarding environmental impacts as required by law.

- Another commenter asserted that they believe the agencies were leading the public to believe that the proposed rule could be implemented without NEPA or similar analysis. The commenter claimed that this lack of analysis would damage the entire NEPA process as NEPA must be completed prior to any project starting implementation.
- Another commenter asserted that the NEPA regulations are not confined to section 102(2)(C) and must apply to the whole of section 102(2). The commenter claimed that the provisions of the Clean Water Act and the NEPA regulations must be read together as a whole to comply with the spirit and letter of the law.
- Another commenter asserted that because the Corps completed a NEPA analysis for the 2015 rule, they felt it was clear that NEPA applies to the proposed rule as well.
- Another commenter asserted that they believe the agencies failed to provide information regarding why the amended definition of "waters of the United States" was needed. The commenter requested that the agencies respond to questions such as how much of the water supply is being impacted by unregulated discharges, how polluted the water is that is not regulated, and what the probability is of the proposed rule impacting pollution, among others. The commenter claimed that the rulemaking failed to educate the public on benefits and costs from the proposed rule. The commenter asserted that they believe the proposal did not address possible negative or positive impacts to a range of uses and this is justification for why a NEPA analysis is necessary.

A few commenters asserted that the proposed rulemaking should be supported by an environmental assessment prepared in accordance with NEPA and agency implementing regulations. The commenters claimed that a NEPA analysis of the effects of the proposed rule, and reasonable alternatives, is necessary in order for the proposed rule to be legally defensible. The commenters recommended that the agencies prepare an environmental assessment with public involvement.

A commenter wrote, "The Environmental Protection Agency's and the U.S. Army Corps of Engineers' quest to achieve a 'durable' definition of the phrase 'waters of the United States' will remain unachievable if both agencies continue to shirk their statutory responsibilities under the Endangered Species Act and the National Environmental Policy Act."

<u>Agencies' Response</u>: This final rule is not subject to the requirements of NEPA. Generally, the Clean Water Act exempts actions of the EPA Administrator from NEPA obligations. 33 U.S.C. § 1371(c)(1) (providing that, with two exceptions not relevant here, "no action of the [EPA] Administrator taken pursuant to [the CWA] shall be deemed a major Federal action significantly affecting the quality of the human environment within the meaning of [NEPA]"). As the Senate Conference Report advised: ''If the actions of the Administrator under [the CWA] were subject to the requirements of NEPA, administration of the Act would be greatly impeded.'' S. Conf. Rep. No. 92-1236, *reprinted in* 1972 U.S.C.C.A.N. 3776, 3827.

The statutory exemption applies here despite the fact that the EPA is promulgating this rule jointly with the Department of the Army. Nothing in the CWA's exemption from NEPA limits it to actions taken by the EPA alone. *See*, *e.g.*, *Murray Energy Corp. v. U.S. Dep't of*

***Def*., 817 F.3d 261, 273 (6th Cir. 2016) ("That the [2015 Rule] was promulgated jointly by the EPA Administrator and the Secretary of the Army does not defeat the fact that it represents action, in substantial part, of the Administrator."); *see also Municipality of Anchorage v. United States*, 980 F.2d 1320, 1328–29 (9th Cir. 1992) (holding that an action "does not cease to be 'action of the Administrator' merely because it was adopted and negotiated in conjunction with the Secretary of the Army and the Corps"). In *Municipality of Anchorage*, the Ninth Circuit found that a Memorandum of Agreement between EPA and the Corps providing guidance for administration of the section 404 permitting program was exempt from NEPA under 33 U.S.C. § 1371(c). 980 F.2d at 1329. This rule concerns the jurisdictional scope of the entire Act, implicating the many CWA programs administrated only by the EPA (the EPA shares its CWA authority with the Army only with respect to section 404, 33 U.S.C. § 1344). The EPA has the ultimate authority to determine the scope of CWA jurisdiction, *see* Administrative Authority to Construe section 404 of the Federal Water Pollution Control Act, 43 Opp. Att'y Gen. 197 (1979), and this final rule is an "action of the Administrator." *Murray Energy*, 817 F.3d at 273.**

5.13.2 Relationship between the Proposed Rule and NEPA

Some commenters discussed NEPA in the context of Clean Water Act sections 401, 402, and/or 404. These commenters generally indicated that changes in "waters of the United States" definitions and/or expanded jurisdiction could trigger additional regulatory requirements, such as NEPA and other federal regulations. Most of these commenters raised concerns about additional time and cost needs associated with NEPA and other regulations.

