

Case No. 15-3751 and consolidated cases

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

In re: Environmental Protection Agency and Department of Defense, Final Rule:
Clean Water Rule: Definition of “Waters of the United States,” 80 Fed. Reg. 37,054
(June 29, 2015)

MURRAY ENERGY CORP., et al.,
Petitioners

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.,
Respondents.

On Petitions for Review of a Final Rule of the United States Environmental
Protection Agency and the United States Army

BRIEF FOR RESPONDENTS

Of Counsel:

AVI S. GARBOW, General Counsel

KARYN I. WENDELOWSKI

U.S. Environmental Protection Agency

ALISSA STARZAK, General Counsel

CRAIG R. SCHMAUDER,

Deputy General Counsel

Department of the Army

DAVID COOPER, Chief Counsel

DANIEL INKELAS

U.S. Army Corps of Engineers

JOHN C. CRUDEN

Assistant Attorney General

DANIEL R. DERTKE

AMY J. DONA

ANDREW J. DOYLE

MARTHA C. MANN

KEVIN McARDLE

DEVON LEHMAN McCUNE

JESSICA O'DONNELL

Environment & Natural Res. Div.

U.S. Department of Justice

P.O. Box 7611

Washington, D.C. 20044

(202) 305-0851

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GLOSSARY

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| 2005 RGL | U.S. Army Corps of Engineers, Regulatory Guidance Letter No. 05-05, Subject: Ordinary High Water Mark Identification (Dec. 7, 2005) |
| 2006 Study | Robert W. Lichvar et al., U.S. Army Corps of Eng’rs, <i>Distribution of Ordinary High Water Mark (OHWM) Indicators and Their Reliability in Identifying the Limits of “Waters of the United States” in Arid Southwestern Channels</i> (2006) |
| Agencies | U.S. Environmental Protection Agency and U.S. Army |
| Amicus Br. of ACWA | Amicus Curiae Brief in Support of Petitioners (ECF No. 135) |
| Amicus Br. of Members of Congress | Brief of Members of Congress as Amici Curiae in Support of State Petitioners and Business and Municipal Petitioners (ECF No. 138) |
| Amicus Br. of Nat’l Rural Water Ass’n | Brief of Amicus Curiae National Rural Water Association Supporting State Petitioners (ECF No. 141) |
| Amicus Br. of Wash. Legal Found. | Brief of Washington Legal Foundation as Amicus Curiae in Support of the Business and Municipal Petitioners and the State Petitioners, Urging that the Rule be Vacated (ECF No. 142) |
| APA | Administrative Procedure Act, 5 U.S.C. §§ 551-559, 701-706 |
| AR | Agency Record ¹ |
| Army | U.S. Army |

¹ Throughout this brief, documents in EPA’s Corrected Certified Index (ECF No. 122) will be identified using the last four- or five-digits of the Docket Document ID, as “AR-_____.” The Docket Document ID refers to the unique docket ID number given to each record in the docket for this rulemaking, which may be found on regulations.gov.

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| Ass'n Br. | Brief of Petitioners National Wildlife Federation, Natural Resources Defense Council, One Hundred Miles, Puget Soundkeeper Alliance, Sierra Club, and the South Carolina Coastal Conservation League (ECF No. 130) |
| Bus. Br. | Opening Brief for the Business and Municipal Petitioners (ECF No. 129-1) |
| Corps | U.S. Army Corps of Engineers |
| Clean Water Rule or Rule | Clean Water Rule: Definition of "Waters of the United States"; Final Rule, 80 Fed. Reg. 37,054 (June 29, 2015), AR-20862 |
| CWA or Act | Clean Water Act, 33 U.S.C. §§ 1251-1388 |
| Draft Science Report | Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence (September, 2013 External Review Draft, EPA/600/R-11/098B), AR-0004 |
| EA/FONSI | Environmental Assessment: Finding of No Significant Impact for the Clean Water Rule, AR-20867 |
| Economic Analysis | Economic Analysis of the EPA-Army Clean Water Rule, AR-20866 |
| EIS | Environmental Impact Statement |
| EPA | U.S. Environmental Protection Agency |
| ESA | Endangered Species Act, 16 U.S.C. §§ 1531-1544 |
| FEMA | Federal Emergency Management Agency |
| GAO | Government Accountability Office |
| JA | Joint Appendix |
| NEPA | National Environmental Policy Act, 42 U.S.C. §§ 4321-4347 |
| NPDES | National Pollutant Discharge Elimination System |

| | |
|------------------------------|---|
| Primary waters | Traditional navigable waters, interstate waters, and the territorial seas, as identified in 33 C.F.R. § 328.3(a)(1)-(a)(3) |
| Proposed Rule | Definition of “Waters of the United States” Under the Clean Water Act; Proposed Rule, 76 Fed. Reg. 22,188 (Apr. 21, 2014), AR-0001 |
| <i>Rapanos</i> Guidance | Clean Water Act Jurisdiction Following the U.S. Supreme Court’s Decision in <i>Rapanos v. United States & Carabell v. United States</i> ,” (June 5, 2007), superseded December 2, 2008 |
| RFA | Regulatory Flexibility Act, 5 U.S.C. §§ 601-612 |
| RTC | Response to Comments for the Clean Water Rule, AR-20872 |
| SAB | Science Advisory Board |
| SAB Proposed Rule Review | Science Advisory Board (SAB) Consideration of the Adequacy of the Scientific and Technical Basis of the EPA's Proposed Rule titled "Definition of Waters of the United States under the Clean Water Act," AR-7531 |
| SAB Science Report Review | SAB Review of the Draft EPA Report Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence, AR-8046 |
| SBA | Small Business Administration |
| Science Report | Connectivity of Streams and Wetlands to Downstream Waters: A Review of the Scientific Evidence, AR-20859 |
| States Br. | Opening Brief of State Petitioners (ECF No. 141) |
| Traditional navigable waters | All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters subject to the ebb and flow of the tide |
| TSD | Technical Support Document for the Clean Water Rule: Definition of Waters of the United States, May 27, 2015, AR-20869 |

Waterkeeper Br.

Opening Brief of Petitioners Waterkeeper Alliance, et al.
(ECF No. 131)

STATEMENT IN SUPPORT OF ORAL ARGUMENT

Pursuant to Fed. R. App. Proc. 34 and Sixth Cir. R. 34(a), Respondents hereby request oral argument because it would be useful to the Court in understanding the multiple issues in this case.

INTRODUCTION

The Clean Water Act (“CWA” or “Act”) was enacted to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a). The Act protects “navigable waters,” which is defined as “waters of the United States.” 33 U.S.C. § 1362(7). The agencies charged with implementing the CWA—the United States Environmental Protection Agency and the United States Army (the “Agencies”)—“must necessarily choose some point at which water ends and land begins,” which is no easy task because “[w]here on this continuum to find the limit of ‘waters’ is far from obvious.” *United States v. Riverside Bayview Homes*, 474 U.S. 121, 132 (1985). After three Supreme Court decisions and years of determining CWA jurisdiction on a case-by-case basis, and in response to suggestions by Supreme Court Justices, Congress, and the public, the Agencies conducted a multi-year rulemaking culminating in the Clean Water Rule, a regulation interpreting the scope of “waters of the United States.”

The foundation of the Agencies’ interpretation is the significant nexus standard. The overwhelming scientific evidence—virtually unchallenged here—demonstrates a continuum of chemical, physical, and biological connections between important downstream waters and streams, ponds, wetlands, and other waters. The Agencies’ task in interpreting the statutory term “waters of the United States” was to identify where on that continuum the nexus is “significant” enough to bring waters within the Act’s jurisdictional reach and under what circumstances the Act does not

apply notwithstanding a possible nexus. The Agencies' overarching goal was to make identification of waters protected under the CWA easier to understand and more predictable, while protecting the streams, wetlands, and other waters at the core of our Nation's water resources.

The Clean Water Rule is a carefully tailored response to Supreme Court precedent, peer-reviewed science, and the Agencies' long experience in implementing the Act. The Rule establishes a three-tiered framework: First, traditional navigable waters, interstate waters, and the territorial seas—collectively referred to in this brief as “primary waters”—are jurisdictional. Jurisdictional waters also include “tributaries” and “adjacent waters,” as defined, based on the Agencies' determinations that a significant nexus exists between those waters and primary waters. Second, the Rule identifies narrow categories of waters that may be found jurisdictional only upon a case-specific demonstration of significant nexus with a primary water. Third, the Rule expressly excludes certain waters and features from CWA jurisdiction.

Four sets of petitioners challenge the Rule. State and Business Petitioners contend that the Rule is a “transformative expansion” of CWA jurisdiction, States Br. 43, purportedly extending to “countless miles of previously unregulated features.” Bus. Br. 58. At the same time, Waterkeeper and Associational Petitioners contend that the Rule “abandon[s] crucial federal protections for potentially huge swaths” of waters, Waterkeeper Br. 1, and that “the Agencies lack statutory authority to deny protection categorically to several classes of water.” Ass'n Br. 18. None of these

characterizations is accurate. The record demonstrates that jurisdiction under the Rule is narrower than the historical scope of CWA jurisdiction under the prior regulation, and slightly broader than the Agencies' practices under pre-Rule guidance.

More importantly, Petitioners' characterizations have little to do with whether the Agencies reasonably interpreted the term "waters of the United States." The Agencies established a balanced regulatory framework that provides protection for primary waters and categories of waters with a significant nexus to primary waters, clearly defined exclusions for waters and features that historically have not generally been considered jurisdictional, and a middle ground for a narrowly defined set of waters that science shows may have the requisite nexus but require a case-specific analysis. The Rule is consistent with the CWA and Supreme Court precedent and is supported by the extensive administrative record.

While the Rule is obviously important to the administration of the CWA, this case presents ordinary issues of statutory interpretation and exercise of agency discretion, matters entitled to deferential judicial review. The Rule is consistent with constitutional authority to protect the Nation's waters from pollution, and it does not alter states' authority to regulate land use, protect water resources, or participate in the Act's cooperative federalism framework. The Agencies provided exhaustive public participation and outreach, receiving over one million comments, and complied with all applicable procedural requirements. Petitioners' attempts to impose additional

requirements under the National Environmental Policy Act (“NEPA”) and the Endangered Species Act (“ESA”) are not cognizable and lack merit.

For all these reasons, the Rule should be upheld.

STATEMENT OF JURISDICTION

This Court has jurisdiction to review the Clean Water Rule: Definition of “Waters of the United States”; Final Rule, 80 Fed. Reg. 37,054 (June 29, 2015) (“Clean Water Rule” or “Rule”), AR-20862. 33 U.S.C. § 1369(b)(1); *In re U.S. Dep’t of Def., U.S. EPA Final Rule: Clean Water Rule: Definition of Waters of U.S.*, 817 F.3d 261 (6th Cir. 2016), *petition for cert. filed*, 2016 WL 4698748 (U.S. Sept. 2, 2016) (No. 16-299).

ISSUES PRESENTED

1. In interpreting the CWA, did the Agencies reasonably rely on the significant nexus standard set forth in Justice Kennedy’s concurring opinion in *Rapanos v. United States*, 547 U.S. 715 (2006), because it: (a) represents a rule of law notwithstanding the fractured nature of the *Rapanos* decision; and (b) reasonably interprets the Act’s broad and ambiguous text in light of the Act’s structure, protective purpose, and other relevant considerations?

2. Did the Agencies reasonably interpret the CWA to protect tributaries that contribute flow to primary waters and possess physical indicators of sufficient volume, frequency, and duration of flow to establish a significant nexus with primary waters?

3. Did the Agencies reasonably interpret the CWA to protect adjacent waters given their demonstrated significant nexus with primary waters?
4. When the Agencies made no changes to the definition of “waters of the United States” with respect to primary waters, should the Court consider a challenge to the Rule’s retention of CWA jurisdiction over interstate waters, and, if so, is the Agencies’ interpretation required by the language and structure of the Act or at least reasonable and consistent with Supreme Court precedent?
5. Was it reasonable for the Agencies to provide for case-specific analysis of significant nexus for certain waters that science and the Agencies’ experience show may have significant effects on primary waters?
6. Did the Agencies reasonably interpret the CWA in adding certain exclusions from the definition of “waters of the United States,” where those exclusions are consistent with the goals of the Act and the Agencies’ past practices?
7. Does the Rule comport with the Constitution?
8. Did the rulemaking process, which included a lengthy and detailed proposal and extensive public participation, comport with the Administrative Procedure Act?
9. Did the Agencies satisfy the Regulatory Flexibility Act by certifying that the Rule does not directly impose regulatory requirements or costs on small entities and, in any event, by conferring with small entities and revising the Rule in response to their comments?

10. Was the rulemaking exempt from NEPA's requirements under 33 U.S.C. § 1371(c)(1) and, if not, did the Agencies adequately assess the Rule's environmental impacts and analyze a reasonable range of alternatives?

11. Have Waterkeeper Petitioners waived their ESA arguments by not raising them during the rulemaking, and do their arguments lack merit in any event because the rulemaking does not trigger the ESA's consultation requirements?

STATEMENT OF THE CASE

I. Statutory and regulatory background

A. The Clean Water Act

The Clean Water Act began with the Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816, as amended, Pub. L. No. 95-217, 91 Stat. 1566, which addressed the shortcomings of earlier, more limited statutes. As this Court observed, the CWA was enacted after “two of the important rivers of this circuit, the Rouge River in Dearborn, Michigan, and the Cuyahoga River in Cleveland, Ohio, reached a point of pollution by flammable materials in the last ten years that they repeatedly caught fire.” *United States v. Ashland Oil & Transp. Co.*, 504 F.2d 1317, 1326 (6th Cir. 1974). With the 1972 amendments, Congress established a number of cooperative state-federal programs to meet the Act's “ambitious goals.” *PUD No. 1 of Jefferson Cnty. v. Wash. Dept. of Ecology*, 511 U.S. 700, 704 (1994).

Two such programs are key to implementing the Act's prohibition on the unauthorized discharge of pollutants to “navigable waters.” 33 U.S.C. §§ 1311(a),

1362(12). The Environmental Protection Agency (“EPA”) or authorized states may issue National Pollutant Discharge Elimination System (“NPDES” or “section 402”) permits for the discharge of pollutants other than dredged or fill material. *Id.* § 1342. For discharges of dredged or fill material, the Secretary of the Army acting through the Army Corps of Engineers (“Corps”), or a state with an approved program, may issue “section 404” permits. *Id.* § 1344(a), (d), (g). EPA, the Corps, and states each have implementation responsibilities and enforcement authority. *See, e.g.*, 33 U.S.C. §§ 1319, 1344(b)-(c), (s). EPA serves as the Act’s chief administrator, 33 U.S.C. § 1251(d), “prescrib[ing] such regulations as are necessary” to carry out its functions. *Id.* § 1361.

The CWA defines “navigable waters” to mean “the waters of the United States, including the territorial seas,” *id.* § 1362(7), but does not define the term “waters of the United States.” However, this broad term reflects Congress’s intent “to repudiate limits that had been placed on federal regulation by earlier water pollution control statutes and 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.” *Riverside Bayview*, 474 U.S. at 133; *see also Int’l Paper Co. v. Ouellette*, 479 U.S. 481, 486, n.6 (1987).

B. Prior regulations interpreting “waters of the United States”

EPA and the Corps have separate regulations defining the statutory term “waters of the United States,” but their interpretations are identical and have

remained largely unchanged since 1977. *See* 42 Fed. Reg. 37,122, 37,124, 37,127 (July 19, 1977). In 1986, the Corps consolidated and recodified its regulations to align with clarifications EPA had previously promulgated; the 1986 regulation neither reduced nor expanded the Agencies' jurisdiction. 51 Fed. Reg. 41,206, 41,216-217 (Nov. 13, 1986).² For convenience we generally cite the Corps' regulations.

The 1986 regulation, which the Rule replaces, identified the following as

“waters of the United States”:

- All traditional navigable waters,³ interstate waters, and the territorial seas, i.e. “primary waters”;
- All impoundments of jurisdictional waters;
- All “other waters” such as lakes, ponds, and sloughs the “use, degradation or destruction of which could affect interstate or foreign commerce”;
- Tributaries of traditional navigable waters, interstate waters, impoundments, or “other waters”; and,

² Multiple C.F.R. provisions interpret the phrases “waters of the United States” and “navigable waters” for purposes of implementing the CWA, 33 U.S.C. § 1362(7), and other water pollution protection statutes such as the Oil Pollution Act, 33 U.S.C. § 2701(21). Some EPA definitions were added after 1986, but each conformed to the 1986 regulation except for minor variations in the waste treatment system exclusions. *See, e.g.*, 55 Fed. Reg. 8666 (Mar. 8, 1990); 73 Fed. Reg. 71,941 (Nov. 26, 2008). The Clean Water Rule revises these regulations but does not alter the waste treatment system exclusion provisions. 80 Fed. Reg. at 37,099, 37,104-27.

³ “Traditional navigable waters” refers to all waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters subject to the ebb and flow of the tide.

- Wetlands adjacent to primary waters, impoundments, tributaries, or “other waters.”

33 C.F.R. § 328.3(a)(1)-(7) (1987). The 1986 regulation also specified that “prior converted cropland” and “waste treatment systems” were not waters of the United States. *Id.* §§ 328.3(a)(7), (b) (1987).

C. Court decisions

Three Supreme Court decisions have considered the scope of waters of the United States as defined by prior regulations: *Riverside Bayview, Solid Waste Agency of Northern Cook Cnty. v. U.S. Army Corps of Eng’rs* (“*SWANCC*”), 531 U.S. 159 (2001); and *Rapanos*.

In *Riverside Bayview*, a unanimous Court upheld the Agencies’ assertion of CWA jurisdiction over wetlands adjacent to traditional navigable waters.⁴ After noting the Agencies’ scientific judgment that “wetlands adjacent to navigable waters do as a general matter play a key role in protecting and enhancing water quality,” 474 U.S. at 133, the Court concluded:

In view of the breadth of federal regulatory authority contemplated by the Act itself and the inherent difficulties of defining precise bounds to regulable waters, the Corps’ ecological judgment about the relationship between waters and their adjacent wetlands provides an adequate basis for a legal judgment that adjacent wetlands may be defined as waters under the Act.

⁴ The regulation that included “wetlands adjacent to” certain jurisdictional waters was at that time codified at 33 C.F.R. § 323.2(a)(7) (1985).

Id. at 134. Although the Court noted that this categorical definition covering “adjacent wetlands” could result in the regulation of some wetlands that “are not significantly intertwined with the ecosystem of adjacent waterways,” the Court reasoned that the Corps could protect all adjacent wetlands so long as it reasonably concludes that “in the majority of cases, adjacent wetlands have significant effects on water quality and the aquatic ecosystem.” *Id.* at 135 n.9. Thus, the Court held that “a definition of ‘waters of the United States’ encompassing all wetlands adjacent to other bodies of water over which the Corps has jurisdiction is a permissible interpretation of the Act.” *Id.* at 135. The Court further found that “the Act’s definition of ‘navigable waters’ as ‘the waters of the United States’ makes it clear that the term ‘navigable’ as used in the Act is of limited import.” *Id.* at 133 (citations omitted).

Sixteen years later, in *SWANCC*, a closely divided Court rejected the Agencies’ assertion of CWA jurisdiction over “nonnavigable, isolated, intrastate” ponds under 33 C.F.R. § 328.3(a)(3) (1987) (jurisdictional “other waters”) based solely on their use by migratory birds. 531 U.S. at 171-72. The Court explained that although the term “navigable” is of limited import, if migratory bird use by itself were a sufficient basis for CWA jurisdiction, the word “navigable” would be rendered meaningless. 531 U.S. at 172. The Court noted that, in *Riverside Bayview*, “[i]t was the significant nexus between the wetlands and ‘navigable waters’ that informed our reading of the CWA.” *Id.* at 167.

The majority of 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 (the only primary water at issue in these decisions), including intermittent or ephemeral streams, ditches, and wetlands adjacent to any such surface water. For example, the Fourth Circuit found “the Corps’ unremarkable interpretation of the term ‘waters of the United States’ as including wetlands adjacent to tributaries of navigable waters” to be “permissible under the CWA because pollutants added to any of these tributaries will inevitably find their way to the very waters that Congress has sought to protect.” *Treacy v. Newdunn Assoc., LLP*, 344 F.3d 407, 416-17 (4th Cir. 2003), *cert. denied sub nom, Newdunn Assoc., LLP v. U.S. Army Corps of Eng’rs*, 541 U.S. 972 (2004). Courts generally held that CWA jurisdiction was present even when the tributaries in question flowed for a significant distance before reaching a primary water or were several times removed from the primary waters (*i.e.*, “tributaries of tributaries”). *See, e.g., United States v. Deaton*, 332 F.3d 698 (4th Cir. 2003), *cert. denied*, 541 U.S. 972 (2004) (affirming CWA jurisdiction over wetlands bordering a “roadside ditch” that took a “winding, thirty-two mile path to the Chesapeake Bay,” flowing through roadside ditches, a creek, and a traditional navigable water).

Five years after *SWANCC*, in *Rapanos*, the Supreme Court issued a fractured decision vacating and remanding for further consideration the Agencies’ assertion of CWA jurisdiction over wetlands adjacent to nonnavigable tributaries of traditional

navigable waters under 33 C.F.R. § 328.3(a)(7) (1987). A plurality of four Justices concluded that Congress intended to protect only “relatively permanent” waters that connect to traditional navigable waters, and wetlands that have a “continuous surface connection” to such relatively permanent waters. 547 U.S. at 742.

Justice Kennedy, while supporting the judgment, took a different approach. In his view, the plurality’s reading of “waters of the United States” lacked support “in the language and purposes of the Act or in our cases interpreting it.” 547 U.S. at 768. Justice Kennedy concluded that CWA jurisdiction extends to wetlands that, either alone or in combination with “similarly situated lands in the region,” have a “significant nexus” to traditional navigable waters. *Id.* at 779-80. He explained that “[t]he required nexus must be assessed in terms of the statute’s goals and purposes,” in particular the objective set forth at 33 U.S.C. § 1251(a), *id.* at 779, and that this relationship must be more than “speculative or insubstantial.” *Id.* at 780.

The four dissenters in *Rapanos* would have upheld the assertion of jurisdiction over the wetlands in question, explaining their view that waters of the United States encompass (at least) waters that satisfy “either the plurality’s test or Justice Kennedy’s.” *Id.* at 810 & n.14 (Stevens, J., dissenting). They remarked, however, that “[Justice Kennedy’s] approach is far more faithful to our precedents and to principles of statutory interpretation than is the plurality’s.” *Id.* at 788.

After *Rapanos*, the Agencies evaluated jurisdiction under the 1986 regulation and guidance issued jointly by EPA and the Corps. *See* “Clean Water Act Jurisdiction

Following the U.S. Supreme Court's Decision in *Rapanos v. United States & Carabell v. United States*," (June 5, 2007), superseded December 2, 2008 (the "*Rapanos* Guidance"), JAxxxx-xxxx. Under the *Rapanos* Guidance, which focuses only on 33 C.F.R. § 328.3(a)(1), (5), and (7) (1987), the Agencies have asserted jurisdiction over traditional navigable waters, wetlands adjacent to traditional navigable waters, nonnavigable tributaries of traditional navigable waters that typically flow year-round or have continuous flow at least seasonally, and wetlands that directly abut such tributaries. *Id.* at 4-7, JAxxxx-xxxx. The Agencies have used the *Rapanos* Guidance to determine on a case-by-case basis whether the following waters have a significant nexus with a traditional navigable water: nonnavigable tributaries that are not relatively permanent, wetlands adjacent to nonnavigable tributaries that are not relatively permanent, and wetlands adjacent to but not directly abutting a relatively permanent nonnavigable tributary. *Id.* at 8-12, JAxxxx-xxxx. The Agencies generally have not asserted jurisdiction over non-wetland swales or erosional features (e.g., gullies and small washes characterized by low volume or infrequent or short duration flow) or ditches (including roadside ditches) excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water. *Id.* at 11-12, JAxxxx-xxxx. The Agencies' assertions of jurisdiction after *Rapanos* have almost universally been upheld when legally challenged. Technical Support Document ("TSD"), AR-20869, at 40-47, JAxxxx-xxxx.

Although the Supreme Court has not revisited the scope of “waters of the United States” since *Rapanos*, it has issued two decisions regarding the government’s assertion of CWA jurisdiction. In *Sackett v. EPA*, 132 S. Ct. 1367 (2012), and in *U.S. Army Corps of Eng’rs v. Hawkes Co.*, 136 S. Ct. 1807 (2016), the Court held that EPA’s assertion of CWA jurisdiction in an administrative compliance order, and the Corps’ position on CWA jurisdiction in an approved jurisdictional determination, were subject to judicial review under the Administrative Procedure Act (“APA”).

Several Justices have suggested that the Agencies should more clearly define the term “waters of the United States.” *Rapanos*, 547 U.S. at 811-812 (Breyer, J. dissenting); *Sackett*, 132 S. Ct. at 1375-76 (Alito, J., concurring); *Hawkes*, 136 S. Ct. at 1816-17 (Kennedy, J., concurring). The Chief Justice noted that the Agencies have “generous leeway” in interpreting the CWA under their delegated rulemaking authority, but that jurisdictional determinations would proceed “on a case-by-case basis” unless and until the Agencies finalized a clarifying rule on the scope of their authority. *Rapanos*, 547 U.S. at 757-58 (Roberts, C.J., concurring).

II. The rulemaking

The Agencies’ goal was to promulgate “a rule that is clear and understandable and protects the Nation’s waters, supported by the science and consistent with the law.” 79 Fed. Reg. 22,188, 22,198/2 (April 21, 2014). By providing greater predictability to the regulated community and regulators, the Agencies also sought to

reduce the time and documentation required to make jurisdictional determinations.

Id. at 22,190/3.

The rulemaking process was extensive. The Agencies analyzed the best available science to determine the degree to which streams, wetlands and other aquatic features in a watershed, either singly or in the aggregate, affect the physical, chemical, and biological integrity of downstream waters. *See* Science Report, AR-20859, at 1-5, JAxxxx (watershed diagram). The Agencies were further guided by the decisions of the Supreme Court and the Agencies' experience implementing the CWA. Given the importance of the Rule and the broad public interest, the Agencies solicited external scientific review, provided many opportunities for public comment, and engaged in extensive outreach to states, local governments, industry, and non-governmental organizations. The key elements of the rulemaking process are described below.

A. The science

Consistent with Supreme Court precedent, the Agencies developed much of the Rule around the significant nexus standard. In determining where a "significant nexus" exists, the Agencies began with the science addressing the relationship between primary waters and their associated upstream waters. The Agencies ultimately considered more than 1,200 peer-reviewed scientific papers and other historical data and information, including individual jurisdictional determinations, agency guidance, and federal and state reports. TSD at 93, JAxxxx. EPA's Office of Research and Development prepared a draft report (the "Draft Science Report") that

reviewed and synthesized the peer-reviewed scientific literature on the connectivity of streams and wetlands to large water bodies, such as rivers, lakes, estuaries, and oceans.

AR-0004, JAxxxx-xxxx.

The Draft Science Report examined the foundational scientific concept of connectivity within and between aquatic systems, i.e., the role of transport mechanisms that link components of aquatic ecosystems. The scientific literature does not use the terms “nexus” or “significant nexus,” but it does address the strength of the connection to and effects of streams, wetlands, and other waterbodies on the chemical, physical, and biological functioning of downstream waters. 79 Fed. Reg. at 22,295/2-3. Based on the literature, the Agencies concluded that waters in floodplains and in riparian areas have a strong influence on downstream waters, and that waters outside of floodplains and riparian areas provide many benefits to downstream waters.⁵ *Id.* at 22,196/1-2. The Agencies also concluded that small water bodies in a watershed should be considered in the aggregate to understand their effects on the health of downstream waters. *Id.*

⁵ A “floodplain” is “a level area bordering a stream or river channel that was built by sediment deposition from the stream or river under present climatic conditions and is inundated during moderate to high flow events.” Science Report at A-4, JAxxxx. Riparian zones are “[t]ransition areas or zones between terrestrial and aquatic ecosystems that are distinguished by gradients in biophysical conditions, ecological processes, and organisms. They are areas through which surface hydrology and subsurface hydrology connect water bodies with their uplands. They include those portions of terrestrial ecosystems that significantly influence exchanges of energy and matter with aquatic ecosystems.” *Id.* at A-10, JAxxxx.

B. The Proposed Rule

The Proposed Rule retained the same general structure as the 1986 regulation and many of the same provisions. Definition of “Waters of the United States” Under the Clean Water Act; Proposed Rule, 76 Fed. Reg. 22,188, 22,198/3 (Apr. 21, 2014), AR-001. The Agencies did not propose to change the status of primary waters (traditional navigable waters, interstate waters, and the territorial seas) or impoundments. *Id.*; *id.* at 22,200-01. Nor did the Agencies propose any revisions to the existing exclusions for waste treatment systems, prior converted cropland, or any of the exemptions from CWA permitting requirements. *Id.* at 22,199/2. The Agencies did propose clarifying “bright line categories” of waters that would be covered, additional categories of waters that would not be covered, and waters that would be protected only after case-specific analyses. *Id.* at 22,198/2. The Agencies also proposed to define several terms relevant to the significant nexus standard. *Id.*

Significant Nexus. For purposes of a significant nexus analysis, the Agencies discussed and solicited comment on: (1) what waters are “similarly situated” because they function alike and are sufficiently close to function together in affecting the nearest primary water; (2) what is the “region” where similarly situated waters should be considered together, and (3) the types of functions that should be analyzed to determine whether waters significantly affect the chemical, physical, or biological integrity of a primary water. *Id.* at 22,211-14.

Tributaries. The Agencies proposed to define “tributary,” which no regulation had previously defined, as “a water physically characterized by the presence of a bed and banks and ordinary high water mark, as defined at 33 C.F.R. § 328.3(e), which contributes flow, either directly or through another water,” to a primary water or impoundment. 79 Fed. Reg. at 22,263/2. Continuing their longstanding practice, the Agencies indicated that a tributary could be natural or man-made, and that natural or man-made breaks would not change the jurisdictional status of a water meeting the proposed definition of tributary. *Id.*

Adjacent waters. CWA regulations have long defined “adjacent” as “bordering, contiguous, or neighboring,” but the Agencies proposed to define the term “neighboring” for the first time, 79 Fed. Reg. at 22,206-07, as a water located within the riparian area or floodplain of a primary water, impoundment, or tributary, or a water with a shallow subsurface hydrologic connection or confined surface hydrologic connection to such a water. *Id.* at 22,208/1. Noting that adjacency has always included an element of reasonable proximity, the Agencies sought comment on other options for defining “neighboring,” including: waters with a shallow subsurface or confined surface connection “regardless of distance”; waters within a floodplain or riparian area; waters with confined surface connections but not shallow subsurface connections; and “specific geographic limits” related to hydrologic connections or other distance limits. *Id.* at 22,207-08.

Case-specific waters. The Proposed Rule did not retain the 1986 regulation’s coverage of “other waters” the “use, degradation or destruction of which could affect interstate or foreign commerce.” 33 C.F.R. § 328.3(a)(3) (1987). Recognizing that there are waters that the Agencies could not by rule determine either have or lack a significant nexus to primary waters, 79 Fed. Reg. at 22,198/2-3, the Agencies instead proposed a category of waters that would be protected only on a case-specific basis. These waters, either individually or in combination with similarly situated waters in the same region, must have a significant nexus to a primary water in order to be jurisdictional. *Id.* at 22,263/1. To be “significant,” the effect on the primary water must be “more than speculative or insubstantial.” *Id.* at 22,263/3. The proposal discussed subcategories of waters that the Agencies were considering identifying as similarly situated, such as by region or by type (e.g., Texas coastal prairie wetlands). *Id.* at 22,215-16. The Agencies also requested comment on the proposal’s use of “similar functions” and “sufficiently close,” and on other options, including not having a category of case-specific waters. *Id.* at 22,216-17.

Exclusions. The Agencies proposed to explicitly exclude, for the first time by rule, waters and features that under longstanding practice generally had not been considered to be covered by the CWA. *Id.* at 22,216/3, 22,218-19. The Proposed Rule also retained the pre-existing exclusions for waste treatment systems and prior converted cropland, *id.* at 22,217/3, and did not affect longstanding exemptions from permitting requirements under 33 U.S.C. §§ 1342, 1344, and 1362. *Id.* at 22,193.

On the same day the Proposed Rule was published, the Agencies posted to the rulemaking docket supporting materials, including the Draft Science Report and an Economic Analysis (AR-20866, JAxxxx-xxxx). Submissions from the public and supporting and related materials gathered or generated by the Agencies were placed in the docket on a rolling basis.

C. Science Advisory Board Review

Prior to being added to the rulemaking docket for comment, the Draft Science Report underwent peer review by EPA and Corps staff, as well as external independent peer review by scientists in government, academic, nonprofit, and private industry organizations. Draft Science Report at xvi, JAxxxx. Following those reviews, the Agencies requested a public peer review of the Draft Science Report by the Science Advisory Board (“SAB”), an independent scientific and technical advisor to the EPA Administrator. 80 Fed. Reg. at 37,057/2. The SAB formed a panel of 27 technical experts from an array of relevant fields—including hydrology, wetland and stream ecology, biology, geomorphology, biogeochemistry, and freshwater science—to review the Draft Science Report. *Id.* at 37,062/1-2. That panel held public meetings, released the Draft Science Report for public review, and solicited public comments for the SAB’s consideration. 78 Fed. Reg. 58,536-37 (Sept. 24, 2013).

In October 2014, prior to the close of the comment period on the Proposed Rule, the SAB completed its peer review and concluded that the Draft Science Report “is a thorough and technically accurate review of the literature on the connectivity of

streams and wetlands to downstream waters.” SAB Science Report Review, AR-8046, at 1, JAxxxx. The SAB found “[s]trong scientific support” for the Draft Science Report’s conclusions regarding streams and riparian and floodplain waters, and recommended strengthening the conclusion regarding non-floodplain waters to include a more definitive statement of how numerous functions of such waters sustain the integrity of downstream waters. *Id.* at 1-3, 5 JAxxxx-xxxx, xxxx.

The SAB separately reviewed and commented on the scientific and technical bases of the Proposed Rule. SAB Proposed Rule Review, AR-7531, JAxxxx-xxxx. The SAB found that the available science provides an adequate basis for the Proposed Rule’s key components. *Id.* at 1, JAxxxx. The SAB noted that although water bodies differ in degree of connectivity to downstream waters (i.e., they exist on a “connectivity gradient” or continuum), the available science supports the conclusion that the types of water bodies identified as waters of the United States in the Proposed Rule exert strong influence on the chemical, physical, and biological integrity of downstream waters. *Id.* In particular, the SAB expressed support for the Proposed Rule’s inclusion of tributaries and adjacent waters, and other waters on a case-specific basis, at the same time noting that additional types of waters could be determined to be similarly situated. *Id.* at 2-3, JAxxxx-xxxx. To the extent the SAB disagreed with the proposal, it was to recommend the inclusion of additional waters. The SAB advised the Agencies to reconsider defining “tributary” without reference to the ordinary high water mark because not all streams have one (e.g., ephemeral

streams in low gradient landscapes). *Id.* at 2, JAxxxx. The SAB also questioned the scientific basis for excluding certain waters and features, such as groundwater and certain ditches. *Id.* at 3-4, JAxxxx-xxxx.

D. The Science Report

EPA revised the Draft Science Report based on the SAB's recommendations and public comments. 80 Fed. Reg. at 37,064. The final Science Report did not substantively alter the content, key findings, or conclusions of the Draft Science Report, but it did clarify and expand upon certain topics and adopt recommendations regarding organization and the use of consistent terminology and visual aids.

The final Science Report reached five major conclusions, the first three of which were unchanged in substance from the Draft Science Report and the last two of which were elevated in importance from the Draft Science Report:

(1) Perennial, intermittent, and ephemeral streams are physically, chemically, and biologically connected to downstream rivers and individually or cumulatively exert a strong influence on the integrity of those downstream waters. Science Report at ES-2, JAxxxx.

(2) Wetlands and open waters in riparian areas and floodplains are physically, chemically, and biologically integrated with rivers and serve an important role in the integrity of those downstream waters. *Id.* at ES-2 to ES-3, JAxxxx-xxxx.

(3) Wetlands and open waters in non-floodplain landscape settings provide numerous functions that benefit downstream water integrity and occur on a gradient of connectivity to those downstream waters. *Id.* at ES-3 to ES-4, JAxxxx-xxxx.

(4) Connectivity of streams and wetlands to downstream waters occurs along a continuum that can be described in terms of the frequency, duration, magnitude, timing, and rate of change of water, material, and biotic fluxes to downstream waters. Stream channels and riparian and floodplain waters together are clearly connected to downstream waters in ways that profoundly influence downstream water integrity. The connectivity and effects of non-floodplain waters are more variable and thus more difficult to address solely from evidence available in peer-reviewed studies. *Id.* at ES-4 to ES-5, JAxxxx-xxxx.

(5) The incremental effects of individual streams and wetlands are cumulative across entire watersheds and therefore must be evaluated in combination with other streams and wetlands. When considering the effect of an individual stream or wetland, all contributions of that stream or wetland should be evaluated cumulatively. *Id.* at ES-5 to ES-6, JAxxxx-xxxx.

E. The Agencies' experience

In addition to considering the Science Report and the SAB review, the Agencies applied their experience implementing the CWA. The Agencies have worked closely with states and the regulated community for more than 40 years issuing permits, reviewing state programs, developing numerous guidance documents

and, when necessary, pursuing enforcement actions against polluters. Since *Rapanos*, the Corps has made more than 400,000 jurisdictional determinations, resulting in a broad array of data points. Determinations have been made in all 50 states, and in settings as varied as the arid West, the tropics of Hawaii, the Appalachian Mountains, and the forests of the Northwest. 80 Fed. Reg. at 37,065/1-2.

F. Outreach and public involvement

The Agencies engaged in an extensive public outreach effort that, in several ways, exceeded the procedural requirements required by law. The Agencies provided the public more than 200 days to submit comments and other input on the Proposed Rule. Response to Comments (“RTC”), AR-20872, Topic 13 at 124, JAxxxx. At the same time, the Agencies convened over 400 meetings with states, small businesses, farmers, academics, miners, energy companies, counties, municipalities, environmental organizations, other federal agencies, tribes, and many others to provide an enhanced opportunity for these stakeholders to provide input on the Proposed Rule. 80 Fed. Reg. at 37,057/1; RTC Topic 13 at 124, JAxxxx; 2014 EPA Regional Proposed Rule Meetings/Events, AR-13182, JAxxxx-xxxx; 2014 EPA Headquarters Proposed Rule Meetings/Events, AR-13183, JAxxx-xxxx.

At the end of the rulemaking process, the administrative record comprised over 20,400 documents and 350,000 pages. The record contains, *inter alia*, over one million comments and the Agencies’ 17-volume Response to Comments; a Technical Support Document; the Science Report and thousands of scientific references; the SAB’s

review of the Draft Science Report and its separate comments on the technical and scientific basis of the Rule; the Economic Analysis and supporting files; an environmental justice report; an Environmental Assessment; a report on discretionary outreach to small entities; a summary of tribal consultation; a report on the outreach to state, local, and county governments; and lists of stakeholder meetings held during and after the comment period.

III. The Rule

The Rule reflects the Agencies' goal of protecting the Nation's waters while "providing simpler, clearer, and more consistent approaches for identifying the geographic scope of the CWA" by defining significant nexus and by grouping waters and features in three tiers: (1) waters that are jurisdictional; (2) waters that will be found jurisdictional only upon a case-specific showing of a significant nexus with a primary water; and (3) waters and aquatic features that are expressly excluded from jurisdiction. 80 Fed. Reg. at 37,057/3.

A. The significant nexus standard

The Agencies developed much of the Rule around the significant nexus standard. The Rule defines "significant nexus" to mean that "a water, including wetlands, either alone or in combination with other similarly situated waters in the region, significantly affects the chemical, physical, or biological integrity" of a primary water. 33 C.F.R. § 328.3(c)(5). A significant nexus is based on the cumulative incremental effects of individual waters, *Rapanos*, 547 U.S. at 780, *see also* TSD at 166,

JAxxxx, and determining which waters have a significant nexus involves scientific and policy judgment and legal interpretation. 80 Fed. Reg. at 37,057/2-3. Science shows that “waters fall along a gradient of chemical, physical, and biological connection to traditional navigable waters,” and the Agencies’ task was to determine where along that continuum to “draw lines of jurisdiction under the CWA.” *Id.* In establishing the boundaries, the Agencies relied on science, the statute’s text and goals, the case law, public comment, and their own technical expertise and experience. *Id.* at 37,061/3. The Agencies were also guided by the compelling need for clearer, more consistent, and easily implementable standards to govern determinations of jurisdiction. *Id.* at 37,057/3.

The Agencies determined that the appropriate “region” is the drainage basin, or watershed, within which all precipitation ultimately flows to the nearest single primary water (referred to as the “single point of entry watershed.”). A watershed includes all streams, wetlands, lakes, and open waters within its boundaries, and is generally regarded as the most appropriate spatial unit for water resource management. *Id.* at 37,066-77.

The Agencies defined “similarly situated” waters as waters that are similar in their form and the functions they provide for downstream waters. For tributaries and adjacent waters, the Agencies defined each category so that the functions the waters provide are similar, and the waters are situated so as to provide those functions in combination to significantly affect downstream waters. *Id.* at 37,065-66. The

Agencies also identified the specific functions that can significantly affect the chemical, physical, or biological integrity of a primary water, such as sediment trapping and nutrient recycling. *Id.* at 37,067-68.

B. Waters that are jurisdictional under the Rule

1. Primary waters and impoundments

The Rule leaves unchanged from the 1986 regulation the protection of all primary waters (traditional navigable waters, interstate waters, and the territorial seas) and impoundments of jurisdictional waters. *Id.* at 37,058/1.

2. Tributaries

As in the 1986 regulation and its predecessor, the Rule identifies tributaries as jurisdictional. The Rule defines “tributary” as a water that contributes flow, either directly or through another water,” to a primary water and that has the “physical indicators of a bed and banks and an ordinary high water mark.” 33 C.F.R. § 328.3(a)(5), (c)(3). Because a bed and banks can itself be an indicator of the ordinary high water mark, the Agencies explained that their intent is to limit the tributary definition to waters “that have both a bed and banks and *another* indicator of ordinary high water mark.” 80 Fed. Reg. at 37,068/3 (emphasis added); *see also* TSD at 245, JAxxxx, *id.* at 236-37, JAxxxx-xxxx (“The definition of ‘tributary’ in the rule also requires another indicator of ordinary high water mark.”). The Agencies included these physical indicators to ensure that only streams with sufficient volume, frequency, and duration are regulated. The Agencies determined that all waters

meeting this definition are similarly situated in the region, i.e., they perform similar functions and work together in affecting downstream primary waters.

The great majority of tributaries as defined by the Rule are headwater streams; the Agencies relied on the scientific studies showing that those streams play an important role in the transport of water, sediments, organic matter, nutrients, and organisms to downstream primary waters. 80 Fed. Reg. at 37,058/1-2. Tributaries acting together in a watershed exert a strong cumulative influence on the integrity of downstream primary waters. *Id.* at 37,068-69.

3. Adjacent waters

“Waters of the United States” include “wetlands, ponds, lakes, oxbows, impoundments, and similar waters” that are “adjacent to” a primary water, impoundment, or tributary. 33 C.F.R. § 328.3(a)(6). The term “adjacent” continues to be defined as in the 1986 regulation to mean “bordering, contiguous, or neighboring.” 33 C.F.R. § 328.3(c)(1). Based upon the connectivity continuum discussed in the scientific literature, and in response to public comment seeking greater clarity, the Agencies included for the first time a definition of “neighboring” that provides clear geographic limits. 80 Fed. Reg. at 37,058/2-3. “Neighboring” waters are those located: (i) within 100 feet of the ordinary high water mark of a jurisdictional water; (ii) within the 100-year floodplain of a jurisdictional water but not more than 1,500 feet from the ordinary high water mark of such water; or (iii) within 1,500 feet of the high tide line of a primary water or the ordinary high water mark of

the Great Lakes. 33 C.F.R. § 328.3(c)(2). Adjacent waters do not include waters used for established normal farming, ranching, and silviculture activities. 33 C.F.R. § 328.3(c)(1).

The inclusion of adjacent waters as jurisdictional is based upon the Agencies' science-based conclusion, supported by the SAB's review, that adjacent waters have a significant nexus to primary waters "based upon their hydrological and ecological connections to, and interactions with, those waters." 80 Fed. Reg. at 37,057/1 to 37,058/2; *see* SAB Proposed Rule Review at 2, JAxxxx. Adjacent waters are shown to help reduce floods; trap or filter sediment; influence stream flow; transport dissolved organic carbon; remove excess nitrogen, phosphorus, and other nutrients; provide habitat for aquatic and water-tolerant plants, invertebrates, and larger species; and provide feeding, refuge, and breeding areas for fish and wildlife. TSD at 307-20, JAxxxx-xxxx. *See also* Science Report at 4-4 to 4-5, JAxxxx-xxxx (examples of mechanisms by which floodplain waters influence downstream waters).

