Regulatory Impact Analysis for the Proposed *Updated Definition of Waters of the United States* Rule

U.S. Environmental Protection Agency

and

Department of the Army

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Abbreviations

AJD	Approved Jurisdictional Determination
ASWM	Association of State Wetland Managers
C&D	Construction and Development
CONUS	Contiguous United States
Corps	U.S. Army Corps of Engineers
CWA	Clean Water Act
E.O.	Executive Order
ELG	Effluent Limitations Guidelines
ELI	Environmental Law Institute
EPA	U.S. Environmental Protection Agency
FOSC	Federal On-site Coordinator
FRP	Facility Response Plan
FTE	Full-time Equivalent
LEDPA	Least Environmentally Damaging Practicable Alternative
MI EGLE	Michigan's Department of Environment, Great Lakes, and Energy
MS4	Municipal Separate Storm Sewer System
NAICS	North American Industry Classification System
NAWM	National Association of Wetland Managers
NFIP	National Flood Insurance Program
NHD	National Hydrography Dataset
NOI	Notice of Intent
NPDES	National Pollutant Discharge Elimination System
NPFC	National Pollution Funds Center
NRCS	Natural Resources Conservation Service
NWI	National Wetlands Inventory
NWPR	Navigable Waters Protection Rule
OMB	Office of Management and Budget
OPA	Oil Pollution Act of 1990
ORM2	Operation and Maintenance Business Information Link, Regulatory Module
OSLTF	Oil Spill Liability Trust Fund
PHMSA	Pipeline and Hazardous Materials Safety Administration

PJD	Preliminary Jurisdictional Determination
Rapanos	*Rapanos v. United States*, 547 U.S. 715 (2006)
RFA	Regulatory Flexibility Act
RIA	Regulatory Impact Analysis
Sackett	*Sackett v. Environmental Protection Agency*, 598 U.S. 651 (2023)
SBREFA	Small Business Regulatory Enforcement Fairness Act
SISNOSE	Significant Economic Impact on a Substantial Number of Small Entities
SPCC	Spill Prevention, Control, and Countermeasure
SWANCC	*Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001)
TAS	Treatment in a Manner Similar as a State
TMDL	Total Maximum Daily Load
TNW	Traditional Navigable Waters
USDA	United States Department of Agriculture
U.S. FWS	U.S. Fish and Wildlife Service
USGS	United States Geological Survey

Executive Summary

The U.S. Environmental Protection Agency (EPA) and the U.S. Department of the Army (Army) (together, the agencies) are seeking public comment on a proposed rule that revises key aspects of the definition of "waters of the United States" to clarify the scope of Federal jurisdiction under the Federal Water Pollution Control Act, as amended, also known as the Clean Water Act, in order to implement the U.S. Supreme Court's May 25, 2023 decision in *Sackett v. Environmental Protection Agency*, 598 U.S. 651 (2023) (*Sackett*).

This action is a significant regulatory action per Executive Order 12866 that was submitted to the United States Office of Management and Budget for review. Therefore, pursuant to Executive Orders12866 and 13563, not the Clean Water Act, the agencies have prepared this Regulatory Impact Analysis (RIA) to inform the public of potential effects associated with this proposed rulemaking. It is provided here to inform the public about the possible effects of this action. The proposed rule will not impose direct requirements on entities of any size. Instead, this rule establishes a definition of "waters of the United States," a foundational term in determining the scope of key Clean Water Act programs.

This RIA provides the potential impacts of the proposed changes to the definition of "waters of the United States" based on the anticipated effects on the Clean Water Act programs that rely on the definition of "waters of the United States" and highlights methodological approaches to quantifying those potential impacts. Due to ongoing litigation over both the 2023 Rule and the Amended 2023 Rule, the agencies are currently implementing two regulatory regimes across the country as of the signature date of this proposed rule. The agencies are implementing the Amended 2023 Rule in 24 States, the District of Columbia, and the U.S. Territories. In the other 26 States, the agencies are interpreting "waters of the United States" consistent with the pre-2015 regulatory regime and in light of the Supreme Court's *Sackett* decision.[1] The Amended 2023 Rule is currently the definition in the Code of Federal Regulations that the agencies are proposing to revise. In addition, there are certain parallels that can be drawn between these two extant regulatory regimes. Therefore, for purposes of meeting the statutory and executive order requirements for a significant rulemaking, the Amended 2023 Rule serves as the primary baseline for the RIA. The RIA approach is consistent with the EPA's *Guidelines for Preparing Economic Analyses* (U.S. EPA, 2024b) and the Office of Management and Budget (OMB) Circular A-4 (U.S. Office of Management and Budget, 2003).

The agencies are proposing to amend certain portions of the Amended 2023 Rule, as discussed below, with amendments to reflect the agencies' determination of the statutory limits on the scope of the "waters of the United States" informed by Supreme Court precedent. The agencies are proposing to revise the categories of "waters of the United States" under paragraph (a) by deleting the interstate waters category under paragraph (a)(1)(iii) and deleting "intrastate" from the paragraph (a)(5) category for lakes and ponds. In addition, the agencies are proposing to revise the following exclusions: the paragraph (b)(1) waste treatment system exclusion, the paragraph (b)(2) prior converted cropland exclusion, and the paragraph (b)(3) ditch exclusion. The agencies are also proposing to add definitions of "continuous surface connection," "ditch," "prior converted cropland," "relatively permanent," "tributary," and "waste

[1] The latest information on the status of this litigation can be found on the EPA's Rule Status and Litigation Update webpage (U.S. EPA, 2024a).

treatment system," in paragraph (c) of their regulations. In addition, the agencies propose to exclude groundwater, including groundwater drained through subsurface drainage systems, in the proposed rule, consistent with longstanding policy of the agencies, which would result in no change from the baseline and thus does not need to be quantified.

The agencies analyzed the effects of the changes qualitatively and anticipate that the impacts of the proposed change to the definition of "continuous surface connection" and the approach whereby non-relatively permanent flow in a channel would break jurisdiction of upstream relatively permanent flow to be the most impactful in terms of reducing the scope of jurisdictional waters relative to the baseline. Further, the agencies anticipate that the 404 program will likely see the most changes from the proposed rule, with projected reductions in the number of permits and required mitigation relative to the baseline. The agencies expect, but cannot yet reliably quantify, associated cost savings from the avoided 404 permits and impact minimization and mitigation actions, as well as forgone benefits from impact mitigation.

On May 23, 2025, the White House issued Executive Order (E.O.) 14303, Restoring Gold Standard Science, 90 FR 22601 (May 29, 2025). The E.O. restores the scientific integrity policies from the first Trump Administration and ensures that agencies practice data transparency, acknowledge relevant scientific uncertainties, are transparent about the assumptions and likelihood of scenarios used, approach scientific findings objectively, and communicate scientific data accurately. The E.O. defines "gold standard science" as science conducted in a manner that is: (i) reproducible; (ii) transparent; (iii) communicative of error and uncertainty; (iv) collaborative and interdisciplinary; (v) skeptical of its findings and assumptions; (vi) structured for falsifiability of hypotheses; (vii) subject to unbiased peer review; (viii) accepting of negative results as positive outcomes; and (ix) without conflicts of interest. On June 23, 2025, the Office of Science and Technology Policy recently issued a guidance memorandum (Office of Science and Technology Policy, 2025) to direct the agency's actions in implementing the E.O. "Agency Guidance for Implementing Gold Standard Science in the Conduct & Management of Scientific Activities." In consideration of the objectives of the E.O. and agency guidance, the agencies are seeking feedback on quantitative analyses for the final rule's Regulatory Impact Analysis to allow for a more in-depth understanding of the acknowledged uncertainties and limitations of the existing data described in this document. The E.O. and agency guidance direct the EPA to be fully transparent and identify data shortcomings which the agencies have indicated throughout this document. Through further analysis, potential identification of additional data and methods described in this document, and public input, the agencies intend to improve upon the proposed rule analysis and continue to fully meet the "gold standard" for the final rule's Regulatory Impact Analysis.

Summary of Potential Effects of the Proposed Rule on Major Clean Water Act Programs

Clean Water Act Section 303

Water quality standards are the foundation for a wide range of programs under the Clean Water Act. They serve multiple purposes including establishing the water quality goals for a specific waterbody, or portion thereof, and providing the regulatory basis for establishing water quality-based effluent limits beyond the technology-based levels of treatment required by Clean Water Act sections 301(b) and 306. Water quality

standards also serve as a basis for water quality assessment and a target for Clean Water Act restoration activities such as Total Maximum Daily Loads (TMDLs).

The potential effect of the proposed definitional change on the number of waterbodies with Clean Water Act-effective water quality standards and that appear on the impaired waters list (and subsequent TMDL development) is uncertain. The agencies anticipate that fewer waters would be jurisdictional under the proposed rule compared to the baseline, but the agencies do not know how many of those waters that would no longer be jurisdictional were classified as impaired waters. Absent the application of the Clean Water Act to waters that would no longer be jurisdictional under the proposed rule, States and Tribes can still choose to impose similar State or Tribal law requirements on these waters irrespective of Federal requirements, and some States already have standards for certain categories of waters (*e.g.,* ephemeral features) that would not be jurisdictional under the proposed rule (*see* Table 2-1).

Changes in Clean Water Act jurisdiction could lead to requests for revisions or withdrawals of TMDLs. The agencies do not have information on what share of the waters associated with the more than 260,000 completed TMDLs nationwide were affected by the previous rules and could be non-jurisdictional under the proposed rule.

Clean Water Act Section 311

Section 311 of the Clean Water Act provides authority to address the risk and harm from discharges or significant threats of discharges of oil and hazardous substance discharges to "waters of the United States." For example, two main Federal oil spill components are: (1) spill prevention requirements contained in the EPA's Spill Prevention, Control, and Countermeasure (SPCC) and worst case discharge preparedness requirements in the EPA's Facility Response Plan (FRP) regulations for non-transportation related facilities located onshore or landward of the coastline, and in the United States Coast Guard, Department of the Interior, and Department of Transportation regulations for certain offshore and transportation-related facilities, and (2) spill notification and response, as described under the National Contingency Plan.

Applicability of the SPCC and FRP depends on whether there is a reasonable expectation that a discharge from the facility could reach navigable waters based on geographical and locational aspects of the facility, and therefore, changes in Clean Water Act jurisdiction could affect the need for compliance with both SPCC and FRP requirements for some facilities. The agencies estimate that approximately 550,000 facilities are currently subject to SPCC requirements and about 3,800 facilities are subject to FRP requirements.

The agencies asserted the 2020 Navigable Waters Protection Rule (NWPR) did not cause a substantive change to the compliance costs subject to SPCC and FRP requirements or change the number of pipeline or rail operators that are required to prepare and maintain facility response plans. The agencies believe that most facilities still chose to continue to implement spill prevention measures that are considered good engineering practices for their industry, such as secondary containment, overfill prevention, practices to ensure the safe transfer of oil to bulk storage containers and visual inspections of bulk storage containers while the agencies pursue this rulemaking. The agencies also did not observe that changes in the scope of "waters of the United States" under the NWPR had a material effect on spill notification and response.

Therefore, the agencies anticipate that potential impacts of the proposed rule on the Clean Water Act section 311 program would not be significant.

Clean Water Act Section 401

Under Section 401 of the Clean Water Act, a Federal agency may not issue a permit or license to conduct any activity that may result in any discharge into "waters of the United States" unless a Section 401 water quality certification is issued, or certification is waived. States and authorized Tribes where the discharge would originate are generally responsible for issuing water quality certifications. In cases where a State or Tribe does not have authority, the EPA is responsible for issuing certification (33 U.S.C. 1341).

Clean Water Act section 404 dredged or fill permits require the Section 401 certification described above. Section 404 of the Clean Water Act requires a permit for discharges of dredged or fill material from a point source into "waters of the United States" unless the discharge is associated with an activity exempt from 404 permitting requirements under Clean Water Act section 404(f). Under the proposed rule, the agencies expect the number of Clean Water Act section 404 permits would decrease since certain features would no longer be included in the definition of "waters of the United States." A decrease in Clean Water Act section 404 permits could result in a cost savings to States and authorized Tribes by decreasing the number of section 401 certification reviews and required staff time.

Similarly, section 402 of the Clean Water Act provides that a NPDES permit is required for the discharge of pollutants from any point source to a "water of the United States." Forty-seven States and one U.S. Territory have been authorized to administer all or parts of the Clean Water Act section 402 National Pollutant Discharge Elimination System (NPDES) program. States that have not been authorized to administer the section 402 program and Tribes authorized to administer section 401 would continue to have the opportunity to complete section 401 certification on EPA-issued section 402 permits. If there are fewer EPA-issued section 402 permits, then there would be a decrease in the number of section 401 reviews and associated staff time.

Clean Water Act Section 402

Generally, facilities that currently have a Clean Water Act section 402 NPDES permit either discharge to a "water of the United States" or to waters that convey pollutants downstream to a jurisdictional water. State NPDES programs can be broader in scope or more stringent than the Federal NPDES program. Where State programs issue permits for the discharge of pollutants directly into waters that are not defined as "waters of the United States," "or into waters that do not convey pollutants downstream to a jurisdictional water," under the Clean Water Act these programs are considered to be broader in scope than the Federal NPDES program, and as such those permits are not part of the State's authorized NPDES program.

The agencies note that, under the proposed rule, some existing NPDES permits may still be needed even if a discharge of a pollutant is no longer directly to a jurisdictional water.[2] The basis for determining

[2] *See Rapanos v. United States*, 547 U.S. 715, 743-45 (2006) ("The Act does not forbid the "addition of any pollutant directly to navigable waters from any point source," but rather the "addition of any pollutant to navigable waters." Thus, from the time of the CWA's enactment, lower courts have held that the discharge into intermittent channels of any pollutant that naturally

whether an NPDES permit is needed is whether the discharge of a pollutant from a point source reaches a "water of the United States." Under such circumstances, some existing permits may need to be modified, subject to anti-backsliding requirements.

Clean Water Act Section 404

Under the proposed rule, the agencies expect the number of Clean Water Act section 404 permits to decrease since certain features would no longer be included in the definition of "waters of the United States." As a result of the *Sackett* decision, the agencies anticipate that the impacts of the proposed rule would be most significant for the section 404 program, reducing the number of section 404 permits issued and potentially the number of acres of wetland impacts mitigated, relative to the baseline. The agencies expect these proposed changes in turn to produce cost savings to project proponents from avoided permitting and mitigation activities. In addition, the impacts to non-jurisdictional waters under the proposed rule as compared to the baseline without avoidance, minimization, or compensation would result in forgone benefits over time, including habitat support, recreation, and aesthetic benefits. Given data limitations that prevent quantification of the changes in jurisdictional scope under the proposed rule at this time, those effects are discussed qualitatively. The agencies anticipate that, if finalized, this proposed rule would result in a negligible change in regulatory violations.

A change in Clean Water Act jurisdiction may be an incentive for States to develop their own State dredged and fill permitting program and, therefore, may increase interest in assumption of the 404 program under 404(g) of the Act. A change in scope of Clean Water act jurisdiction, therefore, might alter State and Tribal interest in assuming administration of the Clean Water Act section 404 program depending on the nature of their water resources and other State interests.

washes downstream likely violates section 1311(a), even if the pollutants discharged from a point source do not emit "directly into" covered waters, but pass "through conveyances" in between…We have held that the Act "makes plain that a point source need not be the original source of the pollutant; it need only convey the pollutant to 'navigable waters.'") (internal citations omitted); *see also County of Maui, Hawaii* v. *Hawaii Wildlife Fund,* 590 U.S. 165, 169 (2020) (holding that the statute also requires a permit ''when there is the functional equivalent of a direct discharge'').

1 Introduction and Overview

The U.S. Environmental Protection Agency (EPA) and the U.S. Department of the Army (Army) (together, the agencies) are seeking public comment on a proposed rule that revises key aspects of the definition of "waters of the United States" to clarify the scope of Federal jurisdiction under the Federal Water Pollution Control Act, as amended, also known as the Clean Water Act, in light of the U.S. Supreme Court's May 25, 2023 decision in *Sackett v. Environmental Protection Agency*, 598 U.S. 651 (2023) (*Sackett*).

In September 2023, the agencies issued a final rule amending the regulations defining "waters of the United States" to conform to the Supreme Court's *Sackett* decision. "Revised Definition of 'Waters of the United States'; Conforming," 88 FR 61964 (September 8, 2023). The agencies refer to the amended regulations as the "Amended 2023 Rule."

The agencies have heard numerous concerns raised by stakeholders about the Amended 2023 Rule, including concerns that the Amended 2023 Rule does not adequately comply with the Supreme Court's interpretation in *Sackett* regarding the scope of Federal jurisdiction under the Act as well as concerns about implementation-related issues. With this action, the agencies are proposing to revise the Amended 2023 Rule to implement the *Sackett* decision, provide greater regulatory certainty, and increase Clean Water Act program predictability and consistency by clarifying the definition of "waters of the United States" in accordance with *Sackett*.

The agencies' fundamental basis for this proposed revised definition is the text of the Clean Water Act and Supreme Court precedent, especially in light of *Sackett*, taking into account agency policy choices and other relevant factors. This proposed revision to the definition of "waters of the United States" is intended to faithfully adhere to Supreme Court direction. It also aims to strike the appropriate balance—pursuant to the Clean Water Act's cooperative federalism framework—between Federal and State authority to carry out Congress' overall objective in the Clean Water Act to restore and maintain the integrity of the nation's waters in a manner that preserves the traditional sovereignty of States and Tribes over their own land and water resources. The agencies believe the proposed revised definition would also ensure clarity and predictability for Federal agencies, States, Tribes, the regulated community, and the public. Ultimately, the proposed rule is intended to ensure that the agencies are operating within the proper scope of the Federal government's authority over navigable waters under the Clean Water Act and the Commerce Clause of the U.S. Constitution.

This Regulatory Impact Analysis (RIA) provides the potential impacts of the proposed changes to the definition of "waters of the United States" based on the anticipated effects on the Clean Water Act programs that rely on the definition of "waters of the United States" and highlights methodological approaches to quantifying those potential impacts. Due to ongoing litigation on the Amended 2023 Rule, the agencies are currently implementing two regulatory regimes that could each be considered as a baseline for this analysis: the previously mentioned "Amended 2023 Rule" and a pre-2015 regulatory regime implemented in light of *Sackett* (Pre-2015 Post-*Sackett*). The Amended 2023 Rule is currently the definition in the Code of Federal Regulations that the agencies are proposing to revise. In addition, there are certain parallels that can be drawn between these two extant regulatory regimes. Therefore, for purposes of meeting the statutory and executive order requirements for a significant rulemaking, the

Amended 2023 Rule serves as the primary baseline for the RIA. The RIA approach is consistent with the EPA's *Guidelines for Preparing Economic Analyses* (U.S. EPA, 2024b) and the Office of Management and Budget (OMB) Circular A-4 (U.S. Office of Management and Budget, 2003).

1.1 Overview of Regulatory Impact Analysis

This RIA is organized as follows. Section 1 provides summaries of the current baseline, the proposed rule changes, and available data. Section 2 provides information on State and Tribal regulatory practice. Section 3 contains an assessment of the potential changes in jurisdictional waters relative to the baseline, including a summary of existing assessments, methodological approaches, and data that can be used to quantify potential changes in jurisdictional waters. Section 4 evaluates the potential impacts of jurisdictional changes across programs and identifies methodological approaches and data to quantify and monetize potential impacts. Section 5 presents a Sector Impact Analysis.

1.2 Current Baseline

The baseline for the proposed rule RIA is the definition currently in effect, which is based either on the Amended 2023 Rule or the pre-2015 regulatory regime implemented in light of *Sackett*, depending on the State.[3] Tribal lands are all currently under the Amended 2023 Rule. The following sections detail the definition applicable to the two regulatory regimes.

The regulations established in the Amended 2023 Rule are generally consistent with the pre-2015 regulatory regime *post-Sackett*. While the language differs between the two regimes, there are certain parallels that can be drawn between them (U.S. EPA and Army, 2022), and the agencies will therefore treat the Amended 2023 Rule and the pre-2015 regulatory regime post-*Sackett* baselines as equivalent with respect to the "baseline" for the economic analysis for the proposed rule. When the agencies intend to reference the two regimes together, they will be referenced collectively as the "baseline" and where the agencies clarify minor differences between the regimes, they will be cited independently as the Amended 2023 Rule and the Pre-2015 rule.

1.2.1 Amended 2023 Rule

In August 2023, the agencies amended the 2023 Rule to conform the definition of "waters of the United States" to the U.S. Supreme Court's May 25, 2023, decision in *Sackett v. EPA*. 88 FR 61964 (Sept. 8, 2023).

In the conforming amendments to the 2023 Rule, the agencies removed certain waters, deleted the significant nexus standard, and revised certain definitions. As a result, the following are "waters of the United States" in paragraph (a) under the Amended 2023 Rule:

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

[3] The agencies are currently implementing the Amended 2023 Rule in 24 States, the District of Columbia, and the U.S. Territories as of the date of this RIA for the Proposed Rule. In the other 26 States, the agencies are currently interpreting "waters of the United States" consistent with the pre-2015 regulatory regime and the Supreme Court's decision in light of *Sackett*. The agencies will evaluate questions about application of the injunctions in Indian country on a case-by-case basis, informed by the particular Indian country area and the language of the injunctions. *See also* supra note 1.

(ii) The territorial seas; or
(iii) Interstate waters;
(2) Impoundments of waters otherwise defined as waters of the United States under this definition, other than impoundments of waters identified under paragraph (a)(5) of this section;
(3) Tributaries of waters identified in paragraph (a)(1) or (2) of this section that are relatively permanent, standing or continuously flowing bodies of water;
(4) Wetlands adjacent to the following waters:
(i) Waters identified in paragraph (a)(1) of this section; or
(ii) Relatively permanent, standing or continuously flowing bodies of water identified in paragraph (a)(2) or (a)(3) of this section and with a continuous surface connection to such waters;
(5) Intrastate lakes and ponds not identified in paragraphs (a)(1) through (4) of this section that are relatively permanent, standing or continuously flowing bodies of water with a continuous surface connection to the waters identified in paragraph (a)(1) or (a)(3) of this section.

Paragraph (b) provides exclusions from the definition of "waters of the United States" even where they otherwise meet the terms of paragraphs (a)(2) through (5) of the rule:

(1) Waste treatment systems, including treatment ponds or lagoons, designed to meet the requirements of the Clean Water Act;
(2) Prior converted cropland designated by the Secretary of Agriculture. The exclusion ceases upon a change of use, which means that the area is no longer available for the production of agricultural commodities. Notwithstanding the determination of an area's status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA;
(3) Ditches (including roadside ditches) excavated wholly in and draining only dry land and that do not carry a relatively permanent flow of water;
(4) Artificially irrigated areas that would revert to dry land if the irrigation ceased;
(5) Artificial lakes or ponds created by excavating or diking dry land to collect and retain water and which are used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing;
(6) Artificial reflecting or swimming pools or other small ornamental bodies of water created by excavating or diking dry land to retain water for primarily aesthetic reasons;
(7) Waterfilled depressions created in dry land incidental to construction activity and pits excavated in dry land for the purpose of obtaining fill, sand, or gravel unless and until the construction or excavation operation is abandoned and the resulting body of water meets the definition of waters of the United States; and
(8) Swales and erosional features (*e.g.,* gullies, small washes) characterized by low volume, infrequent, or short duration flow.

Paragraph (c) provides definitions:

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

(2) *Adjacent* means having a continuous surface connection.
(3) *High tide line* means the line of intersection of the land with the water's surface at the maximum height reached by a rising tide. The high tide line may be determined, in the absence of actual data, by a line of oil or scum along shore objects, a more or less continuous deposit of fine shell or debris on the foreshore or berm, other physical markings or characteristics, vegetation lines, tidal gages, or other suitable means that delineate the general height reached by a rising tide. es and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds such as those accompanying a hurricane or other intense storm.
(4) *Ordinary high water mark* means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.
(5) *Tidal waters* means those waters that rise and fall in a predictable and measurable rhythm or cycle due to the gravitational pulls of the moon and sun. Tidal waters end where the rise and fall of the water surface can no longer be practically measured in a predictable rhythm due to masking by hydrologic, wind, or other effects.

33 CFR 328.3 [88 FR 3142, Jan. 18, 2023, as amended at 88FR 61968, Sept. 8, 2023]

1.2.2 The Pre-2015 Regulatory Regime Prior to *Sackett*

The "pre-2015 regulatory regime" refers to the agencies' pre-2015 regulations defining "waters of the United States," implemented in light of relevant case law and longstanding practice, as informed by applicable guidance, training, and experience. The pre-2015 regulations are commonly referred to as "the 1986 regulations."[4]

The 1986 regulations defined the term "waters of the United States" at paragraph (a) of that rule as:

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

2. All interstate waters including interstate wetlands;

3. All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural

[4] The EPA and the Corps have separate regulations defining the statutory term "waters of the United States," but their interpretations were substantially similar and remained largely unchanged between 1977 and 2015. *See, e.g.,* 42 FR 37122, 37144 (July 19, 1977); 44 FR 32854, 32901 (June 7, 1979). For convenience, in this document and in the preamble the agencies will generally cite the Corps' longstanding regulations and will refer to them as "the 1986 regulations," "the pre-2015 regulations," or "the regulations in place until 2015." These references include the EPA's comparable regulations that were recodified in 1988 and of the exclusion for prior converted cropland, which both agencies added in 1993.

ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:

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

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

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

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

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

6. The territorial seas;

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

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

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

Due to Supreme Court decisions, the agencies' implementation of the 1986 regulations differs from the straight text of the regulations. The agencies' pre-2015 practice is consistent with Supreme Court's decisions in *United States v. Riverside Bayview Homes*, *Solid Waste Agency of Northern Cook County (SWANCC)*, *Rapanos*, and *Sackett* and informed by applicable agency guidance documents and longstanding agency practice. When this document refers to the categories of "waters of the United States" used in the 1986 regulations, the agencies are specifically referring to the categories as they are implemented under the pre-2015 regulatory regime in light of *Sackett*.

Under pre-2015 practice implemented in light of *Sackett*, the agencies assert jurisdiction over the following waters:

- traditional navigable waters, interstate waters, and the territorial seas;
- impoundments of jurisdictional waters;[5]

[5] Impoundments were not addressed directly by the *Riverside Bayview*, *SWANCC*, or *Rapanos* Supreme Court decisions, but under pre-2015 practice, impoundments of jurisdictional waters remain jurisdictional.

- non-navigable tributaries of traditional navigable waters, interstate waters, or the territorial seas that are relatively permanent (*i.e.*, where the tributaries typically flow year-round or have continuous flow at least seasonally); and

- wetlands adjacent to traditional navigable waters, interstate waters, the territorial seas, and relatively permanent jurisdictional impoundments and relatively permanent jurisdictional tributaries, where adjacent is implemented to mean having a continuous surface connection.

Under pre-2015 practice prior to *Sackett*, the agencies assessed whether certain waters were jurisdictional based on a case-specific analysis to determine whether they had a significant nexus with a traditional navigable water, interstate water, or the territorial seas. However, in light of *Sackett*, the agencies are no longer implementing the significant nexus standard. Under the pre-2015 regulatory regime post-*Sackett*, the agencies continue to utilize the relevant portions of the 2008 *Rapanos* Guidance.

Under pre-2015 practice, the agencies also utilize the 2003 *SWANCC* Guidance for determinations that are made under the (a)(3) category of that rule. The Guidance stated that in light of the *SWANCC* decision, the agencies should not assert Clean Water Act jurisdiction over waters under the (a)(3) category of the 1986 regulations, where the sole basis available for asserting jurisdiction rests on any of the factors listed in the "Migratory Bird Rule" and also established coordination procedures for paragraph (a)(3) "other waters." *See* 68 FR 1991, 1995 (January 15, 2003) ("field staff should seek formal project-specific Headquarters approval prior to asserting jurisdiction over such waters, including permitting and enforcement actions"). Since *SWANCC* and the issuance of the *SWANCC* Guidance with its requirement of headquarters approval over determinations under that provision, the agencies have not in practice asserted jurisdiction over paragraph (a)(3) "other waters" under the pre-2015 regulatory regime.[6] However, in light of *Sackett*, the agencies intend to assess only relatively permanent lakes and ponds that do not meet one of the other jurisdictional categories under the (a)(3) category of waters under the pre-2015 regulatory regime. These (a)(3) waters can only be jurisdictional if they meet the requirements of this regulatory provision and are relatively permanent and have a continuous surface connection to a requisite covered water.

1.2.3 The 2025 Continuous Surface Connection Memorandum

On March 12, 2025, the agencies announced a joint memorandum issuing guidance to field staff on implementation of "continuous surface connection" in light of the May 25, 2023 decision in the case of *Sackett v. EPA*. The agencies' guidance applies to both regulatory regimes that are currently in effect across the country: the pre-2015 regulatory regime and the Amended 2023 Rule.

The guidance describes a two-part test for determining Clean Water Act jurisdiction over adjacent wetlands, in light of the *Sackett* decision. First, the adjacent body of water must be a "water of the United States," which generally means a traditional navigable water or a relatively permanent body of water connected to a traditional navigable water. Second, the wetland, assuming it satisfies the agencies'

[6] Note that when the 2015 Clean Water Rule was in effect the agencies did assert jurisdiction over waters that would have been known as paragraph (a)(3) "other waters" by rule if they were adjacent waters as defined by that rule and, on a case-specific basis, if they fell within the provisions requiring case-specific significant nexus determinations. The NWPR also asserted jurisdiction over certain lakes and ponds that would have been jurisdictional as paragraph (a)(3) "other waters." And prior to the *Sackett* decision, certain lakes, pond, streams, and wetlands could have been determined to be jurisdictional under the (a)(5) category of the 2023 Rule under the significant nexus standard.

longstanding regulatory definition of "wetlands" at 33 CFR 328.3 and 40 CFR 120.2, must have a continuous surface connection to a requisite covered water making it difficult to determine where the water ends and wetland begins. The 2025 joint memorandum also rescinded earlier guidance that assumed a discrete feature established a direct surface connection.

For the purpose of the proposed rule RIA, the 2025 Continuous Surface Connection Memorandum was not considered as a part of the baseline for the following reasons: the goal of the memorandum is consistent with the goal of this proposed rule, guidance documents are not enforceable, and for consistency with EPA and OMB guidance on economic analyses. Notwithstanding this rationale, the agencies do not have sufficient implementation data to include the memorandum in the baseline given its recent issuance.

1.3 The Proposed Rule and How It Compares to Prior Regimes

The agencies are proposing to amend portions of the Amended 2023 Rule, as discussed below, with amendments to reflect the agencies' determination of the statutory limits on the scope of the "waters of the United States" informed by Supreme Court precedent, and specifically to ensure alignment with *Sackett*. The agencies are proposing to revise the following categories of "waters of the United States" under paragraph (a) by deleting the interstate waters category under paragraph (a)(1)(iii) and deleting "intrastate" from the paragraph (a)(5) category for lakes and ponds. In addition, the agencies are proposing to revise the following exclusions: the (b)(1) waste treatment system exclusion, the (b)(2) prior converted cropland exclusion, and the (b)(3) ditch exclusion. The agencies are also proposing to add definitions of "continuous surface connection," "ditch," "prior converted cropland," "relatively permanent," "tributary," and "waste treatment system" in paragraph (c) of their regulations. In addition, the agencies propose to exclude groundwater, including groundwater drained through subsurface drainage systems, in the proposed rule, consistent with longstanding policy of the agencies.

The sections immediately below contain a summary of the agencies' proposed revisions and how they compare to the current regulatory regimes. All other aspects of the agencies' regulations defining "waters of the United States" not addressed in this proposed rule would remain unchanged. Under the agencies' proposed rule, the term "waters of the United States" would include: traditional navigable waters and the territorial seas; most impoundments of "waters of the United States"; relatively permanent tributaries of traditional navigable waters, the territorial seas, and impoundments; wetlands adjacent to traditional navigable waters, the territorial seas, jurisdictional relatively permanent impoundments, and tributaries; and lakes and ponds that are relatively permanent and have a continuous surface connection to a traditional navigable water, the territorial seas, or a relatively permanent tributary.

