



DEPARTMENT OF DEFENSE

Department of the Army, Corps of Engineers

33 CFR Part 328

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 120

[EPA-HQ-OW-2021-0328; FRL-6027.4-02-OW]

Notice of Public Meetings Regarding “Waters of the United States”; Establishment of a Public Docket; Request for Recommendations

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

ACTION: Notice; announcement of public meeting dates and solicitation of pre-proposal feedback.

SUMMARY: On June 9, 2021, the U.S. Environmental Protection Agency (EPA) and the Department of the Army announced their intent to revise the definition of “waters of the United States.” This process includes two rulemakings: a foundational rule to restore longstanding protections, and a second rulemaking process that builds on that regulatory foundation. The forthcoming foundational rule will propose to restore the regulations defining “waters of the United States” that were in place for decades until 2015, with updates to be consistent with relevant Supreme Court decisions. The agencies will also pursue a separate, second rulemaking process that further refines and builds upon that regulatory foundation. The agencies intend to engage with state and tribal co-regulators and the public to inform these two rulemakings. The agencies are committed to learning from the past regulatory approaches—the pre-2015 regulations and guidance, the 2015 Clean Water Rule, and the 2020 Navigable Waters Protection Rule—while engaging with stakeholders and crafting a refined definition of “waters of the United States.”

This document includes a schedule for initial public meetings to hear from interested stakeholders on their perspectives on defining “waters of the United States” under the Clean Water Act and how to implement that definition as the agencies pursue this process. The agencies are also accepting written recommendations from members of the public and are planning further opportunities for engagement. These opportunities will include 10 geographically focused roundtables that will provide for broad, transparent, regionally focused discussions among a full spectrum of stakeholders.

DATES: Written recommendations must be received on or before **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**. The agencies will hold public meetings on the following dates: August 18, August 23, August 25, August 26, and August 31, 2021. Please refer to the SUPPLEMENTARY INFORMATION section for additional information on these meetings.

ADDRESSES: You may send written feedback, identified by Docket ID No. EPA-HQ-OW-2021-0328, by any of the following methods:

- Federal eRulemaking Portal: <https://www.regulations.gov/> (our preferred method).
Follow the online instructions for submitting written feedback.
- Email: OW-Docket@epa.gov. Include Docket ID No. EPA-HQ-OW-2021-0328 in the subject line of the message.

Instructions: All submissions received must include Docket ID No. EPA-HQ-OW-2021-0328. Written feedback received may be posted without change to <https://www.regulations.gov/>, including any personal information provided. Out of an abundance of caution for members of the public and our staff, the EPA Docket Center and Reading Room are closed to the public, with limited exceptions, to reduce the risk of transmitting COVID-19. Our Docket Center staff will continue to provide remote customer service via email, phone, and webform. We encourage the public to submit written feedback via <https://www.regulations.gov/> or email, as there may be a delay in processing mail and faxes. Hand deliveries and couriers may be received by scheduled

appointment only. For further information on EPA Docket Center services and the current status, please visit us online at <https://www.epa.gov/dockets>.

FOR FURTHER INFORMATION CONTACT: Damaris Christensen, Oceans, Wetlands and Communities Division, Office of Water (4504-T), Environmental Protection Agency, 1200 Pennsylvania Avenue NW, Washington, DC 20460; telephone number: (202) 564-2281; email address: *WOTUS-outreach@epa.gov*, and Stacey Jensen, Office of the Assistant Secretary of the Army for Civil Works, Department of the Army, 108 Army Pentagon, Washington, DC 20310-0104; telephone number: (703) 459-6026; email address: *usarmy.pentagon.hqda-asa-cw.mbx.asa-cw-reporting@mail.mil*.

SUPPLEMENTARY INFORMATION:

I. Background

“Waters of the United States” is a threshold term in the Clean Water Act that establishes the geographic scope of federal jurisdiction under the Act. Many Clean Water Act programs, including sections 303 (Water Quality Standards and Total Maximum Daily Loads), 311 (oil spill programs), 401 (water quality certifications), 402 (pollutant discharge permits), and 404 (dredged and fill material discharge permits), address “navigable waters,” defined in the statute as “the waters of the United States, including the territorial seas.” Since the 1970s, the U.S. Environmental Protection Agency (EPA) and the U.S. Department of the Army (“Army,” collectively “the agencies”) have defined “waters of the United States” by regulation. The Navigable Waters Protection Rule (NWPR), the agencies’ most recent regulation revising the definition of “waters of the United States,” was published in the *Federal Register* on April 21, 2020 (85 FR 22250). The NWPR defines categories of waters that are jurisdictional and categories that are not jurisdictional. Eighty-one parties have filed fifteen complaints challenging the NWPR in eleven different district courts.