C. Waters subject to case-specific analysis

The Rule provides that some waters are jurisdictional only if they are found on a case-specific basis to have a "significant nexus" to a primary water. 80 Fed. Reg. at 37,059/1. The significant nexus determination will most typically be made on a water individually, but can, when warranted, be made in combination with other waters that are similarly situated, i.e., they "function alike and are sufficiently close to function together in affecting downstream waters." 33 C.F.R. § 328.3(c)(3); 80 Fed. Reg. at

37,059/1. While the Proposed Rule would have authorized a significant nexus analysis for any water not falling within the definition of “tributary” or “adjacent” water and not specifically excluded, the Rule adopts a narrower approach, identifying two categories of waters subject to a case-specific significant nexus determination.

First, the Agencies identified specific types of waters located in particular regions that are always to be analyzed in combination: (1) prairie potholes, (2) Carolina and Delmarva bays, (3) pocosins, (4) western vernal pools in California, and (5) Texas coastal prairie wetlands. 33 C.F.R. § 328.3(a)(7). These categories of waters were selected based upon the available scientific literature and data, the SAB review, public input, and the Agencies’ experience in assessing these waters. 80 Fed. Reg. at 37,071-73.

Second, the Agencies identified a geographic scope within which waters may be assessed, either alone or in combination with other similarly situated waters, for purposes of a significant nexus determination. With the exception of waters falling into one of the five subcategories described above, the significant nexus analysis will be applied only to those waters that are located within the 100-year floodplain of a primary water or within 4,000 feet of the high tide line or ordinary high water mark of a primary water, impoundment, or tributary. 33 C.F.R. § 328.3(a)(8). The Agencies selected these distance limitations based on a number of factors: the scientific literature; the SAB’s review of the Draft Science Report and its comments on the Proposed Rule; the utility of using a floodplain interval, i.e., 100 years, that is readily

available, well-known, and well-understood; the numerous comments seeking greater clarity; and the Agencies' extensive experience and expertise in making significant nexus determinations.

Case-specific waters will be evaluated based on nine aquatic functions. 33 C.F.R. § 328.3(c)(5). These functions are drawn from the scientific literature and the Agencies' experience in implementing the Act. 80 Fed. Reg. at 37,086/3.

D. Waters excluded from CWA jurisdiction

The Rule retains without modification the pre-existing exclusions for waste treatment systems and prior converted cropland. 33 C.F.R. § 328.3(b)(1), (2). The Rule also reflects established Agency guidance and the Agencies' consideration of public input by providing exclusions for erosional features, certain ditches not located in tributaries or that do not drain wetlands, and groundwater. *Id.* § 328.3(b)(3)-(5). And the Agencies created exclusions for certain waters and features generally considered not to be jurisdictional, e.g., stormwater control features created in dry land. *Id.* § 328.3(b)(6), (7). All of the exclusions are consistent with the Agencies' practices and provide greater clarity regarding what waters are and what waters are not protected under the CWA. 80 Fed. Reg. at 37,097-100.

E. The scope of covered waters under the Rule

The Rule has narrowed the scope of "waters of the United States" in a number of ways. Prior to the Rule, almost all waters across the country theoretically could be subject to a case-specific significant nexus determination of jurisdiction. The Rule

expressly excludes certain waters and features, *see* 33 C.F.R. §§ 328.3(b) (exclusions) and 328.3(a)(8) (providing distance limits on case-specific waters), and requires specific physical characteristics for tributaries for the first time, 33 C.F.R. § 328.3(a)(5), which will have the effect of excluding some waters that contribute flow downstream. The Rule also eliminates the prior regulatory provision that defined “waters of the United States” to include all other the waters the use, degradation or destruction of which could affect interstate or foreign commerce. TSD at 30, JAxxxx. At the same time, some waters that post-*Rapanos* were determined to be jurisdictional only after a case-specific analysis are now considered jurisdictional by rule.

It is not possible to determine precisely the number of waters that will be jurisdictional under the Rule as compared to either the 1986 regulation or to the post-*Rapanos* period. The Agencies estimated that the Rule will result in a small overall increase in positive jurisdictional determinations compared to those made under the *Rapanos* Guidance. Economic Analysis at 5, JAxxxx.⁶ However, there will be fewer waters within the scope of the CWA under the Rule compared to the 1986 regulation.

⁶ The Economic Analysis only considered jurisdictional determinations that were negative under the *Rapanos* Guidance but that might be positive under the Rule, and calculated a 2.84-4.65 percent potential increase. Economic Analysis at 7-13, JAxxxx-xxxx. A separate analysis of 199 approved randomly selected jurisdictional determinations assessed the potential reduction in CWA jurisdiction due to the distance limitation for case-specific waters in § 328.2(a)(8), and found two instances where waters previously found jurisdictional under the *Rapanos* Guidance would not be jurisdictional under the Rule. Jurisdictional Determination Review Memorandum,

Cont.

SUMMARY OF ARGUMENT

Backed by a robust scientific record and the Agencies' decades of experience implementing the Clean Water Act, the Rule reasonably interprets the broad and ambiguous term "waters of the United States" in a manner that fully comports with the Act and relevant Supreme Court decisions. The Agencies also complied with all applicable procedural requirements and laws. Thus, the Rule deserves this Court's deference.

I. The Rule's use of the significant nexus standard is valid.

The "significant nexus" standard, as first informed by the ecological connections the Supreme Court described in *Riverside Bayview*, developed in *SWANCC*, and further refined in Justice Kennedy's concurrence in *Rapanos* is foundational to the Agencies' interpretation. Although *Rapanos* was a fractured decision, it generated a governing rule of law that "waters of the United States" include nonnavigable tributaries and their adjacent waters and wetlands that, either alone or in combination with similarly situated waters, have a significant nexus to a traditional navigable water. Justice Kennedy and four additional Justices expressly agreed that Congress intended to protect such waters under the CWA.

The CWA is unquestionably ambiguous on the precise reach of regulable waters, and therefore the Rule interpreting that reach is owed deference under *Chevron*.

AR-20877, at 1, JAxxxx. The net effect of positive-to-negative and negative-to-positive jurisdiction is uncertain, but the Agencies believe it to be marginal at most.

The Agencies' interpretation of "waters of the United States" to include primary waters and waters with a significant nexus to primary waters is a reasonable construction of the Act's scope in light of its text and purposes and Supreme Court precedent.

II. The Rule reasonably identifies certain waters as waters of the United States.

A. Tributaries have a significant nexus to primary waters.

The Agencies reasonably found that "tributaries," either alone or in combination with other similarly situated tributaries in a watershed, have a significant nexus to primary waters. The scientific underpinning of this finding, which Petitioners do not dispute, is unassailable. State and Business Petitioners rely on an overly constrained view of significant nexus that focuses on individual waterbodies, as opposed to the cumulative effect of similarly situated waterbodies in the watershed of a primary water. Further, Petitioners ask the Court to substitute its judgment for the Agencies' regarding the significance of the nexus between tributaries and primary waters. Petitioners' arguments fail because the Agencies' determination that tributaries are waters of the United States is supported by the law and science.

The Rule reasonably defines "tributary" as a water that contributes flow to a primary water and that is characterized by the physical indicators of a bed and banks and an ordinary high water mark." 33 C.F.R. § 328.3(c)(3). The definition of "ordinary high water mark" has not changed from the 1986 regulation, and the

additional requirement of a second physical indicator further cabins tributaries to those that are similarly situated. Business and State Petitioners' hyperbolic assertions of a vast expansion of jurisdiction are based on false assumptions and fail to consider the pre-existing regulation's scope and the Rule's limitations and exclusions.

B. Adjacent waters have a significant nexus to primary waters.

As with tributaries, the Agencies relied on the scientific evidence and the law to determine that adjacent waters, as defined, have a significant nexus and therefore are properly included as waters of the United States. The science demonstrates that adjacent waters work together to perform important functions, including flow contribution, water retention, and pollutant processing and retention, that significantly affect the chemical, physical, and biological integrity of downstream primary waters. This is true not just of wetlands, but also of ponds, lakes, oxbows, impoundments and similar waters. Again, State and Business Petitioners do not dispute the Agencies' highly-detailed findings, but rather ask the Court to substitute its judgment for that of the Agencies as to whether adjacent waters possess the requisite nexus.

The Rule's treatment of adjacent waters does not represent a sweeping change to CWA jurisdiction. To the contrary, waters defined by the Rule as adjacent waters were covered under the Rule's predecessor if they were actually navigable, flowed to other waters, crossed state lines, impounded other regulated waters, or, broadly, their "use, degradation or destruction ... could affect interstate or foreign commerce." 33 C.F.R. § 328.3(a)(3) (1987).

The Rule's new definition of "neighboring" accords with *Rapanos*. The Rule's numeric and floodplain-based distance limitations for adjacent waters reasonably implement the Agencies' objective to establish bright lines based on the Act, science, and the Agencies' experience.

C. The Rule does not change the covered status of interstate waters.

State and Business Petitioners' challenge to the inclusion of interstate waters as jurisdictional is untimely. Interstate waters have been a distinct regulatory category of jurisdictional waters since at least 1977, and the Rule merely retains that status. The Agencies expressly declined to reconsider the status of interstate waters and did not restart the time period for judicial review.

In any event, the Agencies' interpretation that the CWA protects all interstate waters flows inexorably from the Act's language and structure. Until 1972, the Act expressly protected interstate waters independent of their navigability. That the term "interstate waters" does not appear in the 1972 definition of "navigable waters" is of little import because Congress demonstrated its intent to maintain their protection by keeping in effect pre-1972 water quality standards that applied only to interstate waters. Further, because water pollution in one state can adversely affect the quality of waters in another and has obvious effects on interstate commerce, protecting the quality of interstate waters falls squarely within the federal government's traditional role.

III. The Rule reasonably includes categories of waters that should be assessed for a significant nexus on a case-specific basis.

The Agencies followed science and the law in concluding that waters of the United States includes a middle ground consisting of two narrow categories of waters that are jurisdictional only upon a case-specific significant nexus determination. The science shows that these waters have important hydrologic, water quality, and habitat functions that may affect downstream primary waters, but that the connectivity of these waters to downstream primary waters may vary. Petitioners' challenges to the scope of case-specific waters as arbitrary are unavailing, as the Agencies reasonably limited case-specific waters to five defined subcategories of similarly situated waters and waters within certain distance limitations, establishing for the first time outer geographic limits on CWA jurisdiction.

Petitioners misread the CWA and Justice Kennedy's concurring opinion in *Rapanos*. Congress plainly intended to protect the "chemical, physical, *and* biological integrity" of the Nation's waters, 33 U.S.C. § 1251(a) (emphasis added), and the Agencies' determination that a "significant nexus" may be found based on a significant effect on any of the three forms of integrity is entirely proper. The criteria to be considered in making a significant nexus determination, *see* 33 C.F.R. § 328.3(c)(5), are reasonable and relevant to the assessment of a water's functions and its effects on primary waters.

IV. The Rule reasonably excludes certain waters and erosional features.

The Agencies reasonably exercised their discretion in interpreting “waters of the United States” to exclude certain waters and features, 33 C.F.R. § 328.3(b), based on the CWA’s text and structure, public comments, and the Agencies’ experience.

Each of the Rule’s exclusions is well-supported. In contrast to tributaries, excluded erosional features lack physical indicators of sufficient, regular flow to be considered similarly situated, and thus, when considered in combination, have a significant nexus with a primary water. The ditch exclusions are consistent with the Agencies’ historical practices and the CWA and give due consideration to public comments and the SAB’s views. The groundwater exclusion reflects the Agencies’ permissible and long-established interpretation of the Act and its legislative history. Associational Petitioners’ challenge to the waste treatment system exclusion is unfounded, as the Agencies made clear that they were neither reconsidering that exclusion nor taking comment on it, and in any event, the exclusion is both permissible and reasonable.

V. The Rule is constitutional.

The Rule fits squarely within Congress’s power to regulate the channels of commerce and activities having a substantial effect on interstate commerce. As such, the Rule comports with the Commerce Clause and the Tenth Amendment.

The Rule also comports with the Due Process Clause. By clearly defining waters that are jurisdictional and waters that are excluded, and by providing clear

guidelines for identifying waters that may be jurisdictional by virtue of their significant nexus to other jurisdictional waters, the Rule provides fair notice to regulated parties and appropriate parameters for enforcement. Moreover, parties have ample opportunity to request an approved jurisdictional determination from the Corps and seek judicial review of such determination.

VI. All applicable procedural requirements were met.

A. The rulemaking process adhered to the requirements of the APA.

The Agencies provided adequate notice under the APA. The Agencies' intention to provide bright lines and much needed clarity was evident in myriad ways in the Proposed Rule, including (a) the proposal to define "neighboring" with respect to floodplains, riparian zones, or other spatial distance limits; (b) the proposal to define case-specific waters to include only waters that are sufficiently close to jurisdictional waters; and (c) express statements that waters used for normal agriculture should continue to retain the same status as under the 1986 regulation and agency practice. The Agencies sought and received comments on these questions, which shaped the Agencies' decisionmaking and the Rule. While the final Rule differs from the proposal, the revisions reflect the Agencies' conscientious efforts to respond to the robust debate with the additional clarity requested by commenters.

The Agencies also provided ample opportunity to comment on the Rule's scientific and technical bases by noticing the peer-reviewed Draft Science Report with the Proposed Rule and placing the SAB's review of the Draft Science Report and

other scientific sources in the public docket during the lengthy comment period. The Agencies' voluminous Response to Comments demonstrates that Petitioners commented on all relevant aspects of the Rule and that the Agencies considered and responded to those comments.

B. The Agencies complied with the Regulatory Flexibility Act.

The Agencies complied with the Regulatory Flexibility Act by certifying that the Rule will not “have a significant economic impact on a substantial number of small entities.” 5 U.S.C. § 605(b). The Rule imposes no direct regulatory requirements or costs. Business Petitioners' reliance on extra-record declarations to argue differently should be rejected as outside the scope of judicial review, in addition to being speculative and unfounded. Moreover, the Agencies appropriately relied on the 1986 regulation as the baseline for assessing the Rule's impacts, consistent with EPA guidance on the subject.

Even if Petitioners could establish error with respect to the Agencies' certification of no significant economic impact, such error would be harmless because the Agencies conducted considerable outreach and consultation with small entities and revised the final Rule in response.

VII. Petitioners' NEPA and ESA challenges lack merit.

A. The rulemaking is exempt from NEPA requirements, and the Army's voluntary actions suffice in any event.

As an action of the EPA Administrator, the Rule is statutorily exempt from NEPA's requirements. 33 U.S.C. § 1371(c)(1). This Court and others have recognized that an action does not cease to be "action of the Administrator" merely because it was jointly undertaken with the Secretary of the Army and the Corps. *In Re Dep't of Def.*, 817 F.3d at 273. In any event, the Environmental Assessment and Finding of No Significant Impact that the Army voluntarily prepared satisfy NEPA's requirements.

B. The ESA claims are waived and not cognizable.

Waterkeeper Petitioners' claims that the Agencies should have consulted with the Fish and Wildlife Service and National Marine Fisheries Service under the ESA are waived since they were not raised at any time during the public comment period. Moreover, because the Rule defines the scope of CWA jurisdiction but does not exercise that jurisdiction in a manner that could affect listed species, the duty to consult under the ESA is not triggered.

For all these reasons the Court should deny the petitions.

STANDARD OF REVIEW

This case is governed by the APA standard of review. Petitioners must show that the Rule is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A).

Questions of statutory interpretation, including those involving the CWA’s definitions, are governed by the familiar two-step test set forth in *Chevron, Inc. U.S.A. v. NRDC*, 467 U.S. 837, 842-45 (1984). *B.P. Exploration & Oil, Inc. v. EPA*, 66 F.3d 784, 791 (6th Cir. 1995). Under step one, the Court asks whether Congress “has directly spoken to the precise question at issue,” in which case the Court “must give effect to the unambiguously expressed intent of Congress.” *Chevron*, 467 U.S. at 842-43. If the statute is “silent or ambiguous with respect to the specific issue,” the Court moves to *Chevron’s* second step and must defer to the agency’s interpretation so long as it is “based on a permissible construction of the statute.” *Id.* This deferential standard applies to an agency’s interpretation of its statutory jurisdiction. *City of Arlington, Texas v. FCC*, 133 S. Ct. 1863, 1868 (2013).

Deference accorded an agency is heightened in reviewing its interpretation of a statute it administers when the statute is complex and within the agency’s expertise. *United States v. Mead Corp.*, 533 U.S. 218, 227-31 (2001). The CWA falls within this category. *See PUD No. 1 of Jefferson Cnty.*, 511 U.S. at 704 (characterizing the CWA as a “complex statutory and regulatory scheme”). Thus, the Court need only find “that EPA’s understanding of this very ‘complex statute’ is a sufficiently rational one to

preclude a court from substituting its judgment for that of EPA.” *Chem. Mfrs. Ass’n v. NRDC, Inc.*, 470 U.S. 116, 125 (1985).

The arbitrary and capricious standard applies to an agency’s factual or technical determinations. “The scope of review under the ‘arbitrary and capricious’ standard is narrow” and the Court is not to substitute its judgment for that of the agency. *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). The Court’s role “is limited to reviewing the administrative record ‘to determine whether there exists a ‘rational connection between the facts found and the choice made.’” *Nat’l Truck Equip. Ass’n. v. Nat’l Highway Traffic Safety Admin.*, 711 F.3d 662, 667 (6th Cir. 2013) (citation omitted). This standard is a highly deferential one, which presumes the validity of agency actions, and upholds them if the actions satisfy minimum standards of rationality. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415 (1971); *Citizens Coal Council v. EPA*, 447 F.3d 879, 890 (6th Cir. 2006) (en banc) (applying the “highest level of deference” to agency’s technical and scientific determinations).

ARGUMENT

I. The Agencies reasonably relied on the significant nexus standard to determine CWA jurisdiction over waters of the United States.

The backbone of the Agencies’ interpretation of the scope of the CWA is the significant nexus standard. 80 Fed. Reg. at 37,056/3. Business Petitioners challenge the Agencies’ reliance on the standard, characterizing it as a “faulty legal premise.”

Bus. Br. 50. But the Agencies acted lawfully in applying the fractured decision of *Rapanos* and reasonably in interpreting the broad and ambiguous statutory term “waters of the United States” consistently with Justice Kennedy’s *Rapanos* concurrence.

A. Justice Kennedy’s significant nexus standard constitutes a rule of law from *Rapanos*.

In interpreting the statutory term “waters of the United States,” the Agencies considered *Riverside Bayview*, *SWANCC*, and *Rapanos*. Construing the unanimous opinion in *Riverside Bayview* and the majority opinion in *SWANCC* is relatively straightforward. But understanding *Rapanos* is more complicated—indeed “baffl[ing],” *United States v. Cundiff*, 555 F.3d 200, 208 (6th Cir. 2009)—because “no one rationale commanded a majority of the Court.” *Sackett*, 132 S. Ct. at 1370. Notwithstanding this difficulty, the Agencies have consistently construed *Rapanos* to mean that a water is jurisdictional under the CWA if its meets either the plurality’s relatively permanent standard or Justice Kennedy’s significant nexus standard. *See* TSD at 48-53, JAxxxx-xxxx. That is the right approach because the four dissenting Justices, who would have affirmed CWA jurisdiction under the pre-existing regulatory interpretation of “waters of the United States,” stated explicitly that they would “uphold [CWA] jurisdiction ... in all [] cases in which either the plurality’s or Justice Kennedy’s test is satisfied” and “the United States may elect to prove jurisdiction under either test.” *Rapanos*, 547 U.S. at 810 & n.14. Thus, the assertion of CWA

jurisdiction under either standard would be consistent with the views of a majority of the Court's Members and the limits set on the Agencies' discretion.

1. The Supreme Court has relied on dissenting opinions to formulate a governing rule where the plurality and concurring opinions lack commonality.

The Rule reflects the Agencies' decision to assert CWA jurisdiction in accordance with Justice Kennedy's concurrence in *Rapanos*. Contrary to the Business Petitioners' argument that the significant nexus standard carries no legal force, Bus. Br. 45-50, applicable principles for interpreting splintered decisions of the Supreme Court establish that it does. Traditionally, "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." *Marks v. United States*, 430 U.S. 188, 193 (1977) (internal quotation marks omitted); see, e.g., *Glossip v. Gross*, 135 S. Ct. 2726, 2731, 2738 n.2 (2015); *United States v. Kratt*, 579 F.3d 558 (6th Cir. 2009). In *Marks*, the Supreme Court considered the precedential value of an earlier case, *Memoirs v. Massachusetts*, 383 U.S. 413 (1966), in which there was no majority opinion. Three Justices had voted to reverse the judgment in *Memoirs* based on their view of the First Amendment, while two additional Justices had "concurred on broader grounds." *Marks*, 430 U.S. at 193. *Marks* held that the three-justice plurality in *Memoirs* had provided the controlling rule.

But interpreting fractured decisions has evolved since *Marks*—a fact ignored by Business Petitioners.⁷ As this Court and others have explained, a literal application of *Marks* will reliably effectuate the views of a majority of the Court only when one ground of decision is “narrower” in the sense of offering “the least change to the law,” *Cundiff*, 555 F.3d at 209 (citations omitted), or constituting “a logical subset of other, broader opinions.” *United States v. Johnson*, 467 F.3d 56, 63 (1st Cir. 2006) (quoting *King v. Palmer*, 950 F.2d 771, 781 (D.C. Cir. 1991) (en banc)). Thus, “[t]he *Marks* rule is not workable ... when a concurrence that provides the fifth crucial vote does not provide an opinion that can be meaningfully regarded as narrower than another or does not represent a common denominator of the Court’s reasoning.” *United States v. Ray*, 803 F.3d 244, 270 (6th Cir. 2015) (internal quotation marks and citation omitted). Where a common denominator is lacking among a majority of the Justices supporting the judgment, effectuating a majority’s views may require expanding the search for commonality by considering the dissenting Justices’ views. That furthers *Marks*’s underlying purpose.

Significantly, the Supreme Court itself has recognized that *Marks* can be “more easily stated than applied to the various opinions supporting the result,” *Grutter v. Bollinger*, 539 U.S. 306, 325 (2003), and that “[i]t does not seem useful to pursue the *Marks* inquiry to the utmost logical possibility” in every case, *id.* (internal quotation

⁷ See also States Br. 21; Amicus Br. of Nat’l Rural Water Ass’n 8-10.

marks and citations omitted). *See also Rapanos*, 547 U.S. at 758 (Roberts, C.J., concurring) (quoting *Marks* and *Grutter*). Moreover, “the Supreme Court ... [has] considered dissenting opinions when interpreting fragmented Supreme Court decisions.” *United States v. Davis*, 825 F.3d 104, 1024 (9th Cir. 2016) (en banc) (citing, *inter alia*, *United States v. Jacobsen*, 466 U.S. 109, 115-117 (1984), and *Moses H. Cone Mem’l Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 16-17 (1980)). *See also, e.g., Abdul-Kabir v. Quarterman*, 550 U.S. 233, 251-54 & n. 14, 257-58 (2007); *Vasquez v. Hillery*, 474 U.S. 254, 261 n.4 (1986); *Alexander v. Choate*, 469 U.S. 287, 293 & nn.8-9 (1985).

Jacobsen, which interpreted the fractured decision of *Walter v. United States*, 447 U.S. 649 (1980), is particularly instructive. There, the Court found a common denominator only among two Justices supporting the judgment and four dissenting Justices. In relying upon the dissent, the Court explained that “the disagreement between the majority and the dissenters ... with respect to [application of law to fact] is less significant than the agreement on the standard to be applied.” *Jacobsen*, 466 U.S. at 117 n.12.

Likewise, in *Rapanos*, the plurality and concurring opinions describe different legal standards, neither of which is a logical subset of the other. *See* 80 Fed. Reg. at 37,061/2; TSD at 37, 41, JAxxxx, xxxx. Although this Court has not yet “reconcile[d] *Rapanos* with *Marks*,” it has observed that “there is quite little common ground between Justice Kennedy’s and the plurality’s conceptions of jurisdiction under the Act, and both flatly reject the other’s view.” *Cundiff*, 555 F.3d at 210 (citations

omitted).⁸ The dissent, on the other hand, expressly stated that the Act encompasses all waters that satisfy the significant nexus standard or that of the plurality. *See Rapanos*, 547 U.S. at 809-11 & n. 14 (Stevens, J., dissenting).

Thus, the significant nexus standard articulated by Justice Kennedy is a narrower ground than the dissent and is a ground on which a majority of the Justices would confirm jurisdiction under the Act. As in *Jacobsen*, the disagreement between Justice Kennedy and the dissenters regarding the Act's coverage of adjacent wetlands is less significant than their express agreement that adjacent wetlands with a significant nexus to traditional navigable waters constitute "waters of the United States." Their disagreement turned on whether case-by-case determinations are required. Justice Kennedy, for example, wrote that where wetlands are adjacent to nonnavigable tributaries, "[a]bsent more specific regulations" the Agencies must "establish a significant nexus on a case-by-case basis." *Rapanos*, 547 U.S. at 782. The dissenters believed that any significant nexus requirement was "categorically satisfied" by the 1986 regulation. *Id.* at 807-08. But all five Justices expressly agreed on the

⁸ Business Petitioners correctly note that in *Rapanos*, all Justices agreed that the Act "reaches some waters and wetlands that are not navigable-in-fact[.]" Bus. Br. 48, consistent with *Riverside Bayview*, 474 U.S. at 133. It is also true that "if neither of the tests is met, the plurality and Justice Kennedy would form a majority saying that the wetlands are not covered by the CWA." *United States v. Donovan*, 661 F.3d 174, 184 (3rd Cir. 2011). And all nine Justices in *Rapanos* found the Act to be ambiguous in at least some respects. Beyond that, Business Petitioners are wrong that any common denominator of consequence exists between the plurality and concurring opinions.

fundamental point that wetlands with a significant nexus to traditional navigable waters are waters of the United States.

That the plurality’s standard is also a narrower ground than the dissent, *see Rapanos*, 547 U.S. at 810 n.14 (Stevens, J., dissenting), does not support Business Petitioners’ suggestion that CWA jurisdiction exists only if *both* the plurality’s *and* Justice Kennedy’s standards are met. Bus. Br. 49. Petitioners’ approach to *Rapanos*—adopted by no court to date—would unduly narrow the scope of the Act and exceed the scope of the decision’s common denominator. “*Marks* does not imply that the ‘narrowest’ *Rapanos* opinion is whichever one restricts jurisdiction the most.” *Cundiff*, 555 F.3d at 209.⁹

2. All circuits that have addressed the issue have given effect to the significant nexus standard.

The Rule’s use of the significant nexus standard is consistent with every circuit decision that has gleaned a rule of law from *Rapanos*. TSD at 49, JAxxxx (collecting cases). Three courts of appeals have given effect to the common denominator between Justice Kennedy’s concurrence and the four-Justice dissenting opinion in holding, consistent with the Agencies’ position, that CWA jurisdiction is established if Justice Kennedy’s significant nexus standard is met. *See Donovan*, 661 F.3d at 180-84; *United States v. Bailey*, 571 F.3d 791, 797-99 (8th Cir. 2009); *Johnson*, 467 F.3d at 62-66.

⁹ Contrary to amicus curiae’s contention, Amicus Br. of Nat’l Rural Water Ass’n 12, *Hawkes* did not involve the meaning of waters of the United States and therefore has no bearing on the validity of the significant nexus standard.

These decisions also allow the Agencies to assert jurisdiction under the *Rapanos* plurality standard. But even circuits that have taken somewhat different approaches to *Rapanos* have rejected arguments—like those of Business Petitioners here—that the Agencies *must* establish CWA jurisdiction in accordance with the plurality standard. These decisions hold that Justice Kennedy’s significant nexus standard is either sufficient or exclusive. See *United States v. Robison*, 505 F.3d 1208, 1219-22 (11th Cir. 2007); *N. Cal. River Watch v. City of Healdsburg*, 496 F.3d 993, 999-1000 (9th Cir. 2007); *United States v. Gerke Excavating, Inc.*, 464 F.3d 723, 724 (7th Cir. 2006). No court has held that the plurality standard is the sole available method for establishing CWA jurisdiction.

Every reason exists for this Court to follow its sister circuits and uphold the Agencies’ position. See *Johnson*, 467 F.3d at 64 (applying a “common sense approach to fragmented opinions.”) (citations omitted); *Cundiff*, 555 F.3d at 208 (referencing the “First Circuit’s thoughtful reasoning” in *Johnson*).

B. The significant nexus standard reasonably interprets the Act.

Business Petitioners’ objection fails for the additional reason that the Agencies’ use of the significant nexus standard reasonably interprets the Act.

1. The Act is ambiguous.

The Rule, at its core, represents the Agencies’ interpretation of the Act. Under *Chevron*, if a statute is silent or ambiguous, 467 U.S. at 842, then the Agencies’ interpretation should be upheld so long as it is reasonable. *Id.* at 843-44. As a

threshold matter, the Act’s term “navigable waters” and its definition as including the “waters of the United States” are unquestionably “ambiguous in some respects.” 79 Fed. Reg. at 22,254/2 n.11; RTC Topic 10 at 32, JAxxxx. The Supreme Court has so held twice.

First, in *Riverside Bayview*, the Supreme Court upheld, at *Chevron* step two, the Agencies’ interpretation of the Act to protect wetlands adjacent to navigable-in-fact bodies of water. 474 U.S. at 131 (“[A]n agency’s construction of a statute ... is entitled to deference if it is reasonable and not in conflict with the expressed intent of Congress.”).

Second, in *Rapanos*, all Justices found ambiguity—albeit to varying degrees. In his concurring opinion, Justice Kennedy referenced “ambiguity in the phrase ‘navigable waters.’” 547 U.S. at 780. So did the dissenting Justices. *See id.* at 796 (“[G]iven the ambiguity inherent in the phrase ‘waters of the United States,’ the Corps has reasonably interpreted its jurisdiction[.]” (Stevens, J.); *id.* at 811-12 (“Congress intended the Army Corps of Engineers to make the complex technical judgments that lie at the heart of the present cases (subject to deferential judicial review).”) (Breyer, J.). The plurality agreed that the Act “is in *some* respects ambiguous.” *Id.* at 752 (emphasis in original).

Ambiguity in a statute represents “delegations of authority to the agency to fill the statutory gap in a reasonable fashion.” *Nat’l Cable & Telecomm. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005). As the Supreme Court explained in *Riverside*

Bayview, Congress delegated a “breadth of federal regulatory authority” and expected the Agencies to tackle the “inherent difficulties of defining precise bounds to regulable waters.” 474 U.S. at 134. *See also Nat’l Wildlife Fed’n v. Consumers Power Co.*, 862 F.2d 580, 584 (6th Cir. 1988) (“Congress generally intended that EPA would exercise substantial discretion in interpreting the [CWA].”) (internal citation and quotation omitted).

2. The significant nexus standard reasonably fills the statutory gap.

The Agencies reasonably adopted Justice Kennedy’s significant nexus standard in filling the statutory gap.

First, that standard gives effect to the Act’s broad terms and environmentally protective aim. *See Rapanos*, 547 U.S. at 767-69 (observing “the evident breadth of congressional concern for protection of water quality and aquatic ecosystems” and referring to the Act as “a statute concerned with downstream water quality”) (Kennedy, J., concurring) (citations omitted); *Riverside Bayview*, 474 U.S. at 133 (“Congress chose to define the waters covered by the Act broadly.”). The Act expressly aims to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters,” 33 U.S.C. § 1251(a), and establishes a “national goal” of eliminating discharges and attaining “water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water.” *Id.* § 1251(a)(2). Congress surely understood that “water flows into

traditionally navigable waters from upstream sources; pollution added to non-navigable upstream waters ultimately will cause harmful effects on downstream traditionally navigable waters; and consequently, it would be futile to regulate direct discharges into traditionally navigable waters without also regulating discharges to upstream waters.” TSD at 22, JAxxxx. Thus, the ability to regulate upstream sources is vital to give flesh to the Act, a reality this Court recognized in the Act’s early days, noting that “[i]t would, of course, make a mockery ... if its authority [under the Act] to control pollution was limited to the bed of the navigable stream itself. The tributaries which join to form the river could then be used as open sewers as far as federal regulation was concerned.” *Ashland Oil*, 504 F.2d at 1326.¹⁰

Second, the significant nexus standard reasonably effectuates the text of 33 U.S.C. § 1362(7), which defines “navigable waters.” The requirement that a significant nexus exist between upstream waters (including wetlands) and “navigable waters in the traditional sense” fulfills “the need to give the term ‘navigable’ some meaning.” *Rapanos*, 547 U.S. at 779 (Kennedy, J., concurring). The Agencies likewise gave “navigable” meaning when they applied the significant nexus standard to primary waters *not* addressed in *Rapanos*, i.e., the territorial seas and interstate waters. *See* 33

¹⁰ *See also generally Am. Frozen Food Inst. v. Train*, 539 F.2d 107, 113-14 (D.C. Cir. 1976) (“The only life system we know of and are part of ... cannot develop without water.”) (citation omitted); Amicus Br. of Members of Congress 7 (“Both the Senate and the House of Representatives ... made it clear that to protect the water quality of navigable waters, jurisdiction ... included tributaries of navigable waters.”).

U.S.C. § 1362(7) (“navigable waters” expressly defined to include the territorial seas); TSD at 223, JAxxxx (“As the territorial seas are clearly covered by the CWA (they are also traditional navigable waters), it is reasonable to use Justice Kennedy’s significant nexus framework to protect the integrity of the territorial seas.”); *id.* at 222, JAxxxx (“[T]he rule ... similarly protects the interstate waters ... clearly covered by the CWA.”); *infra* at 104-110 (further explaining that the term “navigable waters” is reasonably read to include interstate waters regardless of their navigability).

Third, the significant nexus standard is consistent with prior Supreme Court decisions. For example, in *Riverside Bayview*, “the Court indicated that ‘the term ‘navigable’ as used in the Act is of limited import,’ 474 U.S., at 133, [and] it relied, in upholding jurisdiction, on the Corps’ judgment that ‘wetlands adjacent to lakes, rivers, streams, and other bodies of water may function as integral parts of the aquatic environment even when the moisture creating the wetlands does not find its source in the adjacent bodies of water,’ *id.* at 135 [.]” *Rapanos*, 547 U.S. at 779 (Kennedy, J., concurring). “The implication,” Justice Kennedy observed, “was that wetlands’ status as ‘integral parts of the aquatic environment’—that is, their *significant nexus* with navigable waters—was what established the Corps’ jurisdiction over them as waters of the United States.” *Id.* (emphasis added). *See also id.* at 780 (“[W]etlands’ ecological functions vis-à-vis other covered waters are the basis for the Corps’ regulation of them[.]”).

Finally, the significant nexus standard furthers sound administration of the Act. Justice Kennedy invited the Agencies to fulfill the significant nexus requirement by promulgating “more specific regulations” rather than proceeding entirely case-by-case. *See Rapanos*, 547 U.S. at 782. That approach accords with *SEC v. Chenery Corp.*, 332 U.S. 194 (1947), and its progeny, *e.g.*, *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974), which hold that agencies generally may choose between rulemaking and case-specific procedures to develop law and policy.

Justice Kennedy elaborated on the applicable rulemaking criteria, stating: “Through regulations ... the Corps may choose to identify categories of tributaries that, due to their volume of flow ..., their proximity to navigable waters, or other relevant considerations, are significant enough that wetlands adjacent to them are likely, in the majority of cases, to perform important functions for an aquatic system incorporating navigable waters.” *Rapanos*, 547 U.S. at 780-81. *See also id.* at 781 (acknowledging “administrative convenience or necessity”). This straightforward regulatory benchmark mirrors that established in *Riverside Bayview*: “If it is reasonable for the Corps to conclude that *in the majority of cases*, adjacent wetlands have significant effects on water quality and the aquatic ecosystem, its definition can stand.” 474 U.S. at 135 n.9 (emphasis added).

Accordingly, the Rule’s incorporation of the significant nexus standard represents a reasonable interpretation of broad and ambiguous statutory text and a

permissible way for the Agencies to fulfill their congressionally-delegated responsibility to interpret “waters of the United States.”

C. Petitioners’ *Chevron* and *Rapanos* plurality arguments fail.

Because the Agencies reasonably interpreted the Act using the significant nexus standard, two corollary arguments by Petitioners necessarily fail—that the Agencies are not entitled to *Chevron* deference and that the *Rapanos* plurality opinion defeats the Rule.

Under Justice Kennedy’s concurring opinion in *Rapanos*, significant nexus is a *statutory* requirement. *See, e.g., Rapanos*, 547 U.S. at 767 (“Absent a significant nexus, jurisdiction under the Act is lacking.”). Indeed, Justice Kennedy explained that “[t]he required nexus must be assessed in terms of the statute’s goals and purposes.” *Id.* at 779 (citing 33 U.S.C. § 1251(a)). Thus, contrary to Petitioners’ argument, Bus. Br. 45-46 and Waterkeeper Br. 38 n.19, the Agencies are entitled to *Chevron* deference when they interpret the significant nexus standard, including associated terminology such as “similarly situated lands,” “in the region,” and “chemical, physical, and biological integrity.” *Rapanos*, 547 U.S. at 780 (Kennedy, J., concurring). *See Precon Dev. Corp. v. U.S. Army Corps of Eng’rs*, 633 F.3d 278, 289-90 (4th Cir. 2011) (“[R]ecognizing the Corps’ expertise in administering the CWA, we give deference to its interpretation and application of Justice Kennedy’s test where appropriate.”). As Justice Breyer explained: “[T]he Court ... has written a ‘nexus’ requirement into the statute ... [b]ut it has left the administrative powers of the Army Corps of Engineers untouched.

That agency may write regulations defining the term ... [a]nd the courts must give those regulations appropriate deference.” *Id.* at 811 (Breyer, J., dissenting) (citations omitted). *See also Precon Dev. Corp.*, 633 F.3d at 290 n.10.

Similarly, there is no reason for this Court to address any argument to the effect that “the Rule fails the *Rapanos* plurality’s test.” States Br. 34-37; *see also* Bus. Br. 67. As the Rule’s text and the administrative record make clear, “[t]he key to the agencies’ interpretation of the CWA is the significant nexus standard.” TSD at 48, JAxxxx. As explained above, the Act covers waters that satisfy either *Rapanos* standard. Although the Agencies considered the plurality opinion—noting, for example, that “certain features were not primarily the focus of the CWA,” *id.* (citing *Rapanos*, 547 U.S. at 734)—the plurality opinion need not and did not form the basis for the Rule. The significant nexus standard is sufficient.

II. The Agencies reasonably determined that tributaries and adjacent waters are jurisdictional and made no change to the status of interstate waters.

A. The Agencies reasonably determined that tributaries are jurisdictional.

Tributaries have long been considered to be waters of the United States. *See, e.g.*, 33 C.F.R. § 328.3(a)(5) (1987); 33 C.F.R. § 323.2(a)(3), (4) (1978); 80 Fed. Reg. at 37,058/1; *see also Ashland Oil*, 504 F.2d at 1329 (in enacting the CWA, “Congress was concerned with pollution of the tributaries of navigable streams as well as with the pollution of the navigable streams”). The Rule retains jurisdiction over tributaries as a category, based on the significant nexus standard and the uncontroverted scientific

evidence that tributaries individually or with other tributaries in a watershed have a significant effect on downstream waters. However, the Agencies clarified that not all streams are tributaries. Under the Rule, a stream is only a tributary if it contributes flow to a primary water and has two physical indicators of the ordinary high water mark, i.e., a bed and banks and a second physical indicator. 33 C.F.R. § 328.3(c)(3); 80 Fed. Reg. at 37,076/2.

State Petitioners assert that the definitions of “tributary” and “ordinary high water mark” are over-inclusive, are inconsistent with Justice Kennedy’s concurring opinion in *Rapanos*, and fail to ensure that a significant nexus to traditional navigable waters exists. States Br. 24-26. Business Petitioners similarly assert that the definitions are inconsistent with Justice Kennedy’s opinion and that the Agencies’ conclusions regarding significant nexus are contrary to evidence in the administrative record. Bus. Br. 56-63. Associational Petitioners, on the other hand, assert that the definition of tributary is under-inclusive. Ass’n Br. 46-47. All of these Petitioners are wrong. The Agencies applied their expertise to balance the law and the science to identify a threshold where the nexus is sufficiently “significant” to ensure that the Rule covers the waters that Congress intended to protect. The arguments of the State and Business Petitioners are addressed immediately below. The arguments of the Associational Petitioners are addressed in Argument Section IV.

1. The Agencies reasonably found a significant nexus between tributaries and primary waters.

Although in *Rapanos* Justice Kennedy focused on whether adjacent wetlands as a category possess a significant nexus to downstream waters, the Agencies concluded that it is reasonable and appropriate to examine whether tributaries, as a category, likewise significantly affect the chemical, physical, or biological integrity of downstream waters. TSD at 53-55, 272, JAxxxx-xxxx, xxxx; *see also Rapanos*, 547 U.S. at 767 (the Agencies can “deem the water or wetland a ‘navigable water’ under the Act”). The Agencies found that tributaries, as defined in the Rule, either alone or in combination with other tributaries in a watershed, do significantly affect primary waters. *Id.* Tributaries are therefore waters of the United States. *Id.*; *see also* 80 Fed. Reg. at 37,068/2-37,069/3.

The science supporting this conclusion is abundant and clear. Perennial, intermittent, and ephemeral streams all play a critical role in the physical, chemical, and biological integrity of primary waters. TSD at 274, JAxxxx; 80 Fed. Reg. at 37,068/3. The Science Report defines streams by reference to the presence of a channel, i.e., a bed and banks. Science Report at 2-2, 2-14, JAxxxx, xxxx. The definition of “tributary” takes a more conservative approach and covers a subset of streams. Under the Rule, a tributary is a stream that contributes flow to a downstream water and that has a bed and banks and an additional physical indicator of the ordinary high water mark.

Streams affect the physical integrity of downstream waters because they are the predominant source of water. This is true even if a stream does not flow seasonally or perennially. For example, one study found that 76% of the flow in the Rio Grande after a storm came from ephemeral streams. TSD at 246, JAxxxx (citing Science Report at 3-7 to 3-8, JAxxxx-xxxx). Streams also even out stormwater pulses into rivers by dispersing the arrival of high flows over time. *Id.* at 246, JAxxxx (citing Science Report at 3-10, JAxxxx). Water also infiltrates into stream channels, especially in ephemeral streams in arid and semiarid regions, which minimizes flooding and recharges the aquifer. *Id.* at 246-47, JAxxxx-xxxx (citing Science Report at 3-10 to 3-11, JAxxxx-xxxx). Streams also trap and store sediment and woody debris until those materials are transported downstream during large flow events, where they shape and maintain river channels and provide habitat. *Id.* at 247-48, JAxxxx-xxxx.

In addition to these physical effects, streams affect the chemical and biological integrity of downstream waters. They trap contaminants and store, transform, and export nutrients and carbon. *Id.* at 249, JAxxxx. For example, small streams can reduce downstream nitrogen delivery by up to 40% by transforming nitrate, excessive amounts of which can harm aquatic life, into atmospheric nitrogen. *Id.* at 252, JAxxxx. Streams also increase the amount and quality of habitat, are an important source of food, and maintain genetic diversity among upstream and downstream populations of fish and other animals. *Id.* at 254-55, JAxxxx-xxxx. As the Science Report recognized, headwater streams and their associated wetlands are “critical to

mediating the recognized relationship between the integrity of downstream waters and the land use and stressor loadings from the surrounding landscape.” Science Report at 5-11, JAxxxx.

Because streams function together in a watershed, and the incremental effects of individual streams are cumulative, they must be evaluated in combination with other streams in a watershed. TSD at 245, JAxxxx (citing Science Report at ES-5, ES-13, JAxxxx, xxxx); *see also id.* at 243, JAxxxx (cumulative influence on downstream rivers); 80 Fed. Reg. at 37,066/1. Downstream rivers are, in fact, the integrated result of their contributing streams. TSD at 245, JAxxxx (citing Science Report at ES-5, JAxxxx).

The Agencies applied these uncontroverted scientific findings to the significant nexus standard. By defining “tributary” to cover only streams with a bed and banks and a second indicator of the ordinary high water mark, the Agencies ensured that regulated tributaries have sufficient volume, duration, and frequency of flow to provide the same functions and to work together as science shows that streams do, and thus are similarly situated in a watershed. And by defining “tributary” to cover only streams that contribute flow to a primary water, the Agencies ensured that only the impacts from streams that drain to the nearest primary water are considered. Tributaries as defined therefore have a significant nexus to downstream primary waters because, either alone or in combination with similarly situated tributaries in the watershed, they significantly affect the physical, chemical, and biological integrity of a

primary water. TSD at 244, JAxxxx; *see also* 80 Fed. Reg. at 37,068/2. This is true whether the primary water is a traditional navigable water, an interstate water, or a territorial sea. TSD at 232-33, 244, JAxxxx-xxxx, xxxx.