1.3.1 Interstate Waters

The proposed rule would remove the category of interstate waters from the definition of "waters of the United States," which is a change from the baseline. The agencies rarely identify waters as jurisdictional solely because they are interstate as they often fall under one of the other categories of "waters of the United States" (*e.g.,* the waters are also traditional navigable waters or jurisdictional tributaries). Under the proposal, interstate waters would only be jurisdictional if they fall within another category in the definition (*i.e.*, traditional navigable waters (TNWs), the territorial seas, jurisdictional impoundments, jurisdictional tributaries, or paragraph (a)(5) lakes and ponds. Interstate waters under other categories of the proposed rule would be assessed consistent with the implementation practices

outlined in those waters categories. Under the baseline, any waters that are part of a State or international boundary, or that cross State or international boundaries, may be considered jurisdictional as interstate waters regardless of whether they are TNWs or connect to a TNW or other jurisdictional water. For example, an "isolated," non-navigable, non-relatively permanent lake straddling a State line would be considered jurisdictional under the baseline without the need to satisfy criteria under the other categories of "waters of the United States." Such a lake would not be jurisdictional under the proposed rule. The proposed rule may therefore reduce the number of waters considered to be subject to Federal jurisdiction compared to the baseline where they would not meet one of the categories of jurisdictional waters under the proposed rule. However, the agencies note that interstate wetlands are already not included in interstate waters under the Amended 2023 Rule.

1.3.2 Relatively Permanent Waters

Under both the proposed rule and the baseline, the concept of "relatively permanent" applies to tributaries assessed under paragraph (a)(3), lakes and ponds assessed under paragraph (a)(5), and all waters to which wetlands can be adjacent (wetlands under paragraph (a)(4) can be adjacent to a paragraph (1) waters or to relatively permanent paragraph (a)(2) impoundments or (a)(3) tributaries). Changes between the proposed rule and the baseline for tributaries and for lakes and ponds are discussed in Sections 1.3.2.1 and 1.3.4, respectively.

The agencies are proposing to define "relatively permanent" for the first time in the regulatory text to mean "standing or continuously flowing bodies of water that are standing or continuously flowing year-round or at least during the wet season." This represents a change from the baseline. As described in the Amended 2023 Rule preamble, relatively permanent is implemented to mean having flowing or standing water year-round or continuously during certain times of the year but more than for a short duration in direct response to precipitation. The proposed rule changes implementation of "relatively permanent" through the replacement of "during certain times of the year" with the term "year-round or at least during the wet season." There are at least some streams that would be jurisdictional under the baseline that would not be jurisdictional under the proposed rule. Such streams may have continuous flow during certain times of the year but for more than a short duration in direct response to precipitation but otherwise do not meet the requirement under the proposed rule to have flow at least during the wet season. The agencies are unable to quantify this change. Under the pre-2015 regulatory regime, the agencies implement "relatively permanent" to mean typically have standing or flowing water year-round or that have standing or continuously flowing water at least seasonally (*e.g.,* typically three months).[7] This may result in differences compared to the proposed rule.

1.3.2.1 Tributaries

Changes in jurisdiction to the "tributaries" category under the proposed rule as compared to the baseline would be due to the proposed definitions of "tributary" and "relatively permanent," as well as due to the proposed elimination of the interstate waters category. The proposed changes, as discussed in this section,

[7] Three months was provided as an example of seasonal flow in the *Rapanos* Guidance, but under the pre-2015 regulatory regime, the agencies have flexibility to determine what seasonally means in a specific case. *See Rapanos* Guidance at 6-7; U.S. EPA and USACE (2007) (finding that two months of continuous flow was considered seasonal flow for site-specific tributaries in a semi-arid region).

represent a change in jurisdiction under the paragraph (a)(3) tributaries category that may not be easily quantified.

The agencies are proposing to define "tributary" to mean "a body of water with relatively permanent flow, and a bed and banks, that connects to a downstream traditional navigable water or the territorial seas, either directly or through one or more waters or features that convey relatively permanent flow. A tributary does not include a body of water that contributes surface water flow to a downstream jurisdictional water through a feature such as a channelized non-jurisdictional surface water feature, subterranean river, culvert, dam, tunnel, or similar artificial feature, or through a debris pile, boulder field, wetland, or similar natural feature, if such feature does not convey relatively permanent flow. When the tributary is part of a water transfer (as that term is applied under 40 CFR 122.3) currently in operation, the tributary would retain jurisdictional status." Under the Amended 2023 Rule, the agencies have not defined the term "tributary" in the regulatory text.

For both the proposed rule and baseline, relatively permanent tributaries include types of waters such as rivers, streams, lakes, ponds and other bodies of surface water that connect to a downstream traditional navigable water or the territorial seas. Consistent with longstanding practice, streams that have been altered or relocated can be tributaries under the proposed rule. The agencies are not proposing to change their longstanding implementation that ordinary high water mark defines the lateral limits of jurisdiction in non-tidal waters, provided the limits of jurisdiction are not extended by adjacent wetlands. 33 CFR 328.4; Regulatory Guidance Letter 05–05 at 1 (December 7, 2005).

One of the biggest changes in implementation of "tributaries" under the proposed rule is that features that convey non-relatively permanent flow would sever jurisdiction upstream if the tributary is not part of a water transfer. Under the baseline, features that convey non-relatively permanent flow do not inherently sever jurisdiction upstream, regardless of whether the tributary is part of a water transfer in current operation exempt from National Pollutant Discharge Elimination System (NPDES) permitting under the EPA's Water Transfers Rule, 73 FR 33697 (June 13, 2008). For example, in some parts of the country, streams may have relatively permanent flow at the headwaters but become non-relatively permanent downstream due to natural conditions (*e.g.,* losing streams) or due to anthropogenic alterations (*e.g.,* water withdrawals). Such relatively permanent waters would not be jurisdictional under the proposed rule (unless they are part of a water transfer) but would be jurisdictional under the baseline if they connect to a TNW, the territorial seas, or an interstate water. This circumstance is different than illegal activities conducted to sever jurisdiction. Although the agencies recognize that relevant factual issues bear on the legality of construction at any particular site, the agencies do not intend this rule to allow artificial barriers illegally constructed under the CWA to sever jurisdiction of a tributary, for example, that would otherwise be jurisdictional. To be clear, this proposed rule does not modify the CWA prohibition on unauthorized discharges. Construction that is unlawful under the CWA remains subject to the agencies' enforcement authorities.

Unlike in current practice, under the proposed rule additional analysis will be needed to see if the tributary is part of a water transfer in current operation. This may increase processing times for approved jurisdictional determinations, as information about both potential features downstream that convey non-relatively permanent flow as well as information about water transfers current in operation is often not readily available. The agencies may rely on cooperative federalism practices with individual States to

identify any water transfers in current operation, as records on water transfers are often available from relevant State agencies. Consistent with current practice, the agencies do not intend for their analysis of any features outside of a jurisdictional determination review area to result in an official approved jurisdictional determination on those other water bodies. This portion of the proposed definition of "tributary" could have a significant impact on which relatively permanent waters are found to be jurisdictional under the proposed rule compared to the baseline, particularly in the arid West and some mountainous regions.

In addition, under the baseline there is no requirement for tributaries to have a bed and banks. While many tributaries under the baseline will have a bed and banks, some will not, and those streams would lose their jurisdictional status under the proposed rule.

As discussed above, the agencies are also proposing to define "relatively permanent" to mean "standing or continuously flowing bodies of surface water that are standing or continuously flowing year-round or at least during the wet season." There are at least some streams that would be jurisdictional as tributaries under the baseline that would not be jurisdictional under the proposed rule as a result of the proposed relatively permanent definition.

The proposed deletion of the interstate waters category would also limit those streams that are found to be jurisdictional under the proposed rule as compared to the baseline. Under current practice, relatively permanent tributaries of interstate waters are jurisdictional without the need to also be tributaries of a TNW or the territorial seas, but such streams would not be jurisdictional under the proposed rule.

The proposed rule would change the current approach for assessing stream reach. As discussed in the preamble to the proposed rule, the reach for purposes of assessing if a tributary has relatively permanent flow means a section of a stream or river along which similar hydrologic conditions exist, such as discharge, depth, area, and slope, consistent with the Navigable Waters Protection Rule (NWPR). This differs from the current approach, where that term is identified by the Strahler stream order (entire reach of the stream that is of the same order). This change may result in some streams being found jurisdictional as relatively permanent tributaries under the proposed rule that would have been non-relatively permanent under the baseline and vice versa. For example, under the proposed rule, if a relatively permanent tributary reach becomes non-relatively permanent and then relatively permanent and then non-relatively permanent again, it may be viewed as four separate reaches, especially if they also share other similarities with respect to depth, slope, or other factors. Unlike current practice, this stream reach approach would not assign a portion of a tributary that has non-relatively permanent flow as jurisdictional based on relatively permanent flow at the farthest downstream limit, or where that downstream limit is not representative of the reach, based on the flow characteristics that best characterize the entire reach. Under the baseline, if the four stream segments comprised a first order stream, that first order stream would be deemed to be either entirely relatively permanent or non-relatively permanent.

1.3.3 Continuous Surface Connection

In this proposal, the agencies define "continuous surface connection" for the first time to mean "having surface water at least during the wet season and abutting (*i.e.*, touching) a jurisdictional water." The agencies propose to implement "having surface water at least during the wet season" to mean that surface water persists throughout the wet season. Consistent with current practice, both paragraph (a)(4) adjacent

wetlands and paragraph (a)(5) relatively permanent lakes and ponds (*see* Section 1.3.4) must only have a continuous surface connection to a requisite covered water to be jurisdictional.

1.3.3.1 Adjacent Wetlands

The agencies are not proposing to change the definition of "adjacent" in the Amended 2023 Rule, which is defined as "having a continuous surface connection," or longstanding definition of "wetlands" in paragraph (c)(1). The agencies' longstanding definition of "wetlands" requires the three factors of hydrology, hydric soils, and hydrophytic vegetation under normal circumstances. However, to ensure alignment with *Sackett,* the agencies are including a proposed definition of "continuous surface connection" (the requirements for surface water at least during the wet season and abutment), the proposed elimination of the interstate waters category, and the proposed changes to implementation of the paragraph (a)(3) tributaries category. Thus, the proposed rule would necessarily include fewer wetlands as "waters of the United States," and thereby include fewer wetlands subject to Federal jurisdiction, than the baseline.

One of the biggest changes from the baseline for wetlands to be adjacent is the proposed requirement of surface water at least during the wet season. The proposed rule for the first time requires an assessment of whether an adjacent wetland has surface water that persists at least during the wet season, which differs from current practice that does not require surface hydrology for wetlands being assessed as adjacent. For example, wetlands which have less than seasonal flooding or hydrology fulfilled by saturated soils and fed by ground water without any expression of surface water at least during the wet season would not be considered adjacent under this proposal, though such wetlands would be jurisdictional under the baseline where they abut a jurisdictional water. Furthermore, only the portion of such a wetland which has surface water at least during the wet season would be jurisdictional under the proposed rule, which also represents a change from the baseline, as under current implementation the agencies consider the entire wetland to be adjacent if any part of the wetland is adjacent. Thus, under the proposed rule, the extent of surface water at least during the wet season in an abutting wetland would need to be delineated when making jurisdictional determinations to draw the boundary between the jurisdictional portion of a wetland and the non-jurisdictional portion of a wetland. This is a change from current practice that considers the entire wetland adjacent, regardless of surface hydrology, as long as the wetland has a continuous surface connection to a qualifying jurisdictional water. For example, if the wetland transitions from having surface water at least during the wet season (where it abuts the jurisdictional water) to seasonally saturated hydrology, only the portion that has surface water at least during the wet season would be considered to be adjacent under the proposed rule. This may result in additional processing times of approved jurisdictional determinations due to the need for additional data collection. The agencies anticipate that wetlands in more arid parts of the country, including the arid West, may be most impacted by this aspect of the proposed definition.

The proposed rule would also require a determination that the wetland is abutting. The agencies consider the baseline for purposes of "continuous surface connection" to be the practice prior to issuance of the March 2025 Continuous Surface Connection Guidance (U.S. Department of the Army, 2025). Thus, under the baseline of the Amended 2023 Rule, depending on the factual context, a wetland could have a continuous surface connection when the wetland is connected to a jurisdictional water by a discrete feature like a non-jurisdictional ditch, swale, pipe, or culvert. *See* 88 FR 3004, 3095 (January 18, 2023). In addition, under the baseline, a natural berm, bank, dune, or similar natural landform between an

adjacent wetland and a jurisdictional water did not sever a continuous surface connection to the extent that it provided evidence of a continuous surface connection.

Elimination of the interstate waters category would also impact jurisdiction for those wetlands that are adjacent to waters whose sole basis of jurisdiction under the baseline is that they are an interstate water. Such wetlands would not be jurisdictional under the proposed rule, unless they meet the requirements of the proposed definition of "continuous surface connection." The proposed changes to implementation of (a)(3) tributaries would also mean that wetlands adjacent under the baseline to tributaries that would now be non-jurisdictional under the proposal would also likely no longer meet the definition of "waters of the United States."

1.3.3.2 Mosaic and Permafrost Wetlands

The agencies are proposing to change implementation of wetland mosaics. Under current implementation, wetlands in the mosaic are considered collectively as one wetland, and the agencies consider the entire mosaic adjacent if any portion of the wetland mosaic is adjacent. S*ee* 88 FR 3093 (January 18, 2023). Under the proposed rule, the agencies would delineate wetlands in the mosaic individually. Only the portions of wetland mosaics that meet the definition of "continuous surface connection" under the proposed rule would be jurisdictional as adjacent wetlands.

The agencies received pre-proposal recommendations that they exclude permafrost wetlands. While the agencies would not exclude permafrost wetlands in the proposed rule, they have considered approaches to permafrost wetlands and believe that the proposed changes to how mosaic wetlands are considered would address some concerns raised in pre-proposal feedback, as many permafrost wetlands are mosaic wetlands. *See, e.g.,* Alaska Regional Supplement at 97.[8] In addition, the requirement in the proposed definition of continuous surface connection regarding having surface water at least during the wet season would likely further limit those permafrost wetlands that are considered to have a continuous surface connection under the proposed rule. Because the agencies anticipate that not many wetlands in permafrost areas in Alaska would likely meet the proposed requirement for continuous surface connection of having surface water at least during the wet season, it is likely that under the proposed rule few wetlands would be found to be adjacent in those areas of the State, whereas under the baseline, there may be many acres of continuous permafrost wetlands that would be found to be abutting a jurisdictional water and thus would be considered adjacent.

1.3.4 Lakes and Ponds Assessed Under Paragraph (a)(5)

Due to the proposed removal of the "interstate waters" category, the agencies are proposing to delete "intrastate" from the regulatory text because it would no longer be necessary. Thus, under the proposal, paragraph (a)(5) would include any relatively permanent lakes and ponds that are not tributaries and that have a continuous surface connection to a TNW, the territorial seas, or a relatively permanent tributary. The agencies do not believe that this aspect of the proposed rule represents a significant change in jurisdiction compared to the baseline.

[8] Noting that wetland mosaics occur in areas of discontinuous permafrost (*e.g.,* north-facing slopes, and burned areas in permafrost-affected regions) and on discharge slopes in Southcentral Alaska (USACE, 2007).

The deletion of "intrastate" from this category may result in some "interstate" lakes and ponds being included in this category of waters under the proposed rule, as compared to the baseline where they would have been included under the interstate waters category. This would not represent a change in overall jurisdiction compared to the baseline. However, the proposed definition of "relatively permanent" and the proposed definition of "continuous surface connection" would likely affect which lakes and ponds are found to be jurisdictional under the proposed rule as compared to the baseline. As discussed in Section 1.3.2, the definition of "relatively permanent" in the proposed rule would likely result in fewer waters meeting the standard compared to the baseline. In addition, the assessment of continuous surface connection for lakes and ponds under the proposed rule would be the same as for adjacent wetlands. Yet, under the baseline, continuous surface connection for paragraph (a)(5) lakes and ponds encompasses more than just those that are abutting (including for lakes and ponds connected via certain discrete features and behind certain natural landforms). Consequently, there would likely be fewer lakes and ponds that would be found to have a continuous surface connection under the proposed rule. The requirement under the proposed rule that a continuous surface connection would be fulfilled by having surface water at least during the wet season would likely not have an impact on lakes and ponds that are abutting but might impact those lakes and ponds whose continuous surface connection under the baseline was fulfilled by a discrete feature or due to evidence provided by a natural landform.

1.3.5 Waters Excluded from the Definition of "Waters of the United States"

1.3.5.1 Waste Treatment Systems

The agencies propose continuing the exclusion for waste treatment systems under paragraph (b)(1), which has existed in the EPA's regulations since 1979 (44 FR 32854; June 7, 1979). The agencies, however, seek to modify the exclusion by adding a definition of "waste treatment system" under paragraph (b)(1) to clarify which waters and features are considered part of a waste treatment system and therefore excluded. Under the proposed rule, a waste treatment system "includes all components, including lagoons and treatment ponds (such as settling or cooling ponds), designed to either convey or retain, concentrate, settle, reduce, or remove pollutants, either actively or passively, from wastewater prior to discharge (or eliminating any such discharge)." The agencies intend for this proposed exclusion to apply only to waste treatment systems constructed in accordance with the requirements of the Clean Water Act. Waste treatment systems constructed prior to the 1972 Federal Water Pollution Control Act amendments would be excluded under this proposed regulation and would also continue to be subject to regulation by the Clean Water Act section 402 permitting program for discharges from these systems to "waters of the United States."

Further, consistent with the agencies' current general practice implementing the exclusion, under this proposed rule, a waste treatment system that is abandoned and otherwise ceases to serve the treatment function for which it was designed would not continue to qualify for the exclusion and could be deemed jurisdictional if it otherwise meets this proposed rule's definition of "waters of the United States." The agencies note that cooling ponds created and maintained in jurisdictional waters pursuant to a Clean Water Act section 404 permit and that have Clean Water Act section 402 permits would be subject to the waste treatment system exclusion under previous rules and the proposed rule.

The agencies' proposed changes are textual in nature in response to requests for simple clarifications, and the agencies do not intend for the proposed rule to change the application of the waste treatment systems

exclusion compared to the baseline. Thus, the agencies do not anticipate a significant change from the baseline for the exclusion for waste treatment systems; however, the agencies note that if a system is located on a water whose jurisdictional status would change under the proposed rule, the application of the exclusion would likewise change, as the exclusion only applies to waters that would be jurisdictional under paragraph (a)(2) through (5).

1.3.5.2 Prior Converted Cropland

The agencies propose continuing to exclude prior converted cropland in this proposed rule, a longstanding exclusion since 1993. *See* 58 FR 45034-36 (August 25, 1993); *see also* Section V.F.2 of the preamble. Historically, the agencies have attempted to create consistency between the Clean Water Act and the Food Security Act of 1985 (16 U.S.C. 3801 *et seq.*) wetlands conservation provisions for prior converted cropland. The agencies continue to believe that consistency across these programs is important for the regulated community (*see* 58 FR 45033; August 25, 1993) and therefore are continuing to exclude prior converted cropland from the definition of "waters of the United States." The agencies are proposing to clarify, consistent with the NWPR, that the prior converted cropland exclusion would no longer be applicable for Clean Water Act purposes when the cropland is abandoned (*i.e.*, the cropland has not been used for, or in support of, agricultural purposes at least once in the immediately preceding five years) and the land has reverted to wetlands. However, even under these conditions and given the Supreme Court's new articulation of the necessity of a continuous surface connection in *Sackett*, a wetland would still need to be determined to be adjacent to a qualifying jurisdictional water, as the term is defined in paragraph (c)(2), to itself be determined jurisdictional. Simply because land may lose prior converted cropland designation under this proposed approach does not automatically determine that land to be a wetland nor does it automatically determine that land to be jurisdictional.

The five-year timeframe for maintaining agricultural purposes under the proposed rule approach to abandonment is consistent with the 1993 preamble. 58 FR 45033 (August 25, 1993). Agricultural purposes include land use that makes the production of an agricultural product possible, including, but not limited to, grazing and haying. This proposed rule would also clarify that cropland that is left idle or fallow for conservation or agricultural purposes for any period or duration of time remains in agricultural use (*i.e.*, it is used for, or in support of, agriculture purposes), and therefore maintains the prior converted cropland exclusion. The agencies believe that this reversion would be necessary to ensure that cropland enrolled in long-term and other conservation programs administered by the Federal government or by State and local agencies that prevent erosion or other natural resource degradation does not lose its prior converted cropland designation as a result of implementing conservation practices.

The agencies currently utilize "change in use" under the baseline to determine if prior converted cropland loses its exclusionary status. Under the Amended 2023 Rule, "change in use" does not require a specific timeframe such as the proposed rule's use of abandonment.[9] Under the baseline, the exclusion ceases when the area has changed use so that it is no longer available for the production of agricultural

[9] Note that under the pre-2015 regulatory regime, the agencies are using "abandonment" to determine whether an area loses its prior converted cropland status. The preamble to the 1993 Rule, which the agencies utilize to implement prior converted cropland under the pre-2015 regulatory regime, provides that land would lose its prior converted status if it is abandoned and it exhibits wetland characteristics (abandonment). 58 FR 45034 (August 25, 1993). Thus, the proposed rule is consistent with the current approach in States where the Amended 2023 Rule is stayed.

commodities, such as when it has been filled for development. Change from an agricultural to a non-agricultural use could occur immediately under the baseline, thereby making the area potentially subject to Clean Water Act jurisdiction. As the agencies do not have reliable data to inform analysis from the baseline, it is unknown as to whether the proposed change to "abandonment" from "change in use" may result in changes of prior converted cropland retaining the exclusion. The agencies solicit comment on additional data or approaches which may be used to better quantify any potential changes.

The agencies note that most prior converted cropland that no longer experience agricultural purposes would not regain wetland status since it is generally manipulated to such a degree that wetland conditions would generally not return. As is the practice under the baseline, where wetland conditions do not return, the area is not subject to the Clean Water Act. However, where wetland conditions do return, the agencies would need to assess if it meets the definition of "waters of the United States." In addition, even where wetlands do return, those wetlands would be less likely to be adjacent wetlands under the proposed rule as compared to the baseline due to the proposed definition of "continuous surface connection," and due to fewer waters being found to be jurisdictional by elimination of the interstate waters category and changes to definition of "relatively permanent."

Thus, the agencies anticipate that there may be a change from the baseline with the proposed codification of the "abandonment" principle, as well as the proposed changes to the categories of jurisdictional waters including for those wetlands that would be found to be "adjacent" under paragraph (a)(4). Not all prior converted cropland that has been officially designated by U.S. Department of Agriculture's (USDA) Natural Resources Conservation Service (NRCS) has been mapped throughout the country. In addition, all land that qualifies under the Food Security Act of 1985 as prior converted cropland may not have been formally designated as such. Further, the agencies note that NRCS is statutorily prohibited from sharing data and information on program participants and their land, even with other Federal agencies.[10] Therefore, the agencies cannot obtain certain information from NRCS without the landowner's consent, which may have otherwise helped in identifying potential effects or changes in jurisdiction. Estimates of the acreage of prior converted croplands have been made in the past (*e.g.,* 53 million acres[11]), but the agencies cannot verify the accuracy of these estimates. In addition, the agencies have only recently started to document in Operation and Maintenance Business Information Link, Regulatory Module (ORM2) when waters meet the prior converted cropland exclusion, so very little agency data exist to provide estimates on the current extent of prior converted cropland. Such data would also be limited to, and biased by, where requests are made by landowners for approved jurisdictional determinations.

[10] Section 1619 of the Food, Conservation, and Energy Act of 2008 (Public Law 110–234, H.R. 2419, 122 Stat. 923; May 22, 2008) prohibits USDA, its contractors, and cooperators, from disclosing information provided by an agricultural producer or owner of agricultural land concerning the agricultural operation, farming or conservation practices, or the land itself, in order to participate in a USDA program, as well as geospatial information maintained by USDA with respect to such agricultural land or operations, subject to certain exceptions and authorized disclosures. Covered information may only be shared with other Federal agencies outside USDA under limited exceptions allowed under Section 1619 of the Food, Conservation, and Energy Act of 2008.Federal Under the NWPR, the agencies did develop a voluntary consent form for landowners to fill out that would allow the USDA to release information to the EPA or the Corps for the purpose of determining applicability of the exclusion for Clean Water Act purposes.

[11] *See* White House Office on Environmental Policy (1993).

The USDA is responsible for making determinations as to whether land is prior converted cropland for its Food Security Act purposes, whereas the agencies would be responsible for determining applicability of the exclusion for Clean Water Act purposes under the proposed rule, consistent with the government's longstanding interpretation of the agencies' authority under the Clean Water Act. *See* 33 CFR 328.3(a)(8) ("Notwithstanding the determination of an area's status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA."); 58 FR 45008, 45036 (August 25, 1993); Civiletti Memorandum at 197. The agencies would be responsible for establishing whether a parcel or tract of land is prior converted cropland and is therefore eligible for the prior converted cropland exclusion for Clean Water Act purposes under this proposed rule. This would represent a change from current practice under the baseline, where the agencies rely on USDA determinations and do not make their own. However, the agencies would recognize a USDA determination of prior converted cropland, if available, when making their own determination for purposes of the Clean Water Act. The agencies anticipate that such practice may potentially result in additional areas being called prior converted cropland under the proposed rule compared to the baseline.

1.3.5.3 Ditches

Current practice under the baseline of the Amended 2023 Rule excludes "ditches (including roadside ditches) excavated wholly in and draining only dry land and that do not carry a relatively permanent flow of water." 40 CFR 120.2(b)(3). This exclusion is consistent with current practice under the pre-2015 regulatory regime, which considers such ditches to be generally non-jurisdictional. The proposed rule would change the (b)(3) exclusion for certain ditches and would exclude those ditches that are constructed or excavated entirely in dry land. Thus, the proposed exclusion for certain ditches differs from current practice such that under the proposed rule, ditches that carry relatively permanent flow, but are constructed or excavated entirely in dry land, would be excluded. In addition, ditches that are constructed or excavated entirely in dry land and draining wetlands but are not constructed or excavated in those wetlands would be determined to be excluded under the proposed rule but would not meet the terms of the exclusion under the baseline because such ditches are not "draining only dry land." The agencies also propose defining the term "ditch" at paragraph (c)(4) of the agencies' regulations to mean "a constructed or excavated channel used to convey water." This proposed definition would be consistent with the 2020 Ditch Memorandum (U.S. Army and EPA, 2020) used under current practice; however, the agencies are proposing to codify the definition consistent with the NWPR.

In the baseline, all ditches that are interstate waters are not subject to the ditch exclusion and would be jurisdictional regardless of any connection to a TNW, even if they are non-relatively permanent waters. The proposed rule would eliminate the interstate waters category, and those ditches would need to meet one of the proposed rule's categories of "waters of the United States" to be jurisdictional, representing a change from the baseline. Under the proposed rule, if a ditch is a traditional navigable water or part of the territorial seas, it would not be excluded consistent with current and longstanding practice. For ditches that are not paragraph (a)(1) waters, the agencies would then assess if the ditch is constructed or excavated entirely in dry land. Consistent with current practice, ditches that are constructed in tributaries or relocate a tributary would not be considered to be constructed entirely in dry land. Such ditches would be assessed to see if they meet the definition of "tributary" under paragraph (c)(9) of the proposed rule and thus would be a paragraph (a)(3) water.

There are also differences in implementation between current practice and the proposed rule with respect to implementing the paragraph (b)(5) exclusion for certain ditches. Under the proposed rule, the "reach" would be interpreted similarly to how it is used for tributaries (*i.e.*, a section of a ditch along which similar hydrologic conditions exist, such as discharge, depth, area, and slope). When a ditch constructed or excavated entirely in dry land connects to and extends the length of a paragraph (a)(3) tributary, even if that ditch has relatively permanent flow, it would be considered as a separate reach from the tributary, and the reach of the ditch that meets the terms of the exclusion would be excluded under the proposed rule. In such a case, the excluded ditch would be a separate reach from the tributary because the ditch's excavated nature means that its hydrologic conditions, such as depth, area, and slope, differ from the natural tributary. This differs from the baseline, as the ditch would extend the reach of the tributary under current practice if it is the same stream order, and the ditch exclusion would not apply to relatively permanent waters. Under the baseline, the agencies would consider the entire channel of the same stream order to be one reach, even if part of the channel was excavated. In addition, under the proposed rule, the entirety of an excluded ditch reach would be non-jurisdictional even when a relatively permanent flow from a tributary to which the ditch drains overflows into the ditch and extends the ordinary high water mark of the tributary into the lower portion of the ditch reach. Under the baseline, the ordinary high water mark of a jurisdictional tributary that extends into an excluded ditch is considered to be part of the jurisdictional tributary and not part of the excluded ditch.

1.4 Summary of Data

As discussed further in this document, the proposed rule is anticipated to reduce the scope of Federal CWA jurisdiction over certain waters (*e.g.,* certain streams, wetlands, and ditches) compared to the baseline, although the agencies are unable to quantify these changes with any reliable accuracy at this time. The agencies face significant challenges in estimating the potential impact of the proposed rule on water resources and activities covered under the CWA. Although the agencies have information on where they have determined on a case-by-case basis if particular waters are or are not "waters of the United States,"[12] the agencies are not aware of any datasets that depict the jurisdictional extent of waters at any point in the long and complicated history of the definition and application of the term "waters of the United States."[13] The agencies determined that a qualitative analysis was the best available alternative for applied empirical work estimating the potential benefits and costs of this proposed rule and the agencies are seeking comment on quantitative methods for the final RIA.

The agencies did not conduct national level analyses regarding the potential effect of the proposed rule due to a number of factors. The National Hydrography Dataset (NHD) and the National Wetlands Inventory (NWI) represent the most comprehensive national datasets of the potential location and extent of streams, rivers, lakes, ponds, and wetlands. However, even where streams and wetlands are identified

[12] *See, e.g.,* the Corps' ORM2 database and the EPA's Clean Water Act Approved Jurisdictional Determinations website (U.S. EPA, 2025a).

[13] The agencies are aware of the Greenhill et al (2024) publication that attempts to estimate Clean Water Act jurisdiction on a national level using machine learning methods. The agencies solicit comment on whether this is an appropriate alternative to use in any final analysis.

in the NHD and the NWI, the maps do not depict the scope of waters regulated under the CWA.[14] In addition, the definitions and implementation practices in the proposed rule cannot be exactly represented in these datasets. Any estimates of waters in NHD or NWI would not correspond cleanly to the scope of CWA jurisdiction under either the baseline or the proposed rule. Instead, they express measures of the extent and distribution of different stream and wetland types throughout the country, as mapped from the datasets. As such, these datasets would provide imprecise quantitative insight on how a change in the definition of "waters of the United States" might affect jurisdictional status under the CWA. Nonetheless, with these limitations in mind, the agencies are soliciting public comment on the proposed approaches in Sections 3 and 4 of this analysis that would primarily rely either directly on the NHD, NWI, or on versions of these data enhanced for further use in an effort to quantify and monetize impacts of the final rule.

There are also limitations with using the Operation and Maintenance Business Information Link, Regulatory Module (ORM2) database to distinguish water resources being affected between the baseline and the proposed rule. Nonetheless, the agencies are soliciting public comment on the proposed approach in Sections 3 and 4 of this analysis that would rely on the ORM2 database to estimate changes in jurisdictional determinations and resulting permits in an effort to characterize the rule's impacts.

