Bridge Over Troubled WOTUS
Discussion of the state of Clean Water Act jurisdiction and the current Administration's efforts to repeal the Clean Water Rule

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

WATERKEEPER ALLIANCE, INC.; CENTER FOR BIOLOGICAL DIVERSITY; CENTER FOR FOOD SAFETY; HUMBOLDT BAYKEEPER, a program of Northcoast Environmental Center; RUSSIAN RIVERKEEPER; MONTEREY COASTKEEPER, a program of The Otter Project, Inc.; SNAKE RIVER WATERKEEPER, INC.; UPPER MISSOURI WATERKEEPER, INC.; and TURTLE ISLAND RESTORATION NETWORK, Plaintiffs, v. E. SCOTT PRUITT, in his official capacity as Administrator of the U.S. Environmental Protection Agency; U.S. ENVIRONMENTAL PROTECTION AGENCY; RICKY DALE JAMES, in his official capacity as Assistant Secretary of the Army for Civil Works; and U.S. ARMY CORPS OF ENGINEERS, Defendants.	Case No.18-cv-3521 COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

INTRODUCTION

1. Water sustains all life on earth. Our nation's rivers, streams, lakes, and wetlands provide food to eat and water to drink for millions of Americans; serve as habitat for thousands of species of fish and wildlife, including scores of threatened or endangered species; and give the public aesthetic, recreational, commercial, and spiritual benefits too numerous to count. It is for the protection of these waters that congress passed the Federal Water Pollution Control Act of 1972, 33 U.S.C. § 1251 *et seq*., commonly known as the Clean Water Act ("CWA" or the "Act").

2. Plaintiffs are regional and national public-interest environmental organizations with a combined membership numbering hundreds of thousands of members nationwide. On behalf of these members, Plaintiffs advocate for the protection of oceans, rivers, streams, lakes, and wetlands, and for the people and animal and plant species that depend on clean water.

3. By this action, Plaintiffs challenge two closely related final rules issued by Defendants regarding the statutory phrase "waters of the United States," a phrase that proscribes the jurisdictional reach of the CWA. The first is the June 29, 2015 "Clean Water Rule," which identifies those waters that are subject to the CWA's critical safeguards. *Clean Water Rule: Definition of 'Waters of the United States'*, 80 Fed. Reg. 37054 (June 29, 2015). Waters that do not meet the regulatory definition of "waters of the United States" will be unprotected as a matter of federal law, subject to myriad abuses by those who have long seen our nation's waters as either a convenient means to dispose of waste and debris or as a resource to be dredged or filled to further their economic objectives.

4. The second is the February 6, 2018 "Delay Rule," which makes no substantive changes to the Agencies' regulatory definition, but delays the applicability of the Clean Water Rule by two years. *See Definition of "Waters of the*

United States"–Addition of an Applicability Date to 2015 Clean Water Rule, 83 Fed. Reg. 5200 (Feb. 6, 2018).

5. Plaintiffs filed a similar action in August 2015, challenging the Clean Water Rule only. *Waterkeeper Alliance et al. v. U.S. Envt'l Protection Agency*, N.D. Cal. No. 3:15-cv-03927 (filed August 27, 2015). That suit was among many filed around the country in both the federal district courts and the courts of appeals; and like most other litigants, Plaintiffs voluntarily dismissed their earlier suit after the Sixth Circuit asserted jurisdiction over all challenges to the Clean Water Rule under 33 U.S.C. § 1369(b). *See In re Clean Water Rule: Definition of Waters of U.S.*, 817 F.3d 261, 264 (6th Cir. 2016). Plaintiffs are filing again in this Court because the U.S. Supreme Court subsequently held that review of the Clean Water Rule belongs in the district courts, not the courts of appeals. *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617 (2018).

6. The Clean Water Rule, in part, reaffirms CWA jurisdiction over waters historically protected by the Agencies, such as many tributaries and their adjacent wetlands; for this reason, Plaintiffs do not seek vacatur of the Clean Water Rule in its entirety, but instead seek vacatur of the Delay Rule so that the lawful parts of the Clean Water Rule may take immediate effect.

7. However, a number of provisions of the Clean Water Rule are legally or scientifically indefensible, and must therefore be excised from the rule, vacated, and remanded to the Agencies. These flawed provisions impermissibly abandon waters that must be protected under the CWA as a matter of law; unreasonably exclude waters over which the Agencies have historically asserted jurisdiction based on their commerce clause authority; arbitrarily deviate from the best available science; or were promulgated without compliance with the Agencies' notice and comment obligations.

8. By this complaint plaintiffs allege that the Agencies violated the CWA, the Administrative Procedure Act, 5 U.S.C. § 551 *et seq*. ("APA"), the National

Environmental Policy Act, 42 U.S.C. § 4321 *et seq*. ("NEPA"), and the Endangered Species Act, 16 U.S.C. § 1531 *et seq*. ("ESA") when they promulgated both the Clean Water Rule and the Delay Rule. Among other remedies, plaintiffs seek an order holding the Delay Rule and specific portions of the Clean Water Rule unlawful and setting them aside because they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;" "in excess of statutory jurisdiction, authority, or limitations," and/or were promulgated "without observance of procedure required by law." 5 U.S.C. § 706(2)(A), (D).

JURISDICTION & VENUE

9. This Court has jurisdiction over the claims set forth herein pursuant to 5 U.S.C. § 702 (APA), 16 U.S.C. § 1540(g) (ESA citizen suit jurisdiction), and 28 U.S.C. § 1331 (federal question jurisdiction). The relief sought is authorized by 5 U.S.C. § 706(1), 16 U.S.C. § 1540(g), and 28 U.S.C. §§ 2201(a) and 2202.

10. Venue is proper in this District pursuant to 28 U.S.C. § 1391(e)(1)(A) because the Agencies are officers or agencies of the United States, and one or more plaintiffs reside in the district within the meaning of 28 U.S.C. § 1391(d).

11. As required by the ESA's citizen suit provision, 16 U.S.C. § 1540(g)(2)(a)(i), Plaintiffs provided Defendants and the required federal wildlife management agencies with written notice of the ESA violations alleged herein by letters dated August 5, 2015 (for claims related to the Clean Water Rule) and February 14, 2018 (for claims related to the Delay Rule). More than 60 days have passed since Plaintiffs provided their notice of intent to sue.

INTRADISTRICT ASSIGNMENT

12. Assignment to the San Francisco Division is appropriate because several of the plaintiffs (including Humboldt Baykeeper, Russian Riverkeeper, Monterey Coastkeeper, and Turtle Island Restoration Network) have their primary place of business within this Division.

PARTIES

13. Plaintiff **Waterkeeper Alliance, Inc.** ("Waterkeeper") is a global not-for-profit environmental organization dedicated to protecting and restoring water quality to ensure that the world's waters are drinkable, fishable and swimmable. Waterkeeper is comprised of more than 300 Waterkeeper Member Organizations and Affiliates working in 44 countries on 6 continents, covering over 2.5 million square miles of watersheds. In the United States, Waterkeeper represents the interests of its 174 U.S. Waterkeeper Member Organizations and Affiliates, as well as the collective interests of thousands of individual supporting members that live, work and recreate in and near waterways across the country – many of which are severely impaired by pollution. The CWA is the bedrock of Waterkeeper Alliance's and its Member Organizations' and Affiliates' work to protect rivers, streams, lakes, wetlands, and coastal waters for the benefit of its Member Organizations, Affiliate Organizations and our respective individual supporting members, as well as to protect the people and communities that depend on clean water for their survival. In many ways, Waterkeeper and its members depend on the CWA to protect waterways, and the people who depend on clean water for drinking water, recreation, fishing, economic growth, food production, and all of the other water uses that sustain our way of life, health, and well being. Waterkeeper has thousands of members worldwide, many of whom use, enjoy, and recreate on or near waters affected by the Clean Water Rule and the Delay Rule.

14. Plaintiff **Center for Biological Diversity** (the "Center") is a national nonprofit organization dedicated to the preservation, protection, and restoration of biodiversity, native species, and ecosystems. The Center was founded in 1989 and is based in Tuscon, Arizona, with offices throughout the country. The Center works through science, law, and policy to secure a future for all species, great or small, hovering on the brink of extinction. The Center is actively involved in species and habitat protection issues and has more than 63,000 members throughout the United

States and the world, including over 5,900 members in this District. The Center has advocated for species protection and recovery, as well as habitat protection, for species existing throughout the United States, including water-dependent species. The Center brings this action on its own institutional behalf and on behalf of its members. Many of the Center's members and staff reside in, explore, and enjoy recreating in and around numerous waters within this District that are affected by the Clean Water Rule and the Delay Rule.

15. Plaintiff **Center for Food Safety** ("CFS") is a national non-profit public interest and environmental advocacy organization working to protect human health and the environment by curbing the use of harmful food production technologies and by promoting organic and other forms of sustainable agriculture. CFS uses legal actions, groundbreaking scientific and policy reports, books, and other educational materials, market pressure, and grass roots campaigns. CFS has over 950,000 members through the United States, including nearly 60,000 members who reside within this District, many of whom use, enjoy, and recreate on or near waters affected by the Clean Water Rule and the Delay Rule.

16. Plaintiff **Humboldt Baykeeper** is a program of Northcoast Environmental Center, a California non-profit public interest and environmental advocacy organization committed to safeguarding the coastal resources of Humboldt Bay, California, for the health, enjoyment, and economic strength of the Humboldt Bay community. Humboldt Baykeeper uses community education, scientific research, water-quality monitoring, pollution control, and enforcement of laws to protect and enhance Humboldt Bay and near-shore waters of the Pacific Ocean. Humboldt Baykeeper has over 1,000 members residing within this District, many of whom use, enjoy, and recreate on or near waters affected by the Clean Water Rule and the Delay Rule.

17. Plaintiff **Russian Riverkeeper** is a California non-profit public interest and environmental advocacy organization committed to the conservation

and protection of the Russian River, its tributaries, and the broader watershed through education, citizen action, scientific research, and expert advocacy. Russian Riverkeeper has over 1,400 members residing within this District, many of whom use, enjoy, and recreate on or near waters affected by the Clean Water Rule and the Delay Rule.

18. Plaintiff **Monterey Coastkeeper** is a project of the Otter Project, Inc., a California non-profit public interest and environmental advocacy organization committed to the protection and restoration of the central California coast. Monterey Coastkeeper has over 2,000 members residing within this District, many of whom use, enjoy, and recreate on or near waters affected by the Clean Water Rule and the Delay Rule.

19. Plaintiff **Snake River Waterkeeper, Inc.** is an Idaho non-profit public interest and environmental advocacy organization committed to protecting water quality and fish habitat in the Snake River and surrounding watershed. Snake River Waterkeeper uses water-quality monitoring, investigation of citizen concerns, and advocacy for enforcement of environmental laws. Snake River Waterkeeper has more than 50 members, including members who reside, explore, and enjoy recreating on or near waters affected by the Clean Water Rule and the Delay Rule.

20. Plaintiff **Upper Missouri Waterkeeper, Inc.** is a Montana non-profit public interest and environmental advocacy organization committed to protecting and improving ecological and community health throughout Montana's Upper Missouri River Basin. Upper Missouri Waterkeeper uses a combination of strong science, community action, and legal expertise to defend the Upper Missouri River, its tributaries, and communities against threats to clean water and healthy rivers. Upper Missouri Waterkeeper has over 70 members, including members who reside, explore, and enjoy recreating on or near waters affected by the Clean Water Rule and the Delay Rule.

21. Plaintiff **Turtle Island Restoration Network, Inc.** is a national non-profit public interest and environmental advocacy organization committed to the protection of the world's oceans and marine wildlife. Turtle Island Restoration Network works with people and communities to accomplish its mission, using grassroots empowerment, consumer action, strategic litigation, hands-on restoration, and environmental education. Turtle Island Restoration Network has over 80,000 members worldwide, including hundreds of members who reside in this District, many of whom use, enjoy, and recreate on or near waters affected by the Clean Water Rule and the Delay Rule.

22. Each Plaintiff has one or more members who reside in, explore, or recreate in areas impacted by the Final Rule's definition of "waters of the United States." Some of Plaintiffs' members will suffer recreational, aesthetic, or other environmental injuries due to the Agencies' final action. Specifically, the Agencies' promulgation of the Clean Water Rule and Delay Rule will result in the loss of Clean Water Act protections for many thousands of miles of ephemeral streams, tributaries, ditches, wetlands, and other waters used and enjoyed by some of Plaintiffs' members, ultimately facilitating the degradation or destruction of those waters.

23. Defendant United States Environmental Protection Agency ("EPA") is the agency of the United States Government with primary responsibility for implementing the CWA. Along with the Army Corps of Engineers, EPA promulgated both the Clean Water Rule and the Delay Rule.

24. Defendant United States Army Corps of Engineers ("Corps") has responsibility for implementing certain aspects of CWA, most notably the dredge and fill permitting program under CWA § 404, 33 U.S.C. § 1344. Along with EPA, the Corps promulgated both the Clean Water Rule and the Delay Rule.

25. Defendant E. Scott Pruitt is the Administrator of the EPA, acting in his official capacity. Administrator Pruitt signed the Delay Rule. In his role as the

EPA Administrator, Mr. Pruitt oversees the EPA's implementation of the CWA.

26. Defendant Ricky Dale James is the Assistant Secretary of the Army for Civil Works, acting in his official capacity. Mr. James' predecessor, former Acting Assistant Secretary of the Army for Civil Works Ryan A. Fisher, signed the Delay Rule. In his role as Assistant Secretary of the Army for Civil Works, Mr. James oversees the Corps' implementation of the CWA.

LEGAL BACKGROUND

I. Overview of the Clean Water Act

27. In 1972 Congress adopted amendments to the Clean Water Act in an effort "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). The 1972 amendments established, among other things, a national goal "of eliminating all discharges of pollutants into navigable waters by 1985" and an "interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife, and provides for recreation in and on the water . . . by 1983." *Id.* § 1251(a).

28. CWA section 301(a), 33 U.S.C. § 1311(a), prohibits the discharge of any pollutant by any person, unless such discharge complies with the terms of any applicable permits, and sections 301, 302, 306, 307, 318, 402, and 404 of the Act. 33 U.S.C. § 1311(a). "Discharge of a pollutant" means "any addition of any pollutant to navigable waters from any point source." *Id.* § 1362(12). "Navigable waters" are broadly defined as "the waters of the United States." *Id.* § 1362(7).

29. While Congress left the term "waters of the United States" undefined, the accompanying Conference Report indicates that it intended the phrase to "be given the broadest possible constitutional interpretation." S. Rep. No. 92-1236, p.144 (1972).

30. CWA section 402, 33 U.S.C. § 1342, establishes the statutory permitting framework for regulating pollutant discharges under the National Pollutant Discharge Elimination System ("NPDES") program. CWA section 404, 33

U.S.C. § 1344, establishes the permitting framework for regulating the discharge of dredged or fill material into waters of the United States.

II. Case Law Interpreting "Waters of the United States"

31. The definition of "waters of the United States" significantly impacts the Agencies' and the States' implementation of the CWA, as it circumscribes which waters are within the Agencies' regulatory authority under the Act, *i.e.,* which waters are jurisdictional. The Act does not protect waters that are not "waters of the United States" from pollution, degradation, or destruction, and it is not unlawful under the Act to dredge and fill them or discharge pollutants into them without a permit.

32. The Agencies last addressed the definition of "waters of the United States" by promulgating essentially identical rules in the mid-1970s. Those regulations asserted jurisdiction over traditionally navigable waters, non-navigable tributaries to those (and other) waters, wetlands adjacent to other jurisdictional waters, and any "other waters," the use, degradation, or destruction of which could affect interstate or foreign commerce. *See, e.g.*, 33 C.F.R. § 328.3(a)(1), (5), (7), and (3) (2014), respectively.

33. The Clean Water Rule is the Agencies' most recent attempt to define "waters of the United States." The impact of the Rule is sweeping; it will result in a massive net loss of CWA jurisdiction as compared to the Agencies' historic interpretation of the Act under their prior rule.

34. The Agencies' efforts were undertaken against the backdrop of three Supreme Court cases addressing this statutory phrase. *See United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985); *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001) ("*SWANCC*"); and *Rapanos v. United States*, 547 U.S. 715 (2006).

35. In *Riverside Bayview*, the Court upheld the Corps' broad interpretation of the phrase "water of the United States" to include wetlands adjacent to

traditionally navigable waters. 474 U.S. at 139.

36. In *SWANCC*, the Court rejected the Corps' assertion of CWA jurisdiction over isolated intrastate waters where the sole asserted basis for jurisdiction was the use of the relevant waters by migratory birds under the Migratory Bird Rule, 51 Fed. Reg. 41217 (1986). *See* 531 U.S. at 163–64.

37. In *Rapanos*, a divided Court announced widely divergent standards for determining CWA Act jurisdiction over wetlands adjacent to non-navigable tributaries. Justice Scalia, writing for the four-justice plurality, held that the Corps could not categorically assert jurisdiction over all wetlands adjacent to ditches or man-made drains that discharge into traditional navigable waters. 547 U.S. at 725, 757 (Scalia, J.) In his concurring opinion, Justice Kennedy indicated that only those waters possessing "a significant nexus with navigable waters" are subject to CWA jurisdiction. *Id.* at 759. He further explained that

> wetlands possess the requisite nexus, and thus come within the statutory phrase 'navigable waters,' if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'

Id. at 780. Justice Kennedy also recognized that the Agencies had authority under the Act to "identify categories of tributaries that, due to their volume or flow, . . . their proximity to navigable waters, or other relevant considerations, are significant enough that wetlands adjacent to them are likely, in the majority of cases, to perform important functions for an aquatic system incorporating navigable waters." *Id.* at 781.

38. Writing for the four dissenters in *Rapanos*, just as he had done in *SWANCC*, Justice Stevens recognized the "comprehensive nature" of the CWA as well as "Congress' deliberate acquiescence" to the Agencies' long-standing definition of "waters of the United States," and thus would have deferred to that definition and the Corps' assertion of jurisdiction over the wetlands and ditches at issue in the

case. 547 U.S. at 797, 803. Justice Breyer joined the dissenting opinion by Justice Stevens, but also wrote separately to emphasize that "the authority of the Army Corps of Engineers under the CWA extends to the limits of congressional power to regulate interstate commerce." 547 U.S. at 811.

39. As Justice Stevens noted in his Rapanos dissent,

> Given that all four Justices who have joined this opinion would uphold the Corps' jurisdiction in both of these cases—and in all other cases in which either the plurality's or Justice KENNEDY's test is satisfied—on remand each of the judgments should be reinstated if *either* of those tests is met.

547 U.S. at 810. Thus, every federal court of appeals to consider the scope of CWA jurisdiction following *Rapanos* has held that a water is jurisdictional *at least* whenever Justice Kennedy's "significant nexus" test is satisfied.[1] No Circuit has held that the Justice Scalia's approach is the exclusive method for establishing CWA jurisdiction.

III. The Clean Water Act's Permit Exclusion for Farming Activities

40. Clean Water Act section 404(f)(1) excludes certain activities from regulation under the Act. 33 U.S.C. § 1344(f)(1). As relevant here, section 404(f)(1)(A) states that "the discharge of dredged or fill material [] from normal

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[1] *See Northern California River Watch v. City of Healdsburg*, 496 F.3d 993 (9th Cir. 2007), *cert. denied*, 128 S.Ct. 1225 (2008); *United States v. Johnson*, 467 F.3d 56 (1st Cir. 2006), *cert. denied*, 128 S.Ct. 375 (2007); *United States v. Donovan*, 661 F.3d 174 (3d Cir. 2011); *United States v. Cundiff*, 555 F.3d 200 (6th Cir. 2009); *United States v. Gerke Excavating, Inc.*, 464 F.3d 723 (7th Cir. 2006), *cert. denied*, 128 S.Ct. 45 (2007); *United States v. Bailey*, 571 F.3d 791 (8th Cir. 2009); and *United States v. Robison*, 505 F.3d 1208 (11th Cir. 2007), *reh'g denied*, 521 F.3d 1319 (2008), *cert. den. sub nom United States v. McWane, Inc.*, 129 S.Ct. 627 (2008); *see also Precon Development Corp. v. U.S. Army Corps of Engineers*, 633 F.3d 278 (4th Cir. 2011) (where the parties stipulated that Justice Kennedy's test was the appropriate test).

farming, silviculture, and ranching activities … is not prohibited by or otherwise subject to regulation under" CWA sections 402, 404, or 301(a). 33 U.S.C. § 1344(f)(1)(A).

41. CWA section 404(f)(2) provides an exception to this exclusion, commonly referred to as the "Recapture Provision":

> Any discharge of dredged or fill material into the navigable waters incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced, shall be required to have a permit under this section.

33 U.S.C. § 1344(f)(2).

42. Notably, section 404(f) does not affect the jurisdictional status of waters under the CWA. Rather, sections 404(f)(1) and (2), read together, mean that a person does not need a CWA section 404 permit to discharge dredged or fill material from normal farming, silviculture, and ranching activities into a jurisdictional water *unless* (1) such discharge brings the water "into a use to which it was not previously subject", *e.g.*, a new use; and (2) the discharge impairs the flow or circulation of the navigable water or the reach of the water.

43. The fact that the Recapture Provision refers several times to "navigable waters," a term which the Act defines to mean waters of the United States, further demonstrates that waters in which activities subject to the 404(f)(1) permit exemption take place are still jurisdictional. This interpretation is borne out by the Agencies' long-standing policies as well as the legislative history of CWA section 404(f). *See, e.g.,* CONG. REC. S19654 (daily ed. Dec. 15, 1977) (Senator Muskie noting that the section 404(f)(1) exemption was only intended to eliminate permitting requirements for certain "narrowly defined activities that cause little or no adverse effects either individually or cumulatively.")

IV. The National Environmental Policy Act

44. The National Environmental Policy Act ("NEPA"), enacted by Congress in 1969, is our "basic national charter for protection of the environment." 40 C.F.R. § 1500.1(a). One of the core goals of NEPA is to "promote efforts which will prevent or eliminate damage to the environment." 42 U.S.C. § 4321. As such, NEPA directs all federal agencies to assess the environmental impacts of proposed actions that significantly affect the quality of the human environment.

45. The Council on Environmental Quality ("CEQ") promulgated uniform regulations to implement NEPA that are binding on all federal agencies. Those regulations designed to "insure that environmental information is available to public officials and citizens before decisions are made and actions are taken" and to "help public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment." 40 C.F.R. § 1500.1(b)–(c). The Corps has its own NEPA regulations, codified at 33 C.F.R. Part 230, which the Corps uses in conjunction with the CEQ regulations.

46. NEPA requires all federal agencies to prepare a "detailed statement" assessing the environmental impacts of all "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(C). This statement is known as an Environmental Impact Statement ("EIS"). CEQ's regulations establish a standard format for EISs, including a summary, purpose and need for action, alternatives, affected environment, and environmental consequences. 40 C.F.R. § 1502.10.

47. A "major Federal action" is an action "with effects that may be major and which are potentially subject to Federal control and responsibility." 40 C.F.R. § 1508.18. Promulgation of a rule is an expressly identified "Federal action" under NEPA. *Id.* § 1508.18(b)(1).

48. NEPA regulations define significance in terms of an action's context

and intensity. *See* 40 C.F.R. § 1508.27. An action's context must be analyzed nationally, regionally, and locally. *See id.* § 1508.27(a). An action's intensity must be analyzed on the basis of at least 10 factors, any one of which can indicate that an EIS is required. *See id.* § 1508.27(b). For example, an EIS may be required if a major action is in proximity of "wetlands, wild and scenic rivers, or ecologically critical areas," "likely to be highly controversial," "establish[es] a precedent for future actions with significant effects," or "may adversely affect an endangered or threatened species." *See id.* Moreover, a "significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial." *Id.* § 1508.27(b)(1).

49. An agency that is uncertain whether an EIS is required may first develop an Environmental Assessment ("EA"). An EA is a "concise public document" that "provide[s] sufficient evidence and analysis" for determining whether to prepare an EIS or issue a finding of no significant impact ("FONSI"). 40 C.F.R. § 1508.9(a). The EA must discuss the need for the proposed project, as well as environmental impacts and alternatives, *see* 40 C.F.R. § 1508.9(b); it must provide sufficient evidence and analysis for determining whether an EIS is appropriate; and it must include a discussion of "appropriate alternatives if there are unresolved conflicts concerning alternative uses of available resources[.] 33 C.F.R. § 230.10. If, after preparing an EA, the federal agency determines that the proposed action is not likely to significantly affect the environment, it may issue a "finding of no significant impacts" ("FONSI").

50. NEPA requires an agency to take a "hard look" at the environmental consequences of the agency's proposed action, and to base its decision not to prepare an EIS on a "a convincing statement of reasons why potential effects are insignificant." *Save the Yaak Comm. v. Block*, 840 F.2d 714, 717 (9th Cir. 1988).

51. The information presented in an EA or an EIS must be of high quality. NEPA regulations provide that "[a]ccurate scientific analysis, expert agency

comments, and public scrutiny are essential to implementing NEPA." 40 C.F.R. § 1500.1(b).

52. Although the CWA exempts most actions taken by the EPA Administrator under the Act from NEPA, 33 U.S.C. § 1372(c)(1), it contains no such exemption for actions taken by the Corps.

V. The Endangered Species Act

53. Section 2(c) of the Endangered Species Act ("ESA") states that it is "the policy of Congress that all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this Act." 16 U.S.C. § 1531(c)(1). The ESA defines "conservation" to mean "the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this Act are no longer necessary." *Id.* § 1532(3).

54. To fulfill the purposes of the ESA, each federal agency is required to engage in consultation with the Fish and Wildlife Service ("FWS") and National Marine Fisheries Service ("NMFS") (collectively "the Services"), as appropriate, to "insure that any action authorized, funded, or carried out by such agency … is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the adverse modification of habitat of such species … determined … to be critical." 16 U.S.C. § 1536(a)(2).

55. Such consultation is required for "any action [that] may affect listed species or critical habitat." 50 C.F.R. § 402.14. Agency "action" is broadly defined in the ESA's implementing regulations to include, *inter alia*, "the promulgation of regulations." *Id.* § 402.02 (emphasis added).

56. At the completion of consultation, the Services are required to issue a Biological Opinion that determines if the agency action is likely to jeopardize any affected species. If so, the Biological Opinion must specify "Reasonable and Prudent Alternatives" that will avoid jeopardy and allow the agency to proceed with the

action. The Services may also "suggest modifications" to the action (called Reasonable and Prudent Measures) during the course of consultation to "avoid the likelihood of adverse effects" to the listed species even when not necessary to avoid jeopardy. 50 C.F.R. § 402.13.

57. The ESA further provides that after federal agencies initiate consultation, the agencies "shall not make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would not violate subsection (a)(2) of this section." 16 U.S.C. § 1536(d). The purpose of this prohibition is to maintain the environmental status quo pending the completion of consultation.

58. The ESA's citizen suit provision authorizes citizens to commence suit against, *inter alia*, federal agencies that are alleged to be in violation of any provision of the Act. 16 U.S.C. § 1540(g)(1)(A).

VI. The Administrative Procedure Act

59. The Administrative Procedure Act ("APA") imposes procedural requirements on federal agency rulemaking. 5 U.S.C. § 553. Under the APA, agencies are required to publish notice of proposed rules in the Federal Register, including "the terms or substance of the proposed rule or a description of the subjects and issues involved." *Id.* § 553(b)(3).

60. Following notice of a proposed rulemaking, agencies are required to provide the public with the opportunity to submit "written data, views, or arguments" which must then be considered and responded to by the agency. 5 U.S.C. § 554(c).

61. APA section 702 provides a private cause of action to any person "suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute." 5 U.S.C. § 702.

62. Only final agency actions are reviewable under the APA. 5 U.S.C. §

704. Promulgation of a final rule is a "final agency action" for APA purposes.

63. Under the APA, a court must "hold unlawful and set aside agency actions, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;" "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;" or "without observance of procedure required by law." 5 U.S.C. § 706(2)(A), (C), (D).

GENERAL FACTUAL ALLEGATIONS

I. General Factual Background

64. As the Agencies correctly noted in the preamble to the Proposed Clean Water Rule,

> "Waters of the United States," which include wetlands, rivers, streams, lakes, ponds and the territorial seas, provide many functions and services critical for our nation's economic and environmental health. In addition to providing habitat, rivers, lakes, ponds and wetlands cleanse our drinking water, ameliorate storm surges, provide invaluable storage capacity for some flood waters, and enhance our quality of life by providing myriad recreational opportunities, as well as important water supply and power generation benefits.

79 Fed. Reg. at 22,191.

65. Many types of waters are connected in a hydrologic cycle, and a key purpose of the CWA is to ensure protections for waters that may not themselves be navigable in fact, but which affect such waters. As EPA's own Office of Research and Development has summarized,[2]

- "The scientific literature unequivocally demonstrates that streams, individually or cumulatively, exert a strong influence on the integrity of downstream waters. All tributary streams, including perennial, intermittent, and ephemeral streams, are physically, chemically, and biologically connected to downstream

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[2] U.S. EPA, Office of Research and Development, Connectivity of Streams & Wetlands to Downstream Waters: A Review & Synthesis of the Scientific Evidence (January 2015) at ES-3, 4, *available at* http://cfpub.epa.gov/ncea/cfm/recordisplay.cfm?deid=296414.

rivers via channels and associated alluvial deposits where water and other materials are concentrated, mixed, transformed, and transported."

- "The literature clearly shows that wetlands and open waters in riparian areas and floodplains are physically, chemically, and biologically integrated with rivers via functions that improve downstream water quality, including the temporary storage and deposition of channel-forming sediment and woody debris, temporary storage of local ground water that supports baseflow in rivers, and transformation and transport of stored organic matter."

- Wetlands and open waters in non-floodplain landscape settings (hereafter called "non-floodplain wetlands") provide numerous functions that benefit downstream water integrity. These functions include storage of floodwater; recharge of ground water that sustains river baseflow; retention and transformation of nutrients, metals, and pesticides; export of organisms or reproductive propagules to downstream waters; and habitats needed for stream species. This diverse group of wetlands (e.g., many prairie potholes, vernal pools, playa lakes) can be connected to downstream waters through surface-water, shallow subsurface-water, and ground-water flows and through biological and chemical connections."

66. In addition, EPA's own Scientific Advisory Board (SAB) has concluded that "groundwater connections, particularly via shallow flow paths in unconfined aquifers, can be critical in supporting the hydrology and biogeochemical functions of wetlands and other waters. Groundwater also can connect waters and wetlands that have no visible surface connections."[3]

67. Many types of waters excluded from CWA jurisdiction by the Clean Water Rule provide important habitat for fish, wildlife and threatened and

[3] Letter from Dr. David T. Allen, Chair, EPA Science Advisory Board, to EPA Administrator Gina McCarthy, *Science Advisory Board (SAB) Consideration of the Adequacy of the Scientific and Technical Basis of the EPA's Proposed Rule titled "Definition of Waters of the Untied States under the Clean Water Act"* (Sept. 30, 2014), at 2-3, *available at* http://yosemite.epa.gov/sab/sabproduct.nsf/0/518D4909D94CB6E585257D6300767DD6/$File/EPA-SAB-14-007+unsigned.pdf.

endangered species. For example, salmon and steelhead in the Pacific Northwest regularly use and require certain types of streams, ditches and ditched or channelized streams during their life cycle. Small wetlands and ponds are important habitat for numerous amphibians and reptiles. Moreover, fish, wildlife, and threatened and endangered species found within traditionally navigable waters are often very sensitive to pollution are harmed from the cumulative impacts to headwater tributaries and wetlands upstream. These species have the potential to receive less or no protection against pollution or destruction under the Clean Water Rule than they did under the Agencies' prior definition of "waters of the United States."

68. At the same time, other types of waters which are afforded greater protection under the Clean Water Rule than under the prior regulatory definition also provide habitat for numerous ESA-listed species. For example, several categories of wetlands, including prairie potholes, Carolina and Delmarva bays, pocosins, western vernal pools in California, and Texas coastal prairie wetlands provide habitat for endangered species such as whooping cranes, Northern Great Plains piping plovers, and prairie shrimp, among others.

II. The Clean Water Rule

69. On April 21, 2014, the Agencies published in the Federal Register a proposed rule entitled *Definition of 'Waters of the United States' Under the Clean Water Act* ("Proposed Clean Water Rule"). 79 Fed. Reg. 21,188–22,274 (Apr. 21, 2014).

70. The Proposed Clean Water Rule provided the public with an opportunity to file comments until July 21, 2014. The comment period was extended twice, ultimately requiring comments to be filed not later than November 14, 2014. *See* 79 Fed. Reg. 35,712 (June 24, 2014); 79 Fed. Reg. 61,590 (Oct. 14, 2014).

71. Each plaintiff in this action submitted written comments on the Proposed Clean Water Rule during the public comment period, including at least

the following: a letter dated November 14, 2014 and submitted electronically to EPA Docket No. EPA-HQ-OW-2011-0880 on behalf of Waterkeeper Alliance, Humboldt Baykeeper, Russian Riverkeeper, Monterey Coastkeeper, Snake River Waterkeeper, Upper Missouri Waterkeeper, and others; a letter dated November 14, 2014 and submitted electronically to EPA Docket No. EPA-HQ-OW-2011-0880 on behalf of Center for Biological Diversity, Center for Food Safety, and Turtle Island Restoration Network; and a letter dated November 14, 2014 and submitted electronically to EPA Docket No. EPA-HQ-OW-2011-0880 on behalf of Center for Biological Diversity and others.

72. On June 29, 2015, the Agencies issued the final Clean Water Rule. 80 Fed. Reg. 37054 (June 29, 2015). The Clean Water Rule revised eleven regulatory provisions where the phrase "waters of the United States" is defined, 40 C.F.R. Parts 110, 112, 116, 117, 122, 230, 232, 300, 301, and 401, which govern various regulatory programs implemented by EPA or the Corps under their CWA authorities.

73. The Clean Water Rule effectively placed all of the nation's waters into one of three categories for purposes of CWA jurisdiction:

(1) Waters that are ***per se jurisdictional***, including traditional navigable waters; interstate waters; the territorial seas; tributaries (as defined elsewhere in the rule) of traditional navigable waters, interstate waters, and territorial seas; impoundments of other jurisdictional waters; and all waters that are adjacent to (as defined elsewhere in the rule) the waters described above;

(2) Waters that are ***per se non-jurisdictional***, including (among others) waters converted to waste treatment systems; certain types of ditches; ephemeral features that do not meet the definition of a tributary; groundwater; and waters outside the 100-year floodplain and more than 4,000 feet of the high tide line or ordinary high water mark of a traditional navigable water, interstate water, the territorial seas, impoundment of other jurisdictional waters, or tributary; and

> (3) Waters which will be assessed for jurisdiction on a case-specific basis by applying a ***significant nexus analysis***, including (among others) all adjacent waters being used for established normal farming, ranching, and silviculture activities; all of certain categories of waters, including prairie potholes, pocosins, and western vernal pools; all waters within the 100-year floodplain of a traditional navigable water, interstate waters, or the territorial seas; and all waters located within 4,000 feet of the high tide line or ordinary high water mark of a traditional navigable water, interstate water, the territorial seas, impoundment of other jurisdictional waters, or tributary.

See 80 Fed. Reg. at 37,104. Substantially the same definition of waters of the United States was incorporated into the relevant definition sections of eleven separate regulations implementing the CWA. *See id.* at 37,104-127.

74. On July 13, 2015, the Clean Water Rule became a "final agency action" within the meaning of 5 U.S.C. § 704.

75. On May 26, 2015, the Corps issued a Final EA on the Clean Water Rule.[4] As part of its EA, the Corps issued a FONSI after concluding "that adoption of the rule is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act for which an environmental impact statement is required." *Id.*

III. Tributaries under the Final Clean Water Rules

76. The Clean Water Rule defines "tributary" as "a water that contributes flow, either directly or through another water" to a traditional navigable water, interstate water, or territorial seas, and "that is characterized by the presence of the physical indicators of a bed and banks and an ordinary high water mark." 80 Fed. Reg. at 37,105; 33 C.F.R. § 328.3(c)(3). As the Agencies explain in the preamble to the Clean Water Rule, this definition "requires the presence of a bed and banks

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[4] *See* Finding of No Significant Impact: Adoption of the Clean Water Rule: Definition of Waters of the United States (May 26, 2015), *available at* http://www2.epa.gov/sites/production/files/2015-05/documents/finding_of_no_significant_impact_the_clean_water_rule_52715.pdf. (hereinafter, "FONSI").

and an additional indicator of ordinary high water mark such as staining, debris deposits, or other indicator[.]" 80 Fed. Reg. at 37,076 (emphasis added).

77. As EPA has noted, the definition of tributary in the Clean Water Rule "narrows the waters that meet the definition of tributary compared to current practice that simply requires one indicator of ordinary high water mark"—e.g., the presence of defined bed and banks.[5]

78. The Clean Water Rule's definition of tributary, which includes only those waters that have a bed and banks *and* an additional indicator of an ordinary high water mark, lacks legal and scientific support. EPA's Scientific Advisory Board "advised EPA to reconsider the definition of tributaries because not all tributaries have ordinary high water marks" and urged EPA to change the definition's wording to "bed, bank, and other evidence of flow." 80 Fed. Reg. at 37,064. The Scientific Advisory Board explained that "[a]n ordinary high water mark may be absent in ephemeral streams within arid and semi-arid environments or in low gradient landscapes where the flow of water is unlikely to cause an ordinary high water mark."[6]

79. EPA's own scientific analyses underpinning the Clean Water Rule do not provide support for the requirement that a tributary have both bed and banks and an ordinary high water mark to have a significant nexus with downstream waters and thus be per se jurisdictional under the CWA. While EPA noted that available science "supports the conclusion that sufficient volume, duration, and frequency of flow are required to create a bed and banks and ordinary high water mark" within a tributary, TSD at 171, this self-evident conclusion has no bearing on whether a particular tributary (or group of similarly situated tributaries)

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[5] U.S. EPA and U.S. Dept. of the Army, *Technical Support Document for the Clean Water Rule: Definition of Waters of the United States* (May 27, 2015) at 67 (hereinafter, "TSD").

[6] Letter from Dr. David T. Allen, *supra* note 3, at 2.

"provide[s] many common vital functions important to the chemical, physical, and biological integrity of downstream waters" and should thus be per se jurisdictional. *Id*. at 235. Indeed, the TSD explicitly recognized, and did not dispute, the SAB's view that "from a scientific perspective there are tributaries that do not have an ordinary high water mark but still affect downstream waters." *Id*. at 242.

IV. Ditches and Ephemeral Features under the Proposed and Final Clean Water Rules

80. In its Proposed Clean Water Rule, EPA stated that certain ditches meet the definition of "tributary," and are therefore "waters of the United States," if they satisfy the following criteria: "they have a bed and banks and ordinary high water mark and they contribute flow directly or indirectly through another water to (a)(1) through (a)(4) waters." 79 Fed. Reg. at 22,203.

81. Under the Proposed Clean Water Rule, two types of ditches were *per se* excluded, regardless of whether they satisfied the requirements of another category of "water of the United States": (1) "[d]itches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow," and (2) "[d]itches that do not contribute flow, either directly or through another water, to a traditional navigable water, interstate water, the territorial seas or an impoundment of a jurisdictional water." 79 Fed. Reg. at 22,273–74. The Proposed Rule also exempted gullies, rills, and "non-wetland swales." *Id.* at 22,263.

82. The SAB provided comments on this aspect of the Proposed Clean Water Rule, and specifically rejected the Rule's exclusion of ditches as "not justified by science." The SAB explained: "There is . . . a lack of scientific knowledge to determine whether ditches should be categorically excluded. Many ditches in the Midwest would be excluded under the proposed rule because they were excavated wholly in uplands, drain only uplands, and have less than perennial flow. However, these ditches may drain areas that would be identified as wetlands under the

Cowardin classification system and may provide certain ecosystem services." SAB Report at 3.

83. Members of the SAB panel also expressed concerns regarding the Proposed Clean Water Rule's exclusion of ephemeral streams, noting for example that such waters are ecologically important to downstream water quality (especially in the arid southwest), *see supra* paragraph 66 and n.5; can deliver nutrients and other agricultural pollutants to downstream waters when tiled;[7] and may provide valuable habitat for certain organisms that have adapted to them.[8]

84. In the final Clean Water Rule, the Agencies significantly altered the provision regarding ditches, changing the exclusion to include: "[d]itches with ephemeral flow that are not a relocated tributary or excavated in a tributary"; "[d]itches with intermittent flow that are not a relocated tributary, excavated in a tributary, or drain wetlands"; and, "[d]itches that do not flow, either directly or through another water, into a water identified in paragraphs (a)(1) through (3) of this section." 80 Fed. Reg. 37,105.

85. In the Clean Water Rule, the Agencies also significantly expanded the exclusion for ephemeral features so that it applies to "[e]rosional features, including gullies, rills, and other ephemeral features that do not meet the definition of tributary, non-wetland swales, and lawfully constructed grassed waterways." *Id.* In the Preamble to the Clean Water Rule, the Agencies explained that the term "ephemeral features" broadly encompasses "ephemeral streams that do not have a bed and banks and ordinary high water mark." *Id.* at 37,058.

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[7] Memorandum from Dr. Amanda D. Rodewald, Chair of the Science Advisory Board (SAB) Panel for the Review of the EPA Water Body Connectivity Report, to Dr. David Allen, Chair of the EPA Science Advisory Board, Comments to the Chartered SAB on the Adequacy of the Scientific and Technical Basis of the Proposed Rule Titled "Definition of 'Waters of the United States' Under the Clean Water Act" (Sep. 2, 2014) at 8.

[8] *Id.* at 25, Revised Comments by Kurt D. Fausch on the proposed rule "Definition of 'Waters of the United States' Under the Clean Water Act."

