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

SECTION 11 – PARAGRAPH (a)(5) 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.

11 PARAGRAPH (a)(5) WATERS

In paragraph (a)(5) of the final rule, the agencies are retaining the category from the 1986 regulations, sometimes referred to as "(a)(3) waters" or "other waters," but with changes to reflect the agencies' determination of the statutory limits on the scope of "waters of the United States" informed by the law, the science, and agency expertise, in addition to consideration of extensive public comment on the proposed rule. In this document, when commenters referred to (a)(3) "other waters" their language is preserved; however, the agencies' responses to these comments will use the term "paragraph (a)(5) waters" when talking about the final rule and related implementation matters.

11.1 Comments on proposed paragraph (a)(3) "other waters" regulatory text

11.1.1 General support for re-establishment of the paragraph (a)(3) "other waters" category

Some commenters expressed general support for the re-establishment of the "other waters" category of "waters of the United States" under the proposed rule.

Many commenters stated that certain types of "non-adjacent" or "isolated" wetlands should be categorically protected as sub-categories of "other waters." Some of these commenters specifically requested that the agencies provide categorical protections for Carolina and Delmarva bays, pocosins, prairie potholes, vernal pools, and other non-floodplain wetlands.

Many commenters stated opposition to the removal of the interstate and foreign commerce jurisdictional basis for protecting "other waters" and expressed that this basis would protect many significant waterways which provide valuable public health, agricultural, recreational, drinking water, ecological, and economic services that are important to local, regional, and national interests. One of these commenters asserted that "closed basins" and other types of waters that may lack a connection to traditional navigable and/or interstate waters were historically protected under the interstate and foreign commerce factors applicable to the (a)(3) "other waters" category. Another commenter stated that the effectiveness of the new rule will in part depend on the weight of the impact that "isolated waters" have on commerce, as determined by the agencies. Another commenter stated that the proposed rule includes significant changes to the 1986 definition to "all other waters" by deleting the reference to the Commerce Clause and inserting new language requiring water to be relatively permanent and have a significant nexus—language at the center of the Supreme Court's review in the *Sackett*[1] case.

A commenter requested the following specific language be retained in the rule:

> "All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, 'wetlands,' sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce including any such waters:
> - Which are or could be used by interstate or foreign travelers for recreational or other purposes; or
> - From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or
> - Which are used or could be used for industrial purposes by industries in interstate commerce; and
> - All impoundments of waters otherwise defined as 'waters of the United States' under this definition."

[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)

Agencies' Response: The agencies acknowledge commenters who requested that the agencies retain the pre-2015 regulatory approach to "other waters." In the final rule, waters not identified in paragraphs (a)(1) through (a)(4) are assessed under paragraph (a)(5), and such waters are jurisdictional if they meet the relatively permanent standard or significant nexus standard. This differs from the pre-2015 regulations, which did not reference these standards. See the agencies' response to comments in Section 2.3.6 for further details on the legal rationale for the agencies' approach to these waters.

The agencies recognize that many commenters requested that the regulatory text from paragraph (a)(3) of the pre-2015 regulations be retained, including the provisions referring to "interstate or foreign commerce." The agencies are mindful of the Supreme Court's decision in *SWANCC*[2] regarding the specific Commerce Clause authority Congress was exercising in enacting the Clean Water Act— "its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made"—and the Court's guidance on avoiding an administrative interpretation of a statute that invokes the outer limits of Congress's power. *See* 531 U.S. at 172.

The agencies also acknowledge commenters who requested categorical protections for specific types of non-navigable, intrastate, "isolated" waters. Agencies may choose to proceed via rulemaking or adjudication. *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974) ("[T]he choice between rulemaking and adjudication lies in the first instance within the [agency's] discretion."). With respect to the significant nexus standard in particular, Justice Kennedy also stated that the agencies could proceed to determine waters jurisdictional through regulations or adjudication. *See* 547 U.S. at 780-81. The agencies have concluded that adjudication of which waters assessed under paragraph (a)(5) are within Clean Water Act protections through case-specific application of the significant nexus standard or the relatively permanent standard under the final rule, is appropriate. Therefore, the agencies are not categorically including or excluding waters that do not fall within one of the more specific categories as jurisdictional under the rule. See Final Rule Preamble Section IV.C.6.b. Thus, the types of wetlands requested by commenters for categorical protections, such as Carolina and Delmarva bays, pocosins, prairie potholes, vernal pools, and other non-floodplain wetlands, can be evaluated for jurisdiction under an appropriate provision of the rule, including paragraph (a)(5), and are not identified as having categorical protections.

11.1.2 General support for removal of the paragraph (a)(3) "other waters" category

Many commenters stated that they have concerns about how "other waters" is defined and/or the methods that are being proposed for determining jurisdiction. In addition to recommending removing "other waters" as a category of "waters of the United States," commenters expressed concerns that the category:

- Is illegal, too ambiguous, and/or too inclusive of waters that should not be protected; and
- Could result in inconsistent jurisdictional determinations, and/or lead to excessive permitting costs as defined with the proposed rule.

[2] *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) ("*SWANCC*")

A commenter stated that "other waters" should not be considered jurisdictional under the rule, arguing that there is no clear and consistent guidance on how to apply the significant nexus standard, which can lead to delays in determinations and assumptions of jurisdiction over waters never intended to be regulated.

A commenter stated that they do not support any regulation that includes protection of "isolated" waters or "isolated" wetlands.