1.4.1 National Hydrography Dataset (NHD)

The NHD primarily focuses on mapping streams and rivers across the U.S. Led and maintained by the U.S. Geological Survey (USGS) National Geospatial Program, the NHD is considered to have the best available stream/river data for the contiguous U.S. (CONUS) and has published inclusion standards. The current NHD (1:24,000 or finer scale) data include over 12 million kilometers of streams and rivers in the CONUS with over 27 million stream reaches or unique features in the geospatial dataset. The NHD streamflow classifications were derived from orthophotos, field visits, and interviews during the creation of the USGS topographic quadrangle maps (Hafen et al., 2020). For the Eastern US, due to the resolution of mapping and the initial focus of the USGS on perennial and intermittent streams, ephemeral classifications are largely missing or omitted from Eastern States despite the potential presence of ephemeral streams (Fritz, 2013). NHD streamflow classifications in the Western US, where climate and

[14] It is the agencies' consistent position that the NHD and the NWI do not represent the scope of waters subject to CWA jurisdiction. *See, e.g.,* Letter from Nancy Stoner, Acting Assistant Adm'r, EPA Office of Water, to Lamar Smith, Chairman, Comm. on Science, Space, and Tech., U.S. House of Representatives (July 28, 2014; emphasis added; U.S. EPA, 2014a). ("[N]o national or statewide maps have been prepared by any agency, including EPA, showing the scope of waters subject to the Clean Water Act. . . . To develop maps of jurisdictional waters requires site-specific knowledge of the physical features of water bodies, and *these data are not available*[.]"); *see also* Letter from Nancy Stoner, Deputy Assistant Adm'r, EPA Office of Water, to Lamar Smith, Chairman, Comm. on Science, Space, and Tech., U.S. House of Representatives (August 6, 2014; U.S. EPA, 2014b); U.S EPA (2014c) ("While these [U.S. Geological Survey and Fish & Wildlife Service] maps are useful tools for water resource managers, they cannot be used to determine Clean Water Act jurisdiction – now or ever."); Letter from Kenneth J. Kopocis, Deputy Assistant Adm'r, EPA Office of Water, to Lamar Smith, Chairman, Comm. on Science, Space, and Tech., U.S. House of Representatives (Jan. 8, 2015; U.S. EPA, 2015) ("These [USGS] maps were not prepared for the purpose of, nor do they represent, a depiction of the scope of waters protected under the Clean Water Act."); Impact of the Proposed "Waters of the United States"' Rule on State and Local Governments Before the H. Comm. on Transp. & Infrastructure and the S. Comm. on Env't & Pub. Works, 114th Cong. (2015)(testimony of Gina McCarthy, Adm'r, EPA; House Committee on Transportation and Infrastructure, 2015) (stating that the NHD and NWI maps were "not used to determine jurisdiction and not intended to be used for jurisdiction," "are not relevant to the jurisdiction of the 'waters of the U.S.'," "are not consistent with how we look at the jurisdiction of the Clean Water Act," and have "nothing to do, as far as I know, with any decision concerning jurisdiction of the Clean Water Act").

geology result in a greater predominance of ephemeral stream reaches, including twelve states where ephemeral classifications are more than 1% of the state total length. While perennial and intermittent classes are identified through the CONUS within the NHD, ephemeral reaches are typically only included in NHD maps of the western US, especially in the arid southwest. Many canals and ditches are also mapped in the NHD, but the accuracy and extent is unknown.

Despite being a useful and robust dataset for many purposes, the high resolution NHD data has been demonstrated to underrepresent the upstream-downstream extent of channel networks due to the scale of the data.[15] Smaller features would generally not be included in the NHD. It does not map all surface waters and sometimes maps streams that do not exist or no longer exist on the ground (*i.e.*, it has errors of omission and commission). The dataset may have positional inaccuracies due to the resolution, where the standard states that 90 percent of well-defined features are within 40 feet of their true geographic position. The NHD data has variable depictions of stream permanence and flow regimes, and in its utilization of sometimes decades-old hydrographic classifications that may no longer necessarily represent current hydrographic conditions.

While there are ongoing efforts to update the National Hydrography Dataset with the 3DHydrography Program within the State of Alaska (U.S. Geological Survey, 2025), the available NHD in Alaska is predominantly derived from 1:63,360 scale topographic maps. There are portions of the State where higher resolution stream maps have been created with elevation data designed to match the 1:24,000 scale used within the CONUS. Unlike the NHDPlus High Resolution in the CONUS, NHD in Alaska does not include streamflow permanence classes (*e.g.,* perennial, intermittent, ephemeral).

1.4.2 National Wetlands Inventory (NWI)

The NWI Program, led and maintained by the US Fish and Wildlife Service (USFWS), is the definitive high spatial resolution source for mapped wetlands across the US. Available throughout all of CONUS, Hawaii, and 70% of Alaska, NWI has standardized the mapping, characterization and monitoring of wetland habitat at fine spatial resolutions via aerial photography and multispectral satellite imagery. Beginning with 1:80,000 scale imagery in the late 1970s, the spatial resolution has increased through time with the Targeted Mapping Unit (the minimum area that can be consistently mapped) of current standards being 0.2ha using 1m imagery at the 1:12,000 scale (Federal Geographic Data Committee, 2009). The current NWI (version 2) documents over 34 million unique wetland vegetation or water features, identifying each feature by wetland vegetation type, water regime, and human alterations. Several adjacent features may be combined to represent the entirety of a wetland. Water regime modifiers catalogue the duration of saturation or flooding conditions (*i.e.,* temporarily flooded, seasonally saturated, continuously saturated, permanently flooded) for each feature based on imagery, ancillary datasets, and limited field surveys. Due to the enormity of the task of national fine-resolution mapping, the inventory is a patchwork of different base map dates (from the 1970s to the present) and different dataset resolutions (1:80,000+ to 1:12,000 scales). Much of the current updating work of the NWI is done via collaborative efforts with State and local entities as 67% of the 165 contributors to the NWI are State agencies, Tribes, and regional or local governments (USFWS, 2021). Updates occur on an ad-hoc basis and are posted to

[15] *See, e.g.,* Fritz et al. (2013).

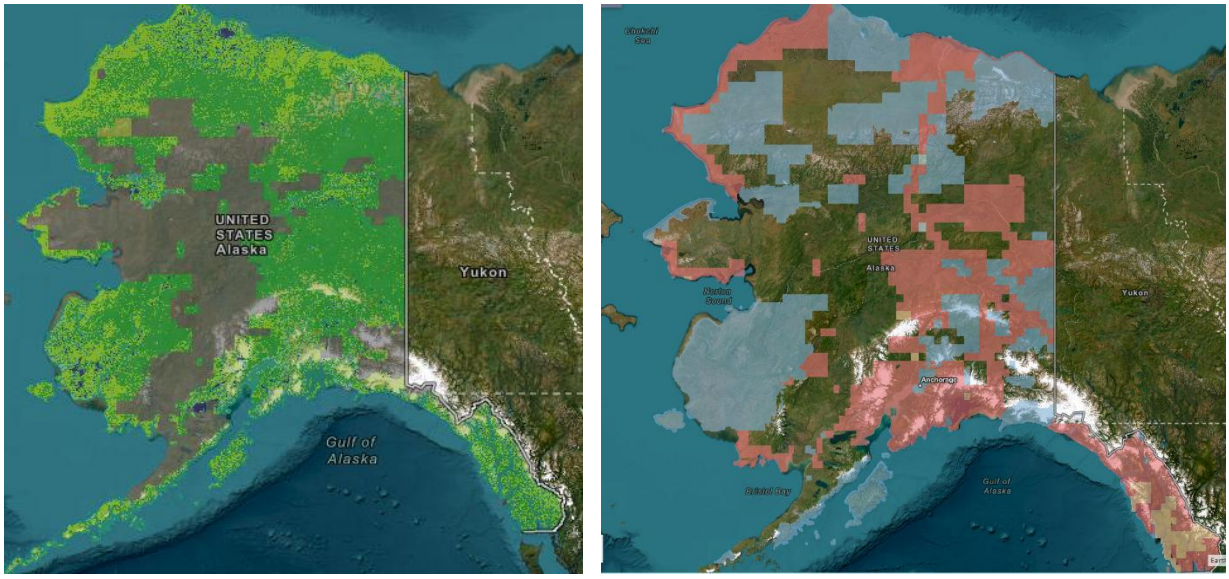
the USFWS's Wetlands Mapper (U.S. Fish and Wildlife Service, 2025b) on a biannual basis, typically in May and October (U.S. Fish and Wildlife Service, 2025a).

Like the NHD, while the NWI is the most comprehensive national dataset of the potential extent of wetlands across the country, it has limitations and was not intended or designed for regulatory purposes. NWI approximates the location and boundaries of a Cowardin wetland type classification system (Cowardin et al., 1979), which is broader in scope than wetlands that meet the CWA regulatory definition of "wetlands." For CWA purposes, a water must have three specific factors to be classified as a wetland: hydric soils, hydrophytic vegetation, and hydrology. Specifically, the longstanding regulations define wetlands as "those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas."[16] In addition, the wetland boundaries as mapped in NWI do not equate to wetland delineation boundaries, established pursuant to the 1987 Corps wetland delineation manual, which serve to inform jurisdictional determinations (U.S. Army Corps of Engineers, 1987).

The NWI dataset for Alaska is of variable spatial resolution and extent (Figure 1-1). Starting in 1994, the Fish and Wildlife Service's NWI performed a high-level survey of Alaska, delineating wetlands within 2,566 four-square mile samples randomly selected from the various Alaskan ecoregions. Those efforts estimated that marine and palustrine wetlands cover 43% of Alaska (Hall et al., 1994).

Figure 1-1: NWI Mapping in Alaska

The left image shows the NWI covering 70% of Alaska. The right image displays more recent split resolution of wetland data in Alaska between 1:40,000 or finer scale (blue), 1:58,000 (tan), and 1:80,000 or coarser scale (salmon).



Apart from the probabilistic survey, spatially explicit wetland maps exist in NWI for 70% of the State though the mapping varies in resolution and collection dates. This includes recent efforts of more fine-

[16] 33 CFR 328.3(b) and 40 CFR 232.2.

resolution digital mapping (1:40,000 or finer), resulting in 31% of mapping occurring after 2020. NWI wetland components include both wetland type (*e.g.*, emergent or forested) and a dominant water regime modifier for each wetland polygon. Multiple wetland polygons might exist adjacent to each other representing larger contiguous wetlands.

North American Commission for Environmental Cooperation Landcover Dataset

Additional satellite-based land cover mapping efforts might allow for extending limited wetland analyses to the entire State of Alaska. State-wide mapping analyses include using RADAR L-band imagery to map wetland extent (Whitcomb *et al.* 2007) or Landsat imagery as part of the North American Commission for Environmental Cooperation (NACEC) landcover mapping (Commission for Environmental Cooperation, 2024). Both datasets have a coarser resolution, fewer wetland types, and no water regime connected to the respective datasets.

To address the NWI data limitations in Alaska, the agencies are proposing the utilization of existing NWI maps paired with landcover datasets to supplement the gaps in data availability with rough approximations and resolve conflicts in wetland type mapping. The agencies acknowledge limitations still exist with this approach and solicit comment on this or other approaches that may be used for analysis in Alaska.

1.4.3 Operation and Maintenance Business Information Link, Regulatory Module (ORM2)

The agencies intend to quantify jurisdictional impacts in the final rule regulatory impact analysis to the extent practicable. After any such quantification, the agencies intend to use the ORM2 database to estimate changes in jurisdictional determinations attributed to the rule to inform the associated potential impact of the rule on water resources, which could in turn be used to estimate potential change in CWA 404 activity and associated permit and mitigation costs.

It is important to note the limitations of using CWA approved jurisdictional determinations (AJDs) from the ORM2 database to assess potential changes in jurisdiction that would result from the rule. First, CWA JDs are typically made at the request of the landowner or project proponent and do not represent a random sample. In other words, they usually represent where landowners or project proponents want to know if jurisdictional waters are located within their properties or project sites, including, but not limited to, for purposes of conducting dredged or fill activities. Thus, some aquatic resource types may be over- or under-represented in the data derived from CWA AJDs for a number of reasons, such as including aquatic resource types that have or have not clearly fallen into a specific jurisdictional category, or they may be located in regions where there are local requirements for AJDs, or they may be located in regions where a particular aquatic resource is more common and have greater increase for proposed discharges of dredged or fill. For example, traditional navigable waters may be under-represented as they are more clearly jurisdictional, while intermittent streams or certain types of wetlands may be over-represented as their jurisdictional status has been less clear. In addition, in certain regions, there are local requirements for a project proponent to obtain a Corps AJD in order to receive a county permit, for example. Therefore, aquatic resources in those regions, which may be more heavily dominated by a particular type depending on region, could be over- or under-represented. Furthermore, some regions experience increased economic development or proposed discharges of dredged or fill, and in those regions, a particular aquatic resource may be more common and therefore could be over-represented in AJD data. The vice-versa could also occur in those regions with some aquatic resources being under-represented. Some landowners

may also request AJDs in order to avoid jurisdictional waters when undertaking proposed activities, and those water types may be over- or under-represented in the AJD data. Also, non-jurisdictional aquatic resources may be over-represented in AJD data as landowners may want formal assurance from the Corps that they do not have jurisdictional waters on their property. Second, there may be selection bias in terms of where the Corps has available information on AJDs. A landowner or applicant can decide whether they would like an AJD—meaning the Corps makes an official determination of whether an aquatic resource is jurisdictional—or whether they would prefer to voluntarily waive or set aside questions regarding jurisdiction with the use of a preliminary jurisdictional determination (PJD) and thus move forward assuming all waters will be treated as jurisdictional without making a formal determination. A PJD cannot determine that something is not a "water of the United States" or whether there are no "waters of the United States" on the site.[17] A landowner or applicant may request a PJD, for example, in order to avoid aquatic resources when undertaking proposed activities to not trigger permitting requirements, to more efficiently move through the permit process, or because they may believe the aquatic resources would be determined jurisdictional under an AJD. In addition, Corps Districts across the country vary in the numbers of AJDs and PJDs they issue based on local requests.

On a national level, ORM2 data are analyzed for reasonableness; when a correction is warranted, it is accomplished by Corps field project managers. Not all individual records, however, are verified and data entry errors may exist. In addition, the States of New Jersey and Michigan have assumed administration of the CWA section 404 permit program for certain waters[18] within their States. The Corps retains administration of the section 404 permitting program for specific waters within New Jersey and Michigan. Thus, the Corps conducts AJDs for only a subset of waters within New Jersey and Michigan, which have been included in the evaluation of ORM2 data where available. The agencies did not supplement the ORM2 data with information from the State programs.[19, 20]

There are also limitations with using the ORM2 database to distinguish water resources being affected between the baseline and the proposed rule. For example, the CWA AJDs in the baseline allow for water resources to be classified as an "interstate water," but there are minimal occasions when this occurs. Most interstate waters are likely classified under other categories (*e.g.,* traditional navigable waters or tributaries). The database also does not allow for distinguishing relatively permanent waters that may

[17] When the Corps provides a PJD, or authorizes an activity through a general or individual permit relying on a PJD, the Corps is not making a legally binding determination of any type regarding whether jurisdiction exists over the particular aquatic resource in question even though the applicant or project proponent proceeds as though the resource were jurisdictional. A PJD is "preliminary" in the sense that a recipient of a PJD can later request and obtain an AJD if that becomes necessary or appropriate during the permit process or during the administrative appeal process. *See* 33 CFR 331.2.

[18] *See* U.S. EPA (2025c) for additional information on the New Jersey and Michigan section 404 State assumption programs.

[19] Dredged or fill permits issued by New Jersey and Michigan under their assumed programs are not Federal section 404 permits; they are State-issued permits subject to the requirements of the CWA for "waters of the State." "Waters of the State" at a minimum encompass "waters of the United States" but may or may not be broader than "waters of the United States."

[20] The EPA approved Florida's program in December 2020. It was challenged on both Clean Water Act and Endangered Species Act grounds, and in February 2024 was vacated. The EPA's appeal of that vacatur is currently pending in the DC Court of Appeals. Since the vacatur, the US Army Corps of Engineers has resumed administration of Florida's program. As a result, the ORM2 database would not include a complete set of data for the State of Florida under the baseline.

have connections to established "waters of the United States" through ephemeral breaks. Other water resources face similar issues to the above two examples.

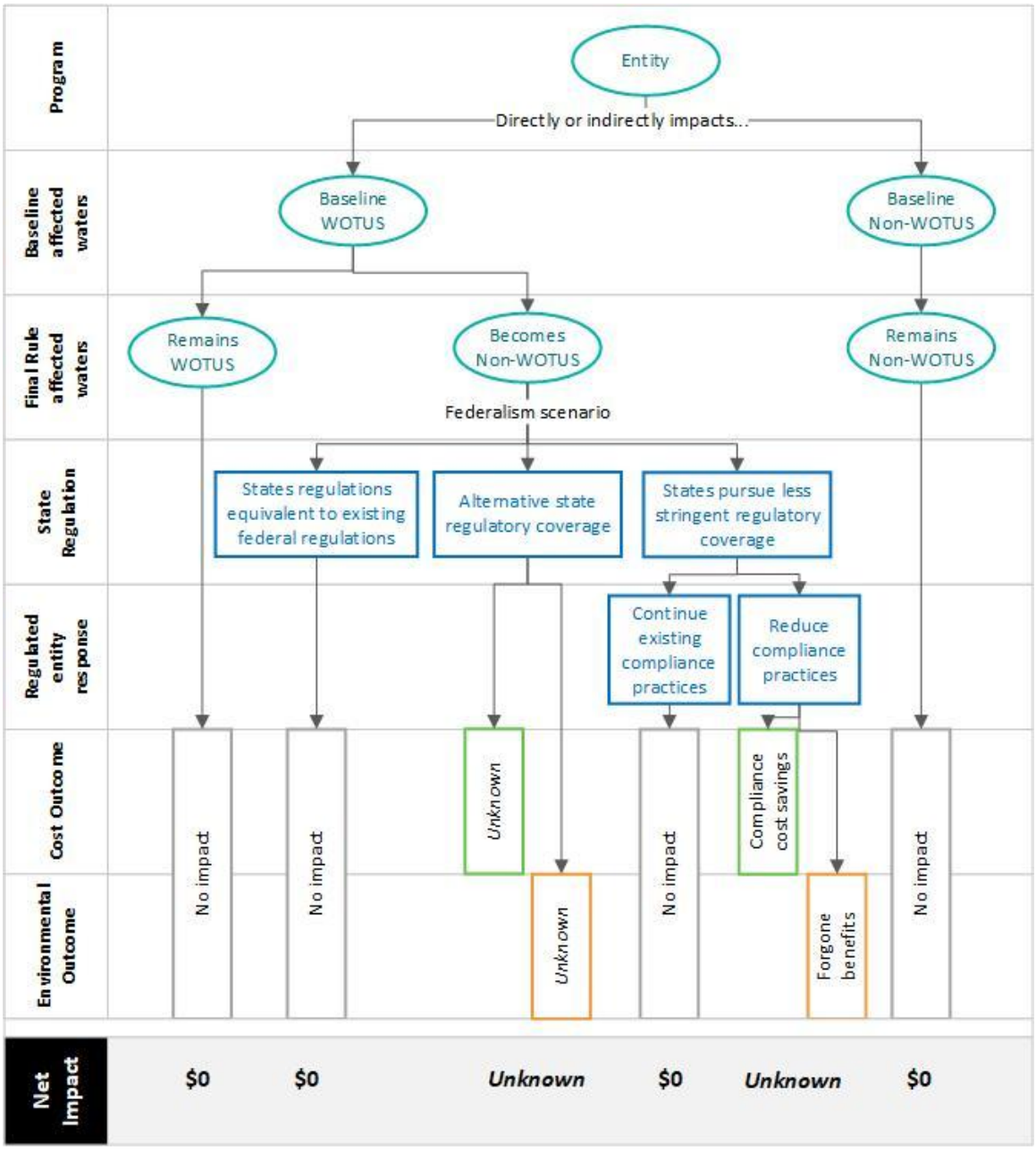
1.5 Summary of Economic Analysis of the Proposed Rule

As mentioned above, the baseline for the economic analysis is the "waters of the United States" regulatory definition currently in effect, which is based either on the Amended 2023 Rule or the pre-2015 regulatory regime, depending on the State.[21] The statutory requirements considered during development of the proposed rule include the Regulatory Flexibility Act (RFA) as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA), the Paperwork Reduction Act, the Unfunded Mandates Reform Act, and the National Technology Transfer and Advancement Act. The analysis is also conducted pursuant to Executive Orders 12866 (Regulatory Planning and Review), 13132 (Federalism), 13175 (Consultation and Coordination with Indian Tribal Governments), 13045 (Protection of Children from Environmental Health Risks and Safety Risks), 13211 (Action Concerning Regulations that Significantly Affect Energy Supply, Distribution, or Use), 13563 (Improving Regulation and Regulatory Review), and 14192 (Unleashing Prosperity Through Deregulation). Requirements with specific import for an economic and programmatic analysis are described below; others are addressed in the preamble to the proposed rule.

Given the uncertainties with the limited available data, the agencies are unable at this stage to quantify the costs, avoided costs, and forgone benefits of the proposed rule. Notably, both the potential cost savings and forgone benefits are contingent on a number of factors, including decisions by States with respect to areas that would fall solely within State or Tribal and local jurisdiction. However, the proposed rule is clearly deregulatory in nature. The agencies identify potential data sets and propose potential methodologies to quantify such costs and benefits in the remainder of this document. Specifically, the agencies highlight approaches to quantitatively estimate the impact of a revised definition of "waters of the United States" through changes to relatively permanent waters, continuous surface connection, and Alaska wetlands that may be used for the final rule RIA. The agencies solicit comment on these approaches as well as the appropriate data sets to use in such approaches.

[21] *See* U.S. EPA (2024a) for descriptions and a map for informational purposes to illustrate which definition of "waters of the United States" is generally operative in each State across the country as a result of litigation challenging the 2023 Rule. As the litigation continues, the EPA will update the map, when possible, to reflect the most current information that is made available to the EPA and the Army. The agencies are implementing the 2023 Rule, as amended by the Amended 2023 Rule, in 24 States, the District of Columbia, and the U.S. Territories. In the other 26 States, the agencies are interpreting "waters of the United States" consistent with the pre-2015 regulatory regime and the Supreme Court's decision in light of *Sackett* until further notice.

Figure 1-2: Stylized Tree Diagram of Potential Impacts from the Proposed Rule, if Finalized



In the simplest case, as shown in the rightmost branch in Figure 1-2, if an entity (*e.g.,* a development project, manufacturing facility, or State transportation project) impacts a water that is not considered a "water of the United States" in the baseline regulatory regime, then it is also assumed not to be a "water of the United States" under the proposed rule, if finalized, and hence there would be no changes in the compliance costs incurred by that entity nor in the environmental benefits experienced. Therefore, there would be no impact to society in this situation.

At the other end of the spectrum, in the leftmost branch of Figure 1-2, if an entity impacts a water that is considered a "water of the United States" in the baseline, and this water is also considered a "water of the United States" under the proposed rule, if finalized, then there would also be no change in regulatory requirements, and thus no change in compliance costs or environmental benefits. Again, in this situation there is a zero-net impact to society. Many categories of baseline activities regulated under CWA sections 401, 402, 303(d), 404, and 311 would likely fall into this type of situation and continue to be regulated by the CWA under the proposed rule, if finalized.

The cases of interest are those where an entity directly or indirectly impacts a water that is considered a "water of the United States" under the baseline regulatory regime but would no longer be considered a "water of the United States" under the proposed rule, if finalized. Generally, the State or Tribal governments[22] could be in one of the following scenarios in response to the proposed rule, if finalized. First, a State or Tribe's current regulatory regime under State or Tribal law may already be as comprehensive, or more comprehensive, than that of the Federal government. In this scenario, it is also possible that a State or Tribe would revise its current laws and regulations to encompass these waters and continue the actions required by the CWA in the baseline. In either case, State or Tribal requirements would fully address any regulatory difference in the wake of the change in what waters are considered a "water of the United States." This would result in no change in compliance costs to the regulated community and no change in environmental benefits.

It is important to emphasize that should States and Tribes choose to regulate more broadly than the Federal government, the administrative costs associated with regulatory administration, implementation, and enforcement Federal may potentially shift from the Federal government to States and Tribes due to their own regulatory action. If Federal and State or Tribal administrative costs are similar, the net impact should be roughly zero in the long run. However, there could be short-run, and long run, costs to States and Tribal governments to build, expand, and maintain the necessary regulatory infrastructure. To the extent that State, Tribe, or local cost of implementing an expanded regulatory framework are greater than the previous Federal expenses, net benefits could decrease. It is also possible that the State and local management costs could be borne most directly by State and local taxpayers, although the data necessary to estimate the size and distribution of the tax impacts was not available for use in this analysis. The agencies recognize that this would be more of an issue in some programs than others (*e.g.,* oil spill response under the CWA section 311 program).

Another potential outcome is a federalism scenario, where States, Tribes, and local governments who may be more knowledgeable of the local factors that can influence the environmental and economic values of the waterbodies in their jurisdiction can allocate resources more efficiently than the Federal government to focus programs on water resources of relatively higher environmental and social value. Depending on whether the newly federally non-jurisdictional water would be regulated by the State, Tribe, or local

[22] *See* U.S. EPA (2025d) for information on the Clean Water Act authorizing the EPA to treat eligible federally recognized Indian Tribes in a similar manner as a State (TAS) for implementing and managing certain environmental programs under the Act. However, Tribes can undertake other actions as described in the scenarios that do not require TAS status under Federalism principles as they would not be directly implementing or managing Clean Water Act programs, but rather programs specific to their Tribal regulations and laws. In addition, Section 2 of this RIA provides further discussion about Tribal programs that provides context for Figure 1-2.

government, the compliance costs for an individual water resource could increase or decrease accordingly. And in turn, the corresponding environmental benefits could increase or decrease.

A final scenario is that States or Tribes would invoke a less comprehensive regulatory regime in response to the change in CWA coverage or not implement any State or Tribal regulations beyond Federal requirements. For example, a few States and all Tribes are currently not authorized to implement the National Pollutant Discharge Elimination System (NPDES) program, and so they would potentially not have the capacity (staff and resources) to regulate discharges to waters that would no longer be jurisdictional. Importantly, nothing would be stopping these States or Tribes from requesting primacy to implement these programs within their respective jurisdictions. That said, these States or Tribes may opt to not build such a capacity depending on the preferences of their residents and budget constraints, or the fact that they currently have legal requirements to not regulate beyond the CWA.[23] In such cases, unless regulated entities continue to behave as if still regulated (due to fixed costs already incurred, fear of future liability, or goodwill with local citizens), there will likely be avoided costs to the regulated community and forgone benefits to the public. Whether the net effect is positive or negative would depend on whether the resulting cost-savings are greater than the absolute value of the forgone environmental benefits.

Overall, the generalized tree diagram here (Figure 1-2) provides a systematic and transparent organization to the qualitative discussion. These diagrams convey that in many cases the potential net effects could be minimal. Quantifying the frequency in which the scenarios in any branches of the tree take place, not to mention the magnitude of any resulting costs and benefits, is extremely difficult. Doing so requires data and well-informed assumptions regarding the current characterization of waters nationwide, the changes in the scope of "waters of the United States" across the country, and the potential response of State and Tribal governments and the regulated entities across the various CWA programs and regulated waters. In addition, such a quantitative analysis faces the usual challenges of trying to model, quantify, and monetize the potential costs and benefits. For these reasons, the agencies pursue qualitative analyses in this Regulatory Impact Analysis. The agencies solicit comment on data and approaches that can inform and/or improve the agencies' ability to develop national-level quantitative analyses for the final rule including: data and approaches to conduct the geospatial analysis of the impact on water resources; data and approaches to estimate the impact on permit activity and cost, and mitigation cost; data and approaches to estimate the impact on small entities; data and approaches to quantify/monetize impacts on CWA programs other than CWA 404; and data and approaches to estimate the valuation of forgone benefits.

[23] For example, to prepare for NPDES authorization, the State of Alaska created a capacity building plan that increased the full-time equivalents (FTEs) allocated to the program by nearly 50 percent (Alaska Department of Environmental Conservation (ADEC), 2008), and the State of Idaho anticipated more than doubling the relevant staff (Idaho Department of Environmental Quality (IDEQ), 2017).

2 State and Tribal Regulatory Practice

The Clean Water Act provides that "[i]t is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States . . . to plan the development and use . . . of land and water resources."[24] In addition, section 518 of the Clean Water Act authorizes the EPA to treat eligible Indian Tribes with reservations in a manner similar to States (TAS) for a variety of purposes, including administering each of the principal Clean Water Act regulatory programs.[25]

States and Tribes have inherent sovereign authority to establish more protective standards or limits than the Federal Clean Water Act, and many, though not all, Clean Water Act programs can be authorized or assumed under State or Tribal law. In addition, States and Tribes may implement, establish, or modify their own programs under State or Tribal law to manage and regulate "waters of the State" or "waters of the Tribe" outside of Clean Water Act delegated authorities.

The Corps regulates the discharge of dredged or fill material into all "waters of the United States" in forty-eight States.[26] However, most States have some form of water protection and restoration program under State authorities. Most of these programs are not as broad as the Federal definition of "waters of the United States." They protect only some of the waters that are jurisdictional under the Clean Water Act, and in some cases specifically address waters that are not federally jurisdictional under the proposed rule. The proposed rule preserves the exclusive authority of States and Tribes over more waters than under previous definitions of "waters of the United States."

This section describes the agencies' understanding of existing State and Tribal authorities and programs, recognizing that States and Tribes may already address waters potentially affected by the revised definition, may want to develop programs to cover certain waters the Clean Water Act does not regulate, or may choose to leave some waters unregulated. For those States that regulate as stringently as the Federal definition of "waters of the United States," the clarified scope of jurisdiction under the proposed rule represents a change. Programs in States that are typically implemented by the Federal government (section 311 oil spill programs and section 404 permitting programs) or triggered by Federal permits and licenses (section 401 certification) are affected by the definition of "waters of the United States."

2.1 Summary of Programs in States, Territories, and the District of Columbia

States and Territories play a primary role in co-managing water resources and implementing Clean Water Act programs and nothing in this proposed rule impacts that primary role. This section discusses existing programs and authorities that govern water resources and their relationship to the definition of "waters of the United States." This section presents individual overviews of current State programs, including the District of Columbia and the U.S. Territories, regarding Clean Water Act programs, definitions of State waters, the scope of State jurisdiction, and additional information on State-level regulations or policies that affect "waters of the State." The agencies compiled this information to describe the breadth of State

[24] 33 U.S.C. 1251(b).

[25] *See* 33 U.S.C. 1377.

[26] Only Michigan and New Jersey are actively administering assumed section 404 programs at this time.

authorities and to provide a current picture of Federal and State regulatory management of water resources.

The Clean Water Act programs discussed in detail in Section 4, including the section 303(c) water quality standards program and 303(d) impaired waters program, the section 311 oil spill and response program, the section 401 water quality certification program, the section 402 NPDES permit program, and the section 404 permit program for the discharge of dredged or fill material rely on the definition of "navigable waters" and "waters of the United States" for program implementation. A revised definition of "waters of the United States" may have some effects on these Clean Water Act programs as implemented at the State level. However, any potential effects will vary from State to State based on their independent legal authority to regulate water resources beyond the scope of the Clean Water Act and existing protections prior to the proposed rule.

2.1.1 Methodology

This summary draws on information from multiple sources, as well as from previous analyses undertaken by independent associations and institutions.[27] Definitions for State and Territorial waters, including wetlands, were drawn from online directories of State laws. Information on State and Territorial water laws and programs was found through State and Territorial agency websites, and information on the various Clean Water Act programmatic areas (sections 303, 311, 401, 402, and 404) was drawn from the Clean Water Act, applicable regulations, EPA staff and websites, various publications, and recommendations received in pre-proposal engagement.

Wetland-specific data on State authorities were compiled using publications from the Association of State Wetland Managers and the Environmental Law Institute (ELI). These refer to State assessments of wetland programs. Information on State restrictions and legal constraints was drawn from an ELI report (ELI, 2013), as well as from States themselves. Summaries of State programs previously provided to the agencies by the Western States Water Council and from the Association of Clean Water Administrators provided additional information on State laws and authorities, water quality-related policies, and definitions.