86. EPA's own scientific analyses underpinning the Clean Water Rule do not provide support for its categorical exemptions of certain types of ditches and ephemeral features. According to EPA, "[t]he scientific literature documents that tributary streams, *including perennial, intermittent, and ephemeral streams*, and certain categories of ditches are integral parts of river networks." TSD at 243 (emphasis added). In the preamble to the Proposed Clean Water Rule, EPA noted that "tributary streams, *including perennial, intermittent, and ephemeral streams*, are chemically, physically, or biologically connected to downstream rivers via channels and associated alluvial deposits where water and other materials are concentrated, mixed, transformed, and transported." 79 Fed. Reg. at 22224.

87. In the preamble to the final Clean Water Rule, EPA explained that the effects tributaries exert on downstream waters "occur even when the covered tributaries flow infrequently (such as ephemeral covered tributaries), and even when the covered tributaries are great distances from the traditional navigable water, interstate water, or the territorial sea." 80 Fed. Reg. at 37,069.

88. EPA has also noted that man-made and man-altered tributaries—such as "ditches, canals, channelized streams, piped streams, and the like," TSD at 256—"likely enhance the extent of connectivity" between streams and downstream rivers, "because such structures can reduce water losses from evapotranspiration and seepage." In other words, to the extent perennial, intermittent, and ephemeral tributaries have significant impacts on downstream waters, the increased flow associated with man-made or man-altered ditches may actually exacerbate these effects.

89. Despite noting the significant impacts that ditches and ephemeral streams have on downstream waters, the Agencies have provided no legal or scientific basis for excluding ditches that are ephemeral, intermittent, or indirectly connected to traditional navigable waters, interstate waters, or the territorial seas, nor have the Agencies provided a legal or scientific basis for *per se* excluding

ephemeral features such as ephemeral streams that do not meet the definition of tributary.

90. The Agencies provided no justification, legal, scientific or otherwise, for concluding that all tributaries are "waters of the United States," yet categorically exempting certain types of ditches—a category of tributary under the Clean Water Rule—and other ephemeral waters that may have a significant nexus with traditional navigable waters, interstate waters, or the territorial seas.

91. Finally, the Agencies have provided no legal or scientific basis for exempting ditches that flow into traditional navigable waters, interstate waters, or the territorial seas, despite concluding that such waters are "waters of the United States" in the Proposed Rule. *Compare* 79 Fed. Reg. 22,273–74 (excluding "[d]itches that do not contribute flow . . . to water identified in paragraphs (l)(1)(i) through (iv) of this section"), *with* 80 Fed. Reg. 37,105 (excluding "[d]itches that do not flow, either directly or through another water, into a water identified in paragraphs (a)(1) through (3) of this section").

V. Limits on the Application of the Significant Nexus Test under the Proposed and Final Clean Water Rules

92. In the final Clean Water Rule, the Agencies defined waters of the United States to include "all waters located within 4,000 feet of the high tide line or ordinary high water mark of" a per se jurisdictional water (other than adjacent waters), "where they are determined on a case-specific basis to have a significant nexus" with such water. 80 Fed. Reg. at 37,114.

93. Under the Clean Water Rule, most waters located *more than* 4,000 feet of the high tide line or ordinary high water mark of a per se jurisdictional water other than an adjacent water (hereinafter collectively referred to as "qualifying per se jurisdictional waters") are automatically excluded from CWA jurisdiction, even if those waters have or may possess a significant nexus with the jurisdictional water

or otherwise have a significant affect on interstate commerce.[9] *See* 80 Fed. Reg. at 37,086 (describing the "exclusive" and "narrowly targeted circumstances" under which case-specific significant nexus determinations can be made under the Clean Water Rule).

94. The Proposed Clean Water Rule did not include the 4,000-foot limitation—or any other distance limitation—on the application of the significant nexus test to other waters. Instead, the Proposed Rule would have extended CWA jurisdiction to all "other waters, including wetlands, provided that those waters alone, or in combination with other similarly situated waters, including wetlands, located in the same region, have a significant nexus to" traditional navigable waters, interstate waters, and the territorial seas. 79 Fed. Reg. at 22,268. For example, under the Proposed Rule, a wetland complex located 5,000 feet from a qualifying per se jurisdictional water could be subject to CWA jurisdiction if it was shown to possess a significant nexus with a traditional navigable water, an interstate water, or a territorial sea.

95. In the preamble to the Proposed Clean Water Rule, the Agencies identified and solicited public comment on several alternatives to their proposal to codify the significant nexus test as the basis for determining jurisdiction over all other non-adjacent waters. *See* 79 Fed. Reg. at 22214-17. None of these alternatives suggested the possibility that the Agencies might establish an outermost limit on the application of the significant nexus test at 4,000 feet, or might use any other distance as the basis for excluding waters from CWA jurisdiction.

96. In establishing the "4,000 foot bright line boundaries for these case-

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[9] Under the Clean Water Rule, a case-by-case significant nexus analysis also applies to five categories of waters that the Agencies "have determined are 'similarly situated' for purposes of a significant nexus determination" (such as prairie potholes and western vernal pools), as well as to waters within the 100-year floodplain of a traditional navigable water, interstate water, or territorial sea. 80 Fed. Reg. at 37,086.

specific significant nexus determinations" in the Clean Water Rule, the Agencies purport to be "carefully applying the available science." 80 Fed. Reg. at 37,059. But the opposite is true; indeed, as noted in the preamble to the Clean Water Rule, EPA's own Scientific Advisory Board "found that distance could not be the sole indicator used to evaluate the connection of 'other waters' to jurisdictional waters." *Id*. at 37,064.

VI. Adjacent Waters and Normal Farming Activities under the Proposed and Final Clean Water Rules

97. Prior to the Clean Water Rule, the Agencies considered all wetlands adjacent to a traditional navigable water to have a "significant nexus" to that water, in recognition of the fact that waters and their adjacent wetlands are properly viewed as one system due to their hydrological connection with one another. Thus, prior to the Proposed or Final Clean Water Rule, the Agencies considered all adjacent wetlands to be jurisdictional under the CWA.

98. Under both the Proposed and the Final Clean Water Rule, "waters of the United States" include all waters that are "adjacent" to a traditional navigable water, interstate water, territorial sea, impoundment of a jurisdictional water, or tributary. *See* 79 Fed. Reg. at 22,206-07; 80 Fed. Reg. at 37,058.

99. In the Proposed Clean Water Rule the Agencies proposed to define "adjacent" as follows:

> The term *adjacent* means bordering, contiguous or neighboring. Waters, including wetlands, separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are "adjacent waters."

79 Fed. Reg. at 22,270 (citing proposed 40 C.F.R. § 232.2).

100. In the preamble to the Proposed Clean Water Rule, the Agencies stated that the rule "does not affect any of the exemptions from CWA section 404 permitting requirements provided by CWA section 404(f), including those for

normal farming, silviculture, and ranching activities." 79 Fed. Reg. at 22,199 (citing 33 U.S.C. § 1344(f); 40 CFR 232.3; 33 CFR 323.4).

101. In the final Clean Water Rule, however, the Agencies added the following language to the definition of adjacent: "Waters being used for established normal farming, ranching, and silviculture activities (33 U.S.C. 1344(f)) are not adjacent." *See, e.g.*, 80 Fed. Reg. at 37,105; 33 C.F.R. § 328(c)(1).

102. This addition was made by EPA on "the day that the draft final rule was sent to OMB to begin the inter-agency review process"[10] and was not subjected to the Agencies' scientific review or the Corps' NEPA evaluation.

103. In the preamble to the Clean Water Rule, the Agencies state that the language added to the definition of adjacent "interprets the intent of Congress[.]" 80 Fed. Reg. at 37,080. But by enacting section 404(f) of the CWA, Congress sought to exempt discharges from certain types of *activities* from the requirement to obtain a permit pursuant section 404; it did not intend to remove any category of waters from the Act's jurisdiction.

104. As a result of this addition to the definition of "adjacent" from the Proposed Clean Water Rule to the final Clean Water Rule, waters being used for established normal farming, ranching, and silviculture activities now must satisfy the significant nexus test in order to be jurisdictional—even if they are physically adjacent to a traditional navigable water would therefore have been *per se* jurisdictional under the Proposed Clean Water Rule or prior agency practice.

105. The Agencies' only stated reasoning for this last-minute addition to the Rule is that farmers play a "vital role" in providing the United States with food, fiber, and fuel, and thus the Agencies wanted to "minimize potential regulatory

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[10] Memorandum from Lance Wood, Assistant Chief Counsel for Environmental Law and Regulatory Programs, U.S. Army Corps of Engineers, to Maj. Gen. John Peabody, Deputy Commanding General for Civil and Emergency Operations, U.S. Army Corps of Engineers, *Legal Analysis of Draft Final Rule on Definition of "Waters of the United States"* (Apr. 24, 2015) at 5.

burdens on the nation's agriculture community." 80 Fed. Reg. at 37,080. The Agencies do not attempt to explain how the CWA section 404(f)(1) exemption is related to "adjacent" waters; nor do the Agencies provide any scientific justification for changing how they treat waters adjacent to traditionally navigable waters.

106. In addition, in the preamble to the Clean Water Rule, the Agencies purport to include all waters "adjacent" to traditional navigable waters, interstate waters, and the territorial seas as waters of the United States "based upon their hydrological and ecological connections to, and interactions with, those waters." 80 Fed. Reg. at 37,058. But in the preamble to the Clean Water Rule the Agencies state that a wetland "being used for established normal farming, ranching, and silviculture activities" "shall not be combined" with other adjacent wetlands when conducting the significant nexus analysis, regardless of the hydrological connection between the wetlands or the effects that the entire wetlands system, as a whole, have on the chemical, physical, or biological integrity of adjacent traditional navigable waters, interstate waters, territorial seas, or tributaries.

107. Nothing in the record or the available science suggests that the mere presence established normal farming, ranching, and silviculture activities affects a water's hydrological and ecological connections to other waters.[11]

108. Moreover, nothing in the preamble to the Proposed Clean Water Rule suggested that the Agencies were considering the creation of an entirely new concept of adjacency that excludes all waters in which established normal farming, ranching, and silvicultural activities occur—even when those waters are bordering, contiguous, or neighboring another jurisdictional water as a matter of geographic fact. *See* 79 Fed. Reg. at 22,207-11.

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[11] *See* Wood Memorandum, *supra* note 8, at 5 (describing the addition of this sentence "indefensible," "a textbook example of rulemaking that cannot withstand judicial review," and "highly problematic, both as a matter of science and for purposes of implementing the final rule").

109. Indeed, nothing in the preamble to the Proposed Clean Water Rule even hinted that Agencies might conclude that established farming practices played any role whatsoever in identifying which waters are subject to CWA jurisdiction. *See, e.g., id*. at 22,210 ("The agencies proposal to determine 'adjacent waters' to be jurisdictional by rule is supported by the substantial physical, chemical, and biological relationship between adjacent waters" and other jurisdictional waters.) Instead, the Agencies noted that the "existing definition of 'adjacent' would be generally retained under" the Proposed Clean Water Rule. *Id*. at 22,207.

VII. Groundwater under the Proposed and Final Clean Water Rule

110. The Agencies have a longstanding and consistent interpretation that the CWA may cover discharges to groundwater that has a direct hydrological connection to surface waters. *See, e.g.*, *National Pollutant Discharge Elimination System Permit Application Regulations for Storm Water Discharges*, 55 Fed. Reg. 47990-01 (Nov. 16, 1990). This interpretation has been upheld by numerous courts.[12]

111. The Agencies proposed definition of "waters of the United States" excluded all "groundwater, including groundwater drained through subsurface drainage systems." 79 Fed. Reg. at 22,193. In the preamble to the Proposed Clean Water Rule, EPA explained that the reasoning behind this exclusion was that the agencies had never interpreted "waters of the United States" to include groundwater. *Id.* at 22,218.

112. The SAB provided comments on the proposed definition and specifically noted that there was no scientific justification for the groundwater

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[12] *See, e.g.*, *Friends of Santa Fe Cnty. v. LAC Minerals, Inc.*, 892 F. Supp. 1333, 1357-58 (D.N.M. 1995); *Washington Wilderness Coalition v. Hecla Mining Co.,* 870 F.Supp. 983, 990 (E.D. Wash.1994); *Sierra Club v. Colo. Ref. Co.,* 838 F.Supp. 1428, 1433–34 (D. Colo. 1993); *McClellan Ecological Seepage Situation v. Weinberger,* 707 F.Supp. 1182, 1195–96 (E.D. Cal.1988), *vacated on other grounds,* 47 F.3d 325 (9th Cir.1995), *cert. denied,* 516 U.S. 807, 116 S.Ct. 51, 133 L.Ed.2d 16 (1995); *New York v. United States,* 620 F.Supp. 374, 381 (E.D.N.Y.1985).

exclusion. *See* Letter from Dr. David T. Allen, *supra* note 3, at 3. The SAB went on to comment:

> The available science . . . shows that groundwater connections, particularly via shallow flow paths in unconfined aquifers, can be critical in supporting the hydrology and biogeochemical functions of wetlands and other waters. Groundwater also can connect waters and wetlands that have no visible surface connections.

Id.

113. Several individual members of the SAB further explained their concerns regarding the Proposed Clean Water Rule's categorical exclusion of all groundwater to EPA. For example, Dr. David Allen, chair of the SAB, questioned the exclusion because "an important pathway for some nutrients and contaminants is via subsurface drainage systems to ditches that may not have perennial flow, but which may deliver much of the nonpoint runoff to downstream waters", and concluded that "this exclusion is a concern, and should be recognized as such."[13]

114. Similarly, SAB member Dr. Robert Brooks stated that the groundwater exclusion "seems ill-advised because of the likely connectivity of surface flows into features such as karst sinkholes, with a potential to contaminate groundwater aquifers used for human water supplies, plus the possibility of reconnections to surface water a reasonable distance away." *Id.* at 17. And SAB member Dr. Kenneth Kolm concluded that "[i]n no cases should groundwater that is shown to be connected to 'waters of the US' be exempt." *Id.* at 49.

115. The Agencies ignored the expert advice of their scientific advisors, and included the *per se* exclusion of all "[g]roundwater, including groundwater drained through subsurface drainage systems" in the Final Clean Water Rule. *See* 80 Fed. Reg at 37,104, 37,114.

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[13] U.S. EPA, Compilation of Preliminary Comments from Individual Panel Members on the Scientific and Technical Basis of the Proposed Rule Titled "Definition of 'Waters of the United States' Under the Clean Water Act" (August 14, 2014) at 14.

116. Pursuant to this exclusion, groundwater that that has a significant nexus to a traditional navigable water, interstate water, or a territorial sea is not a water of the United States, even if it is immediately adjacent to and is directly connected that water.

117. In the preamble to the Clean Water Rule, the Agencies explained that their reasoning for categorically excluding all groundwater from the definition of "waters of the United States" is that they have never interpreted groundwater to fall within this definition, and that "[c]odifying these longstanding practices supports the agencies' goals of providing clarity, certainty, and predictability for the regulated public and regulators, and makes rule implementation clear and practical." 80 Fed. Reg at 37,073. Yet the Agencies categorically regulate all other waters that are adjacent to traditional navigable waters, interstate waters, the territorial seas, or their tributaries. The Agencies provided no legal or scientific basis for categorically excluding all groundwater from the definition of "waters of the United States."

VIII. Waste Treatment Systems under the Proposed and Final Clean Water Rule.

118. On May 19, 1980, EPA promulgated a rule establishing the requirements for several environmental permitting programs, including the NPDES program. *See* 45 Fed. Reg. 33,290 (May 19, 1980). As part of this action, EPA promulgated a definition of the term "waters of the United States." That rule stated that:

> Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the CWA (other than cooling ponds as defined in 40 C.F.R. § 423.11(m) which also meet the criteria of this definition) are not waters of the United States. *This exclusion applies only to manmade bodies of water which neither were originally created in waters of the United States (such as disposal area in wetlands) nor resulted from the impoundment of waters of the United States.*

45 Fed. Reg. 33,290, 33,424 (emphasis added); *see also* 40 C.F.R. § 122.3 (1980). The

preamble to this 1980 rule explains that the second sentence of this regulation was included "[b]ecause CWA was not intended to license dischargers to freely use waters of the United States as waste treatment systems[.]" 45 Fed. Reg. 33,290, 33,298.

119. Two months later EPA suspended the second sentence of this regulation (italicized above) by removing it from the regulation entirely. In its place, EPA inserted a footnote stating that the sentence was "suspended until further notice." 45 Fed. Reg. 48,620 (July 21, 1980). EPA explained in a Federal Register notice that it was suspending this sentence due to industry's objections that the regulation "would require them to obtain permits for discharges into existing waste water treatment systems, such as power plant ash ponds, which had been in existence for many years." *Id.*

120. EPA did not provide the public with an opportunity to comment on the suspension at the time the action was taken in 1980. Instead, EPA noted its intent to "promptly develop a revised definition and to publish it as a proposed rule for public comment. At the conclusion of that rulemaking, EPA will amend the rule, or terminate the suspension." *Id.*

121. EPA never developed a revised definition, and thus never submitted a proposed rule regarding this limitation on the waste treatment system exclusion for notice and comment. The public has therefore never had the opportunity to comment on or legally challenge the suspension of the sentence.

122. Due to the "suspension" of the second sentence of the waste treatment system exclusion found at 40 C.F.R. § 122.3 in 1980, subsequently promulgated regulatory definitions of "waters of the United States" did not include that sentence. As such, this suspension—and the Agencies' obligation to take action to resolve it—has seemingly been forgotten, as the Agencies continue to promulgate definitions of "waters of the United States" that do not, because of the ongoing suspension, contain this limitation on the exclusion for waste treatment systems.

123. The Proposed Clean Water Rule included the "suspended" second sentence of the waste treatment system exclusion, but noted in a footnote that the suspension was still in effect. *See* 79 Fed. Reg. at 22,268. In addition, in the preamble to the Proposed Clean Water Rule the Agencies purport to make only "ministerial" changes to the waste treatment system exclusion, and thus stated that were not seeking comment on this exclusion. *Id.* at 22,190, 22,217. However, these "ministerial" changes included the addition of a comma not in the existing exclusion.

124. The definition of "waters of the United States" in 40 C.F.R. § 122.2, as revised by the Clean Water Rule, provides that "[t]he following are not 'waters of the United States' even where they otherwise meet the terms of (1)(iv) through (viii) of the definition" [i.e., even if they are otherwise jurisdictional as impoundments, tributaries, adjacent waters, or waters with a significant nexus to traditional navigable waters, interstate waters, or the territorial seas]:

> Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the Clean Water Act. This exclusion applies only to manmade bodies of water which neither were originally created in waters of the United States (such as disposal area in wetlands) nor resulted from the impoundment of waters of the United States. [See Note 1 of this section.]

80 Fed. Reg. at 37,114. As it did before, "Note 1" of the revised 40 C.F.R. § 122.2 purports to continue the suspension of the last sentence of the waste treatment system exclusion.

125. In the Clean Water Rule, the Agencies lifted the suspension of the last sentence in 40 C.F.R. § 122.2's exclusion for waste treatment system, and then reinstated the suspension. *See* 80 Fed. Reg. at 37,114. The preamble to the Clean Water Rule describes the changes to the waste treatment system exclusion as "ministerial" and notes that "[b]ecause the agencies are not making any substantive changes to the waste treatment system exclusion, the final rule does not reflect changes suggested in public comments." *Id.* at 37,097.

126. However, the Agencies note in the preamble to the Clean Water Rule that they did, in fact, respond to comments that the addition of the comma narrowed the exclusion, by removing the comma. 80 Fed. Reg. at 37,114. Thus, the agencies responded to some substantive comments on the scope of the exclusion, but not others. Several plaintiffs submitted comments on the Proposed Clean Water Rule that were not addressed by the Agencies. And, moreover, in responding to some of the comments, the Agencies adopted a *broader* exclusion (e.g., excluding more waste treatment systems) than had been contemplated by the Proposed Rule.

127. The Clean Water Rule does not define "waste treatment systems." Thus, under the waste treatment system exclusion in the Final Rule (including the ongoing suspension of the last sentence of that exclusion), certain types of waters such as adjacent wetlands, ponds, or tributaries are not subject to CWA jurisdiction if they are deemed to be part of a "waste treatment system"— *even if* they are themselves naturally occurring waters, were created entirely within a naturally occurring water, or were created by impounding another water of the United States. For example, under the Clean Water Rule an industrial facility could unilaterally destroy CWA jurisdiction over a naturally occurring wetland or tributary merely by using that wetland or tributary as part of its on-site "waste treatment system." This exemption is contrary to the fundamental purposes of the CWA and flies in the face of any permissible reading of "waters of the United States." *See* 33 U.S.C. § 1251(a).

128. In the Preamble to the Clean Water Rule, the Agencies unambiguously recognize that adjacent waters, tributaries, and impoundments are jurisdictional by rule because "the science confirms that they have a significant nexus to traditional navigable waters, interstate waters, or territorial seas." 80 Fed. Reg. at 37,058, 37,075. Thus, the Agencies construe the Clean Water Rule as making these waters jurisdictional "in all cases" and suggest that "no additional analysis is required" to assert CWA jurisdiction over them. *Id.* at 37,058. These statements, however, are flatly contradicted by the waste treatment system exclusion, which excludes

adjacent waters, tributaries, and impoundments of jurisdictional waters (among others) that are deemed to be part of a "waste treatment system."

IX. Abandonment of "Other Waters" under the Clean Water Rule

129. For decades prior to the Clean Water Rule, the Agencies asserted jurisdiction over all other waters "the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce." *See, e.g.*, 33 C.F.R. § 328.3(a)(3) (2014). Under this regulatory definition, many waters of regional or national importance were properly afforded CWA protections, consistent with stated Congressional policy.

130. Among these previously protected "other waters" are closed basins in New Mexico that include many non-tributary rivers, streams and wetlands; wholly intrastate waters such as the Little Lost River in southern Idaho that does not flow into a traditionally navigable water but instead flows into the Snake River Plain Aquifer; and hundreds of "isolated" glacial kettle ponds such as those found on Cape Cod in Massachusetts that, in addition to being tourist attractions, are vital to protecting that region's drinking water.

131. Purportedly on the basis of a single sentence from the Supreme Court's decision in *SWANCC*, in the Clean Water Rule the Agencies "concluded that the general other waters provision in the existing regulation based on [Commerce Clause effects unrelated to navigation] was not consistent with Supreme Court precedent." TSD at 78 (citing SWANCC, 531 U.S. at 172). Thus, in the Clean Water Rule the Agencies rely almost exclusively on the significant nexus test. As a result, because many of these "other waters" are not themselves navigable in fact, and lie beyond 4,000 feet from otherwise jurisdictional navigable waters, tributaries, or adjacent wetlands, they are *per se* non-jurisdictional under the Clean Water Rule.

132. Elsewhere in the rulemaking record, however, the Agencies recognize that the Supreme Court in SWANCC "did not vacate (a)(3) of the existing

regulation" and that "[n]o Circuit Court has interpreted SWANCC to have vacated the other waters provision of the existing regulation." TSD at 77-78.

133. The Agencies do not provide any further factual, scientific, legal, or policy reasons for their change of course with respect to these other waters that are abandoned by the Clean Water Rule, notwithstanding the Agencies' decades-old practice of asserting jurisdiction over them.

X. The Corps' EA/FONSI for the Final Clean Water Rule

134. Concurrently with the issuance of the Clean Water Rule, the Corps released its Final EA and FONSI, in which the Corps concluded that the adoption of the Final Rule would not significantly affect the quality of the human environment and thus an EIS was not required. FONSI at 1.

135. The Corps based its FONSI largely upon an analysis in which it purported to review a random selection of 188 "negative jurisdictional determinations" made by Corps personnel in the years 2013 and 2014. Purportedly based upon this review, the Corps estimated that "there would be an increase of between 2.8 and 4.6 percent in the waters found to be jurisdictional with adoption of the rule." Final EA at 21. These assumptions echo statements found in the Agencies' economic analysis of the Final Rule, which states that "increases in jurisdictional determinations ranging from a 2.84 percent to a 4.65 percent relative to recent practice, utilizing the FY13 and FY14 jurisdictional determination dataset."[14]

136. However, the analyses referenced in the Final EA and the Economic Analysis were incomplete; they only looked at *negative* jurisdictional determinations that might become *positive* under the Clean Water Rule; they did not consider

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[14] U.S. EPA and U.S. Army Corps of Engineers, *Economic Analysis of the EPA-Army Clean Water Rule* (May 20, 2015) at 14 (hereinafter, "Economic Analysis").

whether any waters found to be jurisdictional under then-current policy might be found non-jurisdictional under the Final Rule:

> Reviewing how current positive JDs may become negative as a result of the final rule was determined to be outside the scope of this analysis. Analyzing only negative JDs allows for an estimation of only the potential increase in assertion of CWA jurisdiction, as viewed through the lens of CWA 404 activity during the baseline period of these fiscal years. The agencies recognize that the rule may result in some currently-jurisdictional waters being found to be non-jurisdictional.

Economic Analysis at 7-8.

137. The Final EA and the Economic Analysis, and in particular their reliance on the Agencies' analysis of prior negative jurisdictional determinations as the basis for a "no significant impact" finding, was deeply flawed. With respect to the Economic Analysis of the Clean Water Rule, one senior Corps officer stated:

> [T]he Corps data provided to EPA has been selectively applied out of context, and mixes terminology and disparate data sets. . . . In the Corps' judgment, the documents contain numerous inappropriate assumptions with no connection to the data provided, misapplied data, analytical deficiencies, and logical inconsistencies.[15]

138. Other analyses in the record refute the Agencies' conclusion that there will be a net increase in the number of waters found to be jurisdictional under the Clean Water Rule. For example, a technical analysis performed by Jennifer Moyer, Acting Chief of the Corps' Regulatory Program, concluded that as many as 10% of wetlands previously found to be jurisdictional would *lose* their CWA protections as a result of the Clean Water Rule. In fact, the preamble to the Rule expressly recognizes that the scope of CWA jurisdiction under the Clean Water Rule "is narrower than that under the existing regulation." 80 Fed. Reg. at 37,054.

[15] Memorandum from Maj. Gen. John Peabody, Deputy Commanding General for Civil and Emergency Operations, U.S. Army Corps of Engineers, to Jo-Ellen Darcy, Assistant Secretary of the Army for Civil Works (May 15, 2015).

139. The Final EA barely mentions impacts to fish and wildlife resulting from promulgation of the Clean Water Rule, and gives no particular attention to threatened or endangered species protected by the Endangered Species Act ("ESA"). *See* Final EA at 24. In a cursory two-paragraph discussion, the Final EA merely references the dubious "additional protections associated with the incremental increase" in the amount of waters covered by the CWA as a result of the Clean Water Rule, and presumes that there would be an "expected . . . beneficial impact on fish and wildlife for which the protected waters provide habitat." *Id.*

140. The Corps undertook no NEPA analysis whatsoever for they Delay Rule. It did not consider or assess the likely impacts from delaying by two years the Clean Water Rule's *per se* protections for certain tributaries, adjacent wetlands, and other waters, nor did it consider or assess the impacts of delaying by two years the Agencies' ability to assert jurisdiction over categories of waters like prairie potholes, Carolina and Delmarva bays, pocosins, western vernal pools in California, and Texas coastal prairie wetlands that provide important habitat for many aquatic species, including threatened and endangered species.

XI. The Agencies Failure to Consult under the ESA

141. Although the Clean Water Rule results in the loss of CWA protections for certain tributaries, potentially thousands of miles of ditches and ephemeral streams, thousands of acres of wetlands that lie more than 4,000 feet from a traditionally navigable water, and other waters that provide habitat for dozens of ESA-listed threatened and endangered species, the Agencies failed to consult with the Services under Section 7(a)(2) of the ESA prior to the promulgation of the Clean Water Rule.

142. Further, although the Delay Rule postpones the effective date of the Clean Water Rule by two years—effectively denying per se jurisdiction under the CWA to waters such as tributaries and adjacent wetlands, which provide vital habitat for numerous ESA-listed species—the Agencies failed to consult with the

Services under Section 7(a)(2) of the ESA prior to the promulgation of the Delay Rule.

XII. Litigation over the Clean Water Rule

143. Until recently, the question of which court has jurisdiction over challenges to the Clean Water Rule remained in dispute. In the wake of the rule's promulgation, more than a dozen suits were filed in various district courts under the Administrative Procedure Act, and 14 separate petitions for judicial review were filed under CWA section 509(b), 33 U.S.C. 1369(b). While the district court cases proceeded independently, the petitions for judicial review were consolidated and transferred to the Sixth Circuit, which held that it had exclusive jurisdiction over the matter. *In re Clean Water Rule: Definition of Waters of U.S.*, 817 F.3d 261, 264 (6th Cir. 2016). However, the Supreme Court reversed that decision in a unanimous opinion, and remanded the case to the Sixth Circuit to dismiss the consolidated petitions for review. *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617 (2018).

144. By order dated February 28, 2018, the Sixth Circuit dismissed the consolidated judicial review actions for lack of jurisdiction, and simultaneously dissolved the nationwide stay of the Clean Water Rule it had put in place on October 9, 2015. *In re Clean Water Rule*, 713 Fed. Appx. 489 (Feb. 28, 2018).

145. At least three other district court actions challenging the Clean Water Rule have been revived since the Supreme Court's decision in *National Association of Manufacturers*. All of those suits were filed by states opposed to the Clean Water Rule in its entirety, and none of them include ESA claims such as those Plaintiffs allege here. *North Dakota v. EPA*, No. 15-cv-00059 (D.N.D. filed June 29, 2015); *Georgia v. Pruitt*, No. 15-cv-00079 (S.D. Ga. filed June 30, 2015); *Texas v. EPA*, No. 3:15-cv-162 (S.D. Tex. filed June 29, 2015).

XIII. The Delay Rule and the Agencies' Efforts to Roll Back Clean Water Act Protections

146. In the wake of the 2016 presidential election and the resulting change in administration, the Agencies' new leadership made clear their intent to

significantly curtail the jurisdictional reach of the CWA. On February 28, 2017, President Donald Trump signed Executive Order 13778, instructing the Agencies to review the Clean Water Rule and to "publish for notice and comment a proposed rule rescinding or revising the rule, as appropriate and consistent with law." 82 Fed. Reg. 12,497 (March 3, 2017). That Executive Order was immediately followed by the publication of the Agencies' Notice of Intention To Review and Rescind or Revise the Clean Water Rule, providing advance notice of their forthcoming rulemaking. 82 Fed. Reg. 12,532 (March 6, 2017).

147. The Agencies have described what they intend to be a two-step process to review and revise the definition of "waters of the United States": First, promulgation of a rule rescinding the Clean Water Rule and recodifiying the regulatory definition that existed before the 2015 Clean Water Rule, as modified by the Agencies' undisclosed interpretations of caselaw, agency practice and unidentified policy documents; and second, a rulemaking in which the Agencies will conduct a substantive reevaluation of the definition—and, presumably, attempt to narrow the reach of the CWA.

148. The Agencies initiated "step one" of their approach in July 2017 with a proposed rule which, if finalized, would effectively rescind the Clean Water Rule and replace it with the "exact same regulatory text that existed prior to" that rule, as modified by "applicable guidance documents (e.g., the 2003 and 2008 guidance documents, as well as relevant memoranda and regulatory guidance letters), and consistent with the SWANCC and Rapanos Supreme Court decisions, applicable case law, and longstanding agency practice." Proposed Rule, *Definition of "Waters of the United States"—Recodification of Pre-Existing Rules*, 82 Fed. Reg. 34,899, 34,900, 34,903 (July 27, 2017) ("Proposed Repeal Rule"). The Agencies accepted comments on the Proposed Repeal Rule through September 27, 2017, but a final Repeal Rule has not been promulgated.

149. The Agencies claim to have initiated "step two" of their plan in late

2017 by engaging in stakeholder outreach, initiating consultation with state, local, and tribal governments, and soliciting recommendations on an entirely new definition of waters of the United States. The Agencies have not published a proposed rule as a result of this effort. *See* EPA, Waters of the United States: Rulemaking Process, at https://www.epa.gov/wotus-rule/rulemaking-process.

150. Struggling to find either a rational legal basis for the wholesale rescission of the Clean Water Rule or coherent and timely administrative process for their intended "step one" and "step two" rulemakings, the Agencies published the Proposed Delay Rule on November 22, 2017, and made it available for a 21-day public comment period. 82 Fed. Reg. 55,542 (Nov. 22, 2017). The Agencies sought comment only on "whether it is desirable and appropriate to add an applicability date" to the Clean Water Rule, and not on the underlying substantive definition of the statutory phrase "waters of the United States" or other matters the Agencies intend to address under their two-step process. *Id*. at 55544-45.

151. Plaintiffs submitted comments on the Proposed Delay Rule by letter dated December 13, 2017.

152. Less than eleven weeks after the proposed rule was published, the final Delay Rule was promulgated. *Definition of "Waters of the United States"–Addition of an Applicability Date to 2015 Clean Water Rule*, 83 Fed. Reg. 5200 (Feb. 6, 2018). The Agencies received approximately 4,600 comments on the proposed rule, which they claim to have "carefully considered" during the eight weeks between the close of the comment period and publication of the final Delay Rule. *Id*. at 5203.

153. As the Agencies note in the preamble to the Delay Rule, they are currently enjoined from enforcing the Clean Water Rule in thirteen states, due to a

preliminary injunction issued by the U.S. District Court for the District of North Dakota.[16]

154. This injunction, the Agencies contend, when combined with other litigation over the Clean Water Rule, is "likely to lead to uncertainty and confusion as to the regulatory regime applicable, and to inconsistencies between the regulatory regimes applicable in different States, pending further rulemaking by the agencies." 83 Fed. Reg. at 5202. Hence the Agencies' stated purpose for the Delay Rule is to establish an interim framework by which "the scope of CWA jurisdiction will be administered nationwide exactly as it is now being administered by the agencies, and as it was administered prior to the promulgation of the 2015 Rule." *Id*.

155. The Agencies contend that the Delay Rule will ensure that "the scope of the CWA remains consistent nationwide" and that, pending further rulemaking, they will

> administer the regulations in place prior to the 2015 [Clean Water] Rule, and will continue to interpret the statutory term "waters of the United States" to mean the waters covered by those regulations, as they are currently being implemented, consistent with Supreme Court decisions and practice, and as informed by applicable agency guidance documents.

83 Fed. Reg. at 5200.

156. Uncertainty and inconsistency is in fact greatly increased by the Delay Rule, which returns the Agencies, the regulated community, and the general public to a vague definition of "waters of the United States", apparently including the current Administration's undisclosed interpretation of the prior definition which would be premised on conflicting case law and inconsistent agency interpretations of unidentified agency guidance, practice, letters, and memoranda. *See, e.g.*,

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[16] *See North Dakota v. EPA*, D.N.D. No. 15-cv-00059, Mem. Op. and Order Granting Pls' Mot. for Prelim. Inj. (Dkt. #70, Aug. 27, 2015); Order Limiting the Scope of Prelim. Inj. to Plaintiffs (Dkt. #79, Sept. 4, 2015).

Lawrence Hurley, Supreme Court's murky CWA ruling created legal quagmire (Greewire, Feb. 7, 2011), at https://www.eenews.net/greenwire/stories/1059944930/.

157. As they readily admit, the Agencies now propose to identify and define waters of the United States primarily by following the prior regulatory definition of "waters of the United States," as interpreted by case law and their 2001 and 2008 guidance documents issued in the wake of the *SWANCC* and *Rapanos* decisions. 83 Fed. Reg. at 5201.[17] Those guidance documents require the Agencies' and their field staff to undertake a resource intensive, case-by-case assessment for a huge number of arguably jurisdictional waters such as intermittently flowing tributaries and wetlands adjacent to such tributaries. *See, e.g., Rapanos* Guidance at 4, 8 (explaining that for many waters the Agencies will assert jurisdiction "on a case-by-case basis, based on the reasoning of the *Rapanos* opinions."). The Agencies' also plan to use their unexplained interpretation of caselaw they deem relevant, as well as other undisclosed agency guidance, practice, letters, and memoranda.

158. In its review of the *Rapanos* Guidance the Agencies now propose to implement, the U.S. Fish and Wildlife Service expressed its concern that "Corps Districts may implement the guidance inconsistently across the Nation due to language that appears open to subjective interpretation, potentially leading to increased degradation/destruction of waters." Fish and Wildlife Service, Comments on EPA and Corps Guidance Regarding Clean Water Act Jurisdiction Following Rapanos/Carabel (Feb. 5, 2008), *available at*

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[17] Citing Joint Memorandum providing clarifying guidance regarding the Supreme Court's decision in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001) ("*SWANCC*"), available at 68 FR 1991, 1995 (Jan. 15, 2003) (hereinafter "*SWANCC* Guidance") and Joint Memorandum, "Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States & Carabell v. United States*," (signed December 2, 2008), available at https://www.epa.gov/sites/production/files/2016-02/documents/cwa_jurisdiction_following_rapanos120208.pdf (hereinafter "*Rapanos* Guidance").

https://www.fws.gov/habitatconservation/rapanos_carabell/DOI_comments_on_post_Rapanos_Guidance.pdf.

159. The Agencies' intention to rely on undisclosed agency guidance, practice, letters, and memoranda and "relevant" post-*Rapanos* case law only adds to the uncertainty and confusion. As the Ninth Circuit has recently explained, the fractured decision in *Rapanos*

> paints a rather complex picture, and one where without more it might not be fair to expect a layman of normal intelligence to discern what was the proper standard to determine what are waters of the United States.

United States v. Robertson, 875 F.3d 1281, 1289 (9th Cir. 2017). The courts of appeals "have adopted different approaches" to CWA jurisdiction, giving rise to "competing precedents interpreting *Rapanos*, and further uncertainty engendered" by subsequent appellate decisions. *Id*. at 1289-90.

160. Within some circuits, absent a promulgated definition of "waters of the United States," CWA jurisdiction requires a showing of a significant nexus, consistent with Justice Kennedy's concurring opinion in *Rapanos*. Within others, jurisdiction may also be shown with a "continuous surface connection" as described in Justice Scalia's plurality opinion. Some courts have foresworn either test and have instead relied on the Agencies' prior regulatory definition or pre-*Rapanos* case law. In the words of Chief Justice Roberts, "[l]ower courts and regulated entities . . . now have to feel their way on a case-by-case basis." Rapanos, 547 U.S. at 758.

161. With the Delay Rule in place, therefore, CWA jurisdiction is potentially subject to eleven different formulations based on the caselaw alone, and the Agencies' intent to assert impermissible, unfettered discretion by relying on undisclosed agency guidance, practice, letters, and memoranda to establish the bounds of CWA jurisdiction will result in even greater confusion and conflict.

162. The Agencies themselves previously stated that a purpose of the Clean Water Rule was to place parameters "on waters requiring a case-specific determination" and to create a "clearer definition of significant nexus [to] address the concerns about uncertainty and inconsistencies" 80 Fed. Reg. at 37,095.

163. The Delay Rule does not adopt the Agencies' Proposed Repeal Rule. The Delay Rule does not recodify the prior regulatory definition of "waters of the United States", nor does it create any new regulatory definition that the Agencies will follow during the two-year delay period.

164. In promulgating the Delay Rule, the Agencies asserted that they "are under no obligation to address the merits of the [Clean Water] Rule because the addition of an applicability date to the [Clean Water] Rule does not implicate the merits of that rule." 88 Fed. Reg. at 5205. Thus, the Agencies did not respond to the substance of Plaintiffs' comments on the Proposed Delay Rule with respect to (a) the potential for the Delay Rule to result in the degradation or destruction of significant critical habitat for ESA-listed species; (b) the myriad flaws found in the Agencies' cursory, 5-page economic analysis of the costs and benefits of the Delay Rule; and (c) the Agencies' failure to comply with the CWA, APA, ESA and NEPA, among other comments.

165. Even though promulgation of the Delay Rule will significantly affect the quality of the human environment, the Corps did not engage in any sort of NEPA review prior to its promulgation. The Corps did not assess any alternatives to the Proposed Delay Rule; did not analyze any direct, indirect, or cumulative impacts of the rule's promulgation; and did not prepare either an environmental assessment or an environmental impact statement.

166. Even though promulgation of the Delay Rule is an action that may affect ESA-listed species, the Agencies did not engage in either formal or informal consultation with the Services under Section 7 of the ESA prior to promulgating the Delay Rule, nor did they take any further action to ensure that the Rule will not

jeopardize the continued existence of ESA-listed species or the lead to the destruction or adverse modification of critical habitat.

FIRST CLAIM FOR RELIEF
Clean Water Rule:
Violations of the National Environmental Policy Act and the Administrative Procedure Act

167. The preceding paragraphs are incorporated herein by reference as if fully set forth below.

168. NEPA regulations require that EAs include a "brief discussions of the need for the proposal, of alternatives as required by [NEPA], of the environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted." 40 C.F.R. § 1508.9.

169. NEPA regulations require that a FONSI "present[] the reasons why an action . . . will not have a significant effect on the human environment and for which an environmental impact statement therefore will not be prepared." 40 C.F.R. § 1508.13.

170. NEPA requires federal agencies to prepare an EIS for all "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(C).

171. The Agencies' promulgation of the Clean Water Rule is a major Federal action significantly affecting the quality of the human environment because the Final Rule fundamentally alters the CWA's regulatory landscape and establishes regulatory exclusions from the protections of the Act where none existed before.

172. The Clean Water Rule's effects on the environment are significant for the additional reasons that it affects the regulation of myriad activities in the proximity of "wetlands, wild and scenic rivers, or ecologically critical areas;" is "highly controversial;" establishes "a precedent for future actions with significant effects;" and may adversely affect numerous endangered species or their critical

habitat. 40 C.F.R. § 1508.27(b)(3), (4), (6), and (9).

