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

SECTION 6 – TRADITIONAL NAVIGABLE WATERS, THE TERRITORIAL SEAS, AND INTERSTATE WATERS

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

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6 TRADITIONAL NAVIGABLE WATERS, THE TERRITORIAL SEAS, AND INTERSTATE WATERS

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."

6.1 General

6.1.1 Traditional Navigable Waters

Several commenters supported the agencies' decision not to propose any changes to the definition of traditional navigable waters as defined in the 1986 regulations. One commenter stated that the agencies must ensure that traditional navigable waters are not limited to just the waters that the agencies have determined to be "navigable waters of the United States" under section 10 of the Rivers and Harbors Act of 1899 and requested that the agencies clarify that "traditional navigable waters" need not flow across state boundaries. Another commenter stated that they do not support any regulatory scheme which "removes the term, or substantively alters the current definition, of 'Navigable Waters.'"

Alternatively, one commenter stated that by using the 1986 definition, the agencies are given authority to take "virtually all waters into their jurisdiction." The commenter added that there is no way to know in what manner, if any, waters were used to transport goods for commerce, or how they may be used in the future.

A couple of commenters supported interpreting the term "navigable" as applied by the Supreme Court in *The Daniel Ball v. United States,* 77 U.S. 557 (1871), which one commenter characterized as the "classical understanding" of the term. Another commenter stated that the "Agencies' traditional navigable waters category cannot be squared with either the plurality or Justice Kennedy's opinions in *Rapanos v. United States, 547 U.S. 715 (2006) ("Rapanos").* A few commenters added that both of these opinions equate the traditional navigable water category with the longstanding two-part test for navigability under *The Daniel Ball*. The commenters urged the agencies to confirm that traditional navigable waters are limited to the traditional scope recognized in *Rapanos* and Rivers and Harbors Act case law.

One commenter argued that jurisdictional waters should be limited to traditional navigable waters that are used for the transportation of goods in interstate commerce as opposed to waters that are merely used in commerce. The commenter urged the agencies to amend the proposed regulatory text for traditional navigable waters as follows: "all waters that are used, or were used in the past, or may be susceptible to use in, transport of goods in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide." Another commenter said the agencies should limit federal jurisdiction to the major tributaries of navigable waters.

One commenter encouraged the agencies to reduce the scope of "waters of the United States" so it more closely matches the common meaning of "navigable" in the context of navigable waters. The commenter added that this will improve clarity and predictability, reducing the need for additional guidance. Another

commenter said that the term navigable waters may be misleading because many of the waters within the United States are not navigable by the basic definition of the term navigable. The commenter added, "As a waterway or waterbody of the United States, using illogical terminology to the basic element such as water will amplify disagreement."

One commenter discussed the definition of tidal waters, stating that the term "practically measured," which is used in the proposed definition (Section V.C.8.e – page 69430), is neither a precise nor repeatable measurement. The commenter recommended that the definition of tidal waters retain the term "practically measured," but also include "a quantitative threshold, such as '…a predictable rhythm of no more than 'X' of an inch or inches…' to address instances where a predictable tidal rhythm may be measurable on one day, but not the next."

> **Agencies' Response: The agencies are not making changes to the text or substance of the provisions of the 1986 regulations covering traditional navigable waters. This category of jurisdictional waters continues to be defined as "all waters that are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide" in paragraph 1(a)(i) of the final rule. See response to comments 2.3.1. The agencies agree that waters may be "traditional navigable waters" whether or not they flow across state boundaries. See Final Rule Preamble Section IV.C.2.b.i.**
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> **The agencies disagree with commenters who asked the agencies to limit this longstanding definition of traditional navigable waters, and also disagree with the commenters who suggested that this definition authorizes the agencies to assert jurisdiction over "virtually all waters." The agencies have applied this definition of "traditional navigable waters" for decades. The majority of waters that the agencies have determined are jurisdictional are not traditional navigable waters, but instead fall within the other types of waters identified in the agencies' regulations.**
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> **In response to the comments regarding the common meaning of "navigable" and the lack of a regulatory definition of the specific term "navigable," the agencies note "navigable waters" is defined term in the Clean Water Act and "navigable waters" is defined as "the waters of the United States, including the territorial seas." There is thus no need to define the word "navigable" on its own. The defined term "navigable waters" encompasses a broad range of jurisdictional waters, whereas the term "traditional navigable waters" for purposes of the Clean Water Act refers only to the subset of "navigable waters" defined in paragraph (a)(1)(i) of the final rule and unchanged for decades.**
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> **Regarding the comment on the interpretation of the term "practically measured" in the definition of "tidal waters," the agencies are not making any changes to this definition and maintain the text of the definition as it has existed since 1986. The agencies believe that "practically measured in a predictable rhythm" sufficiently indicates that determinations regarding the extent of tidal waters are based on measurements taken over time, covering a range of tidal conditions, and note that the U.S. Army Corps of Engineers (Corps) has extensive experience analyzing tidal data. The agencies also note that the final rule does not change the lateral scope of Clean Water Act jurisdiction over tidal waters, which extends up to the high tide line, as defined in paragraph (c)(3).**

6.1.2 Territorial Seas

A few commenters discussed the territorial seas category. One commenter asked the agencies to clarify that the territorial seas represent a distinct basis for jurisdiction and are not a type of traditional navigable water. Another commenter specifically voiced support for adding territorial seas to the list of waters to which tributaries connect in order for the tributary to be considered jurisdictional.