To update the State-level summaries to account for activity in recent years, the agencies searched relevant case law and bills post-*Sackett* (*i.e.,* 2023-2025) that would affect "waters of the State" and associated State-level protections. This information was used to assess if a given State has more stringent laws than required by the Clean Water Act post-*Sackett*.

The summarized information does not change or substitute for any legal requirements. While the agencies have tried to ensure the accuracy of the information in this section, the obligations of the regulated community are determined by the relevant statutes, regulations, or other legally binding requirements. The agencies are seeking input on the State-level regulatory summary.

2.1.2 State Responses to Past Jurisdictional Clarifications

Throughout the history of the Clean Water Act, court decisions, as well as agency interpretations, have re-interpreted the scope of "waters of the United States." Some States have responded to changes in

[27] *See also* the Economic Analysis for the 2023 Rule and Supplementary Material.

jurisdictional scope of the Clean Water Act by adjusting their State laws and regulations. Some States have adjusted their laws to be consistent with the scope of Clean Water Act jurisdiction based on requirements in their own laws that they cannot be more stringent than Federal regulations. Other States have increased regulatory requirements to address water resources that were no longer regulated under the Clean Water Act.

2.1.3 Waters of the State

Each State has its own definition of "waters of the State," and many States define similar areas and water resources as waters of the State. A few States also reference "waters of the United States" within their definitions of "waters of the State." All State definitions are more inclusive than past and current definitions of "waters of the United States" in at least one way; for example, most States encompass some combination of groundwater and artificial waters in their definitions of "waters of the State." States typically have very broad definitions which include waters that are not "waters of the United States" under the Clean Water Act, *i.e.,* groundwater.[28] Few States that use the phrase "artificial waters" define it in their definition of "waters of the State," though it may be explained further in regulation. Very few States mention flow requirements in their definitions; the ones that do define "waters of the State" as those waters which flow perennially, seasonally, and intermittently.

Some States may include exemptions in their regulations for certain types of waters of the State, for certain industries, or for certain types of permits. Approximately half or more of the States regulate at least some waters beyond the current scope of Federal Clean Water Act requirements (*See* Table 2-1). All States have a definition of "wetlands" in their State laws and regulations. While these definitions vary widely in exact language, they all either recite, reference, incorporate, or outline similar factors as the Federal definition of wetlands. Some are more inclusive than the Federal definition, while others incorporate the exact Federal factors of a wetland. Many States have different wetland definitions for tidal, nontidal, coastal, and freshwater wetlands.

2.1.4 State Comments

Several States provided pre-proposal recommendations to the agencies' public recommendations docket (Docket ID: EPA-HQ-OW-2025-0093) that opened March 22, 2025, and closed April 23, 2025.[29] Comment letters from States that were sent to the agencies as part of the federalism consultation and a summary of the agencies' April 3, 2025 State listening session with State co-regulators are also available in the docket for the proposed rule (Docket ID: EPA-HQ-OW-2025-0322). For a more detailed account of State comments, refer to the agencies' "Summary Report of Federalism Consultation for the Proposed Rule."

[28] For example, Illinois defines their "waters of the State" as "All accumulations of water, surface and underground, natural, and artificial, public and private, or parts thereof, which are wholly or partially within, flow through, or border upon this State" 415 Ill. Comp. Stat. section 5/3.550, and Nevada defines their "waters of the State" as "All waters situation wholly or partly within or bordering upon the State, including but not limited to: all streams, lakes, ponds, impounding reservoirs, marshes, water courses, waterways, wells, springs, irrigation systems, and drainage systems; and all bodies or accumulations of water, surface and underground, natural or artificial" Nev. Rev. Stat. section 445A.415.

[29] These comments are available from U.S. EPA and Army (2025).

2.2 Status of Tribal Water Programs

There are currently 574 federally recognized Indian Tribes within the United States, including 229 native Tribes within the State of Alaska (89 FR 944; January 8, 2024). Over 300 of the federally recognized Tribes have reservation lands. Many Tribes have lands that the United States holds in trust for the Tribes, known as trust lands. Under the EPA's longstanding approach, and consistent with relevant judicial precedent, trust lands validly set aside for Indian Tribes are considered informal reservations and have the same status as formal reservations for purposes of the agency's programs. In total, approximately 56.2 million acres are held in trust by the United States for Indian Tribes and individuals, including approximately 326 Federal Indian reservations. Although the largest reservation is 16 million acres (the Navajo Nation Reservation located in Arizona, New Mexico, and Utah), most smaller reservations are less than 1,000 acres (U.S. Department of the Interior, 2025).

This section discusses existing Federal Clean Water Act programs and authorities, as well as Tribal inherent regulatory authority, that together govern a federally recognized Tribe's water resources and their relationship to the definition of "waters of the United States." This summary provides a snapshot of the current status of Tribes authorized to administer Clean Water Act programs, and definitions of "waters of the Tribe," as well as additional information on Tribal regulations or policies that affect Tribal waters.

The agencies compiled this information to provide a current picture of Federal and Tribal regulatory management of water resources and to understand the potential effects of a change in scope of "waters of the United States." The EPA and the Corps directly implement most of the programs under the Clean Water Act in the vast majority of Indian country. Some Tribes implement Clean Water Act programs, such as water quality standards, and some Tribes operate water resource programs under Tribal law. The agencies acknowledge that because they generally implement Clean Water Act programs on Tribal lands, a reduced scope of Clean Water Act jurisdiction would likely affect Tribes differently than it may affect States. Currently, of the Tribes that are eligible, most have not received treatment in a manner similar to a State status to administer one or more of the Clean Water Act programs. Based on comments received during Tribal consultation and engagement, Tribes may lack the capacity to administer a Tribal water program under Tribal law, create a program, or expand programs that currently exist. Tribes may depend on the Federal government for enforcement of water quality violations. Nonetheless, the proposed rule would preserve Tribal authority to choose whether to regulate waters that are not covered under the Clean Water Act. Any decision by the Tribes to regulate waters beyond the jurisdiction of the Clean Water Act is not compelled by the statute, nor is it in any way precluded. While the agencies cannot predict precisely how individual Tribes may be affected by the proposed revised definition of "waters of the United States," several Tribes use Federal regulations and oversight to protect reservation waters.

2.2.1 Methodology

Information on Tribal programs for this assessment was drawn from multiple sources including Federal and Tribal sources. Information on the various Clean Water Act programmatic areas (sections 303, 311, 401, 402, and 404) was drawn from the Clean Water Act, applicable regulations, EPA staff, websites, and various publications.

The summary in this section was compiled from publicly available information sources and has not been independently verified by the Tribes or agencies. The summarized information does not change or substitute for any legal requirements. While the agencies have tried to ensure the accuracy of the

discussion in this document, the obligations of the regulated community are determined by the relevant statutes, regulations, or other legally binding requirements. The agencies are seeking input on the Tribal regulatory summary.

2.2.2 Waters of the Tribe or Reservation Waters

Under well-established principles of Federal Indian law, a Tribe retains attributes of sovereignty over both its lands and its members.[30] Further, Tribes retain the "inherent power necessary to Tribal self-government and Territorial management." Thus, Tribes may choose to establish or define "reservation waters" under Tribal law.

2.2.3 Federal Trust Responsibility and Tribal Treaty Rights

The relationship between the Federal government and federally recognized Tribal governments is a "government-to-government" relationship. Federal departments and agencies recognize the Federal government's trust responsibility, which derives from the historical relationship between the Federal government and Indian Tribes as expressed in certain treaties and Federal Indian law. The agencies are committed to maintaining their long-standing work with federally recognized Indian Tribes on a government-to-government basis. One of the key principles of the EPA Policy for the Administration of Environmental Programs on Indian Reservations (1984), which was reaffirmed by EPA Administrator Lee Zeldin on July 17, 2025 (U.S. EPA, 2025b), is that, "The Agency, in keeping with the Federal trust responsibility, will assure that Tribal concerns and interests are considered whenever its actions and/or decisions may affect reservation environments" (U.S. EPA, 1984).

During Tribal consultation and engagement, many Tribes provided feedback that a revised definition of "waters of the United States" could affect Tribal interests. Many Tribes expressed concern about off-reservation areas where some Tribes would be impacted by activities in upstream waterbodies and how the condition of waters in such areas affects natural resources that many Tribes depend upon for cultural lifeways and in which they have subsistence rights. The agencies recognize that treaty rights constitute Federal law, but treaty rights do not expand the scope of authority granted to the agencies by Congress. The agencies recognize their trust responsibilities and will continue to honor these responsibilities within the scope of their authority under the Clean Water Act.

2.2.4 Treatment in a Similar Manner as a State

Section 518(e) of the Clean Water Act authorizes the EPA to grant eligible Indian Tribes treatment in a similar manner as a State for a variety of purposes, including receiving certain categorical grants under several Clean Water Act funding authorities, and administering each of the principal Clean Water Act regulatory programs.[31] Clean Water Act section 518(e) is commonly known as the "treatment in a manner similar as a State" or TAS provision.

Clean Water Act section 518(e) establishes eligibility criteria for TAS, including requirements that an Indian Tribe have a governing body carrying out substantial governmental duties and powers, that the

[30] *See, e.g., California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207 (1987*); U.S. v. Mazurie*, 419 U.S. 544, 557 (1975).

[31] Section 518(e) specifically identifies these programs as those specified in sections 104, 106, 303, 305, 308, 309, 314, 319, 401, 402, 404, and 405 of the Clean Water Act.

functions to be exercised by the Tribe pertain to the management and protection of water resources within the borders of an Indian reservation, and that the Tribe can be reasonably expected to be capable of carrying out the functions to be exercised in a manner consistent with the terms and purposes of the Act and applicable regulations. Clean Water Act section 518(h) defines "Indian Tribe" to mean any Indian Tribe, band, group, or community recognized by the Secretary of the Interior and exercising governmental authority over a Federal Indian reservation. It also defines "Federal Indian reservation" to mean all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation. Because not all Tribes are federally recognized or have a Federal Indian reservation, not all Tribes are eligible to receive TAS to administer Clean Water Act programs. For example, most Tribes in Alaska do not have a reservation and are not eligible to obtain TAS.

The EPA has established application processes for six Clean Water Act regulatory programs: section 303(c) water quality standards, section 303(d) impaired water listing and Total Maximum Daily Load (TMDL) programs, section 401 water quality certification programs, section 402 NPDES permitting and other provisions, section 404 dredged or fill permitting, and section 405 sewage sludge management programs.[32] Tribes that have EPA-approved water quality standards are generally also approved to administer 401 certifications. To date, 85 Tribes have TAS approvals for the development of water quality standards, and 84 Tribes have approvals for water quality certification. No Tribes have TAS for Clean Water Act permitting programs (*e.g.,* section 402, section 404) or section 303(d) impaired water listing and TMDL programs. Of the Clean Water Act programs, the section 106 and section 319 grant programs have the most Tribes with TAS approvals, with 290 and 217 Tribes, respectively (U.S. EPA, 2025d). The proposed rule would not affect Tribes' eligibility for TAS under any of these programs as long as they meet the section 518(e) criteria.

2.2.5 Tribal Comments

Several Tribes provided pre-proposal recommendations to the agencies' public recommendations docket (Docket ID: EPA-HQ-OW-2025-0093) that opened March 21, 2025, and closed April 23, 2025. On March 21, 2025, the agencies signed a Tribal Consultation Notification letter inviting Tribal officials to participate in consultation and coordination events and provide comments to the agencies on the efforts to revise the definition of "waters of the United States." The consultation comment letters received from Tribes during the consultation process, summaries of each one-on-one consultation meetings, a summary of the agencies' April 2025 listening session with Tribal co-regulators, and the *Summary Report of Tribal Consultation and Engagement* prior to the proposed rule are available in the docket for the proposed rule (Docket ID: EPA-HQ-OW-2025-0322).

2.3 Incorporation of State & Tribal Regulations in Economic Analysis

At present, the agencies do not have the information available to assess the changes in forgone environmental benefits or compliance cost savings that individual States or Tribes would incur under the proposed rule. Although some States and Tribes already exceed the water resource or surface water discharge protections of the proposed rule, how States or Tribes would interpret and apply their own regulations is unknown. Consequently, the agencies do not have the information to assess what proportion

[32] The application processes for these six programs are specified in 40 CFR 131.8, 40 CFR 130.16, 40 CFR 131.4(c), 40 CFR 123.31-123.34, 40 CFR 233.60-233.62, and 40 CFR 233.60-233.62, respectively.

of forgone benefits and cost savings States and Tribes would receive. Notably, both the potential cost savings and forgone benefits are contingent on a number of factors, including decisions by States with respect to areas that would fall solely within State or Tribal and local jurisdiction.

States considered as having broader protections than the proposed rule, listed in Table 2-1, would generally still likely experience some forgone benefits and cost savings from the proposed rule. Conversely, States listed in Table 2-1 as not regulating waters more broadly are generally likely to have higher cost savings and forgone benefits from the proposed rule. Section 1.5 provides further nuance to these general statements. Table 2-1 reports the information described above for each State relative to the baseline, with 'Yes' indicating lower cost savings and forgone benefits likely associated with the given State and 'No' indicating higher cost savings and forgone benefits. As shown in the table, 24 States regulate surface waters or dredge and fill activities more broadly than the Clean Water Act requires. Twenty-seven States plus the District of Columbia do not regulate surface waters or dredge and fill activities more broadly than the Clean Water Act requires. While the agencies have tried to ensure the accuracy of the information in Table 2-1, the agencies are seeking corrections to the State-level regulatory protections compared to the proposed rule. The agencies also seek information related to State-level regulatory protections that are "no more stringent" than the Clean Water Act requires.

Table 2-1: States with Regulatory Protections Broader than the Proposed Rule

State	Surface Waters	Wetlands and Dredged and Fill Permitting
Alabama	No	No
Alaska	No	No
Arizona	No	No
Arkansas	Yes	No
California	Yes	Yes
Colorado	No	Yes
Connecticut	Yes	Yes
Delaware	No	No
District of Columbia	No	No
Florida	Yes	Yes
Georgia	No	No
Hawaii	No	No
Idaho	No	No
Illinois	Yes	Yes
Indiana	No	No
Iowa	No	No
Kansas	No	No
Kentucky	No	No
Louisiana	No	No
Maine	Yes	Yes
Maryland	Yes	Yes
Massachusetts	Yes	Yes
Michigan	Yes	Yes
Minnesota	Yes	Yes
Mississippi	No	No
Missouri	No	No
Montana	No	No
Nebraska	No	No

State	Surface Waters	Wetlands and Dredged and Fill Permitting
Nevada	No	No
New Hampshire	No	Yes
New Jersey	Yes	Yes
New Mexico	Yes	No
New York	Yes	Yes
North Carolina	Yes	No
North Dakota	No	No
Ohio	No	Yes
Oklahoma	No	No
Oregon	Yes	Yes
Pennsylvania	Yes	Yes
Rhode Island	Yes	Yes
South Carolina	No	No
South Dakota	No	No
Tennessee	Yes	No
Texas	No	No
Utah	No	No
Vermont	Yes	Yes
Virginia	Yes	Yes
Washington	Yes	Yes
West Virginia	Yes	Yes
Wisconsin	Yes	Yes
Wyoming	Yes	Yes

The States' Regulatory Protections Compared to the Proposed Rule summary table draws on information from multiple sources, as well as from previous analyses undertaken by independent associations and institutions. Definitions for State and Territorial waters, including wetlands, were drawn from online directories of State laws. Information on State and Territorial water laws and programs was found through State and Territorial agency websites, and information on the various Clean Water Act programmatic areas (sections 303, 311, 401, 402, and 404) was drawn from the Clean Water Act, applicable regulations, EPA staff and websites, various publications, and comments on previous proposed rules.

Wetland-specific data on State authorities were compiled using publications from the Association of State Wetland Managers and the Environmental Law Institute (ELI). These refer to State assessments of wetland programs. Information on State restrictions and legal constraints was drawn from an ELI report (ELI, 2013), as well as from States themselves. Summaries of state programs previously provided to the agencies by the Western States Water Council and from the Association of Clean Water Administrators provided additional information on State laws and authorities, water quality-related policies, and definitions. The agencies received comments on the accuracy of assumptions for given States and Tribes outlined in the 2021 Economic Analysis for the Proposed Rule. This input was integrated into the Economic Analysis for the 2023 Rule and the associated supplementary material.

To update the State-level summaries to account for activity in recent years, the agencies searched relevant case law and bills post-*Sackett* (i.e., 2023-2025) that would affect "waters of the State" and associated

State-level protections. This information was used to judge if a given State has more stringent legislation than required by the CWA post-*Sackett*.

3 Assessment of Changes in Jurisdictional Waters under the Proposed Rule Relative to Baseline

3.1 Interstate Waters

The proposed deletion of interstate waters from the definition of "waters of the United States" may result in waters that were determined jurisdictional *only* because they cross or serve as State boundaries (and not because of any other applicable criteria) no longer being jurisdictional under the proposed rule. The agencies anticipate that there will be a decrease in Federal jurisdiction relative to the baseline; however, the agencies are unable to quantify the magnitude of the change.

The agencies lack reliable data to quantify the number and distribution of waters determined to be jurisdictional as interstate waters in the baseline. In ORM2, these waters are generally captured under other categories in the Corps' AJDs, including categories for TNWs, tributaries, and impoundments of jurisdictional waters. "Interstate waters" are rarely identified in the ORM2 data; a total of 15 aquatic resources were found to be jurisdictional as interstate waters in the dataset.[33] The agencies are not aware of any database that identifies the jurisdictional status of interstate waters (including interstate ephemeral waters or any interstate waters that are not tributaries connected to traditional navigable water or the territorial seas) based solely on the fact that they cross or serve as State lines.

3.2 Relatively Permanent Waters

The proposed rule would define "relatively permanent" to mean "standing or continuously flowing bodies of surface water that are standing or continuously flowing year-round or at least during the wet season." The definition of "relatively permanent" would apply to both tributaries under paragraph (a)(3) and lakes and ponds under paragraph (a)(5) of the proposed rule. Relatively permanent waters as proposed would not include ephemeral streams and waters with flowing or standing water for only a short duration in direct response to precipitation. The phrase "at least during the wet season" is intended to include extended periods of predictable, continuous surface flow occurring in the same geographic feature year after year during the rainy or wet season.

Generally speaking, the pre-2015 practice and the Amended 2023 Rule are consistent in terms of how tributaries are assessed under the relatively permanent standard, with some small clarifications in the Amended 2023 Rule regarding implementation of the standard. Under implementation of the Amended 2023 Rule, relatively permanent means having flowing or standing water year-round or continuously during certain times of the year but more than for a short duration in direct response to precipitation. Under the pre-2015 regulatory regime, consistent with the *Rapanos* Guidance, relatively permanent means typically having flowing or standing water year-round or continuously at least seasonally (*e.g.,* typically three months). However, any difference is anticipated to be minor, and implementation of both regimes is referred to as "current practice." There may be some differences in implementation of the proposed rule from current practice, as relatively permanent flow would be bound by the wet season under the proposed rule but is not under current practice. The agencies do not anticipate changes in terms

[33] Based on an analysis of data associated with approved jurisdictional determinations finalized by the Corps between August 28, 2015 and September 18, 2025, a total of 15 aquatic resources were found to be jurisdictional as interstate waters during that time frame.

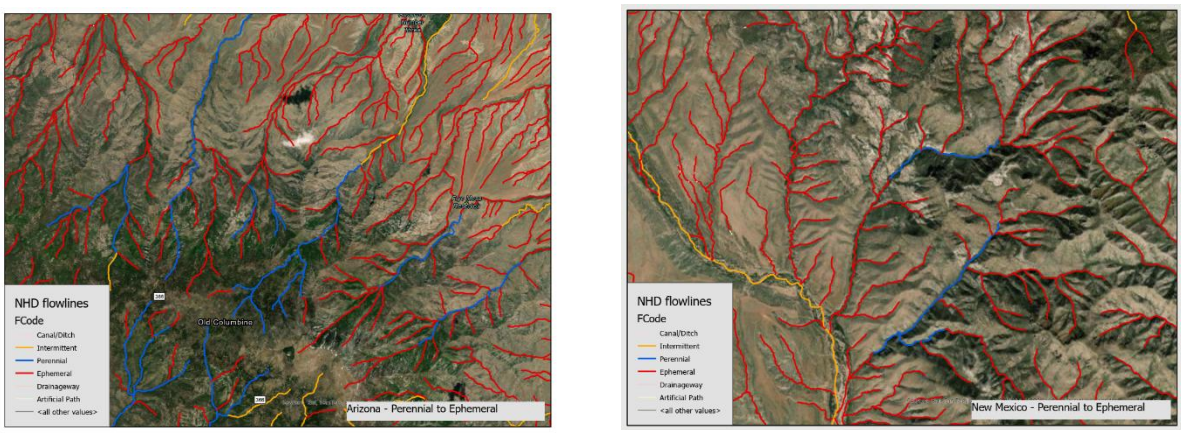
of the lakes and ponds category under the proposed rule from current practice as a result of the proposed rule's relatively permanent definition; however, certain intermittent streams that were considered relatively permanent under current practice may not meet the proposed rule's relatively permanent definition. In addition, certain monsoon-driven stream systems may also not meet the proposed rule's relatively permanent definition. As a result, the agencies anticipate that fewer waters would be relatively permanent under the proposed definition compared to current practice. However, the agencies are unable to quantify any associated change in scope of jurisdiction as a result of the proposed rule's definition of "relatively permanent" at this time, especially given the limitations of the ORM2 database and current practice for discussion of relatively permanent in AJDs. The agencies solicit comment on whether there may be approaches to quantify any potential change for the final rule.

3.2.1 Proposed Analysis of Non-relatively Permanent Flow Features Serving as Breaks of Upstream Jurisdiction

The agencies propose to define "tributary" to mean "a body of water with relatively permanent flow, and a bed and banks, that connects to a downstream traditional navigable water or the territorial seas, either directly or through one or more waters or features that convey relatively permanent flow." This is intended to provide additional clarity as to what features are within the scope of tributaries under the Clean Water Act. Further, the agencies' proposed definition of "tributary" clarifies that a "a tributary does not include a body of water that contributes surface water flow to a downstream jurisdictional water through a feature such as a channelized non-jurisdictional surface water feature, subterranean river, culvert, dam, tunnel, or similar artificial feature, or through a debris pile, boulder field, wetland, or similar natural feature, if such feature does not convey relatively permanent flow. When the tributary is part of a water transfer (as that term is applied under 40 CFR 122.3) currently in operation, the tributary would retain jurisdictional status."

The agencies expect the approach whereby non-relatively permanent flow in a channel would break jurisdiction of upstream relatively permanent flow to reduce the scope of jurisdictional waters relative to the baseline, with relatively greater reductions in Federal jurisdiction in areas where a greater proportion of waters have less than year-round flow, like the arid West. Figure 3-1 below display examples of non-relatively permanent flowlines (as seen in red, labeled as "ephemeral") from NHD in Arizona and New Mexico, respectively, that would serve to break upstream Federal jurisdiction of relatively permanent waters (as seen in blue, labeled perennial) in both.

Figure 3-1: Examples of Non-relatively Permanent Flowlines from NHD in Arizona (Left) and New Mexico (Right)



The agencies intend to work to quantify the regulatory impacts to waters related to the proposed tributary interpretation of non-relatively permanent flow features serving to sever upstream Federal jurisdiction in any final rule analysis, to the extent practicable. A proposed methodology for calculating those impacts is described below. The agencies are seeking comment on the data sources and methodologies proposed to analyze the impacts. The agencies also note that any proposed methodologies are subject to change as unforeseen complications arise.

The National Hydrography Dataset Plus High Resolution (NHDPlus HR) includes more than 24 million stream segments (10.7 million km of streams; Fesenmyer et al., 2021), and identifies both a streamflow duration classification (perennial, intermittent, and ephemeral) and the network typology for how stream segments flow from one segment to the next. To estimate the total stream length of relatively permanent waters upstream from ephemeral breaks, the agencies propose to 1) use the NHD streamflow duration class to identify ephemeral segments (fcode 46007) and then, 2) use the network typology (the tonode and fromnode attributes within NHDPlus HR) to systematically identify any intermittent (as a loose proxy for streams that flow at least during the wet season) (fcode 46003) or perennial (fcode 46006) stream segments that are upstream from each ephemeral segment. The stream length (km) of upstream perennial or intermittent segments would be summed by watershed and by State. This analysis would be limited to those Western U.S. States where ephemeral reaches were included in the streamflow duration classification of watersheds. The NHD streamflow classifications were derived from orthophotos, field visits, and interviews during the creation of the USGS topographic quadrangle maps (Hafen et al., 2020). For the Eastern US, due to the resolution of mapping and the initial focus of the USGS on perennial and intermittent streams, ephemeral classifications are largely missing from Eastern States despite the potential presence of ephemeral streams (*e.g.,* Fritz et al., 2013; James et al., 2023). NHD streamflow classifications in the Western US, where climate and geology result in a greater predominance of ephemeral networks, includes 12 States where ephemeral classifications are used. Therefore, estimates would not be available outside the Western United States (Christensen et al., 2022). While there are known limitations of the NHDPlus HR streamflow duration classes and network typology, it is the most complete dataset with which to assess the potential impact of severing jurisdiction at ephemeral breaks. The agencies seek input on whether there are other data or methodologies to assess the impacts of the

non-relatively permanent breaks, in particular ones that may better account for impacts in the Eastern United States.

3.3 Continuous Surface Connection

On May 25, 2023, the Supreme Court of the United States decided *Sackett v. EPA*. In a unanimous decision, the Court held that the Clean Water Act "extends to only those 'wetlands with a continuous surface connection to bodies that are "waters of the United States" in their own right,' so that they are 'indistinguishable' from those waters." 598 U.S. 651, 684 (quoting *Rapanos*, 547 U.S. at 742, 755 (plurality opinion)). The Court also "agree[d] with [the plurality's] formulation of when wetlands are part of 'the waters of the United States,'" *id.* at 678, explaining: In *Rapanos*, the plurality spelled out clearly when adjacent wetlands are part of covered waters. It explained that "waters" may fairly be read to include only those wetlands that are "as a practical matter indistinguishable from waters of the United States," such that it is "difficult to determine where the 'water' ends and the 'wetland' begins." That occurs when wetlands have "a continuous surface connection to bodies that are 'waters of the United States' in their own right, so that there is no clear demarcation between 'waters' and wetlands." *Id*. at 678 (citing *Rapanos*, 547 U.S. at 742, 755).

The Court also found in *Sackett* that "[w]etlands that are separate from traditional navigable waters cannot be considered part of those waters, even if they are located nearby," *id*. at 678, and that "'adjacent' cannot include wetlands that are not part of covered 'waters,'" *id*. at 682. The Court recognized that in determining the jurisdictional status of wetlands, the *Riverside Bayview* Court "need[ed] to focus so extensively on the adjacency of wetlands to covered waters" to adhere to the proper interpretation of the Clean Water Act. *Id*. at 674. Additionally, the Court found it "instructive" that section 101(b) of the Act expressly "protect[s] the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution" and "to plan the development and use . . . of land and water resources," observing that "[i]t is hard to see how the States' role in regulating water resources would remain 'primary' if the [agencies] had jurisdiction over anything defined by the presence of water." *Id.* at 674.

In the proposed rule, the agencies would define "continuous surface connection" for the first time to mean "having surface water at least during the wet season and abutting (*i.e.,* touching) a jurisdictional water." The proposal would require paragraph (a)(4) adjacent wetlands to have a continuous surface connection to a traditional navigable water, the territorial seas, or a relatively permanent impoundment or tributary to be jurisdictional. In addition, under the proposed rule, paragraph (a)(5) relatively permanent lakes and ponds must have a continuous surface connection to a traditional navigable water, the territorial seas, or a relatively permanent tributary to be jurisdictional. The phrase "abutting" would be implemented consistent with the March 2025 Continuous Surface Connection Guidance (U.S. Department of the Army, 2025) to mean "touching." The phrase "having surface water at least during the wet season" is intended to include wetlands that have at least semipermanent surface hydrology that is persistent surface water hydrology throughout the wet season in most years (except, for example, in times of drought), and would not include wetlands characterized by having surface water for a duration less than the wet season, including wetlands with only saturated soil conditions supported by groundwater.

The agencies intend to estimate the change in CWA jurisdiction of wetlands due to the proposed definition of "continuous surface connection" for the final rule, to the extent practicable. The agencies note that recent publications have explored wetland connectivity in response to *Sackett*, and those documents can

be found in Docket ID EPA-HQ-OW-2025-0322. In the absence of a quantitative analysis for the proposed rule, these publications provide a range of rough estimates of wetland impacts that differ due to the methodology employed in each analysis and are likely still deficient in their capture of wetlands subject to Federal jurisdiction under the proposed definition of "continuous surface connection." Specifically, Gold (2024) estimates the potential impact of interpretations of the ruling on Federal wetlands protections, using a qualitative measure of wetland "wetness" as a proxy for the interpretations of the *Sackett* ruling. The "wetness" indicator used in the publication mirrors the below methods which proposes using the NWI water regime modifier of semi-permanently flooded.[34]

Data limitations and other factors make it challenging to estimate the change in the "waters of the United States" due to the proposed definition. Given the variety of ways continuous surface connection impacts could be calculated, the agencies are seeking comment on an approach to estimate impacts utilizing existing data to inform analysis of the final rule. Provided below is a proposed methodology for estimating the impacts from the definition of "continuous surface connection" for the final rule using available data. The agencies are seeking comment on the data sources and methodologies proposed to analyze impacts.

3.3.1 Proposed Analysis of Continuous Surface Connection

In implementing the unanimous *Sackett* decision, and in accordance with the policy of CWA section 101(b) that the States retain the primary role in preventing, reducing, and eliminating pollution and planning the development and use of their land and water resources, the agencies expect the impact of the new proposed continuous surface connection definition to substantially reduce the scope of Federal jurisdictional oversight of wetlands relative to the baseline in both the continental United States and Alaska. The agencies are seeking feedback on the assessment of the impacts to wetlands based on the proposed definition of "continuous surface connection" to inform any final rule analysis.

The continuous surface connection definition in this proposed rule would include a two-part test: (1) having surface water at least during the wet season, and (2) abutting (*i.e.*, touching) a jurisdictional water. The following Cowardin water regime modifiers are most likely to correspond with wetlands that satisfy the wet season surface water test: permanently flooded, intermittently exposed, and semipermanently flooded. Wetlands are mapped in the NWI with applicable Cowardin water regime modifiers, making acreage and geographic distribution data readily-accessible in many parts of the country, though such data are subject to all of the previously described limitations. Unfortunately, the necessary data (when available) to understand which wetlands may satisfy the abutting (*i.e.*, touching) a jurisdictional water test are significantly less robust. Furthermore, only the portion of an abutting wetland which has surface water at least during the wet season would be jurisdictional. Therefore, both the NHD's and the NWI's data and mapping limitations come into play simultaneously in trying to identify those sufficiently inundated wetlands that abut jurisdictional waters. Despite the data limitations, however, the agencies acknowledge that several spatial connectivity efforts have been conducted recently in an effort to support the assessment of policy options related to the degree of connection between wetlands and relatively permanent waters for CONUS in response to *Sackett* (Lane et al., 2025; Simmons et al., 2024; Gold, 2024).

[34] The data from Gold (2024) are available from https://www.science.org/doi/10.1126/science.adp3222.

