

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

## SECTION 13 – RELATIVELY PERMANENT STANDARD

*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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## 13 GENERAL COMMENTS ABOUT THE RELATIVELY PERMANENT STANDARD

Several commenters provided general input on whether the relatively permanent standard should be used in the final rule.

Some commenters expressed support for the relatively permanent standard and claimed that the standard serves the purposes of the Clean Water Act, is informed by Supreme Court decisions, and is scientifically supported. Other commenters stated that the focus on permanent or relatively permanent connections would limit, prevent, or mitigate adverse impacts to aquatic ecosystems, particularly in upland tributaries and other features that connect to “waters of the United States,” which were not addressed in the 2020 Navigable Waters Protection Rule (2020 NWPR).

Several commenters provided input regarding how the relatively permanent standard should be implemented with consideration of the significant nexus standard.

- A few commenters claimed that the relatively permanent standard may provide “a quicker option” than the significant nexus standard. These commenters added that the relatively permanent standard should only be used as an alternative to the significant nexus standard as long as the final rule is clear that it represents a subset of the significant nexus standard, rather than a separate standard.
- One commenter recommended that the agencies should not expand the definition of relatively permanent to the point where it would include waters that could not meet the significant nexus standard as well.
- Another commenter asserted that the relatively permanent standard should not be included as an independent test in the final rule, and that it should never be used alone to determine that a resource is non-jurisdictional, without also first applying the significant nexus test.
- One commenter supported the use of the relatively permanent standard or the significant nexus standard to define jurisdiction, asserting that this approach is both scientifically sound and consistent with Supreme Court rulings.
- Another commenter supported the use of the relatively permanent standard in concert with the significant nexus standard. The commenter asserted that this combination was important because intermittent and ephemeral streams and wetlands may not be protected solely through a relatively permanent standard.
- One commenter asserted that the agencies should reject the use of the significant nexus standard completely and only maintain the relatively permanent standard instead.

A few commenters objected to the relatively permanent standard, as proposed.

- One commenter asserted that the interpretation of the relatively permanent standard in the proposed rule was inconsistent with the plurality’s opinion in *Rapanos*<sup>1</sup>, which did not state that all waters are required to have a “continuous surface connection.”
- One commenter asserted that “the 2017 rule” more appropriately and accurately defines relatively permanent waters than the proposed rule.
- Another commenter expressed that the agencies seem to be expanding the scope of the relatively permanent standard with the intended application in the proposed rule.

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<sup>1</sup> *Rapanos v. United States*, 547 U.S. 715 (2006) (“*Rapanos*”)

- Another commenter asserted that relatively permanent as interpreted in the proposed rule would include all of Florida’s urbanized areas, most of its agricultural lands, and even the rural areas supporting smaller towns.

A few commenters stated support for the relatively permanent standard provided by the *Rapanos* Guidance.<sup>2</sup> One commenter asserted that the agencies have not justified why the current understanding of relatively permanent in *Rapanos* Guidance should be replaced with more expansive alternatives and therefore stated that the current approach to defining relatively permanent waters should be retained.

**Agencies’ Response: The agencies agree with the commenters who expressed support for including the relatively permanent standard in the final rule and assert that federal protection is appropriate where a water meets the relatively permanent standard. The agencies also agree with those commenters who stated that the relatively permanent standard is insufficient as the sole standard for geographic jurisdiction under the Clean Water Act. The standard’s apparent exclusion of major categories of waters from the protections of the Clean Water Act, specifically with respect to tributaries that are not relatively permanent and adjacent wetlands that do not have a continuous surface water connection to such relatively permanent waters or to paragraph (a)(1) waters, is inconsistent with the Act’s text and objective. In addition, the relatively permanent standard used alone runs counter to the science demonstrating how such waters can affect the integrity of downstream waters, including traditional navigable waters, the territorial seas, and interstate waters. The agencies also note that that phrase “waters of the United States” is by its terms expansive and not expressly limited to relatively permanent, standing or continuously flowing bodies of water or to wetlands with a continuous surface connection. The imposition of such limitations would disregard the science demonstrating the effects of upstream waters and wetlands on downstream paragraph (a)(1) waters. Taking science into account, the agencies agree with Justice Kennedy that the Clean Water Act intends to protect waters that do not meet the relatively permanent standard, where such waters have a significant nexus to a paragraph (a)(1) water. *Rapanos*, 547 U.S. at 773-74.**

**The agencies agree with the commenter who asserted that the proposed rule would protect more waters than were protected under the 2020 NWPR but disagree with the commenter’s characterization that the proposed rule focused on permanent or relatively permanent connections, as described further below.**

**The agencies agree that scientific evidence supports the conclusion that tributaries of paragraph (a)(1) waters with relatively permanent, standing or continuously flowing water perform important functions that either individually, or cumulatively with similarly situated waters in the region, have significant effects on the chemical, physical, or biological integrity of paragraph (a)(1) waters. The same is true of adjacent wetlands and relatively permanent open waters with continuous surface connections to tributaries that meet the relatively permanent standard. See Technical Support Document Section III.A., III.B, and III.D. However, as discussed above, the relatively permanent standard excludes waters that**

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<sup>2</sup> 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)

properly fall within the Clean Water Act’s protections. Thus, the agencies have concluded that the relatively permanent standard provides important efficiencies and additional clarity for regulators and the public by more readily identifying a subset of waters that will virtually always significantly affect paragraph (a)(1) waters but, on its own, the standard is inconsistent with the text of the statute and Supreme Court precedent and is insufficient to advance the objective of the Clean Water Act. For further discussion on why the agencies have determined that the relatively permanent standard is insufficient as the sole standard for geographic jurisdiction under the Clean Water Act, see Section IV.A of the Preamble to the Final Rule.

The agencies agree with those commenters who supported the use of both the relatively permanent and significant nexus standards. Under the final rule, the agencies are interpreting the term “waters of the United States” to include tributaries to traditional navigable waters, the territorial seas, interstate waters, and paragraph (a)(2) impoundments when the tributaries meet either the relatively permanent standard or the significant nexus standard (“jurisdictional tributaries”); wetlands adjacent to paragraph (a)(1) waters, wetlands adjacent to and with a continuous surface connection to relatively permanent paragraph (a)(2) impoundments or to jurisdictional tributaries when the jurisdictional tributaries meet the relatively permanent standard, and wetlands adjacent to paragraph (a)(2) impoundments or jurisdictional tributaries when the wetlands meet the significant nexus standard (“jurisdictional adjacent wetlands”); and 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 (“paragraph (a)(5) waters”). The agencies have concluded that the significant nexus standard as established in the final rule is consistent with the statutory text and legislative history, 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, and as discussed above, the relatively permanent standard is included in the rule because it provides important efficiencies and additional clarity for regulators and the public by more readily identifying a subset of waters that will virtually always significantly affect paragraph (a)(1) waters. Thus, the agencies have determined that together the relatively permanent standard and the significant nexus standard as codified in the final rule give effect to the Clean Water Act’s broad terms and environmentally protective aim as well as its limitations. For further discussion on why the agencies are incorporating both the relatively permanent and significant nexus standards in the final rule, see Section IV.A of the Preamble to the Final Rule.

Under the final rule, tributaries; adjacent wetlands; and intrastate lakes, as well as ponds, streams, or wetlands not identified in paragraphs (a)(1) through (4) will be assessed under the relatively permanent or significant nexus standards per paragraph (a)(3), (a)(4), or (a)(5) of the final rule, respectively. The relatively permanent standard cannot be used alone to determine that a water is non-jurisdictional. Rather, waters that do not meet the relatively permanent standard must be assessed under the significant nexus standard for tributaries, adjacent wetlands, and paragraph (a)(5) provisions of the final rule. For example, if a tributary has flowing water year-round or continuously during certain times of the year, the tributary would meet the relatively permanent standard per paragraph (a)(3) of the final rule if it flows directly or indirectly through another water or waters to a

paragraph (a)(1) water. Conversely, tributaries that do not meet the relatively permanent standard will be assessed under the significant nexus standard and may be jurisdictional when they, either alone or in combination with similarly situated waters in the region, significantly affect the chemical, physical, or biological integrity of a paragraph (a)(1) water. For further discussion about the way the two standards will be implemented in determining the jurisdiction of tributaries, adjacent wetlands, and intrastate lakes, as well as ponds, streams, or wetlands not identified in paragraphs (a)(1) through (4), see Section IV.C of the Preamble to the Final Rule. See also agencies' response to comments on Tributaries in Section 8, Wetlands and Adjacency in Section 10, Paragraph (a)(5) Waters in Section 11, and the Significant Nexus Standard in Section 12.

The agencies acknowledge that some commenters expressed support for the relatively permanent standard provided by the *Rapanos* Guidance. While the final rule is founded on, and generally returns to, the longstanding and familiar pre-2015 regulatory regime, it does not adopt that regime unchanged. As discussed in Final Rule Preamble Section IV.A, the agencies in the final rule have revised the 1986 regulations to reflect the agencies' determination of the statutory limits on the scope of the "waters of the United States" informed by Supreme Court precedent, the best available science, and the agencies' experience and technical expertise. Additionally, as compared to the pre-2015 regulations or pre-2015 regulatory regime, the final rule reflects updates and advances in implementation tools, resources, and scientific support; codifies exclusions for features that were generally considered non-jurisdictional under the pre-2015 regulatory regime; and is streamlined and restructured for clarity. As discussed in Sections IV.A, IV.B, and IV.C of the Preamble to the Final Rule, the agencies view their interpretation of the relatively permanent standard under the final rule as more consistent with the statute and case law, and more implementable, than the approach taken in the *Rapanos* Guidance.

In response to the reference to a 2017 rule, the agencies note that they did not promulgate a definition of "waters of the United States" in 2017. However, in developing the final rule, the agencies thoroughly considered alternatives to this rule, and have concluded that this final rule best accomplishes the agencies' goals to promulgate a rule that advances the objective of the Clean Water Act, is consistent with Supreme Court decisions, is informed by the best available science, and promptly and durably restores vital protections to the nation's waters. See Section IV.B of the Preamble to the Final Rule for further discussion of the agencies' grounds for concluding that none of the agencies' previous rulemakings are suitable alternatives to the final rule.

