



MEMORANDUM FOR THE RECORD

DATE: June 8, 2021

SUBJECT: Review of U.S. Army Corps of Engineers ORM2 Permit and Jurisdictional Determination Data to Assess Effects of the Navigable Waters Protection Rule

On April 21, 2020, the U.S. Environmental Protection Agency (EPA) and the Department of the Army (Army) (collectively “the agencies”) promulgated the Navigable Waters Protection Rule (NWPR), which comprehensively revised regulations defining “waters of the United States” for purposes of the Clean Water Act (CWA). On January 20, 2021, President Joseph R. Biden Jr. signed Executive Order 13990 on Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis (EO 13990) to declare the Administration’s policy “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.” EO 13990 directs federal 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 4 years that conflict with these important national objectives, and to immediately commence work to confront the climate crisis.” 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 NWPR.

Consistent with Executive Order 13990, the agencies have completed their review of the NWPR.

As a part of that review, agency staff reviewed available data to assess the potential effects of the rule, informed by nearly a full year of implementation.¹

Effects of the Navigable Waters Protection Rule and Potential Environmental Harms

EPA and Army staff have reviewed jurisdictional determinations as recorded in the U.S. Army Corps of Engineers’ (Corps) internal ORM2 database² and have identified numerous clear and

¹ The attachments to this memorandum contain the information the agencies reviewed to assess the potential effects of the NWPR.

² The Corps tracks preliminary jurisdictional determinations and approved jurisdictional determinations through an internal regulatory management database, called Operation and Maintenance Business Information Link, Regulatory Module (ORM2). This database documents Department of the Army authorizations under CWA section 404 and Rivers and Harbors Act section 10, including permit application processing and jurisdictional determinations. This

consistent indicators of a substantial reduction in waters covered under the NWPR compared to previous rules and practice. These indicators include an increase in section 404 permit applicants seeking approved jurisdictional determinations (AJDs) rather than preliminary jurisdictional determinations (PJDs), an increase in determinations by the Corps that waters are non-jurisdictional, and an increase in projects for which section 404 permits are no longer required. Additionally, the agencies believe that many project proponents are not seeking any determinations for waters that the NWPR now excludes, such as ephemeral streams; the effects of such projects are not tracked by the Corps database.

Although the agencies did not quantify the estimated change in jurisdiction in the NWPR rulemaking process, including the supporting documents in the record, the decrease in jurisdiction has been more dramatic than the deregulatory effects the agencies had identified in the NWPR preamble or supporting documents in the record for the rule. After reviewing available data, the agencies have found that PJDs (through which applicants proceed with permitting as though all aquatic resources were jurisdictional) are much less common under the NWPR, indicating that fewer project proponents believe waters are jurisdictional to begin with. Conversely, AJDs are more common under the NWPR, and the available data demonstrate that these AJDs are much less likely to result in finding jurisdictional aquatic resources than AJDs made under prior regulatory regimes. The Corps finalized 6,351 AJDs between the NWPR's effective date of June 22, 2020 and April 15, 2021. When this dataset was adjusted to account for differences in how determination forms were designed under the different regulatory regimes, the Corps found approximately 71% of AJDs identified non-jurisdictional aquatic resources and 29% identified jurisdictional aquatic resources.³ In comparison, AJDs made under the 2015 Clean Water Rule and the pre-2015 regulatory regime from the time periods of June 22, 2018 to April 15, 2019, and June 22, 2019 to April 15, 2020, found that approximately 46% of AJDs included non-jurisdictional aquatic resources and 54% included jurisdictional aquatic resources.⁴

The agencies' data provide evidence of trends in the way specific aquatic resources are being affected by implementation of the NWPR. The Corps' ORM2 database contains AJDs that evaluated 40,211 individual aquatic resources or water features under the NWPR between June 22, 2020 and April 15, 2020; of these individual aquatic resources, approximately 76% were

database does not include aquatic resources that are not associated with a jurisdictional determination or permit request or resource impacts that are not associated with a Corps permit or enforcement action.