<u>Agencies' Response</u>: The agencies in this rule are interpreting "waters of the United States" to mean the waters defined by the familiar 1986 regulations, with amendments to reflect the agencies' determination of the statutory limits on the scope of the "waters of the United States" informed by the text of the relevant provisions of the Clean Water Act and the statute as a whole, the scientific record, relevant Supreme Court precedent, and the agencies' experience and technical expertise after more than 45 years of implementing the longstanding pre-2015 regulations defining "waters of the United States." Through this rulemaking process, the agencies have considered all timely public comments on the proposed rule, including changes that improve the clarity, implementability, and durability of the definition. The regulations established in this rule are founded on the familiar framework of the 1986 regulations and are generally consistent with the pre-2015 regulatory regime. They are fully consistent with the statute, informed by relevant Supreme Court decisions, and reflect a reasonable interpretation based on the record before the agencies, including the best available science, as well as the agencies' expertise and experience implementing the pre-2015 regulatory regime. In addition, the agencies find that the final rule increases clarity and implementability by streamlining and restructuring the 1986 regulations and providing implementation guidance informed by sound science, implementation tools, and other resources. Further, 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. Also see the agencies' response to comments on Legal Arguments in Section 2.

The agencies disagree with commenters who requested the removal of "other waters" as a category of "waters of the United States." In paragraph (a)(5) of the final rule, the agencies are retaining the category from the 1986 regulations sometimes referred to as "(a)(3) waters" or "other waters," but with changes to reflect the agencies' determination of the statutory limits on the scope of "waters of the United States" informed by the law, the science, and agency expertise, in addition to consideration of extensive public comment on the proposed rule. 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 regarding the Economic Analysis in Section 17. Given the final rule's similarity to current implementation practices, the agencies do not foresee any difference in the time it will take to complete jurisdictional decisions or permitting. The

agencies have extensive experience implementing the relatively permanent standard and significant nexus standard for wetlands, streams, lakes, and ponds, which are the types of resources that are assessed under paragraph (a)(5) of the final rule, and so will be able to use their experience and implementation resources to ensure consistency of jurisdictional determinations.

The agencies disagree that the "other waters" provision was unclear under the pre-2015 regulatory regime but, along with the replacement of the jurisdictional standard in the pre-2015 regulations, have made changes in the final rule to streamline and clarify the provision. The agencies have added the requirement that these waters must meet either the relatively permanent standard or significant nexus standard to be "waters of the United States." In addition, the agencies have deleted the non-exclusive list of "other waters" that was featured in paragraph (a)(3) of the 1986 regulations. Under the final rule's new paragraph (a)(5) provision, only "intrastate lakes and ponds, streams, or wetlands not identified in paragraphs (a)(1) through (a)(4)" can be assessed for jurisdiction under the relatively permanent standard or significant nexus standard. The agencies have concluded that the more specific water types previously listed in paragraph (a)(3) of the 1986 regulations nonetheless generally fall within one of the four water types listed in paragraph (a)(5) of the final rule. Finally, the agencies have moved the provision for paragraph (a)(5) waters to the end of the section of the regulation which defines the categories of jurisdictional waters since paragraph (a)(5) waters are those that are not covered by the preceding categories. The agencies disagree that there is no clear and consistent guidance on how to apply the significant nexus standard. Details regarding implementation to identify paragraph (a)(5) waters can be found in the Final Rule Preamble Sections IV.C.6.c and IV.C.9 and the agencies' response to comments in Section 12 on the Significant Nexus Standard.

11.1.3 Requests for revisions or modifications of the paragraph (a)(3) "other waters" category

Many commenters requested revisions or clarification of regulatory text relative to "other waters." Some commenters requested general clarification of the definition of "other waters." Several commenters recommended that the agencies clarify that the example list of "other waters" is illustrative and not exhaustive. A commenter recommended that the agencies clarify that including a waterbody on the example list of "other waters" does not necessarily mean it will automatically be classified as a "water of the United States." A commenter requested that the agencies provide further clarification for waterbodies that have historically caused confusion, for example intermittent streams. A commenter requested that the agencies replace the term "wetlands" in the "other waters" category with the term "non-adjacent wetlands." A commenter requested that the agencies clarify that "other waters" include waters that have a continuous surface connection to a "relatively permanent" tributary. A commenter requested that the agencies clarify that all other waterbodies, channels, and/or features that are not specifically exempt or otherwise included can fall into the "other waters" category. A commenter requested that the agencies restore categorical protections to all tributaries, adjacent wetlands, and "other waters," and restore cross-references to "other waters" in the tributaries and adjacent wetlands categories. A commenter stated that natural and human-made water features on golf courses should be exempted or defined separately from the "other waters" category. A commenter recommended clarifying that only non-navigable waters which are not protected under any other category should be assessed as "other waters."

A commenter stated general support for specific sections of the proposed rule related to the "other waters" category that are either relatively permanent standing or continuously flowing bodies of water with a continuous surface connection to traditional navigable waters; interstate waters including interstate wetlands; tributaries that are relatively permanent, standing or continuously flowing bodies of water; or the territorial seas.

Referring to the parenthetical in the regulatory category for "adjacent wetlands," one commenter argued, "the clarification is important to better document that wetlands far removed from actual jurisdictional waters are not characterized as jurisdictional based on the improper perception that those wetlands constitute a mosaic with other wetlands." Another commenter claimed, "we find it clear that such wetlands would be assessed as 'other waters' under the significant nexus standard." A commenter argued that ephemeral, depressional wetlands of the upper Midwest provide physical and biological benefits that should qualify them for jurisdictional protection.

