

6560-50-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-xx-xx-xx]

RIN 2040-AF74

Definition of “Waters of the United States” - Recodification of Preexisting Rule

AGENCIES: 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 [insert date 30 days after the date of publication in the Federal Register].

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>.

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SUPPLEMENTAL 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, 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.

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

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.

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) through (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

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: EPA-HQ-OW-2011-0880-20866), available at <https://www.regulations.gov/document?D=EPA-HQ-OW-2011-0880-20866>.

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 States⁵ 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 district⁶ and appellate⁷ 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.

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.

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 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*").

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.

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, Pub. L. No. 80-845, 62 Stat. 1155 (June 30, 1948), to address interstate water pollution, and subsequently amended that statute in 1956 (giving the statute its 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., 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[.]").

⁹ The FWPCA is commonly referred to as the CWA following the 1977 amendments to the FWPCA. Pub. L. No. 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.

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,

ivers, 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.

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.

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

3. 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:

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,

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

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).

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 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 abut[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*.

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.”).

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 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).

4. 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

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>.

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

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>.

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 uninterrupted 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 241,857²⁷ approved jurisdictional determinations (AJDs) under their 1986 regulations, as informed by applicable Supreme Court precedent and the agencies’ guidance.

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).

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 decisions²⁸ 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 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

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>.

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

³⁰ *Rapanos* Guidance at 8.

³¹ *Id.* at 10.

³² *Id.*

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 Report³³ 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

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).

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 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

³⁴ *Rapanos* Guidance at 10.

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.

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.

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 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 Congress⁴¹ 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

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>.

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

⁴² 2015 Rule Economic Analysis at 7.

(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).

⁴³ 2015 Rule Economic Analysis at 9.

- 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 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

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.

“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

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>.

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 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

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).

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 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.

⁵² 2015 Rule Economic Analysis at 8.

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.

⁵³ The table includes all states except Hawaii.

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

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>.

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

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_map_s_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>.

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 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

⁵⁹ See comments submitted by Alabama Dept. of Environ. Mgmt., Arizona Dept. of Environ. Quality, 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.

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

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.

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.

3. 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

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.”).

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)).

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

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>.

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

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.

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.

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.

4. 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 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

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.

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

C. 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

⁷⁵ See, e.g., *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 549 (D.C. Cir. 1983).

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.

D. 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 (D.C. 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 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

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.

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.

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

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

Environmental protection, 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: _____.

E. Scott Pruitt,

Administrator.

Environmental Protection Agency.

Definition of “Waters of the United States” - Recodification of Preexisting Rule
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Dated: _____.

R.D. James,

Assistant Secretary of the Army (Civil Works).