> **Agencies' Response: The agencies are not making changes to the text or substance of the provisions of the 1986 regulations covering the territorial seas. The agencies agree that the inclusion of the "territorial seas" in the Clean Water Act definition of "navigable waters" provides a distinct basis for jurisdiction over these waters. Therefore, the territorial seas will remain as a separate category of jurisdictional waters in paragraph (a)(1)(ii) of the final rule. As with the other paragraph (a)(1) waters, tributaries that connect to the territorial seas are considered jurisdictional when they otherwise meet the jurisdictional criteria for tributaries identified in paragraph (a)(3), and as described in Final Rule Preamble Section IV.C.4.**

6.2 Traditional Navigable Waters and Territorial Seas – Implementation

6.2.1 The Agencies' Traditional Navigable Waters Guidance (Appendix D)

Several commenters stated that they do not support the interpretation of traditional navigable waters contained in Appendix D[1] and asked the agencies to clarify how they intend to use it. Some of these commenters provided the following reasons:

- One commenter stated that the agencies' reference to Appendix D would create additional confusion during the implementation of the final rule by signaling a broader and more subjective approach to implementation. The commenter asserted that Appendix D allows the agencies to make traditional navigable waters determinations based merely on potential recreational use by out-of-state visitors, but that recreational boating and canoe trips are not sufficient evidence to demonstrate that a water is susceptible for use as a waterborne highway used to transport commercial goods.
- Another commenter stated that the "gist" of the nine cases cited in Appendix D is a requirement that a waterbody be used as a "highway" of commerce, which means the transport of commerce over it by boat. The commenter asserted that the agencies incorrectly conclude that a waterbody merely used for interstate commerce satisfies the navigability test.
- Another commenter wrote that Appendix D is inconsistent with the definition relied on by the *Rapanos* plurality and Justice Kennedy's concurrence by providing that waters will be considered traditional navigable waters if they "have been determined by a federal court to be navigable-in-

[1] The document titled "Waters that Qualify as Waters of the United States Under Section (a)(1)(i) of the Agencies' Regulations" began as Appendix D to the U.S. Army Corps of Engineers Jurisdictional Determination Form Instructional Guidebook that was published in 2007 concurrently with the 2007 *Rapanos* Guidance (U.S. EPA & U.S. Army Corps of Engineers, Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States & Carabell v. United States* (June 5, 2007)). For this reason, this document is thus often simply referred to as "Appendix D." There have been no substantive changes to the guidance since it was issued on May 30, 2007. In 2021, EPA and the Army established "Waters that Qualify as Waters of the United States Under Section (a)(1) of the Agencies' Regulations" as a standalone guidance document when rescinding a memorandum regarding traditional navigable waters that was finalized after issuance of the 2020 NWPR.

fact under federal law." 86 Fed. Reg. at 69,416; see also Appendix D. The fact that a water is deemed a "navigable water" by a federal court for purposes of title, admiralty, the Rivers and Harbors Act, etc. does not mean that it meets the two-part standard for traditional navigable waters.

- One commenter argued that the agencies should remain mindful of the *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) ("*SWANCC*") majority's view of Congress's "commerce power over navigation" and assert federal jurisdiction over only those waters that are actually used today to transport interstate commerce. The commenter asserted that the agencies should affirmatively decline to extend jurisdiction to waters based solely on historic transport of interstate or foreign commerce, arguing that waters that once conveyed, but no longer convey or are capable of conveying, interstate or foreign commerce are not within Congress's present "commerce power over navigation," and therefore do not forever remain "navigable waters" for purposes of asserting federal jurisdiction under the Clean Water Act. The commenter believes that a more reasonable reading of the Clean Water Act and case law affirms that a waterbody's past use to transport goods in interstate or foreign commerce does not alone cause a waterbody to be forever classified as a traditional navigable water subject to federal jurisdiction.
- One commenter stated that application of Appendix D expands the application of traditional navigable water criteria, which will result in lost time and higher costs for infrastructure projects.

Some commenters voiced support for the agencies' proposal to interpret the scope of traditional navigable waters consistent with their longstanding guidance under Appendix D. One commenter added that this practice is familiar to the general public, as well as state and tribal co-regulators. Another commenter asserted it is important the agencies apply the approach set forth in Appendix D. This commenter also referenced case law supporting the concept of "'indelible navigability,' that is, if a water was ever navigable-in-fact, it will always be at least navigable-in-law and subject to federal regulatory power."

<u>Agencies' Response</u>: As discussed in Final Rule Preamble Section IV.C.2.b.i, the agencies did not propose to amend the longstanding text defining "traditional navigable waters" and are not making changes to the text in this rule. The agencies are also not making changes to their longstanding interpretation of traditional navigable waters for purposes of Clean Water Act jurisdiction. The agencies will continue to implement their longstanding guidance, "Waters that Qualify as Waters of the United States Under Section (a)(1) of the Agencies' Regulations" (*i.e.*, Appendix D), to determine whether a water is a "traditional navigable water" for the purposes of the Clean Water Act and the agencies' implementing regulations. This guidance document is available in the docket for the final rule (Docket ID No. EPA-HQ-OW-2021-0602).

The agencies disagree with the commenter who asserted that the Commerce Clause power over navigation does not apply to waters that once conveyed, but no longer convey or are capable of conveying, interstate or foreign commerce. The Supreme Court has expressly held that a previously navigable waterbody remains subject to Commerce Clause jurisdiction "even though it be not at present used for such commerce, and be incapable of such use according to present methods," absent a clear expression by Congress that federal jurisdiction over such waters be abandoned, see *Economy Light & Power Co. v. United States*, 256 U.S. 113, 123-124 (1921). See also the response to comments at 2.3.1.

The agencies also disagree with the commenters who claim that either the final rule definition of "traditional navigable waters," or continued use of the "Waters that Qualify as Waters of the United States Under Section (a)(1) of the Agencies' Regulations" guidance, will result in lost time and higher costs for infrastructure projects or other activities. Since both the definition and the guidance will remain unchanged, the agencies do not anticipate a substantive change to the scope of waters that meet traditional navigable waters criteria.

6.2.2 Navigation by Recreational Watercraft

Several commenters recommended that the agencies clarify that waters used in commercial waterborne recreation or navigation are traditional navigable waters. A few commenters argued that navigation by recreational watercraft is sufficient evidence to demonstrate that a water is susceptible for use as a waterborne highway and therefore qualifies as a traditional navigable water.

A couple of commenters voiced support for the agencies rescinding the 2020 Navigable Waters Protection Rule (2020 NWPR), which called into question navigability determinations based solely on evidence of recreational commerce. The commenter added that the agencies must reiterate that there is nothing "suspect" about navigability determinations based on evidence that a river, stream, or lake can support navigation by recreational watercraft such as canoes, kayaks, or rafts.