³ Under the NWPR, a single AJD in the Corps' database can include both affirmative and negative jurisdictional determinations. Under prior regulatory regimes, the Corps' database was structured such that a single AJD could have only affirmative, or only negative, jurisdictional determinations. Because of this difference, a NWPR jurisdictional determination that includes both affirmative and negative jurisdictional resources was normalized and counted as two separate approved jurisdictional determinations, one affirmative and one negative.

⁴ Due to preliminary injunctions, the 2015 Clean Water Rule and the pre-2015 regulatory regime were being implemented in different parts of the country during a portion of the time periods for which the agencies assessed data. Data used in this analysis for the 2015 Clean Water Rule are from August 16, 2018 (the date that the nationwide stay was lifted) to April 15, 2019, and June 22, 2019 to December 22, 2019 (the Clean Water Rule was replaced by the 2019 Repeal Rule on December 23, 2019). The 2015 Clean Water Rule was never in effect for the entire country due to preliminary injunctions. For the time periods assessed under this analysis, the pre-2015 regulatory regime was in effect nationwide from June 22, 2018 to August 15, 2018, and December 23, 2019 (effective date of the 2019 Repeal Rule) to April 15, 2020. The 2019 Rule Repeal, which reinstated the pre-2015 regulatory regime, was in effect until the NWPR's effective date of June 22, 2020, but the agencies chose to analysis data for comparable time periods as the data available for NWPR determinations.

found to be non-jurisdictional by the Corps. Specifically, 69% of streams and wetlands were found to be non-jurisdictional, including 9,548 ephemeral features (mostly streams) and 12,895 wetlands that did not meet the NWPR's revised adjacency criteria (and thus are non-jurisdictional under the NWPR). Ditches were also frequently excluded (3,849 individual exclusions).

Of particular concern to the agencies is the NWPR's disproportionate effect on arid regions of the country. The Corps' data show that in New Mexico, of the 258 streams assessed in AJDs, 100% were found to be non-jurisdictional ephemeral resources.⁵ In Arizona, of the 1,284 streams assessed in AJDs, 1,280, or 99.6%, were found to be non-jurisdictional ephemeral resources. Compounding potential resource losses, eliminating ephemeral streams from jurisdiction under the NWPR also typically eliminates jurisdiction over any nearby wetlands. Ephemeral streams that have the presence of physical indicators of flow including a bed, bank, and ordinary high water mark, and contribute flow to a traditional navigable water, interstate water, or territorial sea, would have been jurisdictional as tributaries under the 2015 regulations defining "waters of the United States" (the Clean Water Rule). Many, though not all of these streams and their nearby wetlands, would likely have been jurisdictional under the pre-2015 regulatory regime after a case-specific significant nexus analysis.

The agencies are aware of at least 333 projects that required CWA section 404 permitting pre-NWPR, but no longer do under the NWPR. In the year since the NWPR has come into effect, 968 actions associated with AJDs under the NWPR had "no permit required" findings by the Corps. This metric includes the 333 projects that no longer required section 404 permitting due to the NWPR as well as projects that did not require 404 permitting because the activity was not occurring in waters of the United States (projects that are deemed to not require permits can include activities occurring in uplands or in waters that may have also been found to be non-jurisdictional under prior regulatory regimes; such projects would have not required permits under prior regulatory regimes as well.). The more telling aspect of these 968 actions in 2020-2021 is the comparison to prior years. In 2020-2021, there has been a threefold (338%) increase from 2019-2020 and a fourfold (412%) increase from 2018-2019 in the number of projects being determined to not require section 404 permits under the CWA. These metrics likely capture only a small portion of projects that are occurring on the ground since there is typically no need for a project proponent to seek a "no permit required" determination after having already received a wholly negative AJD and other project proponents may not feel the need to obtain any sort of JD at all if they believe their aquatic resources are non-jurisdictional under the NWPR. Many projects could be occurring without consultation with the Corps due to the non-jurisdictional bright lines established under the NWPR. While the Corps' ORM2 data do not represent all aquatic resources in the United States, they shed light on the trend and magnitude of losses under the NWPR.⁶

⁵ These non-jurisdictional ephemeral resources are predominantly ephemeral streams, but a small portion may be swales, gullies, or pools.

