



October 1, 2021

Mr. Michael S. Regan
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Mr. Jaime A. Pinkham
Acting Assistant Secretary of the Army for Civil Works
U.S. Army Corps of Engineers
441 G Street, NW
Washington, DC 20314

CWAwtus@epa.gov and usarmy.pentagon.hqda-asa-cw.mbx.asa-cw-reporting@mail.mil

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

Dear Administrator Regan and Acting Assistant Secretary Pinkham:

The National Tribal Water Council (NTWC) submits the following comments in response to the request of the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) (together, Agencies) for early feedback on the Agencies’ effort to revise the definition of “waters of the United States” (WOTUS).

The NTWC was formed by EPA to provide EPA and other federal entities with technical input from Indian Country to strengthen their coordination with tribes, and to allow them to better understand issues and challenges faced by tribal governments and Alaska Native Villages (referred to collectively in this letter as tribes) as they relate to EPA and other federal agency water initiatives. Since 2007, the NTWC has provided input and recommendations regarding the appropriate scope of the term WOTUS. In 2008, the NTWC submitted comments on the Agencies’ *Rapanos* guidance, which provided direction on how to implement Justice Kennedy’s significant nexus standard.¹ More recently, in 2019 the NTWC submitted comments on the Agencies’ proposed revised definition of WOTUS in the Navigable Waters Protection Rule (NWPR). Among other things, the NTWC highlighted the importance of water to tribal nations and federal obligations to protect it. The NTWC also pointed out that the proposed rule would significantly diminish Clean Water Act (CWA) protection of tribal waters and argued that the Agencies improperly

¹ Clean Water Act Jurisdiction Following the U.S. Supreme Court’s Decision in *Rapanos v. United States & Carabell v. United States* (Dec. 2, 2008), https://www.epa.gov/sites/default/files/2016-02/documents/cwa_jurisdiction_following_rapanos120208.pdf.

failed to consider the impacts of the proposal on tribal waters.² The final NWPR was published on April 21, 2020. 85 Fed. Reg. 22,250. This redefinition of WOTUS considered little of the input received from the NTWC, tribes, and even many states.

On June 9, 2021, the Agencies informed tribes of the Agencies' intent to begin a rulemaking to replace the NWPR with a new definition of WOTUS. Subsequently, on July 30, 2021, the Agencies emailed a letter to Tribal Leaders initiating consultation and coordination on their proposal to develop a "foundational rule" which would restore the WOTUS regulations that existed prior to the 2015 Clean Water Rule, amended to be consistent with relevant Supreme Court decisions, pending development of a new WOTUS rule that would be built on the foundational rule.³ The Agencies provided a consultation period on the development of the foundational rule that extended until September 13, 2021. A month later, in August of 2021, Tribal Leaders received a second notification extending the tribal consultation period until October 4, 2021.⁴

The NTWC appreciates the Agencies' decision to extend the comment period, allowing tribes more time to provide early and meaningful input on the development of both this foundational rule and any subsequent rule defining WOTUS. The NTWC believes that restoring the regulatory regime that existed prior to the 2015 Clean Water Rule, amended to be consistent with relevant Supreme Court decisions, will likely result in more CWA permits being issued on tribal lands and more tribal waters being protected. As the Agencies have noted, that is essentially what is taking place right now, due to the two federal district court decisions vacating the NWPR.⁵

The Agencies provided tribes with a Consultation and Coordination Plan along with the July 2021 Notification letter referenced above. The Plan included a short section labeled "Potential Impacts to Tribes," in which the Agencies predicted that the forthcoming rulemaking was likely to increase CWA protections for tribes, both for those with treatment in a manner similar to a state (TAS) to administer CWA programs as well as for tribes without TAS or water programs of their own. The NTWC strongly supports the Agencies' effort to restore CWA protections to the same level as prior to 2015. We encourage Agencies to restore those regulations that would enhance state and tribal authority to protect

² National Tribal Water Council, Comments on the Proposed Revised Definition of "Waters of the United States," 19-21 (March 29, 2021).

³ Notification of Consultation and Coordination on Revising the Definition of "Waters of the United States" (July 29, 2021).