One commenter provided an example as to why the agencies need to clarify what navigability means. The commenter claimed that in 2008, the Corps determined that only four miles of the Los Angeles River was navigable, and in 2010 EPA overruled the Corps and determined that all 51 miles were jurisdictional. The commenter stated that a 2008 expedition of kayakers and canoeists down the Los Angeles River helped convince EPA that the river was a traditional navigable water under the Clean Water Act, and therefore jurisdictional.

One commenter urged the agencies to codify longstanding guidance on waters used in commercial waterborne recreation. The commenter specifically recommended that the agencies amend 40 CFR 120.2(a)(1) and 33 CFR 328.3(a)(1) as follows: "All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce (including waters currently being used for commercial waterborne recreation such as boat rentals, guided fishing trips, or water ski tournaments), including all waters which are subject to the ebb and flow of the tide."

One commenter suggested clarifying that intrastate lakes, rivers, streams, and other waters navigable by recreational craft such as kayaks are traditional navigable waters and thus jurisdictional with no downstream inquiry.

Alternatively, a few commenters argued that recreational boating and canoe trips are not sufficient evidence to demonstrate that a water is a traditional navigable water. One of these commenters asserted that the agencies claimed jurisdiction under the 1986 regulations over waters "used by interstate or foreign travelers for recreational or other purposes, with no foundation in actual navigable waters."

Agencies' Response: As discussed in Final Rule Preamble Section IV.C.2.b.i, the agencies are maintaining their longstanding position that commercial waterborne recreation (*e.g.*, boat rentals, guided fishing trips, or water ski tournaments) can be considered when determining if a water is a traditional navigable water. The Supreme Court has been clear

that "[e]vidence of recreational use, depending on its nature, may bear upon susceptibility of commercial use." ***PPL Montana v. Montana*****, 565 U.S. 576, 600-01 (2012). See also response to comments 2.3.1.**

As explained in Final Rule Preamble Section IV.C.2.b.i, on November 17, 2021, the agencies rescinded the coordination memorandum "U.S. Environmental Protection Agency (EPA) and Corps Process for Elevating and Coordinating Specific Draft Determinations under the Clean Water Act (CWA)," which required enhanced coordination for certain case-specific and stand-alone traditional navigable water determinations which concluded that a water is "susceptible to use" solely based on evidence of recreation-based commerce. The agencies agree with the commenters that navigability determinations based on evidence that a waterbody can support navigation by recreational watercraft are not "suspect," provided that the determinations are consistent with the regulation and relevant case law, including that discussed in and memorandum "Waters that Qualify as Waters of the United States Under Section (a)(1) of the Agencies' Regulations" (*i.e.*, Appendix D). The agencies acknowledge that the Los Angeles River traditional navigable waters determination was based *in part* on evidence of navigation by recreational watercraft.

Intrastate lakes, rivers, streams, and other waters that are navigable by recreational craft, might be traditional navigable waters, as discussed in Final Rule Preamble Section IV.C.2.b.i.; see also the agencies' response to comments in Section 2.3.1. If waters are determined to be traditional navigable waters under paragraph (a)(1)(i) of the rule then they are jurisdictional without the need for downstream inquiry.

6.3 Interstate Waters – General

6.3.1 Support for maintaining Interstate Waters as a category of "waters of the United States"

Multiple commenters voiced their support for restoring the jurisdictional category of interstate waters. Several commenters discussed the threat of downstream pollution as a reason to include interstate waters as a jurisdictional category. The commenters noted that including interstate waters in the definition helps reduce the burden of pollutants from out-of-state, upstream discharges. One commenter stated that without a separate jurisdictional category for interstate waters, states could implement different water quality standards for shared waterbodies, making it possible for one state to discharge pollutants in an amount that would significantly impact the water quality of the adjacent state.

Several commenters offered that restoring categorical protection to interstate waters would reduce confusion and be easily administrable.

Several commenters stated that maintaining the category of interstate waters would avoid litigation between states. One commenter stated that "Without regulation under the CWA, the impacted state would have had to turn to common law claims of nuisance in an attempt to stop or limit the pollution originating from its neighbor." One commenter stated that removing jurisdiction from interstate waters would place the financial and administrative burden of preventing the degradation of these waters on multiple state governments and ultimately the Supreme Court. The commenter added that if interstate waters are not regulated by the Clean Water Act, a state or tribe would have no mechanism "short of a series of legal

water wars fought in the Supreme Court" to compel an upstream state to control pollution of upstream waters.

Several commenters illustrated their comments with specific examples of waterways they believed should be jurisdictional.

- One commenter stated that New Mexico shares several streams with its neighboring states that have been long treated as "waters of the United States" based solely on their interstate character. These streams include the Gila River, the Rio Costilla, and its tributary Comanche Creek. The commenter added that some of the streams have no clearly continuous connection to traditional navigable waters but nonetheless possess high ecological value.
- One commenter stated that the quality of Virginia's waters is dependent on interstate waters being addressed in the final rule, due to transboundary water pollution. The commenter added that Virginia shares land borders with five other states, some of which have weaker state water protection laws. Therefore, the commenter asserted that regulating interstate waters would ensure minimum protections for Virginia's waters simply by regulating their upstream neighborhood's waters.
- One commenter stated that the impact of upstream waters on those downstream is significant in Louisiana, where nutrient loading from the Mississippi River Basin results in a large area of hypoxia in offshore waters along the coast and the continental shelf.
- One commenter stated that Rhode Island shares multiple interstate waters with the bordering states of Massachusetts and Connecticut. The commenter said that maintaining and improving the water quality of Narragansett Bay is essential to the state's economy. The commenter added that other interstate waters "serve as tributaries to drinking water sources, offer opportunities for recreation, and provide habitat for Rhode Island's fish and wildlife."
- One commenter stated that a "level playing field" was necessary to protect interstate waters such as the Great Lakes, the Chesapeake Bay Basin, Lake Champlain, the Delaware River, and Long Island Sound.

