



**American Water Works  
Association**

*Dedicated to the World's Most Important Resource®*

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October 04, 2021

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Department of the Army  
108 Army Pentagon  
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Electronically submitted to [CWAwotus@epa.gov](mailto:CWAwotus@epa.gov) and [usarmy.pentagon.hqda-asa-cw.mbx.asa-cw-reporting@mail.mil](mailto:usarmy.pentagon.hqda-asa-cw.mbx.asa-cw-reporting@mail.mil).

**Re: Notification of Consultation and Coordination on Revising the  
Definition of “Waters of the United States”**

Dear Ms. Christensen and Ms. Jensen:

The American Water Works Association (AWWA) appreciates the opportunity to participate in the federalism consultation on revising the definition of “Waters of the United States”

AWWA recognizes that this process formally is with regards to the intent of the agencies to promulgate a rulemaking to revoke the Navigable Waters Protection Rule (NWPR) and return to the pre-2015 rules. However, as the agencies have also announced an intent to create a new definition in a subsequent rulemaking, these comments include information relevant to both actions.

Recently in *Pasqua Yaqui Tribe v. EPA* (case 4:20-cv-00266 in the U.S. District Court for the District of Arizona) the NWPR has been effectively overturned and the agencies are already returning to a pre-2015 definition for the purposes of jurisdictional determinations. However, we believe that given the contentious and litigious nature of the definition of WOTUS, that a rulemaking remains essential to codify this change in approach to the greatest extent possible.

Given the repeated changes to the definition of WOTUS over the last 10-15 years, many stakeholders are understandably concerned that additional changes may be difficult to sustain. As it has been long-standing practice and represents a reasonable middle ground amongst many of the key definitional issues, the agencies should formally repeal the NWPR, officially return to the pre-2015 rules, and then take no additional action (other than any required to conform to judicial decisions and other essential minor changes). This would not only return to a well-known (albeit imperfect) definition while assuring clarity on what is and is not jurisdictional but also allow all stakeholders to begin with implementation on a much earlier timeframe than should another rulemaking be needed.

October 4, 2021

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As part of the *Federal Register* notice, “*Request for Recommendations: Waters of the United States*” (EPA-HQ-OW-2021-0328), AWWA as written and submitted detailed comments on these proposed actions. We have attached those comments and are incorporating them by reference into this reply.

We sincerely hope that these comments will assist EPA and USACE in this regulatory process. We encourage EPA and USACE to engage in substantive policy discussions with stakeholders as this process continues to move forward. EPA and USACE’s attention to these important issues is essential and greatly appreciated. AWWA appreciates the opportunity to comment in this important process. Please feel free to contact Adam Carpenter (202-628-8303, [acarpenter@awwa.org](mailto:acarpenter@awwa.org)) if you have any questions regarding these comments.

Respectfully,

FOR THE AMERICAN WATER WORKS ASSOCIATION

A handwritten signature in black ink, reading "G. Tracy Mehan, III". The signature is fluid and cursive, with the last name "Mehan" being the most prominent part.

G. Tracy Mehan, III  
Executive Director of Government Affairs  
American Water Works Association

CC: Radhika Fox, EPA OW  
Jennifer McLain, EPA OGWDW  
Andrew Sawyers, EPA OWM

Attachment: September 3, 2021 comments from AWWA on “*Request for Recommendations: Waters of the United States*” (EPA-HQ-OW-2021-0328).

## About AWWA

AWWA is an international, nonprofit, scientific and educational society dedicated to providing total water solutions assuring the effective management of water. Founded in 1881, the Association is the largest organization of water supply professionals in the world. Our membership includes over 4,200 utilities that supply roughly 80 percent of the nation’s drinking water and treat almost half of the nation’s wastewater. Our nearly 50,000 total memberships represent the full spectrum of the water community: public water and wastewater systems, environmental advocates, scientists, academicians, and others who hold a genuine interest in water, our most important resource. AWWA unites the diverse water community to advance public health, safety, the economy, and the environment.



