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

SECTION 18 – OTHER RECOMMENDATIONS

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.

18 OTHER RECOMMENDATIONS

This section does not represent a comprehensive summary of all recommendations provided by commenters (for example, this section does not contain all recommendations related to defining certain terms). Some recommendations are summarized in other sections of this Response to Comments Document where such recommendations were woven into substantive discussions of specific topics. This section includes certain recommendations on mapping, climate change, regional approaches, implementation, and other topics.

18.1 Mapping

Several commenters requested the agencies develop mapping resources to:

- Foster a sound definition of "waters of the United States";
- Provide certainty and clarity to regulated entities and others in determining jurisdiction; and
- Reduce ambiguity and unnecessary burden on entities by streamlining permitting.

Several commenters provided specific recommendations regarding mapping resources. Some commenters suggested that the agencies should develop a national map that shows which waters are considered jurisdictional. One commenter stated that the map or geodatabase should include details on specific waters or locations where there are jurisdictional concerns. Another commenter suggested that if a mapping resource cannot be developed by the agencies, at a minimum, the agencies should develop a guidance document that summarizes the various tools available and how entities can develop their own maps based on these available tools. Another commenter suggested that as part of an effort to rely on the best available data and tools, the agencies should plan for map maintenance and updates.

A few commenters provided examples of mapping resources for the agencies to consider:

- The Wyoming Association of Conservation Districts created a StoryMap to assist their constituents in determining applicability after the publication of the 2020 NWPR (https://wacd.maps.arcgis.com/apps/MapJournal/index.html?appid=fab0073acab6406fa19d5e8b281341ff).
- Minnesota maps dye test results were included in a StoryMap to show "connected waters."

One commenter stated that the National Hydrography Dataset should be updated with predictive modeling, such as in Fesenmeyer et al. (2021).

One commenter recommended the agencies work with state and local governments when developing the mapping resources.

Another commenter argued, "Mapping would also be improved if the agencies applied the 'reasonable person effect' when documenting project specific determinations. For example, when a project for a bridge identifies jurisdiction as it crosses a waterbody, the extent of the determination should not simply be the boundaries of the project itself. Clearly, the stream segment between the project and the lower jurisdictional water should be delineated as jurisdictional because the stream reach must be jurisdictional for the bridge project to be subject to regulation under the CWA. Mapping is critical to every landowner's understanding of federal jurisdiction." Another commenter wrote, "Without mapping and clear

definitions, which were contemplated under the [2020] NWPR, the public is left with few tools to determine jurisdictional waters."

Agencies' Response: The agencies have considered public comments regarding mapping resources. Consistent with all previous revisions of the definition of "waters of the United States," the agencies are finalizing a revised definition of "waters of the United States" without a map or mandated mapping component. As the agencies have previously indicated, they lack the requisite national data sets and mapping tools to reliably map "waters of the United States" across the country. Consistent with nearly 50 years of practice under the Clean Water Act, the agencies typically make decisions regarding the jurisdictional status of particular waters in response to a request from a landowner or project proponent asking the agencies to make such a determination. Such jurisdictional decisions require site-specific information, although previous jurisdictional decisions, including those conducted nearby the particular waters of interest, may help inform the agencies' analysis of whether the subject waters are jurisdictional. The final rule was developed to increase Clean Water Act program predictability and consistency by increasing clarity as to the scope of "waters of the United States" protected under the Act.

The agencies disagree with the commenter who stated that there are "few tools to determine jurisdictional waters." The final rule provides implementation guidance informed by sound science, implementation tools, and other resources, drawing on more than a decade of post-*Rapanos*[1] implementation experience. Section IV.C of the Final Rule Preamble provides guidance on implementation of each provision of the final rule, and Section IV.G discusses advancements in the implementation data, tools, and methods that are relevant to jurisdictional determinations[2] under the final rule.

The agencies also disagree with the commenter's statement that the 2020 Navigable Waters Protection Rule (2020 NWPR) provided "clear definitions." See Section IV.B.3 of the Preamble to the Final Rule for additional information on why the agencies did not find that the 2020 NWPR is a suitable alternative to the final rule, including the agencies' reasoning in Section IV.B.3.c for why the 2020 NWPR was difficult to implement and yielded inconsistent results.

Recognizing the valuable comments and considerations raised by the public in response to the proposed rule, the agencies conclude improving geospatial information about the location of waters across the United States provides many benefits, including for regulatory purposes, though such mapping is outside the scope of this rulemaking. The agencies have been working with several other federal agencies on an interagency effort to improve aquatic resource mapping and modeling, including the U.S. Geological Survey, which manages the National Hydrography Dataset, and the U.S. Fish and Wildlife Service, which manages the National Wetlands Inventory. Though outside the scope of this rulemaking, the agencies also acknowledge commenters who stated the importance of working with states,

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

[2] For convenience, EPA decisions on jurisdiction are referred to as jurisdictional determinations throughout this document and in the Final Rule Preamble, but such decisions are not approved jurisdictional determinations as defined and governed by the Corps regulations at 33 CFR 331.2.

tribes, and local governments on developing mapping resources. The U.S. Geological Survey and the U.S. Fish and Wildlife Service work closely with interested states, tribes, and local governments to improve the quality of the National Hydrography Dataset and the National Wetlands Inventory. In addition, EPA has provided funding, including through Wetland Program Development Grants, to states, tribes, and local governments to help map water resources within their boundaries.

18.2 Climate Change and the Proposed Rule

Several commenters wrote that climate change must be taken into account with any proposed rulemaking.

- One commenter stated that they support the goal of the proposed rule to consider and maintain climate resilience of downstream water resources with adequate watershed protection throughout the watershed, from headwaters to foundational[3] waters.
- One commenter stated that they support the re-evaluation of longstanding regulations with respect to climate change.
- Another commenter stated that a new "waters of the United States" definition must officially overturn the 2020 NWPR and rely heavily on scientific evidence of the climate benefits of waterbodies excluded by the 2020 NWPR to strengthen their protections.
- In discussing incorporation of science and climate change impacts, one commenter[12] cited, "In *Massachusetts v. EPA*, 549 U.S. 497 (2007), the Supreme Court ruled in favor of the EPA due to their use of the report by the U.S. National Academy of Sciences and the United Nations' Intergovernmental Panel on Climate Change, which used scientific evidence to induce that climate change is a major threat to our public health."
- One commenter suggested that climate change dictates the broad protection of all waters with no exclusions.

Several commenters opposed considering the effects of climate change in the proposed rule.

