



Summary Report of Federalism Consultation for the Proposed Rule: Revised Definition of “Waters of the United States”



U.S. Environmental Protection Agency
and
Department of the Army

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BACKGROUND

This document was prepared to support the U.S. Environmental Protection Agency (EPA) and Department of the Army (the agencies) in drafting the proposed rule “Revised Definition of ‘Waters of the United States,’” which was signed by the agencies on November 18, 2021. This report summarizes the agencies’ federalism consultation and outreach efforts and the feedback they received.

The Federalism Consultation process described in this report follows the EPA policy for implementing Executive Order (E.O.) 13132¹ and responds to E.O. 13990: *Executive Order on Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis*, dated January 20, 2021. E.O. 13990 directs federal agencies to review rules issued in the prior four years that are or might conflict with the policy stated in that order. In conformance with Executive Order 13990, EPA and the Army undertook a review of the Navigable Waters Protection Rule (NWPR) and its definition of “waters of the United States.” The agencies determined that reduction in the scope of protected waters could have a potentially extensive and adverse impact on the nation’s waters. Following a federal district court decision vacating the NWPR on August 30, 2021, the agencies halted implementation of the NWPR and began interpreting “waters of the United States” consistent with the pre-2015 regulatory regime.^{2,3}

To meet the objectives of E.O. 13990, the agencies have initiated a new rulemaking process. First, the agencies have proposed restoring the longstanding Clean Water Act regulations that were in place for decades prior to 2015, as amended to reflect consideration of relevant Supreme Court decisions. The agencies anticipate proposing a second rule which would build on the foundation of the proposed rule.

This report is being released in support of a proposed rule revising the definition of “waters of the United States” (“Revised Definition of ‘Waters of the United States,’” EPA-HQ-OW-2021-0602), which was preceded by tribal and federalism consultations, initial public meetings, and a request for written recommendations, all to hear the perspectives of interested stakeholders and the agencies’ co-regulators on how to define “waters of the United States” under the Clean Water Act and how to implement that definition. Because this revised definition may have federalism implications, the agencies undertook a federalism consultation under E.O. 13132 and applicable EPA guidance.

The agencies initiated the federalism consultation and consultation process with a letter to intergovernmental associations on July 29, 2021, and a meeting on August 5, 2021. In addition, the agencies continued outreach and engagement with state and local governments and hosted three regional state dialogues in September and October 2021. In all of these activities, the agencies solicited

¹ E.O. 13132, titled Federalism, requires meaningful and timely consultation with elected state and local officials or their representative national organizations early in the process of developing the proposed regulation. A federalism summary impact statement is published in the preamble to the regulation, and the agencies must provide the Office on Management and Budget (OMB) copies of all written communications submitted by state and local officials.

² See *Pascua Yaqui Tribe v. EPA*, No. 20-00266 (D. Ariz. Aug. 30, 2021) and *Navajo Nation v. Regan*, No. 2:20-cv-00602 (D.N.M. Sept. 27, 2021); U.S. EPA, Current Implementation of Waters of the United States, <https://www.epa.gov/wotus/current-implementation-waters-united-states>.

³ The “pre-2015 regulatory regime” refers to the agencies’ pre-2015 definition of “waters of the United States,” implemented consistent with relevant case law and longstanding practice, as informed by applicable guidance, training, and experience.

input on the proposed rule to revise the definition of “waters of the United States” consistent with E.O. 13990, the Clean Water Act, and U.S. Supreme Court opinions.

This report provides a summary of the consultation and outreach conducted with state and local governments during the rulemaking process to date. It also summarizes comments and input provided by participants at meetings and the letters received during the federalism consultation period. The summary is intended to provide a description of the wide range of comments received from states, local governments, and their state and local government associations as part of consultation and outreach.

SUMMARY OF CONSULTATION AND OUTREACH EFFORTS

The agencies held a federalism consultation meeting with intergovernmental associations on August 5, 2021, in order to provide an overview of the forthcoming proposed rulemaking and to receive input from intergovernmental representatives about this action.⁴ The agencies also consulted with states and local governments to obtain their input on the proposed rulemaking and to solicit their pre-proposal comments on what they thought a revised definition of “waters of the United States” should look like. The agencies continued outreach with states after the end of the consultation comment period.