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September 03, 2021

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108 Army Pentagon  
Washington, DC 20310

**Re: Comments on “Request for Recommendations: Waters of the United States” ([EPA-HQ-OW-2021-0328](#))**

Dear Ms. Christensen and Ms. Jensen:

The American Water Works Association (AWWA) appreciates the opportunity to comment on the Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers (USACE) *Federal Register* notice, “*Request for Recommendations: Waters of the United States*” ([EPA-HQ-OW-2021-0328](#)). We hope that these comments will assist EPA and USACE in this regulatory process. We encourage EPA and USACE to engage in substantive policy discussions with stakeholders as this process continues to move forward.

EPA and USACE have taken many actions over the last several years related to the regulatory definition of Waters of the United States. AWWA remains concerned about several issues that either have not been addressed or only partially addressed, as we have mentioned in past comments on the Clean Water Rule proposal<sup>1</sup>, the first<sup>2</sup> and second<sup>3</sup> rounds of comments on the Clean Water Rule repeal proposal, in the request for comment on “direct hydrologic connection to surface water”<sup>4</sup>, and in the proposal “Revised Definition of Waters of the United States”<sup>5</sup> (the proposal which eventually became the Navigable Waters Protection Rule). The below comments build upon the themes and concerns mentioned throughout these previous rulemakings. As many of these concerns remain, these comments build heavily off of those past submissions with additional information introduced or adjusted based upon new information.

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<sup>1</sup> Joint comments from AWWA, the Association of Metropolitan Water Agencies, the Association of California Water Agencies, and the National Association of Water Companies dated November 14, 2014 in Docket [EPA-HQ-OW-2011-0880](#).

<sup>2</sup> Joint comments from AWWA and the National Association of Water Companies dated September 22, 2017 in Docket [EPA-HQ-OW-2017-0203](#).

<sup>3</sup> AWWA comments dated August 13, 2018 in Docket [EPA-HQ-OW-2017-0203](#).

<sup>4</sup> AWWA comments dated May 21, 2018 in Docket [EPA-HQ-OW-2018-0063](#).

<sup>5</sup> AWWA comments dated April 12, 2019 in Docket [EPA-HQ-OW-2018-0149](#).

## **EPA and USACE should reaffirm and retain pre-existing (pre-2015) rules**

A common theme woven across AWWA's prior comments is the need for EPA and USACE to balance the importance of the Clean Water Act as a critical tool for protecting sources of drinking water with the need for expedited and straightforward permitting to allow efficient water infrastructure construction and maintenance. To achieve this objective, EPA and USACE should retain the post-SWANCC<sup>6</sup> status quo practice (referred to in this proposal as "pre-2015 rules").<sup>7</sup> EPA and USACE can accomplish this by:

1. Completing the anticipated rulemaking designed to return the post-SWANCC status quo (pre-2015) definition.
2. Withdrawing this current rulemaking or modifying it to conform to post-SWANCC practice (pre-2015) with additional guidance based upon *Rapanos*.<sup>8</sup>

We believe this is the most appropriate mixture of protecting sources of drinking water and streamlining infrastructure and permitting among the options currently being considered.

Reaffirming the pre-2015 definition<sup>9</sup> is also appropriate from a cooperative federalism perspective. In a 2013 study, the Environmental Law Institute found that 36 states had at least one provision of state law that could limit their ability to regulate waters beyond those in the federal definition.<sup>10</sup> Therefore, if the definition of WOTUS were to be limited as is currently enacted in the NWPR, in order to achieve the pre-2015 level of protection of sources of drinking water, most of these states would have to make substantial statutory and regulatory changes to retain environmental and public health protection, using considerable state resources and leading to more variability in state requirements. This outcome would not be ideal for water sector utilities, states, EPA and USACE, or the public, especially when recognizing that watersheds do not follow political boundaries.