- A few commenters expressed concern that the agencies would use climate futures (*i.e.*, predictions of future climate conditions) in jurisdictional determinations. One of these commenters argued that there is no reliable way to predict climate change events or differentiate between natural climate variability and human-induced climate change. Another of these commenters remarked that the agencies should consider climate change as part of the jurisdictional analysis only insofar as climate change has changed or is presently changing actual, real-world conditions. Additionally, one commenter expressed concern that jurisdiction today could be expanded based on possible future conditions predicted due to climate change.
- One commenter asserted that the landscape has been constantly changing over time and will continue to do so. The commenter recommended that a rule should be developed to address current issues, not to predict the future, also stating that climate change is not referenced in the Clean Water Act.
- Similarly, a few commenters stated that the agencies cannot assert jurisdiction based on how waters might exist someday because of a changing climate, as this would create uncertainty.

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

A few commenters wrote about the significant nexus standard as it relates to climate change.

- One commenter discussed that some climate-related items, such as flow regime, may be related to the significant nexus test, but others, such as carbon storage, may not be. The commenter recommended to extend broad protections to wetlands and streams.
- Several commenters discussed how wetlands store vast amounts of carbon and the destruction of the carbon sequestration properties of waterbodies such as wetlands will adversely affect the chemical, physical, and biological integrity of water. They argued that this must be a factor in considering significant nexus standards for wetlands, in particular.
- Another commenter encouraged the agencies to require significant nexus determinations to include a proactive, science-based examination of the modeled impacts climate change will have on aquatic resources and species. The commenter wrote that the science around climate change and local projections of impacts is rigorous and improving over time.
- One commenter argued that there is not a consensus about many issues related to climate change in the arid West relevant to the significant nexus standard.
- One commenter stated that the significant nexus standard in the proposed rule would allow for the agencies to consider a changing climate when evaluating if upstream waters significantly affect traditional navigable waters, the territorial seas, or interstate waters. The commenter argued that this standard is too vague and will lead to various interpretations. The commenter also requested that specific examples or case-studies be included that demonstrate how future benefits of a water for the mitigation of climate change impacts would be incorporated into a jurisdictional determination.

A few commenters discussed climate change and the implementation of the proposed rule.

- One commenter requested that the agencies provide clarity and guidance on how to address climate change in the future.
- One commenter discussed the variable rainfall in Los Angeles County, California, and how much of California is in a state of drought. The commenter requested that the proposed rule not impede the operations of facilities related to local water supply, flood control, and water quality.

<u>Agencies' Response</u>: The agencies agree with commenters who noted that consideration of climate change when conducting a significant nexus analysis can be appropriate where those considerations are related to restoring or maintaining the chemical, physical, or biological integrity of traditional navigable waters, the territorial seas, and interstate waters. Furthermore, the agencies agree with commenters who stated that some climate-related items may be related to the significant nexus standard while others (*e.g.*, carbon storage) are not, and this is reflected in the Final Rule Preamble Section IV.9.c.ii. Considering on a case-specific basis the strength and importance of the functions provided by aquatic resources that contribute to the resilience of the integrity of paragraph (a)(1) waters to climate change is consistent with the policy and goals of the Clean Water Act, case law, and the policy goals of this administration as articulated in Executive Order 13990.

The agencies disagree with commenters who stated that the proposed rule, including the significant nexus standard, would allow the agencies to account for climate futures in jurisdictional determinations. When the agencies assess whether or not a water is a "water of the United States," consistent with longstanding practice, they do not assess future

conditions based on potential climatic changes. Comments about addressing climate change in the future are outside the scope of this rulemaking.

The agencies disagree with the commenter who suggested that climate change dictates the broad protection of all waters with no exclusions. See Final Rule Preamble Section IV.C.9.c.ii for a discussion of how the agencies can consider a changing climate under the significant nexus standard consistent with the best available science.

18.3 Regional Approach

Many commenters expressed general support for a regional approach to determining "waters of the United States" jurisdiction. Several commenters expressed concern that the proposed rule does not adequately consider or account for important regional and/or local differences, or that implementation of a "one-size-fits-all" approach is difficult given the variety of climates, ecoregions, geology, hydrology, and legal frameworks across the country.

A few commenters argued that a regional approach would ensure a more durable rule, allow for better protections for water resources, and/or lessen undue burden on the agencies and regulated entities. One commenter mentioned that as co-regulators, states seek to develop a rule that balances the desire for certainty and clear rules with a process that will provide greater regional flexibility.

Some commenters recommended that the definition of "waters of the United States" be left broad and more detailed guidance be specified regionally. Several commenters stated that regional training or tools are needed.

Several commenters provided specific recommendations on how to include a more regionalized approach.

- Some commenters suggested that region-specific numeric or narrative thresholds can be developed to explain the criteria used to help guide determinations of significance. Similarly, the commenters noted that factors or functions used for the "significantly affect" definition can be further calibrated using more regionally-specific criteria, and that any regional definitions or methods for the identification of a "water of the United States" should be developed using best available science.
- Other commenters claimed that regional general permits can help streamline permitting, reduce the need for jurisdictional determinations, reduce the burden on the agencies, and reduce the potential for adverse impacts on jurisdictional waters. A commenter stated that one example of a regional general permit is for projects that involve discharge of fill material into dry ephemeral and intermittent waters in the west.
- One commenter suggested that EPA's Level II or Level III Ecoregions could be used as the basis to develop a subsequent rulemaking.
- One commenter suggested "managing watersheds, wetland areas, and coastal watersheds to address public health and safety, environmental protection, and restoration issues within hydrologically defined geographic areas" as the agencies update the definitions of "waters of the United States."
- Some commenters claimed that a regional approach should distinguish which waters are protected under federal jurisdiction and which waters are regulated by states and local governments.

- One commenter suggested that the agencies should include state-specific data in hydraulic modeling tools to correlate with a state's recorded observations.
- Some commenters claimed that regional technical guidance, similar to the regional wetland delineation manuals, would assist in certain aspects of determining jurisdiction such as significant nexus, relative permanence, and exclusions. One commenter suggested having a regional manual for each of the U.S. Army Corps of Engineers (Corps) Districts.
- Other commenters stated that the agencies should hold regional workshops to discuss regional differences and considerations when crafting a definition and implementation guidance. These workshops should be attended by a diverse cross-section of stakeholders.
- Another commenter stated that the agencies should involve states in both the development and implementation of any rule.

Commenters provided specific examples of why they believe a regional approach makes sense.