<u>Agencies' Response</u>: The agencies agree with commenters who support the inclusion of interstate waters as a distinct jurisdictional category. The agencies find that categorical protection of interstate waters is the construction of the Clean Water Act that is most consistent with the text of the statute, including section 303(a), its purpose and history, Supreme Court case law, and the agencies' charge to implement a "comprehensive regulatory program" that protects the chemical, physical, and biological integrity of the nation's waters. EPA has interpreted the Clean Water Act to cover interstate waters, with the exception of the 2020 NWPR, since 1973. 38 FR 13528 (May 22, 1973) (providing that the term "waters of the United States" includes "interstate waters and their tributaries, including adjacent wetlands").

The examples provided by some commenters of specific waters that flow across, or form a part of, state boundaries, as well as water pollution that crosses state boundaries, illustrate the importance of categorically protecting interstate waters. Some of these waters may also meet the criteria for other categories of jurisdictional waters, but the identification of a specific waterbody as an interstate water may be the clearest way to determine its jurisdictional status.

6.3.2 Opposition to inclusion of Interstate Waters as a category of “waters of the United States”

Several commenters urged the agencies not to include interstate waters as a distinct jurisdictional category.

A few commenters stated that it would create confusion to have an interstate waters category that includes certain waters that would otherwise fail to qualify as “waters of the United States” under another provision. One commenter stated that such an approach “creates significant uncertainty regarding the status of ditches, ponds, and wetlands that otherwise have no connection to navigable water but lie on or cross a state boundary.” Another commenter stated that a distinct category for interstate waters “would defeat the goals of clarity and being easy to understand.” Another commenter stated that inclusion of interstate waters in the 1986 regulation “contributed to long-standing confusion” and would do so again.

One commenter argued that interstate, but otherwise isolated and unconnected, waters and wetlands are already properly regulated by states and tribes.

A couple of commenters objected to including interstate waters as a jurisdictional category because they stated that such an approach is not based on sound science, which should be an underpinning of this rulemaking. Both commenters noted that “The jurisdictional status of waters that cross state lines should be based on a uniform set of fact- and law-based criteria” rather than reliance on political or geographic boundaries. One of these commenters further argued that “eliminating this arbitrary category of waters places the proposal on a sounder factual and legal footing and assists in avoiding needless permitting and litigation disputes.”

One commenter stated that protecting all interstate waters as “waters of the United States” “could potentially extend jurisdiction to ephemeral waters and desert washes that may extend across state lines regardless of whether they have the potential to impact traditional navigable waters, which is beyond the central framework and protections intended under the CWA.” The commenter argued that the final rule should include an exemption for non-relatively permanent interstate waters. Another commenter provided a specific example of the potential implications of extending federal jurisdiction to non-navigable interstate waters, stating that if interstate waters were jurisdictional, any isolated ten-foot diameter prairie pothole that spanned the North Dakota/South Dakota border would be classified as “waters of the United States.”

> **Agencies’ Response: The agencies disagree with commenters’ assertion that inclusion of interstate waters as a paragraph (a)(1) water would create uncertainty or is not in line with scientific consideration. The agencies find that categorical protection of interstate waters is the construction of the Clean Water Act that is most consistent with the text of the statute, including section 303(a), its purpose and history, Supreme Court case law, and the agencies’ charge to implement a “comprehensive regulatory program” that protects the chemical, physical, and biological integrity of the nation’s waters. EPA has interpreted the Clean Water Act to cover interstate waters, with the exception of the 2020 NWPR, since 1973. 38 FR 13528 (May 22, 1973) (providing that the term “waters of the United States” includes “interstate waters and their tributaries, including adjacent wetlands”). Therefore, the final rule continues the longstanding categorical protections for interstate waters in the agencies’ regulations except briefly when the 2020 NWPR was in effect.**

The agencies interpret interstate waters to encompass all waters that Congress has sought to protect since 1948: all rivers, lakes, and other waters that flow across, or form a part of, state boundaries. Pub. L. No. 80-845, sec. 10, 62 Stat. 55, at 1161 (1948). These waters need not meet the relatively permanent standard or significant nexus standard to be jurisdictional under the final rule. Indeed, interstate waters are, by definition, waters of the "several States," U.S. Const. section 8, and are thus unambiguously "waters of the United States," without regard to their navigability. Thus, commenters are correct that interstate waters will be protected under the Clean Water Act "regardless of whether they have the potential to impact traditional navigable waters." However, interstate waters have been jurisdictional under the statute and regulations for decades and the agencies are unaware of instances in which relatively small prairie potholes or desert washes have been determined to be jurisdictional. The assertion of jurisdiction over interstate waters is based on the statute and under predecessor statutes "interstate waters" were defined as all rivers, lakes, and other waters that flow across, or form a part of, state boundaries. § 10, 62 Stat. 1161 (1948). The agencies will continue to implement the provision consistent with the intent of Congress.

Moreover, the potential for interstate harm, and the consequent need for federal regulation, is particularly clear with respect to waterbodies that span more than one state. See the agencies' response to comments in Section 2.3.2 for a discussion of the agencies' legal authority to assert jurisdiction over interstate waters, including discussion of the Supreme Court's decisions in *Illinois v. Milwaukee*, 406 U.S. 91 (1972) and *City of Milwaukee v. Illinois*, 451 U.S. 304 (1981), which established that resolving interstate water pollution issues are a matter of federal law and that the Clean Water Act provides a comprehensive regulatory scheme for addressing interstate water pollution. Protection of interstate waters, impoundments of interstate waters, tributaries of interstate waters, and wetlands adjacent to interstate waters and their tributaries allows the agencies to efficiently and effectively protect the quality of waters shared by more than one state, and therefore the waters "of the United States." In the agencies' judgment, categorical protection of interstate waters is consistent with the text, structure, and history of the statute, as well as Supreme Court case law, and better fulfills the agencies' charge to implement a "comprehensive regulatory program" that protects the chemical, physical, and biological integrity of the nation's waters. As the Supreme Court acknowledged in *Riverside Bayview*, "[p]rotection of aquatic ecosystems, Congress recognized, demanded broad federal authority to control pollution, for '[w]ater moves in hydrologic cycles, and it is essential that discharge of pollutants be controlled at the source.'" *United States v. Riverside Bayview Homes*, 474 U.S. 121, 132-33 (1985) ("*Riverside Bayview*") (citations omitted).