Moving forward, EPA and USACE should focus exclusively on updating the 1986/1988 regulatory definition<sup>11</sup> to fully conform to current practice, including post-SWANCC<sup>12</sup> and post-*Rapanos*<sup>13</sup> guidance. This pathway would lead to regulatory certainty by reducing the reliance on what many stakeholders consider to be a challenging set of legal opinions and guidance documents for decision-making. However, in achieving this regulatory certainty there would be a need only to fully conform this rule and associated guidance with the pre-

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<sup>6</sup> Solid Waste Agency of Northern Cook Cty. v. Army Corps of Engineers, 531 U.S. 159 (2001).

<sup>7</sup> The following report contains detailed information on the "status quo", especially with regards to the Clean Water Rule being considered for repeal: Copeland, C. 5 January 2017. EPA and the Army Corps' Rule to Define "Waters of the United States" Congressional Research Service. Available at <https://fas.org/sgp/crs/misc/R43455.pdf>.

<sup>8</sup> *Rapanos v. United States and Carabell v United States*, 547 U.S. 715 (2006).

<sup>9</sup> As described in 82 FR 34899 or as anticipated to be proposed by EPA and USACE in the near future.

<sup>10</sup> Environmental Law Institute. May 2013. State Constraints: State-Imposed Limitations on the Authority of Agencies to Regulate Waters Beyond the Scope of the Federal Clean Water Act. Available at: <https://www.eli.org/sites/default/files/eli-pubs/d23-04.pdf>

<sup>11</sup> 40 CFR 230.3(s), as of February 6, 2018.

<sup>12</sup> 2003 Joint legal memorandum (68 FR 1995, January 15, 2003)

<sup>13</sup> USEPA. 2 December 2008. Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States & Carabell v. United States*. Available at [https://www.epa.gov/sites/production/files/2016-02/documents/cwa\\_jurisdiction\\_following\\_rapanos120208.pdf](https://www.epa.gov/sites/production/files/2016-02/documents/cwa_jurisdiction_following_rapanos120208.pdf).

2015 rule practice<sup>14</sup>, thereby continuing to provide protection of sources of drinking water while minimizing economic impacts, consistent with Executive Order 13990.<sup>15</sup>

### **Meaningful stakeholder engagement and appropriate analysis is essential**

An in-depth, open, and thorough stakeholder engagement process is essential to ensure consistent implementation. EPA should actively engage stakeholders across all impacted sectors and conduct meaningful regulatory and scientific analysis of the proposed rules and take comment on those analyses prior to finalizing this rule. EPA and USACE should use sound scientific assessment both in setting the final definition and in analyzing the costs and benefits of that change. During the development of the NWPR, there was limited information presented on how big of a change to current practice the proposed rule will create, and therefore the analysis of the costs and benefits of the change, as well as the impacts on various sectors including water utilities, are not clear. Should EPA and USACE proceed with developing any definition beyond returning to the pre-2015 rules, they should then analyze whether source water quality of drinking water supplies will be adversely impacted, and if so, carefully weigh those costs against the benefits of the proposal.

### **EPA and USACE should consider delayed implementation**

Should EPA and USACE move forward with any definition other than a return to the pre-2015 rules, they should consider a delayed implementation of the new definition. This will allow time for states to adjust their statutes and regulations to address changes to federal environmental and public health protections and will give impacted entities (including water sector utilities) time to analyze the potential impacts of the change and take action to address any specific concerns that will arise from it. We believe this is the best pathway forward to afford the most appropriate protections to both federal and state waters at the lowest overall cost to states.

### **EPA and USACE should provide exemptions necessary for water infrastructure**

Water utilities own and operate critical infrastructure to withdraw, treat, transport, store and return water in the provision of drinking water, reuse, wastewater, and storm water services. Current and past practice have not treated water system infrastructure as subject to WOTUS determinations or potentially duplicative or inappropriate requirements (all of said services are regulated through other means). Constructed conveyance structures, waste treatment systems, and other water infrastructure (other than impoundments, which generally are jurisdictional) could be misinterpreted as being jurisdictional under the 2015 Clean Water Rule, and there is risk that this could occur in any other definition if not explicitly addressed. Therefore, it should be clearly noted through an exemption as being non-jurisdictional. Inappropriate application of a jurisdictional determination to water infrastructure could cause challenges to infrastructure maintenance and upgrades. Waste Treatment systems have been included in NWPR and in previous exemptions (33 CFR 328.3(a) and 40 CFR 122.2).