2. Defining “tributary” to include ephemeral and intermittent streams is consistent with the law.

Contrary to Petitioners’ assertions, States Br. 23-24 and Bus. Br. 57-59, including ephemeral and intermittent streams as tributaries is consistent with Justice Kennedy’s concurrence. Justice Kennedy explained the flaw in the plurality’s logic for excluding such waters from CWA protection, observing that a continuous flow requirement “makes little practical sense” because the “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.” *Rapanos*, 547 U.S. at 769. In Justice Kennedy’s view, an ephemeral water, which “often looks more like a dry roadway than a river,” *id.* at 769, can be a water of the United States. *See also id.* at 768-69 (noting that the plurality’s exclusion of intermittent and ephemeral streams is a limitation “without support in the language and purposes of the Act or in our cases interpreting it”); *id.* at 769 (Congress could have excluded irregular waterways but did not); *id.* at 770 (“the Corps can reasonably interpret the [CWA] to cover the paths of such impermanent streams”).

Business Petitioners assert that even if some tributaries in a watershed have a significant nexus to a primary water, others do not, especially those carrying “minor

volumes” of water. Bus. Br. 59. But the Agencies did not evaluate individual tributaries in isolation; instead, they properly examined the cumulative impact of all similarly situated tributaries in a watershed. Moreover, a perfectly tailored definition is not necessary. The Supreme Court unanimously disposed of a similar argument in *Riverside Bayview*, noting that “it may well be that not every adjacent wetland is of great importance to the environment of adjoining bodies of water. But the existence of such cases does not seriously undermine the Corps’ decision to define all adjacent wetlands as ‘waters.’” 474 U.S. at 135 n.9. The Court concluded that if “it is reasonable for the Corps to conclude that in the majority of cases, adjacent wetlands have significant effects on water quality and the aquatic ecosystem, its definition can stand.” *Id.* If “a wetland covered by the Corps’ definition is in fact lacking in importance to the aquatic environment—or where its importance is outweighed by other values—the Corps may always allow development of the wetland for other uses simply by issuing a permit.” *Id.* There is no reason to treat the categorical definition of tributaries any differently.

Business Petitioners’ assertion that the Rule will cover “countless miles of previously unregulated features,” Bus. Br. 58 & n.11, is based on speculation. For example, comments by the National Association of Home Builders claim that the Rule’s tributary definition will extend jurisdiction to nearly 100,000 miles of intermittent and ephemeral streams in Missouri. AR-19574, at 123, JAxxxx. But the commenter works from a false baseline, arriving at its number by assuming that *zero*

intermittent streams and *zero* ephemeral streams were waters of the United States under the 1986 regulation and the *Rapanos* Guidance, and that *every* intermittent stream and *every* ephemeral stream is regulated under the Rule. *Id.* at 123, JAxxxx. Neither the 1986 regulation nor the *Rapanos* Guidance excludes intermittent or ephemeral streams; in fact, the Agencies historically have considered intermittent and ephemeral streams to be jurisdictional. 80 Fed. Reg. at 37,079/2. Nor is there any basis to assume that every intermittent and ephemeral stream has the physical indicators and contribution of flow necessary to be considered a tributary under the Rule.

Petitioners' comparison of the miles of streams that they speculate were jurisdictional under the 1986 regulation and the 2008 Guidance with the miles of streams that they speculate are jurisdictional under the Rule is speculative and unpersuasive.

A more useful comparison would consider the streams that were not jurisdictional under the 1986 regulation and the *Rapanos* Guidance but would be jurisdictional under the Rule. EPA made that comparison, examining jurisdictional determinations of streams made from 2013 to 2014 under the *Rapanos* Guidance, and found that 99.3% of the streams at issue in those determinations were jurisdictional. Economic Analysis at 13, JAxxxx. Thus, even if every one of those waters would be jurisdictional under the Rule, as the Agencies assumed for purposes of the Economics Analysis, the increase is a mere 0.7%. That is hardly the vast expansion over

“countless miles of previously unregulated features,” that Business Petitioners imagine.¹¹

3. The Agencies’ use of physical indicators to define tributaries is reasonable and supported by the record.

Petitioners incorrectly contend that the Rule’s reliance on the ordinary high water mark is inconsistent with Justice Kennedy’s concurrence and is technically unreliable as a measure of significant nexus. States Br. 24-25 (quoting *Rapanos*, 547 U.S. at 781); Bus. Br. 57. Neither argument has merit.

The ordinary high water mark has long been defined as “that line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line, changes in the character of soil, or other appropriate means that consider the characteristics of the surrounding areas.” 33 C.F.R. § 328.3(c)(6). Although the ordinary high water mark was commonly thought of as a defining attribute of a tributary prior to the Rule, the 1986 regulation only used the ordinary high water mark to establish the lateral extent of certain tributaries. 33 C.F.R. §

¹¹ The other comments Petitioners cite, Bus. Br. 58 n.11, are similarly baseless. For example, Delta County, Colorado, made the same false assumption that all ephemeral streams and impoundments are regulated under the Rule, yet none were previously regulated. AR-14405, at 3, JAxxxx. National Stone, Sand, and Gravel Association broadly asserted, without any explanation, that the Rule “would turn entire mountain ranges and their corresponding watersheds” into waters of the United States. AR-14412, at 21, JAxxxx. And Petitioner Murray Energy Corporation asserted that drainage ditches at many of its mines were “historically exempt and non-jurisdictional,” AR-13954, at 11, JAxxxx, but did not explain how its drainage ditches would be treated differently under the Rule, which retains all the exclusions from the 1986 regulation and adds more.

328.4(c)(1). Nevertheless, the concept of the ordinary high water mark and the means for identifying it are well-understood. As Petitioner Murray Energy Corporation noted in its comments urging the Agencies to require ordinary high water mark indicators, the ordinary high water mark is “clear and discernable” and, along with a bed and banks, are “well-established features of the historical definition of tributaries under the CWA.” AR-13954, at 10, JAxxxx.

Consistent with that view, Justice Kennedy observed that a tributary definition that requires an ordinary high water mark and the flow of water into a traditional navigable water (directly or through another tributary) “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.” *Rapanos*, 547 U.S. at 781. The record amply demonstrates that the Rule’s definition of “tributary,” which requires two indicators of the ordinary high water mark and thus is more restrictive than the definition Justice Kennedy endorsed, provides that reasonable measure and can be consistently applied.

The physical indicators of an ordinary high water mark are reliable evidence that a stream has sufficient volume, duration, and frequency of flow to be considered similarly situated with, and therefore considered in combination with, other streams in the watershed of a primary water. Petitioners’ arguments to the contrary essentially repackage their arguments that ephemeral and intermittent flow are insufficient to establish significant nexus. Bus. Br. 57-58; States Br. 25-26. As the Corps has

explained, “*ordinary high water* implies streamflow levels that are greater than average but less than extreme, and that occur with some regularity.” Matthew K. Mersel et al., U.S. Army Corps of Eng’rs, *A Guide to Ordinary High Water Mark (OHWM) Delineation for Non-Perennial Streams in the Western Mountains, Valleys, and Coast Region of the United States* (2014) at 10, JAxxxx.¹² Further, “[e]vidence resulting from extraordinary events, including major flooding and storm surges, is not indicative” of an ordinary high water mark. U.S. Army Corps of Engineers, Regulatory Guidance Letter No. 05-05, Subject: Ordinary High Water Mark Identification (Dec. 7, 2005) (“2005 RGL”) at 3, JAxxxx.¹³ Instead, the ordinary high water mark should be determined based on “characteristics associated with ordinary high water events, which occur on a regular or frequent basis.” *Id.*

The record supports the Agencies’ conclusion that these physical indicators demonstrate flow that is frequent and consistent enough to be considered “ordinary” and not extreme. TSD at 242, JAxxxx (indicators of the ordinary high water mark demonstrate the duration and frequency of flow); *see also id.* at 239, JAxxxx (the

¹² This document, along with studies and manuals from 2006, 2008, and 2013 cited in subsection I.B.4.b, are in the administrative record. ECF Doc. 122 at 9 n.1. They are also available at <http://www.erdc.usace.army.mil/Media/Fact-Sheets/Fact-Sheet-Article-View/Article/486085/ordinary-high-water-mark-ohwm-research-development-and-training/>.

¹³ Available at <http://www.usace.army.mil/Portals/2/docs/civilworks/RGLS/rgl05-05.pdf>.

ordinary high water mark is indicative of regular flow); 80 Fed. Reg. at 37,076/2 (a bed and banks and other indicators of ordinary high water mark are only created by sufficient and regular intervals of flow).¹⁴

State Petitioners' related assertion that a bed and banks is "an even less reliable measure of water flow" similarly fails. States Br. 26-27. Although a bed and banks can be a useful indicator of flow, the Rule does not define all features with just a bed and banks as tributaries; another indicator of the ordinary high water mark is also required. 33 C.F.R. § 328.3(c)(3).

4. The scientific evidence supports inclusion of streams in the arid West as tributaries protected by the CWA.

Business Petitioners argue that the tributary definition is "inconsistent with the scientific evidence," particularly when applied to intermittent and ephemeral streams in the arid West. Bus. Br. 59, 61-63. However, the record shows that even in the arid West, intermittent and ephemeral streams significantly affect downstream waters and that the physical indicators of the ordinary high water mark are a reliable basis for considering such streams to be similarly situated.

¹⁴ Business Petitioners complain that the Agencies can rely on historical information to identify the ordinary high water mark. Bus. Br. 57. The Agencies have always used *all* reliable information at their disposal, including historical information. TSD at 237, 238, JAxxxx, xxxx; *see also* 2005 RGL at 3, JAxxxx (if physical characteristics are unreliable or otherwise not evident, districts may determine the ordinary high water mark using reliable methods such as historic records of water flow). It is difficult to fathom how the use of reliable methods can be objectionable.

a. The record demonstrates the importance of intermittent and ephemeral streams to downstream waters in the arid West.

All streams, including intermittent and ephemeral streams, are physically, chemically, and biologically connected to downstream rivers via channels. Science Report at ES-2, JAxxxx; *see also* TSD at 259, JAxxxx. These stream channels concentrate, mix, transform, and transport water and other materials such as wood, organic matter, nutrients, and organisms. Science Report at ES-2, JAxxxx. The evidence of the downstream effects of ephemeral streams is “strong and compelling,” particularly due to their channelized flow. *Id.* at ES-7, JAxxxx; *see also* TSD at 274, JAxxxx (whether they are perennial, intermittent, or ephemeral, streams play an important role in the transport of water, sediments, nutrients, organic matter, and organisms to downstream waters).

One way in which intermittent and ephemeral streams affect downstream waters is through the infiltration of water into the stream channel, which minimizes downstream flooding and recharges aquifers. TSD at 246-47, JAxxxx-xxxx (citing Science Report at 3-10 to 3-11, JAxxxx-xxxx); *see also* Science Report at 1-7 (figure 1-2), JAxxxx. As water flows down an ephemeral stream channel it infiltrates the channel bottom and sides, recharging the aquifer and influencing the surface flow in downstream waters. Science Report at B-41, JAxxxx. Large runoff events in ephemeral streams can continue to sustain baseflow in downstream rivers for months. *Id.* at B-42, JAxxxx. In fact, stormflow channeled into aquifers by ephemeral streams

and then released into surface waters over time, for example through seeps and springs, is the major source of water for some rivers. TSD at 259, JAxxxx.

The record shows that this physical connection applies with equal force in the arid West. *Id.* at 267, JAxxxx (flows from ephemeral streams are a major driver of the hydrology of southwestern rivers, particularly through monsoon season flooding); *see also* Science Report at 1-10, B-41 to B-42, JAxxxx, xxxx-xxxx. Ephemeral tributaries of the San Pedro River, for example, supply roughly half of its baseflow. TSD at 266, JAxxxx. The importance of ephemeral streams in the arid West in sustaining baseflow in downstream waters exemplifies the cumulative effects of tributaries—the incremental contribution of individual streams in combination with similarly situated streams. *Id.* at 266-67, JAxxxx-xxxx. Intermittent and ephemeral streams in arid regions thus “exert strong influences on the structure and function of downstream waters.” *Id.* at 265-66, JAxxxx-xxxx.

Intermittent and ephemeral streams also shape river channels by accumulating and periodically releasing stored sediment and woody debris, which help slow the flow of water and provide habitat for aquatic organisms. Science Report at ES-8, JAxxxx. The episodic nature of this physical influence on downstream waters does not diminish its cumulative significance, and is especially apparent in arid environments. TSD at 247, JAxxxx; *see also id.* at 260, 266, JAxxxx, xxxx (southwestern streams transfer water, sediments, and nutrients to downstream waters in an episodic fashion, with material deposited and then moved farther downstream by later precipitation).

The “flashy” nature of flow in ephemeral streams in arid regions is typical, Science Report at 2-36, B-39 to B-45, JAxxxx, xxxx-xxxx, and is well-documented. *See, e.g.*, Multiflume runoff event August 1, 1990, AR-20875, JAxxxx (video of intense, but typical, flow in Walnut Gulch, an ephemeral tributary of the San Pedro River in Arizona, discussed in more detail, *infra* at 77-78).¹⁵

Fish and other aquatic life in downstream rivers are adapted to the variable flow regimes of ephemeral and intermittent tributaries. TSD at 267, JAxxxx. In particular, ephemeral tributaries in the Southwest strongly influence the biological integrity of downstream rivers and their riparian communities by supplying water, sediment, and nutrients. *Id.* at 267-68, JAxxxx-xxxx, citing Science Report at B-46 to B-48 and 3-25, JAxxxx-xxxx, xxxx. In arid and semiarid regions, riparian areas, including those near ephemeral streams, support the vast majority of wildlife species, are the predominant sites of woody vegetation, and provide food and critical habitat. Science Report at B-55, JAxxxx.

b. The physical indicators of the ordinary high water mark are reliable in the arid West.

Petitioners claim that ordinary high water mark indicators in the arid West “often reflect one-time, extreme water events,” Bus. Br. 60, and provide “no indication of the regularity of flow and no indication of other channel characteristics

¹⁵ The record contains a link to a video which is also available at: http://www.tucson.ars.ag.gov/unit/Movies/Aug_1_1990_with_animation.wmv.

that could justify a significant nexus.” States Br. 26; *see also id.* 24, 27; Bus. Br. 61 (asserting that “‘randomly’ distributed indicators cannot provide a rational basis for a blanket significant nexus finding”). These arguments, and the comments Petitioners cite, mischaracterize the Corps’ studies of the physical indicators of the ordinary high water mark in arid landscapes and are wrong.¹⁶

In 2006 the Corps examined whether potential physical indicators of the ordinary high water mark can be used to establish the regularity of flow in arid regions. Robert W. Lichvar et al., U.S. Army Corps of Eng’rs, *Distribution of Ordinary High Water Mark (OHWM) Indicators and Their Reliability in Identifying the Limits of “Waters of the United States” in Arid Southwestern Channels* (2006) (“2006 Study”) at 1-2, JAxxxx-xxxx. Intermittent and ephemeral streams in the arid West have a low-flow channel (which is extremely dynamic and which moves around in response to flood events), an active floodplain (which is very stable), and a terrace floodplain. *Id.* at 9, 16, JAxxxx, xxxx. The Corps found that some indicators of the ordinary high water mark in arid regions were related to smaller, one-to-three-year flow events, and that

¹⁶ Business and State Petitioners rely on comments from Freeport McMoRan, AR-14135, at 7, JAxxxx, and from the Arizona Mining Association, AR-13951 at 7-11, JAxxxx-xxxx. Bus. Br. 60, 61; States Br. 26-27. These comments simply repeat the same mischaracterizations of the Corps’ studies that Business and State Petitioners make in their briefs. State Petitioners also cite the Water Advocacy Council’s comments, States Br. 27, which similarly claim that arid regions have “a significant number of small channels (often only a few feet in width) yet with a defined bed and bank.” AR-14568 at 34, JAxxxx. As discussed in the text, this “low flow channel” has been addressed in the numerous studies and manuals issued by the Corps since 2006.

moderate, five-to-10-year flow events could over-write these indicators until they were gradually replaced. The 2006 Study observed that some physical indicators are therefore “randomly” distributed within the active floodplain, depending on when during the cycle of one-to-three- and five-to-10-year flow events the stream is examined. *Id.* at 14-16, JAxxxx-xxxx.

Business and State Petitioners attempt to seize on this observation about random distribution, but ignore its context. The Corps found that these physical indicators still indicate that flow has occurred; they simply do not correspond to the same flow events that apply in more humid regions.

In order to promote consistency, the 2006 Study suggested that the boundary of the active floodplain is the most reliable indicator of the ordinary high water mark in arid systems. 2006 Study at 16, JAxxxx. In 2008 the Corps released a regional manual to identify the boundary of the active floodplain and delineate the ordinary high water mark. Robert W. Lichvar et al., U.S. Army Corps of Eng’rs, *A Field Guide to the Identification of the Ordinary High Water Mark (OHWM) in the Arid West Region of the Western United States: A Delineation Manual* (2008) at 28, 31, JAxxxx, xxxx. This manual confirmed that in arid regions “the location of traditional [ordinary high water mark] indicators is transitory,” so the active floodplain is “the only repeatable feature that can be reliably used to delineate the position of a non-wetland water’s [ordinary high water mark]. The active floodplain is easily identified in the field, less variable over time, and statistically linked to the hydrologic and hydraulic parameters of

ephemeral/intermittent arid channel forms.” *Id.* at 31, JAxxxx; *see also id.* at 33, JAxxxx (the ordinary high water zone in ephemeral channels in the arid West “is the active floodplain”).

Contrary to Petitioners’ assertion, Bus. Br. 61, States Br. 26, the Corps did not reach a different conclusion in 2013. As Petitioners note, the Corps repeated its 2006 finding that in arid systems some ordinary high water mark indicators can be found throughout the active floodplain. Lindsey Lefebvre, et al., U.S. Army Corps of Eng’rs, *Survey of OHWM Indicator Distribution Patterns across Arid West Landscapes* (2013) at 15, JAxxxx. The Corps explained that these indicators are therefore better described as flow indicators for streams in arid regions. Thus, the ordinary high water mark in arid regions should be delineated by identifying the active floodplain, through an examination of changes in vegetation, sediment, and slope. *Id.* at 15-17, JAxxxx-xxxx.

The random distribution of some physical indicators of the ordinary high water mark in arid regions does not mean that the ordinary high water mark itself is a poor tool for defining tributaries with a significant nexus to downstream waters. It simply means that not all indicators correlate to the active floodplain, which in arid regions most closely fits the concept of ordinary high water. TSD at 268, JAxxxx. When the focus is on the boundary of the active floodplain, the ordinary high water mark indicators are readily ascertainable, indicate regular flow, and are an effective tool for defining tributaries in the arid West.

Petitioners also cite comments by the Arizona Mining Association, Bus. Br. 60-61, States Br. 27, which similarly asserted that the Agencies are regulating features that only carry water “in direct response to flashy, but infrequent, precipitation events.” AR-13951, at 8, JAxxxx; *see also* Bus. Br. 59; States Br. 26, 27, citing AR-18024, at 3, JAxxxx (pointing to Rawhide Wash, which the City of Scottsdale, Arizona, claims has recorded flow for only 18 hours over the past 15 years). But as we have explained, a channel and an ordinary high water mark form from the *ordinary* flow of water, even if the ordinary flow is flashy and infrequent. In the arid West, “short, intense rainstorms during the summer monsoons commonly drive hydrologic events,” Science Report at 2-36, JAxxxx, and are neither rare nor extraordinary. And in order to satisfy the definition of “tributary” under the Rule, the ephemeral or intermittent stream must contribute flow to a primary water. For example, an intermittent stream that exists wholly within one state, is not itself a primary water, and which does not connect, directly or through another water, to a primary water, is not a “tributary” under the Rule. 80 Fed. Reg. at 37,076/1. As Business Petitioners acknowledge, Bus. Br. 59-60, such considerations have led the Agencies to identify some washes and other features as not jurisdictional under the *Rapanos* Guidance. The result would likely be the same under the Rule.

Instead of relying on extraordinary events, or very short-term transient indicators, identifying the most consistent physical indicator of the ordinary high

water mark in arid regions ensures that tributaries include only those streams that are similarly situated.

c. The Agencies' conclusions regarding ephemeral systems in the arid West are well supported by the record.

Business Petitioners wrongly assert that the scientific basis for the Agencies' conclusions regarding ephemeral streams in the arid West is flawed because the Science Report relied "almost exclusively" on the watershed of the San Pedro River, which they contend is not representative of arid regions. Bus. Br. 62-63.

The Science Report appropriately relied on data gathered about the San Pedro River basin, given the "uniquely thorough understanding" of that river and its tributaries, and given its watershed's hydrogeology, which is typical of many river basins in the southwest. Science Report at B-39, B-45, JAxxxx, xxxx. Several studies have demonstrated that ephemeral streams supply water and sediment to the San Pedro River, which influence the character of its floodplain and aquifer. *Id.* at B-39, B-46 to B-47, 2-36, JAxxxx, xxxx-xxxx, xxxx. Other studies have demonstrated that riparian plant communities along the river's mainstem depend on water derived from ephemeral streams, and that ephemeral streams heavily influence nutrients in the river. *Id.* at B-47 to B-48, JAxxxx-xxxx.

Furthermore, the Science Report explicitly addressed Petitioners' concerns about the representative nature of the San Pedro River watershed, noting that similar impacts from ephemeral tributaries have been observed in other southwestern rivers,

“increasing confidence that the observations made within the San Pedro are applicable to other southwestern river systems.” *Id.* And contrary to Petitioners’ characterization, the Science Report was not confined to the San Pedro River but included a specific section titled “Other Southwestern Rivers.” *Id.* at B-48 to B-58, JAxxxx-xxxx. For example, the Science Report described a study of 14 ephemeral stream reaches in northeastern Arizona that reinforces the conclusion that downstream rivers are influenced and connected, often episodically, to distant upstream tributaries. *Id.* at B-49 to B-50, JAxxxx-xxxx. The Science Report also cited a study that found that significant contributions of flow in the lower Pecos River came from ephemeral tributary streams. *Id.* at B-49, JAxxxx.

Petitioners suggest that the Santa Cruz River would be a more representative choice, Bus. Br. 62-63, but the record shows otherwise. The Santa Cruz River’s aquifer has been extensively pumped in the Tucson, Arizona, area, severely lowering the groundwater level. Science Report at B-54 to B-55, JAxxxx-xxxx. Petitioners attempt to compare median flow statistics from the main stems of the Santa Cruz and the San Pedro, but the focus of such a comparison should be on the entire river system, including a river’s ephemeral tributaries, not just on its main stem. *Id.* at 5-8, JAxxxx. One of the comments cited by Petitioners agrees, explaining that the relevant inquiry is the effects of the “features at the distal ends of the channel network,” i.e., the tributaries, “not the main stem river.” Freeport McMoRan, AR-14135, at technical comments page 2, JAxxxx. Those comments go on to suggest that “the vast

data available from Walnut Gulch,” a tributary of the San Pedro River, would provide “a more meaningful analysis for arid landscapes.” *Id.* at 3, JAxxxx. The Science Report did just that, extensively discussing and relying on information from the Walnut Gulch Experimental Watershed research station. Science Report at B-45 to B-47, JAxxxx-xxxx.

5. The definition of “tributary” reasonably allows for man-made features and breaks.

Business Petitioners contend that the definition of “tributary” is unreasonable because it allows for breaks in the ordinary high water mark indicators. Bus. Br. 57, 63-64. Many streams lose their ordinary high water mark—for example, if wetlands border the stream channel—yet remain connected to downstream waters. The Agencies have long held the view that a jurisdictional water remains jurisdictional even if there are natural or man-made breaks in the ordinary high water mark (e.g., culverts, boulder fields, a reach where the stream flows underground), provided the ordinary high water mark can be identified upstream of the break. *See, e.g.*, Memorandum for 2006-436-FBV, AR-20876, at 1, JAxxxx (memo clarifying that breaks do not isolate the upstream portion of a tributary). The Rule does not change that view. 80 Fed. Reg. at 37,078/1; 33 C.F.R. § 328.3(c)(3). The Agencies explained that the upper limit of the tributary is generally the point at which a bed and banks and another indicator of the ordinary high water mark “cease to be identifiable.” 80 Fed. Reg. at 37,077/3; RTC Topic 8 at 480, JAxxxx. If those indicators can still be

identified upgradient of a break, the indicators have not ceased to be identifiable and the stream is still a tributary upstream of the break. 80 Fed. Reg. at 37,077/3; RTC Topic 8 at 480, JAxxxx. This approach is reasonable because a break in the stream channel's characteristics may change the nature of the connection to downstream waters, but it does not remove that connection altogether. RTC Topic 8 at 479, JAxxxx.

Petitioners also assert that the Rule's treatment of breaks in the ordinary high water mark is unsupported and inconsistent with the SAB's review of the Draft Science Report. Bus. Br. 63-64. The Draft Science Report included a chapter on the factors that affect connectivity, including a section pertaining to "Human Activities and Alterations." Draft Science Report at 3-47 to 3-50, JAxxxx-xxxx. The SAB recommended that the Agencies supplement that discussion and include additional scientific references, SAB Science Report Review at 31, JAxxxx, and the final Science Report incorporates the SAB's recommendations. Science Report at 1-11 to 1-14, 2-44 to 2-47, 5-3 to 5-9, JAxxxx-xxxx, xxxx-xxxx, xxxx-xxxx. Petitioners' assertions of a lack of scientific support for the Agencies' determinations regarding breaks, and of inconsistency with the views of the SAB on this subject, are groundless.

6. The Agencies reasonably determined that some ditches may be regulated as tributaries.

The Agencies have long interpreted "waters of the United States" to include certain ditches. TSD at 74, JAxxxx (noting 1975 opinion by EPA's General Counsel

regarding jurisdictional ditches).¹⁷ And courts have frequently affirmed the Agencies’ assertion of jurisdiction over ditches.¹⁸ Under the Rule, modified or constructed waters, including non-excluded ditches, are jurisdictional if they are a primary water or meet the definition of “tributary.” 80 Fed. Reg. at 37,078/2-3. Business and State Petitioners argue that regulating some ditches as tributaries is arbitrary and capricious. Bus Br. 72-73; States Br. 27. In addition, Business Petitioners argue that the Agencies are foreclosed from regulating modified or constructed waters, including ditches, based on the *Rapanos* plurality. Bus. Br. 74-77. These arguments lack merit.

a. The record supports the Rule’s assertion of jurisdiction over ditches that function as tributaries.

Tributaries have a cumulative, significant effect on the chemical, physical, and biological integrity of downstream primary waters regardless of whether they are natural, man-altered, or man-made. TSD at 243, JAxxxx. While modification or construction of tributaries can change the nature of connections within a tributary system, “it does not eliminate them.” *Id.* at 259, JAxxxx; *see also id.* at 256-59, JAxxxx-xxxx (studies demonstrate that ditches and canals, like other tributaries, export

¹⁷ As explained below, not all ditches are considered jurisdictional. *See infra* at 139-42 (addressing arguments that more ditches should be covered by the Rule).

¹⁸ *See, e.g., Deaton*, 332 F.3d 698 (roadside ditch that eventually flowed into a river and bay); *United States v. Eidson*, 108 F.3d 1336, 1341-42 (11th Cir. 1997) (drainage ditch connected to sewer drain and canal leading to Tampa Bay); *Nat’l Ass’n. of Home Builders v. U.S. Army Corps of Eng’rs*, 699 F. Supp. 2d 209 (D.D.C. 2010) (nationwide permit related to upland ditches was reasonable), *rev’d on other grounds* 663 F.3d 470 (D.C. Cir. 2011).

sediment, nutrients, and other materials downstream and provide habitat for fish and other aquatic organisms). Thus, the Rule reasonably includes certain ditches, which function as tributaries, as waters of the United States.

Because the Rule only asserts jurisdiction over ditches that meet the definition of tributary, it was unnecessary to separately define the “ditches” that are considered jurisdictional, as Business Petitioners suggest. Bus. Br. 72. “Ditch” is a colloquial term used to describe a variety of waters. For example, the Los Angeles River, which has been modified with a concrete bed and banks for much of its length, might be called a ditched river, but it is definitively a water of the United States. 80 Fed. Reg. at 37,098/1; *see also Rapanos*, 547 U.S. at 769-70 (Kennedy, J., concurring); *Los Angeles Cnty. Flood Control Dist. v. Nat. Res. Def. Council, Inc.*, 133 S. Ct. 710, 712-13 (2013) (describing the Los Angeles River as jurisdictional despite flow through a concrete channel and other engineered improvement in the river). The Agencies reasonably limited the use of the term “ditch” to 33 C.F.R. § 328.3(b)(3), where it is used with other limiting physical conditions to establish narrow, bright-line exclusions (e.g., “not a relocated tributary or excavated in a tributary”). 80 Fed. Reg. 37,097-98, JAxxxx-xxxx; *see infra* at 139-42.

State Petitioners erroneously assert that certain ditches are covered “regardless of flow,” which they claim is contrary to Justice Kennedy’s *Rapanos* concurrence. States Br. 27. The Rule does not regulate any ditch regardless of its flow. The Rule

excludes certain ditches with either ephemeral or intermittent flow.¹⁹ 33 C.F.R. § 328.3(b)(3)(i)-(ii). However, assuming it meets the tributary definition, a ditch that is excavated in or relocates a tributary is regulated, regardless of whether its flow is ephemeral or intermittent (or perennial). *Id.* But a ditch must still contribute flow to a primary water; that is one of the basic elements of the tributary definition. 80 Fed. Reg. at 37,078/1. The Agencies’ approach reasonably balances the exclusion with the need to ensure that tributaries, and the significant functions they provide, are covered. *Id.* at 37,098/1.

b. Ditches that are tributaries can be both a point source and a jurisdictional water.

The CWA requires permits for discharges of pollutants to waters of the United States from a “point source.” 33 U.S.C. § 1362(12). Business Petitioners erroneously argue that because some modified and constructed waters, such as ditches, channels and conduits, are mentioned in the statutory definition of “point source,” they can never be waters of the United States. Bus. Br. 74-77. Petitioners’ construction renders CWA statutory text superfluous, is inconsistent with *Rapanos*, and is contrary to the Agencies’ longstanding interpretation.

¹⁹ State Petitioners inaccurately claim that the Agencies will identify “some ditches” based on the “historical presence of tributaries,” rather than on “current conditions.” States Br. 27. Petitioners misconstrue the Agencies’ discussion of relocated streams. In order to determine whether or not a stream channel has been “physically moved,” it is unsurprising that the Agencies may rely on maps, photos, or other evidence. 80 Fed. Reg. at 37,078/3-37,079/1.

The Act defines “point source” as “any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, [or] conduit ... from which pollutants are or may be discharged.” 33 U.S.C. § 1362(14). Nothing in the text of the CWA indicates that modified and constructed waters, such as ditches, cannot be waters of the United States. To the contrary, 33 U.S.C. § 1344(f)(1)(C) reflects Congress’s understanding that ditches can be waters of the United States because it creates a permitting exemption for discharges associated with the “construction or maintenance of farm or stock ponds or irrigation *ditches*, or the maintenance of drainage *ditches*.” (Emphasis added.) There would have been no need for Congress to create a permit exemption for discharges related to maintenance activities for some ditches if ditches could *never* be waters of the United States.

In *Rapanos*, the plurality noted that it was not clear “whether the nearby drains and ditches contain continuous or merely occasional flows of water,” and ordered the lower courts to determine “whether the ditches or drains near each wetland are ‘waters’ in the ordinary sense of containing a relatively permanent flow.” 547 U.S. at 729, 757. The plurality thus understood that a ditch could be a water of the United States.

Petitioners rely on a single out-of-context sentence of the plurality, Bus. Br. 76, that compared the definitions of “point source” and “navigable water”: “The definition of ‘discharge’ would make little sense if the two categories were significantly overlapping.” *Rapanos*, 547 U.S. at 735-36. The plurality did not conclude that a ditch

can never be a water of the United States, but instead left room for a ditch to meet its concept of “navigable waters.” *Id.* at 736 n. 7. And Justice Kennedy and the four dissenting Justices noted that the plurality’s reasoning was based on a faulty premise about the amount of flow in waters defined as point sources. *Id.* at 772 (Kennedy, J., concurring), 802 (Stevens, J., dissenting). Thus, these five Justices rejected the plurality’s suggestion that the definition of point source could be read to limit the definition of waters of the United States.²⁰

EPA’s longstanding interpretation that jurisdictional ditches may also meet the definition of “point source” is entitled to deference. *See* TSD at 74, JAXxxx (quoting 1975 EPA General Counsel opinion); *see e.g., Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526, 533 (9th Cir. 2001) (irrigation canals that derived and diverted water from surface streams were waters of the United States); *N.C. Shellfish Growers Ass’n v. Holly Ridge Assocs.*, 278 F. Supp. 2d 654, 673, 679 (E.D.N.C. 2003) (ditches were both waters of the United States and point sources).

B. The Agencies reasonably determined that adjacent waters are jurisdictional.

Waters of the United States under the Rule include not only tributaries of traditional navigable and other primary waters, but also “wetlands, ponds, lakes, oxbows, impoundments, and similar waters” that are “adjacent to” a primary water, a

²⁰ Moreover, Petitioners’ reading would lead to the absurd result that a navigable-in-fact shipping channel could never be a water of the United States, because “channel,” like “ditch,” is mentioned in the statutory definition of point source.

tributary, or an impoundment. *See* 33 C.F.R. § 328.3(a)(6). “Adjacent,” in turn, means “bordering, contiguous, or neighboring” with “neighboring” separately defined to include: (i) all waters located within 100 feet of the ordinary high water mark of a tributary, primary water, or impoundment; (ii) all waters located within the 100-year floodplain of a tributary, primary water, or impoundment and not more than 1,500 feet from the ordinary high water mark of such water; and (iii) all waters located within 1,500 feet of the high tide line of a tidally-influenced primary water, and all waters within 1,500 feet of the ordinary high water mark of a Great Lake. *See* 33 C.F.R. § 328.3(c)(1)-(2).

The record sets forth the Agencies’ highly-detailed determinations that adjacent waters, as defined, “have a significant nexus to traditional navigable waters, interstate waters, and the territorial seas based upon their hydrological and ecological connections to, and interactions with, those waters.” 80 Fed. Reg. at 37,057/1-37,058/2. These determinations are well supported. *See, e.g.*, TSD at 169-70, 305, 312, JAxxxx-xxxx, xxxx, xxxx; Science Report at ES-11, JAxxxx; SAB Science Report Review at 4-5, JAxxxx-xxxx. Indeed, no Petitioner alleges that the Agencies misinterpreted a specific scientific publication or any other technical information in the voluminous record before them.²¹

²¹ Illustrative publications include: Amoros, C., and G. Bornette. 2002. Connectivity and biocomplexity in waterbodies of riverine floodplains. *Freshwater Biology* no. 47:761-776, JAxxxx-xxxx; Junk, W. J., P. B. Bayley, and R. E. Sparks. 1989. The flood pulse

Cont.

Rather, Business and State Petitioners challenge the inclusion of: waters adjacent to nonnavigable tributaries; waters separated from jurisdictional waters by man-made or natural barriers; waters as opposed to just wetlands; and waters within specified numeric distance and floodplain limitations. Petitioners' arguments lack merit.

1. The Agencies reasonably concluded that waters adjacent to nonnavigable tributaries have a significant nexus.

The Rule's coverage of waters that are adjacent to nonnavigable tributaries does not violate Justice Kennedy's concurrence in *Rapanos* or any other precedent. *Contra* States Br. 28-29; Bus. Br. 65-66. *Rapanos* involved an assertion of CWA jurisdiction under the 1986 definition of adjacency in the context of wetlands adjacent to tributaries of traditional navigable waters. *See* 547 U.S. at 759-62 (Kennedy, J., concurring). Justice Kennedy found the treatment of wetlands adjacent to traditional

concept in river-floodplain systems. Pages 110-127 in Proceedings of the international large river symposium, Canadian Special Publication of Fisheries and Aquatic Sciences 106. D. P. Dodge, editor, Ottawa, Canada, JAxxxx-xxxx; Naiman, R. J., and H. Decamps. 1997. The ecology of interfaces: Riparian zones. *Annual Review of Ecology and Systematics* 28:621-658, JAxxxx-xxxx; Stanford, J. A., and J. V. Ward. 1993. An ecosystem perspective of alluvial rivers: Connectivity and the hyporheic corridor. *Journal of the North American Benthological Society* no. 12:48-60, JAxxxx-xxxx; Tockner, K., M. Pusch, D. Borchardt, and M.S. Lorang. 2010. Multiple stressors in coupled river-floodplain ecosystems. *Freshwater Biology* no. 55 (Suppl. 1):135-151. doi: 10.1111/j.1365-2427.2009.02371, JAxxxx-xxxx; Vidon, P., C. Allan, D. Burns, T. P. Duval, N. Gurwick, S. Inamdar, R. Lowrance, J. Okay, D. Scott, and S. Sebestyen. 2010. Hot spots and hot moments in riparian zones: Potential for improved water quality management. *Journal of the American Water Resources Association* no. 46:278-298, JAxxxx-xxxx. Each of these publications is in the record. *See* Notice of Filing of Corrected Certified Index to the Administrative Record (ECF No. 122) at 9 n.1.

navigable waters to be valid without the need for any additional or case-specific significant nexus determination, finding that it “rests upon a reasonable inference of ecological interconnection[.]” *Id.* at 780 (citing *Riverside Bayview*). Any shortcoming, according to Justice Kennedy, regarded inferring a significant nexus in the context of wetlands adjacent to nonnavigable *tributaries* of traditional navigable waters. He explained that the Agencies’ “existing standard for tributaries . . . provides no such assurance,” *i.e.*, evidence that nonnavigable tributaries “are significant enough that wetlands adjacent to them are likely, in the majority of cases, to perform important functions for an aquatic system incorporating navigable waters.” *Id.* at 781.

The record supporting the Rule clearly addresses the shortcoming identified by Justice Kennedy. The Technical Support Document, for example, “summarizes the key points made in the Science Report and explains the technical basis” for the Agencies’ findings that adjacent waters, similarly situated in a given watershed, significantly affect the physical integrity, TSD at 306-11, JAxxxx-xxxx, the chemical integrity, *id.* at 311-15, JAxxxx-xxxx, and the biological integrity, *id.* at 315-21, JAxxxx-xxxx, of primary waters. *See also id.* at 321-26, JAxxxx-xxxx (further summary and rationale). In light of the scientific evidence, the Agencies reasonably determined that adjacent waters, including waters adjacent to nonnavigable tributaries, have the requisite nexus. *See, e.g.*, 79 Fed. Reg. at 22,194/2.

For similar reasons, the Rule accords with *SWANCC*, which did not involve any assertion of CWA jurisdiction over adjacent wetlands. Rather, *SWANCC*

involved “ponds and mudflats” “unconnected to other waters covered by the Act.” 547 U.S. at 766-67 (Kennedy, J., concurring). *See also Sackett*, 132 S. Ct. at 1370 (observing that *SWANCC* involved “an abandoned sand and gravel pit, which ‘seasonally ponded’ but which was not adjacent to open water”). Because the Agencies have determined that adjacent waters as defined in the Rule have a significant nexus to downstream primary waters, the Agencies’ assertion of jurisdiction over waters adjacent to nonnavigable tributaries is fully consistent with *SWANCC*.

2. The Agencies reasonably concluded that adjacent waters have a significant nexus even if a physical separation exists.

The Rule reasonably retains the longstanding approach that “[w]etlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are ‘adjacent wetlands.’” 33 C.F.R. § 328.3(c) (1987); *compare with* 33 C.F.R. § 328.3(c)(1) (2015) (“The term *adjacent* means bordering, contiguous, or neighboring a [jurisdictional water], including waters separated by constructed dikes or barriers, natural river berms, beach dunes, and the like.”). *Rapanos* upheld this approach so long as a requisite nexus exists. Justice Kennedy explained: “Given the role wetlands play in pollutant filtering, flood control, and runoff storage, it may well be the absence of a hydrologic connection ... that shows the wetlands’ significance for the aquatic system.” *Rapanos*, 547 U.S. at

786. *See also id.* at 805-06 (Stevens, J., dissenting) (“This [adjacency] definition is plainly reasonable[.]”).

Justice Kennedy urged the Agencies to examine the relevant science on the relationship and downstream effects of waters and make determinations of significant nexus. That is precisely what the Agencies have now done. *See, e.g.*, TSD at 166, JAxxxx (“[T]he 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 prevent floodwaters and contaminants from reaching downstream waters.”).

Business Petitioners’ (and amici’s) objection to the Rule’s treatment of “man-made barrier[s] *whose precise aim and effect* is to interrupt any hydrologic connection to a jurisdictional water” ignores the foregoing law and science. Bus. Br. 66 (emphasis in original); *see* Amicus Br. of ACWA, *et al.* 7, 16, 23-24; Amicus Br. of Members of Congress 7. Petitioners also disregard the aggregate nature of the significant nexus standard. Under *Rapanos*, the standard does not ask whether physically separated waters *by themselves* possess a significant nexus; the question is whether the waters “either alone *or in combination with similarly situated lands in the region*” have a requisite nexus. *Rapanos*, 547 U.S. at 780 (Kennedy, J., concurring) (emphasis added).

Similarly, Business and State Petitioners are wrong that the Rule’s approach contravenes the “ordinary meaning” of adjacency as gleaned from *Summit Petroleum Corp. v. EPA*, 690 F.3d 733 (6th Cir. 2012). *See* Bus. Br. 64-65; States Br. 28. *Summit*

does not apply here for three reasons. First, *Summit* involved a different environmental statute (the Clean Air Act) and a different regulation (40 C.F.R. § 71.2), neither of which offered any definition of the term “adjacent.” In contrast, the text of the Clean Water Act references adjacency jurisdiction—*see* 33 U.S.C. § 1344(g)(1); *Riverside Bayview*, 474 U.S. at 138-39—and the Rule provides definitions not only for the term “adjacent” but also one of its components, “neighboring.”

Second, *Summit* relied on the plurality opinion in *Rapanos*, which it erroneously assumed constituted the “majority” opinion. 690 F.3d at 743. *See, e.g., Sackett*, 132 S. Ct. at 1370 (recognizing that in *Rapanos*, “no one rationale commanded a majority of the Court”). No court of appeals, including this Court, has interpreted *Rapanos* to limit the Agencies’ authority to act *only* in accordance with the plurality opinion. *See Donovan*, 66 F.3d at 180-81 (surveying case law); *supra* at 49-50. Under the significant nexus standard, which the Rule reasonably employs, it is permissible to interpret the CWA to protect waters that have a functional relationship with downstream waters. *See, e.g., Rapanos*, 547 U.S. at 780 (“[W]etlands’ ecological functions vis-à-vis other covered waters are the basis for the Corps’ regulation of them[.]”) (Kennedy, J., concurring).

Third, the extensive record here supports the inclusion of waters even if they do not physically abut jurisdictional waters because such waters have a significant nexus with primary waters regardless of any physical separation. *See, e.g.,* 80 Fed. Reg. at 37,057/2 (“Wetlands and open waters in floodplains and riparian areas are

chemically, physically, and biologically connected with downstream waters and influence the ecological integrity of such waters.”).

Even if *Summit* did apply here, it does not support Petitioners. Although this Court vacated and remanded EPA’s determination that the facilities in that case—including gas production wells scattered “over an area of approximately forty-three square miles,” 690 F.3d at 735-36—were “adjacent” to the plant at issue, the upshot of *Summit* for present purposes is that EPA there failed to give *more* (indeed controlling) consideration to proximity in interpreting the term. *See Summit*, 690 F.3d at 736, 741, 744, 751. The Rule’s definition of “neighboring” gives due accord to proximity and is backed by a robust record of aquatic interconnectedness.

3. The Rule’s inclusion of adjacent ponds, lakes, oxbows, impoundments, and similar waters—along with adjacent wetlands—is reasonable.

The Rule’s assertion of CWA jurisdiction over adjacent open waters that are not wetlands, i.e., “ponds, lakes, oxbows, impoundments, and similar waters,” 33 C.F.R. § 328.3(a)(6), is also reasonable and consistent with the law. Under the 1986 regulation, such open waters were subject to CWA jurisdiction if they were actually navigable, served as tributaries, crossed state lines, impounded other regulated waters, or if their “use, degradation or destruction ... could affect interstate or foreign commerce,” 33 C.F.R. § 328.3(a)(3) (1987)—commonly referred to as the “other waters” provision. Of the three Supreme Court decisions addressing the meaning of “waters of the United States,” only *SWANCC* involved the assertion of CWA

jurisdiction based upon the “other waters” provision. There, the Court examined whether the “Migratory Bird Rule,” an administrative interpretation of that provision, 51 Fed. Reg. at 41,217, exceeded the Corps’ authority when applied to nonnavigable, isolated, and intrastate waters. *SWANCC*, 531 U.S. at 174.