As stated above, the agencies expect that wetlands with the NWI water regime modifiers of permanently flooded, intermittently exposed, and semipermanently flooded would have surface water at least during the wet season. Table 3-1 below provides an estimate, by State (except for AK and HI), of the acres of wetlands that have these three NWI water regime modifiers alongside the total acreage of wetlands identified by NWI, derived by the agencies from the raw Gold (2024) data.[35] The table below represents the universe of wetlands mapped in NWI, regardless of their connection to a jurisdictional water, and the subset of those wetlands that have the water regime modifiers of permanently flooded, intermittently exposed, and semipermanently flooded. It is important to note that because of the aforementioned data limitations and because it is not known whether these wetland acreages would have been jurisdictional under the baseline of this Regulatory Impact Analysis, this table does not accurately reflect any change in jurisdiction under the proposed rule. However, this information does suggest that the majority of wetland acreage in most States is likely not at least semipermanently flooded and therefore would less likely not meet the requirement under the proposed rule to have surface water at least during the wet season. In those circumstances, the wetland acreage would no longer fall under Federal jurisdiction under the proposed rule. States would then have the authority to determine whether to regulate those wetlands. However, as stated above, it is not known how many of these wetlands acreage estimates already fall under State jurisdiction under the baseline. The agencies may conduct additional analysis using the national NWI dataset in a similar fashion as Gold (2024) to better understand the extent of wetland acreage that may meet the continuous surface connection requirement and to better inform potential changes in jurisdiction under any final rule.

Table 3-1: State-level NWI Estimates for Total Wetland Acres and Acreage of Wetlands that May Have Surface Water at Least During the Wet Season

State	Acreage of wetlands which may have surface water at least during the wet season[1]	Total NWI wetland acres
AL	342,098	3,244,171
AR	535,814	2,209,459
AZ	6,859	281,852
CA	463,464	1,672,770
CO	27,070	906,581
CT	19,968	182,609
DC	85	222
DE	86,196	157,759
FL	4,444,186	9,587,083
GA	1,110,023	4,716,105
IA	30,405	611,605
ID	64,424	767,909
IL	53,676	988,823
IN	26,257	729,845

[35] The NWI contains water regime modifier codes of permanently flooded, intermittently exposed, and semipermanently flooded, but national layers derived from the NWI do not contain the water regime modifier attributes. The data from Gold (2024) contains a national layer that has all relevant NWI data along with the water regime modifier codes. The agencies were able to efficiently compile the summary data in Table 3-1 using the Gold (2024) dataset. The agencies believe the Gold (2024) dataset to be consistent with NWI.

State	Acreage of wetlands which may have surface water at least during the wet season[1]	Total NWI wetland acres
KS	15,043	427,090
KY	44,285	324,233
LA	3,739,086	5,876,355
MA	77,421	439,619
MD	269,892	451,462
ME	88,711	1,929,911
MI	204,504	6,382,337
MN	209,210	10,736,831
MO	40,733	984,369
MS	440,561	3,750,918
MT	55,095	1,370,120
NC	765,966	3,694,857
ND	269,814	1,954,966
NE	122,793	1,115,765
NH	15,781	271,041
NJ	235,865	671,771
NM	60,648	293,646
NV	14,649	929,362
NY	143,658	1,950,676
OH	31,979	496,907
OK	46,525	845,686
OR	125,928	1,317,491
PA	8,741	383,213
RI	4,698	56,680
SC	823,129	3,144,880
SD	100,594	1,708,524
TN	105,828	828,423
TX	834,443	3,103,906
UT	38,330	432,574
VA	314,934	1,023,478
VT	14,425	230,115
WA	72,891	683,950
WI	791,933	6,037,666
WV	2,545	65,416
WY	19,804	939,538
Total	**17,360,970**	**90,910,571**

Source: Gold (2024)

1. Based on the NWI water regime modifier classifications of permanently flooded, intermittently exposed, and semipermanently flooded as proxies for wetlands having surface water at least during the wet season.

Despite significant data challenges and uncertainties, the agencies propose using several datasets to attempt to approximate an estimated range of impacts from baseline implementation (U.S. EPA and Army,

2024) to any final rule definition of "continuous surface connection." Specifically, the agencies are exploring utilizing published data, rather than the publication conclusions, from three recent studies that estimate changes in CWA-covered waters by analyzing the NHD and the NWI, Lane et al. (2025), Simmons et al. (2024), and Gold (2024).

Lane et al. (2025) combined neighboring NWI wetland polygons into merged wetland units and identified which of those merged wetland unit boundaries came within 150m of a NHD perennial or intermittent stream. Simmons et al. (2024) provides a dataset measuring the distance between the centroid of each of their merged wetlands and the nearest NHD river or stream (and include perennial, intermittent, and ephemeral streams). These underlying datasets provide a range of estimates of wetlands impacted from approximate current implementation (150m centroid) to touching a relatively permanent water. The agencies propose utilizing both datasets to compare methods for measuring baseline and provide more certainty to estimates. Gold (2024) identified and merged wetland polygons according to various water regime thresholds and considered distances to perennial and intermittent streams. The areas of touching wetlands in the study were characterized by water regime modifiers, which includes several categories of "wetness." This dataset allows the agencies to estimate the impacts from baseline to semipermanently flooded, intermittently exposed, and permanently flooded wetlands, which the agencies expect would meet the requirement of having surface water at least during the wet season.

The agencies propose to leverage Simmons et al. (2024), Gold (2024), and the Lane et al. (2025) published data sets, rather than the publication conclusions, to derive an estimate of the change from the baseline to the new continuous surface connection definition for any final rule analysis, which would help bound some of the underlying uncertainty in the analysis. The agencies anticipate comparing the Simmons et al. (2024) and Lane et al. (2025) datasets to the Gold (2024) dataset to derive a range of impacts. It is important to note that these comparisons will not capture other potential changes to jurisdictional waters from other parts of this proposed rule, such as changes to ditches or relatively permanent waters. In addition to other uncertainties about the data, any estimated impacts may therefore represent conservative estimates. The proposed comparisons are not intended to be exhaustive and are just a few examples of comparisons that could be performed using the datasets to estimate impacts.[36] The agencies solicit comment on how these data sets could be utilized and compared to best inform impacts for the final rule.

While both the NWI and NHD are incomplete in Alaska, an analysis similar to Lane et al. (2025) and Gold (2024) could be conducted in Alaska where NWI exists and the varying resolution of the NWI and NHD is acknowledged. As the Alaska NHD does not contain streamflow permanence class, the agencies would have to assume that all NHD streams mapped at the 1:63,000 scale would be flowing year-round or streams flowing at least during the wet season under the proposed rule. A potential approach would

[36] Greenhill et al. (2024) is a different type of approach to predicting jurisdictional waters. Greenhill et al. (2024) developed a machine learning approach using AJDs, aerial imagery, and other geophysical data to predict jurisdiction for water resources under different jurisdictional regimes. A similar machine learning model could be retrained to include recent AJD data to predict jurisdiction for water resources under the baseline. Recent research has begun to explore relabeling machine learning training data in order to train the models for situations ex ante (like a proposed regulation), however, the ORM2 data likely has limited data that could be used to predict jurisdiction for the proposed or final rule. While additional data sources might improve prediction under this approach, the agencies are unaware of suitable data.

analyze wetland boundaries within 150m and 20m of the NHD river network and could also include NWI water regime modifier analysis to assist in identifying those wetlands that also have surface water at least during the wet season.

Extending a continuous surface connection analysis beyond the existing NWI extent would depend on finding strong associations between NWI and the coarser satellite-based imagery. If the satellite-based information can provide reasonable estimations of wetland extent, then satellite-based estimates could be spatially connected to NHD stream lines. The inclusion of NWI water regime modifiers would also depend on the strength of the association between NWI and the satellite imagery.

The agencies are also evaluating the potential utility of the USGS Dynamic Surface Water Extent (DSWE) dataset, which provides information on changes in surface water location over time. DSWE is a LANDSAT-derived data product that provides a raster timeseries of surface water presence/absence data going back to 1982. This timeseries provides information on water inundation frequency for a given location, a water permanence metric that could be used to establish relatively permanent surface water connections. LANDSAT satellite images have a spatial resolution of 30 m; however, multiple images of the same region from different flight tracks allow USGS to quantify 'partial surface water' presence within a given pixel.[37] Other countries already use similar LANDSAT-derived surface water data for management purposes.[38] The DWSE product shows high confidence in areas with open water and could add value to a national impacts assessment of the proposed rule in open water areas. DSWE provides hundreds of thousands of images of the nation's waters over decades and could provide ground truth, wet season context, and/or affirmation of other tool outputs of anticipated impacts. Comparatively, the NHD provides linear features at a 1-3m resolution (1:24,000 scale) and the NWI provides polygon features at a 3m resolution in the continental United States. In Alaska, both NHD and NWI have linear, and polygon features represented at least at the 10m resolution (1:63,360 scale) and at least at the 12m resolution (1:80,000+ to 1:12,000 scales) respectively where they are mapped in the state. The agencies solicit comments on how the Dynamic Surface Water Extent (DSWE) USGS dataset, or other datasets, can be used as a substitute or in combination with the NHD and the NWI, to quantify changes in covered waters in the final rule.[39]

3.3.2 Proposed Analysis of Impacts to Mosaic and Permafrost Wetlands

The agencies also propose to modify their approach to mosaic wetlands in this proposed rule, where mosaic wetlands would not be considered "one wetland," but rather only the delineated portions of a wetland mosaic that meet the proposed definition of "continuous surface connection" would be adjacent, pursuant to *Sackett*. This approach would also influence how the agencies identify jurisdictional permafrost wetlands under the proposed rule, as many permafrost wetlands are mosaic wetlands. *See*, *e.g.,*

[37] See Jones, 2019. Improved Automated Detection of Subpixel-Scale Inundation—Revised Dynamic Surface Water Extent (DSWE) Partial Surface Water Tests. *Remote Sensing* 11, 374.

[38] See, for example, Australia's Digital Earth Australia Water Observations program (https://www.ga.gov.au/scientific-topics/dea/dea-data-and-products/dea-water-observations), which utilizes LANDSAT data (https://data.gov.au/data/dataset/719a5433-2af0-4601-8036-a03f77199442).

[39] The Dynamic Surface Water Extent data are described here: https://www.usgs.gov/landsat-missions/landsat-collection-2-level-3-dynamic-surface-water-extent-science-product.

Alaska Regional Supplement at 97 (U.S. Army Corps of Engineers, 2007).[40] In addition, the definition in the proposed rule for continuous surface connection would further limit the coverage of CWA jurisdiction over permafrost wetlands.

The agencies solicit comment in the proposed rule on whether the agencies should add a regulatory provision that would mirror a provision in the Food Security Act definition of "wetland." The Food Security Act provision excludes from the definition of "wetland" certain permafrost wetlands in lands with agricultural potential in Alaska. 16 U.S.C. 3801(a)(27)) ("except that this term does not include lands in Alaska identified as having a high potential for agricultural development and predominance of permafrost soils"). The USDA NRCS has created an Alaska Exempt Wetland Potential data layer that was designed to identify soils with high agricultural potential that are saturated due to permafrost and would potentially thaw and be drained if the natural vegetation was removed. If the final rule adopts such an approach to permafrost wetlands, the agencies may use the NRCS Alaska Exempt Wetland Potential data layer and overlay mapped NWI wetland areas or remotely sensed wetlands in Alaska to estimate those wetlands which would fall under the final rule language. Another available dataset is the "Probabilistic Estimates of the Distribution of Near-surface (within 1m) Permafrost in Alaska" data layer in EnviroAtlas[41] and in the USGS ScienceBase,[42] which also could potentially be used to identify permafrost areas and overlain with the NWI data. Similarly, the Alaska Permafrost Zones layer could be used for permafrost areas and overlain with the NWI data.[43] Additional analysis would need to occur to attempt to estimate any change in jurisdictional status of these wetlands from baseline.

The agencies specifically seek input from the State of Alaska, and other interested parties and regulatory bodies, on relevant datasets and information to develop more refined impact analyses related to the proposed continuous surface connection definition and the impacts to permafrost wetlands. Discussion below highlights some of these methodologies.

3.4 Lakes and Ponds Assessed Under Paragraph (a)(5)

The agencies are proposing to delete "intrastate" from the regulatory text in light of the proposed removal of the "interstate waters" category. Thus, this category would include any relatively permanent lakes and ponds that are not tributaries and that have a continuous surface connection to a TNW, the territorial seas, or a relatively permanent tributary. The agencies do not believe that the proposed rule represents a significant change in jurisdiction compared to the baseline but are unable to quantify any potential reduction.

[40] U.S. Army Corps of Engineers (2007) notes that wetland mosaics occur in areas of discontinuous permafrost (*e.g.*, north-facing slopes, and burned areas in permafrost-affected regions) and on discharge slopes in Southcentral Alaska.

[41] This data layer, available at https://enviroatlas.epa.gov/enviroatlas/interactivemap/?eaLayer=eaLyrNum_461&extent=-20057825.22718743,6357151.088297372,-9970583.47845197,12110107.585151349,102100, was created by the USGS to provide an estimate of the occurrence of near-surface (within one meter of the ground surface) permafrost in Alaska. *See also* https://catalog.data.gov/dataset/enviroatlas-probabilistic-estimates-of-the-distribution-of-near-surface-within-1m-permafrost-in and Pastick *et al*. (2015).

[42] *See* https://www.sciencebase.gov/catalog/item/5602ab5ae4b03bc34f5448b4.

[43] *See* https://services.arcgis.com/8df8p0NlLFEShl0r/arcgis/rest/services/Alaska_Permafrost_Zones/FeatureServer. This dataset was developed in 2008 using a terrain-unit approach for mapping permafrost distribution and based on climate and surficial geology.

Under the proposed rule, this category would include as "waters of the United States" all relatively permanent (as that term is proposed to be defined) lakes and ponds that do not meet one of the other paragraph (a) categories and that have a continuous surface connection (as that term is proposed to be defined) to a TNW, the territorial seas, or a relatively permanent tributary. This category would not include relatively permanent lakes and ponds that are themselves TNWs, jurisdictional impoundments, or jurisdictional tributaries under the proposed rule. The agencies anticipate that the proposed changes to implementation of "continuous surface connection" as compared to the baseline will result a reduction in jurisdiction for this category of waters under the proposed rule. This would be due to the requirement under the proposed rule that the lake or pond "abut" a TNW, the territorial seas, or a paragraph (a)(3) tributary. Under the baseline, lakes and ponds could have a continuous surface connection via certain discrete features or where they were separated by the jurisdictional water by a natural landform that provided evidence of a continuous surface connection. In addition, the proposed elimination of the interstate waters category and the proposed changes to the implementation of relatively permanent tributaries under the proposed rule would limit those waters that lakes and ponds can have a continuous surface connection to. Thus, the agencies anticipate that some lakes and ponds may be jurisdictional under the baseline that would be non-jurisdictional under the proposed rule.

The agencies are not able to parse out from the available AJD data under the baseline practice if a lake or pond that was found jurisdictional under the baseline would be jurisdictional under the proposed rule, as the ORM2 data do not capture how the continuous surface connection was met under the baseline – if it was through abutment, a discrete feature, or a natural landform that provided evidence of a continuous surface connection. Thus, the agencies are not able to estimate the percentage of lakes and ponds associated with AJDs that would lose their jurisdictional status under the proposed rule. The agencies are also unable to estimate the percentage of lakes and ponds that have a continuous surface connection to waters that are jurisdictional under the baseline but not under the proposed rule to further quantify impacts of the prosed rule to the paragraph (a)(5) category.

The differences explained above under the proposed rule would likely lead to fewer lakes and ponds meeting the criteria to be considered a paragraph (a)(5) water. Compared to the baseline, the agencies are uncertain that there would be a need for this category under the proposed rule, as the proposed definition of "continuous surface connection" would mean that lakes and ponds that meet paragraph (a)(5) under the proposed rule would also likely meet the paragraph (a)(3) tributary category. The agencies anticipate the challenges identified above to remain for any analysis for the final rule. However, the agencies solicit comment on whether there are alternative approaches that could capture the anticipated changes described above for the final rule.

3.5 Waters Excluded from the Definition of "Waters of the United States"

3.5.1 Waste Treatment System Exclusions

The agencies propose to continue the exclusion for waste treatment systems under paragraph (b)(1), which has existed in the EPA's regulations since 1979 (44 FR 32854; June 7, 1979). The agencies, however, are modifying the exclusion, by adding a definition of "waste treatment system" under paragraph (c)(11), to clarify which waters and features are considered part of a waste treatment system and therefore excluded. Under the proposed rule, a waste treatment system "includes all components… including lagoons and treatment ponds (such as settling or cooling ponds), designed to either convey or

retain, concentrate, settle, reduce, or remove pollutants, either actively or passively, from wastewater prior to discharge (or eliminating any such discharge)." Consistent with the agencies' current general practice implementing the exclusion, under this proposed rule, a waste treatment system that is abandoned and otherwise ceases to serve the treatment function for which it was designed would not continue to qualify for the exclusion and could be deemed jurisdictional if it otherwise meets this proposed rule's definition of "waters of the United States."

The agencies do not intend for the proposed rule to change the application under the current regulatory regimes regarding implementation of the waste treatment systems exclusion. Thus, the agencies do not anticipate a significant change from the baseline for the exclusion for waste treatment systems but note that if a system is located on a water whose jurisdictional status changes under the final rule, the application of the exclusion would likewise change.

3.5.2 Prior Converted Cropland

The proposed rule defines prior converted cropland to mean:

> any area that, prior to December 23, 1985, was drained or otherwise manipulated for the purpose, or having the effect, of making production of an agricultural product possible. EPA and the Corps will recognize designations of prior converted cropland made by the Secretary of Agriculture. An area is no longer considered prior converted cropland for purposes of the Clean Water Act when the area is abandoned and has reverted to wetlands, as defined in paragraph (c)(1) of this section. Abandonment occurs when prior converted cropland is not used for, or in support of, agricultural purposes at least once in the immediately preceding five years. For the purposes of the Clean Water Act, the EPA Administrator shall have the final authority to determine whether prior converted cropland has been abandoned.

Under the baseline of the Amended 2023 Rule, prior converted cropland loses its status as an excluded water if it is subject to a change in use and reverts to a wetland. Under the pre-2015 regulatory regime, prior converted cropland loses its status as an excluded water under the Clean Water Act if it is abandoned and reverts to a wetland. The proposed rule would clarify that the only way for prior converted cropland to lose its status as an excluded water under the Clean Water Act is when the area is abandoned and has reverted to a wetland meeting the regulatory definition of "wetlands." The proposal further clarifies that prior converted cropland is abandoned if it is not used for, or in support of, agricultural purposes at least once in the immediately preceding five years. Under the baseline of the Amended 2023 Rule, "change in use" does not require that the area not be used for agricultural purposes at least once in the immediately preceding five years (this time requirement was only in place for the abandonment provision); change from an agricultural to a non-agricultural use could occur immediately. As is the baseline practice, where wetland conditions do not return, the area would not be subject to the Clean Water Act. However, where wetland conditions do return, a new jurisdictional determination would be required to determine if the wetlands would be an adjacent wetland under the proposed rule. Since the agencies would no longer apply the change in use provision, fewer wetlands may be identified as jurisdictional under the proposed rule compared to the baseline of the Amended 2023 Rule. In addition, the proposed rule's definition of "continuous surface connection" would limit the areas that have reverted to wetlands found to be jurisdictional as adjacent wetlands as compared to the baseline. Another difference between the proposed rule and the baseline is that the agencies under the proposed rule can

designate areas as prior converted cropland, whereas under the baseline, they only use USDA's determinations. This proposed change may also increase those areas that meet the exclusion.

Compared to the baseline, there may be an increase in the number of areas that are found to be prior converted cropland as there may be some areas that the agencies would designate as prior converted cropland under the proposed rule that do not currently have a USDA designation. The agencies are not able to quantify this difference. In terms of areas that lose their prior converted cropland status, the agencies expect any change arising from the proposed rule's use of abandonment to be small, relative to the baseline's implementation of change in use. Under the pre-2015 regulatory regime, the agencies also use abandonment, and the agencies anticipate that any decrease in Federal jurisdiction arising from the proposed rule's clarifications of the "abandonment" principle would be small, relative to the pre-2015 regulatory regime; however, the agencies are unable to quantify the magnitude of that change. In general, the proposed rule criterion is consistent with historical practice based on the preamble to the EPA and the Corps' 1993 regulations, which provides that land would lose its prior converted status if it is abandoned and it exhibits wetland characteristics (abandonment). The agencies also lack sufficient data to quantify the magnitude of the change in jurisdiction relative to the pre-2015 regulatory regime.

An analysis of the proposed rule's change to the implementation of the prior converted cropland exclusion is not possible given the available data. Not all prior converted cropland that has been officially designated by the USDA's NRCS has been mapped throughout the country. In addition, all land that qualifies under the Food Security Act of 1985 as prior converted cropland may not yet have been formally designated as such. Further, the agencies note that NRCS is statutorily prohibited from sharing data and information on program participants and their land, even with other Federal agencies. Therefore, the agencies cannot obtain certain information from NRCS which may help in identifying potential effects or changes in jurisdiction. Estimates of the acreage of prior converted croplands have been made in the past (*e.g.,* 53 million acres; White House Office on Environmental Policy, 1993), but the agencies cannot verify the accuracy of these estimates. In addition, the agencies have only more recently documented in ORM2 when waters meet the prior converted cropland exclusion, so insufficient agency data exist to provide estimates on the current extent of prior converted cropland.

Finally, in order to establish a baseline and estimate the potential effect of the proposed rule language, the agencies would need to have estimates of the acreage of prior converted cropland that could lose the prior converted designation under the "abandonment" principle because they were not used for production of an agricultural product at least once in the last five years. To establish a baseline, the agencies would need data on how the agencies apply the "change in use" principle in the field and how the determination would differ when considering "abandonment." In addition to being "abandoned," such areas would also need to meet the agencies' regulatory definition of "wetlands," as well as the definition of "waters of the United States." No sources of data exist to perform these comparisons.

3.5.3 Ditches

The agencies propose to revise the existing exclusion in the Amended 2023 Rule, which excludes ditches (including roadside ditches) excavated wholly in and draining only dry land and that do not carry a relatively permanent flow of water, as long as they would not otherwise be jurisdictional as traditional navigable waters, part of the territorial seas, or interstate waters. Under the proposed rule, ditches would be defined as "constructed or excavated channels used to convey water" and ditches (including roadside

ditches) would be excluded from the definition of "waters of the United States" if they are constructed or excavated entirely in dry land and would not otherwise be jurisdictional as traditional navigable waters or part of the territorial seas. Unlike the Amended 2023 Rule, the proposed rule's definition of "relatively permanent" does not directly affect which ditches are excluded. Thus, non-navigable[44] ditches (including roadside ditches) with relatively permanent flow constructed or excavated entirely in dry land are excluded, even if they connect to the tributary network of a traditional navigable water, whereas such ditches would not be excluded under current implementation due to their relatively permanent flow. In addition, there may be some interstate ditches that would be jurisdictional under the baseline that would be excluded under the proposed rule due to the proposed elimination of the interstate waters category. The agencies anticipate that there would be a decrease in Federal jurisdiction under the proposed rule relative to the baseline; however, the agencies are unable to quantify the magnitude of that change.

The agencies lack reliable and representative data to estimate the number and distribution of ditches that would remain jurisdictional given the existing ditch exclusion. As discussed in more detail below, approximately 2,400 permits contain descriptions citing the aquatic resource being evaluated as a ditch. Of those, some would likely no longer be jurisdictional under the proposed rule

There is no national dataset of ditches as a distinct water feature. In ORM2, ditches are not specifically identified as a distinct category in the permitted impacts data and are not consistently described in the approved jurisdictional determination. A total of 1,913 approved jurisdictional determinations completed in 2023-2024 under the Amended 2023 Rule were for waters categorized in ORM2 as potentially excluded ditches.[45] The agencies presume at least some jurisdictional ditches were identified throughout this timeframe, but it is difficult to quantify given the limitations of ORM2 identification of ditches described above. Permit data may also not be useful for jurisdictional change analysis since not all permit actions have an associated approved jurisdictional determination. The agencies solicit comment on whether there are methods to best use the ORM2 data or other datasets to best capture changes to ditches as a result of any final rule.

[44] Non-navigable in this context refers to ditches that are not traditional navigable waters, such as non-tidal ditches.

[45] Based on ORM2 data for WATERS_TYPE equal to B3-EXCL_DITCH.

4 Analysis of the Impacts of Clean Water Act Jurisdictional Changes Across Programs

The Clean Water Act prohibits the discharge of pollutants to "navigable waters," defined as "waters of the United States," except in compliance with specific sections of the Act. Thus, many Clean Water Act programs—including water quality standards, State and Tribal 401 certification programs, discharge permits, and oil spill prevention and planning programs—apply only to waters subject to Clean Water Act jurisdiction. This section focuses on the potential effects associated with the change from the baseline to the proposed rule on major programs of the Clean Water Act. Below, the agencies indicate where revisions to the definition of "waters of the United States" might affect Clean Water Act programs and programs authorized under other statutes. Given data limitations that prevent quantification of the changes in jurisdictional scope under the proposed rule at this time, those effects are discussed qualitatively.

As a result of the *Sackett* decision, the agencies anticipate that the impacts of the proposed rule would be most significant for the section 404 program, reducing the number of 404 permits issued and acres of wetland impacts mitigated, relative to the baseline. The agencies expect the changes in turn to produce cost savings to project proponents from avoided permitting and mitigation activities, as well as forgone benefits from the avoided impact minimization and mitigation. Given data limitations that prevent quantification of the changes in jurisdictional scope under the proposed rule at this time, those effects are discussed qualitatively. In the event that the agencies are able to quantify impacts on affected resources for the final rule, Section 4.5 outlines possible approaches for estimating the resulting cost savings and forgone benefits. The impacts of the proposed rule relative to the baseline on other Clean Water Act programs are anticipated to be small.

4.1 Clean Water Act Section 303: Water Quality Standards and Total Maximum Daily Loads

4.1.1 Water Quality Standards

Water quality standards are provisions of State, Territorial, authorized Tribal, or Federal law approved or promulgated by the EPA that describe the desired condition of a waterbody and the level of protection to achieve that desired condition. The core components of water quality standards are designated uses, water quality criteria that support the uses, and antidegradation requirements. Designated uses establish the environmental objectives for a waterbody, and water quality criteria define the minimum conditions necessary to achieve those environmental objectives. The antidegradation requirements provide a framework for maintaining and protecting water quality that has already been achieved.

Water quality standards are the foundation for a wide range of programs under the Clean Water Act. They serve multiple purposes including establishing the water quality goals for a specific waterbody, or portion thereof, and providing the regulatory basis for establishing water quality-based effluent limits beyond the technology-based levels of treatment required by Clean Water Act sections 301(b) and 306. Water quality standards also serve as a basis for water quality assessment and a target for Clean Water Act restoration activities such as TMDLs.

The Clean Water Act requires States and authorized Tribes to establish water quality standards for navigable waters (*i.e.,* "waters of the United States"). The EPA has not defined "waters of the United

States" separately for water quality standards but, instead, relies on the established definitions, interpretations, and decisions in administering the water quality standards program. States and Tribes may choose to expand their coverage of water quality standards beyond "waters of the United States" to include other waters as "waters of the State" or "waters of the Tribe." For example, a State or Tribe may specifically designate ephemeral streams (even those that do not meet the definition of "waters of the United States" under proposed rule) as waters to which State or Tribal water quality standards apply. The development and revision of water quality standards is an ongoing process that operates independent of changes to the definition of "waters of the United States."

Section 303(c) of the Act requires that States and authorized Tribes hold a public hearing to review their standards at least once every three years (*i.e.,* triennial review), and that the EPA subsequently review and approve or disapprove any new or revised State and authorized Tribal standards for "waters of the United States." State and Tribal water quality standards go into effect for Clean Water Act purposes upon EPA approval. If the EPA disapproves a State or authorized Tribe's water quality standards, or if the Administrator determines that a new or revised water quality standard is necessary to meet the requirements of the Clean Water Act, the EPA must propose and promulgate Federal standards for a State or authorized Tribe, unless the State or authorized Tribe develops its own and the EPA approves.

Currently, 85 Tribes have obtained TAS authority to adopt water quality standards under Clean Water Act section 303(c) (U.S. EPA, 2025d). The EPA has approved water quality standards adopted by 52 of these Tribes. In addition, the EPA promulgated Federal water quality standards for one Tribe. Some Tribes have developed unique designated uses in their water quality standards, such as cultural and traditional uses, and uses appropriate for local species.

4.1.2 Total Maximum Daily Loads

Clean Water Act section 303(d) requires that States identify waters within their boundaries for which applicable water quality standards are not being achieved through existing controls and permitting requirements (referred to as the 303(d) list or the list of impaired waters). Each State is required to assemble and evaluate all existing and readily available water quality-related data and information in order to develop and submit a list of impaired and threatened waters to the EPA by April 1 of even-numbered years. The EPA is required to approve or disapprove the State's 303(d) list within 30 days of submission. If the EPA disapproves a State's list, the EPA is required to identify for inclusion any additional impaired waters. In September 2016, the EPA published a rule to establish regulatory procedures for eligible Tribes to obtain TAS for the section 303(d) program, developing and submitting lists of impaired waters and TMDLs, as States routinely do. While several Tribes have expressed interest in obtaining Clean Water Act section 303(d) TAS authority, none have submitted applications for Clean Water Act section 303(d) TAS to date.

For waters identified on a 303(d) list, States must establish TMDLs for all pollutants preventing, or expected to prevent, attainment of water quality standards. TMDLs must be set at levels necessary to attain and maintain the applicable water quality standards, including a margin of safety and consideration of seasonal variation. The TMDL allocates pollutant loads to both point and nonpoint sources. States use these allocations to set permit limits for point sources and develop restoration strategies for nonpoint sources. States submit their TMDLs to the EPA for review, and the EPA must either approve or

disapprove the TMDL within 30 days of receipt. If the EPA disapproves a State TMDL, the EPA must establish a TMDL for that waterbody within 30 days.

4.1.3 Potential Impacts to Clean Water Act Section 303

While States and Tribes have the option of adopting site-specific criteria, water quality standards are typically written broadly to apply to categories of designated uses or broad classifications of waters. States and authorized Tribes also have developed broad statements of general protection in narrative form that apply to all their jurisdictional waters. In some cases, States and authorized Tribes develop waterbody-specific water quality standards. For example, waterbody-specific water quality standards have been developed for larger, complex systems that are unique, such as the Chesapeake Bay and the Everglades, and for some individual lakes with respect to nutrients. For wetlands, States and authorized Tribes generally rely on a broad set of narrative water quality standards, although a few States and authorized Tribes have developed more robust quantitative water quality standards for wetland categories.

The agencies anticipate that water quality standards are comprehensive and flexible enough to cover any interpretation of the definition of "waters of the United States," and no further investment or disinvestment of water quality standards development and adoption will be necessary with changes in interpretation. Regardless of the extent of jurisdiction of the Clean Water Act, State and Tribal water quality standards can provide coverage for all types of waters. Therefore, the agencies do not anticipate the revised "waters of the United States" definition to significantly change the development and adoption of State and Tribal water quality standards under State or Tribal law.

Should they choose, States and Tribes may apply standards under State or Tribal law for waters that are not "waters of the United States," but they would not be in effect for Clean Water Act purposes. In such federally non-jurisdictional waters, States could apply their own water quality standards as a matter of State law, and authorized Tribes could apply their own water quality standards to the extent their authority under Tribal law would allow. The question that arises in assessing potential effects is whether States and Tribes will continue to apply and enforce water quality standards that are no longer federally enforceable for waters that would be newly excluded from Clean Water Act jurisdiction.

The EPA receives most of its information on impaired waters from ongoing monitoring and assessment programs conducted by the States. States categorize waters based on type, such as lakes, streams, or wetlands, but do not always explicitly differentiate between stream types (*e.g.,* perennial, intermittent, ephemeral) in their Clean Water Act reports to the EPA. Quantitatively estimating the potential effects of any jurisdictional change on the Clean Water Act 303(d) program using existing datasets is not possible because the States do not provide that type of detail regarding water flow regime in their section 305(b) reports to the EPA regarding "the water quality of all navigable waters" in the States.