173. The Corps' EA and FONSI were arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law under the APA, 5 U.S.C. § 706(2)(A), for at least the following reasons:

(a) The FONSI was based upon the incorrect assumption in the EA that the Clean Water Rule would increase jurisdictional determinations from 2.84 percent to 4.65 percent relative to recent agency practice, when in fact the Clean Water Rule is likely to lead to a *net decrease* in jurisdictional determinations of up to 10 percent;

(b) The FONSI was based largely upon the EPA's *Economic Analysis of the EPA-Army Clean Water Rule* (May 20, 2015), which in turn was based upon flawed, incomplete, or selectively-chosen data regarding waters found to be jurisdictional under current agency practice;

(c) The FONSI was reached without any consideration in the EA of several last-minute changes to the Clean Water Rule, including the exclusion of farmed wetlands from the definition of "adjacent" and the 4,000-foot distance limitation on the application of the case-by-case significant nexus analysis.

174. Moreover, the Corps' decision not to prepare an EIS for the Clean Water Rule was arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law under the APA, 5 U.S.C. § 706(2)(A), because the Corps failed to take a "hard look" at the potential environmental impacts of the Clean Water Rule and failed to provide a convincing statement of reasons why the potential effects of the Rule are insignificant.

SECOND CLAIM FOR RELIEF

Clean Water Rule: Violation of the Administrative Procedure Act
(Failure to Provide Sufficient Notice and Comment Opportunities)

175. The preceding paragraphs are hereby incorporated by reference as if

fully set forth below.

176. The APA requires that "[g]eneral notice of proposed rule making shall be published in the Federal Register," and that the notice include "either the terms or substance of the proposed rule or a description of the subjects and issues involved[.]" 5 U.S.C. §§ 553(b), (b)(3).

177. Once notice of a proposed rule has been given, an agency is required to "give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation." 5 U.S.C. § 553(c).

178. For the APA's notice requirements to be satisfied, a final rule need not be identical to the proposed rule, but it must at least be a "logical outgrowth" of the proposed rule. A final rule is a logical outgrowth of the proposed rule if "interested parties reasonably could have anticipated the final rulemaking" based on the proposed rule. *Natural Res. Def. Council v. U.S. E.P.A.*, 279 F.3d 1180, 1186 (9th Cir. 2002).

179. Multiple components of the Clean Water Rule were neither included in nor a logical outgrowth of the Proposed Rule, including at least the following:

A. The definition of "adjacent," which states that "[w]aters being used for established normal farming, ranching, and silviculture activities (33 U.S.C. 1344(f)) are not adjacent." *See, e.g.*, 80 Fed. Reg. at 37,105;

B. The 4,000-foot distance limit on the application of the significant nexus test included in subsection (a)(8) of the Clean Water Rule. *See, e.g.,* 80 Fed. Reg. at 37,105;

C. The per se exclusion of three categories of ditches from CWA jurisdiction. *See, e.g.,* 80 Fed. Reg. at 37,105;

D. The per se exclusion of "[e]rosional features, including . . . other ephemeral features that do not meet the definition of tributary." *See, e.g.,* 80 Fed. Reg. at 37,058, 37,099;

E. The suspension of the last sentence in the waste treatment system exclusion. *See, e.g.,* 80 Fed. Reg. at 37,097.

180. In addition, the Agencies responded to some substantive comments on the scope of the waste treatment exclusion system, but not others.

181. The Agencies' failure to provide sufficient notice and comment opportunities on these components of the Clean Water Rule violated the APA, 5 U.S.C. §§ 553(b), (b)(3), (c), and the Agencies' inclusion of these components in the Clean Water Rule was without observance of the procedures required by law. *Id.* § 706(2)(D).

THIRD CLAIM FOR RELIEF
Clean Water Rule: Violations of the Administrative Procedure Act
(Definition of "Tributary")

182. The preceding paragraphs are hereby incorporated by reference as if fully set forth below.

183. In the Clean Water Rule, the Agencies defined "tributary" as "a water that contributes flow, either directly or through another water" to a traditional navigable water, interstate water, or territorial seas, and "that is characterized by the presence of the physical indicators of a bed and banks and an ordinary high water mark." 80 Fed. Reg. at 37,105.

184. The Agencies' requirement that waters must have both bed and banks and an ordinary high water mark in order to meet the definition of "tributary" and therefore be jurisdictional under the CWA lacks scientific basis and is contrary to the recommendations of EPA's own Science Advisory Board.

185. The Agencies' requirement that tributaries must have both bed and banks and an ordinary high water mark in order to be jurisdictional under the CWA

is arbitrary and capricious, an abuse of discretion, and otherwise not in accordance with law within the meaning of the APA, and is in excess of the Agencies' statutory authority. 5 U.S.C. § 706(2)(A), (C).

FOURTH CLAIM FOR RELIEF

Clean Water Rule: Violation of the Administrative Procedure Act
(Exclusion of Ditches and Ephemeral Features from Clean Water Act Jurisdiction)

186. The preceding paragraphs are hereby incorporated by reference as if fully set forth below.

187. In the Clean Water Rule, the Agencies defined waters of the United States to exclude "[d]itches with ephemeral flow that are not a relocated tributary or excavated in a tributary"; "[d]itches with intermittent flow that are not a relocated tributary, excavated in a tributary, or drain wetlands"; "[d]itches that do not flow, either directly or through another water, into a water identified in paragraphs (a)(1) through (3) of this section"; and "[e]rosional features, including . . . other ephemeral features that do not meet the definition of tributary." 80 Fed. Reg. at 37,105.

188. There is no legal or scientific basis for *per se* excluding these categories of waters from CWA jurisdiction.

189. At a minimum, to the extent that these types of waters, either alone or in combination with other waters similarly situated, possess a significant nexus with traditional navigable waters, interstate waters, or the territorial seas, they are "waters of the United States" and therefore must be subject to the Act's protections. *See Rapanos*, 547 U.S. at 780.

190. The *per se* exclusion of these three categories of ditches and ephemeral streams from CWA jurisdiction is arbitrary and capricious, an abuse of discretion, and otherwise not in accordance with law within the meaning of the APA, and is in excess of the Agencies' statutory authority. 5 U.S.C. § 706(2)(A), (C).

FIFTH CLAIM FOR RELIEF

Clean Water Rule: Violation of the Administrative Procedure Act
(Exclusion of Waters More than 4,000 Feet Beyond the High Tide Line or Ordinary High Water Mark of Qualifying Waters from Clean Water Act Jurisdiction)

191. The preceding paragraphs are hereby incorporated by reference as if fully set forth below.

192. In the Clean Water Rule, the Agencies defined waters of the United States to include "all waters located within 4,000 feet of the high tide line or ordinary high water mark of" a qualifying per se jurisdiction water "where they are determined on a case-specific basis to have a significant nexus" with a traditional navigable water, an interstate waters, or a territorial sea. 80 Fed. Reg. at 37,114.

193. There is no legal or scientific basis for automatically excluding from CWA jurisdiction all waters more than 4,000 feet from a qualifying per se jurisdictional water.

194. At a minimum, to the extent that waters located more than 4,000 feet of the high tide line or ordinary high water mark of a qualifying per se jurisdiction water, either alone or in combination with other waters similarly situated, possess a significant nexus with traditional navigable waters, interstate waters, or the territorial seas, they are "waters of the United States" and therefore must be subject to the Act's protections. See *Rapanos*, 547 U.S. at 780.

195. The automatic exclusion from CWA jurisdiction of all waters more than 4,000 feet from a qualifying per se jurisdictional water is arbitrary and capricious, an abuse of discretion, and otherwise not in accordance with law within the meaning of the APA, and is in excess of the Agencies' statutory authority. 5 U.S.C. § 706(2)(A), (C).

SIXTH CLAIM FOR RELIEF
Clean Water Rule: Violation of the Administrative Procedure Act
(Exclusion of Waters in Which 404(f) Activities Occur from the Definition of "Adjacent")

196. The preceding paragraphs are hereby incorporated by reference as if

fully set forth below.

197. The Clean Water Rule defines "adjacent" in a manner that excludes "[w]aters being used for established normal farming, ranching, and silviculture activities[.]" See 80 Fed. Reg. at 37,080, 37,118. In the Clean Water Rule, the Agencies cite CWA section 404(f), 33 U.S.C. 1344(f),

198. By defining "adjacent" in this manner in the Clean Water Rule, the Agencies changed their long-standing policy regarding their treatment of adjacent farmed wetlands without any legal, scientific, or technical justification or support for the change.

199. Moreover, the Agencies' exclusion of waters in which established normal farming, ranching, and silviculture activities occur from the definition of "adjacent" is inconsistent with CWA section 404(f)(1)(A); that provision creates a limited permitting exemption for discharges of dredged or fill material only that result from "normal farming, silviculture, and ranching acvities[.]" 33 U.S.C. § 1344(f)(1)(A). That permitting exemption not affect the jurisdictional status of the waters into which the exempted discharges occur.

200. The Agencies' definition of "adjacent" in the Clean Water Rule is thus arbitrary and capricious, an abuse of discretion, and otherwise not in accordance with law within the meaning of the APA, and is in excess of the Agencies' statutory authority. 5 U.S.C. § 706(2)(A), (C).

SEVENTH CLAIM FOR RELIEF

Clean Water Rule: Violation of the Administrative Procedure Act
(Exclusion of Groundwater from Clean Water Act Jurisdiction)

201. The preceding paragraphs are hereby incorporated by reference as if fully set forth below.

202. The Clean Water Rule excludes "[g]roundwater, including groundwater drained through subsurface drainage systems" from the definition of waters of the United States. The Agencies have not provided any legal, scientific or technical basis to support this exclusion. The Agencies' own in-house scientific experts have

stated that there is no scientific justification for this exclusion.

203. At a minimum, to the extent that groundwater, either alone or in combination with other waters similarly situated, possesses a significant nexus with traditional navigable waters, interstate waters, or the territorial seas, it is a "water of the United States" and therefore must be subject to the CWA's protections. *See Rapanos*, 547 U.S. at 780.

204. The Agencies' exclusion of groundwater from CWA jurisdiction is arbitrary and capricious, an abuse of discretion, and otherwise not in accordance with law within the meaning of the APA, and is in excess of the Agencies' statutory authority. 5 U.S.C. § 706(2)(A), (C).

EIGHTH CLAIM FOR RELIEF

Clean Water Rule: Violation of the Administrative Procedure Act
(Exclusion of Waste Treatment Systems from Clean Water Act Jurisdiction)

205. The preceding paragraphs are hereby incorporated by reference as if fully set forth below.

206. The Clean Water Rule excludes "waste treatment systems" from the definition of waters of the United States, even where such systems would otherwise be jurisdictional as impoundments, tributaries, adjacent waters, or waters with a significant nexus to traditional navigable waters, interstate waters, or the territorial seas. 80 Fed. Reg. at 37,114; 40 C.F.R. § 122.2.

207. This waste treatment system exclusion is not limited to man-made bodies of water, and indeed the Agencies expressly continued the suspension of such a limitation in the Clean Water Rule. Thus, the exclusion on its face applies equally to naturally occurring waters (such as adjacent waters, tributaries, or ponds) and impoundments that have been determined to be a "waste treatment system," or part of such a system.

208. To the extent the waste treatment system exclusion applies to waters (such as adjacent wetlands or permanently flowing tributaries) that are unambiguously "waters of the United States", the exclusion is contrary to the CWA.

209. There is no rational scientific or technical reason to exclude waters such as adjacent wetlands, tributaries, or impoundments from the definition of waters of the United States simply because they are part of a waste treatment systems. In fact, the Agencies' own conclusions are that such waters can "significantly affect the chemical, physical, or biological integrity of" downstream traditional navigable waters, interstate waters, and the territorial seas. 80 Fed. Reg. at 37,068, 37,075.

210. The waste treatment system exclusion in the Clean Water Rule is arbitrary and capricious, an abuse of discretion, and otherwise not in accordance with law within the meaning of the APA, and is in excess of the Agencies' statutory authority. 5 U.S.C. § 706(2)(A), (C).

NINTH CLAIM FOR RELIEF

Clean Water Rule: Violation of the Administrative Procedure Act
(Abandonment of Clean Water Act Jurisdiction over "Other Waters")

211. The preceding paragraphs are hereby incorporated by reference as if fully set forth below.

212. Unlike the Agencies' prior definition of waters of the United States, the Clean Water Rule does not assert jurisdiction over other waters "the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce." Instead, the Agencies limit themselves in large part to waters that have a significant nexus to traditionally navigable waters.

213. The Agencies' only stated basis for abandoning CWA jurisdiction for other waters that may lack a significant nexus and yet which have other impacts on interstate commerce is a mis-reading of the Supreme Court's decision in *SWANCC*. As such, the Agencies have failed to supply a valid reason for their major shift in their interpretation of the Act.

214. Further, the Agencies' failure to assert jurisdiction over waters long protected on the basis of their interstate commerce impacts unrelated to navigation is contrary to the language and purpose of CWA and Congress' intent that waters be protected to the fullest extent allowed by the commerce clause.

215. To the extent it fails to assert jurisdiction over "other waters" that were previously protected on the basis of interstate commerce impacts unrelated to navigation, the Clean Water Rule is arbitrary and capricious, an abuse of discretion, and otherwise not in accordance with law within the meaning of the APA, and is in excess of the Agencies' statutory authority. 5 U.S.C. § 706(2)(A), (C).

TENTH CLAIM FOR RELIEF

Clean Water Rule: Violation of the Endangered Species Act

216. The preceding paragraphs are hereby incorporated by reference as if fully set forth below.

217. Promulgation of the Clean Water Rule is an "an action [that] may affect listed species or critical habitat" under Section 7(a)(2) of the ESA and its implementing regulations, 50 C.F.R. § 402.02(b), because, *inter alia*, it significantly reduces CWA protections for waters such as intermittent and ephemeral streams, ditches, wetlands, and groundwater that are used as habitat for numerous ESA-listed species, thereby increasing the likelihood that such habitat will be destroyed and the species will be harmed.

218. The Agencies failed to consult with the U.S. Fish and Wildlife Service and the National Marine Fisheries Service to prepare a Biological Opinion prior to the promulgation of the Clean Water Rule, as required by ESA section 7(a)(2), 16 U.S.C. § 1536(a)(2), and 50 C.F.R. § 402.14.

219. The Agencies failed to "insure" that promulgation of the Clean Water Rule "is not likely to jeopardize the continued existence of" any threatened or endangered species or "the destruction or adverse modification" of critical habitat, in violation of ESA section 7(a)(2), 16 U.S.C. § 1536(a)(2).

220. The ESA violations set forth above will continue until they are abated by an order of this Court. This Court has jurisdiction to enjoin the Agencies' violations of the ESA alleged above and such relief is warranted under 16 U.S.C. § 1540(g).

ELEVENTH CLAIM FOR RELIEF

Delay Rule: Violations of the National Environmental Policy Act and the Administrative Procedure Act

221. The preceding paragraphs are hereby incorporated by reference as if fully set forth below.

222. NEPA requires federal agencies to prepare an EIS for all "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(C).

223. While the CWA exempts most actions taken by the EPA Administrator under the Act from NEPA, 33 U.S.C. § 1372(c)(1), that exemption does not apply to actions taken by the Corps.

224. The Agencies' promulgation of the Delay Rule is a major Federal action significantly affecting the quality of the human environment because the Delay Rule fundamentally alters the Act's regulatory landscape by, *inter alia*, denying most tributaries and wetlands per se protections under the Act afforded by the now-suspended Clean Water Rule.

225. The Delay Rule's effects on the environment are significant for the additional reasons that it affects the regulation of myriad activities in the proximity of "wetlands, wild and scenic rivers, or ecologically critical areas;" is "highly controversial;" establishes "a precedent for future actions with significant effects;" and may adversely affect numerous endangered species or their critical habitat. 40 C.F.R. § 1508.27(b)(3), (4), (6), and (9).

226. Moreover, the Corps' decision not to prepare an EA or an EIS for the Delay Rule was arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law under the APA, 5 U.S.C. § 706(2)(A), because the Corps failed

to take a "hard look" at the potential environmental impacts of the Delay Rule and failed to provide a convincing statement of reasons why the potential effects of the Rule are insignificant.

TWELFTH CLAIM FOR RELIEF

Delay Rule: Violations of the Administrative Procedure Act

227. The preceding paragraphs are hereby incorporated by reference as if fully set forth below.

228. The Delay Rule is a final agency action subject to judicial review under the APA.

229. An agency action is arbitrary and capricious if the agency failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. *Motor Vehicle Mfrs. Ass'n. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

230. The Delay Rule is arbitrary and capricious, an abuse of discretion, and otherwise not in accordance with law within the meaning of the APA, 5 U.S.C. § 706(2)(A), for at least the following reasons:

(A) The Agencies failed to consider an important aspect of the problem, including most importantly the environmental and economic costs of delaying implementation of the Clean Water Rule by two years;

(B) The Agencies' only stated basis for the Delay Rule—preserving the "status quo" to achieve certainty and predictability in assertion of CWA jurisdiction—has no support in, and in fact is contradicted by, the administrative record; and

(C) The Agencies failed to meaningfully and substantively respond to comments submitted on the Proposed Delay Rule by Plaintiffs and others regarding the Rule's likely impacts to the environment and

ESA-listed species.

THIRTEENTH CLAIM FOR RELIEF

Delay Rule: Violation of the Endangered Species Act

231. The preceding paragraphs are hereby incorporated by reference as if fully set forth below.

232. Promulgation of the Delay Rule is an "an action [that] may affect listed species or critical habitat" under Section 7(a)(2) of the ESA and its implementing regulations, 50 C.F.R. § 402.02(b), because, *inter alia*, it undermines CWA protections for waters afforded per-se protections under the Clean Water Rule such as tributaries and their adjacent wetlands, waters that are used as habitat for numerous ESA-listed species, thereby increasing the likelihood that such habitat will be destroyed and the listed species using them will be harmed.

233. The Agencies failed to consult with the U.S. Fish and Wildlife Service and the National Marine Fisheries Service to prepare a Biological Opinion prior to the promulgation of the Delay Rule, as required by ESA section 7(a)(2), 16 U.S.C. § 1536(a)(2), and 50 C.F.R. § 402.14.

234. The Agencies failed to "insure" that promulgation of the Delay Rule "is not likely to jeopardize the continued existence of" any threatened or endangered species or "the destruction or adverse modification" of critical habitat, in violation of ESA section 7(a)(2), 16 U.S.C. § 1536(a)(2).

235. The ESA violations set forth above will continue until they are abated by an order of this Court. This Court has jurisdiction to enjoin the Agencies' violations of the ESA alleged above and such relief is warranted under 16 U.S.C. § 1540(g).

REQUEST FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that the Court:

(1) Declare that the Corps' issuance of the FONSI prepared along with the Clean Water Rule was arbitrary, capricious, an abuse of discretion, or

otherwise not in accordance with law;

(2) Declare that portions of the Clean Water Rule, and the entirety of the Delay Rule, are unlawful because they are arbitrary, capricious, an abuse of discretion, not in accordance with law, or in excess of the Agencies' statutory authority;

(3) Declare that portions of the Clean Water Rule are unlawful because the were promulgated without observance of procedure required by law;

(4) Enter an order vacating the Corps' FONSI and instructing the Corps to comply with NEPA for both the Clean Water Rule and the Delay Rule;

(5) Enter an order vacating only those unlawful portions of the Clean Water Rule, leaving the remainder of the Rule in place;

(6) Enter an order vacating the Delay Rule;

(7) Award Plaintiffs their reasonable fees, costs, expenses, and disbursements, including attorneys' fees associated with this litigation under the Equal Access to Justice Act, 28 U.S.C. § 2412(d), and the ESA, 16 U.S.C. § 1540(g)(4); and

(8) Grant Plaintiffs such additional and further relief as the Court may deem just, proper, and necessary.

Dated this 13th day of June, 2018.

s/ Adam Keats

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DEPARTMENT OF DEFENSE

Department of the Army, Corps of Engineers

33 CFR Part 328

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 110, 112, 116, 117, 122, 230, 232, 300, 302, and 401

[FRL–9959–93–OW]

Intention To Review and Rescind or Revise the Clean Water Rule

AGENCY: U.S. Army Corps of Engineers (Corps), Department of the Army, Department of Defense; Environmental Protection Agency (EPA).

ACTION: Notice of intent.

SUMMARY: In accordance with a Presidential directive, the U.S. Environmental Protection Agency (EPA) and the Department of the Army (Army) announces its intention to review and rescind or revise the Clean Water Rule.

DATES: March 6, 2017.

FOR FURTHER INFORMATION, CONTACT: Ms. Donna Downing, Office of Water (4502–T), Environmental Protection Agency, 1200 Pennsylvania Avenue NW., Washington, DC 20460; telephone number 202–566–2428; email *CWAwaters@epa.gov*, and Mr. Gib Owen, Office of the Assistant Secretary of the Army for Civil Works, Department of the Army, 104 Army Pentagon, Washington, DC 20310–0104; telephone number 703–695–4641; email *gib.a.owen.civ@mail.mil*.

SUPPLEMENTARY INFORMATION: The Federal Water Pollution Control Act, originally enacted in 1948, most comprehensively amended in 1972, and known as the Clean Water Act (CWA), seeks ''to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.'' 33 U.S.C. 1251 *et seq.* Among other provisions, the CWA regulates the discharge of pollutants into ''navigable waters,'' defined in the CWA as ''the waters of the United States.'' The question of what is a ''water of the United States'' is one that has generated substantial interest and uncertainty, especially among states, small businesses, the agricultural communities, and environmental organizations, because it relates to the extent of jurisdiction for federal and relevant state regulations.

The EPA and the Department of the Army (collectively, the agencies) have promulgated a series of regulations defining ''waters of the United States.'' The scope of ''waters of the United States'' as defined by the prior regulations has been subject to litigation in several U.S. Supreme Court cases, most recently in *Rapanos* v. *United States,* 547 U.S. 715 (2006) (''*Rapanos*''). In response to that decision, the agencies issued guidance regarding CWA jurisdiction in 2007, and revised it in 2008.

In response to that guidance, Members of Congress, developers, farmers, state and local governments, environmental organizations, energy companies and others asked the agencies to replace the guidance with a regulation. At the conclusion of that rulemaking process, the agencies issued the ''Clean Water Rule: Definition of 'Waters of the United States.' '' 80 FR 37054 (''2015 Rule'') (found at 40 CFR 110, 112, 116, 117, 122, 230, 232, 300, 302 and 401, and 33 CFR 328).

Due to concerns about the potential for continued regulatory uncertainty, as well as the scope and legal authority of the 2015 Rule, 31 states and a number of other parties sought judicial review in multiple actions. Seven states plus the District of Columbia, and an additional number of parties, then intervened in those cases. On October 9, 2015, the U.S. Court of Appeals for the Sixth Circuit stayed the 2015 Rule nationwide pending further action of the court.

On February 28, 2017, the President of the United States issued an Executive Order directing the EPA and the Army to review and rescind or revise the 2015 Rule. Today, the EPA and the Army announce their intention to review that rule, and provide advanced notice of a forthcoming proposed rulemaking consistent with the Executive Order. In doing so, the agencies will consider interpreting the term ''navigable waters,'' as defined in the CWA in a manner consistent with the opinion of Justice Scalia in *Rapanos.* It is important that stakeholders and the public at large have certainty as to how the CWA applies to their activities.

Agencies have inherent authority to reconsider past decisions and to revise, replace or repeal a decision to the extent permitted by law and supported by a reasoned explanation. *FCC* v. *Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (''*Fox*''); *Motor Vehicle Manufacturers Ass'n of the United States, Inc., et al,* v. *State Farm Mutual Automobile Insurance Co., et al.* 463 U.S. 29, 42 (1983) (''*State Farm*''). Importantly, such a revised decision need not be based upon a change of facts or circumstances. A revised rulemaking based ''on a reevaluation of which policy would be better in light of the facts'' is ''well within an agency's discretion,'' and ''[a] change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency's reappraisal of the costs and benefits of its programs and regulations.'' *National Ass'n of Home Builders* v. *EPA*, 682 F.3d 1032, 1038 & 1043 (D.C. Cir. 2012) (citing *Fox*, 556 U.S. at 514–15; quoting *State Farm*, 463 U.S. at 59 (Rehnquist, J., concurring in part and dissenting in part)).

Through new rulemaking, the EPA and the Army seek to provide greater clarity and regulatory certainty concerning the definition of ''waters of the United States,'' consistent with the principles outlined in the Executive Order and the agencies' legal authority.

Dated: February 28, 2017.

E. Scott Pruitt,

Administrator, Environmental Protection Agency.

Dated: February 28, 2017.

Douglas W. Lamont,

Senior Offical Performing the Duties of the Assistant Secretary of the Army for Civil Works, Department of the Army.

[FR Doc. 2017–04312 Filed 3–3–17; 8:45 am]

BILLING CODE 6560–50–P

Consistent with the Act, this document requests that interested persons provide proposed changes to revise or update the Manufactured Home Construction and Safety Standards, the Manufactured Home Procedural and Enforcement Regulations, the Model Manufactured Home Installation Standards, and Manufactured Home Installation Program Regulations. Specifically, recommendations are requested that further HUD's efforts to increase the quality, durability, safety and affordability of manufactured homes; facilitate the availability of affordable manufactured homes and increase homeownership for all Americans; and encourage cost-effective and innovative construction techniques for manufactured homes.

To permit the MHCC to fully consider the proposed changes, commenters are encouraged to provide at least the following information:

- The specific section of the current Manufactured Home Construction and Safety Standards, Manufactured Home Procedural and Enforcement Regulations, Model Manufactured Home Installation Standards, or Manufactured Home Installation Program Regulations that require revision or update, or whether the recommendation would require a new standard;
- Specific detail regarding the recommendation including a statement of the problem intended to be corrected or addressed by the recommendation, how the recommendation would resolve or address the problem, and the basis of the recommendation; and
- Information regarding whether the recommendation would result in increased costs to manufacturers or consumers and the value of the benefits derived from HUD's implementation of the recommendation, should be provided and discussed to the extent feasible.

The Act requires that an administering organization administer the process for the MHCC's development and interpretation of the Manufactured Home Construction and Safety Standards, Manufactured Home Procedural and Enforcement Regulations, Model Manufactured Home Installation Standards, and Manufactured Home Installation Program Regulations. The administering organization that has been selected by HUD to administer this process is Home Innovation Research Labs Inc. This document requests that proposed revisions be submitted to the MHCC for consideration through the administering organization, Home Innovation Research Labs. This organization will be responsible for ensuring delivery of all appropriately prepared proposed changes to the MHCC for its review and consideration.

Paperwork Reduction Act

The information collection requirements contained in this document have been approved by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520), and assigned OMB Control Number 2535–0116. In accordance with the Paperwork Reduction Act, an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information, unless the collection displays a currently valid OMB control number.

Dated: July 19, 2017.

Pamela Beck Danner,

Administrator, Office of Manufactured Housing Programs.

[FR Doc. 2017–15574 Filed 7–26–17; 8:45 am]

BILLING CODE P

DEPARTMENT OF DEFENSE

Department of the Army, Corps of Engineers

33 CFR Part 328

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 110, 112, 116, 117, 122, 230, 232, 300, 302, and 401

[EPA–HQ–OW–2017–0203; FRL–9962–34–OW]

RIN 2040–AF74

Definition of ''Waters of the United States''—Recodification of Pre-Existing Rules

AGENCY: Department of the Army, Corps of Engineers, Department of Defense; and Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency and the Department of the Army (''the agencies'') are publishing this proposed rule to initiate the first step in a comprehensive, two-step process intended to review and revise the definition of ''waters of the United States'' consistent with the Executive Order signed on February 28, 2017, ''Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the 'Waters of the United States' Rule.'' This first step proposes to rescind the definition of ''waters of the United States'' in the Code of Federal Regulations to re-codify the definition of ''waters of the United States,'' which currently governs administration of the Clean Water Act, pursuant to a decision issued by the U.S. Court of Appeals for the Sixth Circuit staying a definition of ''waters of the United States'' promulgated by the agencies in 2015. The agencies would apply the definition of ''waters of the United States'' as it is currently being implemented, that is informed by applicable agency guidance documents and consistent with Supreme Court decisions and longstanding practice. Proposing to re-codify the regulations that existed before the 2015 Clean Water Rule will provide continuity and certainty for regulated entities, the States, agency staff, and the public. In a second step, the agencies will pursue notice-and-comment rulemaking in which the agencies will conduct a substantive re-evaluation of the definition of ''waters of the United States.''

DATES: Comments must be received on or before August 28, 2017.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–HQ–OW–2017–0203, at *http://www.regulations.gov*. Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from *Regulations.gov*. The agencies may publish any comment received to the public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The agencies will generally not consider comments or comment contents located outside of the primary submission (*i.e.,* on the web, cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *http://www2.epa.gov/dockets/commenting-epa-dockets.*

FOR FURTHER INFORMATION CONTACT: Ms. Donna Downing, Office of Water (4504–T), Environmental Protection Agency, 1200 Pennsylvania Avenue NW., Washington, DC 20460; telephone number: (202) 566–2428; email address: *CWAwotus@epa.gov;* or Ms. Stacey Jensen, Regulatory Community of Practice (CECW–CO–R), U.S. Army

Corps of Engineers, 441 G Street NW., Washington, DC 20314; telephone number: (202) 761–5903; email address: *USACE_CWA_Rule@usace.army.mil*.

SUPPLEMENTARY INFORMATION: The regulatory definition of ''waters of the United States'' in this proposed rule is the same as the definition that existed prior to promulgation of the Clean Water Rule in 2015 and that has been in effect nationwide since the Clean Water Rule was stayed on October 9, 2015. The agencies will administer the regulations as they are currently being implemented consistent with Supreme Court decisions and longstanding practice as informed by applicable agency guidance documents.

State, tribal, and local governments have well-defined and longstanding relationships with the federal government in implementing CWA programs and these relationships are not altered by the proposed rule. This proposed rule will not establish any new regulatory requirements. Rather, the rule simply codifies the current legal *status quo* while the agencies engage in a second, substantive rulemaking to reconsider the definition of ''waters of the United States.''

I. Executive Summary

A. What This Proposed Rule Does

In this proposed rule, the agencies define the scope of ''waters of the United States'' that are protected under the Clean Water Act (CWA). In 2015, the agencies published the ''Clean Water Rule: Definition of 'Waters of the United States''' (80 FR 37054, June 29, 2015), and on October 9, 2015, the U.S. Court of Appeals for the Sixth Circuit stayed the 2015 Rule nationwide pending further action of the court. The agencies propose to replace the stayed 2015 definition of ''waters of the United States'', and re-codify the exact same regulatory text that existed prior to the 2015 rule, which reflects the current legal regime under which the agencies are operating pursuant to the Sixth Circuit's October 9, 2015 order. The proposed regulatory text would thus replace the stayed rulemaking text, and re-codify the regulatory definitions (at 33 CFR part 328 and 40 CFR parts 110; 112; 116; 117; 122; 230; 232; 300; 302; and 401) in the Code of Federal Regulations (CFR) as they existed prior to the promulgation of the stayed 2015 definition. If this proposed rule is finalized, the agencies would continue to implement those prior regulatory definitions), informed by applicable agency guidance documents and consistent with Supreme Court decisions and longstanding agency practice.

B. History and the Purpose of This Rulemaking

Congress enacted the Federal Water Pollution Control Act Amendments of 1972, Public Law 92–500, 86 Stat. 816, as amended, Public Law 95–217, 91 Stat. 1566, 33 U.S.C. 1251 *et seq.* (''Clean Water Act'' or ''CWA'' or ''Act'') ''to restore and maintain the chemical, physical and biological integrity of the Nation's waters.'' Section 101(a). A primary tool in achieving that purpose is a prohibition on the discharge of any pollutants, including dredged or fill material, to ''navigable waters'' except in accordance with the Act. Section 301(a). The CWA provides that ''[t]he term 'navigable waters' means the waters of the United States, including the territorial seas.'' Section 502(7).

The CWA also provides that States retain their traditional role in preventing, reducing and eliminating pollution. The Act states that ''[i]t is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources . . .'' Section 101(b). States and Tribes voluntarily may assume responsibility for permit programs governing discharges of pollution under section 402 for any jurisdictional water bodies (section 402(b)), or of dredged or fill material discharges under section 404 (section 404(g)), with agency approval. (Section 404(g) provides that states may not assume permitting authority over certain specified waters and their adjacent wetlands.) States are also free to establish their own programs under state law to manage and protect waters and wetlands independent of the federal CWA. The statute's introductory purpose section thus commands the Environmental Protection Agency (EPA) to pursue two policy goals simultaneously: (a) To restore and maintain the nation's waters; and (b) to preserve the States' primary responsibility and right to prevent, reduce, and eliminate pollution.

The regulations defining the scope of federal CWA jurisdiction currently in effect, which this proposed rule would recodify, were established in large part in 1977 (42 FR 37122, July 19, 1977). While EPA administers most provisions in the CWA, the U.S. Army Corps of Engineers (Corps) administers the permitting program under section 404. During the 1980s, both of these agencies adopted substantially similar definitions (51 FR 41206, Nov. 13, 1986, amending 33 CFR 328.3; 53 FR 20764, June 6, 1988, amending 40 CFR 232.2).

Federal courts have reviewed the definition of ''waters of the United States'' and its application to a variety of factual circumstances. Three Supreme Court decisions, in particular, provide critical context and guidance in determining the appropriate scope of ''waters of the United States.''

In *United States* v. *Riverside Bayview Homes,* 474 U.S. 121 (1985) (*Riverside*), the Court, in a unanimous opinion, deferred to the Corps' ecological judgment that adjacent wetlands are ''inseparably bound up'' with the waters to which they are adjacent, and upheld the inclusion of adjacent wetlands in the regulatory definition of ''waters of the United States.'' *Id.* at 134.

In *Solid Waste Agency of Northern Cook County* v. *U.S. Army Corps of Engineers,* 531 U.S. 159 (2001) (*SWANCC*), the Supreme Court held that the use of ''isolated'' non-navigable intrastate ponds by migratory birds was not by itself a sufficient basis for the exercise of federal regulatory authority under the CWA. The *SWANCC* decision created uncertainty with regard to the jurisdiction of other isolated non-navigable waters and wetlands. In January 2003, EPA and the Corps issued joint guidance interpreting the Supreme Court decision in *SWANCC* (''the 2003 Guidance''). The guidance indicated that *SWANCC* focused on isolated, intrastate, non-navigable waters, and called for field staff to coordinate with their respective Corps or EPA Headquarters on jurisdictional determinations which asserted jurisdiction for waters under 33 CFR 328.3(a)(3)(i) through (iii). Waters that were jurisdictional pursuant to 33 CFR 328.3(a)(3) could no longer be determined jurisdictional based solely on their use by migratory birds.

Five years after the *SWANCC* decision, in *Rapanos* v. *United States,* 547 U.S. 715 (2006) (*Rapanos*), a four-Justice plurality opinion in *Rapanos,* authored by Justice Scalia, interpreted the term ''waters of the United States'' as covering ''relatively permanent, standing or continuously flowing bodies of water . . . ,'' *id.* at 739, that are connected to traditional navigable waters, *id.* at 742, as well as wetlands with a ''continuous surface connection . . .'' to such water bodies, *id.* (Scalia, J., plurality opinion). The *Rapanos* plurality noted that its reference to ''relatively permanent'' waters did ''not necessarily exclude streams, rivers, or lakes that might dry up in extraordinary circumstances, such as drought,'' or ''*seasonal* rivers, which contain

continuous flow during some months of the year but no flow during dry months . . .'' *Id.* at 732 n.5 (emphasis in original). Justice Kennedy concurred with the plurality judgment, but concluded that the appropriate test for the scope of jurisdictional waters is whether a water or wetland possesses a '' 'significant nexus' to waters that are or were navigable in fact or that could reasonably be so made.'' *Id.* at 759. The four dissenting Justices in *Rapanos,* who would have affirmed the court of appeals' application of the agencies' regulations, also concluded that the term ''waters of the United States'' encompasses, *inter alia,* all tributaries and wetlands that satisfy ''either the plurality's [standard] or Justice Kennedy's.'' *Id.* at 810 & n.14 (Stevens, J., dissenting).

While the *SWANCC* and *Rapanos* decisions limited the way the agencies' longstanding regulatory definition of ''waters of the United States'' was implemented, in neither case did the Court invalidate that definition.

After the *Rapanos* decision, the agencies issued joint guidance in 2007 to address the waters at issue in that decision but did not change the codified definition. The guidance indicated that ''waters of the United States'' included traditional navigable waters and their adjacent wetlands, relatively permanent waters and wetlands that abut them, and waters with a significant nexus to a traditional navigable water. The guidance did not address waters not at issue in *Rapanos,* such as interstate waters and the territorial seas. The guidance was reissued in 2008 with minor changes (hereinafter, the ''2008 guidance'').[1]

After issuance of the 2008 guidance, Members of Congress, developers, farmers, state and local governments, environmental organizations, energy companies and others asked the agencies to replace the guidance with a regulation that would provide clarity and certainty on the scope of the waters protected by the CWA.

Following public notice and comment on a proposed rule, the agencies published a final rule defining the scope of ''waters of the United States'' on June 29, 2015 (80 FR 37054). Thirty-one States and a number of other parties sought judicial review in multiple actions in Federal district courts and Circuit Courts of Appeal, raising concerns about the scope and legal authority of the 2015 rule. One district court issued an order granting a motion for preliminary injunction on the rule's effective date, finding that the thirteen State challengers were likely to succeed on their claims, including that the rule violated the congressional grant of authority to the agencies under the CWA and that it appeared likely the EPA failed to comply with Administrative Procedure Act (APA) requirements in promulgating the rule. *State of North Dakota et al.* v. *US EPA,* No. 15–00059, slip op. at 1–2 (D.N.D. Aug. 27, 2015, as clarified by order issued on September 4, 2015). Several weeks later, the Sixth Circuit stayed the 2015 rule nationwide to restore the ''pre-Rule regime, pending judicial review.'' *In re U.S. Dep't. of Def. and U.S. Envtl. Protection Agency Final Rule: Clean Water Rule,* No. 15–3751 (lead), slip op. at 6. The Sixth Circuit found that the petitioners had demonstrated a substantial possibility of success on the merits, including with regard to claims that certain provisions of the rule were at odds with the *Rapanos* decision and that the distance limitations in the rule were not substantiated by scientific support. Pursuant to the court's order, the agencies have implemented the statute pursuant to the regulatory regime that preceded the 2015 rule. On January 13, 2017, the U.S. Supreme Court granted *certiorari* on the question of whether the court of appeals has original jurisdiction to review challenges to the 2015 rule. The Sixth Circuit granted petitioners' motion to hold in abeyance the briefing schedule in the litigation challenging the 2015 rule pending a Supreme Court decision on the question of the court of appeals' jurisdiction.

On February 28, 2017, the President of the United States issued an Executive Order entitled ''Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the 'Waters of the United States' Rule.'' Section 1 of the Order states, ''[i]t is in the national interest to ensure that the Nation's navigable waters are kept free from pollution, while at the same time promoting economic growth, minimizing regulatory uncertainty, and showing due regard for the roles of the Congress and the States under the Constitution.'' It directs the EPA and the Army to review the 2015 rule for consistency with the policy outlined in section 1, and to issue a proposed rule rescinding or revising the 2015 rule as appropriate and consistent with law. Section 2. The Executive Order also directs the agencies to consider interpreting the term ''navigable waters'' in a manner consistent with Justice Scalia's plurality opinion in *Rapanos.* Section 3.

The agencies have the authority to rescind and revise the regulatory definition of ''waters of the United States,'' consistent with the guidance in the Executive Order, so long as the revised definition is authorized under the law and based on a reasoned explanation. *FCC* v. *Fox Television Stations, Inc.,* 556 U.S. 502, 515 (2009) (''*Fox*''). Importantly, such a revised decision need not be based upon a change of facts or circumstances. A revised rulemaking based ''on a re-evaluation of which policy would be better in light of the facts'' is ''well within an agency's discretion,'' and ''[a] change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency's reappraisal'' of its regulations and programs. *Nat'l Ass'n of Home Builders* v. *EPA,* 682 F.3d 1032, 1038 & 1043 (D.C. Cir. 2012) (citing *Fox,* 556 U.S. at 514–15 (Rehnquist, J., concurring in part and dissenting in part)).

The Executive Order states that it is in the national interest to protect the nation's waters from pollution as well as to allow for economic growth, ensuring regulatory clarity, and providing due deference to States, as well as Congress. Executive Order section 1. These various priorities reflect, in part the CWA itself, which includes both the objective to ''restore and maintain'' the integrity of the nation's waters, as well as the policy to ''recognize, preserve, and protect the primary responsibilities and right of States to prevent, reduce, and eliminate pollution . . .'' CWA sections 101(a), 101(b). Re-evaluating the best means of balancing these statutory priorities, as called for in the Executive Order, is well within the scope of authority that Congress has delegated to the agencies under the CWA.

This rulemaking is the first step in a two-step response to the Executive Order, intended to ensure certainty as to the scope of CWA jurisdiction on an interim basis as the agencies proceed to engage in the second step: A substantive review of the appropriate scope of ''waters of the United States.''