- Some commenters stated that "relatively permanent" differs greatly depending on the geographic region—average flow duration varies due to snowpack, precipitation, evaporation, and geology.
- Other commenters stated that Alaska has hydrologically diverse climate and geography and has significantly more waters than other states. The commenters noted that Alaska has over 175 million acres of wetlands and is the only state with permafrost. The commenters claimed that any rulemaking will have a greater impact on Alaska than any other state. Further, the commenters stated that the 1994 Alaska Wetlands Initiative was developed by the state with the assistance of the EPA, the Corps, the U.S. Fish and Wildlife Service, and the National Marine Fisheries Service, and should be reviewed and considered by the agencies.
- One commenter stated that in one water conservation district in California, there is a significant difference between the western inland valleys with an average annual rainfall of approximately 10-13 inches and Coachella Valley, which has an average annual rainfall of approximately 2-4 inches.
- Some commenters claimed that the proposed rule would disproportionately affect the West more than other regions. A few of these commenters stated that the arid West includes a lot of man-made infrastructure to access, store, and transport water. Some of these commenters argued that the region also has arroyos, ditches, washes, and ephemeral or intermittent waterbodies that do not contain water regularly. A few commenters further opined that "dry desert" features, such as washes and alluvial fans, should be specified as non-jurisdictional.
- One commenter noted that states are placed in EPA regional offices based on their watershed, which may not always make sense due to regional differences in climate. The commenter gave the example of New Mexico being in the same EPA region as Texas but noted that the two states are very hydrologically different. According to the commenter, New Mexico shares similar hydrologic characteristics with the arid neighboring states of Colorado, Arizona, and Utah, and the importance of ephemeral and intermittent waters is shared among these states.

One commenter noted that states have existing statutes to protect waters and address water quality issues and they have the ability to expand existing protections.

Many commenters recommended any regional approach be developed in collaboration with states, tribes, and local governments. One of these commenters stated that, unless regional variability in the factors that are part the of the proposed rule's definition of "significantly affect" are addressed, case-specific determinations will most likely increase significantly, resulting in more paperwork and delays in both

approved jurisdictional determinations and permitting projects, with no guarantee of consistency between the project managers or Corps districts. The commenter encouraged the agencies to work with states to develop what constitutes a "significant nexus" for each state.

A few commenters expressed concern over a regional approach, stating that the Clean Water Act is a federal statute, and it should be administered consistently across the United States. These commenters stated that waiting for a second rulemaking to define regional approaches will delay implementation of protections for water resources. Another commenter argued in favor of regional considerations for the definition of "waters of the United States," especially with respect to ephemeral features.

> **Agencies' Response: The agencies acknowledge the impact of regional variation on implementation of the final rule. The agencies recognize that there are appropriate levels of regional variation in implementation of the regulations; however, the agencies strive for national consistency. The agencies will work to facilitate effective, consistent, and efficient implementation of the final rule once it becomes effective. The clarity and certainty provided in the final rule will result in further consistency, while still allowing for regional variation in implementation that may be necessary based on regional differences in aquatic resources; for example, the ordinary high water mark regional manuals, the regional supplements to the wetland delineation manual, or the regional streamflow duration assessment methods, all of which are outside the scope of this rulemaking but are related resources. In addition, because jurisdictional decisions are made on a case-specific basis, consideration of site-specific circumstances such as regional conditions will be considered as appropriate.**
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> **While the agencies acknowledge that intermittent and ephemeral features are more prevalent in the arid West than in more humid areas of the country, the agencies disagree with commenters who stated that certain water types in the arid West (*e.g.*, washes, ephemeral streams, alluvial fans) should be considered categorically non-jurisdictional. The agencies are not categorically including or excluding streams as jurisdictional based on their flow regime in the final rule. The agencies will assess such features on a case-specific basis under the final rule to determine if they satisfy the definition of "water of the United States." See also Sections IV.A and IV.C.4 of the Final Rule Preamble and Topic 8 of the agencies' response to comments.**
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> **The agencies acknowledge the commenter who noted that states have existing statutes to address water quality issues and the ability to expand their existing protections. States and tribes may establish more protective standards or limits than the Clean Water Act to manage waters subject to Clean Water Act jurisdiction or waters that fall beyond the jurisdictional scope of the Act and may choose to address special concerns related to the protection of water quality and other aquatic resources within their borders. Nothing in the final rule limits or impedes any existing or future state or tribal efforts to further protect their waters. The agencies note that in one year of implementation of the 2020 NWPR, states and tribes did not fill the regulatory gap in water quality protection left by the 2020 NWPR. In fact, review of regulatory changes that states implemented during that one year of implementation showed a trend towards state deregulation of surface water protections. See Chapter II of the Economic Analysis for the Final Rule.**

Several comments were outside the scope of this rulemaking. Comments regarding the placement of states within EPA regional offices is outside the scope of this rulemaking, though the agencies acknowledge that some states may share similarities in climate and hydrology with states in other EPA regions. Comments regarding regional general permits are similarly outside the scope of this rulemaking, though the agencies agree with commenters who stated that they can provide many benefits, including helping to streamline the permitting process. Comments regarding any additional rulemaking are also outside the scope of this rulemaking. The agencies conclude that the final rule is durable and implementable because it is founded on the familiar framework of the 1986 regulations, fully consistent with the pre-2015 regulatory regime. They are fully consistent with the statute, informed by relevant Supreme Court decisions, and reflect a reasonable interpretation based on the record before the agencies, including the best available science, as well as the agencies' expertise and experience implementing the pre-2015 regulatory regime; see also the agencies' response to comments in Section 5.

18.4 Implementation

18.4.1 General

Several commenters provided general comments on implementation of the definition of "waters of the United States." Numerous commenters critiqued the agencies' implementation of "waters of the United States" generally, including expressing concern over alleged inconsistencies with field applications between the agencies and/or across Corps' districts, offices, and/or locations. These commenters asserted that such inconsistencies would lead to confusion, unequal application, and/or lack of understanding over which features are jurisdictional. Another commenter recommended that the agencies consider the following factors when considering implementation of the proposed rule: "feasibility, available databases and tools, project management requirements and standards, and analyses based on objective aquatic features."

Several commenters requested that the agencies coordinate implementation within the agencies (*e.g.*, Corps and EPA staff) to reduce regional variability in implementation, and with other federal agencies (*e.g.*, the U.S. States Department of Agriculture), states (including with respect to both quality and quantity, and water rights), tribes, local governments and other entities. One commenter suggested that involving states in the development and implementation of the proposed rule will help respect and avoid conflict with state authority within their borders and requested a clear process for resolving conflicting opinions over jurisdiction, whether federal, state, or tribal.

Several commenters expressed some degree of discomfort with remote approaches to implementation-related issues such as jurisdictional determinations. One of these commenters suggested that interactive online tools, such as a map of jurisdictional waters, should be made available as "an informal guide" to the public but that approved jurisdictional determinations "must be made in the field" to ensure accuracy and to "provide for adequate due process." Another commenter asserted that relying on desktop studies for jurisdictional determinations would lead to "inaccurate and inconsistent determinations" by the Corps.

A number of commenters expressed support for updating the Corps' jurisdictional determination form and instruction manual, particularly with the aim of streamlining and/or simplifying the jurisdictional determination process.