Reductions in Clean Water Act jurisdiction could potentially affect 303(d) programs in several ways, including by reducing the total number, stream miles, or acres of waters covered under the scope of Clean Water Act 303(d) and the number of TMDL restoration plans developed under the Clean Water Act.

For future 303(d) actions, a change in the scope of Clean Water Act jurisdiction could affect existing and future State or Tribal Clean Water Act section 303(d) lists and TMDL restoration plans under section 303(d). For example, some States or Tribes may not assess non-jurisdictional waters and may identify fewer waters as impaired, and therefore, may develop fewer TMDLs. This could result in reduced

regulatory attention to aquatic ecosystems if other mechanisms for restoration are not available or utilized (*e.g.,* Clean Water Act section 319 program nine-element watershed-based plans). However, some States may now be able to focus limited resources on assessing and developing TMDLs for more priority waters that otherwise might be delayed due to the need to assess all Federal waters within State borders. The result may be more effective ecological restoration of high priority resources earlier compared to the baseline. The agencies lack the data to quantitatively assess potential State responses and the potential overall effect on water resources.

States may continue to apply their own State law-based programs to identify and restore impaired waters, although this activity would not be required under the Clean Water Act for waters that would not be jurisdictional under the proposed rule. All States have water quality standards in some form or another, as well as monitoring and assessment programs. They also have existing laws and programs that they may choose to utilize to address water quality challenges. If States do not require public notice and participation components in State regulations and policies for "waters of the State," and impaired waters were not identified via the current Clean Water Act 303(d) public notice requirements, the public may be less aware of impairments for waters that do not fall within the definition of "waters of the United States."

Changes in jurisdiction could prompt questions regarding the status of waste load allocations and load allocations in existing TMDLs, as well as water quality-based effluent limits in existing NPDES permits that are based on a current TMDL waste load allocation. This has the potential to prompt requests for TMDL revisions that may shift additional pollutant reduction responsibility to those sources discharging to jurisdictional waters. As noted elsewhere, however, existing dischargers may still require NPDES permits if pollutants are conveyed downstream to jurisdictional waters even if the intervening water or feature is not jurisdictional. Some States and NPDES permittees may request review and revision of existing permits and TMDLs to account for potential jurisdictional changes. As there are currently more than 260,000 completed TMDLs nationwide, revisions to a portion of those could require additional State and Federal resources to address. However, the agencies are unaware of any TMDL revisions that occurred exclusively as a result of the previous changes to "waters of the United States" definitions and therefore lack applicable data to assess this potential outcome.

4.2 Clean Water Act Section 311: Oil Spill Prevention, Preparedness, Reporting and Response

Clean Water Act section 311 provides authority to address the risk and harm from oil and hazardous substance discharges to "waters of the United States." For example, two main Federal oil spill program components are:

- **Spill prevention and preparedness**, which has been addressed in the EPA's Spill Prevention, Control, and Countermeasure (SPCC) and FRP regulations for non-transportation related facilities and in United States Coast Guard and Department of Transportation regulations for vessels and transportation-related facilities.

- **Spill notification and removal**, as described under the National Contingency Plan.

This section describes these program components and discusses the potential impacts of the change in waters subject to Clean Water Act jurisdiction.

4.2.1 Spill Prevention and Preparedness

Under the authority of Clean Water Act section 311, the EPA requires certain non-transportation-related facilities to prepare SPCC plans if they have a reasonable potential to have a discharge of oil to navigable waters or adjoining shorelines and meet other applicability criteria, including aggregate oil storage capacity (*see* SPCC rule at 40 CFR 112). Specifically, the SPCC rule applies to facilities "engaged in drilling, producing, gathering, storing, processing, refining, transferring, distributing, using, and consuming oils and oil products, which due to its location, could reasonably be expected to discharge oil in quantities that may be harmful, as described in part 110 of this section, into or upon the navigable waters of the United States or adjoining shorelines..." [40 CFR 112.1(b)] where "navigable waters" (as opposed to "navigable waters of the United States") are defined at 40 CFR 112.2 as "waters of the United States, including the territorial seas."[46]

The agencies estimate that approximately 550,000 facilities in a broad spectrum of industry sectors, including farms, oil production facilities, industrial sites, manufacturing plants, and retail establishments, are currently subject to the SPCC rule and must prepare, implement, and maintain their SPCC Plan (U.S. EPA, 2020). Approximately 40 percent of these facilities (230,000) are in the oil production sector, which includes production, drilling, and workover.[47] Other industry sectors with a significant share of facilities include electric utilities (including distribution substations), real estate rental and leasing, and farms. On an ongoing basis, approximately three percent of the universe of SPCC-regulated facilities are new facilities that must develop an SPCC Plan and implement the spill prevention measures required by the regulation (*e.g.,* sized secondary containment, overfill prevention, and employee training) before they start operating and handling oil. The remaining facilities must maintain their existing plan.[48]

Under the FRP rule at 40 CFR 112.20 *et seq.*, the EPA requires a subset of oil SPCC facilities, that could, because of their location, reasonably be expected to cause substantial harm to the environment by discharging oil into or on the navigable waters or adjoining shorelines, to prepare and submit an FRP to the EPA Regional Administrator for the State where the facility is located. The EPA maintains an internal database on FRP facilities, including their locations and characteristics. According to the EPA's Emergency Management-Oil Database, approximately 3,800 facilities are subject to FRP requirements.

Spill preparedness requirements also exist for onshore transportation-related facilities such as pipelines and railcars. These programs derive their authority from Clean Water Act section 311 as amended by the Oil Pollution Act of 1990 (OPA), and therefore, are affected by changes in the scope of jurisdictional

[46] The Clean Water Act [33 U.S.C. 1321(b)(1)] sets as national policy that there "should be no discharges of oil or hazardous substances into or upon the navigable waters of the United States, adjoining shorelines, or into or upon the waters of the contiguous zone, or in connection with activities under the Outer Continental Shelf Lands Act [43 U.S.C. 1331 *et seq.*] or the Deepwater Port Act of 1974 [33 U.S.C. 1501 *et seq.*], or which may affect natural resources belonging to, appertaining to, or under the exclusive management authority of the United States (including resources under the Magnuson-Stevens Fishery Conservation and Management Act [16 U.S.C. 1801 *et seq.*])." While Clean Water Act section 311 uses the phrase "navigable waters of the United States," which traditionally means waters subject to jurisdiction under the Rivers and Harbors Act, the EPA has historically interpreted it to have the same breadth as the phrase "navigable waters" used elsewhere in section 311, and in other sections of the Clean Water Act.

[47] Workover refers to various interventions or maintenance activities on oil or gas wells such as replacing the production tubing.

[48] Among other requirements, facilities with an existing Plan must amend their Plan when there is a change in operations that materially affects the risk of a discharge and review their Plan at least once every five years. 40 CFR 112.5(a)-(b).

waters. Under 49 CFR 194, the operator of an onshore oil pipeline, that, because of its location, could reasonably be expected to cause substantial harm or significant and substantial harm to the environment by discharging oil into or on any navigable "waters of the United States" or adjoining shorelines, must submit an oil spill response plan to the Pipeline and Hazardous Materials Safety Administration (PHMSA) of the Department of Transportation. The pipeline operator needs to identify resources necessary to respond to a worst-case discharge in operator-defined response zones.[49] PHMSA reports 562 oil spill response plans from pipeline operators (PHMSA, 2021).

Under 49 CFR 130, railroad owners or operators must prepare oil spill response plans to cover tank car shipments of petroleum oils. Among other requirements, the basic written plan must describe the manner of response to discharges that may occur during transportation, consider the maximum potential discharge of the contents from the packaging, and identify private personnel and equipment available to respond to a discharge.

Under OPA, States may impose additional requirements for facility response plans as long as these requirements are at least as stringent as the Federal standards.

4.2.1.1 State and Tribal Regulatory Practice for Clean Water Act Section 311

Clean Water Act section 311 does not provide for delegation of regulatory programs to the States or Tribes. The EPA implements the program from EPA headquarters and regional offices.

The EPA coordinates with States and Tribes since many States have similar programs under their own authority that cover at least some of the areas included in the Clean Water Act section 311 program. These programs vary from State to State in their requirements, coverage, and process. Many States have some mechanism to allow for reimbursement for oil spill cleanup from responsible parties, while most States have mechanisms for clean-up cost recovery, civil penalties, or trust funds to aid in cleanup.

Only a few Tribes, such as the Navajo Nation, have an oil spill prevention program similar to the EPA's spill prevention, control, and countermeasure program. Most Tribes do not currently have the resources to create an aboveground storage tank program and typically rely on the EPA to inspect aboveground storage tanks at facilities subject to the program, particularly oil exploration and production facilities located on remote reservation lands.

The EPA has authority to respond to and conduct enforcement of oil spills into and on "waters of the United States" on reservation lands. If there is an oil spill into or on non-jurisdictional waters on reservation lands, the response would be determined by the Tribal government.

[49] The worst-case discharge for planning purposes is the largest foreseeable discharge of oil (*e.g.,* from a pipeline rupture, fire or explosion) in adverse weather conditions (*e.g.,* rain, currents, cold temperatures). 49 CFR 194.5 defines a "response zone" as a "geographic area along a length of pipeline or including multiple pipelines, containing one or more adjacent line sections, for which the operator must plan for the deployment of, and provide, spill response capabilities. The size of the zone is determined by the operator after considering available capability, resources, and geographic characteristics."

4.2.2 Potential Impacts on Spill Prevention and Preparedness

4.2.2.1 Potential Impacts on SPCC Program

In determining whether a facility has a reasonable expectation of an oil discharge that could reach a jurisdictional water, facility owners consider solely the geographical and locational aspects of the facility [40 CFR 112.1(d)(1)(i)]. As the EPA describes in its SPCC Guidance, "the owner or operator should consider the location of the facility in relation to a stream, ditch, gully, or storm sewer; the volume of material likely to be spilled; drainage patterns; and soil conditions. An owner or operator may not consider constructed features, such as dikes, equipment, or other manmade structures that prevent, contain, hinder, or restrain a discharge as described in section 112.1(b), when making this determination." (U.S. EPA, 2013, page 2-34).[50]

Typically, natural conveyances or stream channels are principal spill pathways for impacts to water resources in remote and undeveloped inland areas that lack engineered stormwater conveyance systems. Manufacturing facilities and other facilities, such as storage facilities, located in developed areas may also affect streams through discharges to stormwater drains or other engineered conveyance systems. The agencies anticipate that the inland onshore oil production and farm sectors would be the most likely to be affected by changes to the scope of Clean Water Act jurisdiction given their locations.

Given this, the agencies anticipate that owners or operators of facilities located in relatively less developed areas would be more likely to base their applicability determination on whether there is a reasonable potential for an oil discharge to reach waterbodies in the immediate proximity of the facility. The agencies lack data on how many facilities used the NWPR definition to determine that the facilities did not have reasonable potential for an oil discharge to navigable waters or adjoining shorelines and would reach a different conclusion given the revised scope of "waters of the United States." The estimated universe of SPCC-regulated facilities (550,000 facilities) is based on the number of establishments in each industry sector and oil storage capacities and does not explicitly account for the location of the facilities and reasonable potential for a discharge to a jurisdictional water.

The benefits and costs depend on any applicable State or local requirements and measures the facilities may implement voluntarily (such as following industry standards or recommended practices). Some States have requirements equivalent to those of 40 CFR 112, but these requirements often apply to only a subset of facilities based on aggregate storage volume, facility type (*e.g.,* farms, production, others), and type of oil (*e.g.,* petroleum oils, non-petroleum oils). Other States reference 40 CFR 112 explicitly. While the degree of State program overlap varies,[51] potential impacts of the proposed definition of "waters of the United States" relative to the baseline are expected to be less in States that have some overlapping requirements (*e.g.,* Alaska, California, Colorado, Delaware, Georgia, Hawaii), and which may be regulating ephemeral streams and other waters in the baseline. The agencies expect no change to

[50] The agencies note that guidance cannot impose legally enforceable requirements.

[51] The EPA's regulatory impact analysis for the 2008 amendments to the SPCC regulation researched State regulations affecting the spectrum of facilities subject to the Federal SPCC rule and identified some States with complete, substantial, or partial overlap with Federal requirements. The degree of State overlap was somewhat higher for larger facilities (33 percent) as compared to smaller facilities (10 percent). Overall across the regulated facility universe, the EPA determined that approximately 13 percent of the SPCC burden overlapped with some State requirements (U.S. EPA, 2008; Exhibit 5-22).

compliance costs or spill risk for facilities required to comply with equivalent State or Tribal regulations or those that elect to voluntarily implement SPCC measures.

4.2.2.2 Potential Impacts on FRP Program

If finalized, a change in Clean Water Act jurisdiction could lead some facilities to no longer incur compliance costs to maintain their FRP, maintain a contract with an oil spill removal organization, or conduct periodic drills and exercises to maintain preparedness. The incremental avoided costs attributable to the proposed rule depend on the stringency of any applicable State or local requirements and measures the facility may implement voluntarily in accordance with recommended industry practices. The benefits of these measures, which would no longer be in place, include enhanced preparedness and response and the associated reduction in the harm caused by oil discharges.

The proposed rule could potentially affect FRP facilities primarily through changes in the applicability of requirements to the facilities at two stages:

Changes to the overall applicability of 40 CFR 112: Changes in Clean Water Act jurisdiction that make a facility no longer subject to the SPCC rule also make the facility less likely to be subject to the FRP requirements.

Changes to the FRP-specific self-identification applicability criteria at 40 CFR 112.20(f)(1): As defined in 40 CFR 112.20(f)(1), a non-transportation related onshore facility is required to prepare and implement an FRP if:

1. The facility transfers oil over water to or from vessels and has a total oil storage capacity greater than or equal to 42,000 U.S. gallons, or
2. The facility has a total oil storage capacity of one million U.S. gallons or more, and at least one of the following is true:
    i. The facility does not have secondary containment for each aboveground storage area sufficiently large enough to contain the capacity of the largest aboveground tank within each storage area plus sufficient freeboard for precipitation.
    ii. The facility is located at a distance such that a discharge could cause injury to fish and wildlife and sensitive environments.
    iii. The facility is located such that a discharge would shut down a public drinking water intake.
    iv. The facility has had a reportable discharge greater than or equal to 10,000 U.S. gallons in the last five years.

The criteria related to reportable discharges (item 2(iv) in the list above) and to distance to sensitive environments (2(ii)) could be affected by a change in Clean Water Act jurisdiction.[52] For example,

[52] The criterion related to transfers over water to or from vessels is not expected to be affected by changes in Clean Water Act jurisdiction because the involvement of vessels necessarily implies navigation and therefore federally regulated waters. The secondary containment criterion is unrelated to the scope of Clean Water Act jurisdiction. The criterion related to public drinking water intakes refers specifically to the potential for a discharge to shut down an intake. Public drinking water system intakes are generally expected to draw from perennial streams which will be within scope of Clean Water Act jurisdiction under the proposed rule (and were also under the scope of the NWPR).

changing the scope of waters that trigger the "reportable discharge" applicability criterion may mean that fewer facilities need to prepare or maintain an FRP based on their oil spill history as the affected resource would be marginally less likely to be a "water of the United States." The agencies expect the change in assertions of Clean Water Act jurisdiction to have a small effect on the number of facilities that would trigger oil FRP applicability due to reportable discharges. This is based on program data available for 3,802 oil FRP planholders that identifies only two facilities with FRPs solely because of reportable discharge history (*i.e.*, no other FRP applicability factor).[53]

A majority of oil FRP planholders (2,115 facilities) identify the potential to affect sensitive environments as a determinant of oil FRP applicability. The potential effect of a change in Clean Water Act jurisdiction on sensitive environments is difficult to assess *a priori*. The oil FRP regulation relies on a definition of "fish and wildlife and sensitive environments" at 40 CFR 112.2 during the applicability evaluation by a facility owner/operator and in the development of the FRP by the planholder (*e.g., see* Vulnerability Analysis in Appendix F, section 1.4.2 of 40 CFR 112). As described in 40 CFR 112.2 and in Department of Commerce and NOAA (1994), "fish and wildlife and sensitive environments" may include wetlands, national and State parks, critical habitats for endangered/threatened species, wilderness and natural areas, marine sanctuaries and estuarine reserves, conservation areas, preserves, wildlife areas, wildlife refuges, wild and scenic rivers, recreational areas, national forests, public drinking water intakes, Federal and State lands that are research natural areas, heritage program areas, land trust areas, and historical and archeological sites and parks. These areas may also include aquaculture sites, agricultural surface water intakes, and unique habitats, such as bird nesting areas, critical biological resource areas, designated migratory routes, and designated seasonal habitats. The Area Committee and the spill response Unified Command Structure may consult with the natural resource management agencies to determine additional areas to be considered sensitive environments for the purposes of OPA. 40 CFR 112.20(g)(1) requires FRP to be consistent with the National Contingency Plan and with the applicable Area Contingency Plans. To the extent that Area Committees designate sensitive areas based on federally-regulated waters, it is possible that the changes to Clean Water Act jurisdiction could alter this factor and potentially FRP applicability. The agencies do not have sufficient information about the sensitive environments considered in determining FRP applicability to assess the significance of the change that could be caused by the proposed rule.

Available data are not sufficiently detailed to estimate the incremental avoided costs and quantify a potential change in risk for changes in FRP applicability, but the agencies anticipate that few facilities could be affected by the change in the "waters of the United States" definition. To date, the EPA received five requests by FRP planholders to reconsider applicability of 40 CFR 112 following the promulgation of the previous "waters of the United States" rules.

4.2.2.3 Potential Impacts on Transportation-Related Spill Prevention and Preparedness

The preparation of an FRP for a pipeline facility is based on the potential for a discharge to a jurisdictional water or adjoining shorelines. The existing regulation gives pipeline operators the flexibility to define planning areas, and operators generally develop plans that cover response strategies over fairly

[53] Most of the 55 FRP planholders with histories of reportable discharges also triggered one or more of the other applicability criteria, such as transfers over water (39 facilities), inadequate secondary containment (8 facilities), or potential to affect drinking water intakes (28 facilities) or sensitive environments (47 facilities).

large geographical areas. Accordingly, the agencies expect marginal changes in the number of jurisdictional water crossings, such as may result from the proposed rule, to have no material effect on the number of FRPs that pipeline operators may develop or their planned response resources. For similar reasons, the agencies anticipate no material impact on the number of rail operators required to develop a facility response plan.

Pipeline safety requirements in 49 CFR Part 195, such as integrity management, pipeline burial depth, and inspection of water crossings, are specific to water crossings at least 100 feet wide or to commercially navigable waters.[54] Since these waters would be jurisdictional under the proposed rule, the proposed rule would not affect these requirements.

4.2.3 Spill Notification and Removal

Section 311(c) of the Clean Water Act, as amended by OPA, authorizes response to discharges or threats of discharges of oil or a hazardous substance. The Clean Water Act provides that the President shall ensure effective and immediate removal of a discharge or substantial threat of discharge (1) into or on navigable "waters of the United States;" (2) on the adjoining shorelines to such waters; (3) into or on the waters of the exclusive economic zone; or (4) that may affect natural resources belonging to, appertaining to, or under the exclusive management authority of the United States. The Clean Water Act requires that oil discharges and releases of reportable quantities of hazardous substances be reported to the National Response Center, which in turn notifies the relevant Federal on-scene coordinators (FOSC). FOSCs have the authority to conduct, direct, and coordinate response efforts to protect the environment, public health, and worker safety and health under Clean Water Act sections 311(c) and (e). Most oil and chemical incidents are addressed by State, Tribal, or local governments or by responsible parties. The FOSC determines the need for Federal involvement under the Clean Water Act and the National Contingency Plan.

Liability for response and cleanup costs falls to the responsible party if one can be identified. The Oil Spill Liability Trust Fund (OSLTF) provides funding to cover removal costs incurred by the U.S. Coast Guard and the EPA and by State and Tribal governments. The OSLTF may pay for uncompensated removal costs and damages up to $1 billion per incident, of which no more than $500 million may be paid for natural resource damages. The National Pollution Funds Center (NPFC), which manages the OSLTF, seeks reimbursement from the responsible party for any response expenses, claims, and damage assessment initiation paid by the Fund. One of the key criteria[55] the NPFC applies when approving access to the OSLTF is whether the oil spill incident affected or substantially threatened a water subject to Clean Water Act jurisdiction. Accordingly, changes in the scope of jurisdictional waters can potentially affect access to the OSLTF to oversee a responsible party's response to an oil spill or respond to an oil spill.

The jurisdictional status of the water impacted or threatened by a discharge determines oversight authorities under the National Contingency Plan and what resources are available for removal or for compensating damages. For waters that are non-jurisdictional, oversight falls on the States and Tribes, with removal requirements depending on the State or Tribal requirements for the particular water

[54] Commercially navigable waters as defined by 49 CFR 195.450.

[55] Other criteria include whether the substance is an oil as opposed to a hazardous substance (which would be addressed by the Comprehensive Environmental Response, Compensation, and Liability Act).

resource. For waters within Clean Water Act jurisdiction under the proposed rule, the FOSC would oversee the response and removal actions. The number of incidents that affected or threatened waters that changed jurisdictional status under the previous "waters of the United States" rules is uncertain, since notifications to the National Response Center generally do not provide sufficient detail on the water resources at risk to determine jurisdictional status. This limitation also makes it difficult to quantify the potential impact of the proposed rule.

4.2.4 Potential Impacts on Spill Notification and Removal

There are various possible outcomes of changes to the scope of Clean Water Act jurisdiction, including for oil spill incidents affecting newly non-jurisdictional waters. These outcomes depend on the State requirements and responsible party actions following the incident. They range from no change (in cases where the responsible party assumes full responsibility for response and cleanup), to the transfer of the response burden from the OSLTF to the State or Tribe. The economic implications of these changes are uncertain since they depend on the location of the future spill, the stringency of State and local requirements, and other factors. State regulations cover the discharge to State waters or land of any substance that may be detrimental to environmental quality and are generally similar to baseline oil discharge prohibition requirements under the Clean Water Act. However, whereas the Federal regulations cover spills of non-petroleum oils such as animal fats and vegetable oils, some State requirements focus mainly on petroleum oils and requirements for non-petroleum oils may be less stringent or may not apply. There may also be higher State spill reporting requirement thresholds than provided by the Clean Water Act.

Information on spills is not typically tracked in a manner that would allow the agencies to readily identify if a water feature impacted by a spill would have a different jurisdictional status. To date, the agencies do not have an indication that the definition of "waters of the United States" affected the Federal government's ability to oversee and address oil spills.

4.3 Clean Water Act Section 401: State and Tribal Roles

Under section 401 of the Clean Water Act, a Federal agency may not issue a permit or license to conduct any activity that may result in any discharge into "waters of the United States" unless the State or authorized Tribe where the discharge would originate issues a section 401 water quality certification or waives the certification requirement. Congress enacted section 401 of the Clean Water Act to give States and Tribes a direct role in Federal permitting and licensing processes to ensure that federally licensed or permitted activities comply with established water quality requirements, but places limitations on how that role may be implemented to maintain an efficient process, and appropriate substantive oversight, consistent with the overall cooperative federalism construct established by the Clean Water Act.

Under section 401, a certifying authority may grant, grant with conditions, deny, or waive certification in response to a request for certification from a project proponent. The certifying authority determines whether the proposed activity will comply with the applicable provisions of sections 301, 302, 303, 306, and 307 of the Clean Water Act and "any other appropriate requirement of State law." *Id.* A grant of certification means that the certifying authority has determined compliance with the applicable provisions of the Clean Water Act and "any other appropriate requirement of State law." A grant of certification with conditions means that the certifying authority has determined compliance with the applicable provisions of the Clean Water Act and "any other appropriate requirement of State law," but only if certain

conditions are met. Pursuant to section 401(d), if a grant of certification includes conditions, those conditions must be incorporated into the Federal license or permit. *Id*. at 1341(d). A denial of certification means that the certifying authority is not able to certify that the activity will comply with the applicable provisions of the Clean Water Act and "any other appropriate requirement of State law." If a certifying authority denies certification, the Federal license or permit cannot be issued. *Id*. at 1341(a)(1). A certifying authority may waive certification expressly or constructively by "fail[ing] or refus[ing] to act on a request for certification, within a reasonable period of time . . . after receipt of such request." *Id.* A waiver enables the Federal agency to issue a Federal license or permit without a certification. *Id*.

The EPA, as the Federal agency charged with largely administering the Clean Water Act, is responsible for developing regulations and guidance to ensure effective implementation of all Clean Water Act programs, including section 401. In addition to administering the statute and promulgating implementing regulations, the EPA has several other roles under section 401.

The EPA acts as the section 401 certifying authority on behalf of States or authorized Tribes that do not have "authority to give such certification." *Id*. Currently, the EPA acts as the certifying authority in two scenarios: (1) on behalf of Tribes without TAS and (2) on lands of exclusive Federal jurisdiction in relevant respects. In the first scenario, if a Tribe does not obtain TAS for section 401, the EPA acts as the certifying authority for any federally licensed or permitted activity that may result in a discharge that originates on Tribal lands. In the second scenario, the EPA will act as the certifying authority in situations where any discharge from any activity subject to section 401 certification originates where the Federal government has exclusive jurisdiction in relevant respects.

The EPA also coordinates the opportunity for neighboring jurisdictions to raise concerns and recommendations where their water quality may be affected by a discharge subject to section 401 certification. *Id*. at 1341(a)(2). Whenever the EPA Administrator determines that a discharge subject to section 401 "may affect" the water quality of a neighboring jurisdiction, the EPA is required to notify that other jurisdiction. *Id*. If the neighboring jurisdiction determines that the discharge "will affect" the quality of its waters in violation of any water quality requirement of that jurisdiction, it may notify the EPA and the Federal licensing or permitting agency of its objection to the license or permit. *Id.* It may also request a hearing on its objection with the Federal licensing or permitting agency. At the hearing, the EPA will submit its evaluation and recommendations. The Federal agency will consider the jurisdiction's and the EPA's recommendations, and any additional evidence presented at the hearing. The Federal agency "shall condition such license or permit in such manner as may be necessary to ensure compliance with the applicable water quality requirements" of the neighboring jurisdiction. *Id.* If the conditions cannot ensure compliance, the Federal agency may not issue the license or permit.

Finally, the EPA also must provide technical assistance for section 401 certifications upon the request of any Federal or State agency, or project proponent. *Id*. at 1341(b). Technical assistance might include provision of any relevant information on applicable effluent limitations, standards, regulations, requirements, or water quality criteria, and any methods to comply with such limitations, standards, regulations, requirements, or criteria.

4.3.1 Permits, Licenses, and Activities Subject to Clean Water Act Section 401

Clean Water Act section 401 certification is required for any Federal license or permit to conduct any activity that may result in any discharge into "waters of the United States." To be subject to Clean Water Act section 401 certification, the permit or license must be issued by a Federal agency. Section 401 certification is not required for licenses or permits issued by a State or Tribe that administers a federally approved permit program.

The Clean Water Act does not list specific Federal licenses or permits that are subject to section 401 certification requirements. The most common examples of Federal licenses and permits subject to section 401 certification include:

- Clean Water Act section 402 NPDES permits issued by the EPA in jurisdictions where the EPA administers the NPDES permitting program (currently, New Hampshire, Massachusetts, New Mexico, and Tribal lands).
- Clean Water Act section 404 permits for discharges of dredged or fill material issued by the Corps. At present, the Corps issues all section 404 permits in 48 States, and section 404 permits for discharges into non-assumed waters in Michigan and New Jersey.
- Licenses for non-Federal hydroelectric dams and natural gas pipelines issued by the Federal Energy Regulatory Commission.
- Rivers and Harbors Act sections 9 and 10 permits issued by the Corps.

4.3.2 State and Tribal Regulatory Practice of Clean Water Act Section 401

States, Territories, and Tribes are authorized to carry out the specific role Congress prescribed under the Clean Water Act section 401 certification program to ensure water quality requirements are met when a Federal agency issues a license or permit subject to section 401, including Corps issued dredged and fill permits on State, Territorial, or reservation lands.

All 50 States, the District of Columbia, and the U.S. Territories have adopted section 401 programs which provide the authority to certify, deny, waive, or conditionally certify Federal permits and licenses issued within their jurisdiction. Authorized Tribes can request Clean Water Act section 401 authority and at present 84 Tribes have TAS to administer a 401 certification program. For those Tribes who have not received Clean Water Act section 401 authority, the EPA administers the Clean Water Act section 401 program.

4.3.3 Potential Impacts to Clean Water Act Section 401

Section 401 certification is limited to situations involving a Federal permit or license that may result in a discharge into "waters of the United States." As a result, the proposed revised definition of "waters of the United States" would affect where Federal permits are required and where section 401 certification applies. For example, if an activity is no longer subject to a Federal license or permit due to a change in the jurisdictional status of a waterbody, such as the proposed rule's exclusion of ephemeral streams, section 401 certification would not be required. As such, reduced Clean Water Act coverage will likewise reduce the applicability of section 401. States and Tribes may continue to apply State and Tribal law to non-jurisdictional waters within their boundaries, as authorized and applicable.

A reduction in the applicability of section 401 could result in avoided costs for States and authorized Tribes by decreasing the number of section 401 reviews and required staff workload. This could also result in discharges into newly non-jurisdictional waterbodies and lead to ecosystem impacts and related forgone benefits. In all cases except where States regulate more broadly than required by the Clean Water Act, a lower number of permits issued by Federal agencies would likely decrease State and Tribal costs associated with certification under Clean Water Act section 401.

4.4 Clean Water Act Section 402: National Pollutant Discharge Elimination System

Section 402 of the Clean Water Act provides that a NPDES permit is required for the discharge of pollutants from any point source to a "water of the United States." The EPA estimates that the NPDES program requires permit coverage for discharges from approximately 850,000 facilities or activities. The NPDES program addresses a wide range of discharges, including discharges from publicly owned treatment works, combined sewer systems, sanitary sewer systems, stormwater activities (municipal separate storm sewer systems (MS4s), industrial, and construction), industrial facilities, commercial facilities, cooling water intake structures, concentrated animal feeding operations, and concentrated aquatic animal production facilities.

4.4.1 Types of NPDES Permits (General and Individual Permits)

The two basic types of NPDES permits are individual and general permits. These permit types share many of the same components but are used under different circumstances and involve different permit issuance processes. An individual permit is a permit specifically tailored to an individual facility. General permits are issued to a category or class of facilities or activities and are used to cover the vast majority (800,000 or 94 percent) of facilities or activities requiring NPDES permits. Individual permits typically incorporate more site-specific limits and conditions and are issued to a relatively small percentage (50,000 or 6 percent) of the more complex facilities or activities regulated by the NPDES program. The universe of individual permits comprises approximately 15,000 publicly-owned treatment works, 855 large and medium (*i.e.*, populations > 100,000) MS4s, and 35,000 non-publicly-owned treatment works (*i.e.*, industrial, commercial) facilities or activities.

The EPA classifies some NPDES permittees as "major facilities." Major facilities include publicly-owned treatment works with design flows of greater than one million gallons per day and facilities with pretreatment programs approved by the EPA or an authorized State. Major industrial facilities are identified based on ratings developed by the EPA or an authorized State. Facilities that are not classified as major facilities are "minor facilities." There are approximately 6,800 major facilities, comprising 4,500 publicly-owned treatment works and 2,300 non-publicly-owned treatment works. Nearly all of these facilities are covered by individual NPDES permits. There are an additional 43,200 minor facilities, made up of approximately 10,500 publicly-owned treatment works and 32,700 non- publicly-owned treatment works, covered by individual NPDES permits. In addition, there are approximately 365,000 pesticide applications and 100,000 other non-stormwater minor facilities covered by general NPDES permits. Approximately 335,000 stormwater facilities are covered by general permits. This estimate includes stormwater discharges from Phase II MS4s, construction activities, and industrial activities.