> **Agencies' Response: The agencies acknowledge that many commenters requested revisions or clarification of the proposed rule's language regarding (a)(3) "other waters," and the agencies have made changes to the paragraph (a)(5) regulatory text in the final rule. The final rule has incorporated important changes to the pre-2015 regulations, including the replacement of the broad Commerce Clause basis for jurisdiction under paragraph (a)(3) of the 1986 regulations with the relatively permanent standard and the significant nexus standard under paragraph (a)(5). The "example list" of "other waters" from paragraph (a)(3) of the 1986 regulations has also been replaced and the agencies have clarified that lakes and ponds, streams, or wetlands not identified in paragraphs (a)(1) through (a)(4), and not excluded under paragraph (b), may be jurisdictional under paragraph (a)(5) if they meet the relatively permanent standard or significant nexus standard (see the agencies' response to comments in Section 11.1.4). See Final Rule Preamble Section IV.C.6 for additional information and clarification regarding the implementation of the category.**
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> **The agencies agree with commenters that the example list of "other waters" was illustrative and not exhaustive in the 1986 regulations; the agencies have replaced the example list with "lakes and ponds, streams, or wetlands not identified in paragraphs (a)(1) through (a)(4)." This regulatory text is exclusive, but the agencies have concluded that the more specific water types previously listed in paragraph (a)(3) of the 1986 regulations fall within one of the four water types listed in paragraph (a)(5) of the final rule. See Final Rule Preamble Section IV.C.6.b.**
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> **The agencies agree with commenters that the inclusion of a waterbody on the list of waters in paragraph (a)(3) of the 1986 regulations and in paragraph (a)(5) of the final rule does not reflect a conclusion that these waters are categorically jurisdictional; rather, under the final rule these waters are only jurisdictional if the subject waters meet either the relatively permanent standard or the significant nexus standard. See Final Rule Preamble Section IV.C.6.b.**
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> **The agencies agree with commenters that including intermittent streams in the list of water types in paragraph (a)(3) of the 1986 regulations led to confusion. That list was meant to allow for jurisdictional evaluation of intermittent streams that do not fall within the other**

categories (such as intermittent streams that are not tributaries to the requisite water types but which under the 1986 regulations could affect interstate commerce, and under the proposed rule could meet the significant nexus standard). The list was not meant to imply that intermittent streams were not jurisdictional under the tributary provision of the 1986 regulations. In addition, a flowing aquatic feature that is human-made or human-altered but which is neither a jurisdictional tributary nor an excluded ditch would be assessed as a stream under paragraph (a)(5). See Final Rule Preamble Section IV.C.6.

The agencies acknowledge comments requesting that the word "wetlands" in the "other waters" category from the 1986 regulations be revised to "non-adjacent wetlands." The agencies disagree that such a change is necessary as paragraph (a)(5) waters under the final rule explicitly include only waters not included in paragraphs (a)(1) through (a)(4). Referring to "non-adjacent wetlands" may cause confusion as paragraph (a)(5) waters may include wetlands that meet the regulatory definition of "adjacent" at paragraph (c)(2) but that are adjacent to waters not included in paragraphs (a)(1) through (a)(3).

The agencies agree with commenters who expressed support for including (a)(3) "other waters" as jurisdictional if they meet the relatively permanent standard. The agencies acknowledge the commenters requesting "other waters" be considered jurisdictional if they have a continuous surface connection with a tributary that meets the relatively permanent standard. Under the final rule, waters not included in paragraphs (a)(1) through (a)(4) may be jurisdictional under paragraph (a)(5) if they are relatively permanent, standing or continuously flowing bodies of water with a continuous surface connection to a paragraph (a)(1) water or relatively permanent tributary. Waters which are not relatively permanent, standing or continuously flowing bodies of water, but which have a continuous surface connection to relatively permanent tributaries, do not meet the relatively permanent standard but may be jurisdictional under paragraph (a)(5) if they meet the significant nexus standard.

The agencies disagree with commenters who asserted that all other waterbodies, channels, and/or features that are not specifically excluded or otherwise included as jurisdictional should be assessed under paragraph (a)(5). The final rule clarifies that only lakes and ponds, streams, and wetlands not included in paragraphs (a)(1) through (a)(4) may be assessed for jurisdiction under paragraph (a)(5). See Final Rule Preamble Section IV.C.6.

The agencies acknowledge the commenter who requested that the agencies restore categorical protections to all tributaries, adjacent wetlands, and "other waters." Agencies may choose to proceed via rulemaking or adjudication. *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974) ("[T]he choice between rulemaking and adjudication lies in the first instance within the [agency's] discretion."). With respect to the significant nexus standard in particular, Justice Kennedy also stated that the agencies could proceed to determine waters jurisdictional through regulations or adjudication. *See* 547 U.S. at 780-81. The agencies have concluded that adjudication of which waters assessed under paragraph (a)(5) are within Clean Water Act protections through case-specific application of the significant nexus standard or the relatively permanent standard under the final rule, is appropriate. Therefore, the agencies are not categorically including or excluding waters that do not fall

within one of the more specific categories as jurisdictional under this rule. See Final Rule Preamble Section IV.C.6.b.

The agencies also acknowledge the commenter's request to restore cross-references to "other waters" in the tributaries and adjacent wetlands categories (*i.e.*, paragraphs (a)(3) and (a)(4) in the final rule). The agencies have not restored the cross-references in the final rule and instead made changes from the 1986 regulations in order to ensure the agencies are not pushing the outer limits of the authority granted to them by Congress under the Clean Water Act. See Final Rule Preamble Section IV.C.6.

The agencies disagree with the commenter who stated that natural and human-made water features on golf courses should be exempted or defined separately from the "other waters" category. The final rule does not distinguish between waters located on or off golf courses. The agencies' final rule does contain an exclusion, based on the 1986 preamble language, for artificial reflecting or swimming pools or other small ornamental bodies of water created by excavating or diking dry land to retain water for primarily aesthetic reasons. While certain human-made water features on golf courses may meet the exclusion, determinations regarding the jurisdictional status of any specific water are outside the scope of this rulemaking. The agencies will assess jurisdiction under the final rule on a case-specific basis. Finally, the final rule does not affect longstanding activity-based exemptions from the permitting requirements of the Clean Water Act, such as those found in section 404(f).