⁶ Requests for AJDs and the jurisdictional dispositions of the aquatic resources evaluated as part of those AJDs are imperfect measures of activities that might affect those jurisdictional or non-jurisdictional aquatic resources. The AJD data in the Corps ORM2 database generally contains only records for situations in which landowners or project proponents have requested jurisdictional determinations from the Corps or that are associated with an enforcement action, and thus does not represent all aquatic resources that exist within the United States. The proportion and

The agencies have heard concerns from a broad array of stakeholders, including states, tribes, scientists, and non-governmental organizations, that the reduction in the jurisdictional scope of the CWA is resulting in significant, actual environmental harms. The agencies are aware that projects are proceeding in newly non-jurisdictional waters in states and tribal lands where regulation of waters beyond those covered by the CWA are not authorized, and, based on available information, will therefore result in discharges without any regulation or mitigation from federal or state agencies. *See* EA at 40 (indicating that a large number of states do not currently regulate waters more broadly than the CWA requires, and are “unlikely to increase state regulatory practices” following the NWPR). The agencies are also aware of certain states that have already begun taking deregulatory steps to change their state regulatory practices to match the NWPR, contrary to the agencies’ estimates in the “[l]ikely response category” for such states identified the NWPR’s EA. *See* EA at 39-41 (estimating that some states are likely to continue their current dredged/fill permitting practices; however, some of those states have instead sought to reduce the scope of state clean water protections after the NWPR was finalized). One project that stakeholders have identified is the construction of an oil pipeline which will cause discharges into nearly 100 ephemeral streams that are no longer jurisdictional, and another is construction of a mine that would destroy hundreds of previously jurisdictional wetlands, deemed non-jurisdictional under the NWPR, next to a National Wildlife Refuge.

Ephemeral streams, wetlands that do not meet the NWPR’s revised adjacency criteria, and other aquatic resources not protected by the NWPR provide numerous ecosystem services, and the absence of protections for such resources could cause cascading, cumulative, and substantial downstream effects, including but not limited to effects on water supplies, water quality, flooding, drought, erosion, and habitat integrity.⁷ These substantial effects on the chemical, physical, and biological integrity of the nation’s waters were inadequately considered during the NWPR rulemaking process.

Attachments:

Attachment A: Data Analysis.

Letter from the Southern Environmental Law Center, the Natural Resources Defense Council, and the National Parks Conservation Association, to Radhika Fox, Acting Assistant Administrator for Water, USEPA, Re: Harm Resulting from the 2020 Waters of the United States Definition (March 11, 2021).

specific types of aquatic resources evaluated for jurisdiction via AJDs varies both geographically and also from year to year. In addition, the ORM2 data collected from AJDs conducted under different regulatory regimes have some metrics that are not directly comparable. Notwithstanding these limitations, the volume of ORM2 data on AJDs and associated aquatic resources is quite large and is tracked in a reasonably accurate fashion, and thus provides a reasonable estimate of overall trends and conditions on the ground. It represents the best data available to the agencies at this time.

⁷ U.S. Environmental Protection Agency, *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence* (Final Report), EPA/600/R-14/475F, (Washington, DC: U.S. Environmental Protection Agency, (2015)). <https://cfpub.epa.gov/ncea/risk/recordisplay.cfm?deid=296414>.

How the Trump Administration Eased Destruction of the Nation's Wetlands and Streams, David Groves, 51 Env'l Law Reporter 10194 (2021).

Complaint, *Pueblo of Laguna; Pueblo of Jemez*, No. 1:21-cv-00277-JFR-KK (D.N.M. Mar. 26, 2021).

Declaration of Rebecca Roose, *State of California et al. v. Wheeler et al.*, No. 3:20-cv-03005-DMR (N.D. Cal. May 18, 2021).

Letter from Jeanette Wolfley and James Grieco, University of New Mexico School of Law, to Andrew Wheeler et al., Re: Comments on Proposed Rulemaking, Docket ID No. EPA-HQ-QW-2018-0149 (April 15, 2019).

Indiana Senate Bill 389. Signed on April 29, 2021. Available at: <http://iga.in.gov/legislative/2021/bills/senate/389>.

Ohio House Bill 175. Deregulate Certain Ephemeral Water Features. Introduced March 3, 2021. Available at: <https://www.legislature.ohio.gov/legislation/legislation-summary?id=GA134-HB-175>.