Several commenters provided implementation comments that were outside the scope of this rulemaking. Some commenters requested flexibility for implementing innovative environmentally beneficial projects, managing non-point source pollution (*e.g.*, through water quality trading), and meeting compensatory mitigation requirements (*e.g.*, in type and location of compensatory mitigation). Similarly, one commenter urged the agencies to allow "watershed friendly practices such as low-impact development and environmentally friendly stormwater management solutions (bioswales, vegetated detention, filter strips, etc.)" to serve as mitigation when ephemeral streams are lost, stating that this approach would provide better protection for downstream waters relative to the purchase of mitigation credits in other locations. A few commenters requested additional implementation oversight by the agencies. One commenter suggested that the agencies oversee states that have been approved to administer the Clean Water Act section 404 program for certain waters to ensure appropriate identification of federally protected waters. This commenter used New Jersey as an example of a state relying on the same definition for "waters of the United States" since it was approved to administer the section 404 program in 1993 for certain waters in the state. Another commenter suggested that by adopting restrictive Regional General Permits, Corps districts can eliminate Nationwide Permits, and that the threshold for authorizing district-level regulations is low.

> **<u>Agencies' Response</u>: The agencies considered comments on implementation of the revised definition of "waters of the United States" and provided clarity throughout the preamble to the final rule regarding how the agencies intend to implement the final rule. As discussed further in Final Rule Preamble Section IV.A.4, the agencies have determined the final rule is both familiar and implementable. All definitions of "waters of the United States," including the pre-2015 regulatory regime, the 2015 Clean Water Rule, and the 2020 NWPR have required some level of case-specific analysis. Consistent implementation of the final rule will be aided by improved and increased scientific and technical information and tools that both the agencies and the public can use to determine whether waters are "waters of the United States." See Final Rule Preamble Section IV.G.**
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> **The agencies agree with commenters who stated that the agencies will need to coordinate on implementation of the new rule. As is typical after a rule is promulgated, the agencies have entered into a joint agency coordination memorandum to ensure the consistency and thoroughness of the agencies' implementation of the final rule. Under the new coordination memorandum, the agencies have established timelines for the review of certain draft approved jurisdictional determinations to ensure that there will not be unnecessary delay. Moreover, the coordination will enable the agencies to quickly address any potential inconsistencies, and that will enhance the efficiency of the approved jurisdictional determination process under the final rule. Finally, after the memorandum is in effect for nine months, the agencies will reevaluate this requirement and assess the implementation and coordination approach, including assessing the scope and need for the coordination process. See Final Rule Preamble Sections IV.C.1 and IV.C.6.iv. The agencies coordinated with the U.S. Department of Agriculture during the rulemaking process on implementation of the prior converted cropland exclusion and will continue to do so as appropriate for individual determinations. The agencies will also coordinate as appropriate with state and**

tribal co-regulators, local governments, and other entities on individual determinations of jurisdiction. The agencies also considered comments from states, tribes, local governments, and their representative organizations as part of federalism and tribal consultation processes and as part of the public comment process. See also Final Rule Preamble Sections III.C, V.E, and V.F.

As discussed in Section 18.1 of this Response to Comments document, consistent with nearly 50 years of practice under the Clean Water Act, the agencies typically make decisions regarding the jurisdictional status of particular waters in response to a request from a landowner or project proponent asking the agencies to make such a determination. Such jurisdictional decisions require site-specific information, such as field information, although remote tools may help inform the agencies' analysis of whether the subject waters are jurisdictional. Use of such remote tools to assist with jurisdictional determinations is not new. The agencies have been using such remote sensing and desktop tools to assist with identifying jurisdictional waters for many years, and such tools are particularly critical where data from the field are unavailable, or a field visit is not possible. The agencies' have over a decade of post- *Rapanos* experience utilizing such tools. Final Rule Preamble Section IV.G discusses implementation tools, including advancements in the implementation data, tools, and methods that are relevant to jurisdictional determinations under the final rule.

As typical after a rule is promulgated, the Corps will develop a new approved jurisdictional determination form and associated instructional guidebook that will apply to determinations made consistent with the revised definition.

Several implementation comments were outside the scope of this rulemaking, including those on low-impact development, non-point source pollution, environmentally friendly practices or projects, compensatory mitigation, oversight of states that have been approved to administer the Clean Water Act section 404, and regional general permits.

18.4.2 Implementation tools

The agencies received numerous comments on implementation tools, with many commenters requesting tools related to mapping (see also Section 18.1), as well as online and interactive tools generally. Several commenters stated that implementation tools, guidance resources, and training materials (see also Section 18.4.4) are helpful for regulated entities to anticipate requirements and plan for the permitting process, as well as to help reduce staff time and large administrative costs from making case-specific jurisdictional determinations. One commenter emphasized that the agencies should consider readily available tools and databases in determining how to approach implementation of the proposed rule.

In particular, commenters recommended that any implementation tools and guidance:

- Be practical and workable;
- Be developed in a timely manner;
- Provide additional clarity, specifically on the permitting process;
- Be developed at the national level, but be regionally specific to address site-specific conditions and regional approaches; and
- Be developed in collaboration with states.

One commenter stated support of the longstanding implementation tools identified in the agencies' technical support document.

Commenters provided the following specific recommendations for implementation tools:

- One commenter stated that remote technology upgrades and training should be provided across Corps Districts to increase the use of remote and drone technology.
- Another commenter suggested that GIS identification tools and common field methods should have built-in regional differences tied to specific geographies.
- One commenter stated that regional guidance should document which tools may be more relevant than others.
- One commenter suggested that the agencies should develop a database or index of tools that regulators use to inform jurisdictional determinations. The commenter stated that the database should be organized by Corps District and/or by water feature.
- One commenter suggested that the agencies should make readily available all jurisdictional determination decisions and permit actions to the public in a database.
- Another commenter suggested that real-time data collection, analysis, and management for all water resources and the resulting data should be available in formats consistent with existing datasets.
- Another commenter suggested that hydrogeomorphic classification techniques combined with a GIS-based wetland assessment can assist in evaluating the impacts to the provision of wetland functions and ecosystem services, similar to an assessment conducted in Wisconsin.
- A commenter stated that regional Streamflow Durations Methods (SDAMs) can be used to determine streamflow duration characteristics. The commenter stated that SDAMs should be tailored to account for regional conditions.
- One commenter claimed that Stream Function Assessment Methods (SFAMs) can be used to determine stream function and can inform mitigation planning.
- One commenter stated that the Natural Resources Conservation Service's Climate Analysis for Wetlands Tables (known as WETS Tables) provide the monthly summary and probability of precipitation and temperature, and average length of growing seasons, and can help identify wetland physical characteristics.
- A commenter claimed that the Corps' Antecedent Precipitation Tool (APT) compares recent rainfall conditions to a range of normal rainfall conditions over the preceding 30 years for a given location and can be used to support decisions as to whether field data collection and other site-specific observations occurred under normal climatic conditions.
- One commenter stated that the National Oceanic and Atmospheric Administration's (NOAA) Atlas 14 and other data can help project precipitation and flooding, and the agencies should consider updated rainfall frequency values from NOAA's data. The commenter stated that these data are being used successfully by some counties and the Federal Emergency Management Agency (FEMA) to update floodplain maps, and should inform the rulemaking, including the scope of federal jurisdiction.
- Another commenter suggested that satellite or LIDAR imaging should be used as a tool to determine if the wetland is in an upland with dikes, barriers, and similar structures.