The agencies disagree with the commenter who asserted that the proposed rule's approach to the relatively permanent standard was inconsistent with the plurality's opinion in *Rapanos*, and who asserted that the plurality opinion did not state that all waters are required to have a continuous surface connection. To be clear, in the final rule the agencies are exercising the authority granted to them by Congress to construe and implement the Clean Water Act and to interpret an ambiguous term and its statutory definition. While the agencies' interpretation of the statute is informed by Supreme Court decisions, including *Rapanos*, it is not an interpretation of the multiple opinions in *Rapanos*. See Final Rule Preamble Section IV.A.1. The agencies note that the rule does not require that all waters have a continuous surface connection. Rather, under the final rule, a continuous surface

connection is only required for adjacent wetlands and paragraph (a)(5) waters to meet the relatively permanent standard. As discussed in Section IV.C of the Preamble to the Final Rule, the agencies have determined that this approach is consistent with the plurality’s opinion in *Rapanos*, which concluded, “relatively permanent, standing or continuously flowing bodies of water,” 547 U.S. at 739, that are connected to traditional navigable waters, *id.* at 742, and waters with a “continuous surface connection” to such waterbodies, *id.*, (Scalia, J., plurality opinion), are “waters of the United States” under the relatively permanent standard.

As described in Section IV.A of the Preamble to the Final Rule, the agencies are finalizing a definition of “waters of the United States” that is within the agencies’ authority under the Act; that advances the objective of the Clean Water Act; that establishes limitations that are consistent with the statutory text, supported by the scientific record, and informed by relevant Supreme Court decisions; and is both familiar and implementable. Further, the agencies disagree that the final rule generally represents an expansion beyond the pre-2015 regulatory regime. Rather, as discussed in Section V.A of the Preamble to the Final Rule, the agencies expect that there will be a slight and unquantifiable increase in waters being found to be jurisdictional under the final rule in comparison to the pre-2015 regulatory regime. Indeed, as discussed in Section V.A of the Preamble to the Final Rule, this final rule is generally comparable in scope to the pre-2015 regulatory regime that the agencies are currently implementing.

In response to commenters who asserted that the relatively the permanent standard would include all of Florida’s urbanized areas, most of its agricultural lands, and even the rural areas supporting smaller towns, the agencies are not aware of any basis for this assertion but note that determinations regarding the jurisdictional status of any specific water are outside the scope of this rulemaking. The agencies will assess jurisdiction under the final rule on a case-specific basis.

For further discussion on the final rule’s incorporation of the relatively permanent standard, see Sections IV.A, IV.B, and IV.C of the Preamble to the Final Rule.

### **13.1 General Implementation of the Relatively Permanent Standard**

Several commenters provided general input regarding implementation of the relatively permanent standard. A few commenters claimed that the proposed rule did not define “relatively permanent.” As such, one commenter asserted that it is unclear how the agencies will implement the standard or determine what constitutes a continuous surface connection. Further, one commenter claimed that without a definition for the relatively permanent standard, the agencies would be given too much discretion and there would be more potential for inconsistent application. One commenter asserted that the agencies present the relatively permanent standard differently in different sections of the proposed rule, which makes its application unclear. Another commenter asserted that the agencies should remove the term “relatively” from relatively permanent standard because they felt the word itself added uncertainty to the proposed rule.

A few commenters proposed specific recommendations for implementation of the relatively permanent standard and continuous surface connection requirement.

- One commenter claimed that the final rule should more clearly define the concept of a continuous surface connection. The commenter asserted that without a clear definition, “waters of the United States” could include all upstream resources. The commenter further claimed that within this definition, there needs to be a clear separation from conveyance systems and treatment systems constructed in uplands.
- Another commenter asserted that the qualification of “either directly or indirectly” was missing from the continuous surface waters connection description.
- One commenter asserted that the agencies should not include guidance on the application of the relatively permanent standard with respect to specific features (*e.g.*, ditches, culverts, pipes, or swales), but should clarify that the relatively permanent standard should only be used when those specific features maintain a continuous surface connection or the qualification of those specific features is exceptionally intuitive. The commenter claimed that in all other cases, the significant nexus standard should be used.
- One commenter expressed concern that areas of land or other features that provide for a continuous surface connection between a lake or wetland and a main body of water may itself be considered jurisdictional. This commenter recommended that the agencies define and determine whether and how jurisdiction may or may not extend to seasonal water features.

Some commenters provided feedback on how the relatively permanent standard should be implemented, specifically with regard to how precipitation and other climate information will be considered in the final rule.

- A few commenters expressed concern that the agencies were proposing to change the methodology from using 30-year averages for determining trends in rainfall patterns to using short-term averages.
- One commenter requested that the agencies reconsider using the typical year concept to assist with determinations, using the rolling 30-year record for precipitation data.
- One commenter expressed support for using the Antecedent Precipitation Tool and requested that the agencies provide training to state and federal staff on how to use the tool.
- Another commenter requested that the agencies clearly define how the typical year concept will be determined in the final rule.
- One commenter asserted that the proposed rule did not make clear what constitutes relative permanence given the changing climate.

**Agencies’ Response: In the proposed rule, the agencies sought comment on alternative options for interpreting the relatively permanent standard for tributaries, adjacent wetlands, and waters evaluated under paragraph (a)(5) of the final rule. As described in Sections IV.C.4, IV.C.5, and IV.C.6 of the Preamble to the Final Rule, the agencies have considered public comments on the relatively permanent standard and provided clarity regarding how the agencies intend to implement the relatively permanent standard for each of these categories of waters, including the continuous surface connection requirement for adjacent wetlands and waters evaluated under paragraph (a)(5).**

**The “relatively permanent standard” refers to the test to identify relatively permanent, standing or continuously flowing waters connected to paragraph (a)(1) waters, and waters with a continuous surface connection to such relatively permanent waters or to traditional navigable waters, the territorial seas, or interstate waters. Under the final rule, the**

relatively permanent standard encompasses surface waters that have flowing or standing water year-round or continuously during certain times of the year. Relatively permanent waters do not include surface waters with flowing or standing water for only a short duration in direct response to precipitation. See Final Rule Preamble Sections IV.C.4.c.ii and IV.C.6.c.ii for additional information on how the agencies will identify relatively permanent tributaries and paragraph (a)(5) waters, respectively. Further, under the relatively permanent standard, adjacent wetlands or paragraph (a)(5) waters meet the continuous surface connection requirement if they physically abut, or touch, a requisite jurisdictional water, or if they are connected to these waters by a discrete feature like a ditch, swale, pipe, or culvert. A natural berm, bank, dune, or similar natural landform between an adjacent wetland or a paragraph (a)(5) water and a relatively permanent water does not sever a continuous surface connection to the extent it provides evidence of a continuous surface connection. A continuous surface connection does not require a constant hydrologic connection. Rather, the agencies will identify a continuous surface connection consistent with the *Rapanos* plurality opinion, which indicates that the continuous surface connection standard is a “physical connection requirement.” 547 U.S. at 754; *see also Rapanos* Guidance at 6. See Final Rule Preamble Section IV.C.5.c.ii and Section IV.C.6.c.ii for additional discussion. See also the agencies’ response to comments below, in Sections 13.2, 13.3, and 13.4.

The agencies are not promulgating distinct definitions of “relatively permanent standard” or “continuous surface connection” under the final rule. Rather, the agencies have incorporated the standard into the text of the regulation and explained directly and specifically in the preamble the way the relatively permanent standard should be implemented for tributaries, adjacent wetlands, and waters evaluated under paragraph (a)(5) of the final rule, including how the continuous surface connection requirement should be implemented for waters evaluated under paragraph (a)(5), as well as adjacent wetlands. The agencies disagree that, without a definition for the relatively permanent standard or continuous surface connection, the agencies would be given too much discretion and there would be more potential for inconsistent application of the final rule. The agencies’ approach to implementation of the relatively permanent and significant nexus standards is broadly consistent with the pre-2015 regulatory regime, but the agencies have clarified and refined both the regulatory text and the guidance on how the agencies intend to implement these standards in order to promote consistent Clean Water Act protections for waters. The clarifications in the final rule, including the addition of exclusions that codify longstanding practice, and review of the advancements in implementation resources, tools, and scientific support address many of the concerns raised in the past about timeliness and consistency of jurisdictional determinations under the Clean Water Act. See Final Rule Preamble Section IV.C.7 and IV.G.

The agencies have decided not to include the phrase “either directly or indirectly” in the description of the continuous surface connection. The agencies agree that wetlands may be connected to relatively permanent waters directly or indirectly through a discrete feature like a non-jurisdictional ditch, swale, pipe, or culvert, which can serve as a physical connection that maintains a continuous surface connection between an adjacent wetland and a relatively permanent water. See Final Rule Preamble Section IV.C.5 and IV.C.6 for the agencies’ rationale regarding their interpretation of continuous surface connection in



**the final rule. The agencies disagree with the commenter who asserted that the agencies should not include guidance on specific features that maintain a continuous surface connection. The agencies have added guidance on such features in the final rule to provide clarity and regulatory certainty, as described above. The agencies acknowledge commenters who expressed concern that features maintaining a continuous surface connection may be considered jurisdictional. However, the final rule preamble does not state that such features are automatically jurisdictional, and the preamble also clarifies that features maintaining a continuous surface connection may be non-jurisdictional.**

**The agencies recognize that some commenters supported the “typical year” approach, a concept fundamental to many of the 2020 NWPR’s definitions. 85 FR 22273. The concept of “typical year conditions,” including precipitation normalcy, may be relevant to ensuring that certain surface water connections in natural streams are not being observed under conditions that are unusually wet or dry. In terms of implementation, the concept of precipitation normalcy is valid in certain contexts, such as to inform determinations as to the presence of a wetland. However, the typical year analysis proved difficult to implement and yielded arbitrary and potentially outdated results. For example, a recent study by the U.S. Army Corps of Engineers (Corps) found that precipitation normalcy (as calculated based on the methodology described in the preamble to the 2020 NWPR) was neither a reliable predictor of streamflow normalcy, nor was it a precise predictor of streamflow percentiles, in an analysis of watersheds across the United States.<sup>3</sup> Moreover, it is not required by the plurality opinion in *Rapanos*, which simply required a “connect[ion]” to paragraph (a)(1) waters. See Section IV.B.3 of the Preamble to the Final Rule and Section II.B.4 of the Technical Support Document for additional discussion regarding the implementation challenges of the “typical year” concept. Thus, under the final rule, the agencies have not retained the 2020 NWPR’s requirement that tributaries, or other relatively permanent waters, contribute surface water flow to a paragraph (a)(1) water in a “typical year.” Similarly, the final rule does not require that waters assessed under paragraph (a)(5) of the final rule or adjacent wetlands maintain a continuous surface connection to a relatively permanent water at least once in a typical year.**

**The agencies disagree with the commenter who requested that the agencies reconsider using the typical year concept to assist with determinations using the rolling 30-year record for precipitation data. As discussed in Section IV.B.3 of the Preamble to the Final Rule, the agencies have concluded that the 30-year precipitation record required by 2020 NWPR’s “typical year” definition did not allow the agencies flexibility to consider other time intervals when appropriate to reflect effects of a rapidly changing climate, including positive trends in temperature, increasing storm events, and extended droughts. For additional discussion regarding why the agencies are not including the “typical year” concept in the final rule, see Section IV.B.3 of the Preamble to the Final Rule. See also the agencies’ response to comments in Section 4.2.**

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<sup>3</sup> Sparrow, K.H, Gutenson, J.L., Wahl, M.D. and Cotterman, K.A. 2022. Evaluation of Climatic and Hydroclimatic Resources to Support the US Army Corps of Engineers Regulatory Program. Engineer Research and Development Center (U.S.) Technical Report no. ERDC/CHL TR-22-19.