⁴ Originally, the Agencies stated that the NWPR would remain in effect until the new foundational rule was issued. Since then, however, the U.S. District Court for the District of Arizona vacated and remanded the NWPR. *Pasqua Yaqui Tribe v. U.S. EPA*, No. CV-20-00266 (D. Ariz. Aug. 30, 2021). The Agencies then stated that they "have halted implementation of the Navigable Waters Protection Rule and are interpreting 'waters of the United States' consistent with the pre-2015 regulatory regime until further notice." U.S. EPA, Current Implementation of Waters of the United States (Sept. 16, 2021), <https://www.epa.gov/wotus/current-implementation-waters-united-states>. Since then, a second federal district court vacated and remanded the NWPR. *Navajo Nation v. Regan*, No. 20-CV-602, 2021 WL 4430466 (D.N.M. Sept. 27, 2021).

⁵ See fn. 4.

their waters and are consistent with relevant Supreme Court precedent, the CWA's objective of protecting water quality, and the best available science.

The Agencies also provided notice to the public of their proposed approach to a new WOTUS rulemaking, and specifically requested comment on what both new rules should address.⁶ The Agencies expressed their desire to ensure meaningful opportunities for states, tribes and interested parties to have input in defining WOTUS, explained that they had initiated consultations with states and tribes on the foundational rule, and said that they would be holding state and tribal meetings in addition to discuss both rules.⁷

The NTWC welcomes this opportunity for early input into defining the scope of WOTUS. The NTWC provides comments on two of the areas which the Agencies singled out for feedback:

1. Regional, State, and Tribal Interests
 - Determining whether there are certain waters that can be addressed by regionalized approaches;
 - Reinstating the jurisdictional category for interstate waters.
2. Scope of Jurisdictional Tributaries
 - How to identify ephemeral streams that should be jurisdictional as tributaries;
 - Understanding the impacts of excluding ephemeral streams from CWA provisions, as was done under the NWPR.

The NTWC addresses each topic area in turn, providing both background and policy recommendations.

1. Regional, State, and Tribal Interests

In many comment letters that the NTWC submits to EPA and other federal agencies, we begin with a statement recognizing the deep connection tribes have with water. It must be recognized that virtually all tribes maintain a deep personal, cultural, and spiritual relationship to water. No matter the size of the water body, whether it be an ocean, lake, river, stream, creek, spring, estuary or seep, the water is treated with respect and dignity as a living entity and held sacred. Water is a precious resource, essential to the life, health, subsistence, recreation, and culture of tribal communities.

Clean water is also vital to the existence of all people in this country and to the environment. Congress recognized the importance of clean water by enacting the CWA. The primary goal of the CWA is to "restore and maintain the chemical, physical, and biological integrity of the nation's waters"⁸ and the

⁶ 86 Fed. Reg. 41911, 41914.

⁷ *Id.* at 41914.

⁸ CWA § 101(a), 33 U.S.C. § 1251(a).

CWA expressly recognizes the critical and important role states and tribes play in protecting and enhancing waters within their respective borders.⁹

a. “Agencies Should Consider Regional Variability in Determining the Definition of WOTUS”

EPA found in its 2015 Connectivity Report that ephemeral waters, waters that contribute to traditionally navigable waters through groundwater connections, and "isolated" wetlands, among other categories of water, affect the physical, chemical, and biological integrity of downstream waters, or in other words, that they meet the significant nexus test and the purpose of the CWA.¹⁰

On top of this scientifically supported finding, the United States has a trust responsibility to recognize and protect tribal lands, assets, and resources, which includes the water that flows over and through tribal lands and the natural resources that depend on that water.¹¹ This relationship between the federal government and Indian tribes, which is recognized both in EPA’s Indian Policy and the Corps’ Tribal Consultation Policy, includes rights that require the federal government to provide additional protections for tribal waters compared to those for state waters. The federal trust responsibility to Indian tribes is heightened by federal obligations to recognize and protect tribal treaty rights and other reserved water rights, and also by principles of environmental justice; all of these provide bases for greater protection of tribal waters.¹²

The Agencies cannot ignore these fundamental principles when crafting a new rule that impacts tribes. The Agencies must recognize the importance of water quality to tribes and provide additional protections for tribal water quality and aquatic resources to the greatest extent possible. To fulfill these obligations, the Agencies should take into account regional differences and address factors such as climate, geology, and hydrology in developing a WOTUS definition for tribal waters. Tribes located in the arid and semi-arid Southwest rely on streams that flow seasonally, after precipitation events. Many of these waters are classified as ephemeral under the NWPR and are not protected. These waters are not only culturally significant, but are vital as headwaters supporting fish and wildlife, contribute to water flow and storage, and influence the chemical, physical and biological integrity of downstream waters.