One commenter critiqued the National Wetlands Inventory (NWI) Version 2 for its lack of ground-truthing and cited difficulties and inaccuracies, particularly in the "intermountain west/great basin" with

"a tendency to overestimate the presence of wetlands and stream channels often because of hydrologic modifications related to agricultural irrigation." Another commenter mentioned that although tools can be useful, they also have limitations. Therefore, field verification is important to ground truth techniques employed by the tools. The commenter requested the agencies further clarify the field validation techniques or metrics necessary for establishing a relatively permanent or direct hydrologic surface connection.

Agencies' Response: The agencies acknowledge commenters' suggestions regarding implementation tools. As discussed throughout the Final Rule Preamble, the agencies identified a variety of implementation guidance, tools, and methods available for use to determine if a water is a "water of the United States" under the final rule. This includes several tools and methods that were recommended in public comments, such as Regional SDAMs, the APT, and satellite or LIDAR imaging. The agencies are not mandating specific data or tools to implement the final rule. The agencies will assess jurisdiction based on the most applicable methods and best available sources of information for the specific site under evaluation. As is with any new regulation, the agencies will consider developing additional tools to promote consistent implementation of the final rule's approach. 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. Final Rule Preamble Section IV.C provides guidance on implementation of each provision of the final rule; Section IV.G addresses advancements in the implementation data, tools, and methods that are relevant to jurisdictional determinations under the final rule. See also the agencies' response to comments in Section 18.4.4.

The agencies agree with the commenter who stated that the agencies should consider readily available tools and databases, and have included information about how such readily available tools and databases can be used to implement the final rule throughout the Final Rule Preamble. The agencies acknowledge the comment that it would be useful for the public to easily obtain information on permits or jurisdictional determinations. Such information on Corps individual permits and approved jurisdictional determinations is currently available to the public on the agencies' websites, as discussed further in Final Rule Preamble Section IV.G.

The agencies acknowledge that the NWI and remote tools can have limitations. Due to limitations associated with some remote tools, field verification for accuracy may be necessary (*e.g.*, due to scale or vegetation cover, not all wetlands may be visible in satellite imagery and aerial photographs or mapped in the NWI). Consistent with nearly 50 years of practice under the Clean Water Act, the agencies typically make decisions regarding the jurisdictional status of particular waters in response to a request from a landowner or project proponent asking the agencies to make such a determination. Such jurisdictional decisions often require site-specific information, such as field information. In addition, remote tools may help inform the agencies' analysis of whether the subject waters are jurisdictional. The agencies have been using such remote sensing and desktop tools to assist with identifying jurisdictional waters for many years, and such tools are particularly critical where data from the field are unavailable, or a field visit is not possible. See also the agencies' response to comments in Section 18.4.1.

18.4.3 Delayed Implementation

Multiple commenters requested that the agencies consider delaying implementation of any new definition. To justify this request, some commenters contended that additional time would:

- Enable co-regulators to adjust their statutes and regulations, including to address any changes in coverage (*e.g.*, gaps);
- Provide regulated entities time to evaluate impacts and take action;
- Minimize disruptions to infrastructure projects; and/or
- Allow for the development of implementation tools developed in collaboration with states.

Commenters who specified a timeframe requested a delayed implementation of at least nine to twelve months, which they stated was consistent with the cooperative federalism approach under the Clean Water Act.

> **Agencies' Response: The agencies acknowledge that there will be some period of time between the effective date of the final rule and the finalization of any new state or tribal statute or regulation, or development of state or tribal programs for states or tribes that want to make changes in light of the revised definition of "waters of the United States." States and tribes have discretion under their independent authority to decide whether and how they will regulate waters. While these actions may be resource-intensive on those states and tribes that choose to pass new laws and regulations, those burdens are inherent to state and tribal governance of their state or tribal waters and such obligations are inherent in the exercise of state and tribal authority that Congress embedded in the Clean Water Act.**
>
> **The final rule becomes effective 60 days after it is published. However, states and tribes have been on notice since the issuance of Executive Order 13990 on January 20, 2021, that the agencies might propose a rule (as appropriate and consistent with law) after reviewing if the 2020 NWPR conflicted with national priorities. The agencies subsequently engaged in a series of activities to implement the Executive Order, and the final action draws on over 114,000 public comments. In addition, the 2020 NWPR has been vacated by two federal courts. Throughout this rulemaking process, the agencies engaged in extensive consultation and public outreach efforts, as discussed in the preamble to the final rule in Section III.C. States and tribes therefore had ample notice of the agencies' intentions to revise the definition of "waters of the United States," and the agencies conclude the effective date is reasonable and appropriate.**
>
> **At their discretion, states and tribes could have already begun to take action to adjust their programs during this time period. Some commenters asked for a longer period of time to allow for adjustments to state and tribal programs; however, the agencies are balancing this with the need for a clear, nationwide definition informed by relevant provisions of the Clean Water Act and the statute as a whole, the scientific record, relevant Supreme Court case law, and the agencies' experience and technical expertise after more than 30 years of implementing the longstanding pre-2015 regulations defining "waters of the United States."**
>
> **The agencies note that the final rule increases clarity and implementability by streamlining and restructuring the 1986 regulations and providing implementation guidance informed**

by sound science, implementation tools including modern assessment tools, and other resources.

18.4.4 Training, guidance, and/or technical assistance

Many commenters requested that the agencies provide training, guidance (including guidance documents), tools (see also Section 18.4.2), technical assistance, or a combination thereof. Some requests were specific to states, tribes, local entities, or more generally co-regulators, while other commenters acknowledged that the agencies' staff would also require training and guidance, and recommended that the agencies conduct joint training between the agencies, states, and tribes. One commenter noted that it is important to the regulated community, which often works across multiple Corps Districts and regulatory offices on a project, to have consistent guidance and implementation, and uniform enforcement.