While the final rule does not retain the 2020 NWPR’s “typical year concept,” under longstanding practice since *Rapanos*, the agencies consider the effects of climatic conditions, such as drought, when assessing the flow regime of tributaries. Specifically, the agencies have substantial experience using visual hydrologic observations, field data and indicators, and remote tools, as well as evaluating whether such evidence reflects regular flow conditions characteristic of the waterbody in question when determining the relative permanence of tributaries. For example, as discussed in Section IV.C.4.c.ii of the Preamble to the Final Rule, the agencies have used Streamflow Duration Assessment Methods (SDAMs), which are rapid, field-based assessment methods that rely on physical and/or biological field indicators of stream flow duration and can be used to assist in determining whether tributaries are “relatively permanent.” Because SDAMs use indicators that are robust as to seasonal and short-term climatic variability, these methods can be applied in a single site visit to distinguish streamflow duration when a channel is flowing or in the absence of flow and, in combination with best professional judgment, during abbreviated periods of time when current conditions are wetter or drier than normal. The agencies will continue to use their experience and expertise, as well as the many other available tools and sources of information, to help complete jurisdictional determinations for relatively permanent waters, as described further in the Preamble to the Final Rule in Section IV.C and Section IV.G.

In response to the commenter that expressed support for the use of the Antecedent Precipitation Tool (APT), the agencies acknowledge that automated tools will continue to be important for supporting jurisdictional decision-making. The APT is one example of a tool that can be used to determine precipitation normalcy. The APT is a desktop tool developed by the Corps and is commonly used by the agencies to help determine whether field data collection and other site-specific observations occurred under normal climatic conditions. In addition to providing a standardized methodology to evaluate normal precipitation conditions (“precipitation normalcy”), the APT can also be used to assess the presence of drought conditions, as well as the approximate dates of the wet and dry seasons for a given location. As discussed in Section IV.B.3 of the Preamble to the Final Rule, precipitation data are often not useful in providing evidence as to whether a surface water connection exists in a typical year, as required by the 2020 NWPR. However, the agencies have long used the methods employed in the APT to provide evidence that wetland delineations are made under normal circumstances or to account for abnormalities during interpretation of data, and automated tools like the APT will also continue to be important for supporting jurisdictional decision-making. Additional information on the APT is available on EPA’s “waters of the United States” website (<https://www.epa.gov/wotus/antecedent-precipitation-tool-apt>). Supporting documentation, including a Technical and User Guide and step-by-step instructions for running an analysis, is available on the APT Help Page located on the APT user interface. The agencies may consider the development of additional support materials or trainings over time to facilitate use of the APT. For further discussion on use of the APT, see Section IV.G of the Preamble to the Final Rule. See also Section IV.C of the Preamble to the Final Rule for additional discussion on the other tools and resources that the agencies will use to implement the relatively permanent standard under paragraphs (a)(3), (a)(4), and (a)(5) of the final rule, including other tools and datasets for assessing climatic conditions.

## 13.2 The Relatively Permanent Standard for Tributaries

### 13.2.1 General comments about the relatively permanent standard for tributaries

A few commenters expressed concerns regarding the approach to tributaries under the relatively permanent standard in the proposed rule. For example, one commenter claimed that the proposed rule would categorically assert jurisdiction over relatively permanent waters to include intermittent tributaries, which the commenter claimed was done without regard to whether those features significantly affect downstream traditional navigable waters. A few commenters asserted that the relatively permanent standard, as defined in the proposed rule, would mean that more ephemeral features are likely to be jurisdictional tributaries. As such, one commenter claimed that this may trigger additional regulatory requirements. Another commenter claimed that the agencies were asserting jurisdiction over relatively permanent tributaries based on indirect connections to a traditional navigable water, which they asserted would not satisfy the plurality's test in *Rapanos*.

Some commenters stated that flow regime should not be used to establish jurisdictional status, with one commenter asserting that the proposed rule would not confirm protections for upstream tributaries under the relatively permanent standard. Another commenter argued that all tributaries, regardless of stream flow, affect the health of downstream waters and should be protected. One commenter stated that restricting protections based on regularity of flow is legally and scientifically baseless. Another commenter asserted that the proposed rule ignored the importance of volume, duration, and frequency of flow related to ephemerals, particularly in the arid West. One commenter stated that a flow-based approach is inconsistent with the Clean Water Act, since intermittent streams and shallow subsurface flows should be included as "waters of the United States" under Part 328(a)(3)(ii) due to impact on downstream waters and under Part 120(a)(5)(ii) and (g) due to hydrological connections.

**Agencies' Response: The "relatively permanent standard" refers to the test to identify relatively permanent, standing or continuously flowing waters connected to paragraph (a)(1) waters, and waters with a continuous surface connection to such relatively permanent waters or to traditional navigable waters, the territorial seas, or interstate waters. The final rule establishes that the relatively permanent standard encompasses tributaries that have flowing or standing water year-round or continuously during certain times of the year. Relatively permanent waters do not include tributaries with flowing or standing surface water for only a short duration in direct response to precipitation. Rather than distinguishing between relatively permanent and non-relatively permanent waters with the terms "perennial," "intermittent," and "ephemeral," the agencies have decided to explain directly the way that the relatively permanent standard should be implemented. As discussed in Section IV.C.4 of the Preamble to the Final Rule, the approach in the final rule would encompass tributaries considered relatively permanent under the 2020 NWPR, as well as those considered relatively permanent under the *Rapanos* Guidance, providing continuity in approach for the regulated community and other stakeholders.**

**The agencies disagree with commenters who asserted that the final rule would categorically assert jurisdiction over tributaries with certain flow regimes without regard to whether those tributaries significantly affect traditional navigable waters, the territorial seas, or interstate waters. The agencies are not categorically including or excluding streams as jurisdictional based on their flow regime in the final rule. Streams that are tributaries,**

regardless of their flow regime, will be assessed under the relatively permanent or significant nexus standard per paragraph (a)(3) of the final rule, and streams that are not tributaries will be assessed under the relatively permanent or significant nexus standard per paragraph (a)(5). See Section III.A of the Technical Support Document for more information on the agencies' rationale for the scope of tributaries covered by the final rule. Furthermore, regarding tributaries that meet the relatively permanent standard, scientific evidence supports the conclusion that tributaries of paragraph (a)(1) waters with relatively permanent, standing or continuously flowing water perform important functions that either individually, or cumulatively with similarly situated waters in the region, have significant effects on the chemical, physical, or biological integrity of paragraph (a)(1) waters. See Technical Support Document Section III.A., III.B, and III.D.

The agencies recognize that the final rule's approach to the relatively permanent standard has the potential to result in certain tributaries being jurisdictional under the relatively permanent standard that may have been considered jurisdictional under the pre-2015 regulatory regime following a significant nexus analysis. However, the agencies have decided to implement this approach because it is consistent with the *Rapanos* plurality opinion, it reflects and accommodates regional differences in hydrology and water management, and it can be implemented using available, easily accessible tools.

The agencies disagree that the final rule generally represents an expansion beyond the pre-2015 regulatory regime; rather, the agencies expect that there will be a slight and unquantifiable increase in waters being found to be jurisdictional under the final rule in comparison to the pre-2015 regulatory regime. Indeed, as discussed in Section V.A of the Preamble to the Final Rule, this final rule is generally comparable in scope to the pre-2015 regulatory regime that the agencies are currently implementing. In particular, the agencies disagree that the final rule would result in more than a *de minimis* increase in tributaries with non-perennial flow regimes being jurisdictional or trigger additional regulatory requirements. While analyses under the relatively permanent and significant nexus standards will be slightly different under the final rule compared to pre-2015 practice, it is expected that those slight differences will not have substantive effects to indirect monetary or temporal costs. See the agencies' response to comments in Section 17. For further discussion on how the two standards will be implemented in determining the jurisdiction of tributaries, see Section IV.C.4 of the Preamble to the Final Rule. For additional discussion of the costs associated with implementation of the final rule, see the Economic Analysis for the Final Rule.

The agencies acknowledge that the relatively permanent standard on its own does not provide sufficient protections for all upstream tributaries and agree with the general statements that a flow-based approach to protections is not sufficient to protect the health of downstream waters. While the relatively permanent standard is administratively useful as it more readily identifies a subset of waters that will nearly always significantly affect paragraph (a)(1) waters, on its own, it is inconsistent with the text of the statute and Supreme Court precedent and is insufficient to advance the objective of the Clean Water Act.

The agencies disagree with the commenter who asserted that the proposed rule ignored the importance of volume, duration, and frequency of flow related to ephemeral streams, particularly in the arid West. The proposed rule did not restrict jurisdiction over tributaries based solely on the regularity of flow, nor does the final rule. Rather, under the final rule, tributaries may be jurisdictional where they meet either the relatively permanent standard or the significant nexus standard. In conducting a significant nexus analysis under the final rule, the agencies will consider a number of factors, including hydrologic factors such as the frequency, duration, magnitude, timing, and rate of hydrologic connections, including shallow subsurface flow. For a more detailed discussion of the functions and factors that the agencies will consider in conducting a significant nexus analysis for non-relatively permanent tributaries, see Section IV.C.4 and Section IV.C.9 of the Preamble to the Final Rule. See also the agencies' response to comments on Tributaries in Section 8 and the Significant Nexus Standard in Section 12.