With respect to whether the final rule should include an exemption for non-relatively permanent interstate waters, the relatively permanent standard is not relevant to any of the waters in paragraph (a)(1) of the rule; traditional navigable waters, the territorial seas, and interstate waters are jurisdictional under the statute without further inquiry. See Final Rule Preamble Section IV.C.2. Moreover, the agencies are not categorically including or excluding streams as jurisdictional based on their flow regime in this rule.

6.4 Interstate Waters – Implementation

6.4.1 Interstate Waters – Geographic Scope of Jurisdiction

6.4.1.1 Rivers and streams

Many commenters provided input on how to determine the geographic extent of jurisdiction over interstate rivers and streams. Most commenters agreed with the agencies' proposal that an "interstate" river or stream should include the entire length of the reach of the river or stream where it flows across a state line or forms a state boundary. One commenter added that a stream order approach is consistent with the pre-2015 regulatory regime that had been in long-standing use and therefore well-understood, and stated that it is also consistent with long-standing accepted scientific practice. Another commenter mentioned ease of implementation: "It would be much easier to implement the 'waters of the United States' rule if the entire length of the river that is of the same stream order were considered an interstate water, rather than having the water potentially switch back and forth between 'waters of the United States' categories."

Alternatively, a few commenters voiced concern that using stream order to determine the reach of an interstate water could be either over or under restrictive. One commenter noted that some states find an approach that uses stream order to determine whether a water is an interstate water to be "inadequate and unnecessarily restrictive." Another commenter expressed concern over how the use of stream order comports with Clean Water Act section 101(g) (which they stated limits Clean Water Act authority over state water quantity allocation) and the pre-2015 regulatory regime. The commenter also expressed concern that some methodologies for determining stream order could extend the designation of interstate waters a great distance from state boundaries.

One commenter requested clarification of how the stream order approach would apply to rivers along state boundaries that have undergone morphological change such that the boundary has become a smaller order water. The commenter described the Wabash River as a state boundary water which has shifted significantly in recent times, creating several oxbow lakes in its relic channel. The commenter asked if the river's new pathway will be recognized as the interstate water, or if the oxbow lakes in the former channel remain as the interstate waters.

Two commenters stated that stream order alone might not suffice to identify the extent of an interstate river or stream. One commenter argued that using stream order alone to designate the limits of the interstate waters category is not sufficient to protect their waters from upstream discharges, stating that "the confluence distinguishing between stream orders could only be a few feet from the state boundary, thus discharges in the immediate vicinity may affect a downstream state." A couple of commenters recommended use of watershed boundaries to delineate jurisdictional interstate waters and specifically recommended defining interstate waters as any water or wetland in an interstate Hydrologic Unit Code (HUC-12) watershed. Both commenters also recommended a "significant nexus" consideration of waters outside of a HUC-12 watershed that have the potential to affect water quality or flooding in a downstream state.

One commenter suggested that regional committees of biologists and hydrologists should work with stakeholders to establish waterbodies that clearly meet the threshold of being foundational waters. The commenter asserted that "streams above a certain stream order tend to have large enough flows, are

physically complex enough to provide fish and aquatic life habitat and have been documented to support biological communities that produce harvestable fish and aquatic life." The commenter added that these waters could be presumed to be "susceptible of supporting waterborne commerce" based on the fishing and harvesting activities these waters support and are therefore most likely to be foundational waters.

> **Agencies' Response: The agencies agree with commenters who stated that stream order is an appropriate approach for determining the upstream and downstream limits of an interstate water that is a stream or river. The agencies recognize that other criteria may also be scientifically sound, and that in some cases the use of stream order may not capture all of the waters that impact water quality across a state boundary. However, the agencies conclude that this approach is reasonable and provides a method that is transparent, well-understood, predictable, and easy to implement. This approach is consistent with longstanding practice under the pre-2015 regulatory regime and thus is familiar to the agencies and the public. Additionally, this method is consistent with the agencies' approach to characterizing tributary reaches based on stream order for purposes of applying the relatively permanent standard in this rule (see Final Rule Preamble Section IV.C.4.c.ii), and the agencies' approach to characterizing tributary reaches based on stream order to delineate the catchment for purposes of applying the significant nexus standard in this rule (see Final Rule Preamble Section IV.C.4.c.iii).**

6.4.1.2 Lakes, ponds, and wetlands

Many commenters provided input on how to apply the definition of "interstate waters" to lakes, ponds, and wetlands that cross state boundaries, and how to determine the geographic extent of jurisdiction.

Several commenters on this issue expressed general support for defining, as an interstate water, the entirety of any interstate lake, pond, or wetland that crosses state boundaries (with some commenters also referencing tribal boundaries). Some commenters added that the upstream tributaries of these waters should also be considered jurisdictional. One commenter, observing that many lakes and ponds are also impoundments, suggested "the agencies should better explain and harmonize the proposed jurisdictional standard for lakes, ponds, and impoundments."

Two commenters suggested the same jurisdictional approach for determining interstate wetlands and other "isolated waters," as for determining interstate rivers and streams – the use of a HUC-12 watershed-based approach for waters in an interstate watershed. Likewise, the commenters suggested use of a significant nexus test for interstate watersheds larger than HUC-12.

> **Agencies' Response: Consistent with the pre-2015 regulatory regime, lakes, ponds, and similar lentic (or still) water resources, as well as wetlands, crossing state boundaries are jurisdictional as interstate waters through the entirety of their delineated extent. The agencies recognize that other criteria may also be scientifically sound. However, the agencies conclude that this approach is reasonable and provides a method that is transparent, well-understood, predictable, and easy to implement.**
>
> **The agencies acknowledge that there may be some instances in which site-specific conditions make jurisdictional determinations complicated, but expect that in most cases, implementation of the interstate waters definition will be relatively straightforward.**

See Section 6.4.3 for the agencies' response to comments on waters that cross a state-tribal boundary.