The agencies disagree with commenters who requested that the final rule clarify that wetlands forming a mosaic with other wetlands should be assessed for jurisdiction under paragraph (a)(5) and not as paragraph (a)(4) wetlands. In identifying wetlands, the agencies will ordinarily consider all wetlands within a wetland mosaic collectively. The agencies have long considered wetland mosaics to be delineated as one wetland. Wetlands that do not meet the requirements to be considered under paragraphs (a)(1) through (a)(4) will be assessed for jurisdiction under paragraph (a)(5). The agencies have deleted the parenthetical in the adjacent wetlands provision of paragraph (a)(4) for the reasons discussed in Final Rule Preamble Section IV.C.5.

The agencies acknowledge the commenter who stated that ephemeral, depressional wetlands of the upper Midwest provide physical and biological benefits that should qualify them for jurisdictional protection. Determinations regarding the jurisdictional status of any specific water or type of water are outside the scope of this rulemaking. The agencies will assess jurisdiction under the final rule on a case-specific basis.

11.1.4 Comments on the "example list" of paragraph (a)(3) "other waters"

Many commenters provided feedback on the example list of "other waters" provided by the agencies in the proposed rule language, including arguing that the list helps clarify the types of waters that may qualify as "other waters."

- A commenter stated that the agencies should exclude any language that implies or suggests that prairie potholes are likely to be considered jurisdictional "waters of the United States." Another

commenter stated that that landowners should not be expected to incur the expense of a permit or consultant reports for potholes on their dry land.

- A commenter suggested that the agencies eliminate any potential case-by-case jurisdictional determinations for the entire Prairie Pothole Region and instead assume that these waters are similarly situated.
- A commenter requested that the agencies change the language to read, "All other waters such as intrastate lakes, rivers, streams (including intermittent and ephemeral streams) . . ." and clarify that the significant nexus test would apply to ephemeral features as well.
- A commenter stated that the definition of "other waters" should specifically mention ephemeral as well as intermittent streams, as follows: "All other waters such as intrastate lakes, rivers, streams (including intermittent and ephemeral streams), . . . ponds."
- A commenter requested that the agencies delete the parenthetical reference to intermittent streams in the example list of "other waters," replacing it with "non-tributary streams."
- Several commenters requested removal of the example list of "other waters" from the final rule language.
- A commenter requested that the agencies include "Delmarva Bays" in the example list of "other waters" in the rule language.
- A few commenters suggested that the agencies include "vernal pools" in the example list of "other waters" in the final rule language.
- A commenter requested that the agencies include seepage lakes on the example list of "other waters" in the final rule language.
- A few commenters stated that if the example list of "other waters" is removed, the agencies should clarify that the approach whereby the agencies define "other waters" will include all intrastate waters (including wetlands) that meet either the relatively permanent standard or significant nexus standard.
- A commenter stated concern that explicitly calling out intermittent streams, but not ephemeral streams, will give the impression that ephemeral streams cannot be considered "other waters."
- A commenter recommended clarifying how jurisdiction of special water features will be determined. This commenter noted that Indiana possesses unique dune and swale wetland complexes, as well as rare fens and bogs that they would like to ensure are protected.

<u>Agencies' Response</u>: The agencies acknowledge the commenters who requested an example list of "other waters" in the final rule, as well as commenters who suggested that specific waters be included in that list. As explained in the agencies' response to comments in Section 11.1.3 above, in the final rule, the agencies have made changes to the 1986 regulations to clarify the list of water types that can be jurisdictional under this provision, and to clarify that waters assessed under paragraph (a)(5) include waters that do not meet the requirements to be considered under paragraphs (a)(1) through (a)(4) of the rule.

Paragraph (a)(5) of the final rule identifies as "waters of the United States" those "intrastate lakes and ponds, streams, or wetlands not identified in paragraphs (a)(1) through (a)(4)" that meet either the relatively permanent standard or significant nexus standard. Removing the list of water types from the 1986 regulations is not meant to imply that any of the water types listed in the 1986 regulations are *not* potentially subject to jurisdiction; rather, the revised list of water types is intended to more clearly inform the public of the types of waters that can be assessed for jurisdiction under paragraph (a)(5) and in the final rule the list is intended to be exclusive. The revised list is also streamlined for clarity. The agencies have concluded that the more specific water types previously listed

in paragraph (a)(3) of the 1986 regulations fall within one of the four water types in the rule. See Final Rule Preamble Section IV.C.6.b for additional discussion.

11.2 Science and Functions of the Proposed Paragraph (a)(3) "Other Waters" or Final Rule Paragraph (a)(5) Waters

Many commenters stated that current evidence shows that various types of individual "isolated" waters and groups of "isolated" waters and wetlands provide functional protections to the physical, chemical, or biological integrity of downstream foundational waters[3] and provide valuable public health, agricultural, recreational, drinking water, ecological, and economic services important to local, regional, and national interests otherwise.

A commenter argued that all wetlands merit protection, even if they are "isolated" in terms of surface water and/or shallow groundwater. The commenter stated that while such wetlands may not have a visible effect on the ground surface, they do have effects on aquifer recharge. A commenter cited a scientific study (Winter, T., U.S. Geologic Survey Yearbook, *Hydrologic Function of Wetlands* (1989)) that indicated "most wetlands are locations of groundwater discharge" and argued "isolated" wetlands (wetlands not adjacent to jurisdictional waters) not receiving surface or subsurface flow from jurisdictional waters should be regulated by the states for points of groundwater discharge affecting local water supply. However, the commenter stated that wetlands not adjacent to or not touching jurisdictional waters that contribute to flood control management as floodwater storage, should be jurisdictional under federal regulation.