C. This Proposed Rule

In this proposed rule, the agencies would rescind the 2015 Clean Water Rule and replace it with a recodification of the regulatory text that governed the legal regime prior to the 2015 Clean Water Rule and that the agencies are

[1] The guidance expressly stated that it was not intended to create any legally binding requirements, and that ''interested persons are free to raise questions about the appropriateness of the application of this guidance to a particular situation, and EPA and/or the Corps will consider whether or not the recommendations or interpretations of this guidance are appropriate in that situation based on the statutes, regulations, and case law.'' 2008 guidance at 4 n. 17.

currently implementing under the court stay, informed by applicable guidance documents (*e.g.,* the 2003 and 2008 guidance documents, as well as relevant memoranda and regulatory guidance letters), and consistent with the *SWANCC* and *Rapanos* Supreme Court decisions, applicable case law, and longstanding agency practice. The proposal retains exclusions from the definition of ''waters of the United States'' for prior converted cropland and waste treatment systems, both of which existed before the 2015 regulations were issued. Nothing in this proposed rule restricts the ability of States to protect waters within their boundaries by defining the scope of waters regulated under State law more broadly than the federal law definition.

D. Rationale for This Rulemaking

This rulemaking action is consistent with the February 28, 2017, Executive Order and the Clean Water Act. This action will consist of two steps. In this first step, the agencies are proposing as an interim action to repeal the 2015 definition of ''waters of the United States'' and codify the legal *status quo* that is being implemented now under the Sixth Circuit stay of the 2015 definition of ''waters of the United States'' and that was in place for decades prior to the 2015 rule. This regulatory text would, pending completion of the second step in the two-step process, continue to be informed by the 2003 and 2008 guidance documents. In the second step, the agencies will conduct a separate notice and comment rulemaking that will consider developing a new definition of ''waters of the United States'' taking into consideration the principles that Justice Scalia outlined in the *Rapanos* plurality opinion.

In the 2015 rulemaking, the agencies described their task as ''interpret[ing] the scope of the 'waters of the United States' for the CWA in light of the goals, objectives, and policies of the statute, the Supreme Court case law, the relevant and available science, and the agencies' technical expertise and experience.'' 80 FR 37054, 37060 (June 29, 2015). In so doing, the agencies properly acknowledged that a regulation defining ''waters of the United States'' in this area is not driven by any one type or piece of information, but rather must be the product of the evaluation and balancing of a variety of different types of information. That information includes scientific data as well as the policies articulated by Congress when it passed the Act. For example, the agencies recognized this construct in the preamble to the 2015 Rule by explaining that what constitutes a ''significant nexus'' to navigable waters ''is not a purely scientific determination'' and that ''science does not provide bright line boundaries with respect to where 'water ends' for purposes of the CWA.'' 80 FR at 37060.[2]

The objectives, goals, and policies of the statute are detailed in sections 101(a)–(g) of the statute, and guide the agencies' interpretation and application of the Clean Water Act. Section 101(a) of the Act states that the ''objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters,'' and identifies several goals and national policies Congress believed would help the Act achieve that objective. 33 U.S.C. 1251(a). When referring to the Act's objective, the 2015 rule referred specifically to Section 101(a). 80 FR at 37056.

In addition to the objective of the Act and the goals and policies identified to help achieve that objective in section 101(a), in section 101(b) Congress articulated that it is ''the policy of the Congress'' to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his or her authority. Section 101(b) also states that it is the policy of Congress that the States manage the construction grant program under this chapter and implement the permit programs under sections 402 and 404 of the Act. 33 U.S.C. 1251(b). Therefore, as part of the two-step rulemaking, the agencies will be considering the relationship of the CWA objective and policies, and in particular, the meaning and importance of section 101(b).

The 2015 rule did acknowledge the language contained in section 101(b) and the vital role states and tribes play in the implementation of the Act and the effort to meet the Act's stated objective. *See, e.g.,* 80 FR at 37059. In discussing the provision, the agencies noted that it was ''[o]f particular importance[,] [that] states and tribes may be authorized by the EPA to administer the permitting programs of CWA sections 402 and 404.'' *Id.* The agencies also noted that ''States and federally-recognized tribes, consistent with the CWA, retain full authority to implement their own programs to more broadly and more fully protect the waters in *their jurisdiction*.'' *Id.* at 37060. However, the agencies did not include a discussion in the 2015 rule preamble of the meaning and importance of section 101(b) in guiding the choices the agencies make in setting the outer bounds of jurisdiction of the Act, despite the recognition that the rule must be drafted ''in light of the goals, objectives, and policies of the statute.'' In the two-step rulemaking process commencing with today's notice, the agencies will more fully consider the policy in section 101(b) when exercising their discretion to delineate the scope of waters of the U.S., including the extent to which states or tribes have protected or may protect waters that are not subject to CWA jurisdiction.

The scope of CWA jurisdiction is an issue of great national importance and therefore the agencies will allow for robust deliberations on the ultimate regulation. While engaging in such deliberations, however, the agencies recognize the need to provide as an interim step for regulatory continuity and clarity for the many stakeholders affected by the definition of ''waters of the United States.'' The pre-CWR regulatory regime is in effect as a result of the Sixth Circuit's stay of the 2015 rule but that regime depends upon the pendency of the Sixth Circuit's order and could be altered at any time by factors beyond the control of the agencies. The Supreme Court's resolution of the question as to which courts have original jurisdiction over challenges to the 2015 rule could impact the Sixth Circuit's exercise of jurisdiction and its stay. If, for example, the Supreme Court were to decide that the Sixth Circuit lacks original jurisdiction over challenges to the 2015 rule, the Sixth Circuit case would be dismissed and its nationwide stay would expire, leading to inconsistencies, uncertainty, and confusion as to the regulatory regime that would be in effect pending substantive rulemaking under the Executive Order.

As noted previously, prior to the Sixth Circuit's stay order, the District Court for North Dakota had preliminarily enjoined the rule in 13 States (North Dakota, Alaska, Arizona, Arkansas, Colorado, Idaho, Missouri, Montana, Nebraska, Nevada, South Dakota, Wyoming and New Mexico). Therefore, if the Sixth Circuit's nationwide stay were to expire, the 2015

[2] This notion was at least implicitly recognized by the Chief Justice in his concurring opinion in *Rapanos:* ''[T]he Corps and the EPA would have enjoyed plenty of room to operate in developing *some* notion of an outer bound to the reach of their authority.'' *Rapanos* v. *United States,* 547 U.S. 715, 758 (2006) (Roberts, C.J., concurring). Ultimately, developing ''some notion of an outer bound'' from the full range of relevant information is the task facing the agencies.

rule would be enjoined under the North Dakota order in States covering a large geographic area of the country, but the rule would be in effect in the rest of the country pending further judicial decision-making or substantive rulemaking under the Executive Order.

Adding to the confusion that could be caused if the Sixth Circuit's nationwide stay of the 2015 rule were to expire, there are multiple other district court cases pending on the 2015 rule, including several where challengers have filed motions for preliminary injunctions. These cases—and the pending preliminary injunction motions—would likely be reactivated if the Supreme Court were to determine that the Sixth Circuit lacks original jurisdiction over challenges to the 2015 rule. The proposed interim rule would establish a clear regulatory framework that would avoid the inconsistencies, uncertainty and confusion that would result from a Supreme Court ruling affecting the Sixth Circuit's jurisdiction while the agencies reconsider the 2015 rule. It would ensure that, during this interim period, the scope of CWA jurisdiction will be administered exactly the way it is now, and as it was for many years prior to the promulgation of the 2015 rule. The agencies considered other approaches to providing stability while they work to finalize the revised definition, such as simply withdrawing or staying the Clean Water Rule, but did not identify any options that would do so more effectively and efficiently than this proposed rule would do. A stable regulatory foundation for the *status quo* would facilitate the agencies' considered re-evaluation, as appropriate, of the definition of ''waters of the United States'' that best effectuates the language, structure, and purposes of the Clean Water Act.

II. General Information

A. How can I get copies of this document and related information?

1. *Docket.* An official public docket for this action has been established under Docket Id. No. EPA–HQ–OW–2017–0203. The official public docket consists of the documents specifically referenced in this action, and other information related to this action. The official public docket is the collection of materials that is available for public viewing at the OW Docket, EPA West, Room 3334, 1301 Constitution Ave. NW., Washington, DC 20004. This Docket Facility is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The OW Docket telephone number is 202–566–2426. A reasonable fee will be charged for copies.

2. *Electronic Access.* You may access this **Federal Register** document electronically under the **Federal Register** listings at *http://www.regulations.gov.* An electronic version of the public docket is available through EPA's electronic public docket and comment system, EPA Dockets. You may access EPA Dockets at *http://www.regulations.gov* to view public comments as they are submitted and posted, access the index listing of the contents of the official public docket, and access those documents in the public docket that are available electronically. For additional information about EPA's public docket, visit the EPA Docket Center homepage at *http://www.epa.gov/epahome/dockets.htm.* Although not all docket materials may be available electronically, you may still access any of the publicly available docket materials through the Docket Facility.

B. What is the agencies' authority for taking this action?

The authority for this action is the Federal Water Pollution Control Act, 33 U.S.C. 1251, *et seq.,* including sections 301, 304, 311, 401, 402, 404 and 501.

C. What are the economic impacts of this action?

This proposed rule is the first step in a comprehensive, two-step process to review and revise the 2015 definition of ''waters of the United States.'' The agencies prepared an illustrative economic analysis to provide the public with information on the potential changes to the costs and benefits of various CWA programs that could result if there were a change in the number of positive jurisdictional determinations. The economic analysis is provided pursuant to the requirements of Executive Orders 13563 and 12866 to provide information to the public. The 2015 CWR is used as a baseline in the analysis in order to provide information to the public on the estimated differential effects of restoring pre-2015 status quo in comparison to the 2015 CWR. However, as explained previously, the 2015 CWR has already been stayed by the Sixth Circuit, and this proposal would merely codify the legal status quo, not change current practice.

The proposed rule is a definitional rule that affects the scope of ''waters of the United States.'' This rule does not establish any regulatory requirements or directly mandate actions on its own. However, by changing the definition of ''waters of the United States,'' the proposed rule would change the waters where other regulatory requirements that affect regulated entities come into play, for example, the locations where regulated entities would be required to obtain certain types of permits. The consequence of a water being deemed non-jurisdictional is simply that CWA provisions no longer apply to that water. There are no avoided costs or forgone benefits if similar state regulations exist and continue to apply to that water. The agencies estimated that the 2015 rule would result in a small overall increase in positive jurisdictional determinations compared to those made under the prior regulation as currently implemented, and that there would be fewer waters within the scope of the CWA under the 2015 rule compared to the prior regulations. The agencies estimated the avoided costs and forgone benefits of repealing the 2015 rule. This analysis is contained in the *Economic Analysis for the Proposed Definition of ''Waters of the United States''—Recodification of Pre-existing Rules* and is available in the docket for this action.

III. Public Comments

The agencies solicit comment as to whether it is desirable and appropriate to re-codify in regulation the *status quo* as an interim first step pending a substantive rulemaking to reconsider the definition of ''waters of the United States'' and the best way to accomplish it. Because the agencies propose to simply codify the legal *status quo* and because it is a temporary, interim measure pending substantive rulemaking, the agencies wish to make clear that this interim rulemaking does not undertake any substantive reconsideration of the pre-2015 ''waters of the United States'' definition nor are the agencies soliciting comment on the specific content of those longstanding regulations. *See P&V Enterprises* v. *Corps of Engineers,* 516 F.3d 1021,1023–24 (D.C. Cir. 2008). For the same reason, the agencies are not at this time soliciting comment on the scope of the definition of ''waters of the United States'' that the agencies should ultimately adopt in the second step of this two-step process, as the agencies will address all of those issues, including those related to the 2015 rule, in the second notice and comment rulemaking to adopt a revised definition of ''waters of the United States'' in light of the February 28, 2017, Executive Order. The agencies do not intend to engage in substantive reevaluation of the definition of ''waters of the United States'' until the second step of the rulemaking. *See P&V,* 516 F.3d at 1025–26.

IV. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review

This action is a significant regulatory action that was submitted to the Office of Management and Budget (OMB) for review. Any changes made in response to OMB recommendations have been documented in the docket.

In addition, the agencies prepared an analysis of the potential avoided costs and forgone benefits associated with this action. This analysis is contained in the *Economic Analysis for the Proposed Definition of ''Waters of the United States''—Recodification of Pre-existing Rules.* A copy of the analysis is available in the docket for this action.

B. Paperwork Reduction Act (PRA)

This action does not impose any new information collection burden under the PRA. OMB has previously approved the information collection activities contained in the existing regulations and has assigned OMB control numbers 2050–0021 and 2050–0135 for the CWA section 311 program and 2040–0004 for the 402 program.

For the CWA section 404 regulatory program, the current OMB approval number for information requirements is maintained by the Corps (OMB approval number 0710–0003). However, there are no new approval or application processes required as a result of this rulemaking that necessitate a new Information Collection Request (ICR).

C. Regulatory Flexibility Act

We certify that this action will not have a significant economic impact on a substantial number of small entities. Because this action would simply codify the legal *status quo,* we have concluded that this action will not have a significant impact on small entities. This analysis is contained in the *Economic Analysis for the Proposed Definition of ''Waters of the United States''—Recodification of Pre-existing Rules.* A copy of the analysis is available in the docket for this action.

D. Unfunded Mandates Reform Act (UMRA)

This action does not contain any unfunded mandate as described in UMRA, 2 U.S.C. 1531–1538, and does not significantly or uniquely affect small governments. The definition of ''waters of the United States'' applies broadly to CWA programs. The action imposes no enforceable duty on any state, local, or tribal governments, or the private sector, and does not contain regulatory requirements that might significantly or uniquely affect small governments.

E. Executive Order 13132: Federalism

This action does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Consistent with the agencies' policy to promote communications with state and local governments, the agencies have informed states and local governments about this proposed rulemaking.

The agencies will appropriately consult with States and local governments as a subsequent rulemaking makes changes to the longstanding definition of ''waters of the United States.''

F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

This proposed rule does not have tribal implications as specified in Executive Order 13175. This proposed rule maintains the legal *status quo.* Thus, Executive Order 13175 does not apply to this action.

Consistent with the EPA Policy on Consultation and Coordination with Indian Tribes (May 4, 2011), the agencies will appropriately consult with tribal officials during the development of a subsequent rulemaking that makes changes to the longstanding definition of ''waters of the United States.'' In fact, the agencies have already initiated the formal consultation process with respect to the subsequent rulemaking.

G. Executive Order 13045: Protection of Children From Environmental Health Risks and Safety Risks

This action is not subject to Executive Order 13045 because the environmental health risks or safety risks addressed by this action do not present a disproportionate risk to children.

H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

This action is not a ''significant energy action'' because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy.

I. National Technology Transfer and Advancement Act

This proposed rule does not involve technical standards.

J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations

This proposed rule maintains the legal *status quo.* The agencies therefore believe that this action does not have disproportionately high and adverse human health or environmental effects on minority, low-income populations, and/or indigenous peoples, as specified in Executive Order 12898 (59 FR 7629, Feb. 16, 1994).

K. Executive Order 13771: Reducing Regulation and Controlling Regulatory Costs

Pursuant to Executive Order 13771 (82 FR 9339, February 3, 2017) this proposed rule is expected to be an E.O. 13771 deregulatory action.

List of Subjects

33 CFR Part 328

Environmental protection, Administrative practice and procedure, Intergovernmental relations, Navigation, Water pollution control, Waterways.

40 CFR Parts 110, 112, 116, 117, 122, 230, 232, 300, 302, and 401

Environmental protection, Water pollution control.

Dated: June 27, 2017.

E. Scott Pruitt,

Administrator, Environmental Protection Agency.

Dated: June 27, 2017.

Douglas W. Lamont,

Deputy Assistant Secretary of the Army (Project Planning and Review), performing the duties of the Assistant Secretary of the Army for Civil Works.

Title 33—Navigation and Navigable Waters

For the reasons set out in the preamble, title 33, chapter II of the Code of Federal Regulations is proposed to be amended as follows:

PART 328—DEFINITION OF WATERS OF THE UNITED STATES

■ 1. The authority citation for part 328 is revised to read as follows:

Authority: 33 U.S.C. 1344.

■ 2. Section 328.3 is amended by revising paragraphs (a) through (d) and adding paragraphs (e) and (f) to read as follows:

§ 328.3 Definitions.

* * * * *

(a) The term *waters of the United States* means

(1) All waters which are currently used, or were used in the past, or may

be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(2) All interstate waters including interstate wetlands;

(3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:

(i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or

(ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

(iii) Which are used or could be used for industrial purpose by industries in interstate commerce;

(4) All impoundments of waters otherwise defined as waters of the United States under the definition;

(5) Tributaries of waters identified in paragraphs (a)(1) through (4) of this section;

(6) The territorial seas;

(7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a)(1) through (6) of this section.

(8) Waters of the United States do not include prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 CFR 423.11(m) which also meet the criteria of this definition) are not waters of the United States.

(b) The term *wetlands* means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

(c) The term *adjacent* means bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are ''adjacent wetlands.''

(d) The term *high tide line* means the line of intersection of the land with the water's surface at the maximum height reached by a rising tide. The high tide line may be determined, in the absence of actual data, by a line of oil or scum along shore objects, a more or less continuous deposit of fine shell or debris on the foreshore or berm, other physical markings or characteristics, vegetation lines, tidal gages, or other suitable means that delineate the general height reached by a rising tide. The line encompasses spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds such as those accompanying a hurricane or other intense storm.

(e) The term *ordinary high water mark* means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.

(f) The term *tidal waters* means those waters that rise and fall in a predictable and measurable rhythm or cycle due to the gravitational pulls of the moon and sun. Tidal waters end where the rise and fall of the water surface can no longer be practically measured in a predictable rhythm due to masking by hydrologic, wind, or other effects.

Title 40—Protection of Environment

For reasons set out in the preamble, title 40, chapter I of the Code of Federal Regulations is proposed to be amended as follows:

PART 110—DISCHARGE OF OIL

■ 3. The authority citation for part 110 is revised to read as follows:

Authority: 33 U.S.C. 1321(b)(3) and (b)(4) and 1361(a); E.O. 11735, 38 FR 21243, 3 CFR parts 1971–1975 Comp., p. 793.

■ 4. Section 110.1 is amended by revising the definition of ''Navigable waters'' and adding the definition of ''Wetlands'' in alphabetical order to read as follows:

§ 110.1 Definitions.

* * * * *

Navigable waters means the waters of the United States, including the territorial seas. The term includes:

(a) All waters that are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters that are subject to the ebb and flow of the tide;

(b) Interstate waters, including interstate wetlands;

(c) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, and wetlands, the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce including any such waters:

(1) That are or could be used by interstate or foreign travelers for recreational or other purposes;

(2) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce;

(3) That are used or could be used for industrial purposes by industries in interstate commerce;

(d) All impoundments of waters otherwise defined as navigable waters under this section;

(e) Tributaries of waters identified in paragraphs (a) through (d) of this section, including adjacent wetlands; and

(f) Wetlands adjacent to waters identified in paragraphs (a) through (e) of this section: Provided, That waste treatment systems (other than cooling ponds meeting the criteria of this paragraph) are not waters of the United States;

Navigable waters do not include prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

* * * * *

Wetlands means those areas that are inundated or saturated by surface or ground water at a frequency or duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include playa lakes, swamps, marshes, bogs and similar areas such as sloughs, prairie potholes, wet meadows, prairie river overflows, mudflats, and natural ponds.

PART 112—OIL POLLUTION PREVENTION

■ 5. The authority citation for part 112 is revised to read as follows:

Authority: 33 U.S.C. 1251 *et seq.;* 33 U.S.C. 2720; E.O. 12777 (October 18, 1991), 3 CFR, 1991 Comp., p. 351.

■ 6. Section 112.2 is amended by revising the definition of ''Navigable waters'' and adding the definition of

''Wetlands'' in alphabetical order to read as follows:

§ 112.2 Definitions.

* * * * *

Navigable waters of the United States means ''navigable waters'' as defined in section 502(7) of the FWPCA, and includes:

(1) All navigable waters of the United States, as defined in judicial decisions prior to passage of the 1972 Amendments to the FWPCA (Pub. L. 92–500), and tributaries of such waters;

(2) Interstate waters;

(3) Intrastate lakes, rivers, and streams which are utilized by interstate travelers for recreational or other purposes; and

(4) Intrastate lakes, rivers, and streams from which fish or shellfish are taken and sold in interstate commerce.

* * * * *

Wetlands means those areas that are inundated or saturated by surface or groundwater at a frequency or duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include playa lakes, swamps, marshes, bogs, and similar areas such as sloughs, prairie potholes, wet meadows, prairie river overflows, mudflats, and natural ponds.

* * * * *

PART 116—DESIGNATION OF HAZARDOUS SUBSTANCES

■ 7. The authority citation for part 116 is revised to read as follows:

Authority: Secs. 311(b)(2)(A) and 501(a), Federal Water Pollution Control Act (33 U.S.C. 1251 *et seq.*).

■ 8. Section 116.3 is amended by revising the definition of ''Navigable waters'' to read as follows:

§ 116.3 Definitions.

* * * * *

Navigable waters is defined in section 502(7) of the Act to mean ''waters of the United States, including the territorial seas,'' and includes, but is not limited to:

(1) All waters which are presently used, or were used in the past, or may be susceptible to use as a means to transport interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide, and including adjacent wetlands; the term *wetlands* as used in this regulation shall include those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevelance of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas; the term *adjacent* means bordering, contiguous or neighboring;

(2) Tributaries of navigable waters of the United States, including adjacent wetlands;

(3) Interstate waters, including wetlands; and

(4) All other waters of the United States such as intrastate lakes, rivers, streams, mudflats, sandflats and wetlands, the use, degradation or destruction of which affect interstate commerce including, but not limited to:

(i) Intrastate lakes, rivers, streams, and wetlands which are utilized by interstate travelers for recreational or other purposes; and

(ii) Intrastate lakes, rivers, streams, and wetlands from which fish or shellfish are or could be taken and sold in interstate commerce; and

(iii) Intrastate lakes, rivers, streams, and wetlands which are utilized for industrial purposes by industries in interstate commerce.

Navigable waters do not include prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

* * * * *

PART 117—DETERMINATION OF REPORTABLE QUANTITIES FOR HAZARDOUS SUBSTANCES

■ 9. The authority citation for part 117 is revised to read as follows:

Authority: Secs. 311 and 501(a), Federal Water Pollution Control Act (33 U.S.C. 1251 *et seq.*), (''the Act'') and Executive Order 11735, superseded by Executive Order 12777, 56 FR 54757.

■ 10. Section 117.1 is amended by revising paragraph (i) to read as follows:

§ 117.1 Definitions.

* * * * *

(i) *Navigable waters* means ''waters of the United States, including the territorial seas.'' This term includes:

(1) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(2) Interstate waters, including interstate wetlands;

(3) All other waters such as intrastate lakes, rivers, streams, (including intermittent streams), mudflats, sandflats, and wetlands, the use, degradation or destruction of which would affect or could affect interstate or foreign commerce including any such waters:

(i) Which are or could be used by interstate or foreign travelers for recreational or other purposes;

(ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce;

(iii) Which are used or could be used for industrial purposes by industries in interstate commerce;

(4) All impoundments of waters otherwise defined as navigable waters under this paragraph;

(5) Tributaries of waters identified in paragraphs (i)(1) through (4) of this section, including adjacent wetlands; and

(6) Wetlands adjacent to waters identified in paragraphs (i)(1) through (5) of this section (''Wetlands'' means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally included playa lakes, swamps, marshes, bogs, and similar areas such as sloughs, prairie potholes, wet meadows, prairie river overflows, mudflats, and natural ponds): *Provided,* That waste treatment systems (other than cooling ponds meeting the criteria of this paragraph) are not waters of the United States.

Navigable waters do not include prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

* * * * *

PART 122—EPA ADMINISTERED PERMIT PROGRAMS: THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM

■ 11. The authority citation for part 122 continues to read as follows:

Authority: The Clean Water Act, 33 U.S.C. 1251 *et seq.*

■ 12. Section 122.2 is amended by:

■ a. Lifting the suspension of the last sentence of the definition of ''Waters of the United States'' published July 21, 1980 (45 FR 48620).

■ b. Revising the definition of ''Waters of the United States''.

■ c. Suspending the last sentence of the definition of ''Waters of the United States'' published July 21, 1980 (45 FR 48620).

■ d. Adding the definition of ''Wetlands''.

The revision and addition read as follows:

§ 122.2 Definitions.

* * * * *

Waters of the United States or *waters of the U.S.* means:

(a) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(b) All interstate waters, including interstate ''wetlands;''

(c) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, ''wetlands,'' sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce including any such waters:

(1) Which are or could be used by interstate or foreign travelers for recreational or other purposes;

(2) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

(3) Which are used or could be used for industrial purposes by industries in interstate commerce;

(d) All impoundments of waters otherwise defined as waters of the United States under this definition;

(e) Tributaries of waters identified in paragraphs (a) through (d) of this definition;

(f) The territorial sea; and

(g) ''Wetlands'' adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a) through (f) of this definition.

Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 CFR 423.11(m) which also meet the criteria of this definition) are not waters of the United States. This exclusion applies only to manmade bodies of water which neither were originally created in waters of the United States (such as disposal area in wetlands) nor resulted from the impoundment of waters of the United States. [See Note 1 of this section.] Waters of the United States do not include prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

Note: At 45 FR 48620, July 21, 1980, the Environmental Protection Agency suspended until further notice in § 122.2, the last sentence, beginning ''This exclusion applies . . .'' in the definition of ''Waters of the United States.'' This revision continues that suspension.

Wetlands means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

* * * * *

PART 230—SECTION 404(b)(1) GUIDELINES FOR SPECIFICATION OF DISPOSAL SITES FOR DREDGED OR FILL MATERIAL

■ 13. The authority citation for part 230 is revised to read as follows:

Authority: Secs. 404(b) and 501(a) of the Clean Water Act of 1977 (33 U.S.C. 1344(b) and 1361(a)).

■ 14. Section 230.3 is amended by:

■ a. Redesignating paragraph (o) as paragraph (s).

■ b. Revising newly redesignated paragraph (s).

■ c. Redesignating paragraph (n) as paragraph (r).

■ d. Redesignating paragraph (m) as paragraph (q–1).

■ e. Redesignating paragraphs (h) through (l) as paragraphs (m) through (q).

■ f. Redesignating paragraphs (e) and (f) as paragraphs (h) and (i).

■ g. Redesignating paragraph (g) as paragraph (k).

■ h. Redesignating paragraphs (b) through (d) as paragraphs (c) through (e).

■ i. Adding reserved paragraphs (f), (g), (j), and (l).

■ j. Adding paragraphs (b) and (t).

The revision and additions read as follows:

§ 230.3 Definitions.

* * * * *

(b) The term *adjacent* means bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes, and the like are ''adjacent wetlands.''

* * * * *

(s) The term *waters of the United States* means:

(1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(2) All interstate waters including interstate wetlands;

(3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:

(i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or

(ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

(iii) Which are used or could be used for industrial purposes by industries in interstate commerce;

(4) All impoundments of waters otherwise defined as waters of the United States under this definition;

(5) Tributaries of waters identified in paragraphs (s)(1) through (4) of this section;

(6) The territorial sea;

(7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (s)(1) through (6) of this section; waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 CFR 423.11(m) which also meet the criteria of this definition) are not waters of the United States.

Waters of the United States do not include prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

(t) The term *wetlands* means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas.

PART 232—404 PROGRAMS DEFINITIONS; EXEMPT ACTIVITIES NOT REQUIRING 404 PERMITS

■ 15. The authority citation for part 232 is revised to read as follows:

Authority: 33 U.S.C. 1344.

■ 16. Section 232.2 is amended by revising the definition of ''Waters of the

United States'' and adding the definition of ''Wetlands'' to read as follows:

§ 232.2 Definitions.

* * * * *

Waters of the United States means:

All waters which are currently used, were used in the past, or may be susceptible to us in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide.

All interstate waters including interstate wetlands.

All other waters, such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation, or destruction of which would or could affect interstate or foreign commerce including any such waters:

Which are or could be used by interstate or foreign travelers for recreational or other purposes; or

From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

Which are used or could be used for industrial purposes by industries in interstate commerce.

All impoundments of waters otherwise defined as waters of the United States under this definition;

Tributaries of waters identified in paragraphs (g)(1)–(4) of this section;

The territorial sea; and

Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (q)(1)–(6) of this section.

Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the Act (other than cooling ponds as defined in 40 CFR 123.11(m) which also meet the criteria of this definition) are not waters of the United States.

Waters of the United States do not include prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

Wetlands means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

PART 300—NATIONAL OIL AND HAZARDOUS SUBSTANCES POLLUTION CONTINGENCY PLAN

■ 17. The authority citation for part 300 is revised to read as follows:

Authority: 33 U.S.C. 1321(c)(2); 42 U.S.C. 9601–9657; E.O. 13626, 77 FR 56749, 3 CFR, 2013 Comp., p.306; E.O. 12777, 56 FR 54757, 3 CFR, 1991 Comp., p.351; E.O. 12580, 52 FR 2923, 3 CFR, 1987 Comp., p.193.

■ 18. Section 300.5 is amended by revising the definition of ''Navigable waters'' to read as follows:

§ 300.5 Definitions.

* * * * *

Navigable waters as defined by 40 CFR 110.1, means the waters of the United States, including the territorial seas. The term includes:

(1) All waters that are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters that are subject to the ebb and flow of the tide;

(2) Interstate waters, including interstate wetlands;

(3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, and wetlands, the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce including any such waters;

(i) That are or could be used by interstate or foreign travelers for recreational or other purposes;

(ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce;

(iii) That are used or could be used for industrial purposes by industries in interstate commerce;

(4) All impoundments of waters otherwise defined as navigable waters under this section;

(5) Tributaries of waters identified in paragraphs (a) through (d) of this definition, including adjacent wetlands; and

(6) Wetlands adjacent to waters identified in paragraphs (a) through (e) of this definition: Provided, that waste treatment systems (other than cooling ponds meeting the criteria of this paragraph) are not waters of the United States.

(7) Waters of the United States do not include prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

* * * * *

■ 19. In appendix E to part 300, section 1.5 is amended by revising the definition of ''Navigable waters'' to read as follows:

Appendix E to Part 300—Oil Spill Response

* * * * *

1.5 Definitions * * *

Navigable waters as defined by 40 CFR 110.1 means the waters of the United States, including the territorial seas. The term includes:

(a) All waters that are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters that are subject to the ebb and flow of the tide;

(b) Interstate waters, including interstate wetlands;

(c) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, and wetlands, the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce including any such waters:

(1) That are or could be used by interstate or foreign travelers for recreational or other purposes;

(2) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; and

(3) That are used or could be used for industrial purposes by industries in interstate commerce.

(d) All impoundments of waters otherwise defined as navigable waters under this section;

(e) Tributaries of waters identified in paragraphs (a) through (d) of this definition, including adjacent wetlands; and

(f) Wetlands adjacent to waters identified in paragraphs (a) through (e) of this definition: Provided, that waste treatment systems (other than cooling ponds meeting the criteria of this paragraph) are not waters of the United States.

(g) Waters of the United States do not include prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

* * * * *

PART 302—DESIGNATION, REPORTABLE QUANTITIES, AND NOTIFICATION

■ 20. The authority citation for part 302 is revised to read as follows:

Authority: 42 U.S.C. 9602, 9603, and 9604; 33 U.S.C. 1321 and 1361.

■ 21. Section 302.3 is amended by revising the definition of ''Navigable waters'' to read as follows:

§ 302.3 Definitions.

* * * * *

Navigable waters or *navigable waters of the United States* means waters of the

United States, including the territorial seas;

* * * * *

PART 401—GENERAL PROVISIONS

■ 22. The authority citation for part 401 is revised to read as follows:

Authority: Secs. 301, 304 (b) and (c), 306 (b) and (c), 307 (b) and (c) and 316(b) of the Federal Water Pollution Control Act, as amended (the ''Act''), 33 U.S.C. 1251, 1311, 1314 (b) and (c), 1316 (b) and (c), 1317 (b) and (c) and 1326(c); 86 Stat. 816 *et seq.;* Pub. L. 92–500.

■ 23. Section 401.11 is amended by revising paragraph (l) to read as follows:

§ 401.11 General definitions.

* * * * *

(l) The term *navigable waters* includes: All navigable waters of the United States; tributaries of navigable waters of the United States; interstate waters; intrastate lakes, rivers, and streams which are utilized by interstate travelers for recreational or other purposes; intrastate lakes, rivers, and streams from which fish or shellfish are taken and sold in interstate commerce; and intrastate lakes, rivers, and streams which are utilized for industrial purposes by industries in interstate commerce. Navigable waters do not include prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

* * * * *

[FR Doc. 2017–13997 Filed 7–26–17; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Chapter 1

46 CFR Chapters 1 and III

49 CFR Chapter IV

[Docket No. USCG–2017–0658]

Great Lakes Pilotage Advisory Committee—Input To Support Regulatory Reform of Coast Guard Regulations—New Task

AGENCY: U.S. Coast Guard, Department of Homeland Security.

ACTION: Announcement of new task assignment for the Great Lakes Pilotage Advisory Committee (GLPAC); teleconference meeting.

SUMMARY: The U.S. Coast Guard is issuing a new task to the Great Lakes Pilotage Advisory Committee (GLPAC). The U.S. Coast Guard is asking GLPAC to help the agency identify existing regulations, guidance, and collections of information (that fall within the scope of the Committee's charter) for possible repeal, replacement, or modification. This tasking is in response to the issuance of Executive Orders 13771, ''Reducing Regulation and Controlling Regulatory Costs; 13777, ''Enforcing the Regulatory Reform Agenda;'' and 13783, ''Promoting Energy Independence and Economic Growth.'' The full Committee is scheduled to meet by teleconference on August 23, 2017, to discuss this tasking. This teleconference will be open to the public. The U.S. Coast Guard will consider GLPAC recommendations as part of the process of identifying regulations, guidance, and collections of information to be repealed, replaced, or modified pursuant to the three Executive Orders discussed above.

DATES: The full Committee is scheduled to meet by teleconference on August 23, 2017, from 1:30 p.m. to 3 p.m. EDT. Please note that this teleconference may adjourn early if the Committee has completed its business.

ADDRESSES: To join the teleconference or to request special accommodations, contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section no later than 1 p.m. on August 16, 2017. The number of teleconference lines is limited and will be available on a first-come, first-served basis.

Instructions: Submit comments on the task statement at any time, including orally at the teleconference, but if you want Committee members to review your comments before the teleconference, please submit your comments no later than August 16, 2017. You must include the words ''Department of Homeland Security'' and the docket number for this action. Written comments may also be submitted using the Federal e-Rulemaking Portal at *http://www.regulations.gov.* If you encounter technical difficulties with comment submission, contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this notice. Comments received will be posted without alteration at *http://www.regulations.gov,* including any personal information provided. You may review *Regulations.gov*'s Privacy and Security Notice at *https://www.regulations.gov/privacyNotice.*

Docket Search: For access to the docket or to read documents or comments related to this notice, go to *http://www.regulations.gov,* insert ''USCG–2017–0658'' in the Search box, press Enter, and then click on the item you wish to view.

FOR FURTHER INFORMATION CONTACT: Ms. Michelle Birchfield, Alternate Designated Federal Officer of the Great Lakes Pilotage Advisory Committee, telephone (202) 372–1533, or email *michelle.r.birchfield@uscg.mil.*

SUPPLEMENTARY INFORMATION:

New Task to the Committee

The U.S. Coast Guard is issuing a new task to GLPAC to provide recommendations on whether existing regulations, guidance, and information collections (that fall within the scope of the Committee's charter) should be repealed, replaced, or modified. GLPAC will then provide advice and recommendations on the assigned task and submit a final recommendation report to the U.S. Coast Guard.

Background

On January 30, 2017, President Trump issued Executive Order 13771, ''Reducing Regulation and Controlling Regulatory Costs.'' Under that Executive Order, for every one new regulation issued, at least two prior regulations must be identified for elimination, and the cost of planned regulations must be prudently managed and controlled through a budgeting process. On February 24, 2017, the President issued Executive Order 13777, ''Enforcing the Regulatory Reform Agenda.'' That Executive Order directs agencies to take specific steps to identify and alleviate unnecessary regulatory burdens placed on the American people. On March 28, 2017, the President issued Executive Order 13783, ''Promoting Energy Independence and Economic Growth.'' Executive Order 13783 promotes the clean and safe development of our Nation's vast energy resources, while at the same time avoiding agency actions that unnecessarily encumber energy production.

When implementing the regulatory offsets required by Executive Order 13771, each agency head is directed to prioritize, to the extent permitted by law, those regulations that the agency's Regulatory Reform Task Force identifies as outdated, unnecessary, or ineffective in accordance with Executive Order 13777. As part of this process to comply with all three Executive Orders, the U.S. Coast Guard is reaching out through multiple avenues to interested individuals to gather their input about

FOR FURTHER INFORMATION CONTACT: Judith Kidwell, Center for Food Safety and Applied Nutrition, Food and Drug Administration, 5001 Campus Dr., College Park, MD 20740, 240–402–1071.

SUPPLEMENTARY INFORMATION: In the **Federal Register** of July 26, 2017, in FR Doc. 2017–15535, on page 34615, the following correction is made:

On page 34615, in the second paragraph under the **SUPPLEMENTARY INFORMATION:** caption, in the second column, the second paragraph is corrected to read, ''These proposed changes would allow manufacturers of fruit juices and fruit juice drinks that are fortified with calcium to maintain the absolute level of added calcium at 330 milligrams (mg) and 100 mg, respectively, as established in our regulations at § 172.380(c)(1) and (2).''

Dated: August 17, 2017.

Leslie Kux,

Associate Commissioner for Policy.

[FR Doc. 2017–17704 Filed 8–21–17; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF DEFENSE

Department of the Army, Corps of Engineers

33 CFR Part 328

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 110, 112 116, 117, 122, 230, 232, 300, 302, and 401

[EPA–HQ–OW–2017–0203; FRL–9966–81–OW]

RIN 2040–AF74

Definition of ''Waters of the United States''—Recodification of Pre-Existing Rules; Extension of Comment Period

AGENCY: Department of the Army, Corps of Engineers, Department of Defense; and Environmental Protection Agency (EPA).

ACTION: Proposed rule; Extension of comment period.

SUMMARY: The U.S. Environmental Protection Agency (EPA) and the U.S. Department of the Army are extending the comment period for the proposed rule ''Definition of 'Waters of the United States'—Recodification of Pre-existing Rules.'' The agencies are extending the comment period for 30 days in response to stakeholder requests for an extension, from August 28, 2017 to September 27, 2017.

DATES: The comment period for the proposed rule published on July 27, 2017, at 82 FR 34899, is extended. Comments must be received on or before September 27, 2017.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–HQ–OW–2017–0203, at *http://www.regulations.gov.* Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from *Regulations.gov*. The agencies may publish any comment received to the public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The agencies will generally not consider comments or comment contents located outside of the primary submission (*i.e.* on the web, cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *http://www2.epa.gov/dockets/commenting-epa-dockets.*

FOR FURTHER INFORMATION CONTACT: Ms. Donna Downing, Office of Water (4504–T), Environmental Protection Agency, 1200 Pennsylvania Avenue NW., Washington, DC 20460; telephone number: (202) 566–2428; email address: *CWAwotus@epa.gov;* or Ms. Stacey Jensen, Regulatory Community of Practice (CECW–CO–R), U.S. Army Corps of Engineers, 441 G Street NW., Washington, DC 20314; telephone number: (202) 761–5903; email address: *USACE_CWA_Rule@usace.army.mil.*

SUPPLEMENTARY INFORMATION: On July 27, 2017 (82 FR 34899), the EPA and the U.S. Department of the Army published the proposed rule ''Definition of 'Waters of the United States'—Recodification of Pre-existing Rules'' in the **Federal Register**. The original deadline to submit comments was August 28, 2017. This action extends the comment period for 30 days. Written comments must now be received by September 27, 2017.

Dated: August 16, 2017.

Michael H. Shapiro,

Acting Assistant Administrator for Water, Environmental Protection Agency.

Dated: August 16, 2017.

Douglas W. Lamont,

Deputy Assistant Secretary of the Army (Project Planning and Review), performing the duties of the Assistant Secretary of the Army for Civil Works.

[FR Doc. 2017–17739 Filed 8–21–17; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 63

[EPA–HQ–OAR–2016–0442; FRL–9966–63–OAR]

RIN 2060–AT57

National Emission Standards for Hazardous Air Pollutants From the Portland Cement Manufacturing Industry: Alternative Monitoring Method

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The U.S. Environmental Protection Agency (EPA) is proposing to amend the National Emission Standards for Hazardous Air Pollutants From the Portland Cement Manufacturing Industry (Portland Cement NESHAP). We are proposing to revise the testing and monitoring requirements for hydrochloric acid (HCl) due to the current unavailability of HCl calibration gases used for quality assurance purposes.

DATES: The EPA must receive written comments on this proposed rule on or before October 6, 2017.

Public Hearing. If a public hearing is requested by August 29, 2017, then we will hold a public hearing on September 6, 2017 at the EPA WJC East Building, 1201 Constitution Avenue NW., Washington, DC 20004. If a public hearing is requested, then we will provide additional details about the public hearing on our Web site at *https://www.epa.gov/stationary-sources-air-pollution/portland-cement-manufacturing-industry-national-emission-standards* and *https://www3.epa.gov/airquality/cement/actions.html.* To request a hearing, to register to speak at a hearing, or to inquire if a hearing will be held, please contact Aimee St. Clair at (919) 541–1063 or by email at *stclair.aimee@epa.gov.* The EPA does not intend to publish any future notices in the

vending machine, in a type size at least 150 percent of the size of the net quantity of contents declaration on the front of the package, and with sufficient color and contrasting background to other print on the label to permit the prospective purchaser to clearly distinguish the information.

* * * * *

Dated: July 6, 2018.

Leslie Kux,

Associate Commissioner for Policy.