Due to the greater importance of waters to tribes and the Agencies’ greater obligations to tribes, the Agencies should consider geographic differences when framing the rule, and so should include the

⁹ “It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources.” CWA § 101(b), 33 U.S.C. §125(b).

¹⁰ “Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence,” <https://cfpub.epa.gov/ncea/risk/recordisplay.cfm?deid=296414>).

¹¹ See, e.g., *Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1942) (United States has a “moral obligation of the highest responsibility and trust”) American Indian Policy Review Commission (1973) (U.S. trust responsibilities include protection and proper management of Indian resources, properties, and assets).

¹² See, e.g., *Washington v. Washington State Comm. Passenger Fishing Vessel Ass’n*, 443 U.S. 658 (1979) (treaty rights); *United States v. Winters*, 207 U.S. 564 (1908) (reserved rights); Executive Order 12898, "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations." See also NTWC’s Comments on Revisions to the Federal Water Quality Standards Regulations to Protect Tribal Reserved Rights, submitted on September 13, 2021, for a discussion of tribal reserved rights. The comments addressed rights on off-reservation lands, but the basic principles are applicable on reservation lands as well.

ephemeral and intermittent waters of tribes (and states) in arid and semi-arid areas of the country as WOTUS.

In addition, on September 18, 2019 the NTWC submitted supplemental comments to EPA requesting the Agencies to include a new category of WOTUS for any waters within or flowing through tribal trust land that are designated by a tribal government as “Waters of the Tribe” (WOTT). Thus, WOTT would be treated as WOTUS, regardless of any narrowing of the definition by EPA, for purposes of TAS approvals, approvals of Water Quality Standards (WQS), requests for CWA § 401 certifications, grants, and other actions under the CWA involving tribes. This new category could be added to the WOTUS rule to satisfy the federal government’s trust obligations and those under treaties and other reserved water rights, and would not need an amendment to the CWA.

By including WOTT as a category of WOTUS, therefore, the Agencies would:

- ensure the protection of waters that are critically important to sustain tribal communities, especially in the arid Southwest;
- honor their trust responsibility to tribes for waters that may not be covered under a new definition of WOTUS; and
- give certainty to industry regarding which waters constitute WOTUS on tribal lands.

Recommendations

NTWC recommends that the Agencies recognize the need for any WOTUS rule to address regional differences in climate, geology, and hydrology. A regional approach would classify ephemeral streams as jurisdictional in arid and headwater areas at the very least, based on the 2015 Connectivity Report. In addition, a regional approach should include as WOTUS all waters that have been designated by a tribe as WOTT, assuring their continued protection under the Clean Water Act and honoring federal trust and treaty obligations and tribal reserved rights. This approach would provide the regulatory certainty and consistency the Agencies are seeking to achieve while at the same time ensuring the protection of critical tribal trust resources.

b. Reinstating the Use and Value of the Jurisdictional Category for Interstate Waters

The Agencies should include interstate waters as a separate category of WOTUS, as it was in the 2015 WOTUS rule, and should define “interstate” waters to include waters that border upon or traverse tribal lands, both between and from state to tribe (or vice versa) and between and from one tribe to another (in instances where tribal lands are adjacent to each other). Otherwise, innumerable waterbodies within tribal lands that are located downstream from or otherwise hydrologically connected to these interstate waters, which make up a network of waterbodies, will lose Clean Water Act protections. For example, protection of tribal WQS would be limited, as well as tribes’ involvement in certifications of discharges in neighboring jurisdictions that would impact their waters. In addition, the narrowing of federal responsibilities upstream of reservation waters could leave tribes subject to more instances of state regulation of their water quality, and could moreover result in conflicting water quality regimes.

For the Agencies to do otherwise also would undermine the federal trust responsibility as well as treaty rights and reserved rights dependent on water quality, as discussed above. States are not subject to these commitments, and often have not made commitments of their own to protect tribal water quality or allow for tribal input in water quality decisions.

Recommendations

NTWC recommends that the Agencies include interstate waters as a separate category of WOTUS and define the term to include the intersection between state and tribe as well as tribe and neighboring tribe.