II. Review of the NWPR

On January 20, 2021, the President signed Executive Order 13990 directing federal agencies to review rules issued in the prior four years that are or might conflict with the policy stated in the order. The order provides that “[i]t is, therefore, the policy of my Administration to listen to the science; to improve public health and protect our environment; to ensure access to clean air and water; to limit exposure to dangerous chemicals and pesticides; to hold polluters accountable, including those who disproportionately harm communities of color and low-income communities; to reduce greenhouse gas emissions; to bolster resilience to the impacts of climate change; to restore and expand our national treasures and monuments; and to prioritize both environmental justice and the creation of the well-paying union jobs necessary to deliver on these goals.” 86 FR 7037, section 1 (published January 25, 2021, signed January 20, 2021). The order “directs all executive departments and agencies (agencies) to immediately review and, as appropriate and consistent with applicable law, take action to address the promulgation of Federal regulations and other actions during the last four years that conflict with these important national objectives, and to immediately commence work to confront the climate crisis.” *Id.* at 7037, section 2(a). “For any such actions identified by the agencies, the heads of agencies shall, as appropriate and consistent with applicable law, consider suspending, revising, or rescinding the agency actions.” *Id.* The order also specifically revoked Executive Order 13778 of February 28, 2017 (Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the “Waters of the United States” Rule), which had initiated development of the agencies’ two-step process to repeal and replace the 2015 Clean Water Rule, culminating in promulgation of the NWPR.

In conformance with Executive Order 13990, the agencies reviewed the NWPR and have decided to initiate two new rulemakings. The agencies considered the following factors in making this decision, including but not limited to: the text of the Clean Water Act; Congressional intent and the objective of the Clean Water Act; Supreme Court precedent; the current and future harms to the chemical, physical, and biological integrity of the nation’s waters due to the NWPR;

concerns raised by stakeholders about the NWPR, including implementation-related issues; the principles outlined in the Executive Order; and issues raised in ongoing litigation challenging the NWPR. EPA and the Army have substantial and legitimate concerns that the NWPR did not appropriately consider the effect of the revised definition of “waters of the United States” on the integrity of the nation’s waters. Notwithstanding these concerns and ongoing litigation, the agencies will continue to implement the NWPR until it is no longer in effect, as a result of either a new final rule going into effect or by virtue of a court order.

III. New Rulemakings

The agencies are initiating two new rulemakings. First, the agencies intend to propose restoring the longstanding Clean Water Act regulations that were in place for decades prior to 2015, as amended to be consistent with relevant Supreme Court decisions.¹ The agencies then intend to propose a second rule that builds on that regulatory foundation. During the development of both rules, the agencies will listen to and engage with states, tribes, and interested stakeholders about their experiences implementing the NWPR, the 2015 Clean Water Rule, and the pre-2015 regulatory regime. The agencies’ rulemaking process will be guided by the following considerations:

- Ensure the rule will further the principal objective of the Act as set forth by Congress, which is to “restore the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. 1251.

¹ In *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985), in a unanimous opinion, the Supreme Court deferred to the Corps’ judgment and upheld the inclusion of adjacent wetlands in the regulatory definition of “waters of the United States.” In *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001), the Court (in a 5–4 opinion) held that the use of “isolated” non-navigable intrastate ponds by migratory birds was not by itself a sufficient basis for the exercise of Federal regulatory authority under the CWA. In *Rapanos v. United States*, 547 U.S. 715 (2006), a four-Justice plurality interpreted “waters of the United States” as covering “relatively permanent” waters as well as wetlands with a “continuous surface connection” to such water bodies. Justice Kennedy’s concurring opinion concluded that a water or wetland must possess a “significant nexus” to traditional navigable waters to be a “water of the United States.”

- Consider the latest peer-reviewed and relevant science.
- Prioritize practical implementation approaches for state and tribal co-regulators.
- Reflect the experiences of, and input received from, landowners, the agricultural community, states, tribes, local governments, community organizations, environmental groups, and disadvantaged communities with environmental justice concerns.