[FR Doc. 2018–14906 Filed 7–11–18; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF DEFENSE

Department of the Army, Corps of Engineers

33 CFR Part 328

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 110, 112, 116, 117, 122, 230, 232, 300, 302, and 401

[EPA–HQ–OW–2017–0203; FRL–9980–52–OW]

RIN 2040–AF74

Definition of ''Waters of the United States''—Recodification of Preexisting Rule

AGENCY: Department of Defense, Department of the Army, Corps of Engineers; Environmental Protection Agency (EPA).

ACTION: Supplemental notice of proposed rulemaking.

SUMMARY: The purpose of this supplemental notice is for the Environmental Protection Agency (EPA) and the Department of the Army (agencies) to clarify, supplement and seek additional comment on an earlier proposal, published on July 27, 2017, to repeal the 2015 Rule Defining Waters of the United States (''2015 Rule''), which amended portions of the Code of Federal Regulations (CFR). As stated in the agencies' July 27, 2017 Notice of Proposed Rulemaking (NPRM), the agencies propose to repeal the 2015 Rule and restore the regulatory text that existed prior to the 2015 Rule, as informed by guidance in effect at that time. If this proposal is finalized, the regulations defining the scope of federal Clean Water Act (CWA) jurisdiction would be those portions of the CFR as they existed before the amendments promulgated in the 2015 Rule. Those preexisting regulatory definitions are the ones that the agencies are currently implementing in light of the agencies' final rule published on February 6, 2018, adding a February 6, 2020 applicability date to the 2015 Rule, as well as judicial decisions preliminarily enjoining and staying the 2015 Rule.

DATES: Comments must be received on or before August 13, 2018.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–HQ–OW–2017–0203, at *http://www.regulations.gov.* Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from *Regulations.gov*. The agencies may publish any comment received to the public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The agencies will generally not consider comments or comment content located outside of the primary submission (*i.e.,* on the web, cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *http://www2.epa.gov/dockets.commenting-epa-dockets.*

FOR FURTHER INFORMATION CONTACT: Michael McDavit, Office of Water (4504–T), Environmental Protection Agency, 1200 Pennsylvania Avenue NW, Washington, DC 20460; telephone number: (202) 566–2428; email address: *CWAwotus@epa.gov;* or Stacey Jensen, Regulatory Community of Practice (CECW–CO–R), U.S. Army Corps of Engineers, 441 G Street NW, Washington, DC 201314; telephone number: (202) 761–6903; email address: *USACE_CWA_Rule@usace.army.mil.*

SUPPLEMENTARY INFORMATION: The agencies propose to repeal the Clean Water Rule: Definition of ''Waters of the United States,'' 80 FR 37054, and recodify the regulatory definitions of ''waters of the United States'' that existed prior to the August 28, 2015 effective date of the 2015 Rule. Those preexisting regulatory definitions are the ones that the agencies are currently implementing in light of the agencies' final rule (83 FR 5200, February 6, 2018), which added a February 6, 2020 applicability date to the 2015 Rule. Judicial decisions currently enjoin the 2015 Rule in 24 States as well. If this proposal is finalized, the agencies would administer the regulations promulgated in 1986 and 1988 in portions of 33 CFR part 328 and 40 CFR parts 110, 112, 116, 117, 122, 230, 232, 300, 302, and 401, and would continue to interpret the statutory term ''waters of the United States'' to mean the waters covered by those regulations, as the agencies are currently implementing those regulations consistent with Supreme Court decisions and longstanding practice, as informed by applicable guidance documents, training, and experience.

State, tribal, and local governments have well-defined and established relationships with the federal government in implementing CWA programs. Those relationships are not affected by this proposed rule, which would not alter the jurisdiction of the CWA compared to the regulations and practice that the agencies are currently applying. The proposed rule would permanently repeal the 2015 Rule, which amended the longstanding definition of ''waters of the United States'' in portions of 33 CFR part 328 and 40 CFR parts 110, 112, 116, 117, 122, 230, 232, 300, 302, and 401, and restore the regulations as they existed prior to the amendments in the 2015 Rule.[1]

The agencies are issuing this supplemental notice of proposed rulemaking (SNPRM) to clarify, supplement and give interested parties an opportunity to comment on certain important considerations and reasons for the agencies' proposal. The agencies clarify herein the scope of the solicitation of comment and the actions proposed. In response to the July 27, 2017 NPRM, (82 FR 34899), the agencies received numerous comments on the impacts of repealing the 2015 Rule in its entirety. Others commented in favor of retaining the 2015 Rule, either as written or with modifications. Some commenters interpreted the proposal as restricting their opportunity to provide such comments either supporting or opposing repeal of the 2015 Rule. In this SNPRM, the agencies reiterate that this regulatory action is intended to permanently repeal the 2015 Rule in its entirety, and we invite all interested persons to comment on whether the 2015 Rule should be repealed.

[1] While EPA administers most provisions in the CWA, the Department of the Army, Corps of Engineers (Corps) administers the permitting program under section 404. During the 1980s, both agencies adopted substantially similar definitions of ''waters of the United States.'' *See* 51 FR 41206, Nov. 13, 1986, amending 33 CFR 328.3; 53 FR 20764, June 6, 1988, amending 40 CFR 232.2.

The agencies are also issuing this SNPRM to clarify that the rule adding an applicability date to the 2015 Rule does not change the agencies' decision to proceed with this proposed repeal. For the reasons discussed in this notice, the agencies propose to conclude that regulatory certainty would be best served by repealing the 2015 Rule and recodifying the scope of CWA jurisdiction currently in effect. The agencies propose to conclude that rather than achieving its stated objectives of increasing predictability and consistency under the CWA, *see* 80 FR 37055, the 2015 Rule is creating significant confusion and uncertainty for agency staff, regulated entities, states, tribes, local governments, and the public, particularly in view of court decisions that have cast doubt on the legal viability of the rule. To provide for greater regulatory certainty, the agencies propose to repeal the 2015 Rule and to recodify the pre-2015 regulations, thereby maintaining a longstanding regulatory framework that is more familiar to and better-understood by the agencies, states, tribes, local governments, regulated entities, and the public.

Further, court rulings against the 2015 Rule suggest that the interpretation of the ''significant nexus'' standard as applied in the 2015 Rule may not comport with and accurately implement the legal limits on CWA jurisdiction intended by Congress and reflected in decisions of the Supreme Court. At a minimum, the agencies find that the interpretation of the statute adopted in the 2015 Rule is not compelled and raises significant legal questions. In light of the substantial uncertainty associated with the 2015 Rule, including by virtue of a potential stay, injunction, or vacatur of the 2015 Rule in various legal challenges, as well as the substantial experience the agencies already possess implementing the preexisting regulations that the agencies are implementing today, the agencies propose to conclude that administrative goals of regulatory certainty would be best served by repealing the 2015 Rule.

The agencies also propose to conclude that the 2015 Rule exceeded the agencies' authority under the CWA by adopting such an interpretation of Justice Kennedy's ''significant nexus'' standard articulated in *Rapanos* v. *United States* and *Carabell* v. *United States,* 547 U.S. 715 (2006) (''*Rapanos*'') as to be inconsistent with important aspects of that opinion and to cover waters outside the scope of the Act, even though that concurring opinion was identified as the basis for the significant nexus standard articulated in the 2015 Rule. The agencies also propose to conclude that, contrary to conclusions articulated in support of the rule, the 2015 Rule appears to have expanded the meaning of tributaries and adjacent wetlands to include waters well beyond those regulated by the agencies under the preexisting regulations, as applied by the agencies following decisions of the Supreme Court in *Rapanos* and *Solid Waste Agency of Northern Cook County* v. *U.S. Army Corps of Engineers,* 531 U.S. 159 (2001) (''*SWANCC*''). The agencies believe that the 2015 Rule may have altered the balance of authorities between the federal and State governments, contrary to the agencies' statements in promulgating the 2015 Rule and in contravention of CWA section 101(b), 33 U.S.C. 1251(b).

I. Background

The agencies refer the public to the Executive Summary for the NPRM, 82 FR 34899 (July 27, 2017), and incorporate it by reference herein.

A. The 2015 Rule

On June 29, 2015, the agencies issued a final rule (80 FR 37054) amending various portions of the CFR that set forth definitions of ''waters of the United States,'' a term contained in the CWA section 502(7) definition of ''navigable waters,'' 33 U.S.C. 1362(7).

A primary purpose of the 2015 Rule was to ''increase CWA program predictability and consistency by clarifying the scope of 'waters of the United States' protected under the Act.'' 80 FR 37054. The 2015 Rule attempted to clarify the geographic scope of the CWA by placing waters into three categories: (A) Waters that are categorically ''jurisdictional by rule'' in all instances (*i.e.,* without the need for any additional analysis); (B) waters that are subject to case-specific analysis to determine whether they are jurisdictional, and (C) waters that are categorically excluded from jurisdiction. Waters that are ''jurisdictional by rule'' include (1) waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide; (2) interstate waters, including interstate wetlands; (3) the territorial seas; (4) impoundments of waters otherwise identified as jurisdictional; (5) tributaries of the first three categories of ''jurisdictional by rule'' waters; and (6) waters adjacent to a water identified in the first five categories of ''jurisdictional by rule'' waters, including wetlands, ponds, lakes, oxbows, impoundments, and similar waters. *See id.* at 37104.

The 2015 Rule added new definitions of key terms such as ''tributaries'' and revised previous definitions of terms such as ''adjacent'' (by adding a new definition of ''neighboring'' that is used in the definition of ''adjacent'') that would determine whether waters are ''jurisdictional by rule.'' *See id.* at 37105. Specifically, a tributary under the 2015 Rule is a water that contributes flow, either directly or through another water, to a water identified in the first three categories of ''jurisdictional by rule'' waters and that is characterized by the presence of the ''physical indicators'' of a bed and banks and an ordinary high water mark. ''These physical indicators demonstrate there is volume, frequency, and duration of flow sufficient to create a bed and banks and therefore an ordinary high water mark, and thus to qualify as a tributary.'' *Id.* The 2015 Rule does not delineate jurisdiction specifically based on categories with established scientific meanings such as ephemeral, intermittent, and perennial waters that are based on the source of the water and nature of the flow. *See id.* at 37076 (''Under the rule, flow in the tributary may be perennial, intermittent, or ephemeral.''). Under the 2015 Rule, tributaries need not be demonstrated to possess any specific volume, frequency, or duration of flow, or to contribute flow to a traditional navigable water in any given year or specific time period. Tributaries under the 2015 Rule can be natural, man-altered, or man-made, and they do not lose their status as a tributary if, for any length, there are one or more constructed breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as wetlands along the run of a stream, debris piles, boulder fields, or a stream that flows underground) so long as a bed and banks and an ordinary high water mark can be identified upstream of the break. *Id.* at 37105–06.

In the 2015 Rule, the agencies did not expressly amend the longstanding definition of ''adjacent'' (defined as ''bordering, contiguous, or neighboring''), but the agencies added a new definition of ''neighboring'' that impacted the interpretation of ''adjacent.'' The 2015 Rule defined ''neighboring'' to encompass all waters located within 100 feet of the ordinary high water mark of a category (1) through (5) ''jurisdictional by rule'' water; all waters located within the 100-year floodplain of a category (1) through (5) ''jurisdictional by rule'' water and not more than 1,500 feet from the ordinary high water mark of such water;

all waters located within 1,500 feet of the high tide line of a category (1) though (3) ''jurisdictional by rule'' water; and all waters within 1,500 feet of the ordinary high water mark of the Great Lakes. *Id.* at 37105. The entire water is considered neighboring if any portion of it lies within one of these zones. *See id.* This regulatory text did not appear in the proposed rule, and thus the agencies did not receive public comment on these numeric measures.

In addition to the six categories of ''jurisdictional by rule'' waters, the 2015 Rule identifies certain waters that are subject to a case-specific analysis to determine if they have a ''significant nexus'' to a water that is jurisdictional. *Id.* at 37104–05. The first category consists of five specific types of waters in specific regions of the country: Prairie potholes, Carolina and Delmarva bays, pocosins, western vernal pools in California, and Texas coastal prairie wetlands. *Id.* at 37105. The second category consists of all waters located within the 100-year floodplain of any category (1) through (3) ''jurisdictional by rule'' water and all waters located within 4,000 feet of the high tide line or ordinary high water mark of any category (1) through (5) ''jurisdictional by rule'' water. *Id.* These quantitative measures did not appear in the proposed rule, and thus the agencies did not receive public comment on these specific measures.

The 2015 Rule defines ''significant nexus'' to mean a water, including wetlands, that either alone or in combination with other similarly situated waters in the region, significantly affects the chemical, physical, or biological integrity of a category (1) through (3) ''jurisdictional by rule'' water. 80 FR 37106. ''For an effect to be significant, it must be more than speculative or insubstantial.'' *Id.* The term ''in the region'' means ''the watershed that drains to the nearest'' primary water.[2] *Id.* This definition is different than the test articulated by the agencies in their 2008 *Rapanos* Guidance.[3] That guidance interpreted ''similarly situated'' to include all wetlands (not waters) adjacent to the same tributary, a much less expansive treatment of similarly situated waters than in the 2015 Rule.

Under the 2015 Rule, to determine whether a water, alone or in combination with similarly situated waters across a watershed, has such an effect, one must look at nine functions such as sediment trapping, runoff storage, provision of life cycle dependent aquatic habitat, and other functions. It is sufficient for determining whether a water has a significant nexus if any single function performed by the water, alone or together with similarly situated waters in the watershed, contributes significantly to the chemical, physical, or biological integrity of the nearest category (1) through (3) ''jurisdictional by rule'' water. *Id.* Taken together, the enumeration of the nine functions and the more expansive consideration of ''similarly situated'' in the 2015 Rule could mean that the vast majority of water features in the United States may come within the jurisdictional purview of the federal government.[4] Indeed, the agencies stated in the 2015 Rule that the ''the chemical, physical, and biological integrity of downstream waters is directly related to the aggregate contribution of upstream waters that flow into them, including any tributaries and connected wetlands.'' *Id.* at 37066.

The agencies also retained exclusions from the definition of ''waters of the United States'' for prior converted cropland and waste treatment systems. *Id.* at 37105. In addition, the agencies codified several exclusions that reflected longstanding agency practice, and added others such as ''puddles'' and ''swimming pools'' in response to concerns raised by stakeholders during the public comment period on the proposed 2015 Rule. *Id.* at 37096–98, 37105.

B. Legal Challenges to the 2015 Rule

Following the 2015 Rule's publication, 31 States[5] and 53 non-state parties, including environmental groups, and groups representing farming, recreational, forestry, and other interests, filed complaints and petitions for review in multiple federal district[6] and appellate[7] courts challenging the 2015 Rule. In those cases, the challengers alleged procedural deficiencies in the development and promulgation of the 2015 Rule and substantive deficiencies in the 2015 Rule itself. Some challengers argued that the 2015 Rule was too expansive while others argued that it excluded too many waters from federal jurisdiction.

The day before the 2015 Rule's August 28, 2015 effective date, the U.S. District Court for the District of North Dakota preliminarily enjoined the 2015 Rule in the 13 States that challenged the rule in that court.[8] The district court found those States were ''likely to succeed'' on the merits of their challenge to the 2015 Rule because, among other reasons, ''it appears likely that the EPA has violated its Congressional grant of authority in its promulgation of the Rule.'' In particular, the court noted concern that the 2015 Rule's definition of tributary ''includes vast numbers of waters that are unlikely to have a nexus to navigable waters.'' Further, the court found that ''it appears likely that the EPA failed to comply with [Administrative Procedure Act (APA)] requirements when promulgating the Rule,'' suggesting that certain distance-based measures were not a logical outgrowth of the proposal to the 2015 Rule. *North Dakota* v. *EPA,* 127 F. Supp. 3d 1047, 1051, 1056, 1058 (D.N.D. 2015). No party sought an interlocutory appeal.

The petitions for review filed in the courts of appeals were consolidated in the U.S. Court of Appeals for the Sixth Circuit. In that litigation, state and industry petitioners raised concerns about whether the 2015 Rule violates the Constitution and the CWA and whether its promulgation violated

[2] In this notice, a ''primary'' water is a category (1) through (3) ''jurisdictional by rule'' water.

[3] *See* 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 & Carabell v. United States* at 1 (Dec. 2, 2008) (''*Rapanos* Guidance''), *available at https://www.epa.gov/sites/production/files/2016-02/documents/cwa_jurisdiction_following_rapanos120208.pdf.* The agencies acknowledge that the *Rapanos* Guidance did not impose legally binding requirements, *see id.* at 4 n.17, but believe that this guidance is relevant to the discussion in this notice.

[4] ''[T]he vast majority of the nation's water features are located within 4,000 feet of a covered tributary, traditional navigable water, interstate water, or territorial sea.'' U.S. EPA and Department of the Army. Economic Analysis of the EPA-Army Clean Water Rule at 11 (May 20, 2015) (''2015 Rule Economic Analysis'') (Docket ID: EPAHQ–OW–2011–0880–20866), *available at https://www.regulations.gov/document?D=EPA-HQ-OW-2011-0880-20866.*

[5] Alabama, Alaska, Arizona, Arkansas, Colorado, Florida, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, New Mexico (Environment Department and State Engineer), North Carolina (Department of Environment and Natural Resources), North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, West Virginia, Wisconsin, and Wyoming. Iowa joined the legal challenge later in the process, bringing the total to 32 States.

[6] U.S. District Courts for the Northern and Southern District of Georgia, District of Minnesota, District of North Dakota, Southern District of Ohio, Northern District of Oklahoma, Southern District of Texas, District of Arizona, Northern District of Florida, District of the District of Columbia, Western District of Washington, Northern District of California, and Northern District of West Virginia.

[7] U.S. Court of Appeals for the Second, Fifth, Sixth, Eighth, Ninth, Tenth, Eleventh, and District of Columbia Circuits.

[8] Alaska, Arizona, Arkansas, Colorado, Idaho, Missouri, Montana, Nebraska, Nevada, New Mexico, North Dakota, South Dakota, and Wyoming. Iowa's motion to intervene in the case was granted after issuance of the preliminary injunction.

procedural requirements under the APA and other statutes. Environmental petitioners also challenged the 2015 Rule, including exclusions therein. On October 9, 2015, approximately six weeks after the 2015 Rule took effect in the 37 States that were not subject to the preliminary injunction issued by the District of North Dakota, the Sixth Circuit stayed the 2015 Rule nationwide after finding, among other things, that State petitioners had demonstrated ''a substantial possibility of success on the merits of their claims.'' *In re EPA & Dep't of Def. Final Rule,* 803 F.3d 804 (6th Cir. 2015) (''*In re EPA*'').

On January 13, 2017, the U.S. Supreme Court granted *certiorari* on the question of whether the courts of appeals have original jurisdiction to review challenges to the 2015 Rule. *See Nat'l Ass'n of Mfrs.* v. *Dep't of Defense,* 137 S. Ct. 811 (2017). The Sixth Circuit granted petitioners' motion to hold in abeyance the briefing schedule in the litigation challenging the 2015 Rule pending a Supreme Court decision on the question of the court of appeals' jurisdiction. On January 22, 2018, the Supreme Court, in a unanimous opinion, held that the 2015 Rule is subject to direct review in the district courts. *Nat'l Ass'n of Mfrs.* v. *Dep't of Def.,* 138 S. Ct. 617, 624 (2018). Throughout the pendency of the Supreme Court litigation (and for a short time thereafter), the Sixth Circuit's nationwide stay remained in effect. In response to the Supreme Court's decision, on February 28, 2018, the Sixth Circuit lifted the stay and dismissed the corresponding petitions for review. *See In re Dep't of Def. & EPA Final Rule,* 713 Fed. App'x 489 (6th Cir. 2018).

Since the Supreme Court's jurisdictional ruling, district court litigation regarding the 2015 Rule has resumed. At this time, the 2015 Rule continues to be subject to a preliminary injunction issued by the District of North Dakota as to 13 States: Alaska, Arizona, Arkansas, Colorado, Idaho, Missouri, Montana, Nebraska, Nevada, North Dakota, South Dakota, Wyoming, and New Mexico. The 2015 Rule also is subject to a preliminary injunction issued by the U.S. District Court for the Southern District of Georgia as to 11 more States: Georgia, Alabama, Florida, Indiana, Kansas, Kentucky, North Carolina, South Carolina, Utah, West Virginia, and Wisconsin. *See Georgia* v. *Pruitt,* No. 15–cv–79 (S.D. Ga.). In another action, the U.S. District Court for the Southern District of Texas is considering preliminary injunction motions filed by parties including the States of Texas, Louisiana, and Mississippi. *See Texas* v. *EPA,* No. 3:15–cv–162 (S.D. Tex.); *Am. Farm Bureau Fed'n et al.* v. *EPA,* No. 3:15–cv–165 (S.D. Tex.). At least three additional States are seeking a preliminary injunction in the U.S. District Court for the Southern District of Ohio as well. *See, e.g.,* States' Supplemental Memorandum in Support of Preliminary Injunction, *Ohio* v. *EPA,* No. 2:15–cv–02467 (S.D. Ohio June 20, 2018) (brief filed by the States of Ohio, Michigan, and Tennessee in support of the States' motion for a preliminary injunction against the 2015 Rule).

C. Executive Order 13778, the Notice of Proposed Rulemaking, and the Applicability Date Rule

The agencies are engaged in a two-step process intended to review and repeal or revise, as appropriate and consistent with law, the definition of ''waters of the United States'' as set forth in the 2015 Rule. This process began in response to Executive Order 13778 issued on February 28, 2017, by the President entitled ''Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the 'Waters of the United States' Rule.'' Section 1 of the Executive Order states, ''[i]t is in the national interest to ensure the Nation's navigable waters are kept free from pollution, while at the same time promoting economic growth, minimizing regulatory uncertainty, and showing due regard for the roles of the Congress and the States under the Constitution.'' The Order directed the EPA and the Army to review the 2015 Rule for consistency with the policy outlined in Section 1 of the Order and to issue a proposed rule rescinding or revising the 2015 Rule as appropriate and consistent with law (Section 2). The Executive Order also directed the agencies to ''consider interpreting the term 'navigable waters' . . . in a manner consistent with'' Justice Scalia's plurality opinion in *Rapanos* (Section 3).

On March 6, 2017, the agencies published a notice of intent to review the 2015 Rule and provide notice of a forthcoming proposed rulemaking consistent with the Executive Order. 82 FR 12532. Shortly thereafter, the agencies announced that they would implement the Executive Order in a two-step approach. On July 27, 2017, the agencies published a NPRM (82 FR 34899) that proposed to rescind the 2015 Rule and restore the regulatory text that governed prior to the promulgation of the 2015 Rule, which the agencies have been implementing since the judicial stay of the 2015 Rule consistent with Supreme Court decisions and informed by applicable guidance documents and longstanding agency practice. The agencies invited comment on the NPRM over a 62-day period.

Shortly after the Supreme Court decided that the courts of appeals do not have original jurisdiction to review challenges to the 2015 Rule and directed the Sixth Circuit to dismiss the consolidated challenges to the 2015 Rule for lack of jurisdiction, the agencies issued a final rule (83 FR 5200, Feb. 6, 2018), after providing notice and an opportunity for public comment, that added an applicability date to the 2015 Rule. The applicability date was established as February 6, 2020. When adding the applicability date to the 2015 Rule, the agencies clarified that they will continue to implement nationwide the previous regulatory definition of ''waters of the United States,'' consistent with the practice and procedures the agencies implemented before and immediately following the issuance of the 2015 Rule pursuant to the preliminary injunction issued by the District of North Dakota and the nationwide stay issued by the Sixth Circuit. The agencies further explained that the final applicability date rule would ensure regulatory certainty and consistent implementation of the CWA nationwide while the agencies reconsider the 2015 Rule and potentially pursue further rulemaking to develop a new definition of ''waters of the United States.'' The applicability date rule was challenged in a number of district courts. Generally, the challenges raise concerns that the agencies' action was arbitrary and capricious because the agencies did not address substantive comments regarding the 2015 Rule, as well as procedural concerns with respect to the length of the public comment period for the proposed applicability date rule. At this time, these challenges remain pending in the district courts where they were filed.

D. Comments on the Original Notice of Proposed Rulemaking

The agencies accepted comments on the NPRM from July 27, 2017, through September 27, 2017. The agencies received more than 685,000 comments on the NPRM from a broad spectrum of interested parties. The agencies are continuing to review those extensive comments. Some commenters expressed support for the agencies' proposal to repeal the 2015 Rule, stating, among other things, that the 2015 Rule exceeds the agencies' statutory authority. Other commenters opposed the proposal, stating, among other things, that repealing the 2015 Rule will increase

regulatory uncertainty and adversely impact water quality.

Based on the agencies' careful and ongoing review of the comments submitted in response to the NPRM, the agencies believe that it is in the public interest to provide further explanation and allow interested parties additional opportunity to comment on the proposed repeal of the 2015 Rule. Because some commenters interpreted the NPRM as restricting their ability to comment on the legal and policy reasons for or against the repeal of the 2015 Rule while others submitted comments addressing these topics, the agencies wish to make clear that comments on that subject are solicited. Additionally, some commenters appeared to be confused by whether the agencies proposed a temporary or interim, as opposed to a permanent, repeal of the 2015 Rule. While the agencies did refer to the July 2017 proposal as an ''interim action'' (82 FR 34902), that was in the context of explaining that the proposal to repeal the 2015 Rule is the first step of a two-step process, as described above, and that the agencies are planning to take the additional, second step of conducting a separate notice and comment rulemaking to propose a new definition of ''waters of the United States.'' In this notice, the agencies are clarifying that, regardless of the timing or ultimate outcome of that additional rulemaking, the agencies are proposing a permanent repeal of the 2015 Rule at this stage. This was also our intent in the NPRM. Finally, some commenters did not fully understand the precise action the NPRM proposed to take, *e.g.,* repealing, staying, or taking some other action with respect to the 2015 Rule. The agencies are issuing this SNPRM and are inviting all interested persons to comment on whether the agencies should repeal the 2015 Rule and recodify the regulations currently being implemented by the agencies.

E. Comments on This Supplemental Notice of Proposed Rulemaking

As discussed in the next sections, the agencies are proposing to permanently repeal the 2015 Rule. The agencies welcome comment on all issues that are relevant to the consideration of whether to repeal the 2015 Rule. In response to the initial NPRM, many commenters have already provided comment on considerations and issues that weigh in favor of or against repeal, including many of the issues articulated below. The agencies will consider all of those previously submitted comments, in addition to any new comments submitted in response to this SNPRM, in taking a final action on this rulemaking. As such, commenters need not resubmit comments already provided in response to the agencies' July 27, 2017 NPRM (82 FR 34899).

II. Proposal To Repeal the 2015 Rule

A. Legal Authority To Repeal

The agencies' ability to repeal an existing regulation through notice-and-comment rulemaking is well-grounded in the law. The APA defines rulemaking to mean ''agency process for formulating, amending, or repealing a rule.'' 5 U.S.C. 551(5). The CWA complements this authority by providing the Administrator with broad authority to ''prescribe such regulations as are necessary to carry out the functions under this Act.'' 33 U.S.C. 1361(a). This broad authority includes regulations that repeal or revise CWA implementing regulations promulgated by a prior administration.

The Supreme Court has made clear that ''[a]gencies are free to change their existing policies as long as they provide a reasoned explanation for the change,'' and ''[w]hen an agency changes its existing position, it 'need not always provide a more detailed justification than what would suffice for a new policy created on a blank slate.' '' *Encino Motorcars, LLC* v. *Navarro,* 136 S. Ct. 2117, 2125 (2016) (citations omitted). The NPRM discussed how the agencies may revise or repeal the regulatory definition of ''waters of the United States'' so long as the agencies' action is based on a reasoned explanation. *See* 82 FR 34901. The agencies can do so based on changes in circumstance, or changes in statutory interpretation or policy judgments. *See, e.g., FCC* v. *Fox Television Stations, Inc.,* 556 U.S. 502, 514–15 (2009); *Ctr. for Sci. in Pub. Interest* v. *Dep't of Treasury,* 797 F.2d 995, 998–99 & n.1 (D.C. Cir. 1986). The agencies' interpretation of the statutes they administer, such as the CWA, are not ''instantly carved in stone''; quite the contrary, the agencies ''must consider varying interpretations and the wisdom of [their] policy on a continuing basis, . . . for example, in response to . . . a change in administrations.'' *Nat'l Cable & Telecommc'ns Ass'n* v. *Brand X Internet Servs.,* 545 U.S. 967, 981–82 (2005) (''*Brand X*'') (internal quotation marks omitted) (quoting *Chevron U.S.A., Inc.* v. *NRDC,* 467 U.S. 837, 863–64 (1984)) (citing *Motor Vehicle Mfrs. Ass'n* v. *State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 59 (1983) (Rehnquist, J., concurring in part and dissenting in part)). The Supreme Court and lower courts have acknowledged an agency's ability to repeal regulations promulgated by a prior administration based on changes in agency policy where ''the agency adequately explains the reasons for a reversal of policy.'' *See Brand X,* 545 U.S. at 981. A revised rulemaking based ''on a reevaluation of which policy would be better in light of the facts'' is ''well within an agency's discretion,'' and ''[a] change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency's reappraisal'' of its regulations and programs. *Nat'l Ass'n of Home Builders* v. *EPA,* 682 F.3d 1032, 1038 & 1043 (D.C. Cir. 2012) (''*NAHB*'').

B. Legal Background

1. The Clean Water Act

Congress amended the Federal Water Pollution Control Act (FWPCA), or Clean Water Act (CWA) as it is commonly called,[9] in 1972 to address longstanding concerns regarding the quality of the nation's waters and the federal government's ability to address those concerns under existing law. Prior to 1972, the ability to control and redress water pollution in the nation's waters largely fell to the Corps under the Rivers and Harbors Act of 1899. Congress had also enacted the Water Pollution Control Act of 1948, Public Law 80–845, 62 Stat. 1155 (June 30, 1948), to address interstate water pollution, and subsequently amended that statute in 1956 (giving the statute is current formal name), 1961, and 1965. The early versions of the CWA promoted the development of pollution abatement programs, required states to develop water quality standards, and authorized the federal government to bring enforcement actions to abate water pollution.

These early statutory efforts, however, proved inadequate to address the decline in the quality of the nation's waters, *see City of Milwaukee* v. *Illinois,* 451 U.S. 304, 310 (1981), so Congress performed a ''total restructuring'' and ''complete rewriting'' of the existing statutory framework in 1972, *id.* at 317 (quoting legislative history of 1972 amendments). That restructuring resulted in the enactment of a comprehensive scheme designed to prevent, reduce, and eliminate pollution in the nation's waters generally, and to regulate the discharge of pollutants into navigable waters specifically. *See, e.g.,*

[9] The FWPCA is commonly referred to as the CWA following the 1977 amendments to the FWPCA. Public Law 95–217, 91 Stat. 1566 (1977). For ease of reference, the agencies will generally refer to the FWPCA in this notice as the CWA or the Act.

S.D. Warren Co. v. *Maine Bd. of Envtl. Prot.,* 547 U.S. 370, 385 (2006) (''[T]he Act does not stop at controlling the 'addition of pollutants,' but deals with 'pollution' generally[.]'').

The objective of the new statutory scheme was ''to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.'' 33 U.S.C. 1251(a). In order to meet that objective, Congress declared two national goals: (1) ''that the discharge of pollutants into the navigable waters be eliminated by 1985;'' and (2) ''that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983. . . .'' *Id.* at 1251(a)(1)–(2).

Congress established several key policies that direct the work of the agencies to effectuate those goals. For example, Congress declared as a national policy ''that the discharge of toxic pollutants in toxic amounts be prohibited; . . . that Federal financial assistance be provided to construct publicly owned waste treatment works; . . . that areawide waste treatment management planning processes be developed and implemented to assure adequate control of sources of pollutants in each State; . . . [and] that programs for the control of nonpoint sources of pollution be developed and implemented in an expeditious manner so as to enable the goals of this Act to be met through the control of both point and nonpoint sources of pollution.'' *Id.* at 1251(a)(3)–(7).

Congress envisioned a major role for the states in implementing the CWA, and the CWA also recognizes the importance of preserving the states' independent authority and responsibility in this area. The CWA balances the traditional power of states to regulate land and water resources within their borders with the need for a federal water quality regulation to protect the waters of the United States. For example, the statute reflects ''the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution'' and ''to plan the development and use . . . of land and water resources. . . .'' *Id.* at 1251(b). Congress also declared as a national policy that states manage the major construction grant program and implement the core permitting programs authorized by the statute, among other responsibilities. *Id.* Congress added that ''nothing in this Act shall . . . be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States.'' *Id.* at 1370. Congress also pledged to provide technical support and financial aid to the states ''in connection with the prevention, reduction, and elimination of pollution.'' *Id.* at 1251(b).

To carry out these policies, Congress broadly defined ''pollution'' to mean ''the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water,'' *id.* at 1362(19), to parallel the broad objective of the Act ''to restore and maintain the chemical, physical, and biological integrity of the Nation's waters,'' *id.* at 1251(a). Congress then crafted a non-regulatory statutory framework to provide technical and financial assistance to the states to prevent, reduce, and eliminate pollution in the broader set of the nation's waters. For example, section 105 of the Act, ''Grants for research and development,'' authorized EPA ''to make grants to any State or States or interstate agency to demonstrate, in *river basins or portions thereof,* advanced treatment and environmental enhancement techniques to control pollution from all sources, . . . including nonpoint sources, . . . [and] for research and demonstration projects for prevention of pollution of *any waters* by industry *including, but not limited to, the prevention, reduction, and elimination of the discharge of pollutants.*'' 33 U.S.C. 1255(b)–(c) (emphases added); *see also id.* at 1256(a) (authorizing EPA to issue ''grants to States and to interstate agencies to assist them in administering programs for the prevention, reduction, and elimination of pollution''). Section 108, ''Pollution control in the Great Lakes,'' authorized EPA to enter into agreements with any state to develop plans for the ''elimination or control of pollution, *within all or any part of the watersheds* of the Great Lakes.'' *Id.* at 1258(a) (emphasis added); *see also id.* at 1268(a)(3)(C) (defining the ''Great Lakes System'' as ''all the streams, rivers, lakes, and other bodies of water within the drainage basin of the Great Lakes''). Similar broad pollution control programs were created for other major watersheds, including, for example, the Chesapeake Bay, *see id.* at 1267(a)(3), Long Island Sound, *see id.* at 1269(c)(2)(D), and Lake Champlain, *see id.* at 1270(g)(2).

For the narrower set of the nation's waters identified as ''navigable waters'' or ''the waters of the United States,'' *id.* at 1362(7), Congress created a federal regulatory permitting program designed to address the discharge of pollutants into those waters. Section 301 contains the key regulatory mechanism: ''Except as in compliance with this section and sections 302, 306, 307, 318, 402, and 404 of this Act, the discharge of any pollutant by any person shall be unlawful.'' *Id.* at 1311(a). A ''discharge of a pollutant'' is defined to include ''any addition of any pollutant to *navigable waters* from any point source,'' such as a pipe, ditch or other ''discernible, confined and discrete conveyance.'' *Id.* at 1362(12), (14) (emphasis added). The term ''pollutant,'' as compared to the broader term ''pollution,'' *id.* at 1362(19), means ''dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water.'' *Id.* at 1362(6). Thus, it is unlawful to discharge pollutants into navigable waters (defined in the Act as ''the waters of the United States'') from a point source unless the discharge complies with certain enumerated sections of the CWA, including obtaining authorizations to discharge pollutants pursuant to the section 402 National Pollutant Discharge Elimination System (NPDES) permit program and the section 404 dredged or fill material permit program. *See id.* at 1342 and 1344.

Under this statutory scheme, the states are responsible for developing water quality standards for waters of the United States within their borders and reporting on the condition of those waters to EPA every two years. *Id.* at 1313, 1315. States are also responsible for developing total maximum daily loads (TMDLs) for waters that are not meeting established water quality standards and must submit those TMDLs to EPA for approval. *Id.* at 1313(d). States also have authority to issue water quality certifications or waive certification for every federal permit or license issued within their borders that may result in a discharge to navigable waters. *Id.* at 1341. A change to the interpretation of ''waters of the United States'' may change the scope of waters subject to CWA jurisdiction and thus may change the scope of waters for which states may assume these responsibilities under the Act.

These same regulatory authorities can be assumed by Indian tribes under section 518 of the CWA, which authorizes EPA to treat eligible Indian tribes in a manner similar to states for a variety of purposes, including administering each of the principal

CWA regulatory programs. *Id.* at 1377(e). In addition, states and tribes retain sovereign authority to protect and manage the use of those waters that are not navigable waters under the CWA. *See, e.g., id.* at 1251(b), 1251(g), 1370, 1377(a). Forty-seven states administer the CWA section 402 permit program for those waters of the United States within their boundaries, and two administer the section 404 permit program. At present, no tribes administer the section 402 or 404 programs.

The agencies must develop regulatory programs designed to ensure that the full statute is implemented as Congress intended. *See, e.g., Hibbs* v. *Winn,* 542 U.S. 88, 101 (2004) (''A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant.''). This includes pursuing the overall ''objective'' of the CWA to ''restore and maintain the chemical, physical, and biological integrity of the Nation's waters,'' 33 U.S.C. 1251(a), while implementing the specific ''policy'' directives from Congress to, among other things, ''recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution'' and ''to plan the development and use . . . of land and water resources,'' *id.* at 1251(b). *See Webster's II, New Riverside University Dictionary* (1994) (defining ''policy'' as a ''plan or course of action, as of a government[,] designed to influence and determine decisions and actions;'' an ''objective'' is ''something worked toward or aspired to: Goal''). To maintain that balance, the agencies must determine what Congress had in mind when it defined ''navigable waters'' in 1972 as simply ''the waters of the United States''—and must do so in light of, *inter alia,* the policy directive to preserve and protect the states' rights and responsibilities.

Congress' authority to regulate navigable waters derives from its power to regulate the ''channels of interstate commerce'' under the Commerce Clause. *Gibbons* v. *Ogden,* 22 U.S. (9 Wheat.) 1 (1824); *see also United States* v. *Lopez,* 514 U.S. 549, 558–59 (1995) (describing the ''channels of interstate commerce'' as one of three areas of congressional authority under the Commerce Clause). The Supreme Court explained in *SWANCC* that the term ''navigable'' indicates ''what Congress had in mind as its authority for enacting the Clean Water Act: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made.'' 531 U.S. 159, 172 (2001). The Court further explained that nothing in the legislative history of the Act provides any indication that ''Congress intended to exert anything more than its commerce power over navigation.'' *Id.* at 168 n.3.

The Supreme Court has cautioned that one must look to the underlying purpose of the statute to determine the scope of federal authority being exercised over navigable waters under the Commerce Clause. *See PPL Montana, LLC* v. *Montana,* 132 S. Ct. 1215, 1228 (2012). The Supreme Court did that in *United States* v. *Riverside Bayview Homes,* for example, and determined that Congress had intended ''to exercise its powers under the Commerce Clause to regulate at least some waters that would not be deemed 'navigable' under the classical understanding of that term.'' 474 U.S. 121, 133 (1985) (''[T]he evident breadth of congressional concern for protection of water quality and aquatic ecosystems suggests that it is reasonable for the Corps to interpret the term 'waters' to encompass wetlands adjacent to waters as more conventionally defined.''); *see also SWANCC,* 531 U.S. at 167 (noting that the *Riverside Bayview* ''holding was based in large measure upon Congress' unequivocal acquiescence to, and approval of, the Corps' regulations interpreting the CWA to cover wetlands adjacent to navigable waters'').

The classical understanding of the term navigable was first articulated by the Supreme Court in *The Daniel Ball:*

> Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways of commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. And they constitute navigable waters of the United States within the meaning of the Acts of Congress, in contradistinction from the navigable waters of the States, when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water.

77 U.S. (10 Wall.) 557, 563 (1871). Over the years, this traditional test has been expanded to include waters that had been used in the past for interstate commerce, *see Economy Light & Power Co.* v. *United States,* 256 U.S. 113, 123 (1921), and waters that are susceptible for use with reasonable improvement, *see United States* v. *Appalachian Elec. Power Co.,* 311 U.S. 377, 407–10 (1940).

By the time the 1972 CWA amendments were enacted, the Supreme Court had also made clear that Congress' authority over the channels of interstate commerce was not limited to regulation of the channels themselves, but could extend to activities necessary to protect the channels. *See Oklahoma ex rel. Phillips* v. *Guy F. Atkinson Co.,* 313 U.S. 508, 523 (1941) (''Congress may exercise its control over the non-navigable stretches of a river in order to preserve or promote commerce on the navigable portions.''). The Supreme Court had also clarified that Congress could regulate waterways that formed a part of a channel of interstate commerce, even if they are not themselves navigable or do not cross state boundaries. *See Utah* v. *United States,* 403 U.S. 9, 11 (1971).

These developments were discussed during the legislative process leading up to the passage of the 1972 CWA amendments, and certain members referred to the scope of the amendments as encompassing waterways that serve as ''links in the chain'' of interstate commerce as it flows through various channels of transportation, such as railroads and highways. *See, e.g.,* 118 Cong. Rec. 33756–57 (1972) (statement of Rep. Dingell); 118 Cong. Rec. 33699 (Oct. 4, 1972) (statement of Sen. Muskie).[10] Other references suggest that congressional committees at least contemplated applying the ''control requirements'' of the Act ''to the navigable waters, portions thereof, and their tributaries.'' S. Rep. No. 92–414, 92nd Cong., 1st Sess. at 77 (1971). And in 1977, when Congress authorized State assumption over the section 404 dredged or fill material permitting program, Congress limited the scope of assumable waters by requiring the Corps to retain permitting authority over Rivers and Harbors Act waters (as identified by the *Daniel Ball* test) plus wetlands adjacent to those waters, minus historic use only waters. *See* 33 U.S.C. 1344(g)(1).[11] This suggests that Congress had in mind a broader scope of waters subject to CWA jurisdiction than waters traditionally understood as navigable. *See SWANCC,* 531 U.S. at 171; *Riverside Bayview,* 474 U.S. at 138 n.11.