6.4.2 Interstate Waters – Tributaries, Adjacent Wetlands, and Paragraph (a)(5) Waters

Many commenters provided input on whether, and to what extent, interstate waters function like traditional navigable waters with respect to hydrologically connected tributaries, adjacent wetlands, and paragraph (a)(5) waters (the category of waters described in paragraph (a)(3) of the proposed rule as the "other waters" category).

Some commenters disagreed with the agencies' proposal to treat interstate waters like traditional navigable waters based solely on their status as interstate waters. The commenters opposed the classification of all tributaries, other waters, and adjacent wetlands that satisfy the relatively permanent or significant nexus standards in connection with an interstate water as jurisdictional, when that interstate water is not a traditional navigable water.

Alternatively, a number of commenters supported interstate waters being treated like traditional navigable waters.

One national association commenter stated that several of its member states support the inclusion of interstate waters as categorically "waters of the United States" and as foundational waters, with tributaries, adjacent wetlands, and other waters considered "waters of the United States" based on their relationship to the integrity of interstate waters. The same commenter added that several states also recommend that the final rule "identify tributaries to interstate waters as 'waters of the United States,' as well as waters and wetlands adjacent to such tributaries." The commenter added that if tributaries connected to interstate waters are not considered "waters of the United States," it will be difficult to ensure that the chemical, physical, and biological integrity of interstate waters are restored and maintained.

One commenter suggested that interstate lakes, ponds, and wetlands, as well as their upstream tributaries, be considered jurisdictional. The commenter added that for interstate rivers and streams that cross state boundaries or form a state boundary, jurisdiction should include the interstate waterbody itself and extend to all upstream tributaries to that waterbody. Another commenter urged the agencies to categorically protect all tributaries connected to interstate waters, but specifically argued that the agencies should not require these tributaries to meet the relatively permanent standard or significant nexus standard. A third commenter stated that it is important to make clear that all interstate waterways, including ephemeral and intermittent streams and adjacent wetlands that are hydrologically connected, are also covered by the Clean Water Act. Another commenter broadly suggested that any water that affects the chemical, physical, and biological integrity of an interstate water be categorized as a "waters of the United States."

Agencies' Response: As explained in Final Rule Preamble Section IV.C.2, because interstate waters are fundamental to the Clean Water Act in the same manner that traditional navigable waters and the territorial seas are, they cannot be protected without also protecting the waters that have a significant nexus to those waters. This rule protects interstate waters in the same manner as it protects traditional navigable waters and

the territorial seas. Thus, the following waters that meet the relatively permanent standard or significant nexus standard based on their connection to interstate waters are "waters of the United States": tributaries to interstate waters, wetlands adjacent to interstate waters or to their jurisdictional tributaries, and paragraph (a)(5) waters.

As explained in Final Rule Preamble Section IV.A, the agencies construe the Clean Water Act to cover waters that meet either the relatively permanent standard or the significant nexus standard with respect to paragraph (a)(1) waters. The agencies do not agree that the categorical protection of interstate waters supports the assertion of jurisdiction over all tributaries to interstate waters, without reference to whether a given tributary meets the relatively permanent standard or significant nexus standard. Additionally, it furthers the clear and consistent implementation of the final rule to utilize the same criteria for tributaries to interstate waters as for tributaries to traditional navigable waters and the territorial seas.

6.4.3 Interstate Waters – Waters that Cross a State-Tribal boundary

Many commenters voiced support for including as interstate waters those waters that flow across, or form a part of, boundaries of federally recognized tribes.

Two commenters stated that this interpretation is consistent with "Congress'[s] authority under the Commerce Clause; the history, purpose, and structure of the Clean Water Act; the status of tribal nations as domestic sovereigns, and the trust duty of the federal government."

One of these commenters provided a more specific rationale on behalf of the Commerce Clause argument, stating that: "the Commerce Clause authorizes Congress to not only "regulate commerce . . . among the several states," but also "with the Indian Tribes." [U.S. Const. art. I., sec. 8, cl. 3.] Just as Congress has the authority to regulate upstream pollution of any water that crosses state lines under its authority to "regulate commerce . . . among the several states," it has the authority to regulate upstream pollution of any water that crosses tribal boundaries under its power to "regulate commerce . . . with the Indian Tribes."

The same commenter pointed to the history and scope of the Clean Water Act, stating that "through amendments to the Act, Congress has also made explicit that this 'comprehensive regulatory program' is to equally encompass and address pollution that crosses tribal boundaries." Another commenter stated that Congress amended the Clean Water Act by adding Section 518 to specifically authorize tribes to set their own water quality standards and implement their own permitting programs in a manner similar to states (known as the TAS program). The commenter also directed the agencies to "provide a mechanism for the resolution of any unreasonable consequences that may arise as a result of differing water quality standards that may be set by States and Indian tribes located on common bodies of water." The commenter argues that this "comprehensive regulatory program" created by Congress to address pollution of the "waters of the United States" was explicitly intended to address water pollution crossing tribal boundaries.

Several commenters provided more specific observations about the role of tribes as separate sovereigns. One commenter noted that tribes are “separate sovereigns preexisting the Constitution,” citing *Santa Clara Pueblo v. Martinez*, 436 U.S. 49,56 (1978), and as such, “the policy motivations governing the protection of state-to-state interstate waters apply equally to waters that cross tribal boundaries.” Another commenter stated a tribe’s inherent sovereign authority is subject only to the plenary power held by Congress, citing *US. v. Lara*, 541 U.S. 193, 200 (2004), and that the federal government and the tribal government work in tandem to protect tribes’ individual, territorial, and political rights, citing *National Farmers Union Ins. Companies v. Crow Tribe of Indians*, 471 U.S. 845,851 (1985). Another commenter noted that the proposed approach would be fully consistent with Executive Orders and Memoranda signed by President Biden pledging to recognize and respect tribal sovereignty. Several commenters offered that such an approach recognizes that tribes often lack the authorities and other resources to protect their waters from pollution from adjacent jurisdictions.