The agencies disagree with the commenter who asserted that indirect connections would not satisfy the plurality's test in *Rapanos*. As discussed in Section IV.C.4 of the Preamble to the Final Rule, there is no text in the Clean Water Act supporting limits on tributaries to those with direct connections to paragraph (a)(1) waters, and the agencies have never interpreted the Act to cover only such tributaries. Moreover, the science is clear that the chemical, physical, and biological integrity of paragraph (a)(1) waters depends on the many tributaries, including headwater streams, that feed such waters. It would be impossible to restore and maintain the chemical, physical, and biological integrity as required by the Clean Water Act with a definition of "waters of the United States" that included solely the last tributary that flows "directly" into a paragraph (a)(1) water. Thus, a tributary for purposes of the final rule includes rivers, streams, lakes, ponds, and impoundments that flow directly or indirectly through another water or waters to a downstream paragraph (a)(1) water, or a paragraph (a)(2) impoundment. See Section IV.C.4 of the Preamble to the Final Rule for further discussion on how contribution of flow from tributaries is established in the final rule. See also the agencies' response to comments on Tributaries in Section 8.

### 13.2.2 Scope of the relatively permanent standard for tributaries

Some commenters proposed their own definitions or provided specific suggestions for "relatively permanent" as it pertains to the duration of relatively permanent flow for tributaries.

- A few commenters recommended that relatively permanent be defined as waters with a continuous hydrologic connection to a traditional navigable water for the entire calendar year.
- One commenter asserted that relatively permanent flow should have an obvious definition of constant presence or flow of water except under unusual circumstances such as drought conditions.
- Another commenter proposed that relatively permanent should be defined as waters that are present throughout the year except for infrequent periods of severe drought and have an indistinguishable surface connection with interstate waters that are navigable-in-fact and currently used or susceptible to use in interstate or foreign commerce, including territorial seas.
- Another commenter recommended that relatively permanent be defined as waters with continuous flow for 290 days.

- A few commenters asserted that jurisdictional relatively permanent waters do not need continuous flow and the relatively permanent standard should include waters which contain continuous flow during some months of the year and no flow during dry months.
- A couple of commenters proposed that relatively permanent be defined as waters that flow for at least three contiguous months per year, except during periods of extreme drought or precipitation according to United States Geological Survey (USGS) standards. In particular, one commenter asserted that this definition would exclude dry washes, arroyos, and similar ephemeral and intermittent features.
- One commenter recommended that the agencies include intermittent waters as relatively permanent provided they have a continuous hydrologic connection to a traditionally navigable water for a minimum of 90 consecutive days within the calendar year.
- Another commenter claimed that it would be unreasonable for the agencies to claim jurisdiction over a waterbody that flows less than 90 days per year. The commenter asserted that their state, Wyoming, is generally a semi-arid region that has many ephemeral drainages that only flow in response to precipitation events and are not associated with any navigable waters.
- One commenter recommended that the final rule should include a stream as jurisdictional under the relatively permanent standard only if it flows three or more months of a normal year and contains multiple indicators of an ordinary high water mark (OHWM).

**Agencies' Response: The agencies acknowledge commenters who provided recommendations regarding the scope of relatively permanent tributaries. The “relatively permanent standard” refers to the test to identify relatively permanent, standing or continuously flowing waters connected to paragraph (a)(1) waters, and waters with a continuous surface connection to such relatively permanent waters or to traditional navigable waters, the territorial seas, or interstate waters. The final rule establishes that the relatively permanent standard encompasses tributaries that have flowing or standing water year-round or continuously during certain times of the year. Relatively permanent waters do not include surface waters with flowing or standing water for only a short duration in direct response to precipitation. Rather than distinguishing between relatively permanent and non-relatively permanent waters with the terms “perennial,” “intermittent,” and “ephemeral,” the agencies have decided to explain directly the way that the relatively permanent standard should be implemented. As discussed in Section IV.C.4 of the Preamble to the Final Rule, the approach in the final rule would encompass tributaries considered relatively permanent under the 2020 NWPR, as well as those considered relatively permanent under the *Rapanos* Guidance, providing continuity in approach for the regulated community and other stakeholders. The agencies have decided to implement this approach because it is consistent with the *Rapanos* plurality opinion, it reflects and accommodates regional differences in hydrology and water management, and it can be implemented using available, easily accessible tools. For further discussion and rationale on the final rule’s approach to the relatively permanent standard for tributaries, see Section IV.C.4 of the Preamble to the Final Rule.**

**The agencies disagree with commenters who asserted that jurisdiction of relatively permanent tributaries should be limited to only those tributaries that flow perennially, or year-round, except under times of drought. To be clear, in the final rule the agencies are exercising the authority granted to them by Congress to construe and implement the Clean**

Water Act and to interpret an ambiguous term and its statutory definition. While the agencies' interpretation of the statute is informed by Supreme Court decisions, including *Rapanos*, it is not an interpretation of the multiple opinions in *Rapanos*. See Final Rule Preamble Section IV.A.1. The agencies have determined that the final rule's approach to the relatively permanent standard is consistent with the *Rapanos* plurality opinion which noted that its reference to "relatively permanent" waters did not necessarily exclude "seasonal rivers, which contain continuous flow during some months of the year but no flow during dry months." 547 U.S. at 732 n.5 (emphasis in original). For additional discussion on why the final rule's approach is consistent with the *Rapanos* plurality opinion, see Section IV.C.4 of the Preamble to the Final Rule. See also the agencies' response to comments on Legal Arguments in Section 2.

The agencies acknowledge commenters who provided recommendations regarding a specific flow duration for water features to qualify as "relatively permanent." Consistent with the proposal, the final rule does not establish a specific duration of flow (e.g., a number of days, weeks, or months) that constitutes relatively permanent flow. The agencies decided not to establish a minimum duration because flow duration varies extensively by region based upon climate, hydrology, topography, soils, and other conditions, and establishing a uniform number equally applicable across the country would not be scientifically sound. The agencies acknowledge that an approach utilizing a specific duration would provide for enhanced national consistency, but it would also undermine the regionalized implementation of relatively permanent tributaries as provided for under the final rule. Additionally, the agencies have determined that a specific flow duration requirement would be challenging to implement, as it would often be infeasible for the regulated community or agency staff to determine whether a stream ordinarily flows for a precise number of days or weeks per year. For further discussion on why the agencies are not establishing a specific duration of flow, see Section IV.C.4 of the Preamble to the Final Rule.

The agencies disagree with those commenters who asserted that the relatively permanent standard should require tributaries to have a continuous hydrologic connection with interstate waters that are navigable-in-fact. The final rule retains the longstanding categorical protections for interstate waters, regardless of their navigability, that were established by the earliest predecessors to the 1972 Clean Water Act and remained in place except during the time period the 2020 NWPR was in effect. As described in Section IV.C.2 of the Preamble to the Final Rule, because the Clean Water Act unambiguously includes interstate waters, they are fundamental to the Act in the same manner as the traditional navigable waters and the territorial seas. Therefore, the final rule, like the 1986 regulations, provides Clean Water Act protections for interstate waters in the same manner as for traditional navigable waters and the territorial seas, and 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. For further discussion on why the final rule treats interstate waters in the same manner as the traditional navigable waters and the territorial seas, see Section IV.C.2 of the Preamble to the Final Rule. See also the agencies' response to comments on interstate waters in Section 6.

The agencies disagree with those commenters who recommended that the relatively permanent standard require tributaries to maintain consistent flow to a downstream paragraph (a)(1) water. Under the final rule, tributaries are required to flow directly or indirectly through another water or waters to certain downstream waters. A tributary may contribute flow through a number of downstream waters or features, including both non-jurisdictional features, such as a ditch excluded under paragraph (b) of the final rule, and jurisdictional waters that are not tributaries, such as an adjacent wetland. However, the tributary must be part of a tributary system that eventually flows to a paragraph (a)(1) water. Therefore, under the final rule a relatively permanent tributary may flow through another stream that flows infrequently, and only in direct response to precipitation, and the presence of that stream is sufficient to demonstrate that the tributary flows to a paragraph (a)(1) water. The agencies also disagree with those commenters who recommended that the relatively permanent standard require tributaries to maintain a continuous or indistinguishable surface connection to paragraph (a)(1) waters. For further discussion on why the final rule does not require tributaries to maintain a continuous or indistinguishable surface connection to paragraph (a)(1) waters, see Section IV.C.4 of the Preamble to the Final Rule. See also the agencies' response to comments on Tributaries in Section 8.

In reference to the commenter recommending that relatively permanent tributaries exhibit multiple indicators of an OHWM, the agencies note that the OHWM, a term unchanged since 1977, defines the lateral limits of jurisdiction in non-tidal "waters of the United States," provided the limits of jurisdiction are not extended by adjacent wetlands. See 41 FR 37144 (July 19, 1977); 33 CFR 323.3(c) (1978). As described in Section IV.C.4 of the Preamble to the Final Rule, tributaries typically have at least one indicator of an OHWM and, consistent with pre-2015 practice, physical OHWM characteristics are used to identify waterbodies including streams, lakes, ponds, and ditches that are present on the landscape. To be a jurisdictional tributary under this provision of the rule, the tributary must meet either the relatively permanent standard or the significant nexus standard. For additional discussion on the use of an OHWM in identifying tributaries under the final rule, see Section IV.C.4 of the Preamble to the Final Rule. See also the agencies' response to comments on Tributaries in Section 8.

The agencies agree with commenters who asserted that relatively permanent flow need not be present during drought conditions. As discussed above in the agencies' response to comments in Section 13.1, under longstanding practice since *Rapanos*, the agencies consider the effects of climatic conditions such as drought when assessing the flow regime of tributaries, and will continue to use this experience and expertise, as well as the many tools and available sources of information, to help make jurisdictional determinations for relatively permanent waters assessed under variable climate conditions. However, the agencies disagree with those commenters who recommended that the relatively permanent standard require tributaries to have relatively permanent flow in a "typical year," or to contribute surface water flow downstream in a typical year. For additional discussion regarding why the agencies are not including the "typical year" concept in the final rule, see Section IV.B.3 in the Preamble to the Final Rule. See also the agencies' response to comments in Section 4.2. See Section IV.C and Section IV.G of the Preamble to the Final Rule, where the agencies have described a number of tools and resources that can be used when evaluating naturally variable flow conditions.



### 13.2.2.1 Approaches to seasonal flow

Some commenters provided recommendations regarding how the proposed rule approached seasonal flow.