SWANCC stands for the proposition that “to constitute ‘navigable waters’ under the Act, a *water or wetland* must possess a ‘significant nexus’ to waters that are or were navigable in fact or that could reasonably be so made.” *Rapanos*, 547 U.S. at 759 (Kennedy, J., concurring) (quoting *SWANCC*, 531 U.S. at 167; emphasis added). *See also id.* at 767 (“[T]he 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.”) (emphasis added). Hence, during the rulemaking process, the Agencies sensibly consolidated non-wetland waters with wetlands in considering the presence or absence of a significant nexus. *See* TSD at 325, JAxxxx (“[I]t is reasonable to also assess whether non-wetland waters have a significant nexus, as Justice Kennedy’s opinion makes clear that a significant nexus is a touchstone for CWA jurisdiction.”). As the scientific record demonstrates, “adjacent open waters ... perform many of the same functions as wetlands that impact downstream waters, including contribution of flow, water retention, and nutrient processing and retention.” *Id.* at 326, JAxxxx. The SAB agreed. *See, e.g.*, SAB Proposed Rule Review at 2, JAxxxx (“[A]djacent waters and wetlands have a strong influence on the physical, chemical, and biological integrity of navigable waters.”).

Petitioners' assertion that the Rule's adjacent waters provision constitutes a "sweeping" change, Bus. Br. 66, is refuted by the 1986 regulation's inclusion of, *inter alia*, adjacent other waters. Moreover, Petitioners ignore the aforementioned excerpt from Justice Kennedy's *Rapanos* concurrence—preferring instead to rely on the *Rapanos* plurality opinion and its characterization of *Riverside Bayview*. As discussed *supra* at 43-50, the Agencies may interpret the statutory term "waters of the United States" differently from the plurality opinion as long as they identify a significant nexus to primary waters.

Petitioners' reliance on *San Francisco Baykeeper v. Cargill Salt Div.*, 481 F.3d 700 (9th Cir. 2007), a citizen suit, is also misplaced. *Cargill* merely illustrates adjacency jurisdiction under the 1986 regulation. At that time, only "wetlands" could qualify as waters of the United States based exclusively on the adjacency provision of the regulation. *See* 79 Fed. Reg. at 22,207/2. The *Cargill* plaintiff did not invoke the "other waters" regulatory provision and instead relied solely on adjacency jurisdiction. *See* 481 F.3d at 703. The court rejected the plaintiff's approach, reasoning that a court lacked authority to find non-wetland waters to be adjacent because "[u]nder the controlling regulations, ... the only areas that are defined as waters of the United States by reason of adjacency to other such waters are 'wetlands.'" *Id.* at 705. Thus, nothing in *Cargill* barred the Agencies from consolidating the treatment of wetlands and ponds, lakes, oxbows, impoundments, and similar waters.

4. The Agencies reasonably defined the outer limits of adjacent waters.

Petitioners' remaining objections relate to the geographic reach of adjacency. Addressing adjacent waters within a floodplain, Business Petitioners contend that the Agencies failed to provide "good reasons" to support the 1,500-foot distance limitation. Bus. Br. 68 (citations omitted); *see also id.* at 72 (alleging "no evidentiary basis" for "the 1,500-foot adjacency boundary"); Amicus Br. of Wash. Legal Found. 23-24 (similar assertion). State Petitioners complain that the numeric distance limitations are based "solely on geographical proximity" without regard to significant nexus. States Br. 31 (internal quotation marks omitted). Both sets of Petitioners also challenge the use of the "100-year floodplain" in 33 C.F.R. § 328.3(c)(2). *See* Bus. Br. 67-68; States Br. 29.

These arguments fail.

a. The numeric distance limitations are reasonable.

As an initial matter, the Agencies' interpretation of adjacency-based CWA jurisdiction has never been unbounded, and nothing in Justice Kennedy's *Rapanos* concurrence, *Riverside Bayview*, or *SWANCC* precluded the Agencies from further clarifying the boundaries of adjacent waters through numeric distance limitations. Indeed, "[a]djacen[cy]' ... has always included an element of reasonable proximity." 79 Fed. Reg. at 22,207/3-22,208/1 (citing *Riverside Bayview*, 474 U.S. at 133-34). *See also* 80 Fed. Reg. at 37,089/2 ("The agencies have always recognized that adjacency is

bounded by proximity.”); 42 Fed. Reg. 37,122, 37,128 (July 19, 1977) (CWA jurisdiction extends to “any adjacent wetlands that form the border of or are in reasonable proximity to other waters of the United States, as these wetlands are part of this aquatic system”). It is well within the Agencies’ rulemaking authority to identify a point on the continuum at which: (a) waters are appropriately regarded as jurisdictional based on adjacency; and (b) waters may be regarded as jurisdictional only after a case-specific analysis.

Science drove the Agencies’ consideration of adjacency jurisdiction—including its geographic reach. The Agencies initially proposed that “neighboring” be defined to include, *inter alia*, “waters located within the riparian area or floodplain” of a jurisdictional water. 79 Fed. Reg. at 22,263/2 (proposing alternatives and requesting comment). The Draft Science Report noted, for example, that “wetlands and open waters in floodplains of streams and rivers and in riparian areas ... have a strong influence on downstream waters.” *Id.* at 22,196/2. Indeed, “[t]he body of literature documenting connectivity and downstream effects was *most abundant* for perennial and intermittent streams, *and for riparian/floodplain wetlands.*” TSD at 104, JAxxxx (emphasis added).

That robust scientific support remained unchanged when the Agencies established specific numeric distance limitations for adjacent waters in the final Rule. The final Science Report, like its draft predecessor, presented clear evidence that

wetlands and open waters located in floodplains or riparian areas²² are “physically, chemically, and biologically integrated with rivers via functions that improve downstream water quality, including the temporary storage and deposition of channel-forming sediment and woody debris, temporary storage of local ground water that supports baseflow in rivers, and transformation and transport of stored organic matter.” Science Report at ES-2 to ES-3, JAxxxx-xxxx; *see also* TSD at 126-27, JAxxxx-xxxx. In deciding to narrow the proposed definition, the Agencies focused on a number of factors, including where the scientific support was the strongest:

- For waters within 100 feet of the ordinary high water mark of a jurisdictional water, 33 C.F.R. § 328.3(c)(2)(i), the Agencies observed that “[m]any studies indicate that the primary water quality and habitat benefits will generally occur within a several hundred foot zone of a water.” 80 Fed. Reg. at 37,085/2. The Agencies noted “clear evidence” that waters located close to jurisdictional waters, whether outside the floodplain or in the absence of floodplain (as with small or incised streams), “perform critical processes and functions.” *Id.*
- Likewise, for adjacent waters within the 100-year floodplain, 33 C.F.R. § 328.3(c)(2)(ii), the Agencies established the 1,500-foot distance

²² The Proposed Rule’s reference to riparian areas was dropped since “as a general matter, waters in the riparian area will also be in the 100-year floodplain.” 80 Fed. Reg. at 37,082/3.

limitation, in part, “to protect vitally important waters within a watershed.” 80 Fed. Reg. at 37,085/3. The Agencies explained that “[d]istance also affects connectivity between non-floodplain and riparian/floodplain wetlands and downstream waters” and the limit selected “ensure[s] that the waters are providing similar functions to downstream waters and ... the waters are located comparably in the landscape such that the agencies reasonably judged them to be similarly situated.” TSD at 150, 172, JAxxxx, xxxx.²³

- And with respect to waters within 1,500 feet of a high tide line or the ordinary high water mark of a Great Lake, 33 C.F.R. § 328.3(c)(2)(iii), the Agencies noted that “[m]any tidally-influenced waters do not have floodplains” and “tidally-influenced traditional navigable waters, the territorial seas, and the Great Lakes are generally much larger in size than other jurisdictional waters.” 80 Fed. Reg. at 37,085/3, 37,086/2. The Agencies found that a 1,500-foot distance limit “capture[s] most wetlands and open waters that are so closely linked to these waters that

²³ Only waters within the floodplain up to 1,500 feet are jurisdictional under this provision of the definition of “neighboring.” If the floodplain of a tributary is smaller than 1,500 feet, as is the case for most headwater streams and ephemeral streams, then jurisdiction under this provision extends only to the extent of the floodplain. 80 Fed. Reg. at 37,081/1.

they can properly be considered adjacent as neighboring waters.” 80 Fed. Reg. at 37,086/2.

All the numeric distance limitations are supported by science. Petitioners are incorrect that the SAB “rejected any distance-based approach.” States Br. 54; *see also* Amicus Br. of Nat’l Rural Water Ass’n 16 (similarly incorrect assertion). The SAB instead advised that “adjacent waters and wetlands ... not be defined *solely* on the basis of geographical proximity or distance to jurisdictional waters.” SAB Proposed Rule Review at 3, JAxxxx (emphasis added). The Rule asserts CWA jurisdiction over adjacent waters based upon the existence of a significant nexus, not “solely” because of distance. Furthermore, as the Agencies reasonably explained, “science does not provide bright lines” and thus “the agencies’ interpretation of the CWA is informed by the Science Report and the review and comments of the SAB, but not dictated by them.” TSD at 93, JAxxxx.

Though science supports the numeric distance limitations for adjacent waters, the Agencies reasonably considered other relevant factors. The Rule’s core objective is to establish clear boundaries. *See* 80 Fed. Reg. at 37,082/1 (“In light of the [public] comments, the science, the agencies’ experience, and the Supreme Court’s consistent recognition of the agencies’ discretion to interpret the bounds of CWA jurisdiction, the agencies have made some revisions in the final rule designed to more clearly establish boundaries on the scope of ‘adjacent waters.’”); *id.* at 37,089/1 (“[I]t is important to promulgate a rule that not only protects the most vital of our Nation’s

waters, but one that is practical and provides sufficient boundaries so that the public reasonably understands where CWA jurisdiction ends.”).

Indeed, scores of comments sought greater clarity. RTC Topic 3 at 18, JAxxxx (“The dominant request was to identify specific limits.”). “[M]any commenters” suggested the use of the 100-year floodplain in particular. *Id.* at 19, JAxxxx. *See also, e.g., id.* at 33, JAxxxx (comment that the 100-year floodplain is “[t]he most obvious choice”). The Agencies reasonably found these comments persuasive, 80 Fed. Reg. at 37,082/2-3, particularly given that the Agencies did not determine that floodplain waters located more than 1,500 feet from the ordinary high water mark of a jurisdictional water would *never* be found jurisdictional but rather established that such waters would be analyzed on a case-specific basis for significant nexus. *Id.* at 37,085/3.

It was eminently reasonable for the Agencies to consider the need for a “practical and implementable rule” as informed by their technical expertise and experience. 80 Fed. Reg. at 37,085/3. As the D.C. Circuit explained in the context of whether certain activities constituted the “discharge of any pollutant,” 33 U.S.C. § 1311(a), because the Act does not draw bright lines with regard to whether certain activities are discharges, “a reasoned attempt by the agencies to draw such a line would merit considerable deference.” *Nat’l Mining Ass’n v. U.S. Army Corps of Eng’rs*, 145 F.3d 1399, 1405 (D.C. Cir. 1998). *See also infra* at 116, 120 (discussing *WorldCom, Inc. v. FCC*, 238 F.3d 449, 459 (D.C. Cir. 2001)). Neither the Act nor the science

establishes bright geographic lines within a watershed. The Rule's use of numeric distance limitations for adjacent waters, as supported by science and refined by a host of sensible considerations, should therefore be upheld.

b. The 100-year floodplain limitation is reasonable.

Petitioners premise their attack on the Rule's use of the 100-year floodplain on a misunderstanding of connectivity—the degree of connection among aquatic features. 79 Fed. Reg. at 22,195/3; Science Report at ES-6, JAxxxx. The “100-year flood” refers to the flow volume with a specific probability of occurring annually (0.01), and the “100-year floodplain” is the spatial extent of such an event. 80 Fed. Reg. at 37,081/1. Events of this probability can and do occur more than once every 100 years and last for many days, and larger, lower probability events may inundate an even larger area. *See, e.g.*, Science Report at 2-5, JAxxxx (“100-year floodplain can but need not coincide with the geomorphic floodplain.”). As the SAB explained, less frequent, high intensity flood events, such as those occurring on a 100-year interval, affect the physical connectivity of wetlands and open waters in a floodplain to downstream waters by storing water for later release, attenuating the volume of water flowing downstream, and moving and depositing sediment and wood. SAB Science Report Review at 41, JAxxxx; *see also* Science Report at ES-2 to ES-3, 1-8, 1-19, JAxxxx-xxxx, xxxx, xxxx. The spatial scale of these events “tends to be extensive, dictated largely by topography, and covering all available habitats.” SAB Science Report Review at 41, JAxxxx.

Petitioners are also wrong in their insistence that the scope of adjacent waters should depend on flooding considerations alone. Bus. Br. 67; States Br. 29.

The concept of flood probability in no way describes other connections floodplain wetlands and open waters may have to the nearby channel, such as hydrologic connections through flows overland or beneath and alongside the stream bed. *See* 79 Fed. Reg. at 22,207/1-2; TSD at 124-25, 134-35, 297, 300, 306, 309, JAxxxx-xxxx, xxxx-xxxx, xxxx, xxxx, xxxx, xxxx (describing bidirectional connections floodplain waters have with stream channels). Indeed, the Supreme Court rejected similar arguments in *Riverside Bayview* and upheld the Agencies' scientific judgment that "wetlands adjacent to lakes, rivers, streams, and other bodies of water may function as integral parts of the aquatic environment *even when the moisture creating the wetlands does not find its source in the adjacent bodies of water.*" *Riverside Bayview*, 474 U.S. at 134-35 (emphasis added).

Petitioners do not—and cannot—provide factual record support for their inaccurate assertion that waters in a floodplain have "[a]t most" an insubstantial effect on water quality. Bus. Br. 68; *see also* States Br. 29 (speculating that "hydrologic connection is surely too insubstantial"). The Agencies, in contrast, considered the extensive scientific literature and technical data supporting their conclusion that waters in floodplains prevent flooding, support river food webs and provide important habitat for river species, and otherwise are chemically, physically, and biologically integrated with downstream water quality. *See, e.g.*, 80 Fed. Reg. at

37,063/1-2; TSD at 350, JAxxxx; Science Report at ES-2, ES-3, 2-7, JAxxxx, xxxx, xxxx; *supra* at 85 n.21 (illustrative scientific publications).²⁴

Therefore, the Rule’s interpretation of “waters of the United States” to include adjacent waters, as defined, is reasonable.

C. Interstate waters have always been waters of the United States, independent of their navigability.

The Rule retains interstate waters as one of the primary waters included within waters of the United States. 33 C.F.R. § 328.3(a)(2). Business and State Petitioners argue that interstate waters can only be considered waters of the United States if they are either traditional navigable waters themselves or have a significant nexus to such waters. Bus. Br. 55-56; States Br. 33-34. This argument is untimely; interstate waters have been categorically protected under the CWA and its predecessors for many decades, regardless of their navigability, and the Rule does not change their status. But even if timely, Petitioners’ argument fails.

1. Petitioners’ challenge is untimely.

Interstate waters have long been a distinct category of waters of the United States under the Agencies’ regulations, along with traditional navigable waters and the territorial seas. *See* 33 C.F.R. § 323.2(a)(4) (1978) (identifying jurisdictional “[i]nterstate waters and their tributaries, including adjacent wetlands”); *id.* at §

²⁴ Petitioners also challenge the Rule’s use of the 100-year floodplain in the context of case-specific waters, 33 C.F.R. § 328.3(a)(8); these arguments are addressed *infra* at 118-121.

323.2(a)(5) (1978) (distinguishing between waters that are “part of a tributary system to interstate waters” and waters that are part of the tributary system “to navigable waters of the United States”). The specific regulatory text regarding interstate waters has not changed since 1982, although the Corps consolidated and renumbered its regulations in 1986. *Compare* 33 C.F.R. § 323.2(a)(2) (1983) (waters of the United States include “[a]ll interstate waters including interstate wetlands”) *with* 33 C.F.R. § 328.3(a)(2) (1987) (same) *and* 33 C.F.R. § 328.3(a)(2) (2015) (same).

Because petitions for review of final CWA rules must be filed within 120 days of promulgation, 33 U.S.C. § 1369(b)(1), and the Rule did not change the long-standing language of section 328.3(a)(2), which includes interstate waters as a separate category of waters of the United States, the time to challenge that portion of the regulation is long past. *Ohio Pub. Interest Research Grp., Inc. v. Whitman* (“Ohio PIRG”), 386 F.3d 792, 799-800 (6th Cir. 2004) (denying petition for review as time-barred).

While it is true that an agency may create an opportunity for renewed comments on an established regulation, thus restarting the time period for judicial review, the Agencies did not do so here. The relevant inquiry is whether the agency has given any “indication that [it] was reconsidering” the regulation. *Id.* at 800. In *Ohio PIRG*, EPA sought comment on whether state permit programs implemented under the Clean Air Act complied with the agency’s interpretation of that statute. *Id.* The agency did not, however, “signal its reconsideration of its previous rule

interpreting” that statute. *Id.* Thus, this Court held that a challenge to the interpretation was time-barred.

Here, the Agencies were very clear in the proposal that the Rule “does not change” the Agencies’ jurisdiction over interstate waters. 79 Fed. Reg. at 22,200/2. Although some comments addressed interstate waters, the Agencies’ response was that the Rule effected no change with respect to such waters. RTC Topic 10 at 269, JAxxxx. As the Proposed Rule, the response to comments, and the Rule all demonstrate, the Agencies did *not* reconsider the inclusion of interstate waters, and did not “reopen the question” of interstate waters for purposes of judicial review. *Ohio PIRG*, 386 F.3d at 800 (*quoting Am. Iron & Steel Inst. v. EPA*, 886 F.2d 390, 397-98 (D.C. Cir. 1989)); *Nat’l Ass’n of Reversionary Property Owners v. Surface Transp. Bd.*, 158 F.3d 135, 145 (D.C. Cir. 1998) (“The mere act of repeating old reasons for an old policy ... is not the equivalent of reconsidering, and therefore reopening, the old issue.”).

2. Interstate waters are waters of the United States, independent of their navigability.

If the Court reaches the merits, it should uphold the protection of interstate waters under the CWA whether or not they have a connection to traditional navigable waters. This is required by the language and structure of the Act, but to the extent the statute is ambiguous the Court should defer to the Agencies’ longstanding

interpretation, which is permissible, reasonable, and consistent with Supreme Court precedent. *See generally* TSD at 197-223, JAxxxx-xxxx.

Under *Chevron* step one, courts evaluate whether a statutory term is ambiguous by looking at its plain language, as well as the statute's structure and history. *See, e.g., First City Bank v. Nat'l Credit Union Admin. Bd.*, 111 F.3d 433, 437 (6th Cir. 1997).

Here, the structure, history, and purpose of the Clean Water Act confirm that it unambiguously includes nonnavigable interstate waters within its scope.

Until 1972, the predecessors of the Act explicitly protected interstate waters independent of their navigability. The 1948 statute declared that the "pollution of interstate waters" and their tributaries is "a public nuisance and subject to abatement ..." 33 U.S.C. § 466a(d)(1) (1952) (codifying Pub. L. No. 80-845 § 2(d)(1), 62 Stat. 1156 (1948)). Interstate waters were defined without reference to navigability: "all rivers, lakes, and other waters that flow across, or form a part of, State boundaries." 33 U.S.C. § 466i(e) (1952) (codifying Pub. L. No. 80-845 § 10(e), 62 Stat. 1161 (1948)). In 1961, Congress broadened the 1948 statute and made the pollution of "interstate or navigable waters" subject to abatement, retaining the definition of "interstate waters." 33 U.S.C. § 466g(a) (1964) (codifying Pub. L. No. 87-88 § 8(a), 75 Stat. 204, 208 (1961)). In 1965, Congress required States to develop water quality standards for "interstate waters or portions thereof within such State." 33 U.S.C. § 1160(c)(1) (1970) (codifying Pub. L. No. 89-234 § 5, 79 Stat. 903, 907 (1965)); *see also* 33 U.S.C. § 1173(e) (1970) (retaining definition of interstate waters).

In 1972, Congress abandoned the “abatement” approach initiated in the 1948 statute in favor of a permitting program for discharges of pollutants, which Congress defined as “any addition of any pollutant to navigable waters” 33 U.S.C. §§ 1311(a), 1362(12). Business Petitioners contend that the removal of the term “interstate waters” in 1972 shows that Congress intended to make interstate waters a subset of navigable waters, and to protect them only to the extent that they are navigable. Bus. Br. 55. But that argument ignores 33 U.S.C. § 1313(a), also added in 1972, which provided that pre-existing water quality standards for interstate waters remained in effect, unless EPA determined that they were inconsistent with any applicable requirements of the pre-1972 version of the Act. *A. Philip Randolph Inst. v. Husted*, 838 F.3d 699, 709 (6th Cir. 2016) (internal citation omitted) (“a statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous”). Through section 1313(a), Congress continued to protect the water quality of interstate waters without reference to their navigability.

Furthermore, Petitioners’ reading ignores the purpose of the 1972 amendments, which was to expand, not narrow, federal protections. The 1972 amendments were a reaction to the shortcomings of the prior versions of the statute and the limitations of the Rivers and Harbors Act, also known as the Refuse Act.²⁵

²⁵ Enacted in 1899, the Refuse Act prohibits the discharge of refuse into any “navigable water of the United States,” or into any tributary of any navigable water. 33 U.S.C. § 407. The term “navigable water of the United States” is defined as waters
Cont.

See S. Rep. No. 414, 92nd Cong., 1st Sess. 7 (1972) (the existing mechanisms for abating pollution “have been inadequate in every vital respect”). The House and the Senate conferees explained that they “fully intend that the term ‘navigable waters’ be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes.” S. Conf. Rep. No. 1236, 92nd Cong., 2d Sess. 144 (1972); *see also* H.R. Rep. No. 911, 92nd Cong., 2d Sess. 131 (1972).²⁶ *See also Riverside Bayview*, 474 U.S. at 133 (the 1972 amendments extend to “at least some waters that would not be deemed ‘navigable’ under the classical understanding of that term”).

The Supreme Court has recognized that federal law, as it existed prior to the 1972 amendments, protected nonnavigable interstate waters via the federal common law of nuisance. In *Illinois v. City of Milwaukee*, the Court held that Illinois could bring a nuisance claim against the City of Milwaukee under federal common law because “federal, not state, law . . . controls the pollution of interstate or navigable waters” and because the predecessors to the CWA did not displace such actions “to abate pollution of interstate or navigable waters.” 406 U.S. 91, 102, 104 (1972). Ten years

that are “subject to the ebb and flow of the tide and/or that are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce.” 33 C.F.R. § 329.4.

²⁶ The version passed by the House defined navigable waters as “the navigable waters of the United States,” H.R. 11896, 92nd Cong., 2d Sess., § 502(8) (1971), but that version was rejected and the definition as enacted refers to “the waters of the United States.” 33 U.S.C. § 1362(7).

later, the Court revisited the issue and concluded that the 1972 amendments “occupied the field through the establishment of a comprehensive regulatory program supervised by an expert administrative agency.” *City of Milwaukee v. Illinois and Michigan*, 451 U.S. 304, 317 (1981). Thus, although the 1972 amendments superseded the federal common law of nuisance as a means to protect interstate waters in favor of a statutory “all-encompassing program of water pollution regulation,” *id.* at 318, they did not curtail the scope of protected waters.

Even if the history, structure, and purpose of the CWA do not unambiguously resolve the issue, this Court under *Chevron* step two should defer to the Agencies’ interpretation that interstate waters remain independently protected after the 1972 amendments. As the Agencies have explained, the effects of water pollution in one state can adversely affect the quality of waters in another, “particularly if the waters involved are interstate.” TSD at 216, JAxxxx (quoting 42 Fed. Reg. 37,122, 37,127/3 (July 19, 1977)). Protecting interstate waters as a separate category of waters of the United States is therefore “consistent with the Federal government’s traditional role to protect these waters from the standpoint of water quality and the obvious effects on interstate commerce that will occur through pollution of interstate waters and their tributaries.” TSD at 216, JAxxxx.

State Petitioners argue that Justice Kennedy’s opinion in *Rapanos* requires a significant nexus to navigability, even for interstate waters. States Br. 33-34. But *Rapanos* did not involve interstate waters. Rather, as Justice Kennedy explained, that

case called upon the Court to interpret the application of the CWA to traditional navigable waters, “tributaries of those waters and, of particular relevance here, wetlands adjacent to those waters or their tributaries.” 547 U.S. at 760-61. Justice Kennedy specifically identified the portions of the 1986 regulation that were before the Court as 33 C.F.R. §§ 328.3(a)(1), (a)(5), and (a)(7) (1987). *Id.* at 761. Notably absent from this list is subsection (a)(2), interstate waters.²⁷

Nor were interstate waters at issue in *SWANCC*, where the Court stated numerous times that it was addressing nonnavigable *intrastate* waters. 531 U.S. at 166, 169, 171, 172; *see also id.* at 171 (describing isolated ponds “wholly located within two Illinois counties”). The *SWANCC* Court noted that only 33 C.F.R. § 328.3(a)(3) was at issue: waters that could affect interstate commerce. *Id.* at 163. If State Petitioners were correct that interstate waters must have a significant nexus to traditional navigable waters in order to be protected under the CWA, then *SWANCC* need only have described the waters at issue as nonnavigable. Instead, the Court repeatedly said the waters were neither navigable *nor* interstate. That reference only has meaning if

²⁷ As explained *supra* at 7-9, the 1986 definition of waters of the United States included 328.3(a)(1) traditional navigable waters; 328.3(a)(2) interstate waters; 328.3(a)(3) other waters, the use, degradation, or destruction of which could affect interstate commerce; 328.3(a)(4) impoundments of jurisdictional waters; 328.3(a)(5) tributaries of waters identified in (a)(1) through (a)(4); 328.3(a)(6) the territorial seas; and 328.3(a)(7) wetlands adjacent to waters identified in (a)(1) through (a)(6). 33 C.F.R. § 328.3(a) (1987).

interstate waters are separately protected, independent of their relationship to traditional navigable waters.

Business Petitioners contend that if nonnavigable interstate waters are protected, then the Rule extends to any isolated pond or intermittent trickle that happens to cross a state line. Bus Br. 56. This alleged over-reach is supposedly compounded because tributaries of interstate waters and waters adjacent to interstate waters are also protected. *Id.* But just as interstate waters have always been considered waters of the United States, so too have their tributaries and adjacent wetlands. *See, e.g.*, 33 C.F.R. § 323.2(a)(4) (1978) (covering “[i]nterstate waters and their tributaries, including adjacent wetlands”). Moreover, no Petitioner provides any specific example of alleged over-reach on the basis of interstate waters and the Agencies are unaware of any such example in the million-plus comments on the Proposed Rule.

Business Petitioners also assert that the Agencies’ interpretation fails to “carry into effect the will of Congress.” Bus. Br. 56, quoting *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 213-14 (1976). But *Ernst* stands for the unremarkable proposition that the scope of a regulation cannot exceed the power granted by Congress. The Agencies agree, and have shown that CWA protection of interstate waters, regardless of their navigability, is fully consistent with both Congress’s intent and the Agencies’ authority.

III. The Agencies reasonably concluded that certain waters should be subject to a case-specific analysis of significant nexus.

The Rule includes two narrow categories of waters that may be found jurisdictional based on a case-specific analysis of significant nexus (“case-specific waters”). 33 C.F.R. § 328.3(a)(7), (8). These waters will be found jurisdictional only if, either alone or in combination with similarly situated waters, they are determined to have a significant effect on the chemical, physical, or biological integrity of a primary water. *Id.* § 328.3(c)(5). As explained below, the Rule’s application of the significant nexus standard to case-specific waters is based on the text of the CWA, Supreme Court case law, science, public comment, and the Agencies’ technical expertise and experience. 80 Fed. Reg. at 37,060/2.

All Petitioners challenge some aspects of the case-specific categories of waters, with some asserting their scope is too restrictive and others asserting they are too expansive. Business and State Petitioners also challenge one aspect of the definition of “significant nexus” and one criterion for assessing whether a case-specific water demonstrates a significant nexus. Their arguments are misplaced, however, as the Agencies reasonably designated what waters are subject to a significant nexus analysis and the relevant criteria for making such a determination.

A. The Agencies appropriately confined the scope of case-specific waters to waters that potentially have a significant nexus with primary waters.

Waterkeeper Petitioners contend that the Agencies should have “consider[ed]” retaining the provision of the 1986 regulation that defined “waters of the United States” to include all other waters “the use, degradation, or destruction of which could affect interstate or foreign commerce,” and that the Agencies failed to provide a valid reason for not retaining that provision. Waterkeeper Br. 36 (citing 33 C.F.R. § 328.3(a)(3) (1987)). Petitioners ignore both Supreme Court precedent and the Agencies’ rationale for identifying case-specific waters.

Although the Agencies retained much of the structure of the prior regulatory interpretation of the term “waters of the United States,” the Proposed Rule included a “substantial change”: i.e., the deletion of the provision defining jurisdiction based on effects on interstate or foreign commerce. 79 Fed. Reg. at 22,192/2. This proposed change was in response to *SWANCC* and Justice Kennedy’s concurring opinion in *Rapanos*. *Id.* In both cases, it was the significant nexus to a traditional navigable water that informed the Court’s decision as to whether the waters at issue were intended by Congress to be protected. *SWANCC*, 531 U.S. at 167 (citing *Riverside Bayview*, 474 U.S. at 131-32 n.8); *Rapanos*, 547 U.S. at 767 (Kennedy, J., concurring) (“Absent a significant nexus, jurisdiction under the Act is lacking.”).

Contrary to Petitioners’ assertion, Waterkeeper Br. 37-38, the Agencies have not misread *SWANCC*. Although *SWANCC* did not vacate subsection (a)(3) of the

1986 regulation, it found the Agencies' interpretation of that subsection to be unsupported because the waters at issue were alleged to be jurisdictional based solely on their use by migratory birds, and not because of a significant nexus to a downstream primary water. *SWANCC*, 531 U.S. at 172. *See* TSD at 77-78, JAxxxx-xxxx. As discussed above, the significant nexus standard, as refined in Justice Kennedy's concurrence in *Rapanos*, is an important element of the Agencies' interpretation of the CWA. 80 Fed. Reg. at 37,056/2-3, 37,057/2-3. Indeed, the "fundamental premise" of the Rule is that for a water to be a "water of the United States" it must have a significant effect on the chemical, physical, or biological integrity of a primary water. RTC Topic 4 at 168, JAxxxx; *see also* 80 Fed. Reg. at 37,055/2. Accordingly, it was reasonable that the Agencies defined the category of case-specific waters based on their potential significant nexus with a primary water. RTC Topic 4 at 26-27, 168-69 JAxxxx-xxxx, xxxx-xxxx; TSD at 30, JAxxxx.

B. The geographic scope of waters subject to a case-specific significant nexus analysis is reasonable and supported by the record.

The first category of case-specific waters consists of waters in specific regions of the country that are considered "similarly situated" by rule because they function alike and are typically found sufficiently close together: prairie potholes, Carolina bays and Delmarva bays, pocosins, western vernal pools in California, and Texas coastal prairie wetlands. 33 C.F.R. § 328.3(a)(7). The second category consists of waters that are within the 100-year floodplain of a primary water or within 4,000 feet of the high

tide line or ordinary high water mark of a primary water, impoundment, or tributary. *Id.* at § 328.3(a)(8). Waters in this second category are not considered “similarly situated” by rule but can be determined to be so on a case-specific basis. *Id.*; *see also* 80 Fed. Reg. 37,088/1. The case-specific waters described in subsections (a)(7) and (a)(8) are only *potentially* jurisdictional; in order to actually be found jurisdictional, a case-specific determination of significant nexus must be reached.

The Supreme Court has made clear that CWA jurisdiction is not without limit. *Riverside Bayview*, 474 U.S. at 132-33; *Rapanos* 547 U.S. at 768 (Kennedy, J., concurring). By limiting case-specific determinations to the five categories of similarly situated waters identified in subsection (a)(7), and to waters within either the 100-year floodplain of a primary water or within 4,000 feet of a jurisdictional water as set forth in subsection (a)(8), the Agencies appropriately balanced the goal of protecting waters that science shows may have a significant nexus with the goal of providing greater regulatory certainty.

1. The geographic scope of case-specific waters is consistent with the Agencies’ statutory authority under the CWA.

Associational Petitioners do not challenge the 100-year floodplain and 4,000 foot boundaries for case-specific waters *per se*, but they do contend that, in setting a geographic limit of any sort, the Agencies unlawfully relinquished their duty under the CWA to protect waters of the United States because the Agencies “acknowledge that, as with any meaningful boundary, some waters that could be found jurisdictional lie

beyond the boundary and will not be analyzed for significant nexus.” 80 Fed. Reg. at 37,090. *See* Ass’n Br. 44-45; *see also* Waterkeeper Br. 54-55. Under this view, the Agencies could never select an outer geographic limit for consideration of a case-specific significant nexus given the current body of science. But Justice Kennedy recognized that where there is no “precise boundary” establishing where waters become significantly intertwined, it is reasonable for the Agencies to reach conclusions based on “the majority of cases.” *Rapanos*, 547 U.S. at 772-73. The Agencies’ experience has shown that “the vast majority of waters where a significant nexus has been found, and which are therefore important to protect to achieve the goals of the Act, are located within the 4,000 foot boundary.” 80 Fed. Reg. at 37,089; *see also infra* at 117-124 (discussing rationale for subsection (a)(8) distance limits). Thus, the Agencies reasonably concluded that “the value of enhancing regulatory clarity, predictability and consistency” through distance limits for subsection (a)(8) waters “outweigh the likelihood that a distinct minority of waters that might be shown to meet the significant nexus test will not be subject to analysis.” 80 Fed. Reg. at 37,090/3-37,091/1.

The distance limitations for subsection (a)(8) waters—non-adjacent waters in the 100-year floodplain of a primary water or within 4,000 feet of a primary water, impoundment, or tributary—are distinguishable from the lines drawn in the cases cited by Petitioners. Ass’n Br. 40-41. Here, the Agencies acted within their discretion to interpret the statutory term “waters of the United States,” and there was no

attempt to exclude from the definition any waters that “clearly meet[]” that statutory term. *See League of Wilderness Defs./Blue Mountains Biodiversity Project v. Forsgren*, 309 F.3d 1181, 1190 (9th Cir. 2002) (CWA does not authorize the Administrator to exempt point sources from permitting requirements). To the contrary, the 4,000 foot boundary provides regulatory consistency at a reasonable point in the connectivity continuum in light of the science and the Agencies’ experience. Moreover, Petitioners fail to recognize that the 4,000 foot boundary does not apply to waters in the 100-year floodplain of a primary water, which means that such waters, which are more likely to have a significant nexus precisely because they are in the floodplain, may be assessed on a case-specific basis. 80 Fed. Reg. at 37,088. Nor do they acknowledge that the distance limitations in subsection (a)(8) do not apply to the types of case-specific waters that are identified in subsection (a)(7), 33 C.F.R. § 328.3(a)(7), or the categories of jurisdictional waters in subsections (a)(1)-(6), 33 C.F.R. § 328.3(a)(1)-(6).

An agency’s “decision to make ease of administration and enforceability a consideration in setting its standard for regulatory relief” is permissible provided that the standard set is reasonable. *WorldCom*, 238 F.3d at 459. “[B]right line tests are a fact of regulatory life.” *Macon Cnty. Samaritan Mem’l Hosp. v. Shalala*, 7 F.3d 762, 768 (8th Cir. 1993). There is no general prohibition against an agency using bright lines, provided they are “founded on considerations rationally related to the statute” being administered. *Fook Hong Mak v. INS*, 435 F.2d 728, 730 (2d Cir. 1970). Here, both science and the Agencies’ experience support the distance limits for case-specific

waters in subsection 328.3(a)(8) and ensure that “truly important waters” will be protected. 80 Fed. Reg. at 37,088-89; *see infra* at 117-24 (discussing support for distance limitations).

2. The record supports the Rule’s specific distance limitations for purposes of case-specific significant nexus determinations.

State, Business, and Waterkeeper Petitioners all assert that the Agencies acted arbitrarily in establishing the distance limitations of the 100-year floodplain of a primary water and 4,000 feet from other jurisdictional waters in the second category of waters subject to a case-specific significant nexus analysis under 33 C.F.R. § 328.3(a)(8). States Br. 53-54; Bus. Br. 70-72; Waterkeeper Br. 54-55. While the State and Business Petitioners complain that the distance limitations are over-inclusive and the Waterkeeper Petitioners complain that the limitations are under-inclusive, they all incorrectly contend that the lines drawn by the Agencies are “conclusory” and that there is “nothing in the record” to support them. States Br. 53; *see also* Bus. Br. 72; Waterkeeper Br. 54-55.

It is well-recognized that agencies may “employ bright-line rules for reasons of administrative convenience, so long as those rules fall within a zone of reasonableness and are reasonably explained.” *Emily’s List v. Fed. Election Comm’n*, 581 F.3d 1, 22 n.20 (D.C. Cir. 2009). *See also Beazer E., Inc. v. U.S. EPA Region III*, 963 F.2d 603, 609 (3d Cir. 1992) (noting that “in the complex area of environmental regulation, the [agencies] must create bright lines to separate prohibited and permissible activity,” and

courts “defer to this line-drawing provided the interpretation is both reasonable and consonant with Congress’ intent”). This Court has similarly recognized that administrative lines “need not be drawn with mathematical precision.” *All. for Cmty. Media v. FCC*, 529 F.3d 763, 780 (6th Cir. 2008) (quoting *Kirk v. Sec’y of Health & Human Servs.*, 667 F.2d 524, 532 (6th Cir. 1981)).

Here, the Proposed Rule would have subjected any water not specifically covered or excluded anywhere in the single point of entry watershed of a primary water to a significant nexus determination. The Agencies recognized the potential breadth of this category and sought comment regarding how to achieve greater clarity and predictability as to the jurisdictional status of case-specific waters. 79 Fed. Reg. at 22,192-93. Numerous commenters urged some limitation. 80 Fed. Reg. at 37,090/1. The Agencies candidly acknowledged the difficulty of identifying “any particular bright line delineating waters that have a significant nexus from those that do not.” *Id.* Instead, they considered the known science regarding connectivity of waters in floodplains and non-floodplains, and their experience in making significant nexus determinations, and arrived at reasonable bright lines that provide the administrative certainty sought by commenters.

100-year floodplain. Business Petitioners concede the relevance of using floodplains as a boundary “in general” but challenge the use of the 100-year floodplain “in particular.” Bus. Br. 71. The Agencies’ rationale and the record show that Petitioners are wrong.

As explained *supra* at 94-97 and 100, there is a significant body of science that supports the Agencies' conclusion that waters in floodplains significantly affect the integrity of primary waters, and a flood interval is not dispositive of the degree of connectivity between waters in a floodplain and primary waters. In addition, various scientific studies that form the basis for the Science Report specifically examined 100-year rain or flood events and their influence on downstream waters. *See, e.g.*, Acreman and Holden, *How Wetlands Prevent Floods*, *Wetlands* (2013) 33:777, JAxxxx (noting storage capacity measured in specific wetlands in North Dakota following 100-year frequency rainfall event); Mathews, *North American prairie streams as systems for ecological study*, *Journal of the N. Am. Benthological Soc'y* (1988), 7:391 JAxxxx (discussing potential changes to channel geometry, differences in suspended load, and water chemistry from a single 100+ year event); Osterkamp and Savard, *Recharge estimates using a geomorphic/distributed-parameter simulation approach, Amargosa River Basin*, *Journal of the Am. Water Res. Ass'n* (1994) 30:493-507, JAxxxx-xxxx (study of extreme rainfalls and rare floods and semi-arid areas versus other areas of North America); *see also* Science Report at 4-4 to 4-8, 4-15, 4-19 to 4-20, JAxxx-xxxx, xxxx, xxxx-xxxx (describing wetlands and open waters in floodplains). Moreover, the 100-year interval is commonly used in scientific literature. Science Report at 2-5, JAxxxx.

The Agencies further recognized the utility of using the 100-year floodplain because the Federal Emergency Management Agency ("FEMA") has generally mapped that floodplain for large portions of the United States, and those maps are

publicly available, well-known, and well-understood. 80 Fed. Reg. at 37,083/1; TSD at 300-01, JAxxxx-xxxx.²⁸ For precisely that reason, many commenters specifically requested that references to the term “floodplain” be revised to reflect the 100-year floodplain mapped by FEMA. *See, e.g.*, Comments of Ass’n of Cal. Water Agencies, AR-12978, at 13, JAxxxx; Wash. Cnty. Water Conservancy Dist., AR-15536, at 19, JAxxxx; NRDC, AR-15437, at 62-63, JAxxxx-xxxx. There is nothing improper in the Agencies’ decision to consider “ease of administration” in selecting the 100-year floodplain. *WorldCom*, 238 F.3d at 459.

The Agencies did not “ignore” comments suggesting one- or five-year floodplain intervals. *See* Bus. Br. 71. To the contrary, the Agencies explained that “[a] smaller [distance] threshold increases the likelihood that waters that could have a significant nexus will not be analyzed and therefore not [be] subject to the Act,” while no distance threshold, such as in the Proposed Rule, would mean that the Agencies and the public would expend resources on case-specific analyses of waters that have a lesser likelihood of demonstrating a significant nexus. 80 Fed. Reg. at 37,090/2-3. In setting the 100-year floodplain distance limitation, the Agencies prudently balanced these competing considerations. *Id.* at 37,081/2-3, 37,082/2-3, 37,090/3.

²⁸ Where there is no FEMA map for a particular area, or the FEMA map is out of date, it is reasonable to rely on other tools to identify the 100-year floodplain, such as soil surveys, tidal gauge data and other federal, state, or tribal floodplain maps. 80 Fed. Reg. at 37,081/2-3.

In light of the body of scientific knowledge regarding the effects of floodplain waters on downstream waters, and the practicality of using a well-understood and widely-mapped floodplain interval, the Agencies' decision to use the 100-year floodplain as a limit under subsection 328.3(a)(8) was reasonable and supported by the record. Petitioners have failed to meet their "heavy burden to show that the totality of the evidence required [the Agencies] to decide differently than it did." *Mississippi v. EPA*, 744 F.3d 1334, 1349 (D.C. Cir. 2013); *see also Kirk*, 667 F.2d at 532.

4,000 foot distance limitation. Based on a number of factors, the Agencies appropriately identified a boundary of 4,000 feet from a primary water, impoundment, or tributary for application of case-specific significant nexus determinations under subsection 328.3(a)(8) for waters that are not within the 100-year floodplain of a primary water. 80 Fed. Reg. at 37,089-91; TSD at 353-69, JAxxxx-xxxx. Despite this being a *limitation* on jurisdiction compared to the prior regulation, which presumably benefits their constituents, Business and State Petitioners suggest that the 4,000 foot limit should have been drawn even more narrowly. Bus. Br. 70-71; States Br. 52-54.

First, although the scientific record does not in itself establish a bright line beyond which waters do not have a significant nexus to primary waters, there is compelling scientific evidence that waters up to 4,000 feet from another jurisdictional water *may* have a significant nexus to downstream waters and thus should be subject to a case-specific analysis. Science Report at 4-20 to 4-38, JAxxxx-xxxx (discussing

effects of non-floodplain waters); TSD at 360-62, JAxxxx-xxxx (explaining water movement and other effects on downstream waters).

Second, the Agencies acknowledged that while proximity to primary waters is not the sole factor for evaluating connectivity between waters, it is nonetheless an important one. TSD at 359-60, JAxxxx-xxxx; 80 Fed. Reg. at 37,089/2-3. The body of science informs that “[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.” Science Report at ES-11, JAxxxx. The Agencies’ experience in implementing the Act confirms this to be true. 80 Fed. Reg. at 37,090/2-3.

Recognizing that there is no precise distance at which waters cease to have a significant nexus, the Agencies looked to their extensive experience in making significant nexus determinations since the *Rapanos* decision. TSD at 379, JAxxxx. The Agencies have analyzed waters for significant nexus on a case-specific basis in every state in the country, involving a wide range of waters in a broad variety of conditions. *Id.* As part of the rulemaking process, EPA reviewed 199 approved jurisdictional determinations randomly selected from the approved jurisdictional determinations published on the web sites of all but one of the Corps districts.

Jurisdictional Determination Review Memorandum, AR-20877, JAxxxx-xxxx.²⁹ These approved jurisdictional determinations, issued between March 2009 and March 2015, involved a cross-section of waters. *Id.* Only four of the 199 sites involved wetlands or waters located more than 4,000 feet from a jurisdictional water. *Id.* And of those four sites, only two contained wetlands that were jurisdictional under the 1986 regulation but would presumably not be jurisdictional under the Rule due to the 4,000 foot limit in subsection 328.3(a)(8). *Id.* The total surface area of the wetlands at those two sites is approximately one acre. *Id.* Based on this analysis and their general experience implementing the Act since *Rapanos*, the Agencies concluded that setting a distance limit of 4,000 feet would encompass those waters that are most likely to have a significant nexus while also providing the certainty sought by the public.³⁰ 80 Fed. Reg. at 37,090-91.

²⁹ Although the cited memorandum discusses “200 approved jurisdictional determinations,” one is a duplicate. The 199 approved jurisdictional determinations are included in the administrative record (AR-20876).