Thus, Congress intended to assert federal authority over more than just waters traditionally understood as navigable, and Congress rooted that

[10] The agencies recognize that individual member statements are not a substitute for full congressional intent, but they do help provide context for issues that were discussed during the legislative debates. For a detailed discussion of the legislative history of the 1972 CWA amendments, see Albrecht & Nickelsburg, *Could SWANCC Be Right? A New Look at the Legislative History of the Clean Water Act,* 32 ELR 11042 (Sept. 2002).

[11] For a detailed discussion of the legislative history supporting the enactment of section 404(g), see *Final Report of the Assumable Waters Subcommittee* (May 2017), App. F.

authority in ''its commerce power over navigation.'' *SWANCC,* 531 U.S. at 168 n.3. However, there must necessarily be a limit to that authority and to what water is subject to federal jurisdiction. How the agencies should exercise that authority has been the subject of dispute for decades, but the Supreme Court on three occasions has analyzed the issue and provided some instructional guidance.

2. U.S. Supreme Court Precedent

a. Adjacent Wetlands

In *Riverside Bayview,* the Supreme Court considered the Corps' assertion of jurisdiction over ''low-lying, marshy land'' immediately abutting a water traditionally understood as navigable on the grounds that it was an ''adjacent wetland'' within the meaning of the Corps' then-existing regulations. 474 U.S. at 124. The Court addressed the question whether non-navigable wetlands may be regulated as ''waters of the United States'' on the basis that they are ''adjacent to'' navigable-in-fact waters and ''inseparably bound up with'' them because of their ''significant effects on water quality and the aquatic ecosystem.'' *See id.* at 131–35 & n.9.

In analyzing the meaning of adjacency, the Court captured the difficulty in determining where the limits of federal jurisdiction end, noting that the line is somewhere between open water and dry land:

> *In determining the limits of its power* to regulate discharges under the Act, the Corps must necessarily choose some point at which water ends and land begins. Our common experience tells us that this is often no easy task: The transition from water to solid ground is not necessarily or even typically an abrupt one. Rather, between open waters and dry land may lie shallows, marshes, mudflats, swamps, bogs—in short, a huge array of areas that are not wholly aquatic but nevertheless fall far short of being dry land. Where on this continuum to find the limit of ''waters'' is far from obvious.

Id. at 132 (emphasis added). Within this statement, the Supreme Court identifies a basic principle for adjacent wetlands: The limits of jurisdiction lie within the ''continuum'' or ''transition'' ''between open waters and dry land.'' Observing that Congress intended the CWA ''to regulate at least some waters that would not be deemed 'navigable,' '' the Court therefore held that it is ''a permissible interpretation of the Act'' to conclude that ''a wetland that actually abuts on a navigable waterway'' falls within the ''definition of 'waters of the United States.' '' *Id.* at 133, 135. Thus, a wetland that abuts a navigable water traditionally understood as navigable is subject to CWA permitting because it is ''inseparably bound up with the 'waters' of the United States.'' *Id.* at 134. ''This holds true even for wetlands that are not the result of flooding or permeation by water having its source in adjacent bodies of open water.'' *Id.* The Court also noted that the agencies can establish categories of jurisdiction for adjacent wetlands. *See id.* at 135 n.9.

The Supreme Court in *Riverside Bayview* declined to decide whether wetlands that are not adjacent to navigable waters could also be regulated by the agencies. *See id.* at 124 n.2 & 131 n.8. In *SWANCC,* however, the Supreme Court analyzed a similar question in the context of an abandoned sand and gravel pit located some distance from a traditional navigable water, with excavation trenches that ponded—some only seasonally—and served as habitat for migratory birds. 531 U.S. at 162–65. The Supreme Court rejected the government's stated rationale for asserting jurisdiction over these ''nonnavigable, isolated, intrastate waters.'' *Id.* at 171–72. In doing so, the Supreme Court noted that *Riverside Bayview* upheld ''jurisdiction over wetlands that actually abutted on a navigable waterway'' because the wetlands were ''inseparably bound up with the 'waters' of the United States.'' *Id.* at 167.[12] As summarized by the *SWANCC* majority:

> It was the significant nexus between the wetlands and ''navigable waters'' that informed our reading of the CWA in *Riverside Bayview Homes.* Indeed, we did not ''express any opinion'' on the ''question of authority of the Corps to regulate discharges of fill material into wetlands that are not adjacent to bodies of open water. . . . In order to rule for [the Corps] here, we would have to hold that the jurisdiction of the Corps extends to ponds that are not adjacent to open water. But we conclude that the text of the statute will not allow this.

Id. at 167–68 (internal citations omitted). That is because the text of section 404(a)—the permitting provision at issue in the case—included the word ''navigable'' as its operative phrase, and signaled a clear direction to the Court that ''Congress had in mind . . . its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made.'' *Id.* at 172.

The Court dismissed the argument that the use of the abandoned ponds by migratory birds fell within the power of Congress to regulate activities that in the aggregate have a substantial effect on interstate commerce, or that the targeted use of the ponds as a municipal landfill was commercial in nature. *Id.* at 173. Such arguments, the Court noted, raised ''significant constitutional questions.'' *Id.* ''Where an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result.'' *Id.* at 172–73 (''Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority.''). This is particularly true ''where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power.'' *Id.* at 173; *see also Atascadero State Hospital* v. *Scanlon,* 473 U.S. 234, 242–43 (1985) (finding that where Congress intends to alter the ''usual constitutional balance between the States and the Federal Government,'' it must make its intention to do so ''unmistakably clear in the language of the statute''); *Gregory* v. *Ashcroft,* 501 U.S. 452, 460–61 (1991) (''[The] plain statement rule . . . acknowledg[es] that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere.''). ''Rather than expressing a desire to readjust the federal-state balance in this manner, Congress chose [in the CWA] to 'recognize, preserve, and protect the primary responsibilities and rights of States . . . to plan the development and use . . . of land and water resources. . . .'' *SWANCC,* 531 U.S. at 174 (quoting 33 U.S.C. 1251(b)). The Court therefore found no clear statement from Congress that it had intended to permit federal encroachment on traditional state power, and construed the CWA to avoid the significant constitutional questions related to the scope of federal authority authorized therein. *Id.*

The Supreme Court considered the concept of adjacency again several years later in consolidated cases arising out of the Sixth Circuit. *See Rapanos* v. *United States,* 547 U.S. 715 (2006). In one case, the Corps had determined that wetlands on three separate sites were subject to CWA jurisdiction because they were adjacent to ditches or man-made drains that eventually connected to traditional navigable waters several miles away through other ditches, drains, creeks, and/or rivers. *Id.* at 719–20, 729. In another case, the Corps had asserted

[12] For additional context, at oral argument during *Riverside Bayview,* the government attorney characterized the wetland at issue as ''in fact an adjacent wetland, adjacent—by adjacent, I mean it is immediately next to, abuts, adjoins, borders, whatever other adjective you might want to use, navigable waters of the United States.'' Transcript of Oral Argument at 16, *United States* v. *Riverside Bayview Homes, Inc.,* 474 U.S. 121 (1985) (No. 84–701).

jurisdiction over a wetland separated from a man-made drainage ditch by a four-foot-wide man-made berm. *Id.* at 730. The ditch emptied into another ditch, which then connected to a creek, and eventually connected to Lake St. Clair, a traditional navigable water, approximately a mile from the parcel at issue. The berm was largely or entirely impermeable, but may have permitted occasional overflow from the wetland to the ditch. *Id.* The Court, in a fractured opinion, vacated and remanded the Sixth Circuit's decision upholding the Corps' asserted jurisdiction over the four wetlands at issue, with Justice Scalia writing for the plurality and Justice Kennedy concurring in the judgment. *Id.* at 757 (plurality), 787 (Kennedy, J.).

The plurality determined that CWA jurisdiction only extended to adjacent ''wetlands with a continuous surface connection to bodies that are 'waters of the United States' in their own right, so that there is no clear demarcation between 'waters' and wetlands.'' *Id.* at 742. The plurality then concluded that ''establishing that wetlands . . . are covered by the Act requires two findings: first, that the adjacent channel contains a 'wate[r] of the United States,' (*i.e.,* a relatively permanent body of water connected to traditional interstate navigable waters); and second, that the wetland has a continuous surface connection with that water, making it difficult to determine where the 'water' ends and the 'wetland' begins.'' *Id.* (alteration in original).

In order to reach the adjacency conclusion of this two-part test, the plurality interpreted the *Riverside Bayview* decision, and subsequent *SWANCC* decision characterizing *Riverside Bayview,* as authorizing jurisdiction over wetlands that physically abutted traditional navigable waters. *Id.* at 740–42. The plurality focused on the ''inherent ambiguity'' described in *Riverside Bayview* in determining where on the continuum between open waters and dry land the scope of federal jurisdiction should end. *Id.* at 740. It was ''the inherent difficulties of defining precise bounds to regulable waters,'' *id.* at 741 n.10, according to the plurality, that prompted the Court in *Riverside Bayview* to defer to the Corps' inclusion of adjacent wetlands as ''waters'' subject to CWA jurisdiction based on ecological considerations. *Id.* at 740–41 (''When we characterized the holding of *Riverside Bayview* in *SWANCC,* we referred to the close connection between waters and the wetlands they gradually blend into: 'It was the significant nexus between the wetlands and 'navigable waters' that informed our reading of the CWA in *Riverside Bayview Homes.*' ''). The plurality also noted that ''*SWANCC* rejected the notion that the ecological considerations upon which the Corps relied in *Riverside Bayview* . . . provided an *independent* basis for including entities like 'wetlands' (or 'ephemeral streams') within the phrase 'the waters of the United States.' *SWANCC* found such ecological considerations irrelevant to the question whether physically isolated waters come within the Corps' jurisdiction.'' *Id.* at 741–42 (emphasis in original).

Justice Kennedy disagreed with the plurality's determination that adjacency requires a ''continuous surface connection'' to covered waters. *Id.* at 772. In reading the phrase ''continuous surface connection'' to mean a continuous ''surface-water connection,'' *id.* at 776, and interpreting the plurality's standard to include a ''surface-water-connection requirement,'' *id.* at 774, Justice Kennedy stated that ''when a surface-water connection is lacking, the plurality forecloses jurisdiction over wetlands that abut navigable-in-fact waters—even though such navigable waters were traditionally subject to federal authority,'' *id.* at 776, even after the *Riverside Bayview* Court ''deemed it irrelevant whether 'the moisture creating the wetlands . . . find[s] its source in the adjacent bodies of water,'' *id.* at 772 (internal citations omitted). This is one reason why Justice Kennedy stated that ''*Riverside Bayview*'s observations about the difficulty of defining the water's edge cannot be taken to establish that when a clear boundary is evident, wetlands beyond that boundary fall outside the Corps' jurisdiction.'' *Id.* at 773.

The plurality did not directly address the precise distinction raised by Justice Kennedy, but did note in response that the ''*Riverside Bayview* opinion required'' a ''continuous *physical* connection,'' *id.* at 751 n.13 (emphasis added), and focused on evaluating adjacency between a ''water'' and a wetland ''in the sense of possessing a continuous surface connection that creates the boundary-drawing problem we addressed in *Riverside Bayview*.'' *Id.* at 757. The plurality also noted that its standard includes a ''physical-connection requirement'' between wetlands and covered waters. *Id.* at 751 n.13. In other words, the plurality appeared to be more focused on the abutting nature rather than the source of water creating the wetlands at issue in *Riverside Bayview* to describe the legal constructs applicable to adjacent wetlands, *see id.* at 747; *see also Webster's II, New Riverside University Dictionary* (1994) (defining ''abut'' to mean ''to border on'' or ''to touch at one end or side of something''), and indeed agreed with Justice Kennedy and the *Riverside Bayview* Court that ''[a]s long as the wetland is 'adjacent' to covered waters . . . its creation *vel non* by inundation is irrelevant.'' *Id.* at 751 n.13.[13]

Because physically disconnected wetlands do not raise the same boundary-drawing concerns presented by actually abutting wetlands, the plurality determined that the rationale in *Riverside Bayview* does not apply to such features. The plurality stated that ''[w]etlands with only an intermittent, physically remote hydrologic connection to 'waters of the United States' do not implicate the boundary-drawing problem of *Riverside Bayview,* and thus lack the necessary connection to covered waters that we described as a 'significant nexus' in *SWANCC*[.]'' *Id.* at 742. The plurality supported this position by referring to the Court's treatment of isolated waters in *SWANCC* as non-jurisdictional. *Id.* at 726, 741–42 (''[W]e held that 'nonnavigable, isolated, intrastate waters'—which, unlike the wetlands at issue in *Riverside Bayview,* did not 'actually abu[t] on a navigable waterway,'—were not included as 'waters of the United States.' ''). The plurality found ''no support for the inclusion of physically unconnected wetlands as covered 'waters' '' based on *Riverside Bayview*'s treatment of the Corps' definition of adjacent. *Id.* at 746–47; *see also id.* at 746 (''[T]he Corps' definition of 'adjacent' . . . has been extended beyond reason.'').

Concurring in the judgment, Justice Kennedy focused on the ''significant nexus'' between the adjacent wetlands and traditional navigable waters as the basis for determining whether a wetland is a water subject to CWA jurisdiction: ''It was the significant nexus between wetlands and navigable waters . . . that informed our reading of the [Act] in *Riverside Bayview Homes*. Because such a nexus was lacking with respect to isolated ponds, [in *SWANCC*] the Court held that the plain text of the statute did not permit the Corps' action.'' *Id.* at 767 (internal quotations and citations omitted). Justice Kennedy noted that the wetlands at issue in *Riverside Bayview* were ''adjacent to [a] navigable-in-fact waterway[ ],'' while the ''ponds and

[13] The agencies' *Rapanos* Guidance recognizes the plurality's ''continuous surface connection'' does not refer to a continuous surface *water* connection. *See, e.g., Rapanos* Guidance at 7 n.28 (''A continuous surface connection does not require surface water to be continuously present between the wetland and the tributary.'').

mudflats'' considered in *SWANCC* ''were isolated in the sense of being unconnected to other waters covered by the Act.'' *Id.* at 765–66. ''Taken together, these cases establish that in some instances, as exemplified by *Riverside Bayview,* the connection between a nonnavigable water or wetland and a navigable water may be so close, or potentially so close, that the Corps may deem the water or wetland a 'navigable water' under the Act. In other instances, as exemplified by *SWANCC,* there may be little or no connection. Absent a significant nexus, jurisdiction under the Act is lacking.'' *Id.* at 767.

According to Justice Kennedy, whereas the isolated ponds and mudflats in *SWANCC* lack the ''significant nexus'' to navigable waters, it is the ''conclusive standard for jurisdiction'' based on ''a reasonable inference of ecological interconnection'' between adjacent wetlands and navigable-in-fact waters that allows for their categorical inclusion as waters of the United States. *Id.* at 780 (''[T]he assertion of jurisdiction for those wetlands [adjacent to navigable-in-fact waters] is sustainable under the act by showing adjacency alone.''). Justice Kennedy surmised that it may be that the same rationale ''without any inquiry beyond adjacency . . . could apply equally to wetlands adjacent to certain major tributaries,'' noting that the Corps could establish by regulation categories of tributaries based on volume of flow, proximity to navigable waters, or other factors that ''are significant enough that wetlands adjacent to them are likely, in the majority of cases, to perform important functions for an aquatic system incorporating navigable waters.'' *Id.* at 780–81. However, ''[t]he Corps' existing standard for tributaries'' provided Justice Kennedy ''no such assurance'' to infer the categorical existence of a requisite nexus between waters traditionally understood as navigable and wetlands adjacent to nonnavigable tributaries. *Id.* at 781. That is because:

> the breadth of [the tributary] standard—which seems to leave wide room for regulation of drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water volumes towards it—precludes its adoption as the determinative measure of whether adjacent wetlands are likely to play an important role in the integrity of an aquatic system comprising navigable waters as traditionally understood. Indeed, in many cases wetlands adjacent to tributaries covered by this standard might appear little more related to navigable-in-fact waters than were the isolated ponds held to fall beyond the Act's scope in *SWANCC.*

Id. at 781–82.

Justice Kennedy stated that, absent development of a more specific regulation, the Corps ''must establish a significant nexus on a case-by-case basis when it seeks to regulate wetlands based on adjacency to nonnavigable tributaries. Given the potential overbreadth of the Corps' regulations, this showing is necessary to avoid unreasonable applications of the statute.'' *Id.* at 782. Justice Kennedy explained that ''wetlands possess the requisite nexus, and thus come within the statutory phrase 'navigable waters,' if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.' '' *Id.* at 780. ''Where an adequate nexus is established for a particular wetland, it may be permissible, as a matter of administrative convenience or necessity, to presume covered status for other comparable wetlands in the region.'' *Id.* at 782.

In describing this significant nexus test, Justice Kennedy relied, in part, on the overall objective of the CWA to ''restore and maintain the chemical, physical, and biological integrity of the Nation's waters.'' *Id.* at 779 (quoting 33 U.S.C. 1251(a)). Justice Kennedy also agreed with the plurality that ''environmental concerns provide no reason to disregard limits in the statutory text.'' *Id.* at 778. With respect to wetlands adjacent to nonnavigable tributaries, Justice Kennedy therefore determined that ''mere adjacency . . . is insufficient. A more specific inquiry, based on the significant-nexus standard, is . . . necessary.'' *Id.* at 786. Not requiring adjacent wetlands to possess a significant nexus with navigable waters, Justice Kennedy noted, would allow a finding of jurisdiction ''whenever wetlands lie alongside a ditch or drain, however remote and insubstantial, that eventually may flow into traditional navigable waters. The deference owed the Corps' interpretation of the statute does not extend so far.'' *Id.* at 778–79.

Based on the agencies' review of this Supreme Court precedent, although the plurality and Justice Kennedy established different standards to determine the jurisdictional status of wetlands adjacent to nonnavigable tributaries, they both appear to agree in principle that the determination must be made using a two-part test that considers: (1) The proximity of the wetland to the tributary; and (2) the status of the tributary with respect to downstream traditional navigable waters. The plurality and Justice Kennedy also agree that the proximity between the wetland and the tributary must be close. The plurality refers to that proximity as a ''continuous surface connection'' or ''continuous physical connection,'' as demonstrated in *Riverside Bayview. Id.* at 742, 751 n.13. Justice Kennedy recognized that ''the connection between a nonnavigable water or wetland and a navigable water may be so close, or potentially so close, that the Corps may deem the water or wetland a 'navigable water' under the Act.'' *Id.* at 767. The second part of the two-part tests established by the plurality and Justice Kennedy is addressed in the next section.

b. Tributaries

The definition of tributaries was not addressed in either *Riverside Bayview* or *SWANCC.* And while the focus of *Rapanos* was on whether the Corps could regulate wetlands adjacent to nonnavigable waters, the plurality and concurring opinions provide some guidance on the regulatory status of tributaries to navigable-in-fact waters.

The plurality and Justice Kennedy both recognized that the jurisdictional scope of the CWA is not restricted to traditional navigable waters. *See id.* at 731 (plurality) (''[T]he Act's term 'navigable waters' includes something more than traditional navigable waters.''); *id.* at 767 (Justice Kennedy) (''Congress intended to regulate at least some waters that are not navigable in the traditional sense.''). Both also agree that federal authority under the Act is not without limit. *See id.* at 731–32 (plurality) (''[T]he waters of the United States . . . cannot bear the expansive meaning that the Corps would give it.''); *id.* at 778–79 (Justice Kennedy) (''The deference owed to the Corps' interpretation of the statute does not extend'' to ''wetlands'' which ''lie alongside a ditch or drain, however remote or insubstantial, that eventually may flow into traditional navigable waters.'').

With respect to tributaries specifically, both the plurality and Justice Kennedy focus in large part on a tributary's contribution of flow to, and connection with, traditional navigable waters. The plurality would include as waters of the United States ''only relatively permanent, standing or flowing bodies of water'' and would define such ''waters'' as including streams, rivers, oceans, lakes and other bodies of waters that form geographical features, noting that all such ''terms connote continuously present, fixed bodies of water . . . .'' *Id.* at 732–33, 739. On the other hand, the plurality would likely exclude ephemeral streams

and related features. *Id.* at 733–34, 739, 741. Justice Kennedy would likely exclude some streams considered jurisdictional under the plurality's test. *Id.* at 769 (noting that under the plurality's test, ''[t]he merest trickle, if continuous, would count as a 'water' subject to federal regulation, while torrents thundering at irregular intervals through otherwise dry channels would not'').

In addition, both the plurality and Justice Kennedy would likely include some intermittent streams as waters of the United States. *See id.* at 732–33 & n.5 (plurality); *id.* at 769–70 (Justice Kennedy). The plurality noted that its reference to ''relatively permanent'' waters did ''not necessarily exclude streams, rivers, or lakes that might dry up in extraordinary circumstances, such as drought,'' or ''*seasonal* rivers, which contain continuous flow during some months of the year but no flow during dry months . . . .'' *Id.* at 732 n.5 (emphasis in original). However, neither the plurality nor Justice Kennedy defined with precision where to draw the line. Nevertheless, the plurality provided that ''navigable waters'' must have ''at bare minimum, the ordinary presence of water,'' *id.* at 734, and Justice Kennedy noted that the Corps can identify by regulation categories of tributaries based on volume of flow, proximity to navigable waters, or other factors that ''are significant enough that wetlands adjacent to them are likely, in the majority of cases, to perform important functions for an aquatic system incorporating navigable waters.'' *Id.* at 780–81. And both the plurality and Justice Kennedy agreed that the Corps' assertion of jurisdiction over the wetlands adjacent to the ''drains, ditches, and streams remote from any navigable-in-fact water,'' *id.* at 781 (Kennedy), at issue in *Rapanos* raised significant jurisdictional questions. *Id.* at 737–38 (plurality); *id.* at 781–82 (Kennedy).

3. Principles and Considerations

From this legal foundation, a few important principles emerge from which the agencies can evaluate their authorities. First, the power conferred on the agencies to regulate the waters of the United States is grounded in Congress' commerce power over navigation. The agencies can choose to regulate beyond waters more traditionally understood as navigable given the broad purposes of the CWA, including some tributaries to those traditional navigable waters, but must provide a reasonable basis grounded in the language and structure of the Act for determining the extent of jurisdiction. The agencies also can choose to regulate wetlands adjacent to the traditional navigable waters and some tributaries, if the wetlands are in close proximity to the tributaries, such as in the transitional zone between open waters and dry land. In the agencies' view, it would not be consistent with Justice Kennedy's *Rapanos* opinion or the *Rapanos* plurality opinion to regulate wetlands adjacent to all tributaries, no matter how small or remote from navigable water. The Court's opinion in *SWANCC* also calls into serious question the agencies' authority to regulate nonnavigable, isolated, intrastate waters that lack a sufficient connection to traditional navigable waters, and suggests that the agencies should avoid regulatory interpretations of the CWA that raise constitutional questions regarding the scope of their statutory authority. The agencies can, however, regulate certain waters by category, which could improve regulatory predictability and certainty and ease administrative burden while still effectuating the purposes of the Act.

In developing a clear and predictable regulatory framework, the agencies also must respect the primary responsibilities and rights of States and Tribes to regulate their land and water resources. *See* 33 U.S.C. 1251(b), 1370. The oft-quoted objective of the CWA to ''restore and maintain the chemical, physical, and biological integrity of the Nation's waters,'' *id.* at 1251(a), must be implemented in a manner consistent with Congress' policy directives to the agencies. The Supreme Court long ago recognized the distinction between federal waters traditionally understood as navigable and waters ''subject to the control of the States.'' *The Daniel Ball,* 77 U.S. (10 Wall.) 557, 564–65 (1871). Over a century later, the Supreme Court in *SWANCC* reaffirmed the State's ''traditional and primary power over land and water use.'' 531 U.S. at 174; *accord Rapanos,* 547 U.S. at 738 (Scalia, J., plurality opinion). Ensuring that States and Tribes retain authority over their land and water resources pursuant to CWA section 101(b) and section 510 helps carry out the overall objective of the CWA, and ensures that the agencies are giving full effect and consideration to the entire structure and function of the Act, including Congress' intent as reflected in dozens of non-regulatory grant, research, nonpoint source, groundwater, and watershed planning programs to assist the states in controlling pollution in the nation's waters, not just its navigable waters.

Further, the agencies are cognizant that the ''Clean Water Act imposes substantial criminal and civil penalties for discharging any pollutant into waters covered by the Act without a permit. . . .'' *U.S. Army Corps of Eng'rs* v. *Hawkes Co.,* 136 S. Ct. 1807, 1812 (2016); *see also Sackett* v. *EPA,* 566 U.S. 120, 132–33 (2012) (Alito, J., concurring) (''[T]he combination of the uncertain reach of the Clean Water Act and the draconian penalties imposed for the sort of violations alleged in this case still leaves most property owners with little practical alternative but to dance to the EPA's tune.''). As the Chief Justice observed in Hawkes, ''[i]t is often difficult to determine whether a particular piece of property contains waters of the United States, but there are important consequences if it does.'' 136 S. Ct. at 1812; *see also id.* at 1816–17 (Kennedy, J., concurring) (''[T]he reach and systemic consequences of the Clean Water Act remain a cause for concern,'' and the Act ''continues to raise troubling questions regarding the Government's power to cast doubt on the full use and enjoyment of private property throughout the Nation.''). Given the significant civil and criminal penalties associated with the CWA, it is important for the agencies to promote regulatory certainty while striving to provide fair and predictable notice of the limits of federal jurisdiction. *See, e.g., Sessions* v. *Dimaya,* 138 S. Ct. 1204, 1223–25 (2018) (Gorsuch, J., concurring in part and concurring in the judgment) (characterizing fair notice as possibly the most fundamental of the protections provided by the Constitution's guarantee of due process, and stating that vague laws are an exercise of ''arbitrary power . . . leaving the people in the dark about what the law demands and allowing prosecutors and courts to make it up'').

C. Proposed Reasons for Repeal

The agencies' proposal is based on our view that regulatory certainty may be best served by repealing the 2015 Rule and recodifying the preexisting scope of CWA jurisdiction. Specifically, the agencies are concerned that rather than achieving their stated objectives of increasing regulatory predictability and consistency under the CWA, retaining the 2015 Rule creates significant uncertainty for agency staff, regulated entities, and the public, which is compounded by court decisions that have increased litigation risk and cast doubt on the legal viability of the rule. To provide for greater regulatory certainty, the agencies propose to revert to the pre-2015 regulations, a regulatory regime that is more familiar to and better-understood by the agencies, States, Tribes, local governments, regulated entities, and the public.

Further, as a result of the agencies' review and reconsideration of their statutory authority and in light of the court rulings against the 2015 Rule that have suggested that the agencies' interpretation of the ''significant nexus'' standard as applied in the 2015 Rule was expansive and does not comport with and accurately implement the limits on jurisdiction reflected in the CWA and decisions of the Supreme Court, the agencies are also concerned that the 2015 Rule lacks sufficient statutory basis. The agencies are proposing to conclude in the alternative that, at a minimum, the interpretation of the statute adopted in the 2015 Rule is not compelled, and a different policy balance can be appropriate.

Considering the substantial uncertainty associated with the 2015 Rule resulting from its legal challenges, and the substantial experience the agencies and others possess with the longstanding regulatory framework currently being administered by the agencies, the agencies conclude that clarity, predictability, and consistency may be best served by repealing the 2015 Rule and thus are proposing to do so. The agencies may still propose changes to the definition of ''waters of the United States'' in a future rulemaking.

Further, the agencies are concerned that certain findings and assumptions supporting adoption of the 2015 Rule were not correct, and that these conclusions, if erroneous, may separately justify repeal of the 2015 Rule. The agencies are concerned and seek comment on whether the 2015 Rule significantly expanded jurisdiction over the preexisting regulatory program, as implemented by the agencies, and whether that expansion altered State, tribal, and local government relationships in implementing CWA programs. The agencies therefore propose to repeal the 2015 Rule in order to restore those preexisting relationships and better serve the balance of authorities envisioned in CWA section 101(b).

1. The 2015 Rule Fails To Achieve Regulatory Certainty

The agencies are proposing to repeal the 2015 Rule because it does not appear to achieve one of its primary goals of providing regulatory certainty and consistency. When promulgating the 2015 Rule, the agencies concluded the rule would ''increase CWA program predictability and consistency by clarifying the scope of 'waters of the United States' protected under the Act.'' 80 FR 37054. The agencies stated that the 2015 ''rule reflect[ed] the judgment of the agencies in balancing the science, the agencies' expertise, and the regulatory goals of providing clarity to the public while protecting the environment and public health, consistent with the law.'' *Id.* at 37065. Since then, developments in the litigation against the 2015 Rule and concerns raised since the rule's promulgation indicate that maintaining the 2015 Rule would produce substantial uncertainty and confusion among state and federal regulators and enforcement officials, the regulated public, and other interested stakeholders. To provide for greater regulatory certainty, the agencies propose to repeal the 2015 Rule and restore a longstanding regulatory framework that is more familiar to and better-understood by the agencies, our co-regulators, and regulated entities, until the agencies propose and finalize a replacement definition.

a. Litigation to Date

As noted above, the 2015 Rule has been challenged in legal actions across multiple district courts, in which plaintiffs have raised a number of substantive and procedural claims against the rule. Petitions for review were also filed in multiple courts of appeals and were consolidated in the U.S. Court of Appeals for the Sixth Circuit. To date, all three of the courts that substantively have considered the 2015 Rule—the Sixth Circuit, the District of North Dakota, and the Southern District of Georgia—have found that petitioners seeking to overturn the rule are likely to succeed on the merits of at least some of their claims against the rule.

In the Sixth Circuit, the court granted a nationwide stay of the 2015 Rule after finding, among other factors, that the petitioners showed a ''substantial possibility of success on the merits'' of their claims against the 2015 Rule, including claims that the rule was inconsistent with Justice Kennedy's opinion in *Rapanos* and that the rule's distance limitations were not substantiated by specific scientific support. *In re EPA,* 803 F.3d 804, 807 (6th Cir. 2015).

The District of North Dakota made similar findings in issuing a preliminary injunction against the 2015 Rule. There, the court found that the plaintiff-States are ''likely to succeed on the merits of their claim'' that the rule violated the congressional grant of authority to the agencies under the CWA because the rule ''likely fails'' to meet Justice Kennedy's significant nexus test. *North Dakota* v. *EPA,* 127 F. Supp. 3d 1047, 1055–56 (D.N.D. 2015). The court also found that the plaintiff-States have a fair chance of success on the merits of their procedural claims that the agencies failed to comply with APA requirements in promulgating the rule. *Id.* at 1056–57.

The Southern District of Georgia also preliminarily enjoined the 2015 Rule, holding that the State plaintiffs had demonstrated ''a likelihood of success on their claims that the [2015] WOTUS Rule was promulgated in violation of the CWA and the APA.'' *Georgia* v. *Pruitt,* No. 15–cv–79, 2018 U.S. Dist. LEXIS 97223, at *14 (S.D. Ga. June 8, 2018) (''*Georgia*'') (granting preliminary injunction). The court determined that the 2015 Rule likely failed to meet the standard expounded in *SWANCC* and *Rapanos,* and that the rule was likely fatally defective because it ''allows the Agencies to regulate waters that do not bear any effect on the 'chemical, physical, and biological integrity' of any navigable-in-fact water.'' *Id.* at *17–18. The court also held that the plaintiffs ''have demonstrated a likelihood of success on both of their claims under the APA'' that the 2015 Rule ''is arbitrary and capricious'' and ''that the final rule is not a logical outgrowth of the proposed rule.'' *Id.* at *18.

These rulings indicate that substantive or procedural challenges to the 2015 Rule are likely to be successful, particularly claims that the rule is not authorized under the CWA and was promulgated in violation of the APA. A successful challenge to the 2015 Rule could result in a court order vacating the rule in all or part, in all or part of the country, and potentially resulting in different regulatory regimes being in effect in different parts of the country, which would likely lead to substantial regulatory confusion, uncertainty, and inconsistency.

Notably, the agencies face an increasing risk of a court order vacating the 2015 Rule. The District of North Dakota is proceeding to hear the merits of the plaintiff-States' claims against the 2015 Rule in that case, and the plaintiff-States in the Southern District of Georgia have requested a similar merits-briefing schedule. *See* Scheduling Order, *North Dakota* v. *EPA,* No. 15–cv–59 (D.N.D. May 2, 2018); Response to Defendants' Updated Response to Plaintiff States' Motion for Preliminary Injunction at 11–12, *Georgia,* No. 15–cv–79 (S.D. Ga. May 29, 2018). Although the applicability date rule ensures that the 2015 Rule will not go into effect until February 6, 2020, the prospect of a court order vacating the 2015 Rule creates additional regulatory uncertainty.

b. Stakeholder Confusion Regarding the Scope of the 2015 Rule and Extent of Federal CWA Jurisdiction

Statements made in the litigation against the 2015 Rule and in comments regarding the 2015 Rule indicate that there has been substantial disagreement and confusion as to the scope of the 2015 Rule and the extent of federal CWA jurisdiction more broadly. In the Sixth Circuit, for example, State petitioners asserted that the 2015 Rule covers waters outside the scope of the CWA pursuant to *SWANCC* and *Rapanos* and ''extends jurisdiction to virtually every potentially wet area of the country.'' [14] Industry petitioners contended that the rule's ''uncertain standards are impossible for the public to understand or the agencies to apply consistently.'' [15] In contrast, environmental petitioners found that *SWANCC* and *Rapanos* led to widespread confusion over the scope of the CWA and that the pre-2015 regulatory regime could theoretically apply to ''almost all waters and wetlands across the country.'' [16] These petitioners asserted that the 2015 Rule violated the CWA by failing to cover certain waters, including waters that may possess a ''significant nexus'' to traditional navigable waters.[17] Whether such comments are accurate or not, they indicate continued widespread disagreement and confusion over the meaning of the 2015 Rule and extent of jurisdiction it entails.

Some comments received on the July 27, 2017 NPRM also demonstrate continued confusion over the scope and various provisions of the 2015 Rule. For example, one commenter found that the rule's definitions of ''adjacent,'' ''significant nexus'' and other key terms lack clarity and thus lead to regulatory uncertainty.[18] This same commenter contended that the rule could raise constitutional concerns related to the appropriate scope of federal authority and encouraged the agencies to undertake a new rulemaking to more clearly articulate the extent of federal CWA authority. Another commenter echoed these concerns, alleging that the 2015 Rule resulted in a ''vague and indecipherable explanation'' of the definition of ''waters of the United States'' that has caused confusion and uncertainty as to the extent of jurisdiction that can be asserted by federal, state and local authorities.[19]

The agencies have received comments from numerous other individuals and entities expressing confusion and concern about the extent of federal CWA jurisdiction asserted under the 2015 Rule, and the agencies are continuing to review and consider these comments.

c. Impact on State Programs

Like other commenters on the proposal to the 2015 Rule, some States expressed confusion regarding the scope of the proposal and, uniquely, the potential impacts of that uncertainty on States' ability to implement CWA programs. Though some States have stated that the 2015 Rule ''more clearly identifies what types of waters would be considered jurisdictional,'' [20] others assert that the extent of CWA jurisdiction under the rule remained ''fuzzy'' and unclear.[21] Certain States noted that this uncertainty could ''create time delays in obtaining permits which previously were not required'' [22] and ''result in increased costs to the State and other private and public interests, along with decreased regulatory efficiency.'' [23] One State suggested that even if the 2015 Rule established greater regulatory clarity, the rule's case-by-case determinations could result in permitting delays when a jurisdictional determination is required.[24]

Similar concerns have been raised in the litigation challenging the 2015 Rule. For example, in the Southern District of Georgia, the State of Indiana has asserted that the 2015 Rule's definition of ''waters of the United States'' is ''vague'' and that the rule ''imposes . . . unclear regulatory requirements that will result in an inefficient use of limited regulatory resources.'' [25] In particular, the State asserts concerns that implementing the 2015 Rule will divert resources by ''[d]emanding the time and attention of regulators to make the now-difficult determination of when and whether a feature is a WOTUS'' and ''[g]enerating unnecessary administrative appeals and lawsuits to resolve jurisdictional disputes.'' [26]

d. Agency Experience With the 1986 Regulations

The agencies have been implementing the pre-2015 regulations (hereinafter referred to as the ''1986 regulations'') almost uninterruptedly since 1986. Corps staff are trained on making jurisdictional determinations in the field and through national webinars and classroom or field-based trainings. From June 2007 through June 2018, the Corps issued 241,857 [27] approved jurisdictional determinations (AJDs) under their 1986 regulations, as informed by applicable Supreme Court precedent and the agencies' guidance.

Through over 30 years of experience, the agencies have developed significant technical expertise with the 1986 regulations and have had the opportunity to refine the application of the rules through guidance and the agencies' experience and federal court decisions. Indeed, the 1986 regulations have been the subject of a wide body of case law, including three significant U.S. Supreme Court decisions [28] and dozens of cases in federal district courts and courts of appeals that have addressed the scope of analysis required. Since 1986, the agencies have issued numerous memoranda, guidance, and question-and-answer documents explaining and clarifying these regulations.[29]

Given the longstanding nature and history of the 1986 regulations, this

[14] Opening Brief of State Petitioners at 15, 61, *In re EPA,* No. 15–3751 (6th Cir. Nov. 1, 2016).

[15] Opening Brief for the Business & Municipal Petitioners, *In re EPA,* No. 15–3751 (6th Cir. Nov. 1, 2016).

[16] Brief of Conservation Groups at 11, *In re EPA,* No. 15–3751 (6th Cir. Nov. 1, 2016).

[17] *See, e.g., id.* at 22, 43.

[18] *See* comments submitted by Oregon Cattlemen's Association (July 27, 2017) (Docket ID: EPA–HQ–OW–2017–0203–0039), *available at https://www.regulations.gov/document?D=EPA-HQ-OW-2017-0203-0039.*

[19] *See* comments submitted by Skagit County Dike, Drainage and Irrigation District No. 12 and Skagit County Dike District No. 1 (Sept. 27, 2017) (Docket ID: EPA–HQ–OW–2017–0203–11709), *available at https://www.regulations.gov/document?D=EPA-HQ-OW-2017-0203-11709.*

[20] *See, e.g.,* comments submitted by State of Washington, Department of Ecology (Nov. 13, 2014) (Docket ID: EPA–HQ–OW–2011–0880–13957), *available at https://www.regulations.gov/document?D=EPA-HQ-OW-2011-0880-13957.*

[21] *See, e.g.,* comments submitted by State of Oklahoma (Nov. 14, 2014) (Docket ID: EPA–HQ–OW–2011–0880–14625), *available at https://www.regulations.gov/document?D=EPA-HQ-OW-2011-0880-14625; see also* comments submitted by National Association of Counties (Nov. 14, 2014) (Docket ID: EPA–HQ–OW–2011–0880–15081), *available at https://www.regulations.gov/document?D=EPA-HQ-OW-2011-0880-15081.*

[22] *See* comments submitted by State of Utah, Governor's Office (Nov. 14, 2014) (Docket ID: EPA–HQ–OW–2011–0880–16534), *available at https://www.regulations.gov/document?D=EPA-HQ-OW-2011-0880-16534.*

[23] *See* comments submitted by Wyoming Department of Environmental Quality (Nov. 14, 2014) (Docket ID: EPA–HQ–OW–2011–0880–16393), *available at https://www.regulations.gov/document?D=EPA-HQ-OW-2011-0880-16393.*

[24] *See* comments submitted by State of Washington, Department of Ecology, *supra* note 20.

[25] Statement of Bruno L. Pigott, *Georgia,* No. 15–cv–79 (S.D. Ga. July 21, 2015).

[26] *Id.*

[27] U.S. Army Corps of Engineers, OMBIL Regulatory Module (June 5, 2018).

[28] *Riverside Bayview,* 474 U.S. 121 (1985); *SWANCC,* 531 U.S. 159 (2001); *Rapanos,* 547 U.S. 715 (2006).

[29] The Corps maintains many of these documents on its public website, *available at https://www.usace.army.mil/Missions/Civil-Works/Regulatory-Program-and-Permits/Related-Resources/CWA-Guidance/.* The EPA maintains many of these documents as well; *see also https://www.epa.gov/wotus-rule/about-waters-united-states.*

regulatory regime is more familiar to the agencies, co-regulators, and regulated entities. For this reason, as between the 2015 Rule and the 1986 regulations, the 1986 regulations (as informed by applicable Supreme Court precedent and the agencies' guidance) would appear to provide for greater regulatory predictability, consistency, and certainty, and the agencies seek public comment on this issue. Though the agencies acknowledge that the 1986 regulations have posed certain implementation difficulties and were the subject of court decisions that had the effect of narrowing their scope, the longstanding nature of the regulatory regime—coupled with the agencies' and others' extensive experience with the regulatory scheme—make it preferable to the regulatory uncertainty posed by the 2015 Rule.

2. The 2015 Rule May Exceed the Agencies' Authority Under the CWA

The agencies are concerned that the 2015 Rule exceeded EPA's authority under the CWA by adopting an expansive interpretation of the ''significant nexus'' standard that covers waters outside the scope of the Act and stretches the significant nexus standard so far as to be inconsistent with important aspects of Justice Kennedy's opinion in *Rapanos,* even though this opinion was identified as the basis for the significant nexus standard articulated in the 2015 Rule. In particular, the agencies are concerned that the 2015 Rule took an expansive reading of Justice Kennedy's significant nexus test and exceeds the agencies' authority under the Act.