- One commenter proposed that relatively permanent be defined as waters that flow at least seasonally during the year and are not only driven by precipitation.
- Another commenter proposed that relatively permanent be defined as waters that have flow at least seasonally during the years when precipitation falls within statistical norms.
- Some commenters expressed concern regarding the way the proposed rule approached seasonal flow. For example, multiple commenters asserted that the proposed rule did not provide any scientific or legal justification for interpreting seasonal flow to mean three months.
- A few commenters also asserted that the proposed rule’s approach to seasonal flow could unlawfully include ephemeral features that flow during a season, but not necessarily for three months, as well as many intermittent features.
- One commenter claimed that the “at least seasonal flow” requirement in the proposed rule does not meet the plurality’s standard.

**Agencies’ Response: The agencies acknowledge commenters who requested that the agencies interpret relatively permanent tributaries to include those that flow year-round or at least seasonally (e.g., typically three months), consistent with the approach in the *Rapanos* Guidance. The agencies note that while the final rule encompasses tributaries that are “relatively permanent” under the *Rapanos* Guidance, the agencies have decided not to use the term “seasonal” from the *Rapanos* Guidance in the final rule for several reasons. First, the agencies have determined that directly describing the scenarios in which waters would be “relatively permanent” is clearer than using the term “seasonal,” the meaning of which can vary and could be misunderstood to establish a specific required flow duration. Additionally, the phrase “relatively permanent flow” is also intended to encompass tributaries in which extended periods of standing or continuously flowing water are not linked to naturally recurring annual or seasonal cycles (e.g., tributaries in which flow is driven more by various water management regimes and practices), as well as tributaries in regions where the timing of relatively permanent flow is highly variable from year to year. For further discussion on why the agencies are not using the term “seasonal” to describe relatively permanent waters, see Section IV.C.4 of the Preamble to the Final Rule.**

### 13.2.2.2 Approaches to flow sources

Several commenters provided input on the way water sources should be used to determine relatively permanent waters in the final rule.

- A few commenters recommended that the agencies should not specify which water sources may contribute to intermittent tributaries under the relatively permanent standard.
- One commenter claimed that the agencies should establish that the relatively permanent standard applies when the flows exist during certain times of the year without the need to clarify or identify the sources of intermittent flow.
- Another commenter asserted that the final rule must not require that waters be fed by any particular source in order to satisfy the relatively permanent standard. This commenter claimed

that such a requirement has no basis in Justice Scalia’s plurality opinion, which focuses on the frequency of flow rather than its source. This commenter also claimed that such a requirement has no basis in science or the significant nexus test, which recognize that relatively permanent streams significantly affect downstream waters regardless of the source of water that feeds the stream.

- One commenter recommended that intermittent flow should be determined based on flows associated with the natural hydrologic cycle. This commenter provided suggestions for water sources that should not be considered in making flow determinations, including flows from dry weather urban runoff off, including landscape irrigation runoff, potable water discharges, and swimming pool discharges, effluent from wastewater treatment plants, and water rights transfers imported from outside of the tributary’s region. This commenter asserted that making a determination based on effluent dependent or out-of-watershed flows would result in regulatory uncertainty.
- One commenter expressed support for an exclusion clearly stating that effluent from wastewater treatment plants should not be considered when determining whether a flow regime is relatively permanent.
- Another commenter recommended that intermittent flow should be included in the relatively permanent standard based on regionally specific interpretations of flow sources.

**Agencies’ Response: The agencies acknowledge commenters who provided recommendations regarding the appropriate flow sources for relatively permanent flow. Under the final rule, implementation of the relatively permanent standard for tributaries does not require that relatively permanent flow originate from any particular source. Rather, the final rule establishes that the relatively permanent standard applies to tributaries without the need to identify a specific source of flow. The agencies agree with the commenter who asserted that requiring relatively permanent flow to originate from any particular source has no basis in the Clean Water Act, Justice Scalia’s plurality opinion in *Rapanos*, nor does it have any scientific basis. As discussed in Section IV.C.4 of the Preamble to the Final Rule, the agencies have concluded that the final rule’s approach is consistent with the plurality opinion in *Rapanos*, which lays out the relatively permanent standard and does not require that relatively permanent waters originate from any particular source. *See e.g.*, 547 U.S. at 739. The final rule’s approach is also science-based, as the source of a tributary’s flow does not influence whether it has an effect on downstream waters, including paragraph (a)(1) waters. For further discussion on how the final rule’s approach to the relatively permanent standard accounts for regional variation in sources of relatively permanent flow, see Section IV.C.4 of the Preamble to the Final Rule.**

**For the reasons described above, the agencies disagree with the commenters who asserted that effluent from wastewater treatment plants should not be considered when determining relatively permanent flow, or that relatively permanent flow should be based only on natural hydrologic sources. The agencies’ longstanding interpretation of the Clean Water Act includes tributaries that are natural, modified, or constructed waters, and the agencies are not changing this interpretation. Therefore, under the final rule, waterbodies that have been physically or hydrologically modified, including effluent-dependent streams or streams that flow in response to water transfers, may be jurisdictional as relatively**

**permanent tributaries under paragraph (a)(3) of the final rule if they have flowing water year-round or continuously during certain times of the year. Relatively permanent waters do not include tributaries with flowing or standing water for only a short duration in direct response to precipitation.**

**The agencies also disagree with commenters who asserted that consideration of both natural and artificial sources of flow would result in regulatory uncertainty. Requiring that relatively permanent flow originate solely from a natural source could present unnecessary implementation challenges to the agencies and the regulated public, as it could be difficult to differentiate between natural and artificial sources of flow. In addition, as discussed above, this approach has no basis in science or in the Clean Water Act. For additional discussion about why the agencies are not requiring that flow originate from any particular hydrologic source, see Section IV.C.4 of the Preamble to the Final Rule.**

### *13.2.2.3 Approaches to flow classifications*

Several commenters provided input on specific flow classifications under the relatively permanent standard for tributaries. For example:

- Some commenters stated that jurisdiction should be limited to perennial waters only, stating that this approach would be consistent with Justice Scalia’s plurality opinion in *Rapanos* and would provide clarity and certainty for federal and state regulators as well as the regulated public.
- Some commenters stated that waters must have consistent flow into traditional navigable waters to be considered jurisdictional tributaries. One commenter stated that they support that “relatively permanent, continuously flowing waters that contribute surface water flow in a typical year to navigable-in-fact waters” (perennial waters) are jurisdictional.
- A few commenters asserted that the final rule should not interpret relatively permanent to include all perennial and intermittent tributaries. In particular, one commenter proposed that the agencies use the significant nexus standard to categorically evaluate intermittent tributaries instead of the relatively permanent standard.
- A few commenters did not support including intermittent flow in the definition of “waters of the United States.”
- Another commenter asserted that intermittent flow should not be included in the relatively permanent standard.
- Several commenters recommended that the final rule should only apply the relatively permanent standard to perennial and intermittent waters. In particular, a few commenters recommended that the relatively permanent standard should only include intermittent waters with significant flows at least three months of the year.
- One commenter asserted that the agencies should clarify that intermittent streams under the relatively permanent standard may flow less than three months each year.
- Several commenters supported implementation of the relatively permanent standard consistent with the pre-2015 regulatory regime. Some commenters asserted that the agencies should use past precedent when considering protection of intermittent and perennial streams and wetlands to ensure waters with impacts on drinking water supplies are appropriately regulated.
- One commenter asserted that the relatively permanent standard should protect all intermittent and perennial streams. Therefore, the commenter claimed, the agencies should reject the *Rapanos*

Guidance, which they asserted only protected an undefined subset of perennial and intermittent streams.

- One commenter stated that the rule and associated guidance should recognize that relatively permanent flow includes perennial and intermittent flow and that neither need be present during drought conditions.
- A few commenters proposed that the agencies should not use the 2020 NWPR approach to intermittent to implement the relatively permanent test because they asserted that the 2020 NWPR approach to intermittent was not based solely on the relatively permanent standard.

A few commenters expressed concerns about the way intermittent waters in particular would be included under the relatively permanent standard in the final rule. For example, one commenter recommended that the agencies carefully define intermittent waters and asserted that these waters should rarely be jurisdictional according to the relatively permanent standard. Another commenter asserted that applying the relatively permanent standard to intermittent waters would be problematic. The commenter raised concerns regarding mapping of streams in the National Wetlands Inventory, which they stated does not accurately capture intermittent and ephemeral streams.

A few commenters proposed that the agencies should include ephemeral, intermittent, and perennial waters as relatively permanent in the final rule. In particular, one commenter specifically opposed any approach whereby ephemeral features would not be considered relatively permanent while intermittent and perennial waters would be relatively permanent. In addition, one commenter claimed that protecting ephemeral, intermittent, and perennial waters in Colorado would include headwater streams and connected wetlands, which they asserted are important for downstream communities, the environment, and the economy.

A few commenters asserted that the agencies should provide clarity about flow regimes for perennial, intermittent, and ephemeral flows. One commenter asserted that the proposed rule does not make any real distinction between permanent, intermittent, and ephemeral flows.

Some commenters requested that the agencies provide definitions of the terms “perennial,” “intermittent,” and “ephemeral,” stating that doing so would benefit implementation of the rule by establishing concise and comprehensible definitions. The commenters further requested that the definitions should recognize the importance of ephemeral and non-adjacent wetlands to the protection of foundational waters.<sup>4</sup> In referencing the need for these definitions, one commenter additionally recommended providing detailed guidance documents and examples that have been problematic in the past, to help generate a rule that is predictable and consistent.

Several commenters provided their own definitions or specific suggestions for definitions for “perennial,” “intermittent,” and “ephemeral” in the context of the relatively permanent standard.

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<sup>4</sup> 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.”