³⁰ The April 25, 2015 internal Corps memorandum that was added to the record by the Court, AR-20882 JAxxxx-xxxx, was prepared to facilitate discussion with EPA staff prior to the analysis described in the above-discussed Jurisdictional Determination Review Memorandum, AR-20877. The conclusions in the internal Corps memorandum were based on an earlier draft of the Rule, and several of those conclusions would have been different if revisions made in later drafts of the Rule had been considered. For example, the internal Corps memorandum did not take into account that the 4,000 foot limit does not apply to waters within the 100-year floodplain of a primary water, as ultimately adopted in subsection 328.3(a)(8).

Third, the Agencies considered the goal of providing clarity as to the scope of waters that may be protected under the Act. *Id.* at 37,089/1. Many commenters expressed concern that the Proposed Rule would provide no outer boundary for case-specific waters and requested that the Agencies provide clearer limits, while others contended that the Agencies lacked discretion to set regulatory limits on which waters would be subject to a case-specific analysis. *Id.* at 37,090/1. Because neither the Act nor the case law prohibits the Agencies from setting appropriate limits for case-specific significant nexus determinations, the Agencies balanced the science and their experience with the desire for greater certainty while protecting human health and the environment consistent with the Act.

The Agencies' careful weighing of the relevant considerations in establishing the 4,000 foot limitation is the quintessential example of reasoned decisionmaking deserving of judicial deference, and the "totality of evidence" in the record supports the Agencies' decision. *Mississippi*, 744 F.3d at 1349 (discussing approach to "giant administrative records").

3. The record supports the Agencies' identification of Texas coastal prairie wetlands as similarly situated for purposes of significant nexus determinations.

Business Petitioners contend that Texas coastal prairie wetlands should not have been categorized as "similarly situated" under 33 C.F.R. § 328.3(a)(7). Bus. Br.

73.³¹ Petitioners have waived this argument because neither they (nor, as far as the Agencies are aware, any other commenter) raised this issue during the public comment period. *See Mich. Dep't of Env'tl. Quality v. Browner*, 230 F.3d 181, 183 n.1 (6th Cir. 2000) (noting that an argument petitioners failed to raise during a comment period is waived for purposes of review); *Koretzoff v. Vilsack*, 707 F.3d 394, 398 (D.C. Cir. 2013) (specific argument, not just general legal issue, must be raised before agency). Many comments were submitted in support of identifying Texas coastal prairie wetlands as similarly situated and subject to case-specific significant nexus determination, and there were no comments in opposition. RTC Topic 4 at 445-50, JAxxxx-xxxx; 80 Fed. Reg. at 37,096/1.

In any event, the Agencies' decision to include Texas coastal prairie wetlands in subsection (a)(7) is reasonable and supported by the record. *See* 80 Fed. Reg. at 37,071/1, 37,072/3-37,073/1 (explaining rationale). In the proposal, the Agencies cited numerous scientific studies analyzing coastal prairie wetlands in Texas. 79 Fed. Reg. 22,216/2, 22,250-51; Draft Science Report at 1-12, 5-36, JAxxxx, xxxx. The SAB concurred, finding that there is "adequate scientific evidence" to support the designation of Texas coastal prairie wetlands as similarly situated. SAB Proposed Rule Review at 3, JAxxxx. Petitioners have offered no information to the contrary.

³¹ Business Petitioners erroneously state that subsection 328.3(a)(7) waters do not require a case-specific analysis. Bus. Br. 73. To be clear, the identification of Texas coastal prairie wetlands in 328.3(a)(7) means that these particular wetlands are subject to a significant nexus determination, not that they are categorically jurisdictional.

The apparent basis for Petitioners’ challenge—that coastal prairie wetlands in western Louisiana are not also included under subsection 328.3(a)(7), so coastal prairie wetlands in Texas should not be included, Bus. Br. 73,—is a non sequitur. Coastal prairie wetlands do exist in Louisiana, and they may be found to be jurisdictional under subsection 328.3(a)(8) (or other applicable subsection). However, the scientific studies relied on by the Agencies and cited by commenters focused on coastal prairie wetlands within Texas. 79 Fed. Reg. at 22,251/2-3; Draft Science Report at 1-12, 5-36, JAxxxx, xxxx; TSD at 348-49, JAxxxx-xxxx; Ducks Unlimited Comments, AR-11014 at 50-51, JAxxxx-xxxx. The fact that there are coastal prairie wetlands in Louisiana has no bearing on whether coastal prairie wetlands in Texas are reasonably identified as similarly situated.

C. A case-specific water may reasonably be found to have a significant nexus based on indicators of chemical, physical, or biological integrity.

A “significant nexus” means that “a water, including wetlands, either alone or in combination with other similarly situated waters in the region, significantly affects the chemical, physical, or biological integrity of a [primary water].” 33 C.F.R. § 328.3(c)(5). Case-specific waters are assessed for a significant nexus by evaluating the aquatic functions identified in subsection 328.3(c)(5)(i)-(ix). *Id.* If one or more of the listed functions are present and contribute significantly to the chemical, physical, or biological integrity of the nearest primary water, there is a significant nexus. *Id.* The Agencies’ definition of the term “significant nexus” is consistent with *SWANCC* and

Rapanos, and with the goal of the CWA to “restore and maintain” all three forms of “integrity.” 80 Fed. Reg. at 37,067/2 (citing 33 U.S.C. § 1251(a)).

State and Business Petitioners contend that under Justice Kennedy’s significant nexus standard, jurisdiction may be established only where a water significantly affects the chemical, physical, *and* biological integrity of a primary water. States Br. 31-33; Bus. Br. 69-70. Petitioners misconstrue the Act and Justice Kennedy’s concurring opinion in *Rapanos*.

Justice Kennedy noted the “objective” of the CWA: “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters,” *Rapanos*, 547 U.S. at 759 (quoting 33 U.S.C. § 1251(a)). Justice Kennedy then stated 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. However, in quoting the phrase “chemical, physical, and biological integrity” from the Act’s objective, Justice Kennedy could not have meant to require that all three types of integrity be significantly affected for there to be a significant nexus. This is evident from the types of functions that Justice Kennedy identified that could form a significant nexus—such as pollution filtering or trapping, flood control, and runoff storage—that do not necessarily affect all three types of integrity. *Id.* at 775, 779, 786. Congress intended the CWA to “restore and maintain” all three types of integrity, 33

U.S.C. § 1251(a), and it would be contrary to the statute's stated objective if any one were compromised.

Under Petitioners' view, a water that significantly affects the physical and biological (but not the chemical) integrity of a nearby traditional navigable water would not be protected under the Act. That would be akin to requiring that any actions taken under the Act both "restore *and* maintain" the Nation's waters, *id.* (emphasis added), such that any action that accomplished only restoration or only maintenance would be contrary to the objectives of the Act. Neither the Act nor Justice Kennedy's opinion supports such an illogical reading. Requiring a significant effect on all three types of integrity would be "incongruous with the Act's objectives and inconsistent with the language in the Act." *Benjamin v. Douglas Ridge Rifle Club*, 673 F. Supp. 2d. 1210, 1217 n.4 (D. Or. 2009); *see also id.* (rejecting argument that significant effect to all three forms of integrity must be present); *OfficeMax, Inc. v. United States*, 428 F.3d 583, 589-90 (6th Cir. 2005) (explaining that use of "and" in a statute should be construed disjunctively when necessary to avoid an incoherent reading of the statute).

Likewise, this Court and others have approached the inquiry disjunctively, asking whether there is a significant effect on any one (or more) of the three forms of integrity for purposes of establishing CWA jurisdiction. *See, e.g., Cundiff*, 555 F.3d at 211 n. 4 (stating that the evidence indicated that placing poison into the defendants' wetlands would reach two creeks and the Green River, thereby establishing a

“significant chemical, physical, *or* biological connection between the wetlands and the nearby navigable-in-fact waters”) (emphasis added); *Benjamin*, 673 F. Supp. 2d. at 1217 n.4 (“What is important is not that the nexus between the wetland and the navigable water is chemical, physical, and biological, but that the nexus is *significant*.”) (emphasis in original); *Robison*, 505 F.3d at 1223 (finding that the government had failed to present evidence “about the possible chemical, physical, *or* biological effect” that a creek had on a navigable river) (emphasis added); *United States v. Robertson*, CR15-07-H-DWM, 2015 WL 7720480, *3 (D. Mont. Nov. 30, 2015), *appeal (on other grounds) pending* No. 16-30178 (9th Cir.) (affirming jury instructions that provided that a significant nexus is established if the water in question significantly affects the chemical, physical, *or* biological integrity of traditional navigable waters). Thus, as a textual matter, the Rule reasonably grounds significant nexus in waters where chemical, physical, or biological integrity is implicated.

The Agencies’ definition of significant nexus is further supported by the scientific evidence in the record. The effect of an upstream water can be significant even if that water provides just one of the functions listed in 33 C.F.R. § 328.3(c)(5). TSD at 180-84, JAxxxx-xxxx; *see also* 80 Fed. Reg. at 37,066/2 (describing significant effects of excess nutrients on downstream waters). The definition is also consistent with the Agencies’ practice since *Rapanos*, where field staff evaluate the functions of the waters in question and the effects of those functions on downstream waters. 80 Fed. Reg. at 37,091/2; RTC Topic 4 at 31, JAxxxx. For example, in one of the

jurisdictional determinations in the record, the Agencies found that the subject tributary had a significant nexus to Canyon Lake, a traditional navigable water, based on the tributary's substantial effects on the chemical integrity of the lake. SPL-2007-261-FBV, AR-20876 at 27-31, JAxxxx-xxxx. *See also Rapanos* Guidance at 8-11, JAxxxx-xxxx.

Nor does the definition of significant nexus “reinstate[] the Migratory Bird Rule,” as Petitioners suggest. Bus. Br. 69; *see also* States Br. 32-33. In *SWANCC*, the Court held that the use of isolated, nonnavigable, intrastate ponds by migratory birds was not by itself a sufficient basis for the exercise of federal regulatory authority under 33 C.F.R. § 328.3(a)(3) (1987). But the Clean Water Rule is very different from the Agencies' administrative interpretation at issue in *SWANCC*.

The Rule lists nine functions that may be analyzed with respect to primary waters in case-specific significant nexus determinations. 33 U.S.C. § 328.3(c)(5)(i)-(ix). One of those functions is the “[p]rovision of life cycle dependent aquatic habitat ([including, but not limited to,] as foraging, feeding, nesting, breeding, spawning, or use as a nursery area) *for species located in a water identified in paragraphs (a)(1) through (3),*” i.e., a primary water. *Id.* 328.3(c)(5)(ix) (emphasis added); *see also* 80 Fed. Reg. at 37,068/1-2. For example, amphibians, reptiles, or aquatic birds that move between a primary water and a case-specific water, and depend on both waters for feeding, nesting, or breeding, demonstrate evidence of a biological connectivity between those waters. *See* TSD at 152-53, JAxxxx-xxxx (describing examples of biological

connectivity due to movement of fish, snails, and invertebrates in river systems and floodplain wetland habitats). In the preamble, the Agencies explicitly state that “[n]on-aquatic species or species such as non-resident migratory birds do not demonstrate a life cycle dependency on the identified aquatic resources [i.e., primary waters] and are not evidence of biological connectivity for purposes of this rule.” 80 Fed. Reg. at 37,094/2. Thus, the Rule avoids the deficiency found in *SWANCC* by requiring a significant nexus to a primary water rather than just protecting an isolated, nonnavigable, intrastate water based on the presence of migratory birds.

Here, the Agencies reasonably identified functions that significantly affect the biological (as well as chemical and physical) integrity of primary waters. Where a case-specific water is found to significantly affect a primary water by providing life cycle dependent aquatic habitat for species in a primary water, that water should be protected under the CWA. *SWANCC* is not to the contrary.

IV. The Agencies properly interpreted “waters of the United States” to exclude certain waters.

The Rule retains two pre-existing exclusions from the definition of “waters of the United States” and adds several exclusions that reflect longstanding agency practices and public input during the rulemaking. Associational and Waterkeeper Petitioners challenge the exclusions as inconsistent with congressional intent and the significant nexus analysis. In fact, the exclusions reasonably interpret the CWA and the legal concept of significant nexus. Moreover, the exclusions are a reasonable

mechanism for delineating the outer reaches of CWA jurisdiction in a clear, practical, and functional way for the regulated public and regulators.

A. Regulatory exclusions are within the Agencies' CWA authority.

Associational Petitioners argue that *any* exclusion of a water that could plausibly meet the significant nexus standard exceeds the Agencies' statutory authority under the CWA. Ass'n Br. 39-43. This threshold argument lacks any statutory support, and ignores judicial and congressional affirmation of prior regulatory exclusions. It also contradicts the courts' repeated acknowledgement that the phrase "waters of the United States" is ambiguous, ignores the necessity for administrative line-drawing, and is not supported by the cases Petitioners cite.

Nothing in the CWA precludes the Agencies from using their rulemaking authority under 33 U.S.C. § 1361(a) to promulgate exclusions from the undefined statutory term "waters of the United States." The textual basis for Associational Petitioners' argument—the congressional goal to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters," 33 U.S.C. § 1251(a), Ass'n Br. 6, 30, 39—does not mandate that the Agencies exercise their authority at the outermost possible bound. To the contrary, the Agencies have considerable discretion in interpreting the term "waters of the United States." *See supra* at 55.

"[B]right-line tests are a fact of regulatory life." *Macon Cnty. Samaritan Mem'l Hosp.*, 7 F.3d at 768. Under the CWA, the Agencies may draw bright lines administratively defining "categories" of waters based on their evaluation of what is

“significant enough.” *Rapanos*, 547 U.S. at 780–81. In fact, several Justices have called on the Agencies to clarify “waters of the United States” through rulemaking. *See id.* at 758 (Roberts, C.J., concurring); *id.* at 811-12 (Breyer, J., dissenting); *Sackett*, 132 S. Ct. at 1375-76 (Alito, J., concurring). Clarity requires line drawing, which necessarily entails the exclusion of some waters from the definition of “waters of the United States.” Notably, the sole court of appeals to consider the Agencies’ authority to promulgate an exclusion under the Act concluded that the Agencies acted within their authority in promulgating that exclusion. *See infra* at 149-50 (discussing *Ohio Valley Envtl. Coal. v. Aracoma Coal Co.*, 556 F.3d 177 (4th Cir. 2009)). Congress’s acknowledgment of a prior exclusion also suggests that Congress considered exclusions to be within the scope of the Agencies’ authority under the CWA.³² *Cf.* *Riverside Bayview*, 474 U.S. at 137 (“[A] refusal by Congress to overrule an agency’s construction of legislation is at least some evidence of the reasonableness of that construction, particularly where the administrative construction has been brought to Congress’ attention...”).

³² Pursuant to EPA and Corps regulations, wetlands that qualify as “prior converted cropland” are categorically excluded from the definition of “waters of the United States.” *See, e.g.*, 33 C.F.R. § 328.3(b)(2); *see also* 58 Fed. Reg. 45,008, 45,034 (Aug. 25, 1993). Congress discussed the Agencies’ prior converted cropland exclusion when amending the Food Security Act in 1996. *See* H.R. Rep. No. 104-494, at 380, *as reprinted in* 1996 U.S.C.C.A.N. 683, 745 (referencing “prior converted cropland” and stating the Food Security Act amendments “should not supersede the wetland protection authorities and responsibilities of the [Agencies] under Section 404 of the Clean Water Act”).

Associational Petitioners' reliance on cases addressing exemptions for categories of point sources from the Act's permitting requirements, Ass'n Br. 41, is misplaced. In *NRDC v. Costle*, 568 F.2d 1369, 1377 (D.C. Cir. 1977), *Forsgren*, 309 F.3d at 1190, and *Northwest Environmental Advocates v. EPA*, 537 F.3d 1006 (9th Cir. 2008), two courts concluded that because the NPDES permitting program under 33 U.S.C. § 1342 is central to CWA enforcement, EPA could not exempt categories of point sources. But those cases do not stand for the broad proposition that the Agencies lack authority to exclude some waters from the definition of waters of the United States. Moreover, unlike the categorical point source exceptions in those cases, the Rule's exclusions align with longstanding agency interpretations developed through decades of implementing the CWA that certain waters and features are not waters of the United States. Nor do the exclusions in the Rule have the effect of exempting discharges of pollutants from statutory permitting requirements. As explained *infra* at 139-42 (ditch exclusions), 142-46 (groundwater), and 146-50 (waste treatment system exclusion), while a CWA permit would not be required to discharge directly into an excluded water, if a discharge reaches "waters of the United States" through an excluded water, such discharge may be subject to NPDES permitting.

Associational Petitioners also mistakenly rely on *National Cotton Council of America v. EPA*, 553 F.3d 927, 936 (6th Cir. 2009). In *National Cotton* this Court concluded that pesticide residue could not be exempted from the CWA definition of "pollutant" because it is a "chemical waste" and "biological material[]," terms

included in the statutory definition, 33 U.S.C. § 1362(6). In contrast to the detailed statutory definition addressed in *National Cotton*, the statutory definition of “navigable waters,” *id.* § 1362(7), simply refers to the ambiguous term “waters of the United States.”³³

Nor does *NRDC v. Callaway*, 392 F. Supp. 685, 686 (D.D.C. 1975), compel the inflexible interpretation of “waters of the United States” advocated by Petitioners, *see* Ass’n Br. 40, 42. Aside from the district court’s lack of an articulated rationale, the Supreme Court’s subsequent decisions in *SWANCC* and *Rapanos* make clear that *Callaway* cannot foreclose the Agencies from clarifying the meaning of “waters of the United States” by excluding certain waters. *See supra* at 10-12.

B. The Agencies reasonably interpret “waters of the United States” to exclude some waters from the CWA’s reach.

Associational Petitioners argue broadly that the exclusion of any water with a significant nexus is arbitrary and capricious. Ass’n Br. 43-44. Petitioners also specifically challenge the erosional feature exclusion at 33 C.F.R. § 328.3(b)(4)(vi); the ditch exclusions at section 328.3(b)(3); and the groundwater exclusion at section 328.3(b)(5). Ass’n Br. 28-49; Waterkeeper Br. 41-54. These arguments are unavailing.

³³ *North Plains Resource Council v. Fidelity Exploration & Development Company*, 325 F.3d 1155 (9th Cir. 2003), which also turned on the interpretation of the term “pollutant,” is likewise distinguishable.

Petitioners' arguments presume that the Rule is based *solely* on science, but as the Agencies frequently noted, it is not. Indeed, “[s]ignificant nexus is not purely a scientific determination.” 80 Fed. Reg. at 37,060/3; *see also id.* at 37,056-57 (the Agencies considered the goals, objectives, and policies of the CWA, Supreme Court case law, the Agencies’ own technical expertise and experience, and many requests for bright-lines). The Agencies’ practical line-drawing fully comports with the Supreme Court’s view that the Agencies’ task is to determine whether categories of nonnavigable waters are “significant enough” to the “aquatic system incorporating navigable waters” to qualify for CWA protection. *Rapanos*, 547 U.S. at 780–81 (Kennedy, J., concurring).

The Agencies began by examining their longstanding practices to identify waters that they had generally treated as non-jurisdictional. 79 Fed. Reg. at 22,218/2. These waters included erosional features, a subset of ditches, and groundwater. *Id.* at 22,218-19.

The Agencies also considered numerous comments in support of the proposed exclusions and suggestions for additional exclusions. *See, e.g.*, 80 Fed. Reg. 37,097-98; RTC Topic 7 at 23-28, JAxxxx-xxxx. The Agencies properly balanced numerous considerations in determining whether certain waters have a significant nexus with downstream primary waters and, in a few narrow instances, legal, policy, or other technical factors outweighed possible connections to primary waters. *See infra* at 137-38 (erosional feature exclusion), 139-42 (ditch exclusions), 142-45 (groundwater

exclusion); *see also supra* at 121-24 (4,000 foot limitation). Where the Agencies concluded that a suggested exclusion would provide clarity and also accord with the Agencies' established interpretation of the CWA, they adopted it. *See, e.g.*, 80 Fed. Reg. at 37,100/1-2 (adding a new exclusion for stormwater control features in response to requests for clarity, and based on longstanding view that such features were non-jurisdictional when not constructed in jurisdictional waters).

Such administrative line-drawing need not be mathematically precise. Rather, the fundamental question is whether the "lines drawn ... are patently unreasonable, having no relationship to the underlying regulatory problem." *All. for Cmty. Media*, 529 F.3d at 780 (citing *Covad Commc'n Co. v. FCC*, 450 F.3d 528, 541 (D.C. Cir. 2006)). The Rule's use of bright-line exclusions taken from the Agencies' historical practices passes that test.

1. The Agencies reasonably interpreted the CWA to exclude erosional features.

The Rule excludes erosional features from the definition of "waters of the United States." 33 C.F.R. § 328.3(b)(4)(vi); *see also* 80 Fed. Reg. at 37,099/2. Ephemeral streams that have a bed and banks and another ordinary high water mark indicator and contribute flow to a primary water satisfy the definition of tributary, and thus, are not excluded erosional features. 80 Fed. Reg. at 37, 099/3. Conversely, ephemeral streams that do not meet the definition of "tributary" are excluded as erosional features. 33 C.F.R. § 328.3(b)(4)(vi).

Associational and Waterkeeper Petitioners contend that erosional features should be considered waters of the United States because water flowing through such features could have connections to downstream primary waters. Ass'n Br. 46-48; Waterkeeper Br. 45-50. But the exclusion of erosional features is consistent with the definition of tributary, and is reasonable in light of the Agencies' technical expertise and longstanding practices. *See, e.g.*, 80 Fed. Reg. at 37,075-80; 80 Fed. Reg. at 37,097/1, 37,099/2-3; RTC Topic 7 at 268, JAxxxx.

Numerous commenters stated that the proposed exclusion of erosional features would avoid confusion. *See, e.g.*, RTC Topic 7 at 268, 270-72, JAxxxx, xxxx-xxxx. The Agencies agreed, concluding that it was important to continue their historical practice of excluding erosional features. 80 Fed. Reg. at 37,097/1, 37,099/2.

The Agencies do not dispute that some streams in arid and semi-arid environments or in low gradient landscapes lack an ordinary high water mark. *See* SAB Proposed Rule Review at 2, JAxxxx. However, as discussed *supra* at 72-77, the Agencies reasonably concluded that the ordinary high water mark is indicative of regular intervals of flow, including in the arid West. Therefore, the Agencies reasonably determined that erosional features—which contain less regular flow than tributaries—should be excluded. 80 Fed. Reg. at 37,099/2-3; TSD at 260-61, JAxxxx-xxxx.

2. The Agencies reasonably interpreted the CWA to distinguish between jurisdictional and excluded ditches.

The Rule excludes three types of ditches: (1) those with ephemeral flow, provided that they were not excavated in or relocate a tributary; (2) those with intermittent flow, provided that they were not excavated in or relocate a tributary and that they do not drain wetlands; and (3) those that do not flow, directly or indirectly, into a primary water. 33 C.F.R. § 328.3(b)(3)(i)-(iii).

Waterkeeper Petitioners challenge the first two ditch exclusions, 33 C.F.R. § 328.3(b)(3)(i)-(ii). Waterkeeper Br. 46-50. Contrary to Petitioners' arguments, these exclusions are supported by the record and were adequately explained.

The Agencies have long distinguished between ditches that require protection under the Act and those that do not. The Agencies historically have considered some non-tidal drainage and irrigation ditches excavated in dry land to be non-jurisdictional. *See* 51 Fed. Reg. at 41,217/1; 53 Fed. Reg. at 20,765/2 (June 6, 1988). Following *Rapanos*, the Agencies stated that they generally would not assert jurisdiction over upland ditches that lack relatively permanent flow and that do not drain wetlands. *Rapanos* Guidance at 1, JAxxxx.

The Agencies' goal in promulgating the ditch exclusions was to "improve clarity, predictability, and consistency." 79 Fed. Reg. at 22,219/2. Prior to the Rule, "there [were] inconsistencies in practice implementing agency policy with respect to ditches." *Id.* Thus, the Agencies' primary objective was to address the "existing

confusion and inconsistency regarding the regulation of ditches.” 80 Fed. Reg. at 37,058/2.

The Agencies received many comments regarding the regulation of ditches, and the overwhelming majority requested clarity and limitations. *See, e.g.*, RTC Topic 6 at 24-25, 202-04, 211, JAxxxx-xxxx, xxxx-xxxx, xxxx. Some commenters suggested that all ditches be excluded from regulation, but that would be inconsistent with the CWA, the Agencies’ practice, and numerous courts of appeals decisions. *See supra* at 79-84; *see also* TSD at 73, JAxxxx (citing numerous cases). Instead, the Agencies weighed various options for excluding certain categories of ditches based on flow. 79 Fed. Reg. at 22,203-04, 22,219/1-3; 80 Fed. Reg. at 37,097-98.

The Agencies sought comment “on whether the flow regime in [excluded] ditches should be less than intermittent flow or whether the flow regime in such ditches should be less than perennial flow as proposed.” 79 Fed. Reg. at 22,219/3. Some commenters responded that perennial flow is the simplest to understand and document. RTC Topic 6 at 25, 185-86, 188-89, JAxxxx, xxxx-xxxx, xxxx-xxxx. The Agencies concluded that they would continue to regulate all ditches with perennial flow, ditches that are excavated in or redirect flow from a tributary, and tributary ditches with more than ephemeral flow that drain wetlands; but other ditches would

be excluded.³⁴ *Id.* at 29-30, 185-88, JAxxxx-xxxx, xxxx-xxxx; *see also* 80 Fed. Reg. at 37,098/1-2; TSD at 187, JAxxxx.

The Agencies considered the SAB’s view that some ditches with connections to downstream waters would be excluded under this approach, as well as the need for consistency and clarity. TSD at 163, JAxxxx; *see also* 80 Fed. Reg. at 37,097/3. The Agencies relied on their technical expertise and extensive experience in implementing the CWA over the past four decades in determining where to draw the line between regulated tributaries and excluded ditches. 80 Fed. Reg. at 37,097/1; RTC Topic 6 at 29-30, 185-88, JAxxxx-xxxx, xxxx-xxxx. Balancing all of these factors and the CWA, relevant case law, and public comments, the Agencies reasonably determined that they would continue their policy of not exercising jurisdiction over “[d]itches (including roadside ditches) excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water.” RTC Topic 6 at 185, 187, JAxxxx, xxxx (discussing *Rapanos* Guidance).

Excluded ditches are not wholly exempt from CWA permitting requirements, as they “may function as ‘point sources’ under [33 U.S.C. § 1362(14)], such that

³⁴ The distinction between an excluded ditch and tributary under the Rule is not “blurred to the point of nonexistence.” *Waterkeeper Br.* 49; *see also* *States Br.* 27, 73. Many tools are available to determine the historical presence of tributaries, such as on-site characteristics and “historical maps, historic aerial photographs, local surface water management plans, street maintenance data, wetlands and conservation programs and plans, as well as functional assessments and monitoring efforts.” 80 Fed. Reg. at 37,078/3-37,079/1.

discharges of pollutants to waters through these features would be subject to other CWA regulations (e.g., [33 U.S.C. § 1342]).” 79 Fed. Reg. at 22,219/3; *see also Rapanos*, 547 U.S. at 735-36 (plurality) (noting that ditches may be point sources). In other words, while discharges *into* an excluded ditch will not be subject to CWA requirements, discharges of pollutants *from* an excluded ditch into a jurisdictional water may be regulated. In this way, the ditch exclusions are consistent with congressional policy reflected in 33 U.S.C. § 1344(f)(1)(C), which exempts discharges of dredged or fill material from the construction and maintenance of irrigation ditches or for the maintenance of drainage ditches from section 404 permit requirements.

3. The Agencies reasonably interpreted the CWA to exclude groundwater.

The Rule excludes groundwater from the definition of “waters of the United States.” 33 C.F.R. § 328.3(b)(5). Waterkeeper Petitioners contend that this exclusion is arbitrary and capricious because it “abandon[s]” the significant nexus framework. Waterkeeper Br. 50; *see also* Ass’n Br. 49 (incorporating Waterkeeper’s argument). Petitioners’ argument is misplaced.

Groundwater is not itself jurisdictional, but discharges to groundwater with a direct hydrologic connection to jurisdictional surface waters are subject to CWA regulation. 80 Fed. Reg. at 37,099/3, 37,101/1; TSD at 16-17, JAxxxx-xxxx.³⁵ The

³⁵ *See also* Amendments to the Water Quality Standards Regulations that Pertain to Standards on Indian Reservations, 56 Fed. Reg. 64,876, 64,892/3 (Dec. 12, 1991)

Cont.

Agencies made clear that “[n]othing in this [R]ule changes or affects that longstanding interpretation, including the exclusion of groundwater from the definition of ‘waters of the United States.’” RTC Topic 10 at 383, 386-387, JAxxxx, xxxx-xxxx.

The groundwater exclusion is consistent with the Act and the case law, and is reasonable based on legal and policy considerations. Although the CWA occasionally refers to groundwater, groundwater is noticeably absent from the prohibition on discharges to navigable waters and from the permitting provisions. *Compare* 33 U.S.C. § 1254(a)(5) (providing for “monitoring the quality of the navigable waters and ground waters”) *with* 33 U.S.C. §§ 1311, 1342, 1344, 1362(12)(A) (prohibiting the discharge of a pollutant into “navigable waters” except in compliance with specified CWA sections); *see also* 33 U.S.C. § 1252(a) (differentiating between “navigable waters and ground waters” and between “surface and underground waters”). The occasional references to groundwater strongly indicate that Congress considered groundwater something other than waters of the United States.

(“[I]he affected ground-waters are not considered ‘waters of the United States’ but discharges to them are regulated because such discharges are effectively discharges to the directly connected surface waters.”); NPDES Permit Application Regulations for Storm Water Discharges, 55 Fed. Reg. 47,990, 47,997/3 (Nov. 16, 1990) (“this rulemaking only addresses discharges to waters of United States, consequently discharges to ground waters are not covered by this rulemaking (unless there is a hydrological connection between the ground water and a nearby surface water body”).

Moreover, the legislative history of the CWA indicates that Congress did not intend to regulate groundwater. The report accompanying the Senate version of the CWA stated:

Several bills pending before the Committee provided authority to establish Federally approved standards for groundwaters which permeate rock, soil and other surface formations. Because the jurisdiction regarding groundwaters is so complex and varied from State to State, the Committee did not adopt this recommendation.

S. Rep. No. 414, 92nd Cong., 1st Sess. 73 (1971), U.S. Code Cong. & Admin. News 1972, pp. 3668, 3749. The House also rejected an amendment that would have brought groundwater within the permitting and enforcement sections of the bill. 118 Cong. Rec. 10,669 (1972). In opposing that amendment, Rep. Clausen, a sponsor of the House bill, stated:

Mr. Chairman, in the early deliberations within the committee which resulted in the introduction of H.R. 11896, a provision for ground waters, similar to that suggested by the gentleman from Wisconsin, was thoroughly reviewed and it was determined by the committee that there was not sufficient information on ground waters to justify the types of controls that are required for navigable waters.

118 Cong. Rec. 10,667 (1972) (remarks of Rep. Clausen). Consistent with the CWA's limited and isolated references to groundwater, its legislative history, and EPA's longstanding interpretation, numerous courts have concluded that Congress did not intend the term "waters of the United States" to include groundwater. *See, e.g., Village of Oconomowoc Lake v. Dayton Hudson, Corp.*, 24 F.3d 962, 965 (7th Cir. 1994); *Chevron U.S.A. Inc. v. Apex Oil Co., Inc.*, 113 F. Supp. 3d 807, 816 (D. Md. 2015).

Idaho Rural Council v. Bosma, 143 F. Supp. 2d 1169, 1179-80 (D. Idaho 2001), is not to the contrary. Waterkeeper Br. 53. The court there concluded that “the CWA extends federal jurisdiction over groundwater that is hydrologically connected to surface waters that are themselves waters of the United States.” *Id.* at 1180. The district court, recognizing Congress’s goals in the CWA, concluded that in certain circumstances discharges of pollutants that reach jurisdictional waters through groundwater fall within the Act’s reach. That conclusion is consistent with EPA’s interpretation that although groundwater itself is not a water of the United States, discharges into groundwater that reach jurisdictional waters may be subject to CWA requirements.

Contrary to Petitioners’ suggestion, Waterkeeper Br. 50-53, there is nothing inconsistent between the exclusion of groundwater and the Agencies’ determination that shallow subsurface flow may support the basis for a significant nexus determination, which properly recognizes the importance of shallow subsurface hydrologic connections between geographically separated surface waters. *See, e.g.*, 79 Fed. Reg. at 22,208/2-3; TSD at 371-78, JAXXXX-XXXX; *cf.* 80 Fed. Reg. at 37,099-100 (noting that “surface expressions of groundwater, ... such as where groundwater emerges on the surface and becomes baseflow in streams or spring fed ponds” are not excluded under 33 C.F.R. § 328.3(5)).

C. The Agencies did not reopen the exclusion for waste treatment systems, and even if they had, the exclusion is reasonable.

Associational Petitioners argue that the waste treatment system exclusion at 33 C.F.R. § 328.3(b)(1) exceeds the Agencies' statutory authority, Ass'n Br. 30-31; that it is arbitrary and capricious, *id.* 32-35; and that the Agencies should have responded substantively to their comments, *id.* 36-39. Their challenges are untimely, but in any event, the exclusion is within the Agencies' authority and is a reasonable interpretation of the CWA.

1. Petitioners' challenge to the waste treatment system exclusion is untimely.

The Rule moves the challenged waste treatment system exclusion from 33 C.F.R. § 328.3(b)(8), where it had been codified since 1982, to subsection 328.3(b)(1) in order to consolidate it with the other regulatory exclusions.³⁶ Petitioners' arguments are untimely because the challenged exclusion was promulgated more than thirty years ago.

As discussed *supra* at 103-04, a prior rule is not reopened to challenge if the agency "has not created the opportunity for renewed comment and objection." *Ohio PIRG*, 386 F.3d 800 (internal quotation and citation omitted); *see also Am. Iron & Steel*, 886 F.2d at 397 (issue reopened only if agency proposes substantive changes, solicits

³⁶ Other regulations that address waters of the United States contain similar, though not all identical, exclusions for waste treatment systems. The Agencies did not change these other versions either.

comments, and responds substantively in promulgating the final regulation). Thus, reopening occurs only if the agency undertakes a “serious, substantive reconsideration” of the existing rule. *See Nat’l Mining Ass’n v. DOI*, 70 F.3d 1345, 1352 (D.C. Cir. 1995).

Here, the Agencies did not purport to reexamine, reconsider, or invite comment on the substance of the 1982 waste treatment systems exclusion. The Agencies proposed only two minor ministerial actions: a change in the placement of the exclusion and the deletion of a cross-reference to an EPA regulation that is no longer in the Code of Federal Regulations. 79 Fed. Reg. at 22,217/3. The Agencies expressly stated that they were *not* reopening the waste treatment system exclusion. *Id.* (“The agencies do not propose to address the substance of the waste treatment system exclusion....”).

The Agencies did not substantively respond to unsolicited comments. 80 Fed. Reg. at 37,097/2 (noting comments “outside the scope of the proposed rule”). Nor did the Agencies make any substantive changes to the Rule. *See id.* (“[t]he agencies do not intend to change how the waste treatment exclusion is implemented”).

Associational Petitioners incorrectly assert that the Rule “permanently adopted” a version of the waste treatment system exclusion without limiting language that had been suspended in 1980. Ass’n Br. 36 (citing 45 Fed. Reg. 48,620 (July 21, 1980)). The version of the waste treatment system exclusion Associational Petitioners refer to, located at 40 C.F.R. § 122.2(2)(i), states:

At 45 FR 48620, July 21, 1980, the Environmental Protection Agency suspended until further notice in § 122.2, the last sentence, beginning “This exclusion applies ___” in the definition of “Waters of the United States.” *This revision continues that suspension.*¹

(1) [C.F.R.] Editorial Note: The words “This revision” refer to the document published at 48 FR 14153, Apr. 1, 1983.

(Emphasis added). As the C.F.R. Editorial Note makes clear, the suspension from 1980 was first continued in a 1983 rulemaking, and it was continued again in the Rule. Associational Petitioners’ assertion that the Rule “made the suspension permanent,” Ass’n Br. 29, is without merit. Petitioners may file an administrative petition requesting that the Agencies undertake a new rulemaking to address the continued suspension, but they cannot now bring a collateral attack on a 1980 agency action that was not reopened by the Rule. Such a challenge is untimely.

2. The waste treatment system exclusion is permissible and reasonable.

If the Court reaches the merits of the waste treatment system exclusion, it should reject Associational Petitioners’ argument that the exclusion exceeds the Agencies’ authority under the CWA.

Contrary to Petitioners’ suggestion, Ass’n Br. 30-31, there is no conflict between the waste treatment system exclusion and the CWA’s goal of eliminating pollution discharges or the Act’s permit requirements. The waste treatment system exclusion does not free a discharger from the need to comply with the CWA with respect to pollutants that are discharged from a waste treatment system to a water of the United States. The waste treatment system exclusion exempts only those

discharges that remain within the treatment system itself. *See Healdsburg*, 496 F.3d at 1002 (“The exception was meant to avoid requiring dischargers to meet effluent discharge standards for discharges *into* their own closed system treatment ponds.”) (citing 45 Fed. Reg. 48,620-21 (July 21, 1980)) (emphasis in original). Thus, the exclusion is distinguishable from the categorical “point source” exemptions that Associational Petitioners note some courts have found to be *ultra vires*. *See, e.g., Costle*, 568 F.2d at 1377 (cited at Ass’n Br. 31, 41-43).

Typically, the waste treatment system exclusion applies to ponds and lagoons constructed in non-jurisdictional uplands. *See, e.g.,* 44 Fed. Reg. 32,854, 32,858 (June 7, 1979); *Healdsburg*, 496 F.3d at 1001. Occasionally, the waste treatment system exclusion may apply where an impoundment has been constructed in a stream for treatment of wastes such as mine tailings. *See, e.g., Ohio Valley Envtl. Coal.*, 556 F.3d 177. It is this application of the exclusion that Petitioners specifically challenge. Ass’n Br. 30-31 (asserting that the Agencies cannot “remove waters of the United States from the Act’s protections”).

The Fourth Circuit in *Ohio Valley Environmental Coalition*, considered this precise issue and, as Petitioners acknowledge, Ass’n Br. 31-32, n.9, concluded that the exclusion was neither *ultra vires* nor unreasonable. In *Ohio Valley Environmental Coalition*, the plaintiffs challenged four CWA permits issued by the Corps for the discharge of dredged or fill material associated with surface coal mining, which were

based in part on the Corps' characterization of certain stream segments as "waste treatment systems." *Id.* at 185-86, 211.

The Fourth Circuit reversed the district court judgment in plaintiffs' favor. Applying the *Chevron* framework, the court first concluded that Congress had delegated authority to the Corps to determine the scope of the term "waters of the United States." *Id.* at 212. The court then held that the Corps' application of the regulatory exemption to a water that would otherwise be part of a natural stream, and thus a water of the United States, was permissible. *Id.* at 212-15. The court concluded that the Corps' permitting decision, including the conclusion that stream segments connecting valley fills to sediment ponds are waste treatment systems and not waters of the United States, reasonably harmonized the goals of the CWA and the Surface Mining Control and Reclamation Act. *Id.* at 216 (citing 30 U.S.C. § 1202(f) (2000)).

Petitioners' contention that the Rule changes EPA's interpretation of the waste treatment system exclusion is meritless. Ass'n Br. 33-34. EPA's longstanding interpretation of the exclusion is that waste treatment systems may be located in a water of the United States only if the embankment that creates the waste treatment system is authorized by a section 404 permit. *See, e.g.*, 80 Fed. Reg. at 37,097/2 (explaining that a section 404 permit would be necessary to construct a waste treatment system in a water of the United States and a section 402 permit would be

required for any discharge into a water of the United States); *Ohio Valley Emtl. Coal.*, 556 F.3d at 214 (discussing 1992 and 2006 EPA guidance documents).³⁷

If this Court were to address the reasonableness of the waste treatment system exclusion, despite the untimeliness of the challenge, it should follow the reasoning of the Fourth Circuit in *Ohio Valley Environmental Coalition* and conclude that the exclusion is lawful.

V. The Rule is constitutional.

The Rule is consistent with Congress's Commerce Clause authority to protect the Nation's waters from pollution, and with states' authority to regulate land use, protect water resources, and implement the CWA under its cooperative federalism framework. In providing clarity to the regulatory definition of waters of the United States, the Rule is more than clear enough to meet Due Process requirements. There also is no need to apply any of the constitutional canons the Petitioners invoke.

³⁷ EPA's position in *West Virginia Coal Ass'n v. Reilly*, 728 F. Supp. 1276, 1282 (S.D.W. Va. 1989), *aff'd* 932 F.2d 964 (4th Cir. 1991), is entirely consistent with the regulatory exclusion. EPA's position was that West Virginia could allow instream treatment under some circumstances, but that a section 404 permit might also be required to create the waste treatment system. *Id.* at 1282. In *Ohio Valley Environmental Coalition*, the Fourth Circuit revisited its decision in *Reilly*, and reviewed guidance documents addressing the application of the waste treatment system exclusion to in-stream treatment of mine tailings, and noted that the Agencies' administrative positions and implementation of the waste treatment system exclusion had been consistent. 556 F.3d at 214-25.

Co., 313 U.S. 508, 525-26 (1941)). The Rule incorporates Justice Kennedy’s significant nexus approach and interprets waters of the United States to include traditional navigable waters, interstate waters, and the territorial seas and those waters having a significant nexus to these primary waters. In many cases, interstate waters are or have been navigable-in-fact or susceptible to reasonably being so made, and thus are also traditional navigable waters.³⁹ Thus, by design, the heart of the Rule’s reach is waters that fall within Congress’s broad power over channels of interstate commerce.

Traditional navigable waters are within Congress’s power to regulate. “It has long been settled that Congress has extensive authority over this Nation’s waters under the Commerce Clause” as “channels of interstate commerce.” *Kaiser Aetna v. United States*, 444 U.S. 164, 173 (1979); *United States v. Hubenka*, 438 F.3d 1026, 1032 (10th Cir. 2006) (citations omitted); *Deaton*, 332 F.3d at 706 (citations omitted); see *Illinois v. City of Milwaukee*, 406 U.S. at 101 (noting that “Congress has enacted numerous laws touching interstate waters”). These categories of primary waters have been included in the regulatory definition of waters of the United States since 1977, and Petitioners point to no case even suggesting that the primary waters protected by the Rule are outside of Congress’s Commerce Clause power.

³⁹ As discussed *supra*, Argument Section II.C, the CWA regulates interstate waters whether or not they are navigable. References to interstate waters in this part of the argument are to interstate waters that are also navigable. In the next part, we address Congress’s Commerce Clause authority to regulate nonnavigable interstate waters.

Petitioners do not dispute that the power to regulate channels of commerce includes the power to regulate nonnavigable waters that have an impact on traditional navigable waters. *See* States Br. 66; *see also* Amicus Br. of Members of Congress 5-6, 10. State Petitioners contend that the Rule “sweeps” in waters that are not navigable and have only a “tangential” connection to traditional navigable waters. States Br. 66; *see also* Bus. Br. 88. This argument reflects more Petitioners’ disagreement with the Agencies’ scientific and technical judgments regarding what constitutes a significant nexus than it does a constitutional defect. As Justice Kennedy found in *Rapanos*, “the significant-nexus test itself prevents problematic applications of the statute.” 547 U.S. at 783. By interpreting waters of the United States to include traditional navigable waters and waters that, categorically or on a case-specific basis, have a significant effect on the quality of traditional navigable waters, the protections afforded by the CWA reach waters that are clearly within Congress’s power over channels of interstate commerce.

To the extent Petitioners mean that Congress may not regulate waters based on water quality impacts, as opposed to navigation impacts, they are wrong. Congress has broad power to keep the channels of commerce free from injurious uses. *See, e.g., Pierce Cnty. v. Guillen*, 537 U.S. at 147; *Lopez*, 514 U.S. at 558; *Perez v. United States*, 402 U.S. 146, 150 (1971); *Caminetti v. United States*, 242 U.S. 470, 491 (1917); *The Lottery Case (Champion v. Ames)*, 188 U.S. 321 (1903). Thus, courts have recognized that the power over traditional navigable waters as channels of commerce includes “the power

to regulate waters to limit pollution, prevent obstructions to navigation, reduce flooding, and control watershed development.” *Hubenka*, 438 F.3d at 1032 (citations omitted). Indeed, the pollution control objectives of the Act were evident in the earliest CWA cases. As this Court stated:

It would, of course, make a mockery of those [commerce] powers if [Congress’s] authority to control pollution was limited to the bed of the navigable stream itself. The tributaries which join to form the river could then be used as open sewers as far as federal regulation was concerned. The navigable part of the river could become a mere conduit for upstream waste.

Ashland Oil, 504 F.2d at 1325–26.