IV. Stakeholder Engagement

To assist the agencies in the rulemaking process, the agencies welcome feedback that can be provided through the open public docket or through participation at one of several public meetings. This feedback will inform the rulemaking process; however, the agencies will not be responding to individual recommendations. Issues that the agencies are particularly interested in getting feedback on include:

- *Implementation.* The agencies seek input on co-regulator and stakeholder experiences with implementing the various regulatory regimes. In particular, the agencies would like feedback on significant nexus analyses under the pre-2015 regulatory regime and the 2015 Clean Water Rule, as well as the typical year analysis under the NWPR. Are there implementation successes and challenges in assessing specific types of sites? If there are challenges, what types of implementation assistance would be helpful? Are there ways in which these assessments could be more efficient? Are there tools that have been, or could be, developed to assist in determining jurisdiction?
- *Regional, State, and Tribal interests.* The agencies request feedback on how or whether states and tribes have taken any actions in response to changes in the jurisdictional scope of “waters of the United States” under the NWPR. In addition, the agencies request recommendations regarding whether there are certain waters that could be addressed by regionalized approaches. The agencies are committed to listening to specific tribal interests that should be considered in any revised definition. The agencies are also seeking input on the use and value of the jurisdictional category for interstate waters.

- *Science.* Consistent with Executive Order 13990, the agencies request identification of relevant science related to how streams, wetlands, lakes, and ponds restore and maintain the chemical, physical, and biological integrity of the nation’s waters, including relevant literature that has been published since EPA’s 2015 Report *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*.
- *Environmental justice interests.* Consistent with Executive Order 13990, the agencies request feedback on how to better engage to ensure input is received from communities with environmental justice interests. How does the jurisdictional status of waters affect communities that are overburdened with environmental pollution? How is the implementation of NWPR impacting low-income communities, and other disadvantaged communities? Can the jurisdictional status of waters be linked to environmental justice concerns, and, if so, what is the basis?
- *Climate implications.* Consistent with Executive Order 13990, the agencies request feedback on how climate change affects the chemical, physical, and biological integrity of the nation’s waters. How should the agencies account for the effects of a changing climate in identifying jurisdictional waters? Are there particular types of waters that are especially important in protecting the nation’s waters in the face of a changing climate, and, if so, what scientific evidence supports these conclusions?
- *The scope of jurisdictional tributaries.* Multiple rules, judicial decisions, and longstanding practice protected ephemeral, intermittent, and perennial streams that met applicable criteria for jurisdiction as tributaries that are “waters of the United States.” Ephemeral streams were then categorically excluded from jurisdiction in the NWPR, and some intermittent streams and even some perennial streams are no longer jurisdictional under the NWPR. The agencies seek feedback on whether certain characteristics, such as indicators of channelization; physical indicators such as indicators of ordinary high water mark; flow regime; flow duration; watershed size; landscape position; stream network density; or distance from a

traditional navigable water, territorial sea, or interstate water should inform determinations about which tributaries could be considered jurisdictional as a class, and which decisions are best left to individual, case-specific significant nexus determinations similar to the agencies' practice from 2007 through 2015. The agencies are particularly interested in feedback regarding how to identify ephemeral streams that should be jurisdictional as tributaries, as they are the dominant stream type in the arid West and in many headwater regions. The agencies are interested in understanding the impacts of their exclusion from the regulations under the Clean Water Act by the NWPR.

- *The scope of jurisdictional ditches.* Historically, the agencies have recognized that ditches that reroute otherwise jurisdictional tributaries are themselves jurisdictional as tributaries. In addition, in practice, many other ditches have been considered generally *not* jurisdictional. The 2015 Clean Water Rule and later the NWPR, for the first time, excluded many ditches explicitly in rule language. The agencies solicit feedback on whether flow regime, physical features, excavation in aquatic resources versus uplands, type or use of the ditch (e.g., irrigation and drainage), biological indicators like presence of fish, or other characteristics could provide clear and implementable distinctions between jurisdictional and non-jurisdictional ditches.
- *The scope of adjacency.* Each regulatory definition of “waters of the United States” has taken a different approach to determining adjacency for purposes of jurisdiction under the Act and to the jurisdiction of non-adjacent waters:
 - a. Wetlands that may have been considered adjacent under some but not all definitions of “waters of the United States” include wetlands behind artificial berms, which were considered adjacent under the pre-2015 regulatory regime and the 2015 Clean Water Rule regardless of the presence or absence of a hydrologic surface connection, but required a surface water connection under the NWPR. The pre-2015 regulatory regime and the 2015 Clean Water Rule also included “neighboring” wetlands within