A commenter stated that the proposed rule assumes that "geographically isolated wetlands" do not possess a significant nexus to foundational waters. This commenter recommended that the agencies revise the sections of the proposed rule that neglect to address "isolated" wetlands as potentially having a significant nexus to foundational waters or their tributaries and take into account studies supporting significant biological connections through animal movement, interconnected soil matrix, breeding and nursery habitat.

A commenter stated that protection of "isolated wetlands" is important to the proposed rule's effectiveness with respect to maintaining and improving water quality of foundational waters.

Many commenters provided specific examples of "other waters" that should be protected because they have functionally beneficial physical, chemical, and biological connections to "waters of the United States."

- Many commenters argued that closed basins have the following functional connections:
    - Wildlife habitat;
    - Groundwater recharge;
    - Water storage;
    - Nutrient cycling;
    - Pollution abatement;
    - Public water supply;

[3] 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."

    - Tribal water supply;
    - Sacred ceremonial use;
    - Agriculture water supply;
    - Industrial water supply;
    - Commercial water supply;
    - Fishing; and
    - Recreation.
- Multiple commenters stated that prairie potholes have the following functional connections:
    - Retention, assimilation, and/or sequestration of sediment/pollutants/nutrients;
    - Retention of stormwater and reduction of downstream flows/flooding during storm events;
    - Wildlife habitat; and
    - Groundwater recharge.
- Multiple commenters contended that pocosin wetlands have the following functional connections:
    - Mitigation of downstream flooding/flows and sediment loading via stormwater collection, storage, and slow release;
    - Sequestration, filtration and/or retention of sediment/pollutants/nutrients; and
    - Wildlife habitat.
- Several commenters stated that coastal depressional wetlands (inclusive of Carolina and Delmarva Bays) have the following functional connections:
    - Retention, assimilation, and/or sequestration of sediment/pollutants/nutrients;
    - Groundwater and surface water flows/exchange (for Delmarva Bay wetlands);
    - Retention/storage of stormwater;
    - Wildlife habitat;
    - Water/sediment sources and/or sinks (for Delmarva Bay wetlands); and
    - Water pumping via evapotranspiration.
- Several commenters stated that Texas coastal plain/prairie wetlands have the following functional connections:
    - Headwater flows to downstream waters;
    - Flood control;
    - Storm damage mitigation/prevention;
    - Pollutant filtration/sequestration;
    - Groundwater source;
    - Wildlife habitat; and
    - Intermittent surface water flows.
- Several commenters mentioned that vernal pool wetlands have the following functional connections:
    - Surface water flows;
    - Flood control;
    - Wildlife habitat;
    - Groundwater supply; and
    - Pollutant filtration, retention, and/or sequestration.
- A few commenters stated that fen wetlands have the following functional connections:
    - Pollutant filtration, retention, and/or sequestration;
    - Wildlife habitat;
    - Floodwater storage/flood control;
    - Surface water flows/exchange; and
    - Groundwater flows/exchange.
- A few commenters stated that waters of karst terrain (including losing streams and sinkholes) have the following functional connections:

    - Groundwater flows/exchange;
    - Stormwater runoff storage;
    - Flood control;
    - Sediment and pollutant removal;
    - Nutrient and organic matter cycling;
    - Aquifer recharge; and
    - Wildlife habitat.
- A few commenters stated that interdunal wetlands have the following functional connections:
    - Groundwater flows/exchange;
    - Surface water flows/exchange;
    - Water source and/or sink;
    - Sediment source and/or sink;
    - Nutrient retention and transformation; and
    - Wildlife habitat.
- A commenter stated that wet meadow wetlands have the following functional connections:
    - Flood control;
    - Wildlife habitat; and
    - Pollutant filtration, retention, and/or sequestration.
- A commenter argued that playa lakes have the following functional connections:
    - Flood control;
    - Wildlife habitat;
    - Groundwater flows/exchange;
    - Groundwater supply;
    - Nutrient cycling; and
    - Pollutant filtration, retention, and/or sequestration.
- A commenter stated that rainwater basin wetlands have the following functional connections:
    - Water storage;
    - Flood control;
    - Sediment retention/stabilization;
    - Pollutant filtration, retention, and/or sequestration; and
    - Wildlife habitat.
- A commenter mentioned that sandhill wetlands have the following functional connections:
    - Groundwater flows/exchange;
    - Nutrient and organic matter cycling; and
    - Wildlife habitat.
- A commenter stated that ephemeral depressional wetlands have the following functional connections:
    - Flood control;
    - Groundwater flows/exchange; and
    - Wildlife habitat.

<u>Agencies' Response</u>: The agencies acknowledge commenters who discussed the importance of "isolated" waters, including wetlands, as well as commenters who stated that certain types of paragraph (a)(3) "other waters" should be protected based on the functions they provide. The agencies agree that wetlands and open waters in non-floodplain landscape settings (hereafter called "non-floodplain wetlands") can provide numerous functions that benefit the chemical, physical, and biological integrity of larger downstream waters, including the paragraph (a)(1) waters, particularly when analyzed in the aggregate. This diverse group of wetlands (*e.g.*, many prairie potholes, vernal pools, playa lakes) can be

connected to downstream waters through surface water, shallow subsurface water, and groundwater flows and through biological and chemical connections. Some effects of non-floodplain wetlands on larger downstream waters are due to their relative isolation, rather than their connectivity. Where the wetland intercepts materials that otherwise would reach downstream water, wetland "sink" functions trap materials and prevent their export to downstream waters (*e.g.*, sediment and entrained pollutant removal, water storage). See Technical Support Document Sections I, III.B, and III.D.