2. Scope of Jurisdiction Tributaries

The NWPR constituted a significant departure from the Agencies' prior definition of WOTUS, resulting in an elimination of protection for ephemeral streams and a substantial reduction in the number of intermittent streams, tributaries, and wetlands that were once protected by the CWA. The Agencies acknowledged that the NWPR would affect tribes differently from states.¹³ The narrow definition of WOTUS in the NWPR excluded many tribal waters from CWA protections, which the Agencies nonchalantly dismissed, stating that they were unable to quantify the rule's effects on tribal waters because they were not aware of any dataset showing its potential effects and they could not quantify how tribes would react to the NWPR. The NTWC disagreed with these statements and provided examples of case studies in its March 29, 2019 comment letter.¹³ The NTWC comment letter addressed the proposed (at the time) revised definition of WOTUS and its comments illustrated likely impacts of the proposed rule on tribal waters.

a. Identification of Ephemeral Streams that Should be Jurisdictional as Tributaries

At the time of the NWPR's promulgation, the Agencies claimed that it promoted "clarity," "predictability," and "certainty," as a reason for changing their prior practice(s). To the contrary, the record demonstrates that the key aspects of the NWPR resulted in uncertainty and unpredictability. As an illustration, within the NWPR the Agencies stated that it would be difficult to distinguish between "intermittent" streams (which are protected) and "ephemeral" streams (which are unprotected).

The NTWC requests that the Agencies identify and propose, as part of the new rule, a science-based methodology, drawing upon EPA's 2015 Connectivity Report, "Connectivity of streams and Wetlands to Downstream waters: A Review and Synthesis of the Scientific Evidence" (with updating for possible advances in the science since the Report was prepared), readily implementable by a hydrologist, water resources engineer or other professional (presuming a suitable educational background at the undergraduate level and relevant professional experience and training), that allows for identification of such jurisdictional ephemeral streams.

This methodology is of particular concern in the arid West and in many headwater regions, where ephemeral streams predominate. The approach should take into consideration factors such as: the area that is tributary to runoff-driven ephemeral flow for the reach in question; groundwater conditions; the magnitude, frequency and duration of flows in the reach; the associated riparian flora and fauna (macro to micro); connectivity; and the associated ecosystem-hydro system processes. It should also consider that flows in the vast majority of ephemeral and intermittent reaches are ungauged, with few to no observations. Any identification of jurisdictional ephemeral streams should be defensible and documented. An appeal process may be appropriate if the determination is contested.

This methodology must be developed in the context of the definitions of "ephemeral" and "intermittent" in the proposed rule. That is, the methodology may not be universal in its use or in application. It may or may not have utility outside of the context of CWA Section 404 and WOTUS. These definitions need to be set forth in language that either allows for one to readily distinguish between what is ephemeral and what is intermittent, or, better, the definitions should explicitly recognize that there is no hard boundary

¹³ 85 Fed. Reg. at 22,270, 22, 336-37.

between one and the other (and neither is there a hard boundary between intermittent and perennial flow), as there may be years or times of year, depending on meteorology / climatology, groundwater conditions, and perhaps other factors, when a reach exhibits ephemeral flow conditions and other years or times of year when the flow is intermittent. Ongoing and anticipated future climatic change figures prominently in this regard.

It is possible that different definitions for flow regimes should be used. Perhaps two-category schemes, such as temporary and perennial flow, or perennial and non-perennial flow, should be considered. That issue warrants a much bigger conversation than this letter allows for. Much of it comes down to the intent and objectives of policies expressed by the proposed rule, and on how the rule is to be implemented.

Also, implementation should not be contingent on out-of-date, incomplete, non-existent, or marginally applicable mapping or digital hydrologic or other datasets. Further, implementation in Indian country should draw on the expertise of tribal environmental and science professionals, and on traditional indigenous observations, awareness, memory, and expertise.

Stepping back and looking at the nationwide picture, the need for a science-based foundation in both articulating and implementing the proposed rule(s) cannot be overstated. When the NWPR was in draft form, members of the Science Advisory Board (SAB) who reviewed the draft edition of the above-referenced Connectivity Report, and who also reviewed the 2015 Clean Water Rule (CWR), submitted the following comments to the agencies.¹⁴

- The 2015 CWR is based on an established science of waterbody connectivity supported by the Connectivity Report and buttressed by recent literature. The proposed Rule [NWPR] is not based on sound science, nor does it provide any comparable body of peer-reviewed science to support the proposed changes.
- The proposed Rule rests on physical, hydrologic connectivity, and ignores chemical and biological connectivity, which is in direct contrast with the intent of the CWA to protect chemical, physical, and biological integrity.
- The proposed Rule misinterprets recommendations made by the SAB, and fails to recognize that even low levels of connectivity can be important relative to impacts on the chemical, physical, and biological integrity of downstream waters.
- The proposed Rule's grounding in structural connectivity is weak and its treatment of functional connectivity is non-existent.
- The proposed Rule ignores groundwater connectivity and fails to account for broad watershed processes and the cumulative, aggregate effects of waterbodies.
- Although the agencies (US Environmental Protection Agency and Department of the Army) state that the proposed Rule would establish jurisdiction under the CWA in a clearer and more understandable way, the proposed Rule is, in fact, unclear.
- The proposed Rule seems to leave open the possibility that human activities can lead to removal of protections for intermittent streams and additional wetlands.