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<sup>14</sup> As described in [82 FR 34899](#).

<sup>15</sup> Executive Office of the President. January 20, 2021. EO 13990: “Executive Order on Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis”. [86 FR 7037](#).

This request for an exemption does not include new capital projects that are constructed in WOTUS, which should take appropriate steps to minimize or eliminate adverse impacts to waterbodies and wetlands. However, once operational, water infrastructure is best managed through other mechanisms and should be specifically excluded from this definition.

### **EPA and USACE should continue to review and update nationwide permits**

EPA and USACE should review and potentially expand their nationwide permits for activities by water providers (to the extent that clear jurisdictional exemptions are not in place and for water sector activities that cannot be exempted) as a mechanism to assure limited adverse impact to water sector utilities while assuring environmental protection. Although some changes have already been made<sup>16</sup> after a proposal<sup>17</sup> for which AWWA provided comments<sup>18</sup>, there may be additional opportunities to adjust the permits to assure that any changes to the definition of WOTUS does not inadvertently alter their applicability. This would help to assure best practices to limit adverse impact while preventing delays to water infrastructure maintenance, repair, replacement, and construction. A clear “win” for all entities involved, updating and potentially expanding these permits will:

- Ensure regulatory certainty at the same time as environmental and public health protection.
- Reduce regulatory burden on water sector utilities while deploying best practices.
- Allow regulators to focus their limited resources on site-specific activities.

### **EPA and USACE Should Retain Coverage of “Direct Hydrologic Connections” to Surface Water**

The NWPR eliminated groundwater in any form from the definition of WOTUS, including discharges into groundwater which have a direct hydrologic connection to surface water. Although AWWA agrees that in general groundwater should not be included in the definition of WOTUS because CWA mechanisms are designed for surface water and not groundwater protection, those discharges which have a direct hydrologic connection to surface waters are the exception. EPA previously had a request for comments on this issue ([EPA-HQ-OW-2018-0063](#)) for which AWWA commented on the need for NPDES permitting for discharges with a direct hydrologic connection. Without this essential protection, discharges could be rerouted to discharge in the subsurface and flow into surface waters without an NPDES permit. This would clearly circumvent the intent of the CWA and should be prevented by retaining this permitting coverage.

### **EPA and USACE’s Pathway Forward**

EPA and USACE should retain the reasonable balance struck in post-SWANCC with post-*Rapanos* guidance by re-affirming the current rules and by fully conforming the rules and

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<sup>16</sup> Reissuance and Modification of Nationwide Permits. [86 FR 2744](#)

<sup>17</sup> Proposal to Reissue and Modify Nationwide Permits. [85 FR 57298](#)

<sup>18</sup> <https://www.regulations.gov/comment/COE-2020-0002-0319>

guidance to pre-2015 existing practice. Should EPA and USACE proceed with further revising the definition beyond this, we strongly encourage the inclusion of provisions that will limit the impacts to drinking water utilities, including an exemption for many water infrastructure operations, a review and possible expansion of nationwide permits, and delayed implementation of any jurisdictional changes in the rule.

EPA and USACE's attention to these important issues is essential and greatly appreciated. AWWA appreciates the opportunity to comment on this important proposed rule. Please feel free to contact Adam Carpenter (202-628-8303, [acarpenter@awwa.org](mailto:acarpenter@awwa.org)) if you have any questions regarding these comments.

Respectfully,

FOR THE AMERICAN WATER WORKS ASSOCIATION

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G. Tracy Mehan, III  
Executive Director of Government Affairs  
American Water Works Association

CC: Radhika Fox, EPA OW  
Jennifer McLain, EPA OGWDW  
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