Under the final rule, specific waters described by commenters will be assessed on a case-specific basis to determine if they are jurisdictional. Some of the waters described by commenters may be jurisdictional under paragraphs (a)(1) through (a)(4). However, waters that do not meet the jurisdictional criteria in paragraphs (a)(1) through (a)(4) will be assessed under paragraph (a)(5), and such waters are jurisdictional if they meet either the relatively permanent or significant nexus standard. As discussed in Final Rule Preamble Section IV.A, the agencies conclude that this final rule is consistent with the statutory text, advances the objective of the Clean Water Act, is informed by the scientific record and Supreme Court case law, and appropriately considers the policies of the Act.

Many commenters provided lists of specific functions of various waterbodies. The final rule identifies specific functions that will be assessed and identifies specific factors that will be considered when determining whether the functions provided by waters being considered under paragraph (a)(5) have a material influence on the integrity of a traditional navigable water, the territorial seas, or an interstate water. The functions in the final rule are indicators that are tied to the chemical, physical, or biological integrity of paragraph (a)(1) waters, including contribution of flow; trapping, transformation, filtering, and transport of materials (including nutrients, sediment, and other pollutants); retention and attenuation of floodwaters and runoff; modulation of temperature in paragraph (a)(1) waters; or provision of habitat and food resources for aquatic species located in paragraph (a)(1) waters. The factors considered include the distance from a paragraph (a)(1) water, hydrologic factors, such as the frequency, duration, magnitude, timing, and rate of hydrologic connections, including shallow subsurface flow; the size, density, or number of waters that have been determined to be similarly situated; landscape position and geomorphology; and climatological variables such as temperature, rainfall and snowpack. See Final Rule Preamble Section IV.C.9 for additional discussion and the agencies' rationale for including specific functions in the final rule's definition of "significantly affect." See also the agencies' response to comments in Section 12 on the Significant Nexus Standard.

The agencies agree with commenters who asserted that waters merit protection even in some cases where there is a lack of hydrologic connection. See Final Rule Preamble Section IV.C.9.

11.3 Implementation of the Proposed Paragraph (a)(3) "Other Waters" or Final Rule Paragraph (a)(5) Waters

Many commenters made statements supporting, opposing, or recommending changes related to the implementation of the proposed "other waters" category of "waters of the United States."

11.3.1 Requirement that field staff request headquarters review of paragraph (a)(5) waters jurisdictional determinations

Several commenters stated that the agencies should retain the requirement for field staff to request headquarters review of "other waters" jurisdictional determinations. The commenters argued the following reasons for their position:

- Review of the scientific justification for the chemical, biological or physical nexus under the significant nexus standard must be conducted by senior officials for accuracy and thoroughness and agency headquarters should provide such oversight; and
- This practice would avoid inconsistent and dubious applications of a confusing and unnecessary jurisdictional category.

Several commenters stated that the agencies should abandon the requirement for field staff to request headquarters review of "other waters" jurisdictional determinations. The commenters argued the following reasons for their position:

- Headquarters review should not be necessary because agency field staff have considerable experience with and expertise regarding the significant nexus standard;
- Requiring headquarters review would equate to continued exclusion of "isolated" waters that should be provided Clean Water Act protection;
- In the interest of streamlining the permitting process, it is prudent to reduce the number of determinations needing review by agency headquarters; and
- A few commenters stated that the 2003 "other waters" jurisdictional determination guidance, which was provided to field staff by the agencies via the *SWANCC* Guidance[4], has resulted in de facto practical implementation that has excluded waters that should be protected. These commenters expressed that the agencies should revise these guidelines with the current proposed rulemaking to restore essential protections.

Agencies' Response: The agencies acknowledge commenters supporting and those opposing headquarters coordination on jurisdictional determinations for waters assessed under paragraph (a)(5) waters. The agencies have established coordination procedures under which the agencies' headquarters will review all draft approved jurisdictional determinations for waters assessed under paragraph (a)(5) based on the significant nexus standard. This approach represents enhanced oversight by headquarters staff over approved jurisdictional determinations for waters assessed under paragraph (a)(5) to ensure implementation consistency and to gather more robust data about the number and types of waters under paragraph (a)(5) evaluated by the agencies, any regional or geographic issues, and the information and implementation resources needed to make jurisdictional determinations for this category. The agencies do not intend for this coordination to result in the exclusion of paragraph (a)(5) waters that meet the significant nexus standard. This coordination will enable the agencies to quickly address any potential inconsistencies. To avoid unnecessary delay, the agencies have established timelines for the review of certain draft approved jurisdictional determinations, outlined in the agencies' coordination memorandum for the final rule. After nine months, the agencies will reevaluate this requirement and assess the implementation and coordination memorandum approach.

[4] 68 FR 1991, 1995 (January 15, 2003) ("*SWANCC* Guidance")

11.3.2 Application of the relatively permanent and significant nexus standards to the proposed paragraph (a)(3) "other waters" or final rule paragraph (a)(5) waters

Several commenters expressed support for "other waters" jurisdictional determinations to be based on subject waters meeting either the significant nexus standard or the relatively permanent standard.