To be sure, the Supreme Court has stated that the term “navigable” must be given some meaning in defining “waters of the United States.” *SWANCC*, 531 U.S. at 173; *Rapanos*, 547 U.S. at 779 (Kennedy, J., concurring). The Agencies’ interpretation does that by defining waters of the United States to include traditional navigable waters and those waters that have a significant nexus to those waters. *See supra* at 50-56. But, “there is no reason to believe that Congress has less power over navigable waters than over other interstate channels,” such that Congress could not regulate nonnavigable waters in order to protect water quality in traditional navigable waters. *Deaton*, 332 F.3d at 707. To do so would be contrary to the express purposes in the Act to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters,” and “attain water quality which provides for the protection and

propagation of fish, shellfish, and wildlife and provides for recreation in and on the water.” 33 U.S.C. § 1251(a)(1)-(2).

Similarly unavailing are Petitioners’ arguments that the Rule relies on significant nexus factors that have “nothing to do with commerce” and an “attenuated causal chain.” States Br. 69-70. These arguments fundamentally mischaracterize the Rule and misunderstand the scope of federal authority under the Commerce Clause. The functions relevant to making case-specific significant nexus determinations include those that reflect the potential for upstream waters to significantly degrade or improve the integrity of downstream waters to which they are connected. TSD at 180-84, JAxxxx-xxxx. The Rule thus draws a direct connection between activities in upstream waters and their potential effects on downstream. As already discussed, Congress’s power over channels of commerce is broad enough to allow for the regulation of upstream pollution that affects downstream waters. It is entirely reasonable for the Agencies to include upstream waters that may significantly affect downstream water quality as waters that are subject to the Act’s restrictions on discharges.

2. Protection of some nonnavigable interstate waters under the Rule is a valid exercise of Congress’s power to regulate classes of activities that substantially affect interstate commerce.

State Petitioners contend that the Rule’s definitions of “tributary,” “adjacent waters,” and case-specific waters sweep in waters with no meaningful connection to interstate commerce. States Br. 69; *see also* Bus. Br. 88 (arguing that “ephemeral

trickle[s],” “dry wash[es],” and “isolated wetlands” allegedly covered by the Rule “have no substantial effect on[] interstate commerce”). In most cases, waters covered under the Rule comprise traditional navigable waters or nonnavigable tributaries, adjacent waters, and case-specific waters with a significant nexus to traditional navigable waters. For the reasons discussed above, these waters are within Congress’s authority to regulate channels of commerce and Petitioners’ argument that these waters have no substantial effect on interstate commerce is inapposite.

The Rule’s inclusion of interstate waters as waters of the United States without regard to navigability, however, does raise the possibility that some nonnavigable interstate waters lacking a connection to traditional navigable waters will come within the CWA’s reach. But that possibility does not render the Rule unconstitutional. The “Commerce Clause [is] broad enough to permit congressional regulation of activities causing air or water pollution, or other environmental hazards that may have effects in more than one State.” *Hodel v. Va. Surface Mining & Reclamation Ass’n*, 452 U.S. 264, 282 (1981). Congress could rationally conclude that regulation of discharges to or reaching any interstate water, navigable or not, is necessary to address the substantial effects of water pollution on interstate commerce. *Cf. id.* at 281-82 (finding nationwide coal mining regulation necessary to “insure that competition in interstate commerce among sellers of coal produced in different States will not be used to undermine the ability of the several States to improve and maintain adequate standards on coal mining operations within their borders”).

State Petitioners' argument that the CWA "rests entirely upon Congress' authority to regulate channels of interstate commerce" is unsupported. States Br. 65-66. *SWANCC*, upon which States rely, addressed migratory birds as the sole basis for jurisdiction over "nonnavigable, isolated, *intrastate*" ponds, 531 U.S. at 171-72 (emphasis added), and has no bearing on whether Congress's Commerce Clause authority extends to nonnavigable *interstate* waters. Moreover, Petitioners disregard that "Congress's intent in enacting the [1972 CWA] was clearly to establish an all-encompassing program of water pollution regulation." *City of Milwaukee*, 451 U.S. at 318. As Justice Kennedy recognized in *Rapanos*, "the Act protects downstream States from out-of-state pollution that they cannot themselves regulate." 547 U.S. at 777 (citation omitted); *cf. City of Milwaukee*, 451 U.S. at 317 (concluding that in enacting the 1972 Amendments Congress displaced federal common law for resolving interstate nuisance disputes regarding water pollution). Omission of nonnavigable interstate waters from the Rule would "leave a gaping hole" in Congress's comprehensive scheme to regulate water pollution. *Gonzales v. Raich*, 545 U.S. 1, 22 (2005).

Petitioners' attempt to analogize the CWA to the statutory schemes that the Supreme Court found to be beyond Congress's Commerce Clause power in *Lopez* and *United States v. Morrison*, 529 U.S. 598 (2000), is unavailing. States Br. 67-70; Bus. Br. 88. Unlike the CWA, the statutory schemes in *Lopez* (possession of guns near schools) and in *Morrison* (domestic violence) sought to regulate purely intrastate, noneconomic activity that could *only* be found to have substantial effects on interstate

commerce when viewed in the aggregate. In other words, those statutory schemes had nothing to do with commerce and were not part of a larger congressional scheme to regulate interstate commerce that would be undercut unless the intrastate activity were regulated. Regulation of *interstate* waters under the CWA's comprehensive scheme for addressing water pollution is markedly different than the local, noneconomic activity at issue in *Lopez* and *Morrison*. Indeed, as explained above, the vast majority of activities in waters of the United States as interpreted by the Agencies fall under Congress's authority to regulate channels of interstate commerce.

Moreover, “[t]here can be no doubt that, unlike the class of activities Congress was attempting to regulate in [*Morrison* and *Lopez*], ... the discharge of fill material into the Nation's waters is almost always undertaken for economic reasons.” *SWANCC*, 531 U.S. at 193 (Stevens, J., dissenting). Indeed, one need only consider the number of business entities and associations that are parties to this suit to comprehend the economic nature of the activities involved. Similarly, the state highway and pipeline projects that the States complain will be impacted by the Rule are indisputably economic activities. It is also indisputable that the consequences of water pollution discharged in one state and flowing to another are economic in nature. *Cf. Hodel*, 452 U.S. at 281-82. Such pollution also destroys or diminishes the value of water to “public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes” that the CWA protects. 33 U.S.C. § 1313(c)(2)(A). Congress clearly had a rational basis to conclude that discharges of

pollutants to nonnavigable interstate waters, alone and in the aggregate, substantially affect national water quality and interstate commerce. Therefore, the Agencies' inclusion of nonnavigable interstate waters as waters of the United States does not violate the Commerce Clause.

B. The Rule comports with the Tenth Amendment.

Petitioners argue that the Rule violates the Tenth Amendment because it addresses areas of state authority over land and water resources, regulates states as states, and interferes with traditional state power and functions. *See, e.g.*, States Br. 58-64; Bus. Br. 88-89. These arguments rely on principles rejected decades ago and merit no attention here.

First, the Supreme Court “long ago rejected the suggestion that Congress invades areas reserved to the States by the Tenth Amendment simply because it exercises its authority under the Commerce Clause in a manner that displaces the States’ exercise of their police powers.” *Hodel*, 452 U.S. at 291. The question under the Tenth Amendment is “whether an incident of state sovereignty is protected by a limitation on an Article I power.” *New York v. United States*, 505 U.S. 144, 157 (1992). Because the Commerce Clause allows Congress to regulate discharges of pollutants to waters identified in the Rule, *see supra* 152-160, it raises no Tenth Amendment concerns. *See Gila River Indian Cmty. v. United States*, 729 F.3d 1139, 1153 (9th Cir. 2013). To hold otherwise would “be a radical departure from long-established precedent.” *Hodel*, 452 U.S. at 292.

Second, Petitioners' contention that the Rule "regulates 'states as states' *because* of the extensive cooperative federalism" framework embodied in the CWA misunderstands how cooperative federalism works. States Br. 60 (emphasis added). The CWA authorizes willing States to participate in the implementation of the Act through the various provisions State Petitioners identify in their brief. States Br. 60 (citing 33 U.S.C. §§ 1313, 1341(a)(1), 1342, 1344). However, a State that does not wish to implement these CWA provisions may decline to do so and the "full regulatory burden will be borne by the Federal Government." *Hodel*, 452 U.S. at 288; *see* 33 U.S.C. §§ 1313(c)(4), (d)(2), 1342(a), 1344(a). Nothing in the Rule changes this.

The Supreme Court has "repeatedly affirm[ed] the constitutionality of federal statutes," like the CWA "that allow States to administer federal programs but provide for direct federal administration if a State chooses not to administer it." *Texas v. EPA*, 726 F.3d 180, 196-97 (D.C. Cir. 2013) (citations omitted). An enactment runs afoul of the Tenth Amendment only when through coercion or compulsion it requires States to administer a federal statute. *See New York*, 505 U.S. at 175-76 (holding that Congress could not require states to regulate radioactive waste in a certain manner or be required to take title to the waste). Petitioners do not claim that the Rule compels or coerces States to implement any CWA provisions. Rather, they contend that the Rule commandeers States because it expands federal jurisdiction and thus adds to the waters they would otherwise regulate when implementing the CWA provisions they

choose to administer. *See* States Br. 60, 63.⁴⁰ The notion that the Rule regulates “states as states” because they “will be required to” regulate more waters (and allegedly incur the related financial cost, States Br. 63) is illusory because States are not being compelled or coerced to regulate any waters under the CWA. As the Supreme Court recognized in *New York*, it does not offend the Tenth Amendment “to offer States the choice of regulating ... to federal standards or having state law pre-empted,” as is the option under “numerous federal statutory schemes ... includ[ing] the CWA.” 505 U.S. at 167.⁴¹

The D.C. Circuit rejected a similar argument in *Mississippi Commission on Environmental Quality v. EPA*, 790 F.3d 138, 174-75 (D.C. Cir. 2015). In that case, the State of Texas argued that EPA’s designation of new areas in that State as not meeting federal air quality standards under the Clean Air Act violated the Tenth Amendment because the designation purportedly “compel[led] State regulators to enforce a myriad of federal requirements involving emissions controls, clean fuel programs, transportation and land use limitations in the designated area.” *Id.* The court disagreed, holding that the Clean Air Act does not compel states to enforce or administer federal requirements at all; it gives states the option to do so. *Id.* Here,

⁴⁰ We address *infra* at 164-66 the States’ argument that the Rule will trigger federal permitting requirements for state projects.

⁴¹ Moreover, Petitioners’ characterization of the Rule as expanding federal jurisdiction is exaggerated. *See supra* at 31-33; 80 Fed. Reg. at 37,084; TSD at 30-34, JAxxxx-xxxx.

too, no state is required to take any of the actions that State Petitioners claim they “must.” If a state chooses not to administer any CWA provisions, the federal government must do so.⁴² Thus, as in *Mississippi Commission*, State Petitioners’ commandeering argument should be rejected.

Put another way, a state does not gain a constitutional right to control the reach of the CWA merely by opting into the Act’s cooperative federalism program. *See Islander East Pipeline Co. v. Conn. Dep’t of Env’tl. Prot.*, 482 F.3d 79, 92-93 (2d Cir. 2006) (a state’s grant or denial of water quality certification under the CWA is “not a sovereign state right under the Tenth Amendment,” and therefore judicial review of the certification did not unconstitutionally interfere with the state’s control of sovereign lands). When a state elects to administer provisions of the CWA, such as when it promulgates water quality standards under 33 U.S.C. § 1313, or certifies an activity as compliant with those standards under 33 U.S.C. § 1341, or issues a NPDES permit under 33 U.S.C. § 1342, it is acting in the shoes of the federal government. *See Islander East*, 482 F.3d at 92-93. The Rule does not intrude on state sovereignty or violate the Tenth Amendment by defining those areas where the CWA applies.

It bears emphasizing that the CWA addresses discharges of pollutants into the Nation’s waters. By identifying waters subject to the CWA’s provisions, the Rule does

⁴² State Petitioners do not—and cannot—argue, as Texas did in *Mississippi Commission*, that the CWA imposes sanctions if a state chooses not to implement one of the CWA’s programs.

not displace all of the states' authority over those waters, as the States suggest, States Br. 61-62. While States may not permit more pollution of waters of the United States than the CWA allows, that is a function of the Supremacy Clause and Congress's exercise of its Commerce Clause authority, not a Tenth Amendment violation. The Tenth Amendment reserves to States those powers "not delegated to the United States by the Constitution." U.S. Const., amend. X (emphasis added); *New York*, 505 U.S. at 155 (citation omitted).

Third, Petitioners' contention that the Rule violates the Tenth Amendment because it intrudes on "traditional state functions" is foreclosed by *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 554 (1985), and this Court's decision in *Dressman v. Costle*, 759 F.2d 548, 557 (6th Cir. 1985). Petitioners argue that they are required to obtain CWA permits for state highway, transmission line, and pipeline projects that would impact waters they claim were not subject to the CWA before the Rule. States Br. 60, 63. In *Garcia*, however, the Supreme Court held that the Tenth Amendment poses no obstacle to Congress regulating state activities the same as private activities. 469 U.S. at 554. At issue in that case was whether Congress could require States to comply with federal minimum wage and overtime requirements of the Fair Labor Standards Act. In rejecting the transit authority's claim, the Supreme Court overruled its prior holding in *National League of Cities v. Usery*, 426 U.S. 833 (1976), that the Tenth Amendment prevented the federal government from directly regulating States when compliance would impair "traditional [state] functions."

Garcia, 469 U.S. at 546-47.⁴³ Following *Garcia*, this Court in *Dressman*, 759 F.2d at 557, rejected claims by Kentucky and local governments that the Tenth Amendment shielded them from penalties for noncompliance with a vehicle inspection and maintenance program required by the Clean Air Act.

Garcia and *Dressman* make clear that the Tenth Amendment poses no impediment to the direct regulation of States to the same extent of private parties when their activities involve “discharges of pollutants.” *See Reno v. Condon*, 528 U.S. 141, 151 (2000) (Tenth Amendment posed no bar to federal limits on sale of personal information from databases because it regulated State as “owners of data bases”); *City of Abilene v. EPA*, 325 F.3d 657, 662-63 (5th Cir. 2003) (imposition of CWA permit conditions on city was not Tenth Amendment violation). Thus, State Petitioners cannot mount a Tenth Amendment challenge to the Rule merely by alleging interference with “traditional state functions.” *See also Equal Employment Opportunity Comm’n v. Kentucky Retirement Sys.*, 16 F. App’x 443, 453 (6th Cir. 2001) (holding that while Congress cannot require Kentucky to provide retirement plans, if Kentucky

⁴³ Therefore, Petitioners’ reliance on *Hodel*, 452 U.S. at 286-87, to the extent it reiterated the “traditional state functions” test, is unavailing. *Firestone Tire & Rubber Co. v. Neusser*, 810 F.2d 550, 555 n.2 (6th Cir. 1987) (explaining that the “traditional concept of [state] sovereignty ... is no longer the focus of this analysis”). As the Supreme Court noted in *Garcia*, the “traditional governmental functions” test was not only unworkable, it was inconsistent with established principles of federalism. 469 U.S. at 449-50.

elects to do so, it must comply with federal law governing such plans). Accordingly, Petitioners fail to show that the Rule violates the Tenth Amendment.

C. The Rule comports with the Due Process Clause.

State and Business Petitioners' arguments that the Rule is unconstitutionally vague also lack merit. A statute or regulation is "void for vagueness" if it wholly "fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement." *United States v. Williams*, 553 U.S. 285, 304 (2008); *United States v. Coss*, 677 F.3d 278, 289 (6th Cir. 2012) (citations omitted, emphasis in original). The Rule is neither too vague for ordinary people to understand, nor so standardless that it fails to provide adequate guidelines for agency discretion. Moreover, a person who is uncertain about the jurisdictional status of an aquatic feature may seek a formal determination from the Corps, which is subject to judicial review.

1. The Rule provides fair notice to the public and clear standards for regulators.

The Rule provides notice of what waters are subject to the CWA's prohibition on discharges of pollutants, *viz.*, all primary waters; all impoundments of waters of the United States; all tributaries, as defined by the Rule; and all adjacent waters, as defined by the Rule. 33 C.F.R. § 328.3(a)(1)-(6). The Rule further clarifies permissible and impermissible conduct by identifying waters that are categorically excluded from the CWA's reach. *Id.* § 328.3(b). The Rule clarifies these categories by defining relevant

terms, including “tributary,” “adjacent,” and “neighboring.” *Id.* § 328.3(c). And, although the Rule requires a case-specific significant-nexus analysis for certain categories of waters, it limits the waters requiring such analysis and provides clear guidance about what qualifies as a significant nexus. *Id.* § 328.3(a)(7)-(8), (c)(5). The Rule thus provides fair notice to the ordinary person of where the CWA’s restrictions on pollutant discharges apply and clear standards for agency personnel and courts to apply in determining whether violations of the prohibition have occurred. That is all the Due Process Clause requires.

The Rule is wholly unlike the enactments found to be unconstitutionally vague in the cases cited by Petitioners. For example, in *Johnson v. United States*, 135 S. Ct. 2551 (2015), the Supreme Court found the residual clause of the Armed Career Criminal Act to be impermissibly vague because of the “indeterminacy of the wide-ranging inquiry” required by the clause and the repeated failures of the courts to craft an objective standard in applying the provision. The clause “tied the judicial assessment of risk [it takes to trigger the enhanced sentencing under the clause] to a judicially imagined ‘ordinary case’ of a crime, not to real-world facts or statutory elements.” *Johnson*, 135 S. Ct. at 2557. The clause compounded that uncertainty by providing no measure for how much risk it takes to make a crime “violent” under the clause. *Id.* at 2558. The combination of imagined crimes and a confusing standard “produce[d] more unpredictability and arbitrariness than the Due Process Clause tolerates.” *Id.*

The Rule leads to no such unpredictability or arbitrariness. It defines waters that are jurisdictional and those that are not jurisdictional with clearly identified regulatory standards that refer to real-world facts. For example, the Rule defines a jurisdictional tributary as a water that contributes flow to a primary water and “is characterized by the presence of the physical indicators of a bed and banks and an ordinary high water mark.” 33 C.F.R. § 328.3(c)(3). In contrast to the residual clause at issue in *Johnson*, the Rule does not require the regulated public, agency regulators, or courts to imagine what qualifies as “ordinary high water mark.” 33 C.F.R. § 328.3(c)(6) (defining “ordinary high water mark”). Similarly, the Rule provides clear standards for what categories of waters may be subject to a case-specific significant-nexus analysis (33 C.F.R. § 328.3(a)(7) and (a)(8)), and it provides meaningful guidelines for what is required to establish a significant nexus by defining what “significant” means and identifying the specific types of functions that are relevant to that analysis (*id.* § 328.3(a)(5)). Thus, the Rule is a far cry from the “indeterminacy” and “unpredictability” that doomed the residual clause in *Johnson*.

Contrary to State Petitioners’ argument, States Br. 75-76, the statement in *Johnson* that a “failure of ‘persistent efforts [by the courts] to establish a standard’ may provide evidence of vagueness” has no application to the Rule, which has not been interpreted by any court. The Rule in fact adds clarity to the significant nexus standard that the Supreme Court has consistently recognized—in Justice Kennedy’s

concurrence in *Rapanos*, in *SWANCC*, and implicitly in *Riverside Bayview*—as a reasonable standard for identifying the boundaries of waters of the United States.

The Rule is likewise distinguishable from cases like *Chicago v. Morales*, 527 U.S. 41 (1999), and *Kolender v. Lawson*, 461 U.S. 352 (1983), cited by Petitioners. These cases involved statutes that did not define the relevant legal standard or provide *any* criteria by which police officers could determine whether an individual conformed his conduct to the law. Rather, whether one had an “apparent purpose” for his presence on a public sidewalk, in *Morales*, 527 U.S. at 62-63, or had offered “credible and reliable identification” to establish his identity, in *Kolender*, 461 U.S. at 360-61, was left to the complete subjective discretion of the police officer. Not so under the Rule. While the presence of a water of the United States may contain an element of discretion, that discretion is bounded by the definitions and factors set forth in the Rule. See *Grayned v. City of Rockford*, 408 U.S. 104, 114 (1972) (“As always, enforcement requires the exercise of some degree of police judgment, but, as confined, that degree of judgment here is permissible.”).

State and Business Petitioners argue that the Rule is impermissibly vague because it may be difficult for some would-be dischargers to determine whether certain waters are jurisdictional under the Rule. States Br. 72-74; Bus. Br. 82-86. Petitioners’ arguments demand more precision than the Due Process Clause requires. “What renders a statute vague is not the possibility that it will sometimes be difficult to determine whether the incriminating fact it establishes has been proved; but rather

the indeterminacy of precisely what that fact is.” *United States v. Maslenjack*, 821 F.3d 675, 694-95 (6th Cir. 2016), *petition for cert. docketed* (Sept. 9, 2016) (citing *Williams*, 553 U.S. at 306). The Due Process Clause “does not impose drafting requirements of mathematical precision or impossible specificity.” *Diebold, Inc. v. Marshall*, 585 F.2d 1327, 1336 (6th Cir. 1978); *Williams*, 553 U.S. at 304 (“perfect clarity and precise guidance have never been required”). “[I]t is often sufficient that the proscription mark out the rough area of prohibited conduct, allowing law-abiding individuals to conform their conduct by steering clear of the prohibition.” *United States v. Thomas*, 864 F.2d 188, 194 (D.C. Cir. 1988); *see also Boyce Motor Lines v. United States*, 342 U.S. 337, 340 (1952) (“no more than a reasonable degree of certainty can be demanded”). The Rule provides fair notice under these standards.

Petitioners also fail to show that the Rule is so standardless that it will lead to arbitrary enforcement. Petitioners argue that the challenged aspects of the Rule are so ambiguous and subjective that whether a water is covered by the Rule is left entirely to a regulator’s discretion. States Br. 74-75; Bus. Br. 79-86. This is not an accurate characterization of the Rule. It also misstates the law. An enactment does not violate the Due Process Clause merely because it allows regulators some discretion to enforce the law. “[S]tatutes are not automatically invalidated as vague simply because difficulty is found in determining whether certain marginal offenses fall within their language.” *United States v. Nat’l Dairy Prods. Corp.*, 372 U.S. 29, 32 (1963). It is “wholly subjective judgments without statutory definitions, narrowing context, or settled legal

meanings” that render a statute unconstitutionally vague. *Williams*, 553 U.S. at 306 (citation omitted). The Supreme Court has recognized that “enforcement requires the exercise of some degree of police judgment.” *Grayned*, 408 U.S. at 114. Where, as here, a regulation sets forth “explicit standards for those who apply them,” arbitrary enforcement is avoided. *Id.* Petitioners fail to show that the Rule is so “standardless” that it sanctions arbitrary enforcement.

2. Petitioners fail to identify any provision of the Rule that is unconstitutionally vague.

Petitioners’ arguments that specific provisions of the Rule are vague are themselves vague and conclusory and should be rejected.

Ordinary High Water Mark. The term “ordinary high water mark” is neither impossible to understand nor subject to arbitrary enforcement. The Rule incorporates the Corps’ longstanding definition of “ordinary high water mark,” which refers to “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.” 33 C.F.R. § 328.3(c)(6). However, identification of any jurisdictional water under the Rule is not based solely on the presence of an ordinary high water mark. For example, to be jurisdictional, a “tributary” must have physical characteristics of an ordinary high water mark and a bed and banks and it also must contribute flow to a primary water. 33 C.F.R. § 328.3(c)(3).

Contrary to Petitioners' argument, the Rule does not allow regulators to rely on "whatever 'other . . . means' they deem 'appropriate'" to identify the ordinary high water mark. Bus. Br. 79. Rather, it directs regulators to rely on specific enumerated types of physical characteristics or on other means appropriate to the "surrounding areas," 33 C.F.R. § 328.3(c)(6). Agency guidance further refines what are appropriate means for identifying ordinary high water mark. *See, e.g.*, 2005 RGL at 2-3, JAxxxx-xxxx. This allows regulators sufficient flexibility to address different circumstances that may be present in different parts of the country, while providing at least the "minimal guidelines" necessary to comport with due process. *United States Telecom Ass'n v. FCC*, 825 F.3d 674, 737 (D.C. Cir. 2016) (citation omitted) ("a regulation is not impermissibly vague because it is 'marked by flexibility and reasonable breadth, rather than meticulous specificity'").

State and Business Petitioners' contention that identifying the ordinary high water mark might be subject to ambiguities, especially in the arid West, does not establish that the term is impermissibly vague. *See* States Br. 72 n.10; Bus. Br. 80-81. Petitioners ignore that, as explained *supra* at 72-75, methods for identifying the ordinary high water mark have been the focus of significant efforts across the country and especially in the West for more than a decade. Those efforts have led to the creation of several studies and technical guides that have improved the accuracy and consistency of ordinary high water mark identification while also enhancing the Agencies' familiarity with the various indicators of flow in rivers and streams in the

West. *Supra* at 72-74; TSD at 56-67, 237, 239-240, 268, JAxxxx-xxxx, xxxx, xxxx-xxxx, xxxx; RTC Topic 8 at 314, JAxxxx. The Agencies also published field guides, subject to extensive internal and external peer review, for identifying ordinary high water marks in regions where physical conditions present challenges. TSD at 237, JAxxxx; RTC Topic 8 at 317-18, JAxxxx-xxxx. These manuals provide guidance to the public and regulators facilitating a consistent approach to ordinary high water mark identification.

Also unavailing is Petitioners' claim that the use of remote sensing tools and historical evidence render the Rule unconstitutionally vague.⁴⁴ States Br. 72; Bus. Br. 80-81. That different tools may be used to determine the physical characteristics of waters under the Rule is unremarkable, and certainly does not render the defined term "tributary" vague. As the Agencies explained, these mechanisms are particularly relevant in an enforcement context, where physical characteristics of ordinary high water mark might be absent due to unpermitted conduct such as stream alteration. 80 Fed. Reg. at 37,077/3. Indeed, it would create a vast loophole in the CWA's prohibition on discharges if a jurisdictional water lost its protected status merely because its defining characteristics have been unlawfully manipulated.

⁴⁴ Remote sensing involves evidence other than direct field observation. 80 Fed. Reg. at 37,076. The Rule preamble discusses remote sensing sources of information and mapping. *Id.* at 37,076-077. Historical evidence may include maps, aerial photographs, local surface water management plans, street maintenance data, and wetlands conservation program plans. *Id.* at 37,078-79.

The Agencies have used remote sensing and historical evidence to make jurisdictional determinations for many years, and the Agencies' record establishes their reliability. 80 Fed. Reg. at 37,076-77; TSD at 238-39, JAxxxx-xxxx; *see also* 2005 RGL at 2, 3, JAxxxx, xxxx. And courts have long accepted such evidence. *See, e.g., United States v. Samyer*, 825 F.3d 287, 296 (6th Cir. 2016); *Deerfield Plantation Phase II-B Prop. Owners Ass'n v. U.S. Army Corps of Eng'rs*, 501 F. App'x 268 (4th Cir. 2012); *United States v. Lucas*, 516 F.3d 316, 326-27 (5th Cir. 2008). Petitioners' rank speculation that remote sensing tools and historical evidence will lead to arbitrary enforcement is unfounded, especially since an assertion of jurisdiction in a judicial enforcement action must be supported by sufficient evidence to convince a court or jury. The "mere fact that close cases can be envisioned [does not] render[] a statute vague." *Williams*, 553 U.S. at 305-06. That problem is addressed not by the vagueness doctrine, but "by the requirement of proof beyond a reasonable doubt," *id.*, in a criminal proceeding or by a preponderance of the evidence in a civil action.

Case-specific significant nexus. Business and State Petitioners' arguments that the case-specific significant nexus analysis is subjective and opaque also fail. States Br. 73-74; Bus. Br. 82-85. The Rule identifies two defined categories of waters that are subject to case-specific significant nexus analysis. 33 C.F.R. § 328.3(a)(7), (a)(8). Waters that do not fall within subsections (a)(7) or (a)(8) are not subject to case-specific significant nexus analysis and are not jurisdictional unless they qualify under another provision. 80 Fed. Reg. 37,095. Thus, the Rule makes clear what

waters may be considered jurisdictional under a case-specific significant-nexus analysis, in contrast to the pre-Rule situation, where more individual waters were subject to case-specific analysis. *Id.*

Petitioners' contention that the category of "Texas Coastal Prairie Wetlands" is vague, Bus. Br. 86, is especially weak. The Rule defines these wetlands with specificity: "Texas coastal prairie wetlands are freshwater wetlands that occur as a mosaic of depressions, ridges, intermound flats, and mima mound wetlands located along the Texas Gulf Coast." 33 C.F.R. § 328.3(a)(7)(v); *see* TSD at 348-49, JAxxxx-xxxx. And the preamble to the Rule explains precisely where these wetlands are located for purposes of subsection (a)(7): the Lissie and Beaumon Geological Formations and the Ingleside Sand. 80 Fed. Reg. at 37,073/1. Contrary to Petitioners' argument, Bus. Br. 86, the Constitution does not require that the Rule spell out exactly how near the coast, or how tightly packed, the wetlands must be to fall within subsection (a)(7). *Williams*, 553 U.S. at 304 ("perfect clarity and precise guidance have never been required").

Petitioners also fail to show that the significant nexus standard is unconstitutionally vague. *See* Bus. Br. 83; States Br. 74, 75. The Rule adds substance and clarity to the standard articulated by the Supreme Court by specifying the magnitude of effect a water identified in subsections (a)(7) and (a)(8) must have on the chemical, physical, or biological integrity of a primary water ("more than speculative or insubstantial"), and describing the specific types of functions relevant to that

determination. 33 C.F.R. § 328.3(c)(5)(i)-(ix). The Rule need not precisely quantify the effect any particular function must have on a downstream water to pass constitutional muster. *Johnson*, 135 S. Ct. at 2561; *Diebold*, 585 F.2d at 1336. The concept of significant nexus is one that has been used frequently under the CWA since *SWANCC*. As one commenter observed, these “cases do not suggest that any particular type of evidence, quantitative or otherwise, is required for determining a nexus’ significance.” Env’tl. Law Inst. Comment, AR-16406, at 5, JAxxxx. “As a general matter, [courts] do not doubt the constitutionality of laws that call for the application of a qualitative standard [] to real-world conduct.” *Johnson*, 135 S. Ct. at 2561.

Exclusions. Business Petitioners claim that the Rule’s exclusions for puddles and erosional features are unconstitutionally vague because it will not always be easy to distinguish between a jurisdictional water and an excluded water. Bus. Br. 83-85. They are wrong.

The Rule provides more than adequate guidance to distinguish between a puddle and a wetland. In fact, the Agencies added the exclusion for “puddles” at the suggestion of commenters. That term means “a very small, shallow, and highly transitory pool of water that forms on pavement or uplands during or immediately after a rainstorm or similar precipitation event.” 80 Fed. Reg. at 37,099. The term “wetland,” by contrast, has been defined in the regulations since at least 1986 to mean “those areas that are inundated or saturated by surface or groundwater at a frequency

and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions.” 33 C.F.R. § 328.3(c)(4). Identification of wetlands is further aided by the Corps’ 1987 Wetland Delineation Manual and its regional supplements. Thus, whether any particular feature, such as the feature in Figure 7 of Business Petitioners’ Brief, is a puddle or a “depressional wetland” will be determined with reference to the Rule, the preamble, and the Agencies’ longstanding guidance.⁴⁵

Petitioners’ argument that a “depressional wetland” may be determined to be jurisdictional “without regard for size or permanence,” Bus. Br. 83-84, also fails to establish that the Rule is impermissibly vague. Under the Rule, a depressional wetland is a water of the United States if (1) it is jurisdictional under 33 C.F.R. § 328.3(a)(1)-(6), or (2) it falls within the categories identified in § 328.3(a)(7) or (a)(8) and has a significant nexus to a primary water. Petitioners’ grievance is thus with the Agencies’ use of the significant nexus standard—as opposed to a standard based on “size or

⁴⁵ Business Petitioners’ allegation that the Corps determined *in 2007*, eight years before the Rule was promulgated, that the aquatic feature pictured in Figure 8, Bus. Br. 85, was a “jurisdictional wetland” is irrelevant here. It is also factually incorrect. The Corps determined that the feature pictured in Figure 8 was a wetland that had been disturbed by the repeated driving of cars through it. But because the wetland was found not to have a “significant nexus” to the nearest downstream traditional navigable water, it was determined to be not jurisdictional. *See* Approved Jurisdictional Determination, File No. SPK-2007-1474, available at <http://web.archive.org/web/20161228173203/http://www.spk.usace.army.mil/Portals/12/documents/regulatory/jd/2008/july/SPK-2007-01474.pdf>.

permanence”—for purposes of determining the jurisdictional status of a wetland.

That argument fails for the reasons explained *supra* at 43-57.

Petitioners’ assertion, Bus. Br. 85, that “there is no way for the regulated public to know” whether a feature qualifies as a tributary, as opposed to an erosional feature, misreads the Rule. A tributary is identified by contribution of flow to a downstream primary water and physical indicators of a bed and bank and an ordinary high water mark. 33 C.F.R. § 328.3(c)(3). The regulatory status of a stream thus turns on contribution of flow and the presence of the physical indicators, but not on the regulated public’s ability to assess “volume, frequency, and duration of flow.” *Contra* Bus. Br. 85. The requirement for these physical indicators also sufficiently confines the Agencies’ discretion to satisfy enforcement-related due process concerns. *See Grayned*, 408 U.S. at 114 (“As always, enforcement requires the exercise of some degree of police judgment, but, as confined, that degree of judgment here is permissible.”).

Thus, the Rule does not violate due process principles.

3. Any potential uncertainty about the jurisdictional status of particular waters may be addressed by seeking guidance from the Agencies.

To the extent a landowner or developer is uncertain about whether a particular water is jurisdictional, it may seek a formal determination. The Corps recently reaffirmed its historic practice of providing jurisdictional determinations to the public upon request. Regulatory Guidance Letter 16-01 (Oct. 2016), available at

http://www.usace.army.mil/Portals/2/docs/civilworks/RGLS/rgl_6-01_app1-2.pdf?ver=2016-11-01-091706-840. A party may request a jurisdictional determination from the Corps regardless of whether a section 402 or section 404 permit is being sought, or even if no permit at all is envisioned. The Corps provides information about the jurisdictional status of waters in the form of preliminary and approved jurisdictional determinations. *Id.* Approved jurisdictional determinations may be administratively appealed and are then judicially reviewable. *Hawkes*, 136 S. Ct. 1807.

Business Petitioners' contention that the availability of jurisdictional determinations is insufficient to cure potential ambiguities in the Rule, Bus. Br. 87, is unsupported. Courts have found that the opportunity to obtain clarity from a regulatory agency, through the administrative process, can avoid inadvertent violations and alleviates any lingering due process concerns. *See United States Telecom Ass'n*, 825 F.3d at 738 (citing *DiCola v. Food and Drug Admin.*, 77 F.3d 504, 509 (D.C. Cir. 1996); *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498 (1982)). This is true even where the agency's guidance is non-binding. *United States Telecom Ass'n*, 825 F.3d at 738 (finding that the agency's ability to change its views after issuing an advisory opinion does not negate the procedure's usefulness).

Business Petitioners' argument that jurisdictional determinations do not address the potential for arbitrary enforcement also fails. As already discussed, the Rule provides clear standards that prevent arbitrary enforcement. And the availability of

administrative and judicial review, even before any enforcement process begins, and of judicial review if there is an enforcement action, fully protects against any possibility of arbitrary enforcement.

D. Resort to canons of construction cited by Petitioners is unwarranted.

Business and State Petitioners argue that the Court should avoid reaching the constitutional issues raised in their briefs by applying various canons of construction. These canons have no applicability here. This case presents ordinary questions of statutory interpretation, which should be resolved under the familiar two-step *Chevron* framework and principles of APA review. Petitioners' attempt to make an end-run around the deference afforded the Agencies under *Chevron* and the APA should be rejected. *See supra* at 42-43.

“[T]he burden of establishing unconstitutionality is on the challenger.” *Miss. Comm’n on Emvtl. Quality*, 790 F.3d at 178. Petitioners’ appeal to the constitutional avoidance canon and clear statement rule is an attempt to avoid that burden. The Supreme Court rejected a similar attempt in *Rust v. Sullivan*, explaining that the avoidance canon “will not be pressed to the point of disingenuous evasion.” 500 U.S. 173, 191 (1991) (quotation omitted). Thus, even though the Court believed that the constitutional challenges raised in *Rust* had “some force,” it declined to apply the avoidance canon because it did not believe those arguments “raise[d] ... ‘grave and doubtful constitutional questions,’ ... that would lead us to assume Congress did not

intend to authorize” the regulatory actions at issue, and instead upheld those actions under *Chevron. Id.* (citation omitted). Because the Rule is grounded in the significant nexus standard, it avoids the commerce clause and federalism concerns Petitioners raise. *See Rapanos*, 547 U.S. at 782-83 (Kennedy, J., concurring). Petitioners’ attempt to invoke the rule of lenity is even further from the mark. *See Babbitt v. Sweet Home*, 515 U.S. 687, 704 n.18 (1995) (“We have never suggested that the rule of lenity should provide the standard for reviewing facial challenges to administrative regulations whenever the governing statute authorizes criminal enforcement.”).

Petitioners’ constitutional arguments rest almost entirely on their hyperbolic attempt to cast the Rule as a usurpation of state authority over land use. The Rule in fact effectuates Congress’s clearly stated objective to establish a comprehensive framework to address water pollution, a problem that does not respect state boundaries and has national economic consequences, thus requiring a national solution. Because Petitioners’ constitutional arguments have no force, the canons of construction they advocate should not weigh in their favor—or indeed be considered at all—when analyzing the statutory issues that lie at the heart of this case.

VI. The Agencies complied with all applicable procedural requirements.

Petitioners erroneously contend that the Agencies provided inadequate notice of and opportunity to comment on aspects of the Rule, engaged in improper “lobbying” and “propaganda,” and violated the Regulatory Flexibility Act. The record

shows the opposite to be true, as the Agencies met or exceeded all procedural requirements in promulgating the Rule.

A. The Agencies satisfied the APA.

Petitioners raise an assortment of arguments related to the procedural requirements of the APA. All Petitioners assert that the Agencies did not provide adequate notice as to one or more provisions of the Rule. States Br. 46-52; Bus. Br. 26-28; Ass'n Br. 27-28; Waterkeeper Br. 54. Business Petitioners further contend that the public was denied the opportunity to comment on the Science Report, and that the Agencies failed to consider and respond to important comments. Bus. Br. 28-34. As explained below, the Agencies adhered to the procedural requirements of the APA by providing notice of the subjects and issues involved in the rulemaking, providing the scientific and technical bases for the Rule, and responding to significant public comments.

1. The Rule is a logical outgrowth of the Agencies' proposal.

Under the APA, a “[g]eneral notice” of proposed rulemaking must include “either the terms or substance of the proposed rule or a description of the subjects and issues involved” and provide the public an opportunity to comment. 5 U.S.C. § 553(b)(3), (c). The purpose of these procedures is “to get public input so as to get the wisest rules,” to “ensure fair treatment for persons to be affected by regulations,” and “to ensure that affected parties have an opportunity to participate in and influence

agency decision making at an early stage.” *Dismas Charities, Inc. v. U.S. Dep’t of Justice*, 401 F.3d 666, 678, 680 (6th Cir. 2005) (internal quotation marks and citation omitted).

An agency may promulgate a rule that differs from a proposed rule. *Chrysler Corp. v. Dep’t of Transp.*, 515 F.2d 1053, 1061 (6th Cir. 1975). If that were not the case, one of the key purposes of notice and comment—to allow an agency to reconsider, and perhaps revise, a proposed rule based on the comments submitted—would be undermined. *Ass’n of Battery Recyclers, Inc. v. EPA*, 208 F.3d 1047, 1058 (D.C. Cir. 2000). Agencies could be “forced into perpetual cycles of new notice and comment periods” or “refuse to make changes in response to comments.” *Id.* Thus, even substantial changes to a proposal may be made, provided the final rule is a “logical outgrowth” of the proposed rule. *Leyse v. Clear Channel Broadcasting, Inc.*, 545 F. App’x 444, 453 (6th Cir. 2013) (citing *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 174 (2007)); see also *Alto Dairy v. Veneman*, 336 F.3d 560, 569-70 (7th Cir. 2003) (“The purpose of a rulemaking proceeding is not merely to vote up or down the specific proposals advanced ... but to refine, modify, and supplement the proposals in the light of evidence and arguments presented in the course of the proceeding.”).

A proposed rule satisfies the logical outgrowth test if it “expressly ask[s] for comments on a particular issue or otherwise ma[kes] clear that the agency [is] contemplating a particular change.” *CSX Transp., Inc. v. Surface Transp. Bd.*, 584 F.3d 1076, 1081 (D.C. Cir. 2009). The requirements of APA section 553 are thus satisfied “if affected parties should have anticipated that the relevant modification was

possible,” *Allina Health Servs. v. Sebelius*, 746 F.3d 1102, 1107 (D.C. Cir. 2014), or if additional notice and comment “would not provide commenters with their first occasion to offer new and different criticisms.” *Fertilizer Inst. v. EPA*, 935 F.2d 1303, 1311 (D.C. Cir. 1991) (quotation omitted).

Here, the Agencies clearly described the subjects and issues involved in the rulemaking and invited comment from the public, including the issues for which Petitioners challenge the notice provided. The voluminous and detailed comments on the proposal left no stone unturned. While the final Rule is different from the proposal, the revisions reflect the Agencies’ conscientious efforts to respond to the robust debate with the additional clarity requested by commenters. The modifications to the Proposed Rule were foreseeable and, at least in part, the result of comments, including some from Petitioners.

a. The distance limitations in the definition of “neighboring” are a logical outgrowth of the proposal.

The Rule retained the 1986 regulation’s definition of “adjacent” as “bordering, contiguous [to], or neighboring.” 33 C.F.R. § 328.3(c)(1); *see id.* § 328.3(a)(6).

Petitioners do not challenge the Rule’s inclusion of “bordering” or “contiguous,” and those terms are unchanged from the 1986 regulation. *See* 80 Fed. Reg. at 37,080/2.

Rather, Petitioners assert that in defining “neighboring” the Agencies failed to provide adequate notice regarding the distance limitations, specifically: waters (1) within 100 feet of the ordinary high water mark of a primary water, impoundment, or tributary;

(2) within the 100-year floodplain (but not more than 1,500 feet from the ordinary high water mark) of primary water, impoundment, or tributary; or (3) within 1,500 feet of the high tide line of a primary water or within 1,500 feet of the ordinary high water mark of the Great Lakes. 33 C.F.R. § 328.3(c)(2). *See* Bus. Br. 26-27; States Br. 46-47. Notably, the distances in the definition of “neighboring” provide a boundary between waters that are jurisdictional as “adjacent waters” and waters that must be evaluated for significant nexus on a case-specific basis.

In the proposal, the Agencies sought comment on a number of ways to address and clarify jurisdiction over “adjacent waters,” including establishing a floodplain interval (e.g., a 50-year or 100-year floodplain) and providing clarity on reasonable proximity as an important aspect of adjacency. Petitioners were on notice in the Proposed Rule that adjacent waters would likely be jurisdictional by rule. The distances contained in the Rule provide clarity and in fact identify a smaller subset of waters as “neighboring” than proposed, as requested by some of the Petitioners now challenging that modification. Although the Agencies did not propose the precise distance limitations that were adopted in the final Rule, those limitations are a logical outgrowth of the proposal.

From the opening sentences of the Proposed Rule, the Agencies made clear that the goal of the rulemaking was to “increase CWA program predictability and consistency by increasing clarity as to the scope of ‘waters of the United States.’” 79 Fed. Reg. at 22,188/1; *see id.* at 22,198/2 (stating intention of establishing “bright line

categories of waters that are and are not jurisdictional”). For “adjacent” waters, the Agencies stated their intent to bring “greater clarity to the meaning of ‘neighboring’” by “defin[ing] the lateral reach” of that term. *Id.* at 22,207/1; *see id.* at 22,208-09. The Agencies noted that the term “neighboring,” which was historically part of the definition of “adjacent,” “has generally been interpreted broadly in practice,” and that the clarification of “neighboring” was intended to capture those waters that in practice the Agencies “have identified as having a significant effect” on the chemical, physical, or biological integrity of primary waters. *Id.* at 22,207/3.

The proposed definition of “neighboring” encompassed waters located within the distance limitations established by the riparian area or floodplain of a primary water, impoundment, or tributary, and waters with a shallow subsurface hydrologic connection or confined surface hydrologic connection to a primary water, impoundment, or tributary. *Id.*; *id.* at 22,263. To the extent “neighboring” would be defined based on a shallow subsurface hydrologic connection or confined surface hydrologic connection, the Agencies made clear in the proposal that they would “assess the distance” between the water body and the jurisdictional water, as the Agencies have “always included an element of reasonable proximity” in the application of the definition of “adjacent.” *Id.* at 22,207 (citing *Riverside Bayview*, 474 U.S. at 133-34); *see also* 42 Fed. Reg. at 37,128. Recognizing that in some circumstances “the distance between water bodies may be sufficiently far that even the presence of a hydrologic connection may not support an adjacency

determination,” the Agencies requested comment on a number of other options, including “establishing specific geographic limits for using shallow subsurface or confined surface hydrological connections as a basis for determining adjacency” and a specific floodplain interval. 79 Fed. Reg. at 22,208-09. The Agencies thus informed the public that the definition of “neighboring” was intended to set a clear spatial limit that would provide certainty as to the geographic scope of adjacent waters, based on riparian area, floodplain, and/or some distance limits, and invited comment on how best to accomplish that objective.