Some commenters requested that the agencies develop further guidance that includes the following:

- Detailed examples and potential scenarios on the jurisdictional analysis of various waterbodies;
- The agencies' process for changing the "waters of the United States" definition, how the definition will change, and how changes to the definition will affect the locations of permits, and what is required to be included in the permits, including maps;
- The agencies' regulatory framework as it pertains to the Clean Water Act objectives;
- Regulatory Guidance Letters (RGLs) for new regulatory elements developed in concert with EPA. Such RGLS have been used by the Corps to provide clarification on how the agencies will implement regulations, and specific RGLs developed on the jurisdictional status of specific waters have been helpful to protect those systems and identify the need for a Corps permit;
- Updating the 2008 *Rapanos* Guidance[4] following the finalization of the "waters of the United States" rule, as it has been a reliable resource;
- An implementation checklist or decision flowchart of the jurisdictional determination analysis process, and
- Key implementation guidance to accompany the historical context and general approach to Section D of the Notice of Proposed Rulemaking ("Implementation of Proposed Rule" (86 FR 69433-69445).

One commenter suggested that guidance and training would not only improve consistency of implementation across regions, but also within a single region/office, and promote a common understanding of the regulatory regime for all (*i.e.*, agencies, co-regulators, and stakeholders). Other commenters recommended that such guidance and/or training be provided on a regional basis (*see* Regional Approach discussion above in Section 18.3). One commenter cautioned against developing regional guidance, as the commenter believes that the agencies cannot regulate by guidance alone. This commenter suggested regional regulations are preferable to guidance.

In addition to joint training, one commenter recommended continued coordination between the Corps and states and tribes, including with the practice of joint site visits. This commenter argued that this collaboration can increase understanding and consistency between federal agencies and has been valuable to some states and tribes in the past. The commenter also pointed to a focus of training on federal staff

[4] U.S. EPA and U.S. Army Corps of Engineers, Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States* and *Carabell v. United States* (June 5, 2007)

almost exclusively as a source frustration for states and tribes during the implementation of both the 2015 Clean Water Rule and the 2020 NWPR.

Agencies' Response: The agencies received many helpful comments on the proposed rule that resulted in refinement of the final rule to provide further clarity and certainty to the regulated public. The agencies find that the final rule increases clarity and implementability by streamlining and restructuring the 1986 regulations and providing implementation guidance informed by sound science, implementation tools, and other resources. Further, because the final rule is founded upon a longstanding regulatory framework and reflects consideration of the agencies' experience and expertise, as well as updates in implementation tools and resources, the agencies find that the final rule is generally familiar to the public and implementable.

The agencies considered comments regarding guidance related to the final rule. As is with any final regulation, the agencies will consider developing new guidance to facilitate implementation of the final rule should questions arise in the field regarding application of the final rule. 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 considered comments regarding tools related to the final rule. As discussed throughout the preamble, the agencies identified a variety of implementation guidance, tools, and methods available for use to determine if a water is a "water of the United States" under the final rule. The agencies are not mandating specific data or tools to implement the final rule. The agencies will assess jurisdiction based on the most applicable methods and best available sources of information for the specific site under evaluation. As with any final regulation, the agencies will consider developing additional tools to promote consistent implementation of the final rule's approach. 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. See also Section 18.4.2 of this Response to Comments document.

Comments on training are outside the scope of this rulemaking. The agencies conclude the final rule will result in increased clarity and certainty regarding the identification of "waters of the United States." As with any new regulation, the initial phase of implementing the final rule will require education and training for agency staff as well as co-regulators, stakeholders, and the regulated public, which will likely include regionally based training to ensure consistent and efficient implementation of the rule. The agencies disagree with the commenter who stated that the agencies focused almost exclusively on training federal staff under previous rulemakings; during implementation of the 2015 Clean Water Rule, the agencies conducted a webinar series for states and tribes, and during implementation of the 2020 NWPR, the agencies similarly provided training sessions for states and tribes.

Comments on technical assistance are outside the scope of this rulemaking.

18.4.5 Funding

Often tied to discussions about training and guidance, several commenters requested that the agencies provide, or continue to provide, funding to various entities, including states and local governments to support implementation. Another commenter stated that "some implementation challenges stem from underfunding of the Corps' Regulatory Program to sufficiently staff and train regulators." This commenter asserted that without increased funding for training, the Corps would "continue to fall short in meeting their own stated timelines."

Another commenter wrote, "Whatever form this final rule takes, States will need more Section 106 administration funds to manage Section 401 certification and State Revolving Fund infrastructure funding requests that will come from local communities resulting from the [Infrastructure Investments and Jobs Act]." That commenter also wrote that its "members have provided funds to USACE Districts through Section 214 of the Water Resources Development Act (WRDA) and have seen little improvement in the timely processing of permits. In some areas, federal staff have reached out requesting these funds from local sponsors to process permits. This was not the vision as to how this voluntary program to provide funds under Section 214 would operate."

Additionally, some commenters made specific funding requests.

- Several commenters requested federal funding related to protecting clean water, including for water quality management and pollution control, planning and implementation of comprehensive watershed management (including for stormwater), and restoration of wetlands and other habitat. One of these commenters mentioned that this funding has "deteriorated," and requested that the proposed rule be transparent on all fiscal impacts.
- One commenter recommended that funding be provided for the development of regional studies and guidance.
- In addition to implementation and administrative costs for states, one commenter requested that funding also be provided for states to review and update their existing statutes and regulations.

Multiple commenters discussed tribe need for funding, with respect to the following:

- For tribal governments to implement the Clean Water Act. One commenter also added that training would be beneficial and would support the role of tribes as co-regulators in protecting the environment, cultural and traditional values and sites, ecosystems, and public health to ensure that tribes are empowered in circumstances that may affect their waters, cultural values, and traditions.
- For tribal governments to implement their own programs to "protect the waters in their jurisdiction more broadly and more stringent than the federal government," as encouraged by the agencies. A couple of the commenters added that funding should be increased for both program development and to keep programs running, and that tribes should not have to compete against each other for available funding.
- One commenter noted that they were aware that EPA has been granted an additional $55 billion dollars for water infrastructure, and that funding is also available to address regional and geographic restoration projects. The commenter stated that these programs are important to protect water quality, but they do not replace tribes' need for staffing, developing, and implementing basic Clean Water Act programs.

Agencies' Response: Funding requests and opportunities are outside the scope of this rulemaking. Permit processing is also outside the scope of this rulemaking.

18.5 Other

18.5.1 Additional definitions and specificity[5]

Many commenters expressed concern that certain definitions are missing from the proposed rule or otherwise requested that the agencies provide clear definitions of key terms to help clarify what are considered "waters of the United States." One of these commenters suggested that use of "specific and concise language" in defining certain terms, along with scientifically based methods or standards for assessing jurisdiction, would improve clarity and provide for more consistent implementation. Specifically, commenters requested definitions of terms such as, but not limited to:

- Navigable;
- Intermittent flow/water course;
- Ephemeral;
- Similarly situated;
- Tributary, the current definition of which was qualified as "overly broad" by one commenter;
- Adjacent, or adjacency;
- Significant nexus;
- Relatively permanent;
- Continuous surface connection;
- Groundwater;
- Typical year; and
- Isolated wetland.