- One commenter proposed that “perennial” includes surface waters flowing year-round that result from surface water and/or groundwater inflow that may be supplemented by precipitation. The commenter proposed that “intermittent” includes surface waters flowing continuously for a specific time that the responsible regional EPA and Regional Corps Engineer office determine appropriate; that results from regionally specific, high-volume runoff events due to snowpack melt, snow accumulation melt, retained stormwater, or other regionally specific events; and that does not occur solely due to one rainfall or snowfall event. The commenter proposed that “ephemeral” includes surface water flowing or pooling solely due to precipitation.
- Another commenter provided recommendations for the definitions of “perennial,” “intermittent,” and “ephemeral” based on flow characteristics. The commenter proposed that “perennial” includes waters with year-round continuous surface water flow, even in dry years or years of drought, and the commenter asserted that waters should display clear physical flow evidence. The commenter recommended that this could be based on historical data. The commenter asserted that current flow data must support continuous surface water flow despite fluctuating water elevations or flow discharge rates. The commenter also proposed that “intermittent” includes waters that have surface flow that varies dependent on weather, season, climate, and display clear physical flow evidence. The commenter asserted that this intermittent flow may be year-round and continuous, or may flow only during the regional wet and rainy season, or may flow normally except in those years of drought or extremely dry conditions. The commenter suggested that historical context may be used in this determination. The commenter stated that flow may stem from seasonally wet months, connections to a water table, snowmelt where the region receives normally large quantities of snowfall to influence local and regional hydrology, or any other regionally-appropriate morphological observation. The commenter further proposed that “ephemeral” includes waters with flow dependent on short-duration events, such as precipitation or snow-melting.
- Another commenter asserted that the agencies should use the 2020 NWPR definitions for “perennial,” “intermittent,” and “ephemeral” but that there should be exceptions allowing for changes due to drought conditions which would prevent continuous or seasonal flow during a particular year.
- One commenter asserted that the agencies should define “perennial,” “intermittent,” and “ephemeral” and that the agencies use the definitions that appeared in the most recent 2017 Issuance and Reissuance of Nationwide Permits.
- Another commenter requested that the agencies define “ephemeral stream” and “intermittent stream” based on the longstanding Corps definition.
- Another commenter recommended that the agencies take an approach similar to that of the Rhode Island Freshwater Wetlands Rules and Regulations for defining relatively permanent. The commenter stated that Rhode Island differentiates flowing bodies of water into three categories: Rivers, Streams and Intermittent Streams, and Areas Subject to Storm Flowage (which the commenter stated are analogous to ephemeral streams). The commenter further asserted that the agencies should conduct site visits to support their jurisdictional determinations.
- One commenter asserted that the agencies should clarify that flow is not considered “intermittent” if it exists only in response to precipitation.
- Another commenter recommended that intermittent flow should include tributaries with flow for at least three months.
- One commenter stated that there is a category of streams that is in between “intermittent” and “ephemeral,” which flow less than seasonally, yet more than in response to direct precipitation

(e.g., flows for one month of the year). This commenter stated that if the agencies define the terms “perennial,” “intermittent,” or “ephemeral,” then the definition of “ephemeral” should encompass these sub-seasonal streams, or there should be a new category for such streams.

Once commenter stated that if the agencies determine that flow classification definitions are necessary or useful, the definitions should reflect the usage of these terms by the scientific community and should be derived in consideration of the different climatic, hydrologic, and geomorphic features in regions throughout the country.

Another commenter asserted that the agencies should maintain a general interpretation of relatively permanent flow with perennial, intermittent, and ephemeral flow classifications including physical flow characteristics in the definitions. The commenter claimed that this would provide enough flexibility for regional districts to use historical observations and data from the EPA, Corps, and National Resources Conservation Service (NRCS), or other university or published studies, to discern typical flow characteristics.

A few commenters recommended that the agencies not define the terms “perennial,” “intermittent,” and “ephemeral.” In particular, one commenter asserted that not defining these terms would support regionalized approaches to determining “waters of the United States.” Another commenter recommended that definitions for “perennial,” “intermittent,” and “ephemeral” should not be used in the final rule because the terms are difficult to define and require the establishment of methods to define flow. One commenter asserted that the definition for perennial streams in the 2020 NWPR failed to recognize that even perennial streams can lack continuous flow year-round during drought conditions. One commenter expressed concern that the agencies are seeking public comment on contentious topics, such as whether to define the terms “intermittently,” “ephemerally,” or “periodically.” Another commenter asserted that the agencies do not need to define flow classifications in the final rule as some states and tribes have these definitions in their own regulations.

**Agencies’ Response: In the proposed rule, the agencies sought comment on alternate approaches to interpreting the phrase “relatively permanent waters,” including an approach that would use the terms “perennial” and “intermittent.” The agencies also sought comment on whether these flow regime classifications should be defined in the final rule and, if so, whether the agencies should use the same definitions for these terms as the 2020 NWPR. After considering all of the comments received, the agencies have decided to explain directly the way that the relatively permanent standard should be implemented, rather than defining the phrase with these terms. Although the approach in the final rule would encompass tributaries that were jurisdictional under the 2020 NWPR, the agencies have determined that adding these terms to the final rule could cause confusion and uncertainty, as evidenced by the variety of comments proposing definitions for “perennial” and “intermittent.” For further explanation on why the agencies have decided not to describe relatively permanent waters using these terms, see Section IV.C.4 of the Preamble to the Final Rule. For the agencies’ response to comments on the general scope of relatively permanent tributaries in the final rule, see Sections 13.1 and 13.2.2 above.**

**The agencies agree with the general statements provided by commenters that tributaries of various flow regimes provide functions that are important for downstream communities, the environment, and the economy. The final rule establishes that the relatively permanent**

**standard encompasses tributaries that have flowing water year-round or continuously during certain times of the year. Relatively permanent waters do not include tributaries with flowing or standing water for only a short duration in direct response to precipitation. As discussed in the agencies' response to comments in Section 13, the agencies recognize that the relatively permanent standard excludes many waters that properly fall within the Clean Water Act's protections, including many headwater tributaries. Under the final rule, tributaries may be jurisdictional where they meet either the relatively permanent standard or the significant nexus standard. In conducting a significant nexus analysis under the final rule, the agencies will consider a number of functions and factors to determine whether a tributary and its adjacent wetlands, either alone or in combination with similarly situated waters in the region, have a material influence on the chemical, physical, or biological integrity of a paragraph (a)(1) water. For a discussion of the functions and factors that the agencies will consider in conducting a significant nexus analysis for non-relatively permanent tributaries, see Section IV.C.4 and Section IV.C.9 of the Preamble to the Final Rule. See also the agencies' response to comments in on Tributaries in Section 8 and the Significant Nexus Standard in Section 12.**

### 13.2.3 Implementation of the relatively permanent standard for tributaries

Some commenters requested that the agencies provide clarification regarding implementation of specific aspects of the relatively permanent standard.

- One commenter asserted that the agencies should clarify if relatively permanent flow will include continuous flow of water or if it refers to a historic natural drainage pathway similar to those delineated on the USGS quad maps.
- One commenter urged the agencies to clarify how landowners should distinguish between streams that are intermittent and streams that form in response to rainfall.
- One commenter asserted that to the extent that the agencies conclude that an erosional feature is not considered intermittent if it exists only in direct response to precipitation in arid systems, clarification at the regional level would be useful.

Some commenters expressed concern regarding the need to distinguish between relatively permanent and non-relatively permanent flow, particularly in regions where streamflow is highly variable, and in light of climate change. One commenter opposed approaches that require site-specific determinations, asserting that the proposed rule indicates significant uncertainty in determinations for perennial/intermittent classifications due to the climate variations common throughout the Great Plains. The commenter stated that the complexities make cost-effective, timely, and predictable jurisdictional determinations difficult, imposing significant costs and uncertainties on citizens, and privileging those with resources to engage experts and exposing those lacking such resources to federal enforcement. Another commenter urged the agencies not to distinguish between ephemeral and intermittent streams by providing definitions of the terms, asserting that in the arid Southwest, the distinctions are difficult and meaningless since the variables that determine whether a stream—or portion of a stream—is ephemeral or intermittent are myriad and erratic (including precipitation, evaporation, infiltration, and snowpack). They also stated that extreme conditions such as drought are becoming more typical, and that climate change will shift stream flow categorizations over time. One commenter noted that flow regime distinctions in the arid Southwest are very challenging, especially with respect to intermittent versus ephemeral because the relevant variables (precipitation, infiltration, evaporation, diversion, etc.) can fluctuate season-to-season, year-to-

year, and decade-to-decade. The commenter provided examples and argued that there is no “typical” year. Another commenter stated that climate change will create challenges for any rule based on flow volume, since perennial streams may become intermittent or ephemeral. The commenter claimed that as a result, any approach that relies on past precipitation averages will result in determinations that quickly become outdated or incorrect.

Several commenters provided feedback regarding how relatively permanent flow might be considered in light of climate change. In particular, one commenter asserted that when the relatively permanent standard of flow is utilized instead of applying a significant nexus test, changing climate and hydrologic conditions should be considered. Another commenter claimed that it would be inappropriate for the agencies to consider potential future climate change effects when determining the permanence of a water feature. The commenter asserted that evaluation of a water feature’s relative permanence should be limited to currently existing conditions only. One commenter asserted that while the preamble acknowledges that changes in flow in tributaries caused by climate change will also be relevant to the relatively permanent standard, there is no explanation as to how such changes will affect “relative” permanence.

**Agencies’ Response: The agencies recognize that flow regimes are naturally dynamic and variable, and that the flow permanence of certain streams may fluctuate over time. However, the agencies note that this was equally true under the 2020 NWPR, as well as the pre-2015 regulatory regime, the latter of which applied different tests for jurisdictional determinations of certain waters based upon flow permanence according to the *Rapanos* Guidance. The agencies do not conclude that this natural variability presents any new implementation challenges for the final rule. Following current agency practice, determinations of relative permanence under the final rule will consider all relevant sources of information, including remote tools, on-site observations, and other applicable data. In the Preamble to the Final Rule in Sections IV.C.4 and IV.G, the agencies have described a number of tools and resources that can be used for evaluating naturally variable flow conditions. The agencies will continue to use their professional judgment to make accurate determinations of jurisdiction based on the best available data.**

The agencies also recognize that climate change and other anthropogenic modifications will lead to changes in the relative permanence of tributaries (See Section II.C of the Technical Support Document), and the agencies’ current practices and guidance acknowledge that stream flow can and does change over time. Consistent with longstanding practice, when the agencies assess whether or not a water meets the definition of a “water of the United States,” they do not assess future conditions based on potential climatic changes. See also Final Rule Preamble Section IV.C.9.c.ii for a discussion of how the agencies can consider a changing climate under the significant nexus standard consistent with the best available science. For further discussion on why the final rule’s approach to the relatively permanent standard does not rely on the use of a specific precipitation record when assessing a tributary’s flow regime, see Section IV.B.3 of the Preamble to the Final Rule. See also the agencies’ response to comments in Section 4.2 and Section 13.1.