One commenter recommended that interstate waters should include those crossing tribal boundaries as well as waters affecting the integrity of such waters, such as streams flowing into them.

One commenter stated that it is necessary for the final rule to explicitly address interstate waters that flow across state-tribal boundaries to ensure that states and tribes have a full set of tools available to implement their own water quality standards and other surface water management protocols.

Some commenters provided examples of waterways that cross tribal borders that they believe should be considered interstate waters.

- A few commenters stated that the Allegheny River and Cattaraugus Creek cross the Seneca Nation borders with the states of New York and Pennsylvania, and that numerous streams and creeks also cross between the boundaries of the Seneca Nation Territories and New York. The commenters stated that it is imperative that waters upstream of the Seneca Nation Territories be required to maintain water quality across territorial boundary lines, for the protection of water-dependent resources and Seneca treaty and reserved water rights.
- One commenter stated that interstate waters should include waters that are shared between local government entities and tribal governments. The commenter added that Santa Fe County in New Mexico contains eight different sovereign tribal nations that share rivers, streams, arroyos, lakes, and other “waters of the United States” with Santa Fe County. The commenter stated that it is essential that waters that pass through these sovereign nations and New Mexico counties be considered interstate waters to ensure the quality of water is protected.
- Another commenter observed that interstate waters should include waters that flow between different tribal lands, noting: “There are Navajo waters that flow into Hopi waters and vice versa, as well as waters that form the boundary with or flow from the neighboring states of Arizona, New Mexico, and Utah into Navajo waters and vice versa. These waters should be considered interstate waters in order to protect Navajo Nation water quality from degradation introduced in upstream jurisdiction, and to avoid inter-jurisdictional disputes.”

Alternatively, several commenters voiced opposition to treating waters that cross tribal boundaries as interstate waters.

Two commenters stated that the history and the structure of the Clean Water Act do not support treating state and tribal boundaries in an identical fashion. The commenters state that the language of the 1948 Federal Water Pollution Control Act, amendments in 1956, and the 1972 Clean Water Act, intended

"interstate waters" to apply only to boundaries between states. The commenters also note that the Clean Water Act's definition of "state" does not include tribes (notwithstanding certain provisions allowing tribes to be treated as states in certain circumstances).

Several commenters provided examples to illustrate the complexity and impact of treating waters that cross tribal boundaries as interstate waters.

- One commenter noted that Arizona has more tribal land than any other state in the country, with 22 federally recognized tribes that control approximately 27% of the land in the state (roughly 20 million acres) and roughly 3500 waters that cross state, tribal, or international boundaries. The commenter noted that "treating all waters, no matter how small and no matter their flow regime, as jurisdictional merely because they cross tribal boundaries would have an enormous effect in Arizona. Moreover, it would lead to CWA regulation of many waters (such as small ephemeral washes) that were not navigable and had no (or only a speculative or insubstantial) connection to traditional navigable waters, in contravention of *Rapanos* and *SWANCC*." Another commenter offered the same rationale using slightly different statistics.
- Two commenters noted that such an approach in some parts of the country "could result in significant implementation issues." The commenters pointed to tribal land in the Coachella Valley which is designated in a checkerboard fashion, with alternating parcels of tribal and state lands laid out in a checkerboard approach. The commenters stated that water features that might not otherwise meet the "reasonably [sic] permanent" or "significant nexus" tests could be deemed "waters of the United States" if they happened to flow between tribal and state land.

One national association commenter stated that such an approach could cause confusion about the scope of Clean Water Act jurisdiction, noting that "from a practical perspective, it is also often difficult to determine where such [tribal] boundaries begin and end" and that some of its members "have shared that the center of a waterway is sometimes thought of as the boundary for tribal and sovereign nation boundaries, but the center of rivers is often poorly defined and moves around over time because rivers are dynamic."

One commenter stated that interstate waters should not automatically encompass waters of the tribes. The commenter added that tribes are distinct sovereign governments that have little to no say in states' decisions with regard to interstate water quality or protection standards.

Multiple commenters responded to the agencies' request for comment on whether or how to identify what constitutes a tribal boundary for purposes of defining interstate waters.

Several commenters supported the use of the 18 U.S.C. 1151 definition of "Indian country" to determine tribal boundaries for the purposes of interstate waters. One commenter identified several reasons for using "Indian country," including that: (1) it better encompasses the various territories over which tribes have jurisdiction and the waters that they therefore manage, (2) it has been widely used in both civil and criminal law to determine the boundaries of tribal lands, and (3) it would be consistent with the text of section 518 of the Clean Water Act. Another commenter stated that Indian country has been one of the most reliable definitions of tribal lands since it was promulgated in 1948, adding that "Indian Country includes reservation lands that are checkerboarded, have split estates, or involve lands subject to treaty rights controlled by the Tribe, even in fee status" and that it offers "the broadest interpretation possible to define tribal boundaries."

A few commenters elaborated on the types of Indian country boundaries they believe should be within a definition of "interstate waters." One commenter recommended that the agencies "consider the operation of the definition of interstate waters in relation to "Ceded Territories," "traditional homelands," and "usual and accustomed places," as defined in legal decisions upholding tribal treaty rights throughout the country." Two commenters stated that the definition should apply to all "land deemed equivalent to reservation," including tribal trust land outside formal reservation boundaries, allotted land outside the reservation, and dependent Indian communities. A commenter stated that this includes Seneca Nation Territories, to which the Seneca Nation holds title in restricted fee status.

One commenter added that "the Agencies should consult with tribes to determine what constitutes a tribal boundary for identifying interstate waters." Another commenter added that if boundaries of tribal waters are guided by the term "Indian Country," more will be required to ensure the accuracy of this boundary information. The commenter recommended that the agencies "develop and maintain a database of Tribal boundaries in consultation with affected Tribes that is regularly updated and that can be referenced by the Agencies and those states exercising primacy under Section 402 of the Clean Water Act when making permitting decisions."