4.4.2 Permit Conditions

NPDES permits typically include effluent limitations that restrict the type and amount of specific pollutants that can be discharged to "waters of the United States," as well as requirements for monitoring and reporting. In addition, all NPDES permits are required to include standard conditions which delineate the legal, administrative, and procedural requirements of the permit. There are two general categories of effluent limitations that are included in permits: technology-based effluent limits and water quality-based effluent limitations. Technology-based effluent limits require a minimum level of effluent quality that is attainable using demonstrated technologies for reducing discharges of pollutants into "waters of the United States." Technology-based effluent limits are developed independently of the potential effect of a discharge on the receiving water.

If technology-based effluent limits are not sufficient to meet the applicable water quality standards in the receiving water, the Clean Water Act requires the development of water quality-based effluent limits. The NPDES regulations provide that a water quality-based effluent limitation should be included in a permit for any pollutant in a discharge that "causes, has the reasonable potential to cause, or contribute" to an excursion above a State water quality standard.[56] Many State water quality standards have general provisions allowing some consideration of mixing of effluent and receiving water when determining the need for, and calculating, water quality-based effluent limitations. Depending on the State's water quality standards and implementation policy, such considerations could be expressed in the form of a dilution allowance or regulatory mixing zone. Water quality-based effluent limitations may be based on the criteria in the applicable water quality standards, and consideration of effluent and receiving water critical conditions, including any dilution allowances or mixing zones that are allowed by the water quality standards. Water quality- based effluent limits in NPDES permits must also be consistent with the assumptions and requirements in any available waste load allocation in a TMDL.

4.4.3 State and Tribal Regulatory Practice of Clean Water Act Section 402

The NPDES program comprises five components: the base NPDES permit program, Federal facilities, pretreatment, general permits, and biosolids. (U.S. EPA, 2019). Forty-seven States and the U.S. Virgin Islands are currently authorized to administer the NPDES permit program. Only three States (New Mexico, Massachusetts and New Hampshire) and the District of Columbia are not authorized.

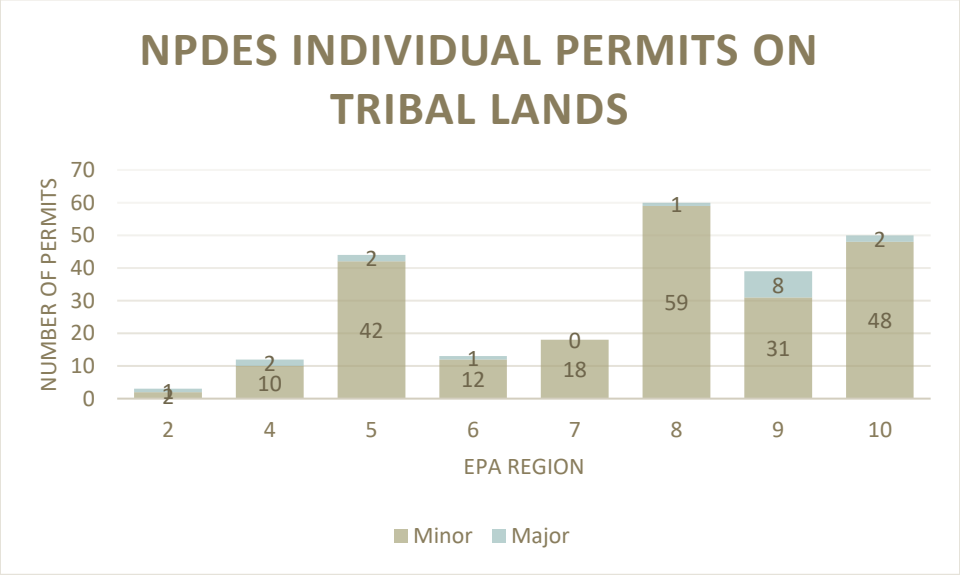
Dischargers obtain a NPDES permit from either the EPA or a State or Tribe authorized to administer its own NPDES program. If the EPA approves a State or Tribal program, the State or Tribe assumes permitting authority responsibilities in lieu of the EPA. State permitting authorities issue approximately 94 percent of the NPDES permits, and the EPA issues approximately 6 percent.

[56] CWA Section 301(b)(1)(C) requires the inclusion of water-quality based limits (WQBELs) in NPDES permits if they are needed to meet applicable water quality standards. The implementing regulations at 40 CFR 122.44 (d)(1) specify that the need for a WQBEL is determined by considering "whether a discharge causes, has the reasonable potential to cause, or contributes to an in-stream excursion above a narrative or numeric criteria within a State water quality standard." WQBELs can be expressed as a numeric value or can be expressed in a narrative form (provided that they set specific requirements permittees must follow to achieve water quality standards). *See* generally, 40 CFR 122.44(d), 122.44(k), 122.45. Per the recent Supreme Court decision, narrative WQBELs must be expressed in terms of controls on the quality of the discharge – not in terms of end-results in the receiving water. *San Francisco v. EPA,* 145 S. Ct. 704 (U.S. 2025).

State NPDES programs can be broader in scope or more stringent than the Federal program. However, where State programs have a broader scope than what is required for the Federal program, the additional coverage is not considered part of the federally-approved program.[57] State programs that regulate the discharge of pollutants from point sources to non-jurisdictional waters are programs that are broader in scope than the Federal NPDES program and as such, any permits issued for these discharges are not NPDES permits and instead, are State-issued non-NPDES permits. Should Federal Clean Water Act jurisdiction change, a State may continue to regulate, under State law, waters that are no longer jurisdictional as "waters of the United States."

Under the Clean Water Act, Tribes may be authorized to administer the NPDES program.[58] Thus far, no Tribes have requested and obtained authorization. As a result, the EPA issues permits for discharges on Tribal lands. There are currently approximately 239 individual NPDES permits on Tribal lands, including 17 major facilities, in eight EPA Regions, as shown below in Figure 4-1. The permits include Tribal-owned publicly-owned treatment works, other Tribal industrial and commercial facilities, State and Federal facilities, as well as non-Tribal facilities on Tribal lands.

Figure 4-1: Number of Individual NPDES Permits for Major and Minor Facilities in Indian Country, by Region



There are facilities on Tribal lands that are covered by general permits. For the permits issued by the EPA, the EPA has gathered the following data:

- Pesticide General Permit: Most Pesticide General Permit Operators are automatically covered and are not required to submit a Notice of Intent (NOI) for coverage under the permit. It is estimated that under the 2021 Pesticide General Permit a total of 27 Operators have NOIs on Tribal lands.

[57] *See* 40 CFR 123.1(i)(2).

[58] *See* footnote 24

- Construction General Permit for stormwater discharges from certain construction activities: Approximately 1708 sites on Tribal land are currently covered by the EPA's construction general permit.

- Multi-Sector General Permit for stormwater discharges from certain industrial activities: Data from the current Multi-Sector General Permit, issued in 2021, indicate that there are 72 facilities on Tribal land covered by the EPA's Multi-Sector General Permit.

Certain EPA Regions also issue general permits that cover facilities on Tribal lands. Estimates from July 2025 indicate that approximately 224 facilities are covered by these permits. The vast majority are covered by permits issued by the EPA's Region 8 for lagoon systems. Other Tribal coverages include drinking water treatment in Region 10, aquaculture facilities in Region 10, hydrostatic testing discharges in Region 6, and remediation coverages in Region 1.

4.4.4 Potential Impacts to Clean Water Act Section 402

The agencies anticipate that the proposed revised definition of "waters of the United States" would decrease the scope of the Clean Water Act geographic jurisdiction compared to the baseline. Waters outside the scope of the agencies' authority under the Clean Water Act likewise fall beyond the agencies' enforcement authority under the Act. However, nothing in the proposed revised definition of "waters of the United States" would affect the ability of States and Tribes to apply and enforce independent authorities over water resources under State or Tribal law.

The agencies note that, under the proposed rule, some existing NPDES permits may still be needed even if a discharge of a pollutant is no longer directly to a jurisdictional water. The basis for determining whether an NPDES permit is needed is whether the discharge of a pollutant from a point source reaches a "water of the United States." If a pollutant is conveyed through a non-jurisdictional water to a jurisdictional water, a NPDES permit may still be required.[59] Some existing permits may need to be modified, subject to anti-backsliding requirements. In the NWPR analysis, the agencies anticipated such circumstances to be more likely to happen in arid areas of the country (U.S. EPA and Army, 2020). Dischargers whose receiving waters or downstream waters were determined to no longer be jurisdictional under the Clean Water Act could, depending on the specific circumstances: continue with their existing permit (*status quo*), formally request that the permitting authority modify the permit, or formally request that the permitting authority terminate the permit.

The agencies do not have information indicating that a significant number of requests for permit modification or termination followed the promulgation of any of the previous "waters of the United States" rules. After the 2006 *Rapanos* decision, several NPDES permit holders in the Western United States asserted that NPDES permit coverage was no longer required because of the potential non-

[59] *See* Footnote 2 above.

jurisdictional status of a receiving water. The agencies are aware that in some of these instances the permitting authority determined that the discharger no longer needed an NPDES permit.

In practice, the agencies anticipate potential impacts to NPDES permits of the proposed rule relative to the baseline to be limited. The agencies did not see significant changes under the NWPR in terms of the number of permittees seeking revisions to existing permit conditions and similarly does not expect significant changes under the proposed rule. Many States already exceed the water resource or surface water discharge protections under the proposed rule, although a number of States currently have programs that are no more stringent than the Clean Water Act (*see* Table 2-1).

4.4.4.1 Stormwater

Over the years, some municipalities and some other public entities that operate MS4s and stormwater management programs expressed concern that various stormwater control measures—such as some stormwater treatment systems and some flood control systems—could be considered "waters of the United States" because of their proximity and potential connection to surface waters. These concerns emphasized that any definitional change to what is a "water of the United States" for these control features should acknowledge the appropriate jurisdictional status relating to these systems.

4.4.4.2 Construction Stormwater

In general, the NPDES stormwater program requires permits for discharges from construction activities that disturb one or more acres, and discharges from smaller sites that are part of a larger common plan of development or sale. The Construction and Development (C&D) effluent limitations guidelines (ELGs) apply to permits for stormwater discharges from all construction activities including clearing, grading, and excavation, except operations that result in the disturbance of less than one acre of land area, unless they are part of a common plan of development or sale that disturbs more than one acre (40 CFR 122.26(b)(14)(x) and 40 CFR 122.26(b)(15)). Under 40 CFR 450 (the C&D ELGs), all covered entities must: (1) design, install, and maintain erosion and sediment controls; (2) initiate soil stabilization in disturbed areas immediately whenever any clearing, grading, excavating, or other earth disturbing activities have ceased; (3) design, install, and maintain pollution prevention measures to minimize the discharge of pollutants to surface waters; (4) prevent the discharge of the wastewater, fuels, oils, or other pollutants used in vehicle and equipment operations and maintenance and equipment washing; and (5) implement other best management practices to minimize adverse effects on surface water.

The agencies considered the potential effect of the revised definition of "waters of the United States" on the issuance of Clean Water Act section 402 permits for stormwater from construction and development sites. It is not feasible to rigorously estimate the potential cost reduction to the construction industry and corresponding benefits of not needing a Clean Water Act section 402 permit for construction site stormwater discharges to newly non-jurisdictional waters that never reach a jurisdictional water. The agencies anticipate that both avoided costs to the industry and the potential environmental impacts from construction activities due to a change to the definition of "waters of the United States" would likely be modest.

4.4.4.3 Industrial Stormwater

Available data are not sufficiently detailed to develop quantitative estimates of the potential cost savings and environmental disbenefits associated with permits for stormwater discharges from regulated industrial facilities discharging to newly non-jurisdictional waters under the proposed rule. However, qualitative analysis suggests that potential impacts may be limited. Most industrial sectors regulated under the Phase I stormwater rule are located in urbanized areas. These types of facilities are generally large and due to their scale, may be more likely to discharge into perennial streams (outside of the arid West) that are jurisdictional under the baseline and the proposed rule. Therefore, the agencies anticipate limited changes in benefits or costs for industrial facilities with stormwater discharges regulated under the proposed rule.

4.4.4.4 Municipal Separate Storm Sewer Systems

Stormwater runoff in cities and towns is commonly transported through MS4s, from which it is often discharged, untreated, into local waters. To prevent harmful pollutants from being washed or dumped into, and being discharged from, an MS4, certain MS4s are required by law to obtain NPDES permit coverage and develop a stormwater management program. The Stormwater Phase I rule, promulgated in 1990, requires operators of medium and large MS4s serving populations of 100,000 or more to obtain NPDES permit coverage for their stormwater discharges. The Stormwater Phase II rule, initially promulgated in 1999, requires small MS4s in urban areas with populations of at least 50,000, as well as small MS4s designated by the EPA or a State, to obtain NPDES permit coverage for their stormwater discharges. Generally, Phase I MS4s are covered by individual permits and Phase II MS4s are covered by general permits. MS4 permits include terms and conditions that are adequate to meet the MS4 standard of reducing pollutant discharges from the MS4 to the "maximum extent practicable" and eliminating non-stormwater discharges to the MS4 and may also include other such conditions that the permitting authority deems appropriate to protect water quality.

MS4s often implement their stormwater management programs uniformly across their area without regard to the receiving water of a specific outfall. Thus, a change in jurisdictional status of some receiving waters is not expected to have an effect on costs or benefits, unless every outfall of a particular MS4 will now discharge to a newly non-jurisdictional water and the discharges never reach a jurisdictional water. Therefore, the agencies anticipate, at most, a minor impact to cost savings or water quality disbenefits from MS4s regulated under the EPA Phase I and Phase II stormwater rules.

4.4.4.5 Pesticide General Permit

An NPDES permit is required for point source discharges of biological pesticides, and chemical pesticides that leave a residue, to a "water of the United States." The EPA issues an NPDES Pesticide General Permit that is available in areas where the EPA is the NPDES permitting authority. The permit covers mosquito and other flying insect pest control, weed and algae pest control, animal pest control, and forest canopy pest control. Forty-six States and the U.S. Virgin Islands have NPDES permitting authority and have developed their own pesticide permits. NPDES permits are not required for nonpoint source discharges or for discharges to non-jurisdictional waters, and the Clean Water Act exempts discharges of agricultural stormwater or irrigation return flow from needing NPDES permits. The proposed rule does not itself establish any new requirements regarding the use of pesticides. As a result, the proposed rule does not change NPDES requirements regarding discharges of pesticides.

4.4.4.6 Water Transfers Rule

The NPDES regulations at 40 CFR 122.3(i) exempt water transfers from the requirement to obtain an NPDES permit and define a water transfer as an activity that conveys or connects two "waters of the United States" without subjecting the transferred water to an intervening industrial, commercial or municipal use. In order to constitute a "water transfer" under the regulation, "the water being conveyed must be a water of the United States prior to being discharged to the receiving waterbody. If the water that is being conveyed is not a water of the United States prior to being discharged to the receiving body, then that activity does not constitute a water transfer."[60] Therefore, to the extent the jurisdictional status of a water being conveyed as part of a water transfer is affected by a revision to the definition of "waters of the United States," the change could result in the activity no longer constituting a water transfer. If so, to the extent that a non-jurisdictional water is discharging pollutants into a jurisdictional water via a point source, it may require an NPDES permit. The impact of this change is unknown, and the agencies are soliciting comment on information regarding water transfers (*see* Preamble Section V.C.3).

4.4.4.7 Authority to Enforce Clean Water Act Section 402

Discharges from point sources to "waters of the United States" may be authorized through the Clean Water Act section 402 NPDES permit program. The EPA and States with authorized programs administer the permitting program. Unpermitted discharges or violations of NPDES permit requirements may be the subject of an enforcement action. Under the Clean Water Act, the EPA can take enforcement actions in both authorized States as well as in those States where the EPA is the NPDES permitting authority.

4.5 Clean Water Act Section 404: Discharge of Dredged or Fill Material

Section 404 of the Clean Water Act requires a permit for discharges of dredged or fill material from a point source into "waters of the United States" unless the discharge is associated with an activity exempt from 404 permitting requirements under Clean Water Act section 404(f). Regulated discharges include the redeposit other than incidental fallback of dredged material into "waters of the United States" and generally any fill material (*e.g.,* rock, sand, dirt) placed in "waters of the United States" which has the effect of replacing any portion of "waters of the United States" with dry land or changing the bottom elevation of any portion of "waters of the United States." Such discharges may be associated with activities such as site development, roadway construction, erosion protection, linear projects (such as utility crossings), shoreline stabilization, and restoration projects.

States and eligible Tribes can take over, or assume, the Clean Water Act section 404 permit program pursuant to Clean Water Act section 404(g) for certain "waters of the United States" within their jurisdiction (with the exception of waters over which the Corps must retain jurisdiction as specified in the Clean Water Act).[61] To date, three States (Florida, Michigan, and New Jersey) have been approved to administer an authorized section 404 program pursuant to section 404(g), consistent with the Clean Water

[60] *See* 73 FR 33697, 33699 (June 13, 2008).

[61] The Corps retains Clean Water Act section 404 permitting authority for all non-assumed waters as well as Rivers and Harbors Act section 10 permitting authority in all waters subject to Rivers and Harbors Act section 10. For example, States generally do not assume Clean Water Act section 404 authority over Tribal waters or waters in Lands of Exclusive Federal Jurisdiction. *See* 40 CFR 233.11(i).

Act, but in lieu of the Federal section 404 program administered by the Corps and the EPA (with the exception of waters over which the Corps must retain jurisdiction as specified in the Clean Water Act). Two States (New Jersey and Michigan) are actively administering such programs at this time.

4.5.1 Clean Water Act Section 404 Permits

Proposed activities are reviewed through a permitting regime process. An individual permit is required for potentially significant impacts. Individual permits are reviewed by the permitting agency (Corps or approved State or Tribe), which evaluates applications under a public interest review, as well as the environmental criteria set forth in the Clean Water Act section 404(b)(1) Guidelines, regulations that are established by the EPA. Alternatively, letters of permission, a type of individual permit, may be used to evaluate specific categories of activities with minor impacts that may not qualify for an existing general permit.

For most discharges that will have no more than minimal adverse effects to the aquatic environment, a general permit may be suitable. General permits are issued on a nationwide, regional, or programmatic basis for particular categories of activities. The general permit process allows certain activities to proceed with little or no delay, provided that the general or special conditions for the general permit are met. For example, a general permit can authorize minor road activities and utility line backfill. In the case of nationwide general permits, the Corps develops, issues, and reissues these permits every five years. The current nationwide permits were issued in 2021, and are set to expire in March 2026 unless reissued by the Corps.

4.5.2 Clean Water Act Section 404(g) State and Tribal Assumption

The Corps manages the day-to-day administration of the Clean Water Act section 404 permitting program in 48 States and all Tribal lands and U.S. Territories. Two States, New Jersey and Michigan, currently implement the section 404 program, pursuant to section 404(g), meaning that they have been approved by the EPA to administer a State dredged or fill program consistent with the Clean Water Act, but in lieu of the Federal section 404 program administered by the Corps and the EPA (with the exception of waters over which the Corps must retain jurisdiction as specified in the Clean Water Act).

About one-third of States have expressed some level of interest to the EPA regarding assumption of the Federal section 404 dredged and fill permit program. By assuming administration of the Clean Water Act section 404 regulatory program under section 404(g), a State or eligible Tribe takes on, or assumes, the primary responsibility of permitting discharges of dredged or fill material into certain "waters of the United States" within its jurisdiction.[62] States and Tribes may authorize discharges of dredged or fill material issuing individual permits or general permits, both of which are subject to a five-year authorization duration.

Prior to assuming the Clean Water Act section 404 permitting program, a State or Tribal program must be approved by the EPA to be consistent with, and no less stringent than, the requirements of the Clean Water Act and its implementing regulations. Assumed State or Tribal dredged or fill permit programs can

[62] The Corps retains CWA section 404 permitting authority for all non-assumed waters as well as RHA section 10 permitting authority in all waters subject to RHA section 10. For example, States generally do not assume CWA section 404 authority over Tribal waters or waters in Lands of Exclusive Federal Jurisdiction. *See* 40 CFR 233.11(i).

be broader in scope or more stringent than the Federal program, or both. States or Tribes with assumed section 404 permit programs can also regulate waters that under State or Tribal law that are not either "waters of the United States" or waters that are retained by the Corps. Where State programs have a broader scope of program coverage than what is required by the Clean Water Act section 404 program, the additional coverage is not considered part of the EPA-approved program.

A State or Tribe administering a section 404 program is responsible for permitting discharges of dredged and fill material, authorizing discharges under general permits, taking enforcement actions with respect to unauthorized discharges, and ensuring compliance with the terms and conditions of permits under the State's or Tribe's authority (U.S. EPA, 2025c). During the period from October 1, 2022, to September 30, 2023, Michigan's Department of Environment, Great Lakes, and Energy (MI EGLE) Water Resources Division took compliance enforcement actions on a total of 918 complaints and violations (MI EGLE, 2025). The EPA does not have additional detail regarding the number of penalties assessed or collected. During the period from July 1, 2022, to June 20, 2023, New Jersey's Department of Environmental Protection completed 736 investigations and issued 92 violations, conducted ten permit compliance inspections and issued eight violations documents, and issued ten penalty assessments and finalized five. Of the $317,077 penalties assessed, New Jersey collected $47,814 in penalties (New Jersey Department of Environmental Protection, 2023).

4.5.3 Potential Impacts to Clean Water Act Section 404(g) Assumption

The agencies are aware that some States have indicated that a change in Clean Water Act jurisdiction may be an incentive to develop their own State dredged and fill permitting program and may increase interest in 404 assumption. A change in scope of Clean Water act jurisdiction, therefore, might alter State interest in assuming the Clean Water Act section 404 program depending on the nature of their water resources and other State interests. The EPA is not aware of any eligible Tribes interested in assuming a Clean Water Act section 404 permit program. It is unknown how a change in scope of Clean Water Act jurisdiction may impact Tribal interest in assuming a Clean Water Act section 404 permit program.

Even without an assumed program, any State or Tribe may use State or Tribal authorities to regulate discharges of dredged or fill materials into any waters of their State or reservation waters. Where such waters are considered "waters of the United States," the Corps would also implement the section 404 program unless it was assumed by the State or Tribe.

Because 38 States, certain Territories, and at least three Tribes administer some form of a State or Tribally-authorized dredged and fill program, the change in the definition of "waters of the United States" may affect such programs insofar as these States, Territories, or Tribes would need to determine whether the scope of their program would or should change as a result of the change in Federal Clean Water Act jurisdiction. Thirty-three of those States have authority to regulate dredged and fill discharges for at least some inland waters, while the other five States and the Territories only have authority to issue State permits in coastal or tidal waters. Of those States with permitting authority in inland waters, 25 have permitting authority for isolated waters. Some of these State programs overlap with the Corps' dredged and fill permitting requirements under the Clean Water Act, and some address waters or activities that the Corps does not regulate. Following a change in the jurisdictional scope of the Clean Water Act, States with permitting authority may already regulate discharges of dredged and fill material into newly non-jurisdictional waters or may choose to expand their programs to address them.

The agencies are aware of several Tribes that have the authority to independently administer their own dredged or fill permitting program under Tribal law (*i.e.,* a non-assumed program), though the agencies are not aware of how many of these Tribes implement such a program. These Tribes may already address some features that would be non-jurisdictional under the proposed rule or may choose to expand their programs in order to address them. Other Tribes may choose to develop Tribal codes, ordinances, or programs to address waters that would be non-jurisdictional under the proposed rule.

4.5.4 Authority to Enforce CWA Section 404

Section 404 of the CWA regulates the discharge of dredged or fill material into "waters of the United States" through the permitting program administered by the Corps. Discharges that are not permitted or exempted can be the subject of an enforcement action. The EPA shares responsibility for CWA section 404 enforcement with the Corps except in States and Tribes which have assumed the program. CWA section 309 and CWA section 404 authorize the EPA, the Corps, and authorized States and Tribes to enforce against unpermitted discharges and violations of permits. For Corps issued permits, the details of the shared enforcement responsibility are found in the 1989 Memorandum of Agreement between the agencies (U.S. Department of the Army, 1989). Under the Memorandum of Agreement, the EPA is the lead enforcement agency for flagrant violations, repeat violators, and other cases where the Corps recommends that the EPA take an action. The State, Tribal and EPA responsibilities are identified in CWA section 404(h) and the regulations at 40 CFR 233.40.

The agencies anticipate that, if finalized, this proposed rule would result in a negligible change in regulatory violations. The agencies note that it is long-standing, well-established policy of economic analysis for the agencies to assume full compliance with the regulation; *see, e.g.,* Section 5.4.1 of the EPA's *Guidelines for Preparing Economic Analyses* (U.S. EPA, 2016).

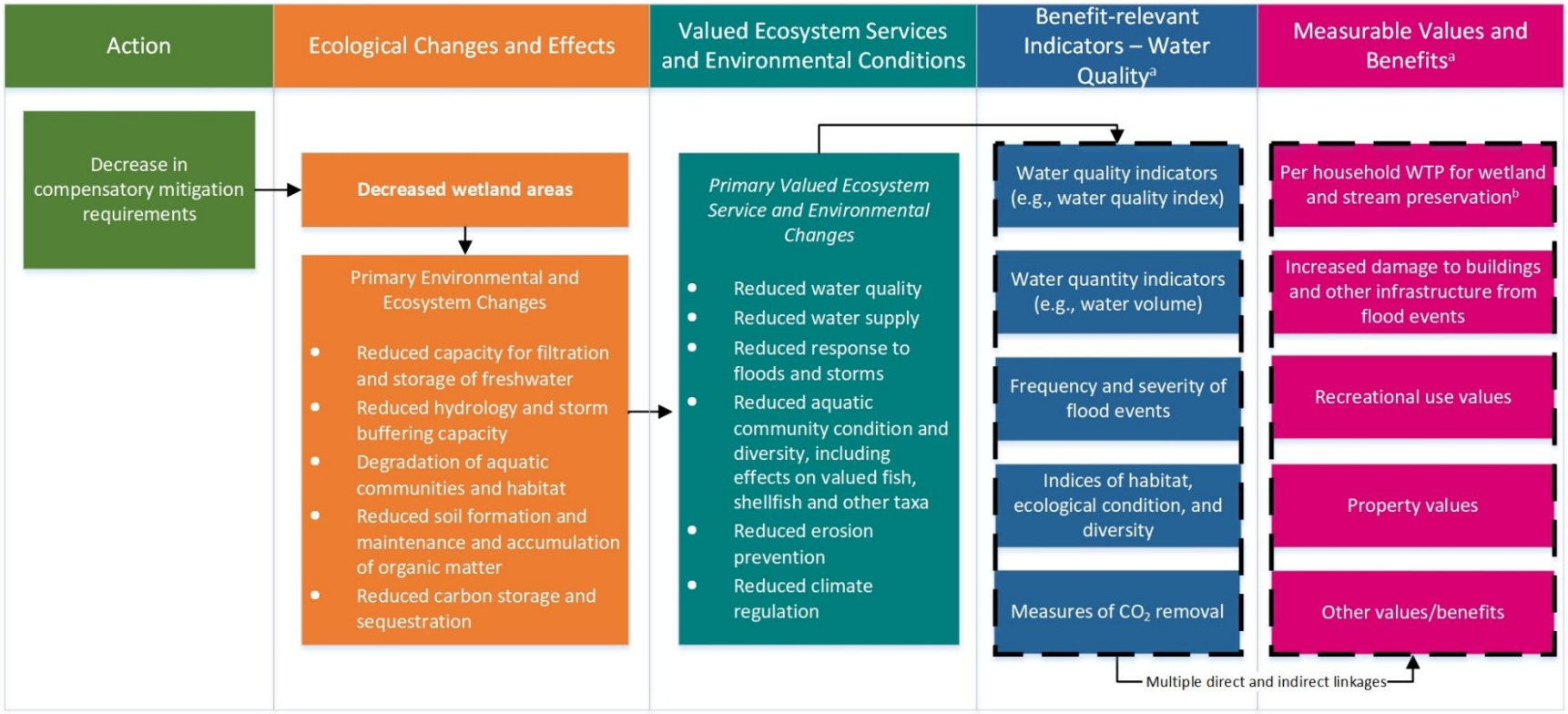
Figure 4-2 provides a conceptual value diagram of how decreased Federal mitigation requirements resulting from the proposed rule (on the left side of the diagram) can forgo public ecosystem service benefits derived from wetlands and streams (shown on the right) in certain circumstances. No such loss of benefits would be expected where States and Tribes have, or develop, commensurate requirements.

Wetlands provide a wide range of ecosystem services that are directly used or appreciated by people, including regulating, provisioning, cultural, and supporting ecosystem services (*e.g.,* Brander, Bräuer, et al., 2012; Brander, Wagtendonk, et al., 2012; Chaikumbung et al., 2016; De Groot et al., 2018; Ghermandi et al., 2010).

- *Regulating services* include flood protection (Ameli & Creed, 2019; Evenson et al., 2018; Lawrence et al., 2019; Martinez-Martinez et al., 2014; Tang et al., 2020; Taylor & Druckenmiller, 2022; Watson et al., 2016; Wu & A. Johnston, 2008), water purification (Ewel, 1997; Ghermandi et al., 2010), erosion control/sediment retention (Hopkins et al., 2018; Richardson et al., 2011), groundwater recharge (Cowdery et al., 2019; Harvey et al., 2004; Williams & Tufford, 2015), and carbon sequestration (Nag et al., 2017; Nahlik & Fennessy, 2016; Mitsch et al., 2013; Tangen & Bansal, 2020). Some of these services have been monetarily valued. *See* Lawrence et al. (2019) and Watson et al. (2016) for examples of monetized flood protection benefits via avoided property damages. Additionally, *see* Hopkins et al. (2018) for an example of monetized sediment-bound nitrogen retention benefits.

- *Provisioning services* relate to the food, water, and other resources provided by wetlands that are consumed. These services include the maintenance of fisheries and wildlife for consumption (and surface and groundwater supply).
- *Cultural services* include all non-material benefits obtained from ecosystems and can include recreational, educational, and spiritual benefits; preservation values (bequest, existence); and aesthetic beauty.
- *Supporting services* are necessary for the production of ecosystem services and include nutrient cycling and soil formation.

Figure 4-2: Conceptual value diagram of forgone public ecosystem service values from decreased compensatory mitigation requirements under the proposed rule



[a] Dashed lines indicate that there are multiple linkages from "valued ecosystem services and environmental conditions" to "benefit-relevant indicators" and from "benefit-relevant indicators" to "measurable values and benefits."

[b] Per household willingness to pay (WTP) for wetland and stream preservation reflects the total amount that a household would be willing to voluntarily pay (their total value) for all improvements that they understand to be caused by a given increase in wetland area/miles of streams, rather than go without those improvements. This is the conceptually correct measure of economic values for households. This total value, in theory, includes all other values that households realize from wetlands and streams, including recreational benefits, flood risk reduction, existence value of wildlife community, etc. The extent to which per household WTP values include all ecosystem services partly depends on how ecosystem services associated with wetlands/streams were described to respondents in the stated preference studies included in the meta-data.

4.5.5 Potential Approach to Quantify Economic Impacts

The proposed rule, if finalized, could likely reduce requirements to obtain CWA section 404 permits for certain activities in waters whose jurisdictional status will change, and for permittees to mitigate unavoidable impacts from those activities, where applicable. Absent any State, Tribal, or local programs regulating discharges to these waters under their own dredged/fill programs, developers and other project proponents affecting these non-jurisdictional waters may not take the same steps to avoid impacts to wetlands and other water resources, as compared to activities requiring a CWA section 404 permit in the baseline, nor would they need to demonstrate that they have minimized potential impacts to the maximum extent practicable. Further, the amount of mitigation required to offset impacts of activities may decrease due to the proposed rule, in the absence of any similar State, Tribal, or local requirements. At this stage, the agencies cannot reliably estimate whether the CWA section 404-related cost savings from avoided permit applications and mitigation may exceed forgone benefits of wetlands, and if so, the extent to which they may exceed.