In the context of Clean Water Act section 404 permitting and recreational opportunities for state and federal lands, a commenter wrote "Organizations are also very concerned that this level of restructure of what areas and waters are subject to the heightened analysis of the Clean Water Act would drive a large scale review of NEPA regulations and existing analysis. The Organizations would have to believe that at best issues such as trails in lands now made navigable water for part of the year would be the basis for a programmatic NEPA analysis, such as those previously performed for agricultural concerns. This is concerning as most land managers we work with simply don't have the time, staff or funding to undertake this type of analysis. This means recreational opportunities will be lost. These are the type of indirect impacts from the Proposal that will be hugely economically impactful and are not even addressed in the Proposal." The commenter went on to discuss impacts to management and maintenance activities and included photographs of conditions.

A few commenters expressed concern that a finding that a feature is a "water of the United States" could trigger potentially costly and time-consuming obligations under the requirements of the National Environmental Policy Act.

Agencies' Response: The agencies acknowledge that a revised definition of "waters of the United States" that changes the number of activities or projects that require a CWA section 402 or 404 permit could also change the number of actions that require compliance with other federal laws. However, as discussed earlier in this section, any changes resulting from the final rule relative to the regulatory regime that the agencies are currently implementing will be minimal. See the Economic Analysis for the Final Rule as well as the agencies' response to comments in Section 17.

5.14 Endangered Species Act (ESA)

5.14.1 Proposed Rule's Compliance with the ESA

A few commenters expressed concerns that the agencies violated the ESA by failing to engage in ESA section 7 consultation on the proposed rule. Specifically, the commenters stated that the proposed rule does not provide for Clean Water Act protections over waters important to threatened and/or endangered species—with one commenter asserting that the proposed rule would cover fewer waters than the pre-2015 definition—and that the absence of Clean Water Act jurisdiction puts those waters at risk of degradation or destruction in a manner that could jeopardize listed species, thereby requiring consultation.

One of the commenters emphasized that the proposed rule is one of many recent agency actions to revise the definition of "waters of the United States," arguing that the rulemaking is thus a "clearly discretionary action" that may be subject to consultation. The commenter stated that ESA consultation does not require that the agencies "promulgate a hypothetical perfect rule for the benefit of threatened and endangered species." Rather, per the commenter, the agencies need only ensure that the action does not jeopardize listed species, which the commenter stated could be achieved by implementing any recommended reasonable and prudent alternatives. The commenter also suggested that the agencies' evaluation of "biological integrity" in making future jurisdictional determinations under the new rule would benefit from information that could be gained by engaging in ESA section 7 consultation.

Another commenter asserted that case law "reinforces the proposition that a regulation that may affect endangered species must be the subject of consultation," citing *W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 495 (9th Cir. 2010); *Nat'l Parks Conservation Ass'n v. Jewell*, 62 F. Supp. 3d 7 (D.D.C. 2014); *Citizens for Better Forestry v. U.S. Dep't of Agriculture*, 481 F. Supp. 2d 1059 (N.D. Cal 2007); and *Washington Toxics Coal. v. U.S. Dep't of Interior*, 457 F. Supp. 2d 1158 (W.D. Wash. 2006).

> **Agencies' Response: Consultation under section 7(a)(2) of the ESA may be required when an agency exercises power under its enabling act to authorize, fund, or carry out an action that may affect listed species or designated critical habitat. 16 U.S.C. 1536(a)(2); 50 CFR 402.14(a). The consultation requirement only applies if the agency has discretion under its enabling legislation to modify the proposed action for the benefit of listed species. *See* 50 CFR 402.03. For the reasons discussed below, this rulemaking does not trigger consultation under section 7(a)(2) of the ESA.**
>
> **This action is a definitional rule that addresses the scope of the agencies' regulatory jurisdiction as established by the Clean Water Act, which is limited to the "waters of the United States," 33 U.S.C. 1362(7). Defining the term "waters of the United States" in the Clean Water Act does not implicate section 7(a)(2) of the ESA. Section 7(a)(2) serves as a check on affirmative action that an agency takes or authorizes under its enabling act, but "does not expand the powers conferred on an agency by its enabling act." *Platte River Whooping Crane Critical Habitat Maintenance Trust v. FERC*, 962 F.2d 27, 33-34 (D.C. Cir. 1992). In other words, because section 7 confers no substantive powers, "EPA cannot invoke the ESA as a means of creating and imposing requirements that are not authorized by the CWA." *Am. Forest & Paper Ass'n v. EPA*, 137 F.3d 291, 299 (5th Cir. 1998).**