As expounded in *Rapanos,* Justice Kennedy's significant nexus standard is a test intended to limit federal jurisdiction due to the breadth of the Corps' then-existing standard for tributaries and in order to ''prevent[ ] problematic applications of the statute.'' 547 U.S. at 783. ''Given the potential overbreadth of the Corps' [1986] regulations,'' Justice Kennedy found that the showing of a significant nexus ''is necessary to avoid unreasonable applications of the statute.'' *Id.* at 782. The agencies are concerned, upon further consideration of the 2015 Rule, that the significant nexus standard articulated in that rule could lead to similar unreasonable applications of the CWA.

Justice Kennedy wrote that adjacent ''wetlands possess the requisite nexus, and thus come within the statutory phrase 'navigable waters,' if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.' '' 547 U.S. at 780. The opinion did not expressly define the relevant ''region'' or what was meant by ''similarly situated,'' but it is reasonable to presume that that the Justice did not mean ''similarly situated'' to be synonymous with ''all'' waters in a region. The agencies' *Rapanos* Guidance, for example, had interpreted the term ''similarly situated'' more narrowly to ''include all wetlands adjacent to the same tributary.'' [30] ''A tributary . . . is the entire reach of the stream that is of the same order (*i.e.,* from the point of confluence, where two lower order streams meet to form the tributary, downstream to the point such tributary enters a higher order stream).'' [31] Thus, under the agencies' 2008 guidance, ''where evaluating significant nexus for an adjacent wetland, the agencies will consider the flow characteristics and functions performed by the tributary to which the wetland is adjacent along with the functions performed by the wetland and all other wetlands adjacent to that tributary. This approach reflects the agencies' interpretation of Justice Kennedy's term 'similarly situated' to include all wetlands adjacent to the same tributary. . . . Interpreting the phrase 'similarly situated' to include all wetlands adjacent to the same tributary is reasonable because such wetlands are physically located in a like manner (*i.e.,* lying adjacent to the same tributary).'' [32]

The 2015 Rule departed from this interpretation of ''similarly situated'' wetlands in a ''region,'' including applying it to other waters, not only wetlands, that were not already categorically jurisdictional as tributaries or adjacent waters. The proposed rule, for example, stated that ''[o]ther waters, including wetlands, are similarly situated when they perform similar functions and are located sufficiently close together or sufficiently close to a 'water of the United States' so that they can be evaluated as a single landscape unit with regard to their effect on the chemical, physical, or biological integrity of a [primary] water.'' 79 FR 22263 (April 21, 2014). The 2015 Rule took it a step further and stated that ''the downstream health of larger downstream waters is directly related to the aggregate health of waters located upstream, including waters such as wetlands that may not be hydrologically connected but function together to ameliorate the potential impacts of flooding and pollutant contamination from affecting downstream waters.'' 80 FR 37063. The 2015 Rule thus concluded that ''[a] water has a significant nexus when any single function or combination of functions performed by the water, alone or together with similarly situated waters in the region, contributes significantly to the chemical, physical, or biological integrity of the nearest [primary] water.'' *Id.* at 37106. The ''term 'in the region' means the watershed that drains to the nearest [primary] water.'' *Id.*

An examination of all of the waters in ''the watershed'' of ''the nearest [primary] water'' under the 2015 Rule therefore may have materially broadened the scope of aggregation that determines jurisdiction in a ''significant nexus'' inquiry for waters not categorically jurisdictional from the focus in the proposed rule on waters ''located sufficiently close together or sufficiently close to a 'water of the United States' so that they can be evaluated as a single landscape unit.'' 79 FR 22263. The agencies in finalizing the rule viewed the scientific literature through a broader lens as ''the effect of landscape position on the strength of the connection to the nearest 'water of the United States,' '' and that ''relevant factors influencing chemical connectivity include hydrologic connectivity . . . , surrounding land use and land cover, the landscape setting, and deposition of chemical constituents (*e.g.,* acidic deposition).'' 80 FR 37094. The agencies are concerned that this important change in the interpretation of ''similarly situated waters'' from the proposed 2015 Rule and the 2008 *Rapanos* Guidance may not be explainable by the scientific literature, including the Connectivity Report [33] cited throughout the preamble to the 2015 Rule, in light of the agencies' view at the time that ''[t]he scientific literature does not use the term 'significant' as it is defined in a legal context.'' 80 FR 37062. The agencies solicit comment on whether the agencies' justification for the 2015 Rule's interpretation of ''similarly situated'' with reference to an entire watershed for purposes of waters not categorically jurisdictional relied on the scientific literature without due regard for the restraints imposed by the statute and case law, and whether this interpretation of Justice Kennedy's significant nexus standard is a reason, at a minimum because of the legal risk it

[30] *Rapanos* Guidance at 8.

[31] *Id.* at 10.

[32] *Id.*

[33] U.S. EPA. Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence (Jan. 2015) (EPA/600/R–14/475F).

creates, to repeal the 2015 Rule. As discussed, the 2015 Rule included distance-based limitations that were not specified in the proposal. In light of this, the agencies also solicit comment on whether these distance-based limitations mitigated or affected the agencies' change in interpretation of similarly situated waters in the 2015 Rule.

The agencies are also concerned that the 2015 Rule does not give sufficient effect to the term ''navigable'' in the CWA. *See South Carolina* v. *Catawba Indian Tribe,* 476 U.S. 498, 510 n.22 (1986) (''It is our duty to give effect, if possible, to every clause and word of a statute[.]'' (quoting *United States* v. *Menasche,* 348 U.S. 528, 538–39 (1955)) (internal quotation marks omitted)). Justice Kennedy's concurring opinion in *Rapanos,* on which the 2015 Rule relied heavily for its basis, recognized the term ''navigable'' must have ''some importance'' and, if that word has any meaning, the CWA cannot be interpreted to ''permit federal regulation whenever wetlands lie along a ditch or drain, however remote and insubstantial, that eventually may flow into traditional navigable waters.'' *Rapanos,* 547 U.S. at 778–79 (Kennedy, J., concurring in judgment). When interpreting the *Rapanos* decision and its application for determining the scope of CWA jurisdiction in 2008, the agencies wrote ''[p]rincipal considerations when evaluating significant nexus include the volume, duration, and frequency of the flow of water in the tributary and the proximity of the tributary to a traditional navigable water.'' [34] The agencies are considering whether the 2015 Rule's definitions of ''tributary'' and ''adjacent'' were so broad as to eliminate consideration of these factors in a manner consistent with Justice Kennedy's opinion and the CWA.

The 2015 Rule stated that the agencies assessed ''the significance of the nexus'' to navigable water ''in terms of the CWA's objective to 'restore and maintain the chemical, physical, and biological integrity of the Nation's waters.' '' 80 FR 37056 (quoting 33 U.S.C. 1251(a)). Under the 2015 Rule, a significant nexus may be established by an individual water or by collectively considering ''similarly situated'' waters across a ''region,'' defined as ''the watershed that drains to the nearest [primary] water identified.'' *Id.* at 37106. The agencies are now concerned that this broad reliance on biological functions, such as the provision of life cycle dependent aquatic habitat, may not comport with the CWA and Justice Kennedy's statement in *Rapanos* that ''environmental concerns provide no reason to disregard limits in the statutory text.'' *See* 547 U.S. at 778. In particular, the agencies are mindful that the Southern District of Georgia's preliminary injunction of the 2015 Rule was based in part on the court's holding that the 2015 Rule likely is flawed for the same reason as the Migratory Bird Rule: ''the WOTUS Rule asserts that, standing alone, a significant 'biological effect'—including an effect on 'life cycle dependent aquatic habitat[s]'—would place a water within the CWA's jurisdiction. Thus, this WOTUS Rule will likely fail for the same reason that the rule in *SWANCC* failed.'' *Georgia,* 2018 U.S. Dist. LEXIS 97223, at *18 (quoting 33 CFR 328.3(c)(5)). The agencies solicit comment on whether the 2015 Rule is flawed in the same manner as the Migratory Bird Rule, including whether the 2015 Rule raises significant constitutional questions similar to the questions raised by the Migratory Bird Rule as discussed by the Supreme Court in *SWANCC.*

Moreover, the 2015 Rule relied on a scientific literature review—the Connectivity Report—to support exerting federal jurisdiction over certain waters based on nine enumerated functions. *See* 80 FR 37065 (''the agencies interpret the scope of 'waters of the United States' protected under the CWA based on the information and conclusions in the [Connectivity] Report''). The report notes that connectivity ''occur[s] on a continuum or gradient from highly connected to highly isolated,'' and ''[t]hese variations in the degree of connectivity are a critical consideration to the ecological integrity and sustainability of downstream waters.'' *Id.* at 37057. In its review of a draft version of the Connectivity Report, EPA's Science Advisory Board (''SAB'') noted, ''[s]patial proximity is one important determinant of the magnitude, frequency and duration of connections between wetlands and streams that will ultimately influence the fluxes of water, materials and biota between wetlands and downstream waters.'' [35] ''Wetlands that are situated alongside rivers and their tributaries are likely to be connected to those waters through the exchange of water, biota and chemicals. As the distance between a wetland and a flowing water system increases, these connections become less obvious.'' [36] The Connectivity Report also recognizes that ''areas that are closer to rivers and streams have a higher probability of being connected than areas farther away.'' Connectivity Report at ES–4.

Yet, the SAB observed that ''[t]he Report is a science, not policy, document that was written to summarize the current understanding of connectivity or isolation of streams and wetlands relative to large water bodies such as rivers, lakes, estuaries, and oceans.'' [37] ''The SAB also recommended that the agencies clarify in the preamble to the final rule that 'significant nexus' is a legal term, not a scientific one.'' 80 FR 37065. And in issuing the 2015 Rule, the agencies stated, ''the science does not provide a precise point along the continuum at which waters provide only speculative or insubstantial functions to downstream waters.'' *Id.* at 37090.

The agencies now believe that they previously placed too much emphasis on the information and conclusions of the Connectivity Report when setting jurisdictional lines in the 2015 Rule, relying on its environmental conclusions in place of interpreting the statutory text and other indicia of Congressional intent to ensure that the agencies' regulations comport with their statutory authority to regulate. This is of particular concern to the agencies today with respect to the agencies' broad application of Justice Kennedy's phrase ''similarly situated lands. '' As discussed previously, the agencies took an expansive reading of this phrase, in part based on ''one of the main conclusions of the [Connectivity Report] . . . that the incremental contributions of individual streams and wetlands are cumulative across entire watersheds, and their effects on downstream waters should be evaluated within the context of other streams and wetlands in that watershed,'' *see* 80 FR 37066. Yet, Justice Kennedy observed in *Rapanos* that what constitutes a ''significant nexus'' to the waters of the United States is not a solely scientific question and that it cannot be determined by environmental effects alone. *See, e.g.,* 547 U.S. at 777–78 (noting that although ''[s]cientific evidence indicates that wetlands play a critical role in controlling and filtering runoff . . . environmental concerns provide no reason to disregard limits in the statutory text'' (citations omitted)). This includes how Congress' use of the term ''navigable'' in the CWA and how the policies embodied in section 101(b) should inform this analysis. Justice Kennedy wrote that ''the Corps deems a

[34] *Rapanos* Guidance at 10.

[35] Science Advisory Board, U.S. EPA. Review of the EPA Water Body Connectivity Report at 60 (Oct. 17, 2014).

[36] *Id.* at 55.

[37] *Id.* at 2.

water a tributary if it feeds into a traditional navigable water (or a tributary thereof) and possesses an ordinary high-water mark,'' defined as a ''line on the shore established by the fluctuations of water and indicated by [certain] physical characteristics.'' *Id.* at 781. This ''may well provide a reasonable measure of whether specific minor tributaries bear a sufficient nexus with other regulated waters to constitute 'navigable waters' under the Act. Yet the breadth of this standard—which seems to leave wide room for regulation of drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor volumes toward it—*precludes its adoption as the determinative measure of whether adjacent wetlands are likely to play an important role in the integrity of an aquatic system comprising navigable waters as traditionally understood.*'' *Id.* (emphasis added).

The 2015 Rule, by contrast, asserts jurisdiction categorically over any tributary, including all ephemeral and intermittent streams that meet the rule's tributary definition, as well as all wetlands and other waters that are within certain specified distances from a broadly defined category of tributaries (*e.g.,* all waters located within the 100-year floodplain of a category (1) through (5) ''jurisdictional by rule'' water and not more than 1,500 feet from the ordinary high water mark of such water). According to the rule, tributaries are characterized by the presence of the physical indicators of a bed and banks and an ordinary high water mark and eventually contribute flow (directly or indirectly) to a traditional navigable water, interstate water, or territorial sea that may be a considerable distance away. *See* 80 FR 37105. The 2015 Rule defined ''ordinary high water mark'' as ''that line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.'' *Id.* at 37106. The 2015 Rule did not require any assessment of flow, including volume, duration, or frequency, when defining the ''waters of the United States.'' Instead, the 2015 Rule concluded that it was reasonable to presume that ''[t]hese physical indicators demonstrate there is volume, frequency, and duration of flow sufficient to create a bed and banks and an ordinary high water mark, and thus to qualify as a tributary.'' *Id.* at 37105. The 2015 Rule thus covers ephemeral washes that flow only in response to infrequent precipitation events if they meet the definition of tributary. These results, particularly that adjacent waters, broadly defined, are categorically jurisdictional no matter how small or frequently flowing the tributary to which they are adjacent, is, at a minimum, in significant tension with Justice Kennedy's understanding of the term significant nexus as explained in *Rapanos. See id.* at 781–82 (''[I]n many cases wetlands adjacent to tributaries covered by [the Corps' 1986 tributary] standard might appear little more related to navigable-in-fact waters than were the isolated ponds held to fall beyond the Act's scope in *SWANCC.*'').

The agencies are mindful that courts that have considered the merits of challenges to the 2015 Rule have similarly observed that the rule may conflict with Justice Kennedy's opinion in *Rapanos,* particularly the rule's definition of ''tributary.'' The District of North Dakota found that the definitions in the 2015 Rule raise ''precisely the concern Justice Kennedy had in *Rapanos,* and indeed the general definition of tributary [in the 2015 Rule] is strikingly similar'' to the standard for tributaries that concerned Justice Kennedy in *Rapanos. North Dakota,* 127 F. Supp. 3d at 1056. The Southern District of Georgia also found that the 2015 Rule's definition of ''tributary'' ''is similar to the one'' at issue in *Rapanos,* and that ''it carries with it the same concern that Justice Kennedy had there.'' *Georgia,* 2018 U.S. Dist. LEXIS 97223, at *17. Likewise, the Sixth Circuit stated in response to petitioners' ''claim that the Rule's treatment of tributaries, 'adjacent waters,' and waters having a 'significant nexus' to navigable waters is at odds with the Supreme Court's ruling in *Rapanos*'' that ''[e]ven assuming, for present purposes, as the parties do, that Justice Kennedy's opinion in *Rapanos* represents the best instruction on the permissible parameters of 'waters of the United States' as used in the Clean Water Act, it is far from clear that the new Rule's distance limitations are harmonious with the instruction.'' *In re EPA,* 803 F.3d at 807 & n.3 (noting that ''[t]here are real questions regarding the collective meaning of the [Supreme] Court's fragmented opinions in *Rapanos*'').

One example that illustrates this point is the ''seasonally ponded, abandoned gravel mining depressions'' specifically at issue in *SWANCC,* 531 U.S. at 164, which the Supreme Court determined were ''nonnavigable, isolated, intrastate waters,'' *id.* at 166–72, and not jurisdictional. These depressions are located within 4,000 feet of Poplar Creek, a tributary to the Fox River, and may have the ability to store runoff or contribute other ecological functions in the watershed. Thus, they would be subject to, and might satisfy, a significant nexus determination under the 2015 Rule's case-specific analysis. However, Justice Kennedy himself stated in *Rapanos,* which informed the significant nexus standard articulated in the rule, that, ''[b]ecause such a [significant] nexus was lacking with respect to isolated ponds, the [*SWANCC*] Court held the plain text of the statute did not permit'' the Corps to assert jurisdiction over them. 547 U.S. at 767. Other potential examples of the breadth of the significant nexus standard articulated in the 2015 Rule are provided below in the next section.

3. Concerns Regarding the 2015 Rule's Effect on the Scope of CWA Jurisdiction

The agencies asserted in the preamble to the 2015 Rule that ''State, tribal, and local governments have well-defined and longstanding relationships with the Federal government in implementing CWA programs and these relationships are not altered by the final rule.'' 80 FR 37054. The agencies further noted that ''[c]ompared to the current regulations and historic practice of making jurisdictional determinations, the scope of jurisdictional waters will decrease'' under the 2015 Rule. *Id.* at 37101. When compared to more recent practice, however, the agencies determined that the 2015 Rule would result ''in an estimated increase between 2.84 and 4.65 percent in positive jurisdictional determinations annually.'' *Id.* The agencies thus concluded that the 2015 Rule would ''result in a small overall increase in positive jurisdiction determinations compared to those made under the *Rapanos* Guidance'' and that the ''net effect'' of the regulatory changes would ''be marginal at most.'' Brief for Respondents at 32–33 & n.6, *In re EPA,* No. 15–3571 (6th Cir. Jan. 13, 2017). Since publication of the final rule, the agencies have received information about the impact of these changes, including through filings in litigation against the 2015 Rule and comments received in response to the July 27, 2017 NPRM. After further analysis and reconsideration of how the 2015 Rule is likely to impact jurisdictional determinations, including how the data on those impacts relate to the specific regulatory changes made in the 2015 Rule, the agencies are now considering whether the definitional changes in the 2015 Rule would have a more substantial impact on the scope of

jurisdictional determinations made pursuant to the CWA than acknowledged in the analysis for the rule and would thus impact the balance between federal, state, tribal, and local government in a way that gives inadequate consideration to the overarching Congressional policy to ''recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution'' and ''to plan the development and use . . . of land and water resources. . . .'' 33 U.S.C. 1251(b).

Between the agencies' ''historic'' (*i.e.,* 1986 regulations) and ''recent'' practices of making jurisdictional determinations under the *Rapanos* Guidance, the Supreme Court held that the agencies' application of the 1986 regulation was overbroad in some important respects. *See SWANCC,* 531 U.S. at 174 (reversing and remanding the assertion of jurisdiction); *Rapanos,* 547 U.S. at 715 (vacating and remanding, for further analysis, the assertion of CWA jurisdiction). Throughout the rulemaking process for the 2015 Rule, the agencies stressed in public statements,[38] fact sheets,[39] blog posts,[40] and before Congress [41] that the rule would not significantly expand the jurisdictional reach of the CWA. Some commenters questioned the accuracy of these statements during the rulemaking process for the 2015 Rule and in response to the July 27, 2017 NPRM. The court in *North Dakota* questioned the scope of waters subject to the 2015 Rule, and based its preliminary injunction in principal part on those doubts, stating, for example, that ''the definition of tributary'' in the 2015 Rule ''includes vast numbers of waters that are unlikely to have a nexus to navigable waters within any reasonable understanding of the term.'' 127 F. Supp. 3d at 1056; *see also In re EPA,* 803 F.3d at 807 (finding that ''it is far from clear that the new Rule's distance limitations are harmonious'' with Justice Kennedy's significant nexus test in *Rapanos*); *Georgia,* 2018 U.S. Dist. LEXIS 97223, at *17 (holding that the 2015 Rule's ''tributary'' definition ''is similar to the one invalidated in *Rapanos,* and it carries with it the same concern that Justice Kennedy had there'').

Given the concerns raised by some commenters and the federal courts, the agencies have reviewed data previously relied upon to conclude that the 2015 Rule would have no or ''marginal at most'' impacts on jurisdictional determinations, Brief for Respondents at 32 n.6, *In re EPA,* No. 15–3571 (6th Cir. Jan. 13, 2017), and are reconsidering the validity of this conclusion. The agencies solicit comment on whether the agencies appropriately characterized or estimated the potential scope of CWA jurisdiction that could change under the 2015 Rule, including whether the documents supporting the 2015 Rule appropriately considered the data relevant to and were clear in that assessment.

For example, the agencies relied upon an examination of the documents supporting the estimated 2.84 to 4.65 percent annual increase in positive approved jurisdictional determinations (AJDs) to conclude that the 2015 Rule would only ''result in a small overall increase in positive jurisdictional determinations compared to those made under the *Rapanos* Guidance.'' *See* Brief for Respondents at 32, *In re EPA,* No. 15–3571 (6th Cir. Jan. 13, 2017). However, others have raised concerns that this information and other data show the 2015 Rule may have expanded jurisdiction more significantly, particularly with respect to so-called ''other waters'' that are not adjacent to navigable waters and their tributaries.

In developing the 2015 Rule, the agencies examined records in the Corps' Operation and Maintenance Business Information Link, Regulatory Module (ORM2) database that documents jurisdictional determinations associated with various aquatic resource types, including an isolated waters category. ''The isolated waters category is used in the Corps' ORM2 database to represent intrastate, non-navigable waters; including wetlands, lakes, ponds, streams, and ditches, that lack a direct surface connection to other waterways. These waters are hereafter referred to as 'ORM2 other waters.' '' [42] To examine how assertion of jurisdiction could change under the 2015 Rule, the agencies reviewed ORM2 aquatic resource records from Fiscal Year (FY)13 and FY14 and placed them into three groups: Streams (ORM2 categories of traditionally navigable waters, relatively permanent waters, and non-relatively permanent waters), wetlands adjacent to the stream category group, and other waters. Of the 160,087 records for FY13 and FY14, streams represented 65 percent of the total records available, wetlands represented 29 percent, and other waters represented 6 percent.

From this baseline, the agencies assumed that 100 percent of the records classified as streams would meet the jurisdictional tests established in the final rule, and 100 percent of the records classified as adjacent wetlands would meet the definition of adjacent in the final rule. These assumptions resulted in a relatively minor projected increase in positive jurisdictional determinations under the final rule for these categories: 99.3 to 100 percent for the streams category, and 98.9 to 100 percent for the wetlands category.

The agencies also performed a detailed analysis of the other waters category to determine whether jurisdiction might change for those waters under the final rule. In total, ''these files represented over 782 individual waters in 32 states.'' [43]

Of the existing negative determinations for other waters, the agencies made the following estimates:

- 17.1 percent of the negative jurisdictional determinations for other waters would become positive under the 2015 Rule because the aquatic resources would meet the new definition of adjacent waters. *See* 80 FR 37105. These waters fall within the 100-year floodplain and are within 1,500 feet of a stream included in the United States Geological Survey's (USGS) National Hydrography Dataset (NHD).
- 15.7 percent of the other waters could become jurisdictional under category (7) of the 2015 Rule following a significant nexus analysis. *See id.* at 37104–05.
- 1.7 percent of the other waters could become jurisdictional under category (8) of the 2015 Rule following a significant nexus analysis. *See id.* at 37105.

In total, the agencies estimated that 34.5 percent of the other waters represented in the FY13 and FY14 ORM2 database could become jurisdictional under the 2015 Rule after

[38] Addressing farmers in Missouri in July 2014, then-EPA Administrator Gina McCarthy stated that no additional CWA permits would be required under the proposed 2015 Rule. *See: http://www.farmfutures.com/story-epas-mccarthy-ditch-myths-waters-rule-8-114845* (''The bottom line with this proposal is that if you weren't supposed to get a permit before, you don't need to get one now.'').

[39] U.S. EPA. Facts About the Waters of the U.S. Proposal at 4 (July 1, 2014), *available at https://www.regulations.gov/contentStreamer?documentId=EPA-HQ-OW-2011-0880-16357&attachmentNumber=38&contentType=pdf* (''The proposed rule does not expand jurisdiction.'').

[40] U.S. EPA blog post entitled ''Setting the Record Straight on Waters of the US'' (June 30, 2014), *available at https://blog.epa.gov/blog/2014/06/setting-the-record-straight-on-wous/* (''The proposed rule does not expand jurisdiction.'').

[41] In a hearing before the House Committee on Science, Space, and Technology entitled ''Navigating the Clean Water Act: Is Water Wet?'' (July 9, 2014), then-Deputy EPA Administrator Bob Perciasepe told the Committee that the agencies are not expanding the jurisdiction of the CWA. *See https://science.house.gov/legislation/hearings/full-committee-hearing-navigating-clean-water-act-water-wet.*

[42] 2015 Rule Economic Analysis at 7.

[43] 2015 Rule Economic Analysis at 9.

having been declared not jurisdictional under the existing regulations and agency guidance. Thus, while the agencies acknowledged in the 2015 Rule Economic Analysis that ''[f]ollowing the Supreme Court decisions in *SWANCC* (2001) and *Rapanos* (2006), the agencies no longer asserted CWA jurisdiction over isolated waters,'' the agencies estimated in the 2015 Rule Economic Analysis that 34.5 percent of the other waters category could become jurisdictional under the 2015 Rule.[44] By way of comparison, a similar analysis of this category of other waters performed in support of the proposed rule in 2014 (using FY09 and FY10 data from the ORM2 database) estimated that 17 percent of the negative jurisdictional for other waters would become positive.[45]

While the Economic Analysis for the 2015 Rule estimated that 34.5 percent of negative jurisdictional determinations for other waters would become positive,[46] the agencies nevertheless premised the 2015 Rule on assertions that the ''scope of jurisdiction in this rule is narrower than that under the existing regulation,'' the scope of jurisdiction in the rule would result ''in an estimated increase between 2.84 and 4.65 percent in positive jurisdictional determinations annually'' based on existing practice, and that such impacts would be ''small overall'' and ''marginal at most.'' *See* 80 FR 37054, 37101; Brief for Respondents at 32–33 & n.6, *In re EPA,* No. 15–3571 (6th Cir. Jan. 13, 2017). The agencies are examining these statements and how this data relates specifically to the regulatory changes made in the 2015 Rule (as opposed to those provisions which already subjected many streams and wetlands to CWA jurisdiction). The agencies request comment on whether the projected increase for this category is most relevant to measuring the impacts of the 2015 Rule, whether the public had ample notice of the doubling of projected positive jurisdiction over the other waters category from the proposed to final rule, and whether the final rule could expand overall CWA positive jurisdictional determinations by a material amount inconsistent with the findings and conclusions that justified the 2015 Rule.

In particular, the agencies seek comment on the conclusions that were based on the method that estimated a 2.84 to 4.65 percent increase in overall jurisdiction, including the use of a method whereby the increase in assertion of jurisdiction in a particular category of waters (*e.g.,* streams, wetlands, and other waters) was proportionally applied based on the raw number of records in a category relative to the total number of records across all categories in the ORM2 database, notwithstanding whether the regulatory changes in the 2015 Rule did not materially impact those other categories. For example, of the 160,087 records in the ORM2 database for FY13 and FY14, 103,591 were associated with the streams category, 46,781 were associated with the wetlands category, and 9,715 were related to the other waters category. Thus, although 34.5 percent of previously non-jurisdictional ''other waters'' would become jurisdictional under the 2015 Rule, the proportional method used in the 2015 Rule Economic Analysis resulted in only an estimated 2.09 percent increase in positive jurisdictional determinations for ''other waters'' relative to the total number of jurisdictional determinations considered.[47]

In addition, the record for the 2015 Rule includes a 57-page document entitled ''Supporting Documentation: Analysis of Jurisdictional Determinations for Economic Analysis and Rule,'' [48] along with an accompanying 3,695 page document of approved jurisdictional determination (AJD) forms.[49] This contains the agencies' assessment conducted in April 2015 of almost two hundred previously performed AJDs to help the agencies better understand how waters might change jurisdictional status based on the distance limitations included in the final 2015 Rule for adjacent and case-specific waters (*see* 80 FR 37105), including where they might no longer be jurisdictional under the final rule. Certain examples included in the assessment suggest that the 2015 Rule could modify CWA jurisdiction over waters that were deemed not jurisdictional under the 1986 regulatory framework and Supreme Court precedent. The agencies request comment on whether the examples illustrate the concerns expressed by the recent court decisions discussed above that the 2015 Rule may have exceeded the significant nexus standard articulated by Justice Kennedy in the *Rapanos* opinion and concerns expressed by certain commenters that the 2015 Rule may have created additional regulatory uncertainty over waters that were previously thought beyond the scope of CWA jurisdiction. The examples are intended to be illustrative, and are not intended to attempt to quantify or reassess previous estimates of CWA jurisdiction, as the agencies are not aware of any map or dataset that accurately or with any precision portrays CWA jurisdiction at any point in the history of this complex regulatory program.

In the first example, a property in Chesapeake, Virginia, was reviewed by the Corps' Norfolk District in early January 2014 and again in March 2015 and was determined not to contain jurisdictional wetlands because the wetlands on the property lacked a hydrological surface connection of any duration, frequency, or volume of flow to other jurisdictional waters. The Corps noted that the wetlands ''appear to be dependent upon groundwater for hydrology, and have no surface connections'' to nearby tributaries, the closest one of which was approximately 80 feet from the wetland. The agencies

[44] 2015 Rule Economic Analysis at 5, 12.

[45] U.S. EPA and U.S. Army Corps of Engineers. Economic Analysis of Proposed Revised Definition of Waters of the United States at 12, Exhibit 3 (Mar. 2014) (Docket ID: EPA–HQ–OW–2011–0880–0003), *available at https://www.regulations.gov/document?D=EPA-HQ-OW-2011-0880-0003.*

[46] 2015 Rule Economic Analysis at 13, Figure 2.

[47] The following summarizes the methodology used to derive the low-end estimated increase in jurisdiction of 2.84 percent: Streams account for 103,591 of the 160,087 total records (64.709 percent of the total ORM2 records) and 100 percent of streams are assumed to be jurisdictional under the final rule compared to 99.3 percent under previous practice (100 percent minus 99.3 percent = 0.7 percent). The relative contribution of streams to the overall change in jurisdictional determinations is thus 64.709 percent multiplied by 0.7 percent for a total of 0.45 percent. Wetlands account for 46,781 of the 160,087 total records (29.222 percent of the total ORM2 records) and 100 percent of wetlands are assumed to be jurisdictional under the final rule compared to 98.9 percent under previous practice (100 percent minus 98.9 percent = 1.1 percent). The relative contribution of wetlands to the overall estimated change in jurisdictional determinations is thus 29.222 percent multiplied by 1.1 percent for a total of 0.32 percent. Other waters account for 9,715 of the 160,087 total records (6.069 percent of the total ORM2 records) and 34.5 percent of other waters are assumed to be jurisdictional under the final rule compared to 0.0 percent under previous practice (34.5 percent minus 0.0 percent = 34.5 percent). The relative contribution of other waters to the overall estimated change in jurisdictional determinations is thus 6.069 percent multiplied by 34.5 percent for a total of 2.09 percent. The agencies then added the relative contribution to the overall estimated change in jurisdictional determinations for each category of waters (*i.e.,* 0.45 percent for streams, 0.32 percent for wetlands, and 2.09 percent for other waters) to get a total projected change in positive jurisdictional determinations of 2.86 percent. The differences between this calculation and the reported 2.84 percent in the 2015 Rule Economic Analysis may be the result of rounding error.

[48] U.S. EPA. Supporting Documentation: Analysis of Jurisdictional Determinations for Economic Analysis and Rule (Docket ID: EPA–HQ–OW–2011–0880–20877), *available at https://www.regulations.gov/document?D=EPA-HQ-OW-2011-0880-20877.*

[49] U.S. EPA and U.S. Army Corps of Engineers. Supporting Documentation: Jurisdictional Determinations (Docket ID: EPA–HQ–OW–2011–0880–20876), *available at https://www.regulations.gov/document?D=EPA-HQ-OW-2011-0880-20876.*

later stated that the wetland features ''would be jurisdictional under the new rule'' because they are ''within 100-feet of a tributary'' and would thus meet the rule's definition of ''neighboring'' and, in turn, ''adjacent.'' Further information regarding this AJD and property has been added to the docket for the NPRM and is identified as ''Case Study A—AJD Number NAO–2014–2269'' (*see* Support Document).

In another example, the Corps' Buffalo District reviewed a small wetland approximately 583 feet away from the Johlin Ditch near Toledo, Ohio, which eventually leads north to Lake Erie. After conducting a field investigation in September 2014, the Corps determined that the wetlands were not jurisdictional because the ''wetlands are isolated and there is no surface water connections [sic] and the only potential jurisdiction would be the [Migratory Bird Rule],'' noting that the area previously would have been regulated under the Migratory Bird Rule prior to the Supreme Court's *SWANCC* decision. The agencies later stated that the wetlands would be jurisdictional under the 2015 Rule. Further information regarding this AJD and property has been added to the docket for the NPRM and is identified as ''Case Study B—AJD Number 2004–001914'' (*see* Support Document).

In another example, the Corps' Memphis District reviewed a borrow pit on a property in Mississippi County, Missouri, and concluded that the borrow pit did not contain jurisdictional wetlands. The project area was described in the AJD as follows:

> The borrow pit has been abandoned for some time. Vegetation consists mainly of black willow (*Salix nigra*) and poison ivy (*Toxicodendron radicans*). A site visit was conducted on 8 December 2014. The borrow pit is bordered by agricultural land on three sides and County Road K on the western border. There are no surface water connections to other waters of the U.S. A sample was taken within the site and all three parameters for a wetland are present. The Soil Survey book for Cape Girardeau, Mississippi and Scott Counties Missouri, compiled in 1974 and 1975 from aerial photography indicates no drainage into or out of the project site. The area is an isolated wetland approximately 7.6 acres in size.

The abandoned pit in this example was 2,184 feet from the nearest ''tributary,'' a feature that itself appears to be a ditch in an agricultural field. The wetlands in the borrow pit were determined by the Corps to be isolated and non-jurisdictional ''with no substantial nexus to interstate (or foreign) commerce'' and on the basis that ''prior to . . .*'SWANCC,'* the review area would have been regulated based solely on the 'Migratory Bird Rule.' '' A later review by the agencies, however, stated that these wetlands would be jurisdictional under the 2015 Rule. Further information regarding this property and associated AJD has been added to the docket for the NPRM and is identified as ''Case Study C—AJD Number MVM–2014–460'' (*see* Support Document).

In another example, the Corps' New England District reviewed a ''mowed wet meadow within a mowed hayfield'' in Greensboro, Vermont, in August 2012 and concluded the site did not contain jurisdictional wetlands. The AJD described the wetlands as ''surrounded on all sides by similar upland,'' ''500′–985′ away'' from the nearest jurisdictional waters, and ''isolated intrastate waters with no outlet, no hydrological connection to the Lamoille River, no nexus to interstate commerce, and no significant nexus to the Lamoille River (located about 1.7–1.8 miles southeast of the site).'' A later review by the agencies, however, stated the wetlands would be jurisdictional under the 2015 Rule. Further information regarding this property and associated AJD has been added to the docket for the NPRM and is identified as ''Case Study D—AJD Number NAE–2012–1813'' (*see* Support Document).

In another example, the Corps' Chicago District completed AJD number LRC–2015–31 for wetlands in agricultural fields in Kane County, Illinois, in January 2015. AJD Number LRC–2015–31 was completed using two separate AJD forms: One form for the features at the project site that were determined to be jurisdictional according to the *Rapanos* Guidance (''positive AJD form'') and a second form for the features at the site that the Corps determined were not jurisdictional under the *Rapanos* Guidance (''negative AJD form''). Only the positive AJD form was included in the docket in Supporting Documentation entitled, ''Jurisdictional Determinations—Redacted.'' [50] The negative AJD form is available on the Chicago District website.[51]

Using a field determination and desk determinations, the Corps found on the AJD form that there were ''no 'waters of the U.S.' within Clean Water Act (CWA) jurisdiction (as defined by 33 CFR part 328) in the review area.'' The Corps described the project area in the AJD form as follows: ''Wetland A is a 1.37 acre high quality closed depressional isolated wetland. Wetlands B and C (0.08 ac and 0.15 ac) are isolated wetlands that formed over a failed drain tile and are over 1,200 feet away from the closest jurisdictional waterway.'' The AJD also notes, ''Weland [sic] A and the area around Wetlands B and C were previously determined to be isolated in 2008. Wetland C is mapped as Prior Converted in a NRCS certified farmed wetland determination—other areas are mapped as not inventoried.'' Upon later reviewing the negative AJD, however, the agencies determined the wetlands would be ''now Yes JD'' under the 2015 Rule. Further information regarding this property and associated positive and negative AJDs has been added to the docket for the NPRM and is identified as ''Case Study E—AJD Number LRC–2015–31'' (*see* Support Document).

In another example, the Corps' Pittsburgh District visited a property in Butler, Pennsylvania, in October 2014 and determined the site did not contain waters of the United States because the wetland was ''completely isolated and has no nexus to a TNW or interstate or foreign commerce.'' The Corps noted that the wetland would have been regulated based solely on the Migratory Bird Rule prior to the decision in *SWANCC.* Upon reviewing the AJD, the agencies later stated the wetland is ''[i]solated but would have flood storage function.'' The agencies' review notes that the wetland is 1,270 feet from the nearest relatively permanent water (RPW) or traditional navigable water (TNW). Given the wetland is within 4,000 feet of a tributary and the agencies have stated it possesses at least one of the nine functions relevant to the significant nexus evaluation, *see* 80 FR 37106 (*i.e.,* retention and attenuation of flood waters), the wetland would be subject to a significant nexus evaluation under the 2015 Rule. It is unclear, however, whether the wetland and its flood storage function would contribute significantly to the chemical, physical, or biological integrity of the nearest category (1) through (3) water as required by the 2015 Rule to satisfy the significant nexus test. Further information regarding this property and associated AJD has been added to the docket for the NPRM and is identified as ''Case Study F—AJD Number LRP 2014–855'' (*see* Support Document).

In addition to the projected increase in positive jurisdictional determinations and the above examples of expected JD changes, an examination of the documents supporting the estimated 2.84 to 4.65 percent annual increase in positive AJDs raises concerns that the 2015 Rule may have significantly expanded jurisdiction over tributaries in

[50] *Id.* at 2082–83.

[51] Available at: *http://www.lrc.usace.army.mil/Portals/36/docs/regulatory/jd/lrcnjd02-2015.pdf* (page 1 and 2).

certain States, particularly those in more arid parts of the country.

As described previously, to assess how assertion of jurisdiction may change under the 2015 Rule, the agencies reviewed ORM2 aquatic resource records from FY13 and FY14 and placed the aquatic resources into three groups: Streams, wetlands adjacent to the stream category group, and other waters. With respect to the streams category, the agencies assumed that ''100 percent of the records classified as streams will meet the definition of tributary in the final rule,'' [52] resulting in a relatively minor projected increase in positive jurisdictional determinations under the final rule for streams: 99.3 percent to 100 percent, or a 0.7 percent increase.

However, the agencies have reexamined the 57-page ''Supporting Documentation: Analysis of Jurisdictional Determinations for Economic Analysis and Rule'' and have questions regarding the minor projected increase in positive jurisdictional determinations over streams in some states. An untitled table on page 46 of the supporting document lists an analysis of a subset of streams and the number of those streams estimated to be non-jurisdictional by State in the FY13–FY14 ORM2 records for the purpose of estimating stream mitigation costs associated with the 2015 Rule.[53]

Investigating the percent of streams estimated to be non-jurisdictional on a State-by-State basis coupled with the 2015 Rule Economic Analysis's assumption that 100 percent of the stream jurisdictional determinations will be positive under the 2015 Rule could indicate that there may be a significant expansion of jurisdiction over tributaries in some States beyond current practice. For example, in the FY13–FY14 ORM2 records for Arizona, the table identifies 709 of 1,070 total streams (66.3 percent) were non-jurisdictional. For Arkansas, the table identifies 116 of 213 total streams (54.5 percent) as non-jurisdictional. In South Dakota, North Dakota, Nevada, New Mexico, and Wyoming, 8.5 percent, 9.2 percent, 13.2 percent, 16.7 percent, and 57.1 percent of streams in the FY13–FY14 ORM2 database, respectively, were identified in the table as non-jurisdictional. The agencies are concerned that because the 2015 Rule may assert jurisdiction over 100 percent of streams as the agencies assumed in the 2015 Rule Economic Analysis, certain States, particularly those in the arid West, would see significant expansions of federal jurisdiction over streams. The agencies solicit comment on whether such expansions conflict with the assumptions underlying and statements justifying the 2015 Rule, and if such expansions were consistent with the policy goals of section 101(b) of the CWA.

Several questions were raised by commenters regarding whether the 2015 Rule expanded CWA jurisdiction over intermittent and ephemeral streams, and whether the agencies accurately identified that potential expansion in the development of the 2015 Rule. Several commenters, for example, suggested that the amount of jurisdictional river and stream miles in the United States may increase from approximately 3.5 million miles to more than 8 million miles in response to the *per se* jurisdictional treatment of millions of miles of ephemeral and intermittent streams under the tributary definition.[54] To frame their analysis, those commenters compared river and stream miles reported in recent CWA section 305(b) reports submitted by States to EPA, and transmitted by EPA to Congress, to the river and stream miles depicted in maps developed by the agencies and the USGS prior to the 2015 Rule's proposal.

Section 305(b)(1)(A) of the CWA directs each state to ''prepare and submit to the Administrator . . . biennially . . . a report which shall include . . . a description of the water quality of all navigable waters in such State during the preceding year. . . .'' 33 U.S.C. 1315(b)(1)(A). Section 305(b)(2) additionally directs the Administrator to ''transmit such State reports, together with an analysis thereof, to Congress . . . .'' *Id.* at 1315(b)(2). Over the years, those reports to Congress have identified between 3.5 and 3.7 million river and stream miles nationwide (*see* Support Document). The agencies previously observed that this analysis may not be precise, because of concerns regarding the baseline for comparison and assumptions regarding which intermittent and ephemeral streams may be covered under the 2015 Rule.[55]

The agencies are not aware of any national, regional, or state-level map that identifies all ''waters of the United States'' and acknowledge that there are limitations associated with existing datasets. The agencies, however, developed a series of draft maps using the NHD identifying ''rivers and streams and tributaries and other water bodies'' in each State, which then-EPA Administrator Gina McCarthy mentioned at a March 27, 2014 hearing before the U.S. House of Representatives Appropriations Committee Subcommittee on Interior, Environment, and Related Agencies.[56] The EPA provided a copy of those draft maps to Congress on July 28, 2014,[57] and they remain available to the public on the U.S. House of Representatives Committee on Science, Space and Technology website.[58] The draft maps identify a total of 8,086,742 river and stream miles across the 50 States (*see* Support Document).