Petitioners’ arguments that they could not have anticipated the distance limits included in the definition of “neighboring” are further belied by the plethora of comments submitted to the Agencies on this point. Many commenters flatly rejected the idea of *any* distance limitations (whether based on a riparian area or floodplain or on a set distance). For example, some commenters asserted that the *Rapanos* plurality opinion, not Justice Kennedy’s opinion, should be followed, and that a hydrologic connection rather than distance should be considered. *See, e.g.*, Comments of N.M. Cattle Growers Ass’n, AR-19595 at 12, JAxxxx; Tex. Comm’n on Env’tl. Quality, AR-14279 at 6, JAxxxx. Others commented that there should be no distance limitation in the definition of “neighboring,” asserting that chemical and biological connectivity can extend well beyond a riparian area or floodplain. Comments of Clean Water Action, AR-15015 at 6, JAxxxx; S. Env’tl. Law Ctr., AR-19613 at 16-17, JAxxxx-xxxx; Earthjustice, AR-14564 at 7, JAxxxx; NRDC, AR-15437 at 62, JAxxxx; *see also*

Comments of Minn. Dept. of Nat'l Res., AR-15742 at 2, JAxxxx (suggesting hydrologic criteria to determine adjacency rather than “geographic proximity”); Ducks Unlimited, AR-11014, Attachment 1 at 9/111, JAxxx (“reasonable proximity” indicates wetlands would be excluded due to distance).

Other commenters responded to the Agencies’ request for suggested distance limits by proposing specific floodplain intervals set by FEMA, riparian areas, and numerical distances. *See, e.g.*, Comments of Ky. Oil & Gas Ass’n, AR-16527, at 8, JAxxxx (recommending 100-year floodplain for larger order streams, and the riparian zone within 50 feet of the ordinary high water mark for smaller order streams); Ctr. for Rural Affairs, AR-15029, at 5, JAxxxx (recommending floodplains and riparian areas as “clear, water body-specific, physical boundaries”); Nat’l Lime Ass’n, AR-14428, at 15, JAxxxx (supporting 5-year floodplain); NAIOP, AR-14621, at 5, JAxxxx (recommending 100 feet from a subsection (a)(1)-(5) water or the floodplain of such a water); Fla. Crystals Corp., AR-17922, at 10 JAxxxx (suggesting a 200 foot limit); AASHTO, AR-17172, at 8, JAxxxx (supporting floodplain, riparian zone, or specific geographic limits such as distance limitations based on the bank-to-bank width of the jurisdictional water); Hancock Cnty. Drainage Bd., AR-11979, at 1, JAxxxx (suggesting a distance in feet from the jurisdictional water); N.M. Mining Ass’n, AR-8644, at 2-3, JAxxxx-xxxx (suggesting one-half mile); *see also* NAM Comments, AR-15410, at 22, JAxxxx (citing a case in which a water 125 feet from a tributary was found to have no significant nexus). The Agencies appropriately responded to the

thousands of comments on the proposed definition of “neighboring” by streamlining and clarifying the definition with a specific floodplain interval and numerical distance limits. 80 Fed. Reg. at 37,082-84.

As this Court has recognized, comments that address an issue resolved in a final rule “provide evidence that the notice was adequate.” *Leyse*, 545 F. App’x at 454; *cf. Am. Trucking Ass’ns, Inc. v. FMCSA*, 724 F.3d 243, 253 (D.C. Cir. 2013). The comments described above provide ample evidence that the floodplain and numerical distance limitations in the definition of “neighboring” were entirely foreseeable. *Cf. E. Tenn. Natural Gas Co. v. FERC*, 677 F.2d 531, 536 (6th Cir. 1982) (rejecting notice claim where parts of a final rule were shaped by the comments on the proposal).

Some Petitioners suggest that the only way notice here could pass muster would be if the Agencies had proposed the precise numerical distance limits that might be chosen. States Br. 48 n.8. But the APA imposes no such requirement. *See, e.g., Chrysler Corp.*, 515 F.2d at 1061 (proposed rule provided adequate notice regarding headlamp specifications, even though the agency did not mention any time limitation attached to the specifications in proposal); *Ala. Power Co. v. OSHA*, 89 F.3d 740, 744 (11th Cir. 1996) (final standard setting out specific weight of fabrics for clothing worn by employees exposed to flames or electrical arcs was a logical outgrowth of proposal that did not propose any weights but did state objective to prevent burn injuries); *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 548 (D.C. Cir. 1983) (although proposal “did not list specific ‘loopholes’ that EPA might try to close,” the

final rule's past production requirements for "small" refiners was a logical outgrowth of the proposal).

Moreover, the Agencies provided sufficient notice of a range of possibilities by proposing to define "neighboring" in terms of riparian areas, floodplains, and distances beyond floodplains. 79 Fed. Reg. at 22,207/1-2, 22,208/1. *Cf. Kennecott v. EPA*, 780 F.2d 445, 452 (4th Cir. 1985) ("the agency is not required to specify every precise proposal that it may eventually adopt"). Commenters recognized that a distance limitation based on a floodplain could result in the inclusion of waters "miles away" from a jurisdictional water, depending on the flood interval selected. *See, e.g.*, Comments of N. Dakota, AR-15365, at 9, JAxxxx; Water Advocacy Coal., AR-14568, at 50, JAxxxx. Several commenters understood that the term "floodplain" could mean a 500-year floodplain. Comments of Water Advocacy Coal., AR-14568, at 50, JAxxxx; AFBF, AR-18005, at 12, JAxxxx; V. Watson, AR-11819, JAxxxx. As such, the distances adopted in the Rule constituted a "natural subset" of what these informed commenters believed to be within the potential scope of the proposal's treatment of "neighboring." *La. Fed. Land Bank Ass'n v. Farm Credit Admin.*, 336 F.3d 1075, 1081 (D.C. Cir. 2003) (upholding a "natural subset" of the proposal against a logical outgrowth challenge).

Because the definition of "neighboring" in the Rule was a logical outgrowth of the proposal, APA section 553(b)(3)'s purpose—fair notice—was satisfied.

b. The distance limitations for case-specific waters are a logical outgrowth of the proposal.

In the Rule, waters within the 100-year floodplain of a primary water, or within 4,000 feet of the high tide line or ordinary high water mark of a primary water, impoundment, or tributary, are subject to case-specific significant nexus determinations. 33 C.F.R. § 328.3(a)(8). Notably, these waters were already subject to a case-specific determination of significant nexus following *Rapanos*, so their treatment in the Rule has not changed.⁴⁶ In addition, the waters subject to case-by-case determinations in the Rule are a subset of those proposed for case-specific determination in the Proposed Rule. Nevertheless, State and Business Petitioners contend that the distance limitations contained in the case-specific category of waters were “unexpectedly” included in the Rule. States Br. 50; *see also* Bus. Br. 27.

The distance limitations for case-specific waters are a logical outgrowth of the proposal, which made clear the Agencies’ intention to provide clarity and predictability by limiting the case-specific category of waters to those waters “sufficiently close” to a jurisdictional water. 79 Fed. Reg. at 22,200, 22,211, 22,213, 22,217, 22,247, 22,263. Specifically, the Agencies proposed that case-specific significant nexus determinations be based on a record that included all available

⁴⁶ For wetlands adjacent to traditional navigable waters, the case-specific determination was limited to whether the wetlands were adjacent. *Rapanos* Guidance at 1, 4, JAxxxx, xxxx.

information, the first item of which would be the “location” of the water body, and the Agencies sought comments on this approach. *Id.* at 22,214. Thus, even though the proposal did not contain the specific distances adopted in the Rule, at least the “germ” of a distance limitation was contained in the proposal, *NRDC v. Thomas*, 838 F.2d 1224, 1242 (D.C. Cir. 1988), and was thoroughly debated by commenters.⁴⁷

As with the proposal to define “neighboring” by reference to a specific lateral limit, the Agencies received numerous comments on case-specific determinations of significant nexus. These comments provide evidence of adequate notice. For example, some commenters recognized the distance component in the proposal and asked that the Agencies specify what distance would be considered “sufficiently close.” *See, e.g.*, Comments of Wis. Wetlands Ass’n, AR-15629, at 3, JAxxxx; Nat’l Lime Ass’n, AR-14428, at 11, JAxxxx; Water Advocacy Coal., AR-17921, at 58, JAxxxx; NAIOP, AR-14621, at 2, JAxxxx. Others rejected the use of distance limitations altogether, or suggested that distance should not be the sole factor in considering whether a water should be subject to a case-specific analysis. Comments of Mo. Coal. for the Env’t, AR-16372 at 6, JAxxxx; NRDC, AR-15437 at 54-55, JAxxxx-xxxx; NWF, AR-10520, at 59-60, JAxxxx-xxxx; *see also* SAB Proposed Rule

⁴⁷ State Petitioners’ reliance on an April 24, 2015 internal Corps memorandum, States Br. 48, is misplaced, as the memorandum, AR-20882, at 1, JAxxxx, only reveals that some individuals at the Corps were unaware that the Agencies were homing in on a specific 4,000 or 5,000 foot limitation for case-specific waters for a portion of the time between the proposal and the final Rule.

Review at 3, JAxxxx (suggesting that distance not be the sole indicator for evaluation of case-specific waters).

The stated purpose of the rulemaking was to provide greater certainty, and the Agencies proposed to limit case-specific analyses to waters “sufficiently close” to a jurisdictional water, which would be determined based in part on their location. As shown by the comments received on the proposal, notice was adequate to meet the requirements of the APA.

c. Any failure by the Agencies to provide specific notice that adjacent waters do not include waters used for certain agricultural activities was harmless error.

State and Associational Petitioners contend that the Proposed Rule did not provide adequate notice that the Agencies might conclude that waters used for normal farming, silviculture, and ranching activities should not be considered “adjacent.” States Br. 51; Ass’n Br. 27; *see* 33 C.F.R. § 328.3(c)(1). Under the Rule, jurisdiction over such waters will be determined only after a case-specific significant nexus analysis is conducted, which was generally the status quo prior to the Rule. It is well-recognized that one logical outgrowth of rulemaking is that an agency will retain the status quo. *New York v. EPA*, 413 F.3d 3, 43-44 (D.C. Cir. 2005); *Am. Iron & Steel Inst.*, 886 F.2d at 400. That is precisely what happened here with respect to adjacent waters used for normal agricultural activities.

In any event, to the extent there was a deficiency in notice, the APA directs reviewing courts to take “due account” of “the rule of prejudicial error.” 5 U.S.C. §

706. As this Court recognized in *United States v. Utesch*, courts generally apply a “harmless-error rule” in the APA review context when any procedural deficiency does not defeat the purpose of the bypassed requirements. 596 F.3d 302, 312 (6th Cir. 2010) (citing examples). Even where a final rule is an abrupt departure from a proposed rule, “if parties directed comments to such a denouement, it might well be properly regarded as a harmless error—depending on how pointed were the comments and by who[m] made.” *Allina Health Servs.*, 746 F.3d at 1109-10. Where a petitioner itself made such a comment, “it would presumably be hoist on its own petard.” *Id.* And where a comment was made by others, if it were the same comment the petitioner would have made, “it would still presumably be non-prejudicial because all that is necessary in such a situation is that the agency had an opportunity to consider the relevant views.” *Id.* Here, as discussed below, the merits arguments made by these Petitioners were advanced during the rulemaking by numerous commenters, including some Petitioners themselves, and there is no harm as a result of any deficiency in notice.

State Petitioners do not (and cannot) assert they are injured by the portion of the definition of adjacency that provides for a case-specific jurisdictional determination, as opposed to categorical jurisdiction, for waters used for normal agricultural activities. *See Am. Coke & Coal Chems. Inst. v. EPA*, 452 F.3d 930 (D.C. Cir. 2006) (rejecting challenge to a less stringent standard that did not prejudice petitioners). Instead, they merely contend that they would have pressed for a

definition of “tributary” that also subjected waters used for normal agricultural activities to a case-specific significant nexus analysis. States Br. 52. Yet the record contains many examples of comments that tributaries should be more narrowly defined and should not be determined to be jurisdictional as a category rather than on a case-specific basis. *See e.g.*, Comments of Mich. Farm Bureau, AR-4779, at 7, JAxxxx; Water Advocacy Coal., AR-14568, at 45-47, JAxxxx-xxxx. Further, numerous commenters requested specialized treatment for agricultural activities in virtually all aspects. *See, e.g.*, Comments of Texas AR-5143, at 4, JAxxxx; Western States Water Coalition, AR-9842, at 2, 5, JAxxxx, xxxx; Nevada DNR, AR-16932, at 6, JAxxxx; W. Va. DEP, AR-15415, at 9, JAxxxx; Kansas Agric. Alliance, AR-14424, at 4, JAxxxx; *see also* RTC Topic 8 at 30-31, JAxxxx-xxxx. It was reasonably foreseeable that the Agencies might adopt special treatment for agricultural use waters in some contexts but not others. *See Long Island Care at Home*, 551 U.S. at 175. In any event, the Agencies already had the full benefit of these comments. *Cf. Ass’n of Battery Recyclers, Inc. v. EPA*, 208 F.3d 1047, 1059 (D.C. Cir. 2000) (no prejudicial error where petitioners commented on alternative standards in all contexts but agency only adopted alternative standards in one context).

In a similar vein, Associational Petitioners contend that they would have objected to the different treatment of waters used for normal agricultural activities, arguing that the disparate treatment in the definition of “adjacent” is legally and scientifically indefensible. Ass’n Br. 28. *See, e.g.*, Comments of Nat’l Wildlife Fed’n,

AR-15020, at 19-23, 43-45, 50, 53-55, 64-66, 68, JAxxxx-xxxx, xxxx-xxxx, xxxx, xxxx-xxxx, xxxx-xxxx, xxxx; Waterkeeper AR-16413, at 24-25, 38-39, 56, JAxxxx-xxxx, xxxx-xxxx, xxxx; L.A. Waterkeeper, AR-15060, at 2-3, JAxxxx-xxxx; *see also* RTC Topic 3 at 112, 118, JAxxx, xxxx. But Associational Petitioners and others raised the same legal and scientific contentions with respect to several of the other proposed regulatory exclusions related to normal agricultural activities, including artificially irrigated areas that could revert to dry land, farm and stock watering ponds, irrigation ponds, settling basins, and fields flooded for rice production. *See, e.g.*, Comments of Earthjustice, AR-14564, at 13-14, JAxxxx-xxxx; Ky. Waterways Alliance, AR-17168, at 12, JAxxxx; Ctr. For Biological Diversity, AR-15233, at 1-2, 10, JAxxxx-xxxx, xxxx; Hackensack Riverkeeper, AR-15377, at 14-15, JAxxxx-xxxx; Del. Riverkeeper, AR-15383, at 5, JAxxxx; Wis. Wetlands Ass'n, AR-15629, at 5, JAxxxx; Ducks Unlimited, AR-11034, at 21, JAxxxx; Clean Water Action, AR-15015, at 4-5, JAxxxx-xxxx; Columbia Riverkeeper, AR-15210, at 2, JAxxx; Robert J. Goldstein & Assocs., AR-16577, at 2, JAxxxx; Idaho Conservation League, AR-15053, at 13, JAxxxx.

In sum, any deficiency in notice regarding the scope of adjacent waters with respect to waters used for normal agriculture is harmless, both because the treatment of those waters generally retained the status quo and because the Agencies had the full benefit of related comments from Petitioners and others. Thus, the purpose of notice was not frustrated.

2. The Agencies fully apprised the public of the scientific basis for the Rule.

Business Petitioners contend that the Agencies “withheld” information upon which the Rule would be based. Bus. Br. 28-31. Specifically, Petitioners claim that they had no meaningful opportunity to comment on the final Science Report prior to the close of the public comment period in November 2014. *Id.* This argument is unavailing.

Under the APA’s notice and comment requirements, technical studies and data upon which an agency relies must be made available for public evaluation. *Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 236 (D.C. Cir. 2008). In order to participate meaningfully in the rulemaking process, however, a party need not have an opportunity to comment on “every bit of information influencing an agency’s decision.” *Texas Office of Pub. Util. Counsel v. FCC*, 265 F.3d 313, 326 (5th Cir. 2001) (citation and internal quotation marks omitted); *see also Kern Cnty. Farm Bureau v. Allen*, 450 F.3d 1072, 1076 (9th Cir. 2006) (same). Moreover, an agency may add supporting documentation for a final rule in response to comments, and an agency may use supplementary data that expands on or confirms the information contained in the proposed rule, so long as no prejudice is shown. *Kern Cnty. Farm Bureau*, 450 F.3d at 1076.

A party objecting to an agency’s delayed publication of documents must indicate with “reasonable specificity” what portions of the documents are objected to

and how the challenger may have responded if given the opportunity. *Texas v. Lyng*, 868 F.2d 795, 799 (5th Cir. 1989). Petitioners do not even attempt to meet that burden here.

Concurrent with the publication of the Proposed Rule, the Agencies made available the Draft Science Report, which contained a review and synthesis of nearly 1,000 peer-reviewed scientific studies on the “connectivity or isolation of streams and wetlands relative to large water bodies such as rivers, lakes, estuaries, and oceans.” Draft Science Report at 1-1, JAxxxx; 79 Fed. Reg. at 22,189/2. The Draft Science Report had been through several rounds of internal review by EPA and Corps technical staff, as well as external review by scientists in government, academic, nonprofit, and industry organizations. TSD at 94, JAxxxx; Independent External Peer Review Report, AR-0005, JAxxxx-xxxx. The Agencies also extended the comment period to allow for comment on the SAB peer review of the draft Report. 79 Fed. Reg. 61,591 (Oct. 14, 2014), AR-7500, JAxxxx.

Petitioners assert that the final Science Report “introduced a new, continuum-based approach that analyzed ... connectivity.” Bus. Br. 28. This conclusory argument is refuted by the Proposed Rule, which expressly stated that “[t]here is a gradient in the relation of waters to each other, and this is documented in the [Draft Science] Report.” 79 Fed. Reg. at 22,193/2. Further, the Draft Science Report defined “connectivity” as “the degree to which components of a [river] system are joined, or connected, by various transport mechanisms.” Draft Science Report at 1-4,

JAXXXX-XXXX. The Draft Science Report discussed, *inter alia*, (1) the “River Continuum Concept” in the scientific literature (*id.* at 3-4, 4-21 to 4-23, 6-3, JAXXXX, XXXX-XXXX, XXXX); (2) the factors that “determine where components of a [river] system fall on the connectivity-isolation gradient at a given time” (*id.* at 3-33, JAXXXX); and (3) the “continuum of connectivity” in wetlands such as prairie potholes (*id.* at 5-57, JAXXXX).

In its September 2014 Review of the Draft Science Report, the SAB recommended that the Agencies put greater emphasis on the gradient nature of connectivity. SAB Science Report Review at 2, JAXXXX. But the Draft Science Report already contained the information the SAB sought to emphasize. Indeed, the SAB stated that the Draft Science Report was “a thorough and technically accurate review of the literature on the connectivity of streams and wetlands to downstream waters.” *Id.* at cover letter, JAXXXX. The SAB recommended revisions to “improve the clarity of the Report, better reflect the scientific evidence, expand the discussion of approaches to quantifying connectivity, and make the document more useful to decision-makers,” *id.*, but the SAB did not recommend a “new” approach, nor did the Science Report adopt one.

Rather, the Science Report merely clarified and expanded upon concepts and topics in the Draft Science Report, including the continuum of connectivity. For example, where some sections of the Draft Science Report used the term “connected” or “isolated” as shorthand for a subset of values within the connectivity gradient—which is a continuum ranging from highly connected to highly isolated—the Science

Report was revised to emphasize the obvious point that connectivity is not a “binary” or static state but rather a dynamic property of all aquatic systems, and that some beneficial effects of tributaries and wetlands result from low or variable connectivity.

Further, many Petitioners and others commented on the SAB’s review of the Draft Science Report and on the concept of connectivity on a gradient and submitted their comments to the rulemaking docket. *See, e.g.*, Comments of Water Advocacy Coal. AR-17921, at 24-28, JAxxxx-xxxx; NRDC, AR-16674, at 33-34, 36 JAxxxx-xxxx, xxxx. These comments show that the public was fully able to provide input to the Agencies on this topic.

Petitioners also suggest that they were deprived of the opportunity to submit comments regarding scientific sources added to the Science Report and on other changes to the Draft Science Report. Bus. Br. 29. But nowhere do they identify a specific source or even hint at the substance of such additional comments, or how they would have differed from those already submitted. In fact, the majority of the 353 supplementary sources were posted to or identified in the rulemaking docket prior to the close of the comment period, including: 102 scientific citations included on the Agencies’ list of additional supporting materials (AR-8591, JAxxxx-xxxx, posted Oct. 21, 2014); 59 citations included in the SAB review of the Draft Science Report (AR-8046, at B-1 through B-5, JAxxxx-xxxx, posted Oct. 17, 2014); 22 citations in references that were added to the docket and are part of the record, including the references cited in the Arid West Report (AR-8280, at 77-102, JAxxxx-

xxxx, posted Oct. 21, 2014); and one cite listed in the Proposed Rule. Other citations were included in Business Petitioners' comments to the Proposed Rule or in attachments to such comments. *See, e.g.,* James P. Hurley et al., *Influences of Watershed Characteristics on Mercury Levels in Wisconsin Rivers*. 29 ENVTL. SCI. & TECH. 1867 (1995), cited in Utility Water Act Group Comment, AR-15016, at App. A-1.

Of the remaining citations, 120 provided additional support for statements and conclusions already in the Draft Science Report; 23 provided new information, mostly on effects of human-altered systems to address comments in the SAB's peer review of the Draft Science Report; and six discuss various methods and metrics to quantify connectivity in response to the SAB's peer review, an issue that has not been raised by any Petitioner. In any event, Petitioners fail to identify a single scientific source that would have caused them to provide new or additional comment. Their claim that they had no meaningful opportunity to comment on the science rings hollow.

3. The Agencies appropriately responded to significant comments.

When an agency promulgates a final rule, it must incorporate "a concise general statement of [its] basis and purpose," 5 U.S.C. § 553(c), including a response to public comments on proposed rulemaking. *Navistar Int'l Transp. Corp. v. EPA*, 941 F.2d 1339, 1359 (6th Cir. 1991). An agency "need not respond to every comment, but it must respond in a reasoned manner to the comments received, to explain how the agency resolved any significant problems raised by the comments, and to show how

that resolution led the agency to the ultimate rule.” *Id.* (internal quotation marks and citation omitted). *See also Perez v. Mortg. Bankers Ass’n*, 135 S. Ct. 1199, 1203 (2015) (“An agency must consider and respond to significant comments received during the period for public comment.”). Business Petitioners contend that the Agencies failed to adequately respond to three topics discussed in comments, Bus. Br. 31-34, but the preamble to the Rule, the Technical Support Document, and the nearly 7,500-page Response to Comments plainly demonstrate otherwise.

The first topic Petitioners raise relates to comments expressing concern that the Rule would “unduly expand” federal jurisdiction and encroach on areas of “traditionally local land-use regulation.” Bus. Br. 31. The Agencies provided a considered response to those comments, explaining that the Rule does not regulate land use or change the relationship between federal, state, tribal and local authorities, and that the Rule is not an expansion of federal authority. *See* RTC Topic 1 at 171-72, 186-88, JAxxxx-xxxx, xxxx-xxxx; 80 Fed. Reg. at 37,055/2-3, 37,058-60, 37,096-101; TSD at 30-34, JAxxxx-xxxx. In their Response to Comments, the Agencies quoted many of the comments cited by Petitioners in their briefs, and responded substantively to all the comments cited by Petitioners. RTC Topic 4 at 453-55, Topic 5 at 18-19, and Topic 6 at 86-87, JAxxxx-xxxx, xxxx-xxxx, xxxx-xxxx.

The second topic raised by Petitioners relates to the definition of “tributary” in connection with waters in the arid West that have intermittent or ephemeral flow. Bus. Br. 31-32. The Agencies’ response to comments on this issue reveals careful

consideration of the comments, including those cited by Petitioners. RTC Topic 8 at 144-47, 186, 213-14, 313-14, 316, 345-46, 528-31 and Topic 9 at 25-28, 63-65 JAxxxx-xxxx, xxxx, xxxx-xxxx, xxxx-xxxx, xxxx, xxxx-xxxx, xxxx-xxxx, xxxx-xxxx, xxxx-xxxx; 80 Fed. Reg. at 37,064; TSD at 265-68, JAxxxx-xxxx. As the preamble to the Rule explains, the Agencies made modifications to the definition of “tributary” after considering comments related to indicators of flow in intermittent or ephemeral streams, such as those in the arid West. 80 Fed. Reg. at 37,079-80; *see also supra* Argument Section II.A (discussing flow with respect to tributaries).

The third topic raised in comments cited by Petitioners pertains to concerns that the Rule would effectively eliminate CWA permitting exemptions for agricultural activities. Bus. Br. 33. But the Agencies explained that the Rule “not only maintains current statutory exemptions, it expands regulatory exclusions ... to make it clear that this rule does not add any additional permitting requirements on agriculture.” RTC Topic 1 at 13-14, JAxxxx-xxxx. Further, the Rule “does not regulate shallow subsurface connections nor any type of groundwater, erosional features, or land use, nor does it affect either the existing statutory or regulatory exemptions from NPDES permitting requirements, such as for agricultural stormwater discharges and return flows from irrigated agriculture, or the status of water transfers.” *Id.* Far from “turn[ing] a blind eye” to such comments, Bus. Br. 33, the Agencies responded by explaining that the Rule recognizes and retains the statutory exemptions for normal agricultural activities. 80 Fed. Reg. at 37,055/2, 37,080/2-3, 37097-98; RTC Topic 6

at 30-31, Topic 7 at 311, Topic 12 at 747, 750-51, 755-56 JAxxxx-xxxx, xxxx, xxxx, xxxx-xxxx, xxxx-xxxx.

Finally, Petitioners' attempt to cast the Agencies as closed-minded, Bus. Br. 34, is flatly refuted by the record.⁴⁸ The Agencies began engaging with states, tribes, business entities, environmental organizations, and other stakeholders in 2011—years before the Proposed Rule was published—and continually sought input from stakeholders and the public throughout the rulemaking process. 80 Fed. Reg. at 37,102-03; Summary: Small Entities Outreach Meeting on the Proposed Rule for Redefining Waters of the United States under the Clean Water Act, AR-13172, JAxxxx-xxxx; Final Report of the Discretionary Small Entity Outreach for the Clean Water Rule: Definition of “Waters of the United States;” Final Rule, AR-20865, JAxxxx-xxxx;; Tribal Consultation Summary, AR-20868, JAxxxx-xxxx; 2014 EPA Regional Proposed Rule Meetings/Events, AR-13182, JAxxxx-xxxx; 2014 EPA Headquarters Proposed Rule Meetings/Events, AR-13183, JAxxxx-xxxx; Federalism

⁴⁸ The Court should not consider the extra-record article on the website Farm Futures cited by Petitioners. Bus. Br. 34. In any event, the article and evidence in the record demonstrate that Administrator McCarthy made many visits to agricultural communities to hear their concerns and assure them that none of the exemptions for agricultural activities would be changed as a result of the rulemaking. *See, e.g.*, AGWEEK, “McCarthy addresses ‘misinformation’ about Waters of the US rule” (July 14, 2014), AR-18005 at App. Q, JAxxxx (describing Administrator’s trip to Missouri to discuss “legitimate concerns” and to dispel claims that the Rule would regulate puddles on lawns and playgrounds, groundwater, or normal farming practices); *see also* Murray Energy Comments, AR-13954, at 3, JAxxxx (acknowledging the Agencies’ attempts to respond to “some of the more fringe ‘myths,’ such as ‘whether a permit is needed for walking cows across a wet field or stream.’”).

Report, AR-20864, JAxxxx-xxxx; Summary of Additional Outreach to States, AR-13454, JAxxxx-xxxx.

Commenters expressed appreciation for the Agencies' "open process," which "invite[d] the public, Congress and all interested parties to participate in the discussion." Comments of Nat'l Res. Mgr., Lake County, IL Forest Preserve Dist. AR-3834, at 1, JAxxxx. The Agencies held hundreds of public meetings on the Rule across the country, and provided a comment period of 207 days, far in excess of the 30 days required under 5 U.S.C. § 553(d). 80 Fed. Reg. at 37,057; 79 Fed. Reg. 35,712 (June 24, 2014), AR-2733, JAxxxx (extending comment period); 79 Fed. Reg. at 61,591, AR-7500 (same), JAxxxx. The Agencies considered more than one million public comments and made many revisions to the Proposed Rule based on the comments of Petitioners and others. *See* 80 Fed. Reg. at 37,079-80, 37,082-84, 37,095-96, 37,097, 37,099 (describing revisions in response to comments). Any suggestion that the Agencies acted with an "unalterably closed mind," *Miss. Comm'n on Env'tl. Quality*, 790 F.3d at 183-84, is especially weak.

The non-record report prepared by the majority staff for the Committee on Oversight and Government Reform of the U.S. House of Representatives, relied on by the Business Petitioners and one amicus curiae, Bus. Br. 24 n.5 and Wash. Legal Found. Br. 22, should receive no consideration at all from the Court. "Allegations of government misconduct are easy to allege and hard to disprove, so courts must insist on a meaningful evidentiary showing." *Coal. for Advancement of Reg'l Transp. v. Fed.*

Highway Admin., 576 F. App'x 477, 487 (6th Cir. 2014). With one narrow exception, this Court has denied motions to supplement the record in this case with the type of evidence cited in the majority staff's report. Doc. 119-2.

Moreover, Congressional committee reports authored by majority staff over the dissent of minority staff, and for which there is doubt as to the completeness or accuracy, are given no weight. *Barry v. Trustees of the Int'l Ass'n Full-Time Salaried Officers & Employees of Outside Local Unions & Dist. Counsel's (Iron Workers) Pension Plan*, 467 F. Supp. 2d 91, 97-101 (D.D.C. 2006) (describing cases). Here, the minority staff issued a statement and background information explaining their dissent from the majority staff report. Minority Statement, <http://democrats.oversight.house.gov/news/press-releases/cummings-issues-statement-and-backgrounder-on-republican-staff-report-on-clean>; Background, <http://democrats.oversight.house.gov/sites/democrats.oversight.house.gov/files/documents/Backgrounder%20on%20WOTUS.pdf>. As the minority correctly noted in their background statement, the report—aptly entitled “Politicization of the Waters of the United States Rulemaking”—suggests procedural irregularities where the Government Accountability Office found the rule to be procedurally proper, and minimizes or completely ignores the transcribed testimony of numerous agency officials that directly contradicted the Report's conclusions. The Report's conclusions are not supported by the totality of the evidence collected by the Committee, much of which the Committee has not released and which involves mostly deliberative

materials of the type that this Court has already found to be outside the scope of review. Notably, the members of Congress who filed a nearly 7,000 word amicus curiae brief in support of the State and Business Petitioners barely mention the report. Doc. 138 at 30 n.20.

In sum, the Agencies have complied with—and in many instances gone far beyond—the requirements of the APA.

4. Business Petitioners’ anti-lobbying and “propaganda” claims lack merit.

Business Petitioners’ assertions of unlawful advocacy, Bus. Br. 34-38, do not set forth a justiciable claim and are irrelevant to their allegation that the Rule is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,” 5 U.S.C. § 706(2)(A), or was promulgated “without observance of procedure required by law,” *id.* § 706(2)(D).

Petitioners base their challenge on two appropriations act provisions that do not set forth “procedures that are required by law.” Bus. Br. 35-37 (citing Pub. L. No. 113-76, div. E, § 718; Pub. L. No. 113-235, div. E, §§ 715, 718). One provision prohibits the expenditure of funds for indirect lobbying of Congress in support of, or in opposition to, pending legislation; the other prohibits the expenditure of funds for publicity that is self-aggrandizing, purely partisan, or conceals an agency’s role in sponsoring the material. *Id.* In contrast, statutes that provide a basis for a procedural claim under 5 U.S.C. § 706(2)(D) set forth specific procedures that an agency must

affirmatively undertake, such as the APA's requirements for notice and comment and the Regulatory Flexibility Act. 5 U.S.C. § 603. Here, the Government Accountability Office ("GAO") concluded that the Agencies completed all applicable procedural requirements in promulgating the Rule. July 15, 2016, GAO letter at 2, available at <http://gao.gov/products/GAO-15-750R> ("Our review of the procedural steps taken indicates that the agencies complied with the applicable requirements.").

It is well-established that there is no private right of action for a claim that an agency has misused appropriated funds under either an appropriations act or under 18 U.S.C. § 1913, which prohibits the use of appropriated funds to pay for a communication (e.g., letter or advertisement) that is intended or designed to influence a member of Congress to favor, adopt, or oppose legislation. *Nat'l Treasury Emp. Union v. Campbell*, 654 F.2d 784, 790-93 (D.C. Cir. 1981); *Grassley v. Legal Servs. Corp.*, 535 F. Supp. 818, 825-6 (S.D. Iowa 1982). The GAO's role is to "investigate all matters related to the receipt, disbursement, and use of public money" and to "make an investigation and report ordered by either House of Congress or a committee of Congress having jurisdiction over revenue, appropriations, or expenditures." 31 U.S.C. § 712(1), (4). Congress may take appropriate legislative action after an investigation or report by the GAO, but there is no remedy for a private party to enforce what Petitioners generally refer to as "anti-lobbying laws," Bus. Br. 36-37. *See*

Nat'l Treasury Emp. Union, 654 F.2d at 794.⁴⁹ The GAO opinion relied on by Business Petitioners, Op. B-326944, 2015 WL 8618591 (Comp. Gen. Dec. 14, 2015), is not to the contrary.

Even if the GAO opinion were correct—which it is not—it is irrelevant to whether the Rule was promulgated “without observance of procedure required by law.”⁵⁰ 5 U.S.C. § 706(2)(D). The GAO opinion in no way found that EPA acted in

⁴⁹ Similarly, Petitioners do not satisfy the minimal constitutional requirements for standing set in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992), with respect to this claim. Those requirements are: (1) an injury in fact; (2) a causal connection between the injury and the challenged conduct; and (3) the likelihood that a favorable decision will remedy the injury. *Id.* Petitioners have not stated how the asserted anti-lobbying and publicity spending restrictions, or any resulting anti-deficiency violation, affect them. Nor do they state how a judicial finding of such violations would translate into a meaningful remedy with respect to the Rule.

⁵⁰ As background, a U.S. Senator asked the GAO to provide an opinion as to whether EPA’s use of certain social media tools during the rulemaking violated restrictions on the use of federal funds either (1) to indirectly lobby Congress in support of or in opposition to pending legislation or (2) to engage in publicity that is self-aggrandizing, purely partisan, or conceals the agency’s role in sponsoring the material. 2015 WL 8618591, at *1. After examining an entire database of social media outreach materials, the GAO concluded that (1) the indirect lobbying restriction had been violated based on a single blog post that contained two hyperlinks to articles on third party websites and (2) the publicity restriction had been violated based on EPA’s use of a social media tool called “Thunderclap.” *Id.* at *1, 5.

EPA vigorously disagrees with the GAO opinion’s conclusions. As EPA has explained, the opinion’s conclusion that EPA violated appropriations act restrictions was based on the actions of third parties over which EPA had no control. Sept. 15, 2016 EPA Letter to GAO, Attachment at 2-10, JAxxxx-xxxx (available at https://www.epa.gov/sites/production/files/2016-11/documents/epa_reply_to_gao_social_media_op_9-15-16_0.pdf). The GAO opinion is also in conflict with that agency’s prior opinions and unsupported by any case law, which render the opinion of little value. *See id.* at 1; Aug. 7, 2015 EPA Letter

Cont.

bad faith, or that the Agencies “had closed minds all along.” Bus. Br. 38. Upon its own finding that no violations occurred, EPA took no disciplinary action, and no further steps are required on the part of EPA. In any event, the GAO Opinion regarding the expenditure of funds has no relevance to the procedural requirements that the Agencies were required to follow, or to whether the Rule is arbitrary, capricious, or otherwise contrary to law. *Cf. Miss. Comm’n on Env’tl. Quality*, 790 F.3d at 184-85 (finding that claim of violation of the Information Quality Act did not give rise to a right of action or bear on the petitions for review of EPA decision that specific areas were not in attainment of air quality standards).

The Agencies acted with an open mind and complied with all applicable procedural requirements in promulgating the Rule. Petitioners have failed to demonstrate otherwise.

B. The Agencies complied with the Regulatory Flexibility Act.

As part of the rulemaking, the Agencies found, pursuant to the Regulatory Flexibility Act (“RFA”), 5 U.S.C. §§ 601-612, that the Rule would not have a significant adverse economic impact on a substantial number of small entities. The RFA is a procedural statute with no substantive requirements. *See U.S. Cellular Corp. v.*

to GAO, Attachment at 4-10, 14-16 (available at https://www.epa.gov/sites/production/files/2016-01/documents/2015_8_7_epa_response_to_gao_re_social_media.pdf; *Delta Chem. Corp. v. West*, 33 F.3d 380, 382 (4th Cir. 1994) (finding GAO opinion to be “undeserving of judicial deference” where it was inconsistent with other opinions).

FCC, 254 F.3d 78, 88 (D.C. Cir. 2001). It requires agencies to prepare a “regulatory flexibility analysis” describing the impact certain rules will have on small entities. 5 U.S.C. §§ 603, 604. A regulatory flexibility analysis is not required, however, if the head of the agency, as here, certifies “that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities.” *Id.* § 605(b).

Business Petitioners’ challenge to the Agencies’ finding of no significant adverse economic impact, Bus. Br. 38-42, lacks merit. Even if the RFA section 605(b) certification were flawed, any error was harmless because the Agencies engaged in voluntary outreach to small entities.

1. The Rule does not directly impose regulatory requirements or costs on small entities.

This Court has already observed that “the Rule is definitional only and does not *directly* impose any restriction or limitation.” *In re U.S. Dep’t of Def.*, 817 F.3d at 269 (McKeague, J.) (emphasis in original). As Judge McKeague noted, the limitations that do derive from the Rule are “not self-executing.” *Id.*; *see also id.* at 276 (Griffin, J., concurring) (noting that the Rule is definitional and not self-executing). The Rule simply clarifies *where* restrictions on discharging pollutants may apply, but it does not impose those restrictions—any accompanying costs are incurred through the distinct permitting process. *See, e.g.*, Economic Analysis at vii, 1, JAxxxx, xxxx (the costs assessed in the Economic Analysis “would be incurred only indirectly”); 80 Fed. Reg.

at 37,102 (the Rule “is not designed to subject any entities of any size to any specific regulatory burden”).

In enacting the RFA, Congress “did not intend to require that every agency consider every indirect effect that any regulation might have on small businesses in any stratum of the national economy.” *Mid-Tex Elec. Coop., Inc. v. F.E.R.C.*, 773 F.2d 327, 342-43 (D.C. Cir. 1985). In *Cement Kiln Recycling Coal. v. EPA*, 255 F.3d 855, 869 (D.C. Cir. 2001), the D.C. Circuit warned that expanding the regulatory flexibility analysis beyond directly regulated entities would require a “massive exercise in economic modeling” for all rulemaking activities. Thus, courts have repeatedly found that an RFA section 605(b) certification is “justified” where the economic impacts on regulated entities are indirect. *See, e.g., Michigan v. EPA*, 213 F.3d 663, 689 (D.C. Cir. 2000) (finding EPA’s section 605(b) certification justified because the Clean Air Act action in question only required *the States* to decide what entities would be subject to air emission reductions); *Mid-Tex*, 773 F.2d at 342 (concluding that Congress intended to limit the regulatory flexibility analysis to small entities “directly regulated” by the rule in question); *Am. Trucking Ass’n, Inc. v. U.S. EPA*, 175 F.3d 1027, 1044 (D.C. Cir. 1999), *judgment aff’d in part and rev’d in part on other grounds, Whitman v. Am. Trucking Ass’n, Inc.*, 531 U.S. 457 (2001) (internal quotation and citation omitted) (concluding that the RFA places “no obligation upon an agency to conduct a small entity impact analysis of effects on entities which [the agency] does not regulate”).

Petitioners nonetheless assert that the Rule imposes costs, relying primarily on declarations that are outside the administrative record. Bus. Br. 40-41. The Court should disregard these extra-record materials and the arguments made in reliance upon them. *See* Memorandum Opinion and Order on Administrative Record (ECF No. 119-2) (denying motions to supplement the administrative record with the exception of a single document); *Rybachek v. EPA*, 904 F.2d 1276, 1296 n.25 (9th Cir. 1990) (striking portions of brief that relied on extra-record material). Regardless, the declarations do not demonstrate that the Rule imposes direct costs. The declarants' assertions regarding costs are speculative and based on unfounded assumptions about a presumed change in the jurisdictional status of specific waters. Even then, any costs would only be an indirect effect of the Rule.

Underlying Petitioners' argument is a faulty assumption that the Agencies could have promulgated a definition of "waters of the United States" tailored to small entities. But by its own terms, the RFA does not change the objectives or decisional factors of the underlying statute. "The requirements of sections 603 and 604 of this title do not alter in any manner standards otherwise applicable by law to agency action." 5 U.S.C. § 606. Sections 603(c) and 604(a)(5) further provide that any alternatives to a proposed and final rule must "accomplish" and be "[c]onsistent with the stated objectives of applicable statutes." *See Associated Fisheries of Maine, Inc. v. Daley*, 127 F.3d 104, 114 (1st Cir. 1997) ("Congress emphasized that the RFA should not be construed to undermine other legislatively mandated goals."). As noted above,

multiple courts have held that the Agencies may not remove categories of “point sources,” such as those operated by small entities, from the permitting requirements of the Act. *See supra* at 134 (discussing, *inter alia*, *Costle*, 568 F.2d at 1377). Thus, even if any costs associated with the Rule were direct, which none are, a flexible alternative that would provide a less “burdensome” definition of waters of the United States for small entities would not be permitted under the CWA.

2. The Agencies reasonably used the 1986 regulation as the baseline for its regulatory flexibility analysis.

Business Petitioners mischaracterize the Agencies’ second rationale for the RFA section 605(b) certification as “historic practices dating to 1986.” Bus. Br. 41-42. The baseline used by the Agencies was not the amorphous concept of “historic practices,” but rather the prior version of 33 C.F.R. Part 328, promulgated in 1986. 80 Fed. Reg. at 37,102/1 (“Because fewer waters will be subject to the CWA under the rule than are subject to regulation under existing [i.e., 1986] *regulations*, this action will not affect small entities to a greater degree than the existing [i.e., 1986] *regulations*.”) (emphasis added). EPA’s guidance suggests that such comparison is the best practice when performing a regulatory flexibility analysis for rules revising an existing regulation. EPA Final Guidance for EPA Rulewriters: Regulatory Flexibility Act (Nov. 30, 2006) at 29, available at <https://www.epa.gov/reg-flex/epas-action-development-process-final-guidance-epa-rulewriters-regulatory-flexibility-act>

(“Generally, in the case of a rule revising an existing rule, you should assess only the incremental cost of the rule revision.”).⁵¹

Ignoring EPA’s guidance on this subject, Petitioners suggest that the baseline should have been the Agencies’ practice under guidance issued after the *Rapanos* decision. Bus. Br. 42. That argument is flawed because *Rapanos* did not displace the 1986 regulation, and Business Petitioners read the effects of *SWANCC* and *Rapanos* on CWA jurisdiction too broadly. Indeed, Associational Petitioners interpret the impact of *SWANCC* and *Rapanos* on CWA jurisdiction as quite marginal. Ass’n Br. 9-10; Waterkeeper Br. 36-38. The varying positions advocated by the Petitioners demonstrate how the scope of the CWA jurisdiction after *Rapanos* lacked clarity. (That, of course, is what made the Rule necessary.) While the Agencies sought to increase administrative clarity and consistency through post-*Rapanos* guidance, that guidance was not binding and actual agency practice varied by region or district. TSD at 79, JAxxxx; *id.* at 81, JAxxxx (noting “some inconsistencies in practice in

⁵¹ The agency guidance documents that Petitioners rely on are distinguishable because they address a distinct type of analyses that may be required under Executive Order 12,866, not the RFA. *Compare* Executive Order No. 12,866, Sec. 6(a)(3)(B), 58 Fed. Reg. 51,735 (Oct. 4, 1993) (requiring an assessment of potential costs and benefits of the regulatory action for significant actions) and *id.* Sec. 6(a)(3)(C) (requiring an additional assessment of anticipated costs and benefits of the regulatory action and its feasible alternatives for economically significant rules) *with* 5 U.S.C. §§ 603(b), 603(a) (setting out requirements for initial and final regulatory flexibility analyses, respectively). *Cape Hatteras Access Preservation Alliance v. U.S. Department of Interior*, 344 F. Supp. 2d 108, 127-28 (D.D.C. 2004), is likewise distinguishable, as it evaluated an analysis under a provision of the Endangered Species Act, 16 U.S.C. § 1533.

implementing the 2008 guidance”). In contrast, the Rule, like the prior 1986 regulation, constitutes binding law. Given EPA’s RFA guidance, it was entirely reasonable for the Agencies to use the most recent binding definition of “waters of the United States” as the baseline for their RFA section 605(b) certification.