Under the proposed rule, the agencies expect the number of Clean Water Act section 404 permits to decrease since certain features would no longer be included in the definition of "waters of the United States." The agencies expect the changes in turn to produce cost savings to project proponents from avoided permitting and mitigation activities, as well as forgone benefits from the avoided impact minimization and mitigation. The agencies are considering options for development of a quantitative economic analysis of the effects for the final rule analysis and solicit input on data and methods that could assist in that development. Notably, both the potential cost savings and forgone benefits are contingent on a number of factors, including decisions by States with respect to areas that would fall solely within State or Tribal and local jurisdiction.

The agencies are proposing an approach to monetizing Clean Water Act section 404 permit impacts for the final rule RIA that is generally similar to the approach in the 2020 NWPR Economic Analysis (U.S. EPA and Army, 2020), though in this case starting with the proposed geospatial analysis of the impact on jurisdictional waters. The agencies propose to apply the percent change in estimated jurisdictional waters to the relevant ORM2 permit data to identify the number of permits that might change Federal jurisdictional coverage as well as associated impacted mitigation, before estimating related permit and mitigation cost savings. Similarly, the agencies propose using the estimated impacted mitigation and wetlands valuation studies to estimate forgone benefits. To test the sensitivity of the assumptions of the NWPR approach, two alternatives could also be used. First, the agencies propose to overlay AJD data from ORM2 on the geospatial analysis of jurisdictional waters to estimate the percent change in jurisdictional waters. This percent change would be applied to relevant permit data, which is used to estimate cost savings and avoided ecosystem benefits. Second, the agencies could overlay permit data on the geospatial analysis to directly estimate the percent change in permits and permit activity. These last two approaches overlaying data on the geospatial analysis can provide a sensitivity analysis for estimating the impact on permit activity.

The agencies recognize that the cost savings and forgone benefits estimates associated with this rule are subject to numerous uncertainties. As detailed in Section 1.4, neither the ORM2 database nor NWI were developed to depict the jurisdictional extent of waters. The current jurisdictional regimes have only been in place for approximately 2 years, restricting the agencies' ability to appropriately estimate State level permit activity. Furthermore, the agencies lack an up-to-date source for current permit cost data. The

agencies solicit comment on additional uncertainties with estimating the cost savings and forgone benefits of this rule, as well as additional data or approaches for addressing and evaluating these uncertainties.

In the NWPR analysis, the agencies used the ORM2 database to identify which permits might change Federal jurisdictional coverage through Cowardin codes and other relevant database fields. The agencies could employ this same approach but acknowledge there are limitations in the ORM2 database that would make this challenging, such as the lack of specific wet season data for satisfying continuous surface connection. As proposed in Section 3.3, the agencies could use the estimated percent change in impacted waters used for monetization as derived from the GIS analyses of the NWI, NHD and other data described in the sections above. Alternatively, the agencies could attempt to account for this via other methods, such as a crosswalk of aquatic resource coordinates in the ORM2 database with the NWI database.

In the NWPR analysis, the agencies quantified permit data at the State level to tie changes in permit activity to State level mitigation costs. At this time, the baseline only includes an approximately 2-year timeframe, and as such, the ORM2 database does not contain a representative sample size for the nation. For example, the current dataset contains zero relevant 404 permits for ten States and another eleven States have fewer than ten relevant 404 permits. The agencies solicit comment on whether this would be an adequate sample size for analysis, and whether States may have other information that could assist in the analysis.

In addition, the agencies propose estimating forgone benefits using a wetlands valuation meta-analysis of 21 observations from 11 studies as was performed under the NWPR analysis. However, the agencies intend to incorporate additional studies, as well as update the methodological approaches used in the meta-analysis.

Lastly, the agencies previously applied a State-level wetland benefits quantification analysis using the valuation meta-analysis in the NWPR economic analysis. The agencies propose to compare this approach to more recent distance-based approaches that may better estimate the effect of distance on household valuation of wetlands. For example, under a State-level approach, a household in Texas will value all the wetlands in Texas. Under a distance approach, the corresponding household would only value wetlands within a certain distance of its location. This may provide a more accurate assessment of valuation at a local level for the final rule.

Several potential overall effects on the CWA section 404 permit program are possible based on the change in CWA jurisdiction under the proposed rule, if finalized:

- **Transfers:** Projects may shift away from areas containing waters that require 404 permits to areas with waters that would not be jurisdictional under the proposed rule (*e.g.,* non-adjacent wetlands and ephemeral features). All else being constant, profit-maximizing entities will aim to avoid regulatory requirements and the associated costs. Therefore, the agencies expect that following finalization of the revised definition of "waters of the United States," projects affecting "waters of the United States" to decrease and projects that affect only waters that are non-jurisdictional to increase. The potential change in the number of projects affecting both jurisdictional and non-jurisdictional waters is uncertain. Depending on State, Tribal, or local requirements, in cases where the project would not be subject to a Federal permit, the developer may elect to not go through the same steps to minimize impacts and the length or acres of affected non-jurisdictional waters could increase as compared to

the baseline. Further, as a result of projects shifting to non-jurisdictional waters, the number of projects requiring avoidance measures would decrease. However, developers may still practice avoidance measures for projects for which such actions are in the developer's best interest. While there are likely limited situations where profit-maximizing entities would continue to practice avoidance absent of being forced, the net change in impact area reductions resulting from avoidance measures is uncertain.

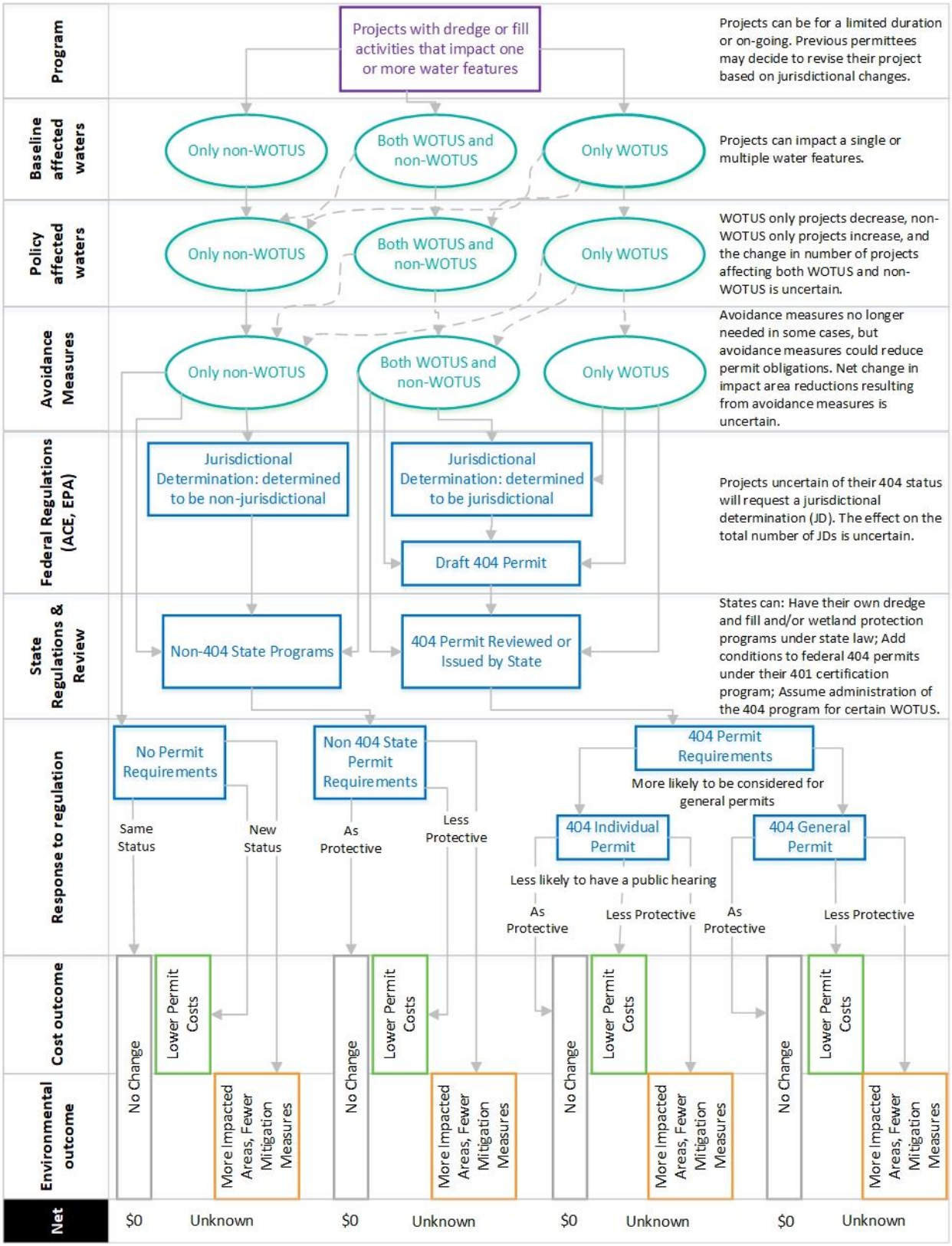
- **Lower permit and administrative costs:** Several possible scenarios would result in reduced permit costs. When projects involve only non-jurisdictional waters and no State or Tribal permits are required, permit burden (including any construction delays) would be reduced at the Federal level, for regulated entities, and for States and Tribes in terms of reduced CWA section 401 certification reviews. Permit burden would also be reduced when States or Tribes implement less protective regulations for waters that are not "waters of the United States." For projects where the area of jurisdictional waters would be reduced as a result of the change in the definition of "waters of the United States," permit burden may also be reduced because of a shift from individual permits to general permits, and fewer individual permits that may receive public hearings. The agencies anticipate that the Corps would generally incur reduced administrative actions under the proposed rule, if finalized, associated with the decreased permitting workload. States and Tribes would thereby also experience a decrease in workload from conducting fewer CWA section 401 certification reviews on Corps-issued permits. In addition, the regulated community would see reduced workload in not needing to go through the permit process. The agencies are unable to predict if the workload associated with issuing AJDs would increase or decrease as a result of the proposed change to the definition of "waters of the United States," for the reasons discussed before.

The Corps is usually the permitting authority for CWA section 404 permits. The States of Michigan and New Jersey currently administer the CWA section 404 permitting program for certain waters in their States and may experience similar changes, or if they maintain regulation of waters whose status as a "water of the United States" would change under their programs there may be no changes in their administrative costs. Specific changes in Corps administrative costs would include: responding to a change in the number of requests for AJDs; an overall decrease in workload-related tasks such as permit actions, consultations, and compliance and enforcement actions; improved efficiency in issuing AJDs due to the revised definition of "waters of the United States" The change in the number of AJDs is uncertain; the Corps may experience an increase in AJDs if applicants request the certainty associated with an AJD, as opposed to a PJD, or a decrease in the number of AJDs as applicants may be able to estimate jurisdiction more readily. However, the agencies would also likely need to provide program management, training, and compliance oversight associated with administering changes to the program, especially in the near term.

- **Forgone benefits:** Establishing non-adjacent wetlands, ephemeral streams, and certain ditches, for example, as non-jurisdictional, would place any potential regulation of these features solely in the hands of State and Tribal governments. States that currently do not regulate these waters or choose to reduce or eliminate regulation of these waters could see larger impact areas from projects (from eliminating the minimization requirements), fewer mitigation measures, and greater wetlands acreage losses than they currently experience under Federal regulations. Additionally, potential impacts of the definitional changes on the types of 404 permits issued (*i.e.*, higher likelihood for general permits;

likely fewer individual permits with public hearings and more individual permits with letters of permission) could result in decreased regulation of projects affecting non-jurisdictional waters. The impacts to these waters without avoidance, minimization, or compensation would result in forgone benefits over time, including habitat support, recreation, and aesthetic benefits.

Figure 4-3: Potential Effects of the Proposed Rule, if Finalized, on CWA Section 404 Program



5 Sector Impact Analysis

The agencies have assessed potentially impacted sectors. This assessment seeks to provide insight into the types of entities that have historically sought Clean Water Act section 404 permits, incurred permitting and mitigation costs in the baseline, and may see regulatory relief when they conduct future activities that affect waters no longer jurisdictional under the proposed rule's definition of "waters of the United States."

As discussed in the Introduction and in Section 3, the agencies lack sufficient information to identify specific water resources that would experience a jurisdictional change and the different regulated activities that may be affected under the proposed rule. However, the agencies reviewed available information on the type of entities that are permitted under the Clean Water Act section 404 program, with the purpose of identifying sectors with entities that may be affected by a change in jurisdictional status.

During the development of the 2023 Rule, the agencies conducted an extensive review of national section 404 permit data from ORM2 for the 10-year period of 2011 through 2020 to identify North American Industrial Classification System (NAICS) codes corresponding to entities that obtained section 404 permit coverage during that period (U.S. EPA and Army, 2022). The ORM2 database does not track the NAICS category of the permit applicant. The agencies identified the general category of work based on the listed work type, further refining the sector based on keywords in the project name and project description. The agencies first categorized the sector (public, non-public), then for non-public categories, the agencies assigned one or more NAICS code, again, based on the work type, project name, and project description. Some permits provided enough information to assign a single 6-digit NAICS code. Others did not provide enough information to be able to assign a single 6-digit NAICS code, and in these cases the agencies assigned a broader industry (one or more 2- to 5-digit NAICS).[63]

The results of that analysis showed 404 permits for a wide range of sectors (*e.g.,* mining, residential and commercial development, the energy sector, and public sectors such as State departments of transportation, county governments, stormwater management agencies, and public utilities). The top sectors in terms of the largest number of permits obtained included: the public sector, Highway, street, and bridge construction (NAICS 237310), Pipeline transportation (NAICS 486), Dredging (NAICS 237990), Marinas (NAICS 713930), Oil and gas extraction (NAICS 2111), Airport (NAICS 488119), Residential building construction (NAICS 2361), Electric power transmission, control, and distribution (NAICS 22112), and Commercial building construction (NAICS 2362). The agencies expect the profile of activities covered by 404 permits in the baseline for this proposed rule to be very similar.

The agencies expect that the decrease in future Clean Water Act section 404 permit obligations could result in cost savings for permittees, unless States continue to require permits for waters that would no longer be jurisdictional under the proposed rule. However, the agencies are not able to identify the permits and mitigation activities that would no longer be required under the proposed rule and, therefore, attribute cost savings due to the proposed rule changes to specific permits and the associated sectors.

[63] For example, the agencies classified permits identified as single-family residential development, which could fall into either NAICS 236115 or NAICS 236117, as NAICS 2361 Residential Building Construction. The agencies classified permits identified as mining, with no mention of oil or gas but no other material listed, as NAICS 212 Mining (except oil and gas).

While the nature of the prior analysis is such that it is difficult to determine which sectors are more likely to experience a change in permits, the analysis may provide some context based on the wetland types listed in the permit data. For example, of the top ten identified sectors, residential building construction (NAICS 2361) and commercial building construction (23622) both exhibit close to 60% of permits with wetlands classified as palustrine. If this type of wetland is more likely to be affected by the proposed rule, then the above sectors may be more likely to experience a change in permits. Similarly, marinas (NAICS 713930) and dredging (NAICS 237990) are sectors that have 3% of permits with wetlands classified as palustrine, so under this assumption might be less likely to experience a change in permits. However, the agencies are not able to make this determination based on the available data nor this prior assessment.

Due to the nature of the data used in this assessment, differentiation between small and large entities is not feasible. Any cost savings attributable to the proposed rule would be expected to extend to the universe of small entities required to obtain Clean Water Act section 404 permit coverage in approximately equal proportion of their overall section 404 regulatory burden for permits and waters with changes in jurisdictional status.

The proposed rule will not impose direct requirements on entities of any size. Instead, this rule establishes a definition of "waters of the United States," a foundational term in determining the scope of key Clean Water Act programs. The sector analysis provided herein is used to describe the potential impacts to entities that may be affected by a change in jurisdictional status under the proposed rule.

If the agencies are able to quantify waters and permits affected by the revised definition for the final rule, then the agencies may be able to update the analysis to identify the subset of sectors associated with changing permit requirements and quantify cost savings. However, even then, the agencies note that the amount of meaningful information within the work type, project name, and project description fields that can be used to inform the NAICS code assignment varies considerably across permits, adding uncertainty to the characterization of affected entities and subsequent assignment of the cost savings to the correct entity. For many categories such as dredging and road construction, it does not identify the sector category of the actual project owner. A construction firm conducting work categorized under the NAICS category 237310 for highway, street, and bridge construction is likely performing the work for another entity that owns the land, and any section 404 permitting cost savings for the road construction would likely be passed directly through to the property owner.

5.1 Potential Impacts to Small Business

The Regulatory Flexibility Act (RFA) of 1980, as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996, requires Federal agencies to consider the impact of their rules on small entities, to analyze alternatives that minimize those impacts, and to make their analyses available for public comments.

The RFA is concerned with three types of small entities: small businesses, small nonprofits, and small government jurisdictions. The RFA describes the regulatory flexibility analyses and procedures that must be completed by Federal agencies unless they certify that the rule, if promulgated, would not have a significant economic impact on a substantial number of small entities. This certification must be supported by a statement of factual basis, *e.g.,* addressing the number of small entities affected by the proposed action, estimated cost impacts on these entities, and evaluation of the economic impacts.

The agencies certify that this proposed action will not have a significant economic impact on a substantial number of small entities under the RFA. The small entities that may be subject to this action are largely those entities whose activities are directly covered by the CWA sections 311, 402, and 404 programs. The proposed rule is expected to result in fewer entities subject to these programs, and a reduced regulatory burden for many of the entities that will still be subject to these programs. As a result, small entities subject to these regulatory programs are unlikely to suffer adverse impacts as a result of regulatory compliance. The agencies do not expect the cost of the proposed rule to result in significant adverse impact to a substantial number of small entities.

Clarifying the scope of CWA regulatory jurisdiction over waters in the proposed rule is anticipated to reduce the ecosystem services provided by some waters, albeit indirectly. Regardless, some entities could be adversely impacted. Some business sectors that depend on habitat, such as those catering to hunters or anglers, or that require water treatment to meet production needs, would likely experience a greater impact relative to other sectors. Potential changes in ecosystem services are uncertain but may be dispersed over wide geographic areas, thereby limiting the significance of these impacts on these business sectors. In addition, States and Tribes may already address waters potentially affected by a revised definition, thereby reducing forgone benefits. States and Tribes have inherent sovereign authority to establish more protective standards or limits than the Federal Clean Water Act, and many, though not all, Clean Water Act programs can be authorized or assumed under State or Tribal law. In addition, States and Tribes may implement, establish, or modify their own programs under State or Tribal law to manage and regulate "waters of the State" or "waters of the Tribe" outside of Clean Water Act delegated authorities.

5.2 Small Entity Engagement

This proposed rulemaking would clarify the definition of "waters of the United States" in accordance with the Supreme Court's decision in *Sackett* v. *EPA.* The agencies held a Small Entity stakeholder listening session in spring 2025 to hear recommendations on key topics and solicit information on how a rulemaking to revise the definition of "waters of the United States" could impact small entities. The small entity stakeholders requested a clear definition of "waters of the United States" to provide regulatory certainty for small entities, increase innovation, and inspire small business market diversity. The stakeholders shared real world examples of how regulation can slow productivity, increase cost to do business, and impact opportunity cost through approved jurisdiction delays. The feedback received was considered and the proposed rule attempts to clearly define "waters of the United States" to reduce the need for costly expert and legal reviews. Similarly, the proposed rule clarifies that the agencies bear the burden to demonstrate that a water resource is jurisdictional and is not excluded. The agencies believe that this would provide regulatory relief to small entities working in good faith to comply with the CWA.

5.3 Potential Impacts to Small Entities

The proposed rule would affect those entities regulated under the CWA that impact waters that would no longer be jurisdictional. Small businesses, small not-for-profits organizations, and small government jurisdictions that would be undertaking projects near certain wetlands, near or in ephemeral streams, across State borders, and in upland ditches would be more likely to be indirectly affected by a change in the definition of "waters of the United States" due to avoided permitting and mitigation activities, as well as forgone benefits from the avoided impact minimization and mitigation. A precise estimate of the number of small entities potentially impacted by the proposed rule is difficult to determine because the

best available data is the Corps' permit data which has geospatial and stakeholder type limitations. The Corps data do not reflect the universe of areas where jurisdiction may be found across the entire country, only reflect the jurisdictional requests received from the public, and do not contain the data necessary to identify permit applicants that may be categorized as small entities (*e.g.,* type of entity or NAICS category of the permit applicant). Table 5-1 provides average annual data on Corps-issued permits by permit type and entity type for the 2020-2024 timeframe.

Table 5-1: Corps Permits by Type and Entity type (2020-2024)

Permit Type	Permits	Entities[1]
Nationwide Permits	52,695	27,404
Regional General Permits	8,303	5,877
Programmatic General Permit	1,324	1,185
Standard Permits	2,557	2,510
Letter of Permission	496	460
Total	**65,375**	**36,822**

Source: ORM2 Database

1. Total does not equal the sum across permit types due to some entities receiving more than one permit of different types.

The agencies previously conducted an extensive review of section 404 permit data from ORM2 for the 10-year period of 2011 through 2020 to identify North American Industrial Classification System (NAICS) codes[64] corresponding to entities that obtained section 404 permit coverage during that period (U.S. EPA and Army, 2022). The agencies expect the profile of activities covered by 404 permits in the baseline for this proposed rule to be very similar.

Table 5-2 combines this sector evaluation with information about small entities in each sector from the 2022 Statistics of U.S. Businesses and 2022 Census of Governments. While this does not shed light on which small entities might be affected or the magnitude of potential cost savings, it may provide a broad perspective of the potentially affected sectors and their corresponding share of small entities.

Table 5-2: Percentage of Small Entities in Potentially Affected Top Sectors

NAICS	Industry	SBA Size Standard	Total Entities	Small Entities	% Small Entities
2111	**Oil and Gas Extraction**				
211120	Crude Petroleum Extraction	1,250 Employees	3,425	3,395	99%
211130	Natural Gas Extraction	1,250 Employees	841	812	97%
22112	**Electric Power Transmission, Control, and Distribution**				
221121	Electric Bulk Power Transmission and Control	950 Employees	76	58	76%
221122	Electric Power Distribution	1,100 Employees	1,290	1,223	95%
2361	**Residential Building Construction**				
236115	New Single-Family Housing Construction (except For-Sale Builders)	$45M Revenue	59,293	58,947	99%

[64] The North American Industry Classification System (NAICS) is the standard used by Federal statistical agencies in classifying business establishments. NAICS codes divide the economic activity into 20 sectors based on production activity. The NAICS codes have a hierarchical structure with the first two digits identifying the sector and the subsequent numbers identifying subsectors and specific activities.

NAICS	Industry	SBA Size Standard	Total Entities	Small Entities	% Small Entities
236116	New Multifamily Housing Construction (except For-Sale Builders)	$45M Revenue	3,701	3,375	91%
236117	New Housing For-Sale Builders	$45M Revenue	11,761	11,274	96%
236118	Residential Remodelers	$45M Revenue	132,711	132,488	100%
2362	**Commercial Building Construction**				
236210	Industrial Building Construction	$45M Revenue	2,999	2,832	94%
236220	Commercial and Institutional Building Construction	$45M Revenue	37,402	35,328	94%
237310	**Highway, Street, and Bridge Construction**	**$45M Revenue**	**8,441**	**7,699**	**91%**
237990	**Other Heavy and Civil Engineering Construction**	**$45M Revenue**	**4,533**	**4,363**	**96%**
486	**Pipeline Transportation**				
486110	Pipeline Transportation of Crude Oil	1,500 Employees	65	40	62%
486210	Pipeline Transportation of Natural Gas	$41.5M Revenue	101	54	53%
486910	Pipeline Transportation of Refined Petroleum Products	1,500 Employees	67	45	67%
486990	All Other Pipeline Transportation	$46M Revenue	12	3	25%
488119	**Other Airport Operations**	**$40M Revenue**	**1,052**	**954**	**91%**
713930	**Marinas**	**$11M Revenue**	**3,440**	**3,319**	**96%**
92	**Public Sector**				
	Counties	50,000 Population	3,031	2,097	69%
	Towns & Municipalities		35,705	34,748	97%
	Special Districts		39,555	38,495	97%
	All Listed Industries		**349,501**	**341,549**	**98%**

Data on small entities from 2022 Statistics of U.S. Businesses and 2022 Census of Governments. Size standards come from the SBA Table of Size Standards

5.4 Anticipated Changes in Small Entity Burden

If finalized, the proposed rule would reduce the overall burden on small entities. Specifically, the proposed rule would indirectly reduce small entities' regulatory burdens by eliminating the need for permits for deregulated waters (or enabling them to obtain a general permit with reduced impacts), reduce the need for legal and field experts, reduce compensatory mitigation costs, and reduce costs due to jurisdictional determination and permit delays. In addition to indirect burden reductions, small entities may also see benefits from this proposed rulemaking due to increased opportunities, and shorter delays for AJDs for projects still requiring a permit due to less demand for AJDs and clearer regulatory text. For example, one small business developer estimated $17,500/month incurred cost for a delayed approved jurisdictional determination for a 50-lot project for a small business contractor.[65] For permits issued in FY 2024, the time between when the Corps received a complete permit application and issued a permit averaged 56 days for nationwide permits and 254 days for standard individual permits, with overall timeframes varying depending on the complexity of the project and the type of permit required. Table 5-3

[65] *See Summary Report of Pre-Proposal Listening Sessions for WOTUS Notice: The Final Response to SCOTUS*, available in the docket (Docket ID No. EPA-HQ-OW-2025-0322) for the proposed rule.

reports national average section 404 permit costs for individual and general permits. These costs could also be used to estimate cost savings for small entities that face a change in jurisdictional waters. Further information about compensatory mitigation can be found in Section 4.5. The agencies are soliciting additional information on permit delays and associated costs due to delays. However, small entities would be expected to see a slight short-term increased regulatory burden to become familiar with any final rule issued by the agencies. It is the agencies' general practice to provide training materials to aid in rule familiarization.

Table 5-3: National Average Section 404 Permit Costs

Permit Type	Low Corps NWP (2024$)	High Corps NWP (2024$)
Individual	$18,800	$45,200
General	$5,600	$18,800

Note: Costs based on a 2020 Corps analysis to calculate incremental permit application costs associated with the replacement of Nationwide Permit 26 with a suite of new and modified nationwide permits in the year 2000, updated to 2024$ (U.S. EPA and Army, 2015).

States and Tribes have inherent sovereign authority to establish more protective standards or limits than the Federal CWA, and many, though not all, CWA programs can be authorized or assumed under State or Tribal law. In addition, States and Tribes may implement, establish, or modify their own programs under State or Tribal law to manage and regulate "waters of the State" or "waters of the Tribe" outside of CWA delegated or assumed authorities. The proposed rule would preserve the exclusive authority of States and Tribes over more waters than under previous definitions of "waters of the United States." The summary in Section 2 describes existing State and Tribal authorities and programs, recognizing that under the pre-2015 regulatory regime and the Amended 2023 Rule, States and Tribes may already address waters potentially affected by the revised definition, may want to develop programs to cover certain waters the CWA does not regulate, and may choose to leave some waters unregulated. Further information about the anticipated impacts to each of the CWA programs can be found in Section 4 of this document.

5.5 Entities Potentially Impacted by Changes in Ecosystem Services under the Proposed Rule

Clarifying the scope of Federal jurisdiction under the CWA may result in a reduction in the ecosystem services provided by some waters if they are not covered by States or Tribes, such as less habitat, increased flood risk, and higher pollutant loads. This may be temporary as States regain the ability to regulate these waters under their respective jurisdictions. As a result, both public and private entities that rely on these ecosystem services may be adversely impacted, albeit indirectly. For example, loss of wetlands can increase the risk of, but does not guarantee, property damage due to flooding, and other contextual factors like the presence of flood protection infrastructure may matter significantly more. To predict if there will be significant impacts to any given sector it is important to assess which sectors may be more impacted by changes in ecosystem services. The agencies solicit comment on additional businesses, services, sectors, and recreational opportunities impacted by changes in ecosystem services not captured in this analysis.

Increases in flood risk may occur in the watersheds where the wetland losses occur but are not expected to impact a specific group or business sector. Habitat loss may affect recreational activities such as hunting, fishing, and bird watching, depending on the type of ecosystem and species affected (*e.g.,* NAICS Code: 114210- Hunting and Trapping). Changes in water quality may also impact recreational activities and,

indirectly, those businesses and localities that support these activities (*e.g.,* NAICS Code: 423910-Sporting and Recreational Goods and Supplies Merchant Wholesalers). In addition, increased pollutant loadings, should they occur, may lead to higher drinking water treatment costs for localities and businesses that require water treatment for their production process. Higher sediment loads impact downstream communities by increasing the need for dredging to maintain reservoir capacity and for navigation, and by potentially shortening the useful life of infrastructure damaged by increased scouring.

Potential changes in ecosystem services will be project-specific and, therefore, difficult to reasonably predict. However, because of the deregulatory nature of this proposed rule, and its intent to grant States more meaningful oversight of waters within their jurisdiction, the agencies anticipate subsequent State action may address at least a portion of any adverse effects on ecosystems, habitats, and their enjoyment by recreational stakeholders. Based on the results from three case study analyses for NWPR (U.S. EPA and Army, 2020), it is likely that many of these reductions in services will be small, infrequent, and dispersed over wide geographic areas, thereby limiting the significance of the financial impacts on small organizations and governments and small entities within specific business sectors. In addition, the rule's intent for States and Tribes to individually address waters within their jurisdiction potentially affected by the revised definition may reduce forgone benefits.

5.6 Entities Potentially Impacted by Changes in Mitigation Demand under the Proposed Rule

An economic sector that may be indirectly impacted by the proposed rule are mitigation banks, and companies that provide restoration services. Because fewer waters would be subject to the CWA regulation under the proposed rule than are subject to regulation under the Amended 2023 Rule or pre-2015 regulatory regime, there would likely be a reduction in demand for mitigation and restoration services under the section 404 permitting program. Assessing impacts to this sector is problematic, however, because this sector lacks a precise Small Business Administration small business definition, and many of the businesses that fall within this sector are also classified under various other North American Industry Classification System (NAICS) categories. Mitigations banks are often limited liability companies that have been authorized by a State or Federal agency to generate credits that can be used to meet the demand for mitigation, driven by State and Federal regulations. Restoration services are businesses that provide the range of services needed for mitigation efforts. Their customers can be mitigation banks or permittees that meet their regulatory requirements through on-site or off-site mitigation. Although primarily a business sector, there are mitigation banks owned and managed by non-profit organizations and government entities, such as State transportation departments. Businesses involved in mitigation banking and providing ecological restoration services are not contained within a single economic sector as defined by the North American Industrial Classification System (NAICS). A survey of this restoration sector conducted in 2014 showed that many of the businesses involved in this sector fall into five categories: Environmental Consulting (NAICS: 541620); Land Acquisition (NAICS: 237210); Planning, Design, and Engineering (NAICS: 541320, 541330); Site Work (earth moving, planting) (NAICS: 237210, 237990); and Monitoring (BenDor et al., 2015).

Furthermore, impacts to this sector would not be the direct result of these businesses complying with the proposed rule, rather, they would be the indirect result of other entities no longer being required to mitigate for discharges of dredged or fill material into waters and wetlands that would no longer be jurisdictional under the proposed rule. In addition, potential impacts would be lessened when accounting

for State and Tribal dredged and fill programs that would necessitate the purchase of mitigation credits or through the actions of States and Tribes that choose to regulate discharges of dredged or fill material into their wetlands under State or Tribal law.

Assessing potential impacts to the restoration sector is challenging given that this sector falls under a range of potential NAICS and associated SBA small business definitions. Existing data on 404 permits maintained by the agencies does not identify sufficient ownership and business arrangement information to determine the economic profile of mitigation bank ownership, nor does it identify specific entities involved in performing restoration work. In addition, States and Tribes may require mitigation for impacted waters no longer covered under the proposed rule, thereby reducing the future change in mitigation demand.

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