¹⁴ April 5, 2019, letter to A.R. Wheeler (EPA) and R.D. James (USACE) from S. Mažeika et al., RE: Revised Definition of "Waters of the United States" (84 Fed. Reg. 4154; Docket ID No. EPA-HQOW-2018-0149).

b. Understanding the Impacts of Excluding Ephemeral Streams from CWA Provisions by the NWPR

The NTWC believes that a new definition of “WOTUS” should include perennial, intermittent and ephemeral waters, if not nationally, then at least regionally, especially in arid and headwater areas. A tributary is a surface water which flows into another surface water at the confluence between the two surface waters. The flow from one surface water to the next occurs both as surface flow and subsurface ground water flow. There can be no perennial, intermittent, or ephemeral surface flow without the presence of water flowing in the subsurface in the ground water beneath the surface flow. Therefore, one cannot claim that ephemeral flows are not tributaries to perennial or intermittent flowing surface waters. Even if there is no surface water flowing in the stream, there is usually subsurface flow hydraulically connecting the tributary to the next receiving body. There may be instances where ephemeral subsurface flow dries up “seasonally” and does not establish a hydraulic connection to the intermittent or perennial water body, but the ephemeral water is still a tributary because it conveys flow during the year.

As mentioned earlier, all these waters have significant meaning to tribes, not only culturally, but also because they sustain ecosystems that depend on flow regimes that change between perennial, intermittent, and ephemeral, illustrating the connectivity of all these waters. For example, the situation on the Pyramid Lake Indian Reservation in northern Nevada demonstrates why ephemeral and intermittent streams should be afforded protection under the CWA, especially when those waters have a significant nexus to navigable waters as they do on that reservation. These streams have hydrologic connections within gaining/losing reaches of the stream that are important to riparian habitat and aquatic life, which adapted to living in these streams. Aquatic life will retreat to the hyporheic or wetted zone when surface flows cease. This is the reason why it is important to protect the physical, biological, and physical integrity of not only perennial streams, but intermittent and ephemeral streams as well, especially in the arid southwest such as the great basin region in Nevada.

The Pyramid Lake Paiute Tribe went through a long process to obtain EPA approval of the tribe’s Water Quality Control Plan, beginning in 1994. With growth and development occurring closer to the borders of the reservation, it is imperative that all of the tribe’s waterbodies are afforded water quality standards protection under the CWA. The Tribe has no plans to remove intermittent and ephemeral streams from protection in the tribe’s Water Quality Control Plan.

Recommendations

The NTWC recommends that a definition of “WOTUS” should include perennial, intermittent and ephemeral waters, if not nationally, then at least regionally, especially in arid and headwater areas. As detailed above, this definition of WOTUS must address the fact that hard and fast boundaries between these categories of flow do not exist in the dynamic natural world – especially one that is rapidly changing in response to the hand of humanity and climatic change.

Conclusion

As the Agencies continue with their rulemaking process and draft a new definition of “waters of the United States,” the NTWC requests that the scope of the new definition include ephemeral and intermittent streams as nationwide jurisdictional waters. In doing so, the Agencies will address both the regional variability in arid and headwater areas and the required federal obligations to protect tribal waters and aquatic resources. If “waters of the Tribe” is included as a category of WOTUS, as NTWC has suggested, then all ephemeral streams are likely to be in that category. The Agencies also should include interstate waters as a jurisdictional category of WOTUS, specifying that those waters include intertribal waters and waters traveling or forming the boundaries between states and tribes. Finally, the Agencies

should ensure that any methodology they develop to define jurisdictional ephemeral streams is based on scientific principles, as explained in the 2015 Connectivity Report. The NTWC believes that its comments and recommendations align with the goals of the CWA and strengthen the important role tribes already play in protecting their waters.

The NTWC appreciates the opportunity to submit early feedback as EPA considers revising the definition of the WOTUS.

Sincerely,

A handwritten signature in black ink that reads "Ken Norton". The signature is written in a cursive style with a prominent initial "K" and "N".

Ken Norton, Chair
National Tribal Water Council

Cc: Karen Gude, USEPA Office of Water