- A commenter stated that the proposed rule lacks sufficient guidance as to how the agencies will apply the significant nexus standard to the "other waters" category.
- A commenter stated opposition to the use of the significant nexus standard for "other waters" jurisdictional determinations, arguing that there is no clear and consistent guidance on how to provide evidence of significance.
- A commenter was particularly concerned with the agencies' potential application of the significant nexus standard to "other waters" and urged the agencies not to aggregate "other waters" for a significant nexus determination. The commenter further argued that the "other waters" category was inconsistent with the *SWANCC* ruling, which disallowed "the extension of jurisdiction to ponds that were not adjacent to navigable waters."
- A commenter recommended clarifying how the agencies would assess tributaries to "other waters" under the relatively permanent or significant nexus standard in order to ensure that these tributaries may be assessed jointly with their connected "other waters," rather than assessed in a manner that separates them from their connection with "other waters."
- A commenter expressed that the agencies cannot protect "other waters" due to the *SWANCC* ruling. This commenter indicated that "other waters" may be regulated by the relatively permanent standard or as a similarly situated water.
- A commenter stated concern that federal jurisdiction might be applied to ephemeral, "isolated" features, even when such features demonstrate a "lack of connection" to "waters of the United States."
- A commenter stated that water features should be evaluated individually to determine their significance to physical, chemical, or biological integrity of downstream waters, rather than assume their value and inclusion as "other waters" based on their location and/or aggregate function. The commenter argued that too much value is categorically attributed to the location of "other waters" in floodplain and riparian areas, and that such value should not be presumed based on feature location.
- A commenter stated that "other waters" should only be jurisdictional if the subject feature meets both the significant nexus standard and the relatively permanent standard. The commenter argued that including "other waters" based on their relative permanence without also requiring a significant nexus amounts to the agencies usurping states' rights and applying federal jurisdiction to waters that were not previously included as "waters of the United States."
- A commenter expressed support for a case-specific approach to determining jurisdiction for specific bodies of water, including ponds and intrastate lakes, among others.
- A commenter stated support for including "other waters" with a continuous surface water connection to a traditional navigable water that also meets the relatively permanent standard as defined in *Rapanos v. United States*, 547 U.S. 715 (2006).[5]
- A commenter who discussed how many ephemeral and intermittent streams are part of closed basins or otherwise do not reach downstream traditional navigable waters requested that the agencies provide criteria on how to determine the strength or significance of a connection and its effect on downstream waters.

[5] *Rapanos v. United States*, 547 U.S. 715 (2006) ("*Rapanos*")

- A commenter stated that all "other waters" that significantly affect "downstream waters" must be protected under the Act.
- A commenter stated that where peer-reviewed science and field observation documents a significant effect that "other waters" have on the integrity of foundational waters, either individually or in combination, the agencies should consider establishing categories for those waters as *per se* jurisdictional.

Agencies' Response: Under paragraph (a)(5) of the final rule, "waters of the United States" include "intrastate lakes and ponds, streams, or wetlands not identified in paragraphs (a)(1) through (a)(4)" that meet either the relatively permanent standard or the significant nexus standard. As described more fully in Section 11.1.2 above, the agencies disagree that they lack authority to assert jurisdiction over waters that do not fall within one of the more specific categories. The agencies' regulations have long had provisions for case-specific determinations of jurisdiction over waters that did not fall within the other jurisdictional categories. See Final Rule Preamble Section IV.A.2.c.

The agencies disagree that the proposed rule lacked sufficient guidance as to how the agencies would apply the significant nexus standard to the "other waters" category but have provided additional clarity and guidance for waters assessed under paragraph (a)(5) in the final rule. The agencies acknowledge commenters who provided recommendations on how "other waters" should be aggregated as part of a significant nexus analysis. The agencies have made important changes to the 1986 regulations including streamlining and clarifying the provision for paragraph (a)(5) waters. Waters assessed under paragraph (a)(5) meet the relatively permanent standard if they are relatively permanent, standing or continuously flowing bodies of water with a continuous surface connection to a paragraph (a)(1) water or relatively permanent tributary. Waters assessed under paragraph (a)(5) meet the significant nexus standard if they "significantly affect" the chemical, physical, or biological integrity of a traditional navigable water, the territorial seas, or a interstate water. The agencies generally intend to analyze waters under paragraph (a)(5) individually to determine if they significantly affect the chemical, physical, or biological integrity of a paragraph (a)(1) water. This approach reflects the agencies' consideration of public comments, as well as being practical and implementable for waters assessed under paragraph (a)(5). See Final Rule Preamble Section IV.A.6 for additional discussion and rationale.

The agencies disagree with commenters arguing that the "other waters" category is inconsistent with the *SWANCC* ruling, and with commenters arguing that "other waters" should only be jurisdictional if the subject feature meets both the significant nexus standard and the relatively permanent standard. No court has held that a water must meet both standards, and the agencies' position since *Rapanos* has been that either standard is sufficient to support jurisdiction. See Final Rule Preamble Sections III.A.4 and III.A.5. Furthermore, the agencies disagree with commenters arguing that including "other waters" based on their relative permanence without also requiring a significant nexus amounts to the agencies usurping states' rights. See the agencies' response to comments on Legal Arguments in Section 2; see also Final Rule Preamble Section IV.A.6.

The agencies disagree with commenters opposed to the use of the significant nexus standard for "other waters" jurisdictional determinations, including commenters who argued that

there is no clear and consistent guidance on how to provide evidence of significance nexus. See the agencies' response to comments in Section 12 for additional information on implementation of the significant nexus standard; see also Final Rule Preamble Section IV.C.9.

The agencies disagree with commenters who asserted that when functions such as flood storage and pollutant retention result from a lack of hydrologic connection, those functions should not be assessed in a significant nexus analysis. Such a rigid, categorical test would ignore that, even in the absence of a hydrologic connection, an upstream water could still have an important functional relationship to a downstream traditional navigable water, the territorial seas, or an interstate water, most notably where the upstream water retains floodwaters or pollutants that would otherwise flow to the downstream water. See Technical Support Document Section III.D.1; *see also* 547 U.S. at 775 (Kennedy, J., concurring in the judgment) ("[I]t may be the absence of an interchange of waters prior to the dredge and fill activity that makes protection of the wetlands critical to the statutory scheme.").

The agencies acknowledge a commenter who recommended clarifying how the agencies would assess tributaries to "other waters" under the relatively permanent or significant nexus standard. The final rule defines "waters of the United States" to include tributaries of traditional navigable waters, the territorial seas, interstate waters, or paragraph (a)(2) impoundments when the tributaries meet either the relatively permanent standard or the significant nexus standard. Tributaries to paragraph (a)(5) waters are assessed as paragraph (a)(5) waters themselves. See Final Rule Preamble Section IV.C.4 and IV.C.6 for additional discussion and rationale.