Indeed, the bounds of the agencies' regulatory jurisdiction under the Clean Water Act are set by the Clean Water Act alone and cannot be expanded or modified by the results of a consultation under ESA section 7(a)(2), including any findings related to jeopardy of a listed species. Because the agencies lack authority "to consider the protection of threatened or endangered species as an end in itself" in determining the bounds of their Clean Water Act jurisdiction, ESA consultation would serve no purpose and is not required. *See Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 665, 671 (2007); *see also Alaska Wilderness League v. Jewell*, 788 F.3d 1212, 1225 (9th Cir. 2015) ("[D]etermining *whether* the statutory criteria have been achieved does not trigger ESA's consultation requirement." (emphasis in original)). That the agencies' interpretation of their statutory authority may warrant judicial deference under *Chevron* or other deference doctrines does not alter this conclusion. *See Center for Food Safety v. Vilsack*, 718 F.3d 829, 840 (9th Cir. 2013) (concluding that USDA Animal and Plant Health Inspection Service's (APHIS's) decision, based on the agency's interpretation of its statutory jurisdiction, was "a nondiscretionary act that did not trigger the agency's duty to consult under the ESA" (citing, *inter alia*, *Nat'l Ass'n of Home Builders*, 551 U.S. at 665)); *see also id.* at 832-33 ("APHIS's lack of jurisdiction over [Roundup Ready Alfalfa] obviated the need for the agency to consult with the FWS under the ESA and to consider alternatives to unconditional deregulation under NEPA."); *cf. Department of Transportation v. Public Citizen*, 541 U.S. 752, 766 (2004) (accepting agency's "entirely reasonable reading" of statutory provision in course of concluding that agency had no discretion over the relevant effects and thus no NEPA analysis was required).

Further, the agencies disagree with suggestions that the proposed rule's impacts would exceed the ESA's "may affect" threshold and trigger the agencies' section 7(a)(2) consultation duties. As an initial matter, the final rule is definitional and does not authorize any activity, let alone one that could affect a listed species or designated critical habitat. Additionally, the relationship between the final rule and any potential effects from future third-party activities is too attenuated to establish legal causality. *See, e.g.*, 50 CFR 402.17(b) (providing that "[c]onsiderations for determining that a consequence . . . is not caused by the proposed action" include where "(1) [t]he consequence is so remote in time from the action . . . that it is not reasonably certain to occur . . . or (3) [t]he consequence is only reached through a lengthy causal chain that involves so many steps as to make the consequence not reasonably certain to occur"). Indeed, the agencies note that any harm to listed species or designated critical habitat resulting from future activities in non-jurisdictional or jurisdictional waters would result from the activities themselves, not the final rule. The potentially harmful effects of future third-party projects would also result from a lengthy causal chain that is too speculative and hypothetical to be meaningfully analyzed in a consultation on this rulemaking, and the consequences of such projects would depend on a host of factors unrelated to the final rule including the nature of the proposed activity and the applicability of other federal, state, and local laws, including section 9 of the ESA. As such, those future third-party projects—not the final rule—would be the appropriate actions triggering consultation under the ESA, to the extent that section 7 were found to apply to those actions. *See, e.g.*, *Ctr. for Biological Diversity v. DOI*, 563 F.3d 466, 483 (D.C. Cir. 2009) (finding consultation not triggered where agency's approval of leasing program itself did not affect listed species and species welfare was, "by design, only implicated at later stages of the program, each of which requires ESA consultation").

Further, any specific future projects in waters that are determined to be non-jurisdictional under the final rule are not exempt from the ESA merely because they do not require a Clean Water Act permit. Any project requiring federal funding or approvals under other statutes would trigger consultation if listed species or critical habitat may be affected and the federal agency involved has the discretion to consult. *See* 50 CFR 402.03, 402.14(a). Likewise, any project requiring federal funding or approvals in waters that *are* jurisdictional under the final rule would trigger consultation if listed species or critical habitat may be affected and the federal agency involved has the discretion to consult. And even in the absence of a federal nexus, such future projects would remain subject to section 9's "take" prohibition, 16 U.S.C. 1538(a)(1)(B), along with applicable state, tribal, or local laws and restrictions.

5.14.2 Relationship between the Proposed Rule and the ESA

A few commenters expressed concern that a finding that a feature constitutes "waters of the United States" could trigger potentially costly and time-consuming obligations under the requirements of the Endangered Species Act, such as consultation requirements under ESA section 7.

Agencies' Response: The agencies acknowledge that a revised definition of "waters of the United States" that changes the number of activities or projects that require a Clean Water Act section 402 or 404 permit could also change the number of actions that require compliance with other federal laws. However, as discussed earlier in this section, the changes resulting from the final rule relative to the regulatory regime the agencies are currently implementing will be minimal. See the Economic Analysis for the Final Rule as well as the agencies' response to comments in Section 17.