- the definition of “adjacent,” while the NWPR generally did not.
- b. Adjacent lakes and ponds that were not jurisdictional as tributaries were covered under the other waters category in the pre-2015 regulations if they met certain criteria. Adjacent lakes and ponds were included with adjacent wetlands in an adjacent waters category in the 2015 Clean Water Rule. Lakes and ponds with certain surface water connections are jurisdictional under the NWPR.
 - c. Another category of waters includes non-adjacent, intrastate, non-navigable waters, such as certain prairie potholes, playa lakes, Carolina Bays, and more, that are not proximate (reasonably close) to jurisdictional waters or lack natural tributary connections or ditching to connect them to a tributary network. These waters are typically non-jurisdictional under the NWPR and, as a matter of practice, following Supreme Court decisions the agencies did not assert jurisdiction over them under the pre-2015 regulatory regime. These waters would have been jurisdictional under the 2015 Clean Water Rule where they met specific criteria and were found to have a significant nexus to downstream traditional navigable waters, interstate waters, or territorial seas.

The agencies are interested in identifying characteristics that could allow for clarity, implementability, and/or regionalization in defining adjacency and identifying jurisdictional waters, including whether there are appropriate distances or other factors to limit adjacency, whether there are certain situations where case-specific significant nexus determinations would more appropriately determine jurisdiction, and whether there are certain types of waters with particular features or characteristics that could provide clear and implementable distinctions between jurisdictional and non-jurisdictional waters. The agencies are also interested in recommendations for implementation approaches to address any of these types of waters.

- *Exclusions from the definition.* The agencies request feedback on the implementability and

clarity of exclusions present in the NWPR and identified in the 2015 Clean Water Rule or the pre-2015 regulations and the preambles to those regulations. Was the scope of these exclusions appropriate under the Clean Water Act, easy to understand, and implementable? Are the NWPR definitions of prior converted cropland and waste treatment systems appropriate under the Clean Water Act, easy to understand, and implementable? Did the exclusions have any benefits or harmful impacts? Are there regional differences with these features and/or systems that should be considered?

V. Public Meetings and Outreach

The agencies will hold a series of public meetings intended to solicit recommendations as the agencies pursue the development of both rules. During these meetings, the agencies intend to provide brief background information on the rulemaking process and stakeholders will have the opportunity to provide input, particularly with regard to the directives in Executive Order 13990 and the topics above. The agencies will hold four meetings open to all stakeholders and an additional session for small entities, and reserve a time for an additional meeting that will be added in case all speaking slots are filled in earlier meetings.

The public meetings will be held as web conferences in August 2021, with one date reserved in September, if needed. Registration instructions can be found at the following website: <https://www.epa.gov/wotus/public-outreach-and-stakeholder-engagement-activities>. Persons or organizations wishing to provide verbal recommendations during the meetings will be selected on a first-come, first-serve basis. Due to the expected number of participants, individuals will be asked to limit their spoken presentation to three minutes. Once the speaking slots are filled, participants may be placed on a standby list to speak or continue to register to listen to the recommendations. The meetings will be recorded and posted on EPA's website. Supporting materials and written feedback from those who do not have an opportunity to speak can be submitted to the docket as described above. The schedule for the "waters of the United States" meetings is as follows:

- August 18, 2021, from 3-p.m. to 5 p.m. Eastern,
- August 23, 2021, from 1 p.m. to 3 p.m. Eastern,
- August 25, 2021, from 3 p.m. to 5 p.m. Eastern,
- August 26, 2021, from 6 p.m. to 8 p.m. Eastern, and
- August 31, 2021, from 3 p.m. to 5 p.m. Eastern.

The agencies have also reserved September 2, 2021, from 2 p.m. to 4 p.m. Eastern, for an additional meeting that will be added in case all speaking slots are filled in earlier meetings.

In addition, the agencies are initiating Federalism and tribal consultations for the proposed rulemaking to restore the regulations defining “waters of the United States” in place from 1986 until 2015, amended to be consistent with relevant Supreme Court decisions. The agencies also intend to host a series of dialogues with state and tribal coregulators this fall to discuss both rulemakings.

Finally, the rulemaking efforts of the past decade have highlighted the regional variability of water resources and the importance of close engagement with stakeholders to understand the specifics of how they experience regulation under varying definitions of waters of the United States. As an agency, we will honor our commitment to listen and learn from diverse perspectives by hosting 10 roundtables representing different regions of the country and encouraging broad participation that reflects diverse views. These 10 regional roundtables will allow a full spectrum of stakeholders to provide their perspectives about what has worked and what has not worked within their geographic areas in previous regulatory efforts with each other and in the presence of EPA and Army leadership. These roundtables will highlight similarities and differences across geographic regions, while emphasizing particular water resources that are characteristic of or unique to each region, and providing site-specific feedback about implementation. Information on the roundtables will be posted on the EPA website above.

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