Several commenters requested clarity and specificity in the agencies' definitions in general, without requesting specific definitions. Some of these commenters tied the clarity of definitions to the durability of the proposed rule, and some commenters used qualifiers such as "simple," "easy to understand," "clear," "pragmatic," and "commonsense" to help entities, including small businesses, determine whether waters are jurisdictional. In this context, one commenter suggested that incorporating stakeholder input would ensure clarity. Another commenter recommended including examples.

One commenter requested that the agencies tie the definition of "significantly affect" to the significant nexus test and define that test.

One commenter requested that the agencies consider definitions that provide the flexibility of incorporating multiple lines of evidence (*e.g.*, hydrology, geology, plant life) when determining jurisdiction, including for ditches.

One commenter requested that the agencies' proposed definitions provide flexibility to accommodate a changing delta landscape due accelerating climate and development pressures and demands.

[5] Note that other sections of the agencies' response to comments address specific definitions, such as the definition of "tributary" (Topic 8) or "adjacent" (Topic 10). Please reference those sections for the agencies' response to comments on such definitions.

One commenter argued that being selective on definitions and leaving certain definitions out of the proposal contributes to a lack of transparency in policy. This commenter asked why the agencies did not define the following terms:

- "Restore" the chemical, physical, or biological integrity of the nation's waters;
- "Physical integrity," "chemical integrity," or "biological integrity"; and
- "Biological connectivity," "biological factors," "dispersal," "life-cycle dependency," "timing of dispersal," "habitat corridors," "barriers," and "spatial distribution."

One commenter contended that if the significant nexus standard and relatively permanent standard will be used for determining federal jurisdiction, specific definitions for tributary flow classifications, such as ephemeral, perennial, and intermittent, should be maintained in the final rule to ensure clarity, as established by the Supreme Court decisions.

One commenter requested that the agencies close what the commenter perceives to be a "loophole" in the Clean Water Act's section 404 program. The commenter argued that the definition of "fill material" enables permittees to define "toxic mine waste" as "fill material," and requested that the agencies remove "placement of overburden, slurry, or similar mining related materials from the definition of the term." They pointed to *Coeur Alaska v. Southeast Alaska Conservation Council* to support their argument.

> **Agencies' Response: The agencies considered comments on the need for additional definitions. In light of public comments, the agencies made several changes to the final rule, including adding a definition of "significantly affect" that identifies the functions and factors to be evaluated as part of a significant nexus analysis. 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 find that the regulatory text in the final rule and the preamble's explanation of the regulatory text clearly present the agencies' definition of "water of the United States" and that additional definitions are not needed. For example, because the agencies are not utilizing ephemeral, intermittent, or perennial flow classifications in either the relatively permanent standard or the significant nexus standard, the agencies are not defining those flow classification terms in the final rule.**
>
> **Comments on the definition of "fill material" are outside the scope of this rulemaking.**

18.5.2 Categorical protection

Multiple commenters suggested that the agencies should consider certain waters as "categorically" "waters of the United States" or jurisdictional by rule without the need for further analysis, and the agencies rely on science to do so. Most of these commenters suggested this would result in greater regulatory certainty and transparency, and/or more consistent protection.

One commenter requested that the agencies identify National Wild and Scenic Rivers as "waters of the United States" for their "recreational and tourism interstate commerce potential."

Another commenter suggested that the agencies provide "bright-line tests" to identify jurisdictional waters and recommended as an example that the agencies consider jurisdictional all intermittent streams that "satisfy the 'relatively permanent' test."
One commenter requested that the regulatory text enable and prescribe a process whereby additional waters can be added following review of emerging peer reviewed literature, if not provided categorical protection under the rule.

One commenter was strongly opposed to the regulation of certain waters by category and requested that the agencies provide and adhere to clear definitions.

Another commenter recommended the agencies develop these clear categories based on the historical interpretation of key terms and activities (*e.g.*, prior converted cropland), and suggested that the public notice for a second rulemaking would provide the best opportunity to incorporate these categories. The commenter urged the agencies to move forward with a second rulemaking revising the definition of "waters of the United States."

Another commenter indicated that tracking the defensibility of case-by-case significant nexus decisions places an undue burden on the agencies and the scientific community and asserted that identifying certain waters as categorically jurisdictional would be a better approach.

> **<u>Agencies' Response</u>: The agencies considered public comments regarding the inclusion of certain waters as "categorically" jurisdictional. Although the agencies agree that the best available science supports that certain waters categorically have a significant nexus with paragraph (a)(1) waters, for the reasons described in the final rule's preamble, the agencies are not including additional types of waters as categorically jurisdictional. Consistent with the proposed rule and the pre-2015 regulatory regime, the only water types that are categorically jurisdictional under the final rule are traditional navigable waters, the territorial seas, and interstate waters (*i.e.*, paragraph (a)(1) waters); wetlands adjacent to paragraph (a)(1) waters; and impoundments of "waters of the United States," other than impoundments of waters identified under paragraph (a)(5). Other categories of waters must meet either the relatively permanent standard or the significant nexus standard to be jurisdictional under the final rule. The agencies acknowledge the comment regarding the desire for a process that would allow additional waters to be added to the definition of "waters of the United States" following review of emerging peer reviewed literature, and have determined that it is not a suitable alternative to the final rule. In developing the final rule, the agencies thoroughly considered alternatives to this rule, including the 2015 Clean Water Rule, which treated certain waters as "categorically" jurisdictional, and have concluded that the 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.1 of the Preamble to the Final Rule for further discussion of the agencies' grounds for concluding that the 2015 Clean Water Rule is not a suitable alternative to the final rule.**
>
> **In the preamble to the proposed rule, the agencies stated that they would consider changes through a second rulemaking that they anticipated proposing in the future, which would build upon the foundation of this rule. The agencies have concluded that this rule is durable**

and implementable because it is founded on the familiar framework of the 1986 regulations, fully consistent with the statute, informed by relevant Supreme Court decisions, and reflects the record before the agencies, including consideration of the best available science, as well as the agencies' expertise and experience implementing the pre-2015 regulatory regime; see also the agencies' response to comments in Section 5.

The agencies also disagree that tracking the defensibility of case-by-case decisions will be a burden to the agencies. Section IV.C.9.c of the Final Rule Preamble discusses that the agencies' record for determinations of jurisdiction for waters evaluated under the significant nexus standard will include descriptive information regarding the water at issue, an explanation of the rationale for the jurisdictional conclusion, and a description of the information used. In addition, Section IV.H of the Final Rule Preamble describes jurisdictional information and permit data that is already available to the public.