The agencies acknowledge that some commenters opposed an approach to the relatively permanent standard that requires case-specific determinations. However, as discussed in Final Rule Preamble Section IV.A.3, the agencies have determined that fact-based standards for determining Clean Water Act jurisdiction are reasonable. All definitions of



**“waters of the United States,” including the pre-2015 regulatory regime, the 2015 Clean Water Rule, and the 2020 NWPR have required some level of case-specific analysis. The agencies have authority to determine which tributaries and their adjacent wetlands are jurisdictional either through regulations or adjudication. See 547 U.S. at 780-81. This final rule continues the use of case-specific jurisdictional tests, but also provides needed clarity by establishing regulations that include definitions of key terms and specific exclusions. Implementation of the final rule will be aided by improved and increased scientific and technical information and tools that both the agencies and the public can use to determine whether waters are “waters of the United States.” The clarifications in the final rule, including the addition of exclusions that codify longstanding practice, and review of the advancements in implementation resources, tools, and scientific support address many of the concerns raised in the past about timeliness and consistency of jurisdictional determinations under the Clean Water Act. See Final Rule Preamble Section IV.G.**

**In reference to the commenter regarding the jurisdictional status of erosional features and clarification at the regional level, the agencies have clarified in the final rule that swales and erosional features (e.g., gullies, small washes) characterized by low volume, infrequent, or short duration flow are not tributaries and are not jurisdictional. As described in Section IV.C.4 of the Preamble to the Final Rule, streams are waterbodies that are typically characterized by the presence of a channel and an OHWM. In contrast, erosional features like gullies and rills are typically more deeply incised than streams and lack an OHWM. Similarly, swales do not have an OHWM and typically lack a more defined channel than a stream exhibits. Field indicators, remote sensing, and mapping information can help identify an OHWM, and the Corps continues to improve such regulatory practices across the country through ongoing research and the development of regional and national OHWM delineation procedures. For example, the Corps has developed field indicators to help field staff identify the OHWM in common stream types in the arid West. Under the final rule, streams that are tributaries, regardless of their flow regime, will be assessed under the relatively permanent or significant nexus standard per paragraph (a)(3) of the final rule, and streams that are not tributaries will be assessed under the relatively permanent or significant nexus standard per paragraph (a)(5) of the final rule. For additional discussion about how to distinguish between tributaries, erosional features, and swales, and how to identify tributaries based on an OHWM, see Sections IV.C.4 and IV.C.7 of the Preamble to the Final Rule; see also Sections III.A.v and IV.A.ii of the Technical Support Document. For additional discussion on implementation of the relatively permanent and significant nexus standards for purposes of determining jurisdiction over tributaries, see Section IV.C.4.c of the Preamble to the Final Rule.**

### **13.3 The Relatively Permanent Standard for Adjacent Wetlands**

Several commenters provided input as to how the relatively permanent standard should be implemented for adjacent wetlands.

- One commenter expressed concern that under the proposed rule, the agencies could determine a water meets the relatively permanent standard for adjacent wetlands, but not the significant nexus standard, and therefore may not be considered jurisdictional. This commenter recommended that the agencies should clarify in the final rule that the relatively permanent standard cannot be used

on its own to determine that wetlands that are adjacent to relatively permanent waters are non-jurisdictional.

- A few commenters provided feedback regarding how a continuous surface connection would be considered in the proposed rule. In particular, one commenter supported the agencies' position that a continuous surface connection does not require surface water to be continuously present between the wetland and the tributary and may be satisfied when the space between the two is inundated or saturated by surface or ground water at a frequency and duration sufficient to support a prevalence of vegetation typically adapted for life in saturated soil conditions. However, the commenter expressed concern that the proposed rule preamble describes the relatively permanent standard as requiring a "continuous surface water connection" rather than a "continuous surface connection."
- One commenter asserted support for a connection between wetlands and ephemeral waters as requirement for adjacency, and the commenter asserted that such connections demonstrate a potential significant effect on the chemical, physical, and biological integrity of foundational waters.
- One commenter claimed that adjacent wetlands should be considered relatively permanent only if there is a surface water that is continuously present between the wetland and the tributary.
- Another commenter opposed the interpretation that the continuous surface connection requirement could be satisfied by other physical connections, rather than requiring a constant hydrologic connection.
- A commenter recommended that the agencies interpret and implement the relatively permanent standard for adjacent wetlands in accordance with the 2008 *Rapanos* Guidance. The commenter stated that adjacent wetlands should satisfy the continuous surface connection requirement only if "the wetland directly abuts the [relatively permanent] tributary (*e.g.*, they are not separated by uplands, a berm, dike, or similar feature)."
- One commenter asserted that the agencies should further define the relatively permanent standard and limit its application to wetlands adjacent to non-navigable tributaries of traditional navigable waters. The commenter claimed that the agencies were erroneously conflating the jurisdictional test for "wetlands adjacent to non-navigable tributaries of traditionally navigable waters" with the jurisdictional test for all waters in the proposed definition for relatively permanent standard. The commenter asserted that the relatively permanent standard is appropriate as one of many bases for protecting wetlands adjacent to non-navigable tributaries of traditional navigable waters, but it should not be used as a bar to asserting CWA jurisdiction over all wetlands or as a jurisdictional limit on any waters.
- One commenter asked the agencies to clarify that a "continuous surface connection" does not require water to be observed on the ground surface, but rather a hydrologic connectivity must be observable, whether that be wetland conditions or evidence of surface flow.
- Another commenter claimed that the agencies should provide guidance regarding how the relatively permanent standard would be applied to specific features that serve as a physical connection between a wetland and a relatively permanent water. The commenter claimed that short-term flow due to flooding could provide false-positive indicators of flow between a relatively permanent water and a wetland. The commenter recommended that guidance should note this possibility for field interpretations for any sort of connection.
- Another commenter claimed that the agencies should clarify in the final rule that the connection between a wetland and a stream or other water may occur through a jurisdictional or non-jurisdictional feature, whether natural or man-made.

**Agencies' Response:** The final rule defines “waters of the United States” to include: (1) wetlands adjacent to traditional navigable waters, the territorial seas, and interstate waters; (2) wetlands adjacent to and with a continuous surface connection to relatively permanent paragraph (a)(2) impoundments or jurisdictional tributaries when the jurisdictional tributaries meet the relatively permanent standard; and (3) wetlands adjacent to paragraph (a)(2) impoundments or jurisdictional tributaries when the wetlands meet the significant nexus standard. In the final rule, the agencies have amended the regulatory text from the proposed rule to be clearer that a wetland adjacent to but lacking a continuous surface connection to a tributary that is relatively permanent must be assessed under the significant nexus standard. For example, if a wetland is “neighboring” to a relatively permanent tributary, and thus “adjacent,” but lacks a continuous surface connection to that tributary, the wetland would need to be assessed under the significant nexus standard in order to determine its jurisdictional status. Thus, under the final rule, the relatively permanent standard cannot be used alone to determine that wetlands that are adjacent to relatively permanent waters are non-jurisdictional; rather, an adjacent wetland that does not meet the relatively permanent standard must be assessed under the significant nexus standard. This is consistent with pre-2015 practice under the *Rapanos* Guidance for wetlands adjacent to relatively permanent tributaries and was the agencies’ intent under the proposed rule language. See *Rapanos* Guidance at 8; 86 FR 69423 (“Wetlands adjacent to relatively permanent tributaries but that lack a continuous surface connection to such waters would then be assessed under the significant nexus [standard], along with the tributary.”). For further discussion on how the two standards will be implemented in determining the jurisdiction of adjacent wetlands, see Section IV.C.5 of the Preamble to the Final Rule.

In the proposed rule, the agencies sought comment on alternative options for interpreting the continuous surface connection requirement under the relatively permanent standard. As described in Section IV.C.5 of the Preamble to the Final Rule, the agencies have considered public comments on the continuous surface connection requirement for adjacent wetlands and provided clarity regarding how the agencies intend to implement that requirement. In the final rule, under the relatively permanent standard for adjacent wetlands, wetlands meet the continuous surface connection requirement if they physically abut, or touch, a relatively permanent paragraph (a)(2) impoundment or a jurisdictional tributary when the jurisdictional tributary meets the relatively permanent standard, or if the wetlands are connected to these waters by a discrete feature like a non-jurisdictional ditch, swale, pipe, or culvert. A natural berm, bank, dune, or similar natural landform between an adjacent wetland and a relatively permanent water does not sever a continuous surface connection to the extent it provides evidence of a continuous surface connection. In the final rule, the agencies also clarify that a continuous surface connection does not require continuous presence of surface water between the adjacent wetland and relatively permanent paragraph (a)(2) impoundment or jurisdictional tributary when the jurisdictional tributary meets the relatively permanent standard, and the agencies continue this longstanding approach in this rule. Rather, the agencies will identify a continuous surface connection consistent with the *Rapanos* plurality opinion, which indicates that the continuous surface connection requirement is a “physical connection requirement.” 547 U.S. at 754; see also *Rapanos* Guidance at 6.

As with any final regulation, the agencies will consider developing new guidance to facilitate implementation of the final rule should questions arise in the field regarding application of the continuous surface connection requirement, including guidance regarding how the relatively permanent standard would be applied to specific features that serve as a physical connection between a wetland and a relatively permanent water. Nevertheless, the agencies conclude that the final rule, together with the preamble and existing tools, provides sufficient clarity to allow consistent implementation of the final rule.

The agencies disagree with commenters who asserted that the relatively permanent standard should require surface water to be continuously present between the wetland and the tributary. The agencies have clarified in the final rule that a continuous surface connection can be present, for example, when a wetland physically abuts another jurisdictional water, even if surface water is not continuously present between the two. Requiring a continuous surface water connection, as suggested by some commenters, would effectively limit Clean Water Act protection of wetlands to areas that are inundated throughout the year. But many wetlands have surface water only seasonally or intermittently, while others do not express water at the surface (*i.e.*, have saturated soils), and no scientific or regulatory definition of wetlands demands year-round surface water. This approach to continuous surface connection is supported by the scientific literature, case law, and the agencies' technical expertise and experience. See Final Rule Preamble Section IV.C.5.c for additional discussion.

The agencies agree with commenters who stated that the continuous surface connection between a wetland and relatively permanent water may occur through a non-jurisdictional feature, whether natural or man-made. In the final rule, the agencies clarify that adjacent wetlands may meet the continuous surface connection requirement if they are connected to relatively permanent waters by a discrete feature like a non-jurisdictional ditch, swale, pipe, or culvert. This is because a ditch or other such feature can serve as a physical connection that maintains a continuous surface connection between an adjacent wetland and a relatively permanent water. The agencies have determined that this approach to the continuous surface connection is supported by the scientific literature, case law, and the agencies' technical expertise and experience. See *United States v. Cundiff*, 555 F.3d 200, 213.