None of the commenters specifically recommended use of "existing reservation boundaries" in lieu of "Indian Country." One commenter said that using existing reservation boundaries "would be an insufficiently narrow definition that would fail to encompass many lands and waters over which tribes have jurisdiction."

One commenter suggested that the agencies work with tribal biologists and others with traditional ecological knowledge to develop lists of species that have traditionally been gathered or harvested, and work to identify waters and wetlands that support harvestable populations of these plant and animal species. The commenter added that subsistence hunting, fishing, and gathering, especially when done for the benefit of a community of people, is clearly a commercial act, and therefore these waters should be considered foundational waters.

One commenter stated that the agencies had not sufficiently analyzed basic issues regarding applicability of tribal boundaries to interstate waters. The commenter points to a public notice, "Proposed Interstate Waters for the State of Arizona," issued in 2002 by the Los Angeles District of the Corps, which sought to define all waters that crossed tribal boundaries in Arizona as "interstate waters" and which was suspended and withdrawn following public opposition.

One commenter suggested that a subsequent rulemaking could provide additional clarification of what constitutes a tribal boundary for purposes of interstate waters associated with the term "Indian Country" or reservation boundaries. The commenter also asked for clarity on the definition of "tributary, gradient of connectivity, cumulative effects, flow, nexus, significant, etc."

> **<u>Agencies' Response</u>: The agencies requested comment in the proposed rule on whether interstate waters should encompass waters that flow across, or form a part of, boundaries of federally recognized tribes where these waters simultaneously flow across, or form a part of, state boundaries. The agencies also sought comment on how to identify "tribal boundaries" for purposes of implementing the interstate waters provision, such as boundaries associated with a tribe's reservation or boundaries associated with the term "Indian country" as defined at 18 U.S.C. 1151.**

The feedback that the agencies received during pre-proposal tribal consultation and the public comment period show that consideration of tribal boundaries in reference to interstate waters is of great importance to tribes and various stakeholders.

At this time, the agencies are continuing to evaluate the issue of interstate waters and tribal boundaries, including what should appropriately be considered "tribal boundaries" for purposes of identifying interstate waters under the Clean Water Act. The agencies have weighed the benefits of addressing this issue now, based on the record currently before them, versus undertaking additional analysis and outreach to tribes to gain a better understanding of tribal boundaries as related to interstate waters and related implications via a separate process to avoid delaying the entire rule.

Based on the agencies' evaluation of the comments received and the benefits of further analysis and outreach, the agencies have decided to conduct additional analysis and outreach to inform a future action related to considering designating waters that cross a State/Tribal boundary as interstate waters under the definition of "waters of the United States." The agencies recognize the importance of this issue to Tribes and are fully committed to directly engaging with Tribal governments as the agencies continue to evaluate this aspect of the scope of "waters of the United States." Accordingly, the agencies will address this issue in a subsequent action after completing additional analysis and essential outreach and engagement activities with Tribes and interested stakeholders. Although the agencies are not taking a position on this specific issue at this time, a water that crosses a State/Tribal boundary may be jurisdictional if it otherwise falls within this rule's definition of "waters of the United States."

6.5 Consolidation of Foundational Waters in the Rule

Several commenters supported consolidating traditional navigable waters and territorial seas into one category of "waters of the United States." One commenter added that this approach is logical because these two types of waters are the only types of waters explicitly referenced in the operative sections of the Clean Water Act. The commenter asserted that combining these waters into one category makes the rule clearer and easier to administer. Another commenter stated that the broader term of navigable waters sufficiently covers territorial seas, but they did not oppose separating territorial seas from the category of traditional navigable waters because doing so does not appear to affect the jurisdictional status of the territorial seas.

One commenter voiced support for the categorical protection and consolidation of all three categories of foundational waters (traditional navigable waters, territorial seas, and interstate waters), stating that consolidation is "consistent with the history and text of the law." The commenter added that the protection of these waters should not be affected by any exclusions that the agencies may include in the final rule. One commenter stated that if the agencies do combine all foundational waters into one category, they must clarify that the territorial seas represent distinct basis for jurisdiction and are not a type of traditional navigable water.

Several commenters opposed the consolidation of the three categories of foundational waters into one jurisdictional category. One commenter stated that keeping the waterbody categories separate "demarcates historical use and context related to ever-changing geopolitical boundaries." The commenter

added that “maintaining separation can be used to help keep tidal and salt-influenced waters separated from inland freshwaters, which display different hydrological, soil, and vegetative community differences.” The commenter asserted that these separations can also maintain differences in maritime laws and inland water regulations with regard to any necessary economic implications, especially in cases where water transportation is still necessary, or water use is needed for industry, and/or lessens confusion with any potential permitting.

A few commenters specifically voiced support for interstate waters having their own provision, separate from any consolidation of traditional navigable waters and territorial seas. One commenter stated that if the agencies combine the foundational waters into one category, they must clarify that the three categories of waters still represent distinct bases for jurisdiction. Another commenter suggested that “if the common shorthand is that the waters used for commerce, the interstate waters, and the territorial seas are the ‘foundational waters’, then the additional term ‘foundational waters’ should be defined as such.”

> **Agencies’ Response: The agencies consolidated traditional navigable waters, the territorial seas, and interstate waters into one paragraph at the beginning of the regulatory text, but each of these categories will remain as distinct categories in separate subparagraphs. The agencies have kept the text of each category the same as in the 1986 regulations. The agencies agree that the Clean Water Act fundamentally protects these three categories of waters, and that the jurisdictional standards for each are different. See Final Rule Preamble Section IV.C.2.**
>
> **The agencies have concluded that this non-substantive change streamlines the regulatory text and increases clarity, in part because the jurisdictional status of the other four categories of waters relies on their connection traditional navigable waters, the territorial seas, or interstate waters. The agencies maintain the longstanding position that a feature is not excluded where it would otherwise be jurisdictional as a traditional navigable water, territorial seas, or interstate water. See Final Rule Preamble Section IV.C.7.**
>
> **The agencies are not using the term “foundational waters” in the rule text and will instead generally refer to these three categories of waters as “paragraph (a)(1) waters.”**