Given the significant differences between the CWA section 305(b) reports and the draft NHD maps submitted to Congress, and the possibility that each may represent potential estimates for the relative jurisdictional scope of the 1986 regulations and practice compared to the 2015 Rule, several States have questioned whether the proposed definition of ''tributary'' for the 2015 Rule would expand federal jurisdiction over State water resources. Eight State departments of environmental quality, for example, stated in joint comments that ''comparing the 'waters of the United States' reported by States to recent USGS maps released by the EPA shows a 131% increase in federal waters.'' [59] Comments filed by the State

[52] 2015 Rule Economic Analysis at 8.

[53] The table includes all states except Hawaii.

[54] *See* comments submitted by Arizona Department of Environmental Quality et al. (Nov. 14, 2014) (Docket ID: EPA–HQ–OW–2011–0880–15096), *available at https://www.regulations.gov/document?D=EPA-HQ-OW-2011-0880-15096;* comments submitted by CropLife America (Nov. 14, 2014) (Docket ID: EPA–HQ–OW–2011–0880–14630), *available at https://www.regulations.gov/document?D=EPA-HQ-OW-2011-0880-14630;* comments submitted by American Foundry Society (Nov. 14, 2014) (Docket ID: EPA–HQ–OW–2011–0880–15148), *available at https://www.regulations.gov/document?D=EPA-HQ-OW-2011-0880-15148;* comments submitted by U.S. Chamber of Commerce et al. (Nov. 12, 2014) (Docket ID: EPA–HQ–OW–2011–0880–14115), *available at https://www.regulations.gov/document?D=EPA-HQ-OW-2011-0880-14115.*

[55] *See* U.S. EPA and U.S. Army Corps of Engineers. Clean Water Rule Response to Comments—Topic 8: Tributaries at 88–89, *available at https://www.epa.gov/sites/production/files/2015-06/documents/cwr_response_to_comments_8_tributaries.pdf.*

[56] EPA Administrator Gina McCarthy testimony before the U.S. House of Representatives Appropriations Committee Subcommittee on Interior, Environment, and Related Agencies (March 27, 2014), *available at https://www.c-span.org/video/?318438-1/fy2015-epa-budget.*

[57] Letter from Nancy Stoner, Acting Asst. Administrator, U.S. EPA Office of Water, to Rep. Lamar Smith, Chairman, U.S. House of Representatives Committee on Science, Space, and Technology (July 28, 2014), *available at https://science.house.gov/sites/republicans.science.house.gov/files/documents/epa_releases_maps_letter.pdf.*

[58] EPA State and National Maps of Waters and Wetlands, *available at https://science.house.gov/epa-state-and-national-maps-waters-and-wetlands.*

[59] *See* comments submitted by Alabama Dept. of Environ. Mgmt., Arizona Dept. of Environ. Quality,

of Kansas on the proposed rule raised similar concerns and focused on the inclusion of ephemeral streams in the proposed definition of tributary: ''In Kansas we have identified approximately 31,000 miles of perennial and intermittent waters that have been treated as WOTUS for several decades. . . . As per the preamble to the Rule and EPA/ACOE statements, the additional 133,000 miles [of ephemeral streams] would result in a 460% increase in the number of Kansas waters presumed to be jurisdictional under the Rule.'' [60] Kansas added that the State does ''not believe ephemeral waters have *always* been considered *de facto* tributaries for CWA jurisdictional purposes.'' [61] Referencing a statement made by then-EPA Administrator McCarthy in which she stated, ''[u]nfortunately, 60 percent of our nation's streams and millions of acres of wetlands currently lack clear protection from pollution under the Clean Water Act,'' [62] Kansas noted that ''if those 60 percent that 'lack clear protection' are brought under the umbrella of the CWA, [there will be] a significantly larger expansion than estimated in the economic analysis for the Rule.'' [63]

The agencies in 2015 suggested that a feature that flows very infrequently would not form the physical indicators required to meet the 2015 Rule's definitions of ''ordinary high water mark'' and ''tributary.'' [64] In response to comments questioning the agencies' characterization of the change in scope of jurisdiction under the 2015 Rule, the agencies stated that the 2015 Rule was narrower in scope than the existing regulations and historical practice, and reiterated that an increase of approximately 3 percent represented the agencies' estimate of the increased positive jurisdictional determinations compared to recent practice.[65] In the administrative record for the 2015 Rule and in a brief filed with the Sixth Circuit (based on that record), the agencies asserted that the definition of ''waters of the United States'' historically has included ephemeral streams and that some federal court decisions after *SWANCC* upheld assertions of CWA jurisdiction over surface waters that have a hydrologic connection to and that form part of the tributary system of a traditional navigable water, including intermittent or ephemeral streams. 80 FR 37079; Brief for Respondents at 11, 62–64, *In re EPA,* No. 15–3571 (6th Cir. Jan. 13, 2017).[66] The agencies are requesting comment on whether these responses to these issues are adequate. While some ephemeral streams may have been jurisdictional after a case-specific analysis pursuant to the *Rapanos* Guidance,[67] and while challenges to some of those determinations have been rejected by courts, the agencies are requesting public comment on whether these prior conclusions and assertions were correct.

Given the concerns expressed by three federal courts regarding the potential scope of the 2015 Rule and comments raised during the 2015 rulemaking and submitted in response to the July 27, 2017 NPRM, the agencies are re-evaluating the 2015 Rule and the potential change in jurisdiction. While the agencies are not aware of any data that estimates with any reasonable certainty or predictability the exact baseline miles and area of waters covered by the 1986 regulations and preexisting agency practice or data that accurately forecasts of the additional waters subject to jurisdiction under the 2015 Rule, the agencies are examining whether the data and estimates used to support the 2015 Rule's conclusions that the rule would be narrower than preexisting regulations may not have supported those conclusions, and instead the 2015 Rule may have had more than a marginal impact on CWA jurisdictional determinations and may impact well-defined and longstanding relationships between the federal and State governments in implementing CWA programs. The agencies seek comment on this and other data that may be relevant to a proposed finding, and whether such a change in finding would, either independently or in conjunction with other factors, support the agencies' proposal to repeal the 2015 Rule.

4. Potential Impact on Federal-State Balance

When promulgating the 2015 Rule, the agencies concluded and prominently stated that ''State, tribal, and local governments have well-defined and longstanding relationships with the Federal government in implementing CWA programs and these relationships are not altered by the final rule,'' 80 FR 37054. Indeed, it was ''the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this Act.'' 33 U.S.C. 1251(b).

In response to the agencies' July 27, 2017 NPRM, some commenters have suggested that the 2015 Rule—including, *inter alia,* elements of the final rule that commenters were not able to address during the comment period—may not effectively reflect the specific policy that Congress articulated in CWA section 101(b). The agencies are considering whether and are proposing to conclude that the 2015 Rule did not draw the appropriate line, for purposes of CWA jurisdiction, between waters subject to federal and State regulation, on the one hand, and waters subject to state regulation only, on the other. In comments submitted to the agencies in response to the July 27, 2017 NPRM, many States, representatives of entities within many sectors of the regulated community, and numerous other commenters expressed concerns that the 2015 Rule permits federal encroachment upon the States' traditional and primary authority over land and water resources. Such commenters cite the Supreme Court's recognition that ''Congress chose to 'recognize, preserve, and protect the primary responsibilities and rights of states . . . to plan the development and use' '' of those resources in enacting the CWA rather than ''readjust the federal-state balance,'' *SWANCC,* 531 U.S. at 174 (quoting CWA section 101(b), 33 U.S.C. 1251(b)).

Indiana Dept. of Environ. Mgmt., Kansas Dept. of Health and Environ., Louisiana Dept. of Environ. Quality, Mississippi Dept. of Environ. Quality, Oklahoma Dept. of Environ. Quality, and Wyoming Dept. of Environ. Quality (Nov. 14, 2014) (Docket ID: EPA–HQ–OW–2011–0880–15096), *available at https://www.regulations.gov/document?D=EPA-HQ-OW-2011-0880-15096.*

[60] *See* comments submitted by the State of Kansas at Appendix A (Oct. 23, 2014) (Docket ID: EPA–HQ–OW–2011–0880–16636), *available at https://www.regulations.gov/document?D=EPA-HQ-OW-2011-0880-16636.*

[61] *Id.* (emphasis in original).

[62] *See* ''Clean Water Drives Economic Growth'' by Gina McCarthy (Sept. 29, 2014), *available at http://www.huffingtonpost.com/gina-mccarthy/clean-water-act_b_5900734.html.*

[63] *See supra* note 60.

[64] *See, e.g.,* U.S. EPA and U.S. Army Corps of Engineers. Clean Water Rule Response to Comments—Topic 11: Cost/Benefits (Volume 2) at 223, *available at https://www.epa.gov/sites/production/files/2015-06/documents/cwr_response_to_comments_11_econ_vol2.pdf.*

[65] *See, e.g., id.* at 10–13, 17.

[66] *See also* U.S. EPA and Department of the Army. Technical Support Document for the Clean Water Rule: Definition of Waters of the United States at 28 (May 27, 2015), *available at https://www.epa.gov/sites/production/files/2015-05/documents/technical_support_document_for_the_clean_water_rule_1.pdf.*

[67] *See Rapanos* Guidance at 7 (''[R]elatively permanent' waters do not include ephemeral tributaries which flow only in response to precipitation and intermittent streams which do not typically flow year-round or have continuous flow at least seasonally. However, CWA jurisdiction over these waters will be evaluated under the significant nexus standard.'').

Under the 2015 Rule, commenters have observed that the agencies asserted categorical jurisdiction over water features that may be wholly intrastate and physically remote from navigable-in-fact waters. Such waters ''adjacent'' to jurisdictional waters are deemed to meet the definition of ''waters of the United States'' under the 2015 Rule, so long as any portion of the water is located within 100 feet of the ordinary high water mark of a category (1) through (5) ''jurisdictional by rule'' water; within the 100-year floodplain of a category (1) through (5) ''jurisdictional by rule'' water but not more than 1,500 feet from the ordinary high water mark of such water; or within 1,500 feet of the high tide line of a primary water or the ordinary high water mark of the Great Lakes. 80 FR 37085–86, 37105. The agencies also established case-specific jurisdiction over water features generally at a greater distance, including waters (including seasonal or ephemeral waters) located within 4,000 feet of the high tide line or ordinary high water mark of a category (1) through (5) water. *See* 80 FR 37105. For such waters, ''the entire water is a water of the United States if a portion is located within the 100-year floodplain of a water identified in paragraphs (a)(1) through (3) . . . or within 4,000 feet of the high tide line or ordinary high water mark'' of a category (1) through (5) water.'' *Id.*

The agencies are considering whether the 2015 Rule's coverage of waters based, in part, on their location within the 100-year floodplain of a jurisdictional water is consistent with the policy articulated in CWA section 101(b) that States should maintain primary responsibility over land and water resources. The agencies received many comments on the proposal to the 2015 Rule indicating that the potential breadth of this standard could conflict with other federal, State or local laws that regulate development within floodplains.[68] In particular, certain local governments expressed concern that the floodplain element of the rule could conflict with local floodplain ordinances or otherwise complicate local land use planning and development.[69] Though the agencies added a distance-based threshold to limit the use of the 100-year floodplain as a basis for categorical CWA jurisdiction with respect to adjacent waters, the agencies are concerned that the Rule's use of this standard, including its use as a basis for requiring a case-specific significant nexus determination, could nonetheless interfere with traditional state and local police power, as suggested by some of the comments received in 2014.[70] Comments received in response to the July 27, 2017 NPRM also raise concerns about the use of the 100-year floodplain. Specifically, commenters expressed concern about the absence of suitable maps and about the accuracy of existing maps. Given these concerns, the agencies request comment on whether the 2015 Rule's use of the 100-year floodplain as a factor to establish jurisdiction over adjacent waters and case-specific waters interferes with States' primary responsibilities over the planning and development of land and water resources in conflict with CWA section 101(b). The agencies also seek comment on to what extent the 100-year floodplain component of the 2015 Rule conflicts with other federal regulatory programs, and whether such a conflict impacts State and local governments.

The agencies noted in 2015 ''that the vast majority of the nation's water features are located within 4,000 feet of a covered tributary, traditional navigable water, interstate water, or territorial sea.'' [71] The agencies' broadening of certain key concepts and terms relative to the prior regulatory regime means that the agencies can potentially review the ''vast majority'' of water features in the country under the 2015 Rule, unless those features have been excluded from the definition. Similar concern was raised in response to the July 27, 2017 NPRM, for example, by the Missouri Department of Natural Resources and Department of Agriculture.[72] The agencies seek comment on that analysis and whether the 2015 Rule readjusts the federal-state balance in a manner contrary to the congressionally determined policy in CWA section 101(b). Indeed, when issuing a preliminary injunction of the 2015 Rule, the Southern District of Georgia held that ''The [2015] WOTUS Rule asserts jurisdiction over remote and intermittent waters without evidence that they have a nexus with any navigable-in-fact waters.'' *Georgia,* 2018 U.S. Dist. LEXIS 97223, at *19. The agencies thus solicit comment on whether the definitions in the 2015 Rule would subject wholly intrastate or physically remote waters or wetlands to CWA jurisdiction, either categorically or on a case-by-case basis, and request information about the number and scope of such waters of which commenters may be aware.[73]

Further, the agencies solicit comment about whether these, or any other, aspects of the 2015 Rule as finalized would, as either a *de facto* or *de jure* matter, alter federal-state relationships in the implementation of CWA programs and State regulation of State waters, and whether the 2015 Rule appropriately implements the Congressional policy of recognizing, preserving, and protecting the primary rights of states to plan the development and use of land and water resources. Because such findings would, if adopted by the agencies, negate a key finding underpinning the 2015 Rule, the agencies request comment on whether to repeal the 2015 Rule on this basis.

5. Additional Bases for Repealing the 2015 Rule That the Agencies Are Considering

In addition to our proposed conclusions that the 2015 Rule failed to provide regulatory certainty and that it exceeded the agencies' authority under the CWA, the agencies are also considering several other supplemental bases for repealing the 2015 Rule. These are discussed below along with requests for public comment.

Some commenters have suggested that the 2015 Rule may exceed Congress' power under the Commerce Clause. The Supreme Court in *SWANCC* found that, in enacting the CWA, Congress had in mind as its authority ''its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made.'' 531 U.S. at 172. The Court went on to construe the CWA to avoid the significant constitutional

[68] *See, e.g.,* comments submitted by City of Chesapeake (Sept. 9, 2014) (Docket ID: EPA–HQ–OW–2011–0880–9615), *available at https://www.regulations.gov/document?D=EPA-HQ-OW-2011-0880-9615.*

[69] *See, e.g.,* comments submitted by National Association of Counties (Nov. 14, 2014) (Docket ID: EPA–HQ–OW–2011–0880–15081), *available at https://www.regulations.gov/document?D=EPA-HQ-OW-2011-0880-15081.*

[70] *See, e.g.,* comments submitted by Georgia Municipal Association (Nov. 13, 2014) (Docket ID: EPA–HQ–OW–2011–0880–14527), *available at https://www.regulations.gov/document?D=EPA-HQ-OW-2011-0880-14527;* comments submitted by City of St. Petersburg (Nov. 13, 2014) (Docket ID: EPA–HQ–OW–2011–0880–18897), *available at https://www.regulations.gov/document?D=EPA-HQ-OW-2011-0880-18897.*

[71] 2015 Rule Economic Analysis at 11.

[72] *See* comments submitted by the Missouri Department of Natural Resources and Department of Agriculture (Sept. 26, 2017) (Docket ID: EPA–HQ–OW–2017–0203–13869), *available at https://www.regulations.gov/document?D=EPA-HQ-OW-2017-0203-13869* (''The broad definition of tributary and the inclusion of a three-quarter mile buffer around every tributary and impoundment, would have cast a very broad jurisdictional umbrella over the state; requiring significant nexus determinations on all but a very few number of waters.'').

[73] This includes whether the 2015 Rule is supported by a ''clear and manifest'' statement under the CWA to change the scope of traditional state regulatory authority. *See BFP* v. *Resolution Trust Corp.,* 511 U.S. 531, 544 (1994); *see also Bond* v. *United States,* 134 S. Ct. 2077, 2089–90 (2014); *SWANCC,* 531 U.S. at 172–74.

questions raised by the agencies' assertion that the '' 'Migratory Bird Rule' falls within Congress' power to regulate intrastate activities that 'substantially affect' interstate commerce.'' *Id.* at 173. The agencies are evaluating the concerns, reflected in certain comments received by the agencies, that many features that are categorically jurisdictional under the 2015 Rule, such as wetlands that fall within the distance thresholds of the definition of ''neighboring,'' test the limits of the scope of the Commerce Clause because they may not have the requisite effect on the channels of interstate commerce.[74]

For example, according to certain litigants challenging the 2015 Rule, the ''seasonally ponded, abandoned gravel mining depressions'' specifically at issue in *SWANCC,* 531 U.S. at 164, which the Supreme Court determined were ''nonnavigable, isolated, intrastate waters,'' *id.* at 166–72, might be subject to case-specific jurisdiction under the 2015 Rule. The depressions appear to be located within 4,000 feet of Poplar Creek, a tributary to the Fox River, and may have the ability to store runoff or contribute other ecological functions in the watershed.

The agencies request comment, including additional information, on whether the water features at issue in *SWANCC* or other similar water features could be deemed jurisdictional under the 2015 Rule, and whether such a determination is consistent with or otherwise well-within the agencies' statutory authority, would be unreasonable or go beyond the scope of the CWA, and is consistent with Justice Kennedy's significant nexus test expounded in *Rapanos* wherein he stated, ''[b]ecause such a [significant] nexus was lacking with respect to isolated ponds, the [*SWANCC*] Court held that the plain text of the statute did not permit'' the Corps to assert jurisdiction over them. *See* 547 U.S. at 767.

The examples identified in Section II.C.3 above raise similar issues. The abandoned borrow pit, for example, discussed in Case Study C—AJD Number MVM–2014–460, was determined by the Corps in December 2014 to be an isolated water located 2,184 feet from a relatively permanent body of water ''with no substantial nexus to interstate (or foreign) commerce'' (*see* Support Document), yet the agencies later stated the feature would be jurisdictional under the 2015 Rule. In addition, the wetlands at issue in Case Study B—AJD Number 2004–001914 (*see* Support Document) described above in Section II.C.3 were located 583 feet from the Johlin Ditch outside Toledo, Ohio, situated east of an existing medical building and west of an agricultural area. The wetlands were determined by the Corps to be isolated, lacking a surface connection to a water of the United States and a substantial nexus to interstate commerce. Those wetlands, however, were later stated by the agencies to be subject to CWA jurisdiction under the 2015 Rule. The agencies therefore solicit comment on whether the 2015 Rule would cover such wetlands and, if so, whether that would exceed the CWA's statutory limits. *See, e.g., SWANCC,* 531 U.S. at 171–72, 174 (''[W]e find nothing approaching a clear statement from Congress that it intended § 404(a) to reach an abandoned sand and gravel pit'' that is ''isolated.'').

Interested parties are encouraged to provide comment on whether the 2015 Rule is consistent with the statutory text of the CWA and relevant Supreme Court precedent, the limits of federal power under the Commerce Clause as specifically exercised by Congress in enacting the CWA, and any applicable legal requirements that pertain to the scope of the agencies' authority to define the term ''waters of the United States.'' The agencies also solicit comment on any other issues that may be relevant to the agencies' consideration of whether to repeal the 2015 Rule, such as whether any potential procedural deficiencies limited effective public participation in the development of the 2015 Rule.[75]

D. The Agencies' Next Steps

In defining the term ''waters of the United States'' under the CWA, Congress gave the agencies broad discretion to articulate reasonable limits on the meaning of that term, consistent with the Act's text and its policies as set forth in CWA section 101. In light of the substantial litigation risk regarding waters covered under the 2015 Rule, and based on the agencies' experience and expertise in applying the CWA, the agencies propose to repeal the 2015 Rule and put in place the prior regulation. This is based on the concerns articulated above and the agencies' concern that there may be significant disruption to the implementation of the Act and to the public, including regulated entities, if the 2015 Rule were vacated in part. The agencies therefore propose to exercise their discretion and policy judgment by repealing the 2015 Rule permanently and in its entirety because the agencies believe that this approach is the most appropriate means to remedy the deficiencies of the 2015 Rule identified above, address the litigation risk surrounding the 2015 Rule, and restore a regulatory process that has been in place for years.

The agencies have considered other alternatives that could have the effect of addressing some of the potential deficiencies identified, including proposing revisions to specific elements of the 2015 Rule, issuing revised implementation guidance and implementation manuals, and proposing a further change to the February 6, 2020 applicability date of the 2015 Rule. The agencies are soliciting comments on whether any of these alternative approaches would fully address and ameliorate potential deficiencies in and litigation risk associated with the 2015 Rule. Consistent with the President's Executive Order, the agencies are also evaluating options for revising the definition of ''waters of the United States.''

The agencies are proposing to permanently repeal the 2015 Rule at this time, and are taking comment on whether this proposal is the best and most efficient approach to address the potential deficiencies identified in this notice and to provide the predictability and regulatory certainty that alternative approaches may not provide.

E. Effect of Repeal

The 2015 Rule amended longstanding regulations contained in portions of 33 CFR part 328 and 40 CFR parts 110, 112, 116, 117, 122, 230, 232, 300, 302, and 401 by revising, removing, and re-designating certain paragraphs and definitions in those regulations. In this action, the agencies would repeal the 2015 Rule and restore the regulations in existence immediately prior to the 2015 Rule. As such, if the agencies finalize this proposal and repeal the 2015 Rule and thus repeal those amendments, the regulatory definitions of ''waters of the United States'' in effect would be those portions of 33 CFR part 328 and 40 CFR parts 110, 112, 116, 117, 122, 230, 232, 300, 302, and 401 as they existed immediately prior to the 2015 Rule's amendments. *See, e.g., API* v. *EPA,* 883 F.3d 918, 923 (DC Cir. 2018) (regulatory criterion in effect immediately before enactment of criterion that was vacated by the court ''replaces the now-vacated'' criterion). Thus, if the agencies

[74] Though the agencies have previously said that the 2015 Rule is consistent with the Commerce Clause and the CWA, the agencies are in the process of considering whether it is more appropriate to draw a jurisdictional line that ensures that the agencies regulate well within our constitutional and statutory bounds.

[75] *See, e.g., Small Refiner Lead Phase-Down Task Force* v. *EPA,* 705 F.2d 506, 549 (DC Cir. 1983).

determine that repeal of the 2015 Rule is appropriate, the agencies concurrently would recodify the prior regulation in the CFR, which would not have the effect of creating a regulatory vacuum, and the agencies need not consider the potential consequences of such a regulatory vacuum in light of this. If this proposed rule is finalized, the agencies propose to apply the prior definition until a new definition of CWA jurisdiction is finalized.

The current regulatory scheme for determining CWA jurisdiction is ''familiar, if imperfect,'' *In re EPA,* 803 F.3d at 808, and the agencies and regulated public have significant experience operating under the longstanding regulations that were replaced by the 2015 Rule. The agencies would continue to implement those regulations, as they have for many years, consistent with Supreme Court decisions and practice, other case law interpreting the rule, and informed by agency guidance documents. Apart from a roughly six-week period when the 2015 Rule was in effect in 37 States, the agencies have continued to implement the preexisting regulatory definitions as a result of the court orders discussed in Section I.B. above, as well as the final rule adding an applicability date to the 2015 Rule (83 FR 5200, Feb. 6, 2018). While the agencies acknowledge that the 1986 and 1988 regulations have been criticized and their application has been narrowed by various legal decisions, including *SWANCC* and *Rapanos,* the longstanding nature of the regulatory framework and its track record of implementation makes it preferable until the agencies propose and finalize a replacement definition. The agencies believe that, until a new definition is completed, it is important to retain the status quo that has been implemented for many years rather than the 2015 Rule, which has been and continues to be mired in litigation.

In other words, restoration of the prior regulatory text in the CFR, interpreted in a manner consistent with Supreme Court decisions, and informed by applicable agency guidance documents and longstanding practice, will ensure that the scope of CWA jurisdiction will be administered in the same manner as it is now; as it was during the Sixth Circuit's lengthy, nationwide stay of the 2015 Rule; and as it was for many years prior to the promulgation of the 2015 Rule. To be clear, the agencies are not proposing a new definition of ''waters of the United States'' in this specific rulemaking separate from the definition that existed immediately prior to the 2015 Rule. The agencies also are not proposing to take this action in order to fill a regulatory gap because no such gap exists today. *See* 83 FR 5200, 5204. Rather, the agencies are solely proposing to repeal the 2015 amendments to the above-referenced portions of the CFR and recodify the prior regulatory text as it existed immediately prior to the 2015 Rule's amendments.

III. Minimal Reliance Interests Implicated by a Repeal of the 2015 Rule

More than 30,000 AJDs of individual aquatic resources and other features have been issued since August 28, 2015, the effective date of the 2015 Rule. However, less than two percent of the AJDs of individual aquatic resources were issued under the 2015 Rule provisions in the six weeks the rule was in effect in a portion of the country.[76] The 2015 Rule was in effect in only 37 States for about six weeks between the 2015 Rule's effective date and the Sixth Circuit's October 9, 2015 nationwide stay order, *see In re EPA,* 803 F.3d 804 (6th Cir. 2015), and only 540 AJDs for aquatic resources and other features were issued during that short window of time. The remainder of the AJDs issued since August 28, 2015, were issued under the regulations defining the term ''waters of the United States'' that were in effect immediately before the effective date of the 2015 Rule.

''Sudden and unexplained change, . . . or change that does not take account of legitimate reliance on prior [agency] interpretation, . . . may be arbitrary, capricious [or] an abuse of discretion[,] [b]ut if these pitfalls are avoided, change is not invalidating[.]'' *Smiley* v. *Citibank (South Dakota), N.A.,* 517 U.S. 735, 742 (1996) (internal quotation marks and citations omitted). Therefore, in proposing to repeal the 2015 Rule, the agencies are considering any interests that may have developed in reliance on the 2015 Rule, as well as the potential harm to such reliance interests from repealing the Rule against the benefits. The agencies solicit comment on whether the AJDs that were issued under the 2015 Rule's brief tenure (and any ensuing reliance interests that were developed) would be adversely affected by the Rule's repeal. If the potential for such harm exists, the agencies also solicit comment on whether those harms outweigh the potential benefits of repealing the 2015 Rule.

In staying the 2015 Rule nationwide, the Sixth Circuit found no indication ''that the integrity of the nation's waters will suffer imminent injury if the [2015 Rule] is not immediately implemented and enforced.'' *In re EPA,* 803 F.3d at 808. The Sixth Circuit wrote that the ''burden—potentially visited nationwide on governmental bodies, state and federal, as well as private parties—and the impact on the public in general, implicated by the Rule's effective redrawing of jurisdictional lines over certain of the nation's waters'' was of ''greater concern.'' *Id.* As a result, the Sixth Circuit held that ''the sheer breadth of the ripple effects caused by the Rule's definitional changes counsels strongly in favor of maintaining the status quo for the time being.'' *Id.* For the reasons expounded in this notice and the NPRM, the agencies believe that any potential adverse reliance interests are outweighed by the benefits of the agencies' proposed action. The agencies therefore propose to repeal the 2015 Rule and request comment on that proposal.

IV. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review; Executive Order 13563: Improving Regulation and Regulatory Review

This action is a significant regulatory action that was submitted to the Office of Management and Budget (OMB) for review prior to the NPRM and again prior to issuance of the SNPRM. Any changes made in response to OMB recommendations have been documented in the docket.

While economic analyses are informative in the rulemaking context, the agencies are not relying on the economic analysis performed pursuant to Executive Orders 12866 and 13563 and related procedural requirements as a basis for this proposed action. *See, e.g., NAHB,* 682 F.3d at 1039–40 (noting that the quality of an agency's economic analysis can be tested under the APA *if* the ''agency decides to rely on a cost-benefit analysis as part of its rulemaking'').

B. Executive Order 13771: Reducing Regulations and Controlling Regulatory Cost

This rule is expected to be an Executive Order 13771 deregulatory action. Details on the estimated cost savings of this proposed rule can be found in the economic analysis that was published together with the NPRM.

[76] *See* Clean Water Act Approved Jurisdictional Determinations, *available at https://watersgeo.epa.gov/cwa/CWA-JDs,* as of May 9, 2018. The 2015 Rule was enjoined in 13 States by the U.S. District Court for the District of North Dakota and has never gone into effect in those States.

C. Paperwork Reduction Act

This proposed rule does not impose any new information collection burdens under the Paperwork Reduction Act.

D. Regulatory Flexibility Act

The Regulatory Flexibility Act generally requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small not-for-profit enterprises, and small governmental jurisdictions.

The proposed repeal of the 2015 Rule is a deregulatory action that would effectively maintain the status quo as the agencies are currently implementing it, and avoid the imposition of potentially significant adverse economic impacts on small entities in the future. Details on the estimated cost savings of this proposed rule can be found in the economic analysis that was published together with the NPRM. Accordingly, after considering the potential economic impacts of the proposed repeal action on small entities, we certify that this proposed action will not have a significant economic impact on a substantial number of small entities.

E. Unfunded Mandates Reform Act

Under section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA), signed into law on March 22, 1995, an agency must prepare a budgetary impact statement to accompany any proposed or final rule that includes a federal mandate that may result in estimated cost to state, local, or tribal governments in the aggregate, or to the private sector, of $100 million or more. Under section 205 of the UMRA, the agency must select the most cost-effective and least burdensome alternative that achieves the objectives of the rule and is consistent with statutory requirements. Section 203 requires the agency to establish a plan for informing and advising any small governments that may be significantly or uniquely impacted by the rule. This proposed action does not contain any unfunded mandate as described in the UMRA, and does not significantly or uniquely affect small governments. The definition of ''waters of the United States'' applies broadly to CWA programs. The proposed action imposes no enforceable duty on any state, local, or tribal governments, or the private sector, and does not contain regulatory requirements that significantly or uniquely affect small governments.

F. Executive Order 13132: Federalism

Executive Order 13132 requires the agencies to develop an accountable process to ensure ''meaningful and timely input by state and local officials in the development of regulatory policies that have federalism implications.'' ''Policies that have federalism implication'' is defined in the Executive Order to include regulations that have ''substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.'' Under Executive Order 13132, the agencies may not issue a regulation that has federalism implications, that imposes substantial direct compliance costs, and that is not required by statute, unless the federal government provides the funds necessary to pay the direct compliance costs incurred by state and local government, or the agencies consult with state and local officials early in the process of developing the proposed regulation. The agencies also may not issue a regulation that has federalism implications and that preempts state law unless the agencies consult with state and local officials early in the process of developing the proposed regulation.

This proposed rule will not have substantial direct effects on the states, on the relationship between the national government and states, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132, because it merely proposes to repeal a rule that was in effect in only a portion of the country for a short period of time, and does not alter the relationship or the distribution of power and responsibilities established in the CWA. The agencies are proposing to repeal the 2015 Rule in part because the 2015 Rule may have impermissibly and materially affected the states and the distribution of power and responsibilities among the various levels of government and therefore likely should have been characterized as having federalism implications when promulgated in 2015. Thus, the requirements of section 6 of the Executive Order do not apply to this proposed rule because it returns the federal-state relationship to the status quo.

G. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

Executive Order 13175, entitled ''Consultation and Coordination with Indian Tribal Governments'' (65 FR 67249, Nov. 9, 2000), requires the agencies to develop an accountable process to ensure ''meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.'' This proposed rule does not have tribal implications, as specified in Executive Order 13175. This proposed rule will not have substantial direct effects on tribal governments, on the relationship between the federal government and Indian tribes, or on the distribution of power and responsibilities between the federal government and Indian tribes, because it merely preserves the status quo currently in effect today and in effect immediately before promulgation of the 2015 Rule. Thus, Executive Order 13175 does not apply to this proposed rule. Consistent with E.O. 13175, however, the agencies have and will continue to consult with tribal officials, as appropriate, as part of any future rulemaking to define ''waters of the United States.''

H. Executive Order 13045: Protection of Children From Environmental Health Risks and Safety Risks

Executive Order 13045, ''Protection of Children from Environmental Health Risks and Safety Risks'' (62 FR 19885, Apr. 23, 1997), applies to any rule that: (1) Is determined to be ''economically significant'' as defined under Executive Order 12866, and (2) concerns an environmental health or safety risk that an agency has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, the agency must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the agency. This proposed rule is not subject to Executive Order 13045 because it does not involve decisions intended to mitigate environmental health or safety risks.

I. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

This rule is not subject to Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355, May 22, 2001), because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy.

J. National Technology Transfer and Advancement Act

Section 12 of the National Technology Transfer and Advancement Act of 1995 requires federal agencies to evaluate existing technical standards when developing a new regulation. The proposed rule does not involve technical standards.

K. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations

This proposed rule maintains the legal status quo. The agencies therefore believe that this action does not have disproportionately high and adverse human health or environmental effects on minority, low-income populations, and/or indigenous peoples, as specified in Executive Order 12898 (59 FR 7629, Feb. 16, 1994).

List of Subjects

33 CFR Part 328

Environmental protection, Administrative practice and procedure, Navigation (water), Water pollution control, Waterways.

40 CFR Part 110

Environmental protection, Oil pollution, Reporting and recordkeeping requirements.

40 CFR Part 112

Environmental protection, Oil pollution, Penalties, Reporting and recordkeeping requirements.

40 CFR Part 116

Environmental protection, Hazardous substances, Reporting and recordkeeping requirements, Water pollution control.

40 CFR Part 117

Environmental protection, Hazardous substances, Penalties, Reporting and recordkeeping requirements, Water pollution control.

40 CFR Part 122

Environmental protection, Administrative practice and procedure, Confidential business information, Hazardous substances, Reporting and recordkeeping requirements, Water pollution control.

40 CFR Part 230

Environmental protection, Water pollution control.

40 CFR Part 232

Environmental protection, Intergovernmental relations, Water pollution control.

40 CFR Part 300

Environmental protection, Air pollution control, Chemicals, Hazardous substances, Hazardous waste, Intergovernmental relations, Natural resources, Occupational safety and health, Oil pollution, Penalties, Reporting and recordkeeping requirements, Superfund, Water pollution control, Water supply.

40 CFR Part 302

Environmental protection, Air pollution control, Chemicals, Hazardous substances, Hazardous waste, Intergovernmental relations, Natural resources, Reporting and recordkeeping requirements, Superfund, Water pollution control, Water supply.

40 CFR Part 401

Environmental protection, Waste treatment and disposal, Water pollution control.

■ For the reasons stated herein, the agencies propose to amend 33 CFR part 328 and 40 CFR parts 110, 112, 116, 117, 122, 230, 232, 300, 302, and 401 of the Code of Federal Regulations to repeal the amendments that were promulgated in the 2015 Rule and reestablish the regulatory text that was in place immediately prior to promulgation of the 2015 Rule.

Dated: June 29, 2018.

E. Scott Pruitt,

Administrator, Environmental Protection Agency.

Dated: June 29, 2018.

R.D. James,

Assistant Secretary of the Army (Civil Works).

[FR Doc. 2018–14679 Filed 7–11–18; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

42 CFR Part 447

[CMS–2413–P]

RIN 0938–AT61

Medicaid Program; Reassignment of Medicaid Provider Claims

AGENCIES: Centers for Medicare & Medicaid Services, Department of Health and Human Services.

ACTION: Proposed rule.

SUMMARY: This proposed rule would remove the regulatory text that allows a state to make payments to third parties on behalf of an individual provider for benefits such as health insurance, skills training, and other benefits customary for employees. We are concerned that these provisions are overbroad, and insufficiently linked to the exceptions expressly permitted by the statute. As we noted in our prior rulemaking, section 1902(a)(32) of the Act provides for a number of exceptions to the direct payment requirement, but it does not authorize the agency to create new exceptions.

DATES: To be assured consideration, comments must be received at one of the addresses provided below, no later than 5 p.m. on August 13, 2018.

ADDRESSES: In commenting, please refer to file code CMS–2413–P. Because of staff and resource limitations, we cannot accept comments by facsimile (FAX) transmission.

Comments, including mass comment submissions, must be submitted in one of the following three ways (please choose only one of the ways listed):

1. *Electronically.* You may submit electronic comments on this regulation to *http://www.regulations.gov.* Follow the ''Submit a comment'' instructions.

2. *By regular mail.* You may mail written comments to the following address ONLY: Centers for Medicare & Medicaid Services, Department of Health and Human Services, Attention: CMS–2413–P, P.O. Box 8016, Baltimore, MD 21244–8016.

Please allow sufficient time for mailed comments to be received before the close of the comment period.

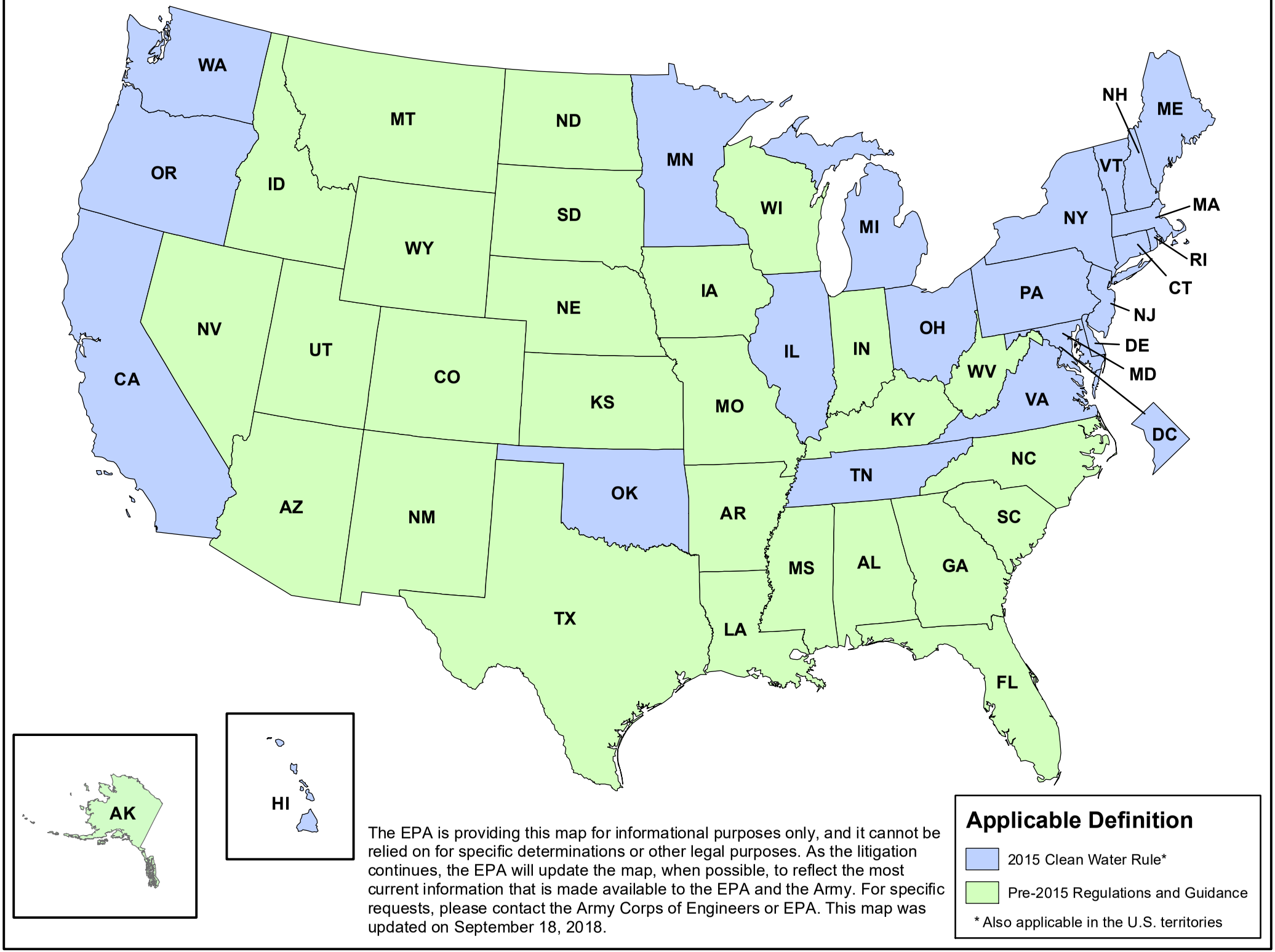
3. *By express or overnight mail.* You may send written comments to the following address ONLY: Centers for Medicare & Medicaid Services, Department of Health and Human Services, Attention: CMS–2413–P, Mail Stop C4–26–05, 7500 Security Boulevard, Baltimore, MD 21244–1850.

FOR FURTHER INFORMATION CONTACT: Christopher Thompson, (410) 786–4044.

SUPPLEMENTARY INFORMATION: *Inspection of Public Comments:* All comments received before the close of the comment period are available for viewing by the public, including any personally identifiable or confidential business information that is included in a comment. We post all comments received before the close of the comment period on the following website as soon as possible after they have been received: *http://www.regulations.gov.* Follow the search instructions on that website to view public comments.

I. Background

The Medicaid program was established by the Congress in 1965 to



The EPA is providing this map for informational purposes only, and it cannot be relied on for specific determinations or other legal purposes. As the litigation continues, the EPA will update the map, when possible, to reflect the most current information that is made available to the EPA and the Army. For specific requests, please contact the Army Corps of Engineers or EPA. This map was updated on September 18, 2018.