18.5.3 Other

Commenters also provided the following additional recommendations.

- A few commenters recommended the agencies evaluate Tennessee's approach to determining (state) jurisdiction over waters, which they claim provides the clarity needed to encourage compliance. One commenter quoted specific statutory definitions to show that state waters are broadly defined and categorized. Another commenter provided an overview of Tennessee's approach to making "hydrologic determinations," which they claimed is based on science and local conditions and has proven to be a successful approach for the state.
- One commenter requested that the proposed rule also apply to all land managers, including land owned/managed by local or federal government.
- One commenter requested that the agencies consider "monsoon" rains as an "issue of significance" in the proposed rule. The commenter illustrated this point with the example of New Mexico, which relies heavily on seasonal rain, particularly in Santa Fe County where the commenter argues storm events carry legacy contaminants from the Los Alamos National Laboratory into the Rio Grande, which cannot be used to provide drinking water for Santa Fe County certain times of year due to high turbidity and contaminant concentrations.
- One commenter recommended that the agencies repeal both the 2020 NWPR and the 1986 regulations and dedicate all resources to making jurisdictional determinations based on science, rather than developing and defending a new revised definition of "waters of the United States." This commenter opined that the Clean Water Act does not require the agencies to define the phrase "waters of the United States."
- One commenter pointed out that other environmental laws are not founded on definitions left to rulemaking but on impacts, thus making them more durable. This commenter drew a comparison with the Clean Air Act, which regulates emissions based on the magnitude of a "discharge" or its impact to air quality relative to health standards, rather than on a definition of "Air of the U.S." or the "discharge" itself. The commenter then invited the agencies to consider a different approach in their rulemaking and described that approach with specific text edits to the proposed rule. This commenter argued the proposed approach would provide needed durability to the agencies' rulemaking.
- One commenter mentioned that the proposed rule does not take water conservation or flood control infrastructure into consideration.

- One commenter recommended that the agencies adopt a more holistic lifecycle approach as they finalize the definition of "waters of the United States" and work across programs to address contamination sources by considering that preventing contamination is more effective and less costly than having to remove it. While acknowledging that groundwater is not jurisdictional under the Clean Water Act, this commenter recommended that the agencies use a life cycle approach and link between the Clean Water Act and the Safe Drinking Water Act to help prevent groundwater contamination and protect drinking water sources. The commenter pointed to a 2014 Clean Water Act-Safe Drinking Water Act Toolkit entitled, "Opportunities to Protect Drinking Water Sources and Advance Watershed Goals through the Clean Water Act: A Toolkit for State, Interstate, Tribal and Federal Water Program Managers" to show how Clean Water Act provisions can be used to mitigate impacts to drinking water sources.
- Another commenter suggested that watershed and wetland management policies should discourage development in floodplains and wetlands, and that flood risk and environmental impact analyses should be conducted ahead of development activities in sensitive areas.

Some commenters provided agencies with various attachments and references, including reports, scientific papers, testimony, policy documents, news articles, requesting that such material be included in the record for the rule or considered by the agencies as the finalize the rule.

<u>Agencies' Response</u>: Through this rulemaking process, the agencies considered all public comments on the proposed rule, including changes that improve the clarity, implementability, and durability of the definition. The regulations established in the final rule are founded on the familiar framework of the 1986 regulations and are generally consistent with the pre-2015 regulatory regime. They are fully consistent with the statute, informed by relevant Supreme Court decisions, and reflect the record before the agencies, including consideration of the best available science, as well as the agencies' expertise and experience implementing the pre-2015 regulatory regime.

The agencies considered the comments regarding Tennessee's approach to determining "waters of the state," including the comment on "hydrologic determinations," but decided to finalize an approach to defining "waters of the United States" that is familiar and implementable. Together the relatively permanent standard and the significant nexus standard as codified in this rule give effect to the Clean Water Act's broad terms and environmentally protective aim as well as its limitations. For discussion of tributaries generally, see the agencies' response to comments in Section 8.

As with past rules defining "waters of the United States," the agencies note that the final rule applies across the country, regardless of who owns or manages the land. With regard to monsoon rains, the agencies note that the Final Rule Preamble Section IV.C.4.c.ii addresses when streamflow that occurs during the monsoon season may be relatively permanent or non-relatively permanent.

In regard to the commenter who recommended that the agencies repeal the 2020 NWPR and the 1986 regulations, while the agencies agree that those rules are not suitable alternatives to the final rule (see Final Rule Preamble IV.B), the agencies disagree that they should cease rulemaking efforts. While the agencies agree that the Clean Water Act does not require the agencies to define "waters of the United States," the agencies conclude that

the final rule increases clarity and implementability of the definition of "waters of the United States" and is preferable to taking no action. As discussed in the Final Rule Preamble Section IV.A.4, the agencies are exercising their discretionary authority to establish a final rule that is both familiar and implementable.

The agencies disagree with the commenter who stated that the Clean Air Act and other environmental laws can be used as a framework to an approach that makes the rule more durable. The Clean Air Act is fundamentally different than the Clean Water Act, and its approach to regulating air pollution cannot be equated to the authority granted by Congress to the agencies to define "waters of the United States."

Some topics may be outside the authority of what the agencies are allowed to consider when revising the definition of "waters of the United States." Though the agencies appreciate that water conservation, flood control infrastructure, and holistic lifecycle approaches (including those that link the Clean Water Act to the Safe Drinking Water Act) are important topics, the agencies are only able to consider such topics when defining "waters of the United States" to the extent they relate to restoring and maintaining the chemical, physical, and biological integrity of traditional navigable waters, the territorial seas, and interstate waters.

Several comments were outside the scope of this rulemaking, including the comment that watershed and wetland management policies should discourage development in floodplains and wetlands.

With respect to the citations and references commenters provided for consideration, the agencies have responded to the substantive comments received in Sections 1-18 of the agencies' response to comments, as well as in other locations in the administrative record for this rule. In doing so, the agencies have responded to the commenters' reference or citation as it was used to support the commenters' statements. The agencies have also considered references that were provided to the agencies in response to their request for additional literature relevant to the conclusions of the Science Report that had been published since 2014 but that was not included in the agencies' analysis in the Proposed Rule TSD (*e.g.*, literature that was not cited in Appendix C1 of the Proposed Rule TSD). The agencies' response to such literature is provided in Section 16.2.2.

In addition, the agencies have reviewed reports, citations, and other documents provided by commenters and have incorporated some of these references, as relevant and appropriate, into the final Technical Support Document for the rule. The agencies note that some of the citations provided to them were already cited in the Proposed Rule TSD. See also Section 16.3 of the agencies' response to comments document.