In reference to the commenter who supported the “connection between wetlands and ephemeral waters as justification for adjacency,” the agencies note that the presence of an ephemeral water does not change the approach described above for identifying jurisdictional wetlands. See Section IV.C.5 of the Preamble to the Final Rule for additional discussion on wetland adjacency.

The agencies recognize that some commenters expressed support for implementing the relatively permanent standard for adjacent wetlands in accordance with the 2008 *Rapanos* Guidance. In developing the final rule, the agencies thoroughly considered alternatives to the relatively permanent standard approach taken in this rule, including the 2008 *Rapanos* Guidance. While the final rule is founded on, and generally returns to, the longstanding and familiar pre-2015 regulatory regime, it does not adopt that regime unchanged. As discussed in Final Rule Preamble Section IV.A, the agencies in the final rule have revised the 1986 regulations to reflect the agencies' determination of the statutory limits on the scope of the

**“waters of the United States,” as informed by Supreme Court precedent, the best available science, and the agencies’ experience and technical expertise. Additionally, as compared to the pre-2015 regulations or pre-2015 regulatory regime, the final rule reflects updates and advances in implementation tools, resources, and scientific support; codifies exclusions for features that were generally considered non-jurisdictional under the pre-2015 regulatory regime; and is streamlined and restructured for clarity. Though the agencies are not relying on the *Rapanos* Guidance for purposes of implementing the final rule, many aspects of the final rule, including implementation-related issues, are consistent with or similar to the approaches taken in the *Rapanos* Guidance. See Section IV.C.5 of the Preamble to the Final Rule for further discussion of the final rule’s approach to relatively permanent standard for adjacent wetlands.**

### **13.4 The Relatively Permanent Standard for “Other Waters”**

Several commenters provided recommendations for how the agencies should implement the relatively permanent standard for the paragraph (a)(3) “other waters” category in the proposed rule.

- One commenter recommended that the final rule include relatively permanent criteria for “other waters,” particularly waters that are in close proximity to larger wetlands and maintain seasonal hydrological connections through groundwater discharge or diffuse surface flows. The commenter further recommended that this approach should also apply to isolated depressional wetlands that receive seasonal flooding from larger, permanent or semi-permanent waterbodies as well as headwater seeps and wetlands, due to the importance of seasonal hydrologic connectivity, with measurable seasonal non-channel flows and nutrient transfers.
- Another commenter supported application of the relatively permanent standard to “other waters” but indicated that it should not exclude important waters for protection, such as wetlands with a hydrological connection via flooding. This commenter further stated that such wetlands should be jurisdictional without the need for “a complex significance review.”
- One commenter recommended that the agencies should not assess non-tributary open waters under the relatively permanent standard and should not require that these waters have a continuous surface water connection to a relatively permanent tributary to be considered jurisdictional. This commenter argued that “isolated” wetlands and similar open waters are critical to the health of our downstream waters and such an approach would ignore the statutory obligation to protect the chemical and biological integrity of the nation’s waters.
- One commenter recommended that the agencies should not apply the relatively permanent standard to “other waters” because it would be duplicative. The commenter asserted that “other waters” that meet the relatively permanent standard as described in the proposed rule would always meet the jurisdictional criteria for another rule category.
- One commenter supported the application of the relatively permanent standard to non-tributary open waters with a connection to a stream on public lands. The commenter generally questioned whether this approach would be unduly burdensome if applied to private landowners.

**Agencies’ Response: Paragraph (a)(5) of the final rule defines “waters of the United States” to 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. Under the final rule, 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 an interstate water. See Section IV.C.6.c of the Final Rule Preamble for further discussion on implementation of these standards for paragraph (a)(5) waters.

The agencies agree with those commenters recognizing the importance of certain intrastate lakes and ponds, streams, or wetlands not identified in paragraphs (a)(1) through (4) to maintaining the integrity of paragraph (a)(1) waters. The scientific literature unequivocally demonstrates that wetlands and open waters in riparian areas and floodplains are chemically, physically, and biologically integrated with rivers via functions that improve water quality in paragraph (a)(1) waters. Wetlands and open waters in non-floodplain landscape settings can also 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 features, including many prairie potholes, vernal pools, and playa lakes, can be connected to downstream waters through surface water, shallow subsurface water, and groundwater flows and through biological and chemical connections. See Technical Support Document Sections I, III.B, and III.D. The final rule provides for case-specific analysis of waters not addressed by any other provision of the definition to determine whether they are “waters of the United States” under the relatively permanent or significant nexus standards.

Under the final rule, the agencies intend to identify relatively permanent waters under paragraph (a)(5) using a similar approach to the one described for relatively permanent tributaries in Section IV.C.4.c.ii of the Preamble to the Final Rule. The agencies also intend to identify a continuous surface connection between waters assessed under paragraph (a)(5) and a paragraph (a)(1) water or a tributary that is relatively permanent using the approach described for adjacent wetlands in section IV.C.5.c of the Preamble to the Final Rule (although waters assessed under paragraph (a)(5) are not subject to the adjacency requirement for jurisdictional adjacent wetlands). There must be a continuous surface connection on the landscape for waters assessed under paragraph (a)(5) to be jurisdictional under the relatively permanent standard. Relatively permanent waters under paragraph (a)(5) do not include features with flowing or standing water for only a short duration in direct response to precipitation. However, a continuous surface connection does not require a constant hydrologic connection. Waters assessed under paragraph (a)(5) can meet the continuous surface connection requirement if they are connected to a paragraph (a)(1) water or a tributary that is relatively permanent by a discrete feature like a non-jurisdictional ditch, swale, pipe, or culvert. Similarly, a natural berm, bank, dune, or similar natural landform between a water assessed under paragraph (a)(5) and a paragraph (a)(1) water or a tributary that is relatively permanent does not sever a continuous surface connection to the extent it provides evidence of a continuous surface connection. The agencies have decided to implement this approach because it is consistent with the *Rapanos* plurality opinion, it reflects and accommodates regional differences in hydrology and water management, and it can be implemented using available, easily accessible tools. See Section IV.C.6.c of the Preamble to the Final Rule for further discussion of implementation of the relatively permanent standard for paragraph (a)(5) waters.

Under the final rule, waters evaluated under paragraph (a)(5) that do not meet the relatively permanent standard may be jurisdictional under the significant nexus standard if they significantly affect the chemical, physical, or biological integrity of a traditional navigable water, the territorial seas, or an interstate water. The agencies acknowledge that the need for case-specific analyses will continue under the final rule for certain jurisdictional determinations, potentially raising some timeliness and consistency issues that the agencies' rules in 2015 and 2020 were designed, in part, to reduce. Yet, as discussed in Final Rule Preamble Section IV.A.3, the agencies find that fact-based standards for determining Clean Water Act jurisdiction are appropriate and not unique to the definition of "waters of the United States." The agencies have provided more clarity in the final rule by: adding limitations to the scope of the definition to the rule text; adding a definition of "significantly affect" that identifies the functions and factors to be evaluated as part of a significant nexus analysis; adding exclusions to the rule; restructuring and streamlining the 1986 regulations; and drawing on more than a decade of post-*Rapanos* implementation experience to provide additional implementation guidance and resources. These improvements, taken together, substantially reduce any inefficiencies that may be presented by the rule's case-specific approach. The agencies have established a definition of "significantly affect" in the final rule, provided additional guidance on applying the significant nexus standard, and identified implementation tools and resources that will work together to provide clarity and further consistency in implementing the significant nexus standard. See Final Rule Preamble Section IV.C.9 and IV.G. The agencies have concluded that these actions, along with the agencies' experience making determinations under the significant nexus standard, will increase the clarity and consistency of determinations of jurisdiction.

The agencies disagree with the commenter who asserted that assessing non-tributary open waters under the relatively permanent standard would ignore the statutory obligation to protect the chemical and biological integrity of the nation's waters. Under the final rule, waters evaluated under paragraph (a)(5) are not required to have a continuous surface connection to a relatively permanent tributary to be jurisdictional. Rather, as described above, waters evaluated under paragraph (a)(5) that do not have a continuous surface connection to a relatively permanent water may be jurisdictional under the significant nexus standard if they significantly affect the chemical, physical, or biological integrity of a traditional navigable water, the territorial seas, or an interstate water. As discussed in section IV.A of the Final Rule Preamble, the agencies have concluded that the significant nexus standard is consistent with the statutory text and legislative history, 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. The relatively permanent standard is included in the rule because it provides important efficiencies and additional clarity for regulators and the public by more readily identifying a subset of waters that will virtually always significantly affect paragraph (a)(1) waters. For further discussion about the implementation of the significant nexus standard for paragraph (a)(5) waters, see Section IV.C.6.c of the Preamble to the Final Rule.

The agencies disagree with commenters who asserted that applying the relatively permanent standard to the paragraph (a)(5) waters would be duplicative, or that paragraph

**(a)(5) waters that meet the relatively permanent standard would always meet the jurisdictional criteria for another category of water under the rule. Under the final rule, certain aquatic resources that do not meet the requirements for tributaries or adjacent wetlands could be jurisdictional as paragraph (a)(5) waters under the relatively permanent standard. For example, lakes and ponds that are not connected to a tributary system but are relatively permanent waters and have a continuous surface connection to a paragraph (a)(1) water or a tributary that is relatively permanent, could be jurisdictional as paragraph (a)(5) waters. To illustrate, a relatively permanent lake that is located near a tributary that meets the relatively permanent standard, but is separated by a natural berm, to the extent the berm provides evidence of a continuous surface connection, is jurisdictional as a paragraph (a)(5) water under the relatively permanent standard. See section IV.C.4.c.ii of the Final Rule Preamble. Similarly, a relatively permanent oxbow pond located near a traditional navigable water and connected to that traditional navigable water via a swale that provides a continuous surface connection between the pond and the traditional navigable water is jurisdictional as a paragraph (a)(5) water under the relatively permanent standard. For further discussion about the implementation of the relatively permanent standard for paragraph (a)(5) waters, see Section IV.C.6.c of the Preamble to the Final Rule.**

**The agencies disagree with commenters who asserted that application of the relatively permanent standard to paragraph (a)(5) waters, including non-tributary open waters, would be unduly burdensome to private landowners. The agencies' regulations have long authorized the assertion of jurisdiction on a case-specific basis over waters that do not fall within the other jurisdictional provisions. As discussed in Final Rule Preamble Section V.A, the final rule will establish a regime that is generally comparable to current practice and is expected to generate *de minimis* costs and benefits as compared to the pre-2015 regulatory regime that the agencies are currently implementing.**