Petitioners do not and cannot dispute that the Rule is narrower than its 1986 predecessor. The Rule deletes from the definition of “waters of the United States” all “other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats ... the use, degradation or destruction of which could affect interstate or foreign commerce.” *See* 33 C.F.R. § 328.3(a)(3) (1987). Waters lacking any connection to a primary water are no longer jurisdictional. The Rule expressly excludes some features and waters over which the Agencies have not generally asserted jurisdiction and in so doing eliminates the authority of the Agencies to determine in case-specific circumstances that some such waters are jurisdictional. The Rule reduces the totality of tributaries by requiring a bed, banks and an ordinary high water mark, and also imposes a floodplain or 4,000-foot distance limit on waters that can be found jurisdictional on a case-specific basis. Together these changes narrow the scope of the definition in comparison to the 1986 regulation. TSD at 30-34, JAxxxx-xxxx. Thus, the rulemaking did not affect small entities to a greater extent than the prior rule.

Petitioners mistakenly assert that the Agencies “conceded” in the Economic Analysis that the Rule will result in an expansion of CWA regulatory jurisdiction. Bus.

Br. 41. The Economic Analysis did not come to that conclusion. Rather, the figures cited by Petitioners represent hypothetical scenarios based on conservative assumptions that looked *only* at the potential for *increases* in CWA jurisdiction, without assessing any *reductions* in jurisdiction. *See* Economic Analysis at vi-ix, JAxxxx-xxxx (summarizing analysis and key conclusions). The Economic Analysis did not consider how the limitations in the Rule might result in certain waters no longer being jurisdictional. Thus, the Economic Analysis was a modeling exercise that was inherently inclined toward predicting an increase in CWA regulatory jurisdiction when it calculated a potential 2.84 to 4.65 percent expansion.

Moreover, the Economic Analysis only assessed post-*Rapanos* data. Economic Analysis at 5, JAxxxx. Because the Agencies were “unable to develop quantitative estimates of the impact of the rule relative to historic practice,” *id.*, the Economic Analysis could not use the same baseline as the Agencies’ RFA section 605(b) certification. The Economic Analysis does note, however, that “[b]ecause the final rule is *narrower* in jurisdictional scope than the existing regulations, there would be *negative* costs and benefits in comparison to this baseline.” *Id.* (emphasis added); *see also id.* at v, JAxxxx (“The analysis compared to historic practice is conceptually straightforward because the narrowed jurisdictional scope results in negative or zero impact.”).

Petitioners also rely on a letter from the Small Business Administration (“SBA”) Office of Advocacy, which asserts the same arguments presented by

Petitioners. Bus. Br. 39. The role of the SBA Office of Advocacy is to advocate on behalf of small businesses, not to administer the RFA, much less the CWA. Its letter is not entitled to any weight. *See Am. Trucking*, 175 F.3d at 1044 (“we do not defer to the SBA’s interpretation of the RFA”); *Mid-Tex*, 773 F.2d at 341 (concluding SBA advocacy not persuasive).

Petitioners’ assertion that the record does not support the Agencies’ RFA section 605(b) certification is also baseless. Bus. Br. 42 (citing *Nat’l Truck Equip. Ass’n v. Nat’l Highway Traffic Safety Admin.*, 919 F.2d 1148, 1157 (6th Cir. 1990)). The Agencies responded to numerous comments regarding the baseline and the assertion that the Rule would have an economic impact on small entities. *See, e.g.*, RTC Topic 11-1 at 112-16, 213-15, JAxxx-xxxx, xxxx-xxxx; *id.*, Topic 11-2 at 9-12, 208-14, JAxxx-xxxx, xxxx-xxxx. Thus, this case is easily distinguishable from *National Truck Equipment*, where the court concluded that the National Highway Traffic Safety Administration made only a “conclusory statement with no evidentiary support” that the standard in question would not have a significant economic impact on small businesses. 919 F.2d at 1157.

In sum, the Agencies reasonably focused on the definitional nature of the Rule when they certified it under 5 U.S.C. § 605(b), and they also reasonably compared the Rule to its 1986 predecessor. This “good-faith effort” satisfies the RFA’s requirements. *N. Carolina Fisheries Ass’n, Inc. v. Gutierrez*, 518 F. Supp. 2d 62, 95 (D.D.C. 2007) (“What is required of the agency is not perfection, but rather a

reasonable, good-faith effort to take those steps and therefore satisfy the statute’s mandate.”); *see also State of Mich. v. Thomas*, 805 F.2d 176, 188 (6th Cir. 1986) (RFA judicial review considers whether the agency’s reasoning was “so defective as to render its final decision unreasonable” or whether any analysis is absent in response to public comments).

3. The Agencies’ small entity consultation renders any procedural error harmless.

If there were a procedural error under the RFA, it would be harmless under 5 U.S.C. § 706. “[T]he key to whether an agency’s procedural error in promulgating a rule is harmless error hinges not on whether the same rule would have issued absent the error, but whether the affected parties had sufficient opportunity to weigh in on the proposed rule.” *United States v. Stevenson*, 676 F.3d 557, 565 (6th Cir. 2012).

Although the Agencies reasonably determined they were not required to convene a Small Business Advocacy Review Panel for the Rule, they nonetheless engaged in substantial outreach to small entities. The Agencies sought wide input from representatives of small entities in developing both the proposed and final definition of “waters of the United States.” In 2011, coordinating with the Office of Management and Budget and the SBA, the Agencies convened an informal group of small entities to exchange ideas on potential jurisdictional policies. EPA Summary of the Discretionary Small Entity Outreach for Planned Proposed Revised Definition of “Waters of the United States,” AR-1927, at 3, 6-8, JAxxxx, xxxx-xxxx (summarizing

meeting with small business participants from the oil and gas sector, farming/agriculture, construction and equipment, municipal storm sewer systems or publicly owned treatment plants, the manufacturing sector, and non-governmental organizations). A second outreach meeting was held with small entities in October 2014. Final Report of the Discretionary Small Entity Outreach for the Clean Water Rule: Definition of “Waters of the United States;” Final Rule, AR-20865, at 3, 6-8, JAxxxx, xxxx-xxxx (summarizing meeting with participants from aforementioned and additional sectors, such as mining, fertilizer and pesticide use, and power industry). In addition, the Agencies held hundreds of public meetings and sought feedback from a broad audience of stakeholders that included small entities. *See, e.g.*, 2014 EPA Regional Proposed Rule Meetings/Events, AR-13182, JAxxxx-xxxx; 2014 EPA Headquarters Proposed Rule Meetings/Events, AR-13183, JAxxxx-xxxx; Local Government Advisory Committee Letter to the Administrator on Proposed Rule, AR-10584, JAxxxx-xxxx (thanking the Agencies for public outreach meetings).

The Agencies also thoroughly responded to comments about the economic effects of the Rule, including concerns about its effect on small entities. *See, e.g.*, RTC Topic 11-1 at 112-16, 213-15, JAxxxx-xxxx, xxxx-xxxx. The Agencies made numerous changes in response to small entities’ concerns, such as including exclusions for construction, agriculture, and stormwater management features. *See, e.g.*, RTC Topic 7 at 205, 312, 325, JAxxxx, xxxx, xxxx.

Thus, the objectives of the RFA were achieved here.

VII. Petitioners' NEPA and ESA claims lack merit.

A. Petitioners' NEPA arguments lack merit.

Petitioners' NEPA claims must be rejected because the CWA expressly exempts the Rule from NEPA's requirements. As such, the Agencies were not required to complete an Environmental Assessment ("EA") or an Environment Impact Statement ("EIS"). Even assuming that NEPA applied, the Army's voluntary EA and Finding of No Significant Impact ("FONSI") (AR-20867, JAxxxx) met NEPA's requirements.

1. The CWA exempts the Rule from NEPA.

With two exceptions not relevant here, "no action of the [EPA] Administrator taken pursuant to [the CWA] shall be deemed a major Federal action significantly affecting the quality of the human environment within the meaning of [NEPA]." 33 U.S.C. § 1371(c)(1). As the Senate Conference Report advised: "If the actions of the Administrator under [the CWA] were subject to the requirements of NEPA, administration of the Act would be greatly impeded." S. Conf. Rep. No. 92-1236, *as reprinted in* 1972 U.S.C.C.A.N. 3776, 3827.

The statutory exemption applies here even though EPA jointly promulgated the Rule with the Army. The CWA does not state that only actions taken by EPA alone are exempt. As this Court previously concluded in this case: "That the Clean Water Rule was promulgated jointly by the EPA Administrator *and* the Secretary of the Army does not defeat the fact that it represents action, in substantial part, of the

Administrator.” *In re Dep’t of Def.*, 817 F.3d at 273 (emphasis in original); *see also Municipality of Anchorage v. United States*, 980 F.2d 1320, 1328-29 (9th Cir. 1992) (holding that an action “does not cease to be ‘action of the Administrator’ merely because it was adopted and negotiated in conjunction with the Secretary of the Army and the Corps”). The *Municipality* court found that a Memorandum of Agreement between EPA and the Corps providing guidance for administration of the section 404 permitting program was exempt from NEPA under section 1371(c). 980 F.2d at 1329. Here, the Rule broadly concerns the jurisdictional scope of the entire Act, including the myriad CWA programs administrated only by EPA (EPA shares its CWA authority with the Army only with respect to section 404, 33 U.S.C. § 1344). *See* 80 Fed. Reg. at 37,054/1-2. EPA has the ultimate authority to determine the scope of CWA jurisdiction and took the lead role in the rulemaking process. *See* Respondents’ Combined Opp’n to Mots. to Dismiss, ECF No. 58, at 32-34; 43 Op. Att’y Gen. 197, 1979 WL 16529 (U.S.A.G. Sept. 5, 1979); 80 Fed. Reg. at 37,055/3 (describing at least six exclusively EPA programs in which the term “waters of the United States” is used). It is beyond question that the Rule is an “action of the Administrator.” *In re Dep’t of Def.*, 817 F.3d at 273.

Waterkeeper Petitioners argue that the Army’s revision of its regulations takes this case outside the statutory NEPA exemption. Waterkeeper 28 n.13 (citing 33 U.S.C. § 1371(c)(1)). The Army’s regulations regarding jurisdictional limits under the CWA, however, must conform with EPA’s authority under the same statute since the

same statutory term—“waters of the United States”—applies to *all* CWA programs. *See* 43 Op. Att’y Gen. 197, 1979 WL 16529, at *3. Given EPA’s ultimate authority over the geographic scope of the CWA, the Army lacks discretion to adopt a different definition. The Army’s amendment of its own regulations, therefore, does not subject the Rule to NEPA.

Petitioners attempt to avoid the statutory NEPA exemption by characterizing the Rule as “the issuance of a permit” under CWA section 402. *Waterkeeper Br.* 28 n.13 (quoting 33 U.S.C. § 1371(c)(1)). But in determining that it has subject matter jurisdiction, this Court did not hold, and the Agencies did not argue, that the Rule is the functional equivalent of a permit. Rather, the Court concluded that CWA section 509(b)(1)(F), 33 U.S.C. § 1369(b)(1), should be interpreted functionally to include regulations relating to the issuance or denial of permits. *In re Dep’t of Def.*, 817 F.3d at 273. That practical ruling does not convert the Rule to a section 402 NPDES permit requiring NEPA review.

And the Army’s voluntary preparation of an EA does not create a NEPA obligation where none previously existed. *See Kandra v. United States*, 145 F. Supp. 2d 1192, 1203 n.4 (D. Or. 2001) (rejecting the contention that agency, by issuing an EA, had admitted NEPA’s applicability) (citing 40 C.F.R. § 1501.3(b)); *accord Olmsted Citizens for a Better Cmty. v. United States*, 793 F.2d 201, 208 n.9 (8th Cir. 1986) (agency’s belief regarding degree of required NEPA analysis irrelevant to such question).

2. Even if NEPA did apply, the Army's EA and FONSI were consistent with NEPA's requirements.

Even if the statutory NEPA exemption did not apply here, the Army's voluntary EA satisfied any NEPA requirements. The Army appropriately considered the environmental impacts of the proposed action, including changes made to the Rule between the draft and final versions, and reasonably concluded that the Rule would have few—and mainly beneficial—impacts. Accordingly, even if NEPA applied, the Army would not have been required to complete an EIS, as the record demonstrates that the Rule would not have a significant impact on the human environment. In addition, given that the Rule was developed through an extensive rulemaking process and will have minimal impacts, the Army considered an appropriate range of alternatives.

“NEPA imposes only procedural requirements on federal agencies with a particular focus on requiring agencies to undertake analyses of the environmental impact of their proposals and actions.” *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 756-57 (2004). NEPA does not force an agency to reach a particular substantive outcome or to select the most environmentally-friendly option. *Kelley v. Selin*, 42 F.3d 1501, 1512 (6th Cir. 1995).

While an in-depth EIS is required for “major Federal action[s] significantly affecting the quality of the human environment,” NEPA regulations provide that an agency may prepare “a shorter” EA and FONSI “if it determines ... that the

proposed action will not have a significant impact on the environment.” *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 16 (2008) (citing 40 C.F.R. §§ 1508.9(a), 1508.13 (2007)). EAs are intended to be “concise public document[s]” that “[b]riefly provide sufficient evidence and analysis for determining whether to prepare an [EIS] or a [FONSI].” 40 C.F.R. § 1508.9(a)(1).

The Court should not substitute its “judgment of the environmental impact for the judgment of the agency, once the agency has adequately studied the issue.” *Kelley*, 42 F.3d at 1518 (citation and internal quotation omitted). When the resolution of the issues involves primarily questions of fact and “requires a high level of technical expertise [it] is properly left to the informed discretion of the responsible federal agencies.” *Kleppe v. Sierra Club*, 427 U.S. 390, 412 (1976). An agency’s decision “that no EIS is required, can be overturned only if it is arbitrary, capricious, or an abuse of discretion.” *Crounse Corp. v. I.C.C.*, 781 F.2d 1176, 1193 (6th Cir. 1986).

a. The Army reasonably concluded the Rule would not have a significant impact.

The proposed action here was a definition and clarification of the Agencies’ jurisdiction under the CWA. Thus, the Army properly concluded that “[a]doption of the final proposed rule would have no direct effect on the environment.”

EA/FONSI, AR-20867, at 21, JAxxxx. Further, specific “proposals that would impact jurisdictional areas,” such as applications for permits to discharge pollutants, will be subject to review under NEPA. EA/FONSI at 23, JAxxxx. The Agencies are

in a far better position to assess a proposed action's environmental consequences when a specific proposal is before them.

Accordingly, the Army not only reasonably concluded that promulgating the Rule would have no direct impacts, but also that any potential indirect impacts were speculative and not reasonably foreseeable. EA/FONSI at 23, JAxxxx; *see Wyoming v. U.S. Dep't of Agric.*, 661 F.3d 1209, 1253 (10th Cir. 2011) (holding that a rule did not require NEPA analysis because it “merely established an overarching framework for evaluating future [specific proposals for action], which generally would undergo their own NEPA evaluations”). State Petitioners complain, States Br. 84-86, that the EA's analysis of environmental conclusions is cursory, but the general analysis is a result both of the nature of an EA—defined by regulation as a concise document with brief discussions—and the lack of specific proposals for action.

In any event, the Army's finding in the EA/FONSI that the Rule will likely result at most in an incremental increase in CWA jurisdiction compared to the Agencies' post-*Rapanos* practices is well-supported by the record. The Agencies' analysis of a random selection of negative jurisdictional determinations “showed that with adoption of the rule there would be between a 2.8 to 4.6 percent increase in positive jurisdictional determinations,” compared to post-*Rapanos* practices, with the majority of the increase in the category of case-specific waters. EA/FONSI at 21-23, 25-26, JAxxxx-xxxx, xxxx-xxxx. And, as previously discussed, this analysis was conservatively skewed toward finding an increase in CWA jurisdiction.

Contrary to Waterkeeper Petitioners' argument, Waterkeeper Br. 30, the EA addresses "the possibility that some wetlands that might have been found jurisdictional ... would no longer be jurisdictional under the final proposed rule." EA/FONSI at 22, JAxxxx. In the Agencies' experience, "the vast majority of wetlands with a significant nexus are located within the 4,000 foot boundary." *Id.* at 22-23, JAxxxx-xxxx. Thus, the EA states that the decrease in jurisdictional determinations for wetlands outside the 4,000 foot boundary "would correspondingly be small." *Id.* at 23, JAxxxx. The Army also noted that it would be impossible to speculate on the environmental consequences of those waters no longer being subject to the section 404 permitting process because that would depend on the specific nature of activities proposed for such waters, the individual waters themselves, and other applicable requirements, such as the Endangered Species Act and state and local law. *Id.*

Petitioners rely on an internal Corps memorandum as evidence that the 4,000 foot cutoff will be significant. Waterkeeper Br. 31-32; April 25, 2015 Internal Corps Memorandum, JAxxxx.⁵² That memorandum, however, does not demonstrate either that the cutoff will have significant impacts or that the EA's NEPA analysis is unreasonable. The memorandum contains examples that "were developed in a limited amount of time" to facilitate interagency discussion. Jurisdictional

⁵² See *supra* at 123 n.30 for additional discussion of this internal Corps memorandum.

Determination Review Memorandum at 1, JAxxxx. The examples were not randomly selected or representative of a typical situation.⁵³ In addition, the internal memorandum represented the Corps' comments, not the Army's official position. *See Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 659 (2007) (“[T]hat a preliminary determination by a local agency representative is later overruled at a higher level within the agency does not render the decisionmaking process arbitrary and capricious.”). The law favors robust internal discussions that will form the foundation for well-informed decisions. *See Dep't of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8-9 (2001).

Petitioners also argue that the Army failed to consider changes made between the Proposed Rule and final Rule. Waterkeeper Br. 29. This assertion is false. As discussed above, the EA addresses the 4,000 foot bright line boundary, finding that it would not lead to a significant decrease in CWA jurisdiction. *See EA/FONSI* at 7-8, 17, 22-23, JAxxxx-xxxx, xxxx, xxxx-xxxx. The EA also addresses the exclusion of certain ditches and ephemeral erosional features, and specifically notes that these exclusions reflect the Agencies' current practice. *EA/FONSI* at 5, 9, JAxxxx, xxxx. The revised definitions of “tributary” to require a bed and banks and an ordinary high

⁵³ EPA separately conducted a review of 199 jurisdictional determinations from across the United States and found only two instances of waters (wetlands) determined to be jurisdictional under the standing practice that fell outside the 4,000 foot boundary. This evidence is compelling because it involved a random sample and a larger number of determinations than the internal Corps memorandum. Jurisdictional Determination Review Memorandum, JAxxxx; *see supra* at 122-23.

water mark are reflected in the EA's definitions, and did not change from the Proposed Rule. *See* EA/FONSI at 4, 5, JAxxxx, xxxx; 80 Fed. Reg. at 37,076; 79 Fed. Reg. at 22,199. And a case-specific significant nexus determination for agricultural waters for purposes of "adjacency" was generally the status quo prior to promulgation of the Rule. In short, the EA reasonably assessed changes made in the Rule.

b. NEPA would not have required the Army to complete an EIS.

Notwithstanding State Petitioners' additional NEPA allegations, the Army was not required to prepare an EIS in this case, even if NEPA applied. Petitioners argue in conclusory fashion that the Army failed to analyze the significance and intensity factors and that these factors support a finding that the Rule will have significant impacts. States Br. 79. They are wrong.

Petitioners' argument that a detailed, time and resource intensive EIS was required simply because the Army did not explicitly address the context and intensity factors in 40 C.F.R. § 1508.27(b) is without merit. *See* States Br. 79. NEPA does not require a "formalistic" application of factors, particularly in an EA, which is intended to be a concise document. *Spiller v. White*, 352 F.3d 235, 242-43 (5th Cir. 2003) (holding that agency need not specifically address each of ten intensity factors in an EA); *Advocates for Transp. Alts., Inc. v. U.S. Army Corps of Eng'rs*, 453 F. Supp. 2d 289, 301 (D. Mass. 2006) ("The list of intensity factors does not serve as a 'checklist.'").

The EA demonstrates that the Army in fact considered the context and intensity of the Rule's impacts. NEPA regulations provide that "an action must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality." 40 C.F.R. § 1508.27. Because the "affected region" here includes the entire United States, the Army acted properly in considering the nationwide effects of the Rule and was not required to analyze narrower state or regional impacts, as Petitioners assert. *See* 40 C.F.R. § 1502.4(c) (noting that when preparing an EIS on "broad actions," agencies may evaluate proposals "generically"); *Wyoming*, 661 F.3d at 1256 (holding that site-specific analysis was not required for "'broad' nationwide rule"). It would be impossible (and highly speculative) to fully examine the impacts on each locality, given the jurisdictional nature of the Rule and the intrinsic uncertainty in forecasting future permit applications, let alone their impacts.

Nor is the Rule "highly controversial." Under NEPA, "highly controversial" refers to a substantial dispute about the "size, nature, or *effect* of the major federal action" on the quality of the human environment, not to mere opposition. 40 C.F.R. § 1508.27; *Town of Cave Creek, Arizona v. FAA*, 325 F.3d 320, 331 (D.C. Cir. 2003). "Those courts that have addressed this issue have consistently held that when an agency's finding of no significant impact is based upon adequate data, the fact 'that the record also contains evidence supporting a different scientific opinion does not render the agency's decision arbitrary and capricious.'" *Indiana Forest All., Inc. v. U.S.*

Forest Serv., 325 F.3d 851, 860–61 (7th Cir. 2003) (quoting *Wetlands Action Network v. U.S. Army Corps of Eng’rs*, 222 F.3d 1105, 1120–21 (9th Cir. 2000)). In a rulemaking such as this, it would be impossible to have uniformity of opinion. The FONSI is also supported by ample data, and the agencies have discretion to rely on the reasonable opinions of their own qualified experts. *See Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 378 (1989).

Similarly, the Rule does not set a precedent for future actions with significant effects. States Br. 83 (citing 40 C.F.R. § 1508.27(b)(6)). “The purpose of that section is to avoid the thoughtless setting in motion of a ‘chain of bureaucratic commitment that will become progressively harder to undo the longer it continues.’” *Presidio Golf Club v. Nat’l Park Serv.*, 155 F.3d 1153, 1162-63 (9th Cir. 1998) (quoting *Sierra Club v. Marsh*, 769 F.2d 868, 879 (1st Cir. 1985)). The Rule defines the scope of the CWA and thus what waters will need permits. It does not authorize any significant impacts, nor does it set a precedent for doing so in the future. *See* EA/FONSI at 21, JAxxxx; *see also Friends of the Earth, Inc. v. U.S. Army Corps of Eng’rs*, 109 F. Supp. 2d 30, 43 (D.D.C. 2000) (finding “significance” when in future projects the “Corps may feel bound to the conclusions reached” in FONSI issued). Future actions affecting waters within the Agencies’ jurisdiction will be subject to analysis under NEPA, the CWA, and other relevant statutes in the context of actual permit applications. *See* EA/FONSI at 22, JAxxxx (noting that proposals to impact jurisdictional areas will be

subject to review). Thus, the Rule in no way sets a precedent for future actions with significant impacts.

Finally, State Petitioners argue that the Rule “threatens a violation of Federal, State, or local law” based on their theory that the Rule violates the CWA. States Br. 83 (quoting 40 C.F.R. § 1508.27(b)(10)). NEPA does not require the Army to prepare an EIS to analyze the impacts of the Rule based on the premise that the Rule itself is invalid or in excess of the Agencies’ authority. The Agencies reasonably concluded that the Rule is consistent with all applicable law, including the CWA.

c. The Army assessed an appropriate number of alternatives.

NEPA does not require a minimum number of alternatives, and courts have upheld EISs that examined only one alternative and the No Action alternative. *See Cal. ex rel. Imperial Cnty. Air Pollution Control Dist. v. U.S. Dep’t of Interior*, 767 F.3d 781, 797 (9th Cir. 2014); *League of Wilderness Defenders-Blue Mountains Biodiversity Project v. U.S. Forest Serv.*, 689 F.3d 1060, 1071 (9th Cir. 2012); *Partners in Forestry Coop. v. U.S. Forest Serv.*, 45 F. Supp. 3d 677, 688 (W.D. Mich. 2014), *aff’d sub nom. Partners in Forestry Coop., Northwood All., Inc. v. U.S. Forest Serv.*, 638 F. App’x 456 (6th Cir. 2015). The range of alternatives is “within an agency’s discretion. In exercising that discretion, the agency should consider the purpose of the project, and the environmental consequences of the project.” *Save Our Cumberland Mtns. v. Kempthorne*, 453 F.3d 334, 342 (6th Cir. 2006) (internal quotations and citations omitted). NEPA does not require an agency

to pursue alternatives that “present unique problems, or are impractical or infeasible.” *Latin Ams. for Soc. & Econ. Dev. v. Adm’r of Fed. Highway Admin.*, 756 F.3d 447, 470 (6th Cir. 2014).

Here, the Army properly concluded that the Rule and the No Action alternative were the only reasonable alternatives. The Rule was developed after years of extensive study and comment and reflects the best available peer-reviewed science and the Agencies’ policy judgments, legal interpretations, and experience in implementing the CWA for more than 40 years. 80 Fed. Reg. at 37,057; EA/FONSI at 1, JAxxxx; *see Imperial Cty.*, 767 F.3d at 797 (“Discussing a hypothetical alternative that no one had agreed to (or would likely agree to) would have been unhelpful, and as a result, the [EIS] reasonably compared a hard-fought negotiated agreement to no agreement at all.”); *HonoluluTraffic.com v. Fed. Transit Admin.*, 742 F.3d 1222, 1231 (9th Cir. 2014) (noting that an agency does not violate NEPA by not discussing alternatives rejected in prior studies); *Oceana, Inc. v. Pritzker*, 24 F. Supp. 3d 49, 65 (D.D.C. 2014) (“Where an issue is particularly complex, the scope of reasonable alternatives is necessarily limited.”).

The Army also acted reasonably in not considering the Draft Rule Alternative further. EA/FONSI at 13, JAxxxx. The Draft Rule Alternative was “no longer a viable option to accomplish the purpose and need for action” because it had been modified based on comments received during the public comment process.

EA/FONSI at 13, JAxxxx. While, as Waterkeeper Petitioners argue, Waterkeeper Br.

34–35, the Draft Rule Alternative was developed to meet the EA’s project purpose, the comments demonstrated that it did not do so. In particular, commenters stated that the Draft Rule Alternative did not provide sufficient clarity or bright-line rules. *See, e.g.*, 80 Fed. Reg. at 37,057. As such, the Army reasonably concluded that the Draft Rule Alternative, which had already been publicly vetted, did not meet the Rule’s purpose and need and eliminated it from further NEPA analysis.

Additional alternatives also would not be feasible given EPA’s ultimate authority to define the scope of CWA jurisdiction. The Army cannot define its jurisdiction differently than does EPA. Thus, the Army need not examine other alternatives when it lacks the power to define the “waters of the United States” differently. *See Pub. Citizen*, 541 U.S. at 770 (holding that when agency does not have discretion to prevent an effect, EA need not consider it).

Finally, the alternatives analysis was reasonable given the Army’s conclusion that the Rule would overall have only incremental effects on the environment. *See Save Our Cumberland Mtns.*, 453 F.3d at 342 (“When an agency permissibly identifies few if any environmental consequences of a project, it correspondingly has fewer reasons to consider environmentally sensitive alternatives to the project.”).

In conclusion, the Rule was not subject to NEPA’s requirements, but the Army met them in any event. If this Court were to determine otherwise, any error was harmless. The rulemaking process itself furthered NEPA’s twin goals of informed decisionmaking and broad dissemination of relevant environmental information to the

public. See *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989); *Pacific Legal Found. v. Andrus*, 657 F.2d 829, 837 (6th Cir. 1981) (holding that no EIS was required because rulemaking itself furthered NEPA's purposes); *Wyoming v. Hathaway*, 525 F.2d 66, 68-69, 72 (10th Cir. 1975) (holding that rulemaking was akin to an EIS even without any NEPA documentation). Given the intensive study of the Proposed Rule, the extensive record, public participation, and consideration of a wide variety of factors, and the fact that EPA has the ultimate authority to determine the geographic scope of the CWA, remand to the Army for further NEPA analysis would not serve any purpose.

B. Waterkeeper Petitioners' ESA claim has been waived and lacks merit.

Section 7(a)(2) of the Endangered Species Act directs each federal agency to ensure, in consultation with the Secretary of Commerce or of the Interior, that any action it authorizes, funds, or carries out is not likely to jeopardize the continued existence of any threatened or endangered species, or to destroy or adversely modify such species' critical habitat. 16 U.S.C. § 1536(a)(2). Waterkeeper Petitioners assert that the Agencies promulgated the Rule in violation of section 7(a)(2).

Petitioners' claim fails for two reasons. First, Petitioners waived their ESA objections by not raising them during the rulemaking. Second, because the Rule merely defines the scope of the Agencies' regulatory jurisdiction under the CWA, but

does not exercise that jurisdiction in a manner that could affect listed species, section 7(a)(2) is not triggered.

1. Petitioners waived their ESA objections.

The Court should decline to reach the merits of Waterkeeper Petitioners' ESA arguments because neither they nor anyone else raised those issues during the rulemaking process. "It is well established that issues not raised in comments before the agency are waived.... Indeed, there is a near absolute bar against raising new issues—factual or legal—on appeal in the administrative context." *Nat'l Wildlife Fed'n v. EPA*, 286 F.3d 554, 562 (D.C. Cir. 2002); *Mich. Dep't of Env'tl. Quality*, 230 F.3d at 183 n. 1.

Petitioners had sufficient information to raise any ESA claims during the rulemaking. While they now assert that "the breadth of the Rule" alone "strongly suggests that ESA consultation was required," Waterkeeper Br. 20, "the breadth of the Rule" was evident from the proposal. 79 Fed. Reg. at 22,188. Several provisions that Petitioners now characterize as "[m]ost troubling," Waterkeeper Br. 22-24, including the groundwater exclusion and the treatment of ditches, were also in the proposal in the same or similar form. 79 Fed. Reg. at 22,193, 22,199, 22,218; Waterkeeper Comments, AR-16413, at 34-38, JAxxxx-xxxx, xxxx. The Agencies also identified the statutes they believed applied to the rulemaking. 70 Fed. Reg. at 22,219-22. If Petitioners believed that ESA section 7(a)(2) applied, they had ample opportunity to raise the issue during the comment period.

Petitioners' ESA claim also was not raised by other commenters or addressed in other parts of the record. Although Petitioners cite record excerpts indicating that ESA-listed species use wetlands, Waterkeeper Br. 22-23, such generic information is not a claim that a definitional CWA rule requires ESA consultation. "An objection must be made with sufficient specificity reasonably to alert the agency." *Appalachian Power Co. v. EPA*, 251 F.3d 1026, 1036 (D.C. Cir. 2001). "[A]gencies have no obligation to anticipate every conceivable argument about why they might lack ... authority" to proceed. *Koretzoff*, 707 F.3d at 398; *Nat'l Ass'n of Mfrs. v. U.S. Dep't. of Interior*, 134 F.3d 1095, 1111 (D.C. Cir. 1998).

Nor are Petitioners' ESA objections "so obvious that there [was] no need for a commentator to point them out specifically." *Pub. Citizen*, 541 U.S. at 765. On the contrary, Petitioners' ESA theory appears to be unprecedented. The Agencies have previously published regulations and guidance documents addressing the scope of jurisdictional waters and have made over 400,000 CWA jurisdictional determinations since 2008 alone. 80 Fed. Reg. at 37,065. Yet Petitioners have not identified a single prior instance in which anyone has asserted that determining the scope of CWA jurisdiction requires ESA consultation.

Finally, Petitioners cannot avoid waiver by pointing to their "notice of intent to sue" provided under the ESA's citizen suit provision. Waterkeeper Br. 18 n.10. Putting aside that the citizen suit provision (including the notice requirement) does not apply because the basis for this Court's jurisdiction is CWA section 509(b)(1),

Waterkeeper Br. 3-4; see *Ctr. for Biological Diversity v. EPA*, 106 F. Supp. 3d 95, 102 (D.D.C. 2015) (appeal pending); *Washington v. Daley*, 173 F.3d 1158, 1170 n.16 (9th Cir. 1999), Petitioners did not send their notice until *after* the Rule was promulgated. Consequently, the notice did not give the Agencies the requisite “fair opportunity” to address Petitioners’ objections before making a final decision. See *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952); *Nuclear Energy Inst., Inc. v. EPA*, 373 F.3d 1251, 1298 (D.C. Cir. 2004). Petitioners’ ESA claim is waived.

2. Petitioners’ ESA claim lacks merit.

Even if it were not waived, Petitioners’ ESA claim lacks merit. Because the Rule merely defines the scope of the Agencies’ regulatory jurisdiction under the CWA, but does not exercise that jurisdiction in a manner that could affect listed species, ESA section 7(a)(2) does not apply.

a. Determining the scope of CWA jurisdiction does not trigger ESA section 7(a)(2).

Section 7(a)(2) applies when an agency exercises its power under its enabling act to authorize, fund, or carry out an action that may affect listed species. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(a). But section 7 “does not expand the powers conferred on an agency by its enabling act.” *Platte River Whooping Crane Critical Habitat Maintenance Trust v. FERC*, 962 F.2d 27, 33-34 (D.C. Cir. 1992). Because section 7 confers no substantive powers, “EPA cannot invoke the ESA as a means of creating and imposing requirements that are not authorized by the CWA.” *Am. Forest & Paper*

Ass'n v. EPA, 137 F.3d 291, 299 (5th Cir. 1998). Thus, where, as here, the Agencies are simply determining the scope of their CWA authority, section 7 does not apply; the bounds of the Agencies' jurisdiction are limited by the CWA to "waters of the United States," 33 U.S.C. § 1362(7), and cannot be expanded by the ESA.

Even if ESA consultation revealed waters of importance to listed species, the Agencies would lack authority to extend CWA jurisdiction to such waters on that basis alone. *See SWANCC*, 531 U.S. at 682-84 (use of isolated nonnavigable intrastate ponds by migratory birds not a sufficient basis for assertion of CWA jurisdiction).⁵⁴ In addition to other prerequisites that may apply depending on the nature of the waters involved, the CWA requires at least a significant nexus between those waters and primary waters. *See supra* at 44-49. Determining whether an area satisfies the significant nexus standard does not trigger ESA section 7. *See Alaska Wilderness League v. Jewell*, 788 F.3d 1212, 1225 (9th Cir. 2015) ("[D]etermining *whether* the statutory criteria have been achieved does not trigger ESA's consultation requirement") (emphasis in original). Because the Agencies lack authority to "consider the protection of listed species as an end in itself" in defining the bounds of their CWA

⁵⁴ The so-called Migratory Bird Rule addressed in *SWANCC* extended CWA jurisdiction to intrastate waters used as habitat by migratory birds or "for endangered species." 531 U.S. at 678. Petitioners offer no basis to conclude that *SWANCC*'s holding would have been different had the waters at issue been used by endangered species rather than by migratory birds.

jurisdiction, ESA consultation is not required. *Nat'l Ass'n of Home Builders*, 551 U.S. at 671.

Petitioners argue that consultation is required because the Rule “abdicates federal jurisdiction” over waters of importance to listed species, *Waterkeeper Br. 17*, improperly “limiting the reach of the Act.” *Id.* at 19; *see id.* at 22-25. But that is merely an attack on the Agencies’ interpretation of the CWA. Because the Agencies reasonably interpreted the CWA in defining the scope of jurisdictional waters, the Rule itself is the “authoritative” statement as to the reach of the Act. *Brand X*, 545 U.S. at 983. And because ESA consultation cannot be used to expand the CWA’s reach, it would serve no purpose and is not required. *See Ctr. for Food Safety v. Vilsack*, 718 F.3d 829, 841-42 (9th Cir. 2013) (where agency reasonably determined that genetically-modified alfalfa was not a “plant pest” under enabling act, agency “had no jurisdiction to continue regulating the crop. The agency’s deregulation ... was thus a non-discretionary act that did not trigger the agency’s duty to consult under the ESA.”); *Alaska Wilderness League*, 788 F.3d at 1219-25 (ESA not triggered where agency reasonably interpreted governing statute and regulations in concluding that it lacked authority to condition proposed action on species protection); *Platte River*, 962 F.2d at 33-34 (same).

b. The Rule has no effect on listed species

Petitioners also fail to show that the Rule has any effect on listed species that could trigger section 7’s duty to consult. Section 7 applies only when an agency action

“may affect” listed species; if the action will have no effect, section 7 is not applicable. 50 C.F.R. § 402.14(a); *Ctr. For Biological Diversity v. U.S. Dep’t of the Interior*, 563 F.3d 466, 474-75 (D.C. Cir. 2009).

The Rule does not authorize any activity that could affect a listed species. Contrary to Petitioners’ assertions, Waterkeeper Br. 21 n.12, any extension of CWA jurisdiction resulting from the Rule also would have no effect. Although future CWA permitting in jurisdictional waters could affect listed species, *id.*; EA/FONSI at 23-24, JAXxxx-xxxx, the permitting itself, and not the Rule, would trigger section 7. *See Ctr. For Biological Diversity*, 563 F.3d at 483 (consultation not triggered and ESA challenge unripe where agency’s approval of leasing program itself did not affect listed species and species welfare was, “by design, only implicated at later stages of the program, each of which requires ESA consultation”).

Petitioners argue that the Rule adversely affects listed species because excluded waters are not subject to CWA permitting and they “will lose all benefits that may flow from future ESA consultation.” Waterkeeper Br. 22-23. But any harm to listed species resulting from future projects in non-jurisdictional waters would not be “caused by” the Rule and is not “reasonably certain to occur.” 50 C.F.R. § 402.02 (defining indirect effects for consultation purposes).

To be the legal cause of an effect, an action must “be a substantial and foreseeable cause,” and the connection must “be logical and not speculative.” *Trollinger v. Tyson Foods, Inc.*, 370 F.3d 602, 615 (6th Cir. 2004). Here, the relationship

between the Rule and the potentially harmful effects of future third-party projects in non-jurisdictional waters is too attenuated to establish legal causality. The Rule itself does not dictate the location or parameters of any such projects, all of which would result from third-party planning and decision-making unrelated to the Rule. *Cf. Ctr. for Biological Diversity v. U.S. Dep't of Housing & Urban Dev.*, 359 F. App'x 781, 2009 WL 4912592 (9th Cir. 2009) (holding that “agencies’ loan guarantees have such a remote and indirect relationship to the watershed problems allegedly stemming from the urban development that they cannot be held to be a legal cause of any effect on protected species for purposes of ... the ESA”).

Nor are the potentially harmful effects of future third-party projects reasonably certain to occur or sufficiently well-defined to be meaningfully analyzed in consultation. As the Agencies explained, it is “speculative and hypothetical as to what the environmental consequences would be” for non-jurisdictional waters not subject to CWA permitting. EA/FONSI at 22-23, JAxxxx. “The consequences would depend on other factors not related to this rule, such as the nature of any activity proposed for such waters and the waters affected, and any other requirements (e.g., Section 9 of the [ESA], or state and local law).” *Id.*

Projects in non-jurisdictional waters are not exempt from the ESA merely because they do not require a CWA permit. Any project requiring federal funding or approvals under other statutes would trigger consultation if listed species would be affected. *See* 50 C.F.R. § 402.14(a). Even in the absence of a federal nexus, such

projects would also remain subject to Section 9's "take" prohibition, 16 U.S.C. § 1538(a)(1)(B); *Medina Cnty. Env'tl. Action Ass'n v. Surface Transp. Bd.*, 602 F.3d 687, 703 (5th Cir. 2010), and applicable state law or tribal restrictions, 80 Fed. Reg. at 37,060.

Consequently, Petitioners cannot show that harmful future projects in non-jurisdictional waters "are free from regulatory and financial contingencies such that their occurrence would be reasonably foreseeable, much less reasonably certain."

Medina Cnty., 602 F.3d at 703.⁵⁵ As a result, Waterkeeper has not met its burden of demonstrating that the rulemaking triggered section 7(a)(2).

VIII. The appropriate remedy is to deny the petitions for review, but in no event should the Court vacate all or part of the Rule without supplemental briefing.

As this brief explains, all of the petitions for review should be denied because the Rule is not arbitrary, capricious, or otherwise contrary to law. But in the event that one or more sets of Petitioners prevail on any of their challenges, the Court should not automatically vacate the entire Rule, as Business and State Petitioners contend, Bus. Br. 93 and States Br. 90, or vacate certain components of the Rule, as Association and Waterkeeper Petitioners urge, Ass'n Br. 49-51 and Waterkeeper Br. 55-58. The Court should instead consider all relevant factors before deciding the

⁵⁵ In addition, the Rule's groundwater exclusion does not add any effects to the environmental baseline that could trigger a duty to consult because "the agencies have never interpreted [groundwater] to be a 'water of the United States.'" 80 Fed. Reg. at 37,073, 37,099; TSD at 16-17, JAxxxx-xxxx.

appropriate remedy—factors that will not be fully known until the Court completes its review of Petitioners’ claims.

It is well established that, under the APA, judicial relief—whether in the form of vacatur or injunctive relief—does not issue automatically upon a finding of legal error. Courts have discretion to remand all or part of the challenged decision without vacatur, and the decision whether to do so “depends on the seriousness of the [agency action’s] deficiencies (and thus the extent of doubt whether the agency chose correctly) and the disruptive consequences of an interim change that may itself be changed.” *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm’n*, 988 F.2d 146, 150-51 (D.C. Cir. 1993) (internal quotation marks and citation omitted). *See also Natural Res. Def. Council v. EPA*, 808 F.3d 556, 584 (2d Cir. 2015); *Black Warrior Riverkeeper, Inc. v. U.S. Army Corps of Eng’rs*, 781 F.3d 1271, 1290 (11th Cir. 2015); *Cal. Communities Against Toxics v. EPA*, 688 F.3d 989, 992 (9th Cir. 2012).

Even where the *Allied-Signal* factors militate in favor of vacatur of some portion of a rule, courts retain discretion to stay vacatur for a period of time. *See, e.g., Chamber of Commerce of U.S. v. SEC*, 443 F.3d 890, 909 (D.C. Cir. 2006) (withholding issuance of the mandate while agency assessed the disruptive effect of vacating portions of a rule). That option may be instructive here, given the Court’s earlier decision to stay the Rule pending further order. Regardless, the Court should not consider its options in a vacuum. Both *Allied-Signal* factors are fact-specific, turning on the nature of any deficiency the Court may identify and the state of affairs at the time the Court issues

its decision. *See, e.g., Shands Jacksonville Med. Ctr. v. Burnwell*, 139 F. Supp. 3d 240, 267 (D.D.C. 2015).

Here, given the multitude of arguments presented by disparate sets of Petitioners, it would be difficult and impractical for the parties to address meaningfully the relevant factors until after the Court adjudicates Petitioners' claims. Accordingly, should the Court rule in Petitioners' favor on any issue, the Court should direct supplemental briefing to address remedy, including whether the affected portions of the Rule are severable and whether remand without vacatur is appropriate. *See, e.g., KindHearts for Charitable Humanitarian Dev., Inc. v. Geithner*, 710 F. Supp. 2d 637, 658 (N.D. Ohio 2010); *Sierra Club v. USDA, Rural Utils. Serv.*, 841 F. Supp. 2d 349, 352 (D.D.C. 2012).

CONCLUSION

The petitions should be denied.

Respectfully submitted,

JOHN C. CRUDEN
Assistant Attorney General

Of Counsel:

Of Counsel:

AVI S. GARROW, General Counsel
KARYN I. WENDELOWSKI
U.S. Environmental Protection Agency

ALISSA STARZAK, General Counsel
CRAIG R. SCHMAUDER,
Deputy General Counsel
Department of the Army

s/ Jessica O'Donnell
DANIEL R. DERTKE
AMY J. DONA
ANDREW J. DOYLE
MARTHA C. MANN
KEVIN McARDLE
DEVON LEHMAN McCUNE
JESSICA O'DONNELL
Environment & Natural Res. Div.
U.S. Department of Justice

DAVID COOPER, Chief Counsel
DANIEL INKELAS
U.S. Army Corps of Engineers

P.O. Box 7611
Washington, D.C. 20044
(202) 305-0851
jessica.o'donnell@usdoj.gov

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**CERTIFICATE OF COMPLIANCE WITH
FEDERAL RULE OF APPELLATE PROCEDURE 32(A)**

I hereby certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Garamond, a proportionally spaced font.

I further certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 61,196, as permitted by the Court's Case Management Order No. 2 (ECF No. 99-1), excluding the parts of the brief exempted under Rule 32(a)(7)(B)(iii), according to the count of Microsoft Word.

s/ Jessica O'Donnell

JESSICA O'DONNELL

CERTIFICATE OF SERVICE

I hereby certify that on January 13, 2017, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system.

The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

s/ Jessica O'Donnell

JESSICA O'DONNELL