11.3.3 Treatment of proposed paragraph (a)(3) "other waters" or final rule paragraph (a)(5) waters adjacent to traditionally navigable waters or their tributaries

A few commenters recommended including "other waters" as jurisdictional in a manner similar to adjacent wetlands, with some arguing that this would streamline the permitting process and others stating general support for this approach.

A few commenters expressed support of extending adjacency to cover "open waters" based on scientific grounds. One of those commenters stated that such an approach "was not only fully consistent with the goal of the Clean Water Act but also was firmly based in aquatic science" and presented the argument in the context of the 2015 Clean Water Rule and 2020 Navigable Waters Protection Rule. A commenter who discussed similarities between the 2015 Clean Water Rule and the proposed rule included treatment of adjacency to other aquatic resources in that discussion.

In redefining adjacency in the second rulemaking, a commenter encouraged the agencies to consider including open waters as "adjacent" where they have a similar ecological relationship with nearby "waters of the United States" as adjacent wetlands. The commenter asserted that such an approach would be consistent with peer-reviewed science.

Agencies' Response: The agencies acknowledge commenters who supported applying the concept of adjacency to open waters. However, under the final rule, the agencies have included separate jurisdictional categories for adjacent wetlands (paragraph (a)(4)) and

intrastate lakes and ponds, stream, or wetlands that do not meet another jurisdictional category (waters assessed under paragraph (a)(5)). Under both categories, waters are jurisdictional if they meet either the relatively permanent standard or significant nexus standard. Final Rule Preamble Section IV.C.5.c discusses the agencies' implementation approach for adjacent wetlands, while Section IV.C.6.c discusses the agencies' implementation approach for waters assessed under paragraph (a)(5). The agencies have carefully considered the limitations on their authority under the Clean Water Act, especially concerning paragraph (a)(5) waters. The agencies have made a number of changes to the 1986 regulations that collectively ensure the definition of "waters of the United States" remains well within statutory and constitutional limits.

11.3.4 Other aspects of implementation of proposed paragraph (a)(3) "other waters" or final rule paragraph (a)(5) waters

A commenter stated opposition to the use of "shallow subsurface flow" as evidence of a connection between "other waters" and traditional navigable waters, arguing that this would be inconsistent with the long-recognized understanding that groundwater is not part of the "waters of the United States."

A commenter stated that the proposed rule lacks the clarity needed for effective interpretation and administration of the Clean Water Act in the prairie pothole region.

A commenter stated that impoundments of "other waters" should also be considered jurisdictional "waters of the United States." This commenter argued that not doing so establishes an incentive to avoid regulation by building impoundments within those channels to remove the upstream portion of the channel from jurisdiction, creating a "break" in the jurisdictional status of an "other water."

A commenter requested that the agencies consider several options for addressing the jurisdictional status of ephemeral and intermittent drainages in the Western United States that the commenter asserted would provide greater certainty, including:

- Stating that a lack of an ordinary high water mark (OHWM) and bed and bank indicates insufficient flow to affect the integrity of downstream navigable waters;
- Stating that the absence of an OHWM and bed and bank will be used to determine the lack of a connection to downstream waters; and
- Where a significant nexus is found, developing regional general permits that allow some fill activities in ephemeral and intermittent drainages in the Western United States with conditions to limit downstream impacts.

Agencies' Response: The agencies disagree that shallow subsurface connections should not be used to establish connections between (a)(1) waters and waters assessed under paragraph (a)(5). The agencies conclude that consideration of shallow subsurface hydrologic connections is consistent with longstanding agency practice and note waters possessing a shallow subsurface connection are only jurisdictional where they meet the requirements under paragraph (a) of the final rule. Further, the agencies find that consideration of shallow subsurface flow as a factor in determining if waters meet the applicable standards to be "waters of the United States" is not inconsistent with the long-recognized understanding that groundwater is not a "water of the United States."

The agencies disagree that the rule lacks clarity needed for the prairie pothole region or any particular region of the United States. As described in Final Rule Preamble Section IV.C, the agencies have considered public comments on implementation of the jurisdictional categories in the final rule and provided clarity regarding how the agencies intend to implement the final rule, including application of the relatively permanent standard and significant nexus standard. The agencies have extensive experience implementing the pre-2015 regulatory regime, and this experience will assist the agencies in implementing the final rule. Further, while the agencies' approach to implementation of the relatively permanent and significant nexus standards is broadly consistent with the pre-2015 regulatory regime, the agencies have clarified and refined both the final rule and the guidance on how the agencies intend to implement these standards in order to promote consistency of provisions of Clean Water Act protections for waters. See Final Rule Preamble Sections IV.A, IV.C, and IV.G.

The agencies acknowledge commenters who expressed concern that impoundments of paragraph (a)(5) waters will not be considered paragraph (a)(2) impoundments of "waters of the United States." This approach in the final rule is consistent with the agencies' careful approach to jurisdiction over paragraph (a)(5) waters. This change from the 1986 regulations reflects the agencies' consideration of the jurisdictional concerns and limitations of the statute as informed by *SWANCC* and *Rapanos*. See Final Rule Preamble Section IV.C.3 for additional discussion.

The agencies acknowledge commenters who requested increased certainty on Clean Water Act jurisdiction for ephemeral and intermittent streams in the Western United States. In the final rule, the agencies have described how waters will be assessed for jurisdiction under the significant nexus standard to determine whether they significantly affect the integrity of traditional navigable waters, the territorial seas, and interstate waters. See Final Rule Preamble Section IV.C.9.

The agencies also acknowledge commenters who requested that general permits be developed for impacts to jurisdictional intermittent and ephemeral streams; however, these comments are outside of the scope of this rulemaking.