The agencies held three regional dialogues with states. The meeting dates and the states who participated follow:

- September 29, 2021, Eastern Meeting: Representatives from Rhode Island, Maryland, Indiana, Mississippi, and Kentucky
- October 6, 2021, Central Meeting: Representatives from Minnesota, Missouri, Texas, Kansas, Wisconsin, Michigan, and South Dakota
- October 20, 2021, Western Meeting: Representatives from Alaska, Colorado, Idaho, New Mexico, Nevada, Oregon, Washington, Wyoming, and Arizona

Senior Agency representatives provided the same background information and questions to all the participants at each meeting. Participants were invited to make opening statements and then the Agency representatives offered discussion topics on which participants were asked to provide input. When possible, the agencies provided responses to the questions posed during the meeting. Minutes taken during each meeting were used in the preparation of this summary.

In addition to the meetings, the agencies received letters from state and local governments, as well as government associations, as part of this Federalism consultation process. A total of thirty-seven letters

⁴ Associations of elected officials represented at this meeting included the National Governors’ Association, the National Conference of State Legislatures, the National League of Cities, the U.S. Conference of Mayors, the National Association of Towns and Townships, the National Association of Counties, the County Executives of America, and the Environmental Council of States. Additionally, several other state and local professional associations, such as the Western Governors’ Association, the Western States Water Council, the National Association of Attorneys General, the Association of State Drinking Water Administrators, the Association of State Wetland Managers, the National Association of State Departments of Agriculture, the National Association of Clean Water Agencies, the National Rural Water Association, the National Municipal Stormwater Alliance, the National Water Resources Association, the American Water Works Association, and the Association of Metropolitan Water Agencies participated.

were submitted to the agencies as part of the federalism consultation process, from the following entities:

- 12 State Government Agencies,
- 5 Local Government Agencies,
- 17 Intergovernmental Associations, and
- 3 State-level Associations of Local Governments.

This report summarizes comments provided by participants at the federalism meetings, and the letters received during federalism consultation. This summary does not generally distinguish comments submitted by a state government entity from those provided by local government entities, nor does it distinguish between comments submitted by letter or at meetings. The summary is intended to provide a description of the wide range of comments received from both state and local governments as part of this consultation process. All letters submitted are publicly available in the docket and on the EPA's website at: <https://www.epa.gov/wotus/federalism-consultation-pre-proposal-revised-definition-waters-us>. The letters are also included as attachments to this report in the docket (Docket ID No. EPA-HQ-OW-2021-0602).

These meetings and the subsequent comments and input were provided before the proposed rule was signed. Therefore, state and local governments were asked to consider specific implementation experience related to the NWPR, the 2015 Clean Water Rule, and the pre-2015 regulatory regime.

1. Significant Nexus Analyses – *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) (SWANCC) and *Rapanos v. United States*, 547 U.S. 715 (2006) (*Rapanos*) Kennedy opinion
2. Typical Year Analyses – from NWPR, what worked, what did not?
3. Tributaries - flow classifications vs. “relatively permanent”?
4. Ditches
5. Adjacent Wetlands
6. Exclusions – General, Prior Converted Cropland, Wastewater Treatment Systems
7. Needed Tools for Implementation
8. Regional, State, and Tribal Interests – regionalization, key issues to identify for agencies
9. Science, Environmental Justice, Climate Change, and other topics

When developing the proposed rule, the agencies carefully considered all comments received and all input from states, local governments, and intergovernmental associations from the various meetings. The agencies will continue to consider these comments as they work to finalize the rule.

A copy of the agencies’ letter initiating federalism consultation and a copy of the letter extending the consultation comment period are available as attachments to this report in the docket. The appendix lists the federalism consultation letters submitted by states, local governments, and state and local associations.

THEMES EMERGING FROM STATE AND LOCAL GOVERNMENT CONSULTATION LETTERS AND STATE DIALOGUES

The consultation meetings and letters indicate the wide and diverse range of interests, positions, comments, and recommendations provided to the agencies by participants and commenters from state and local governments. However, a number of key themes emerged throughout comments and letters. These themes are summarized below, in approximate descending order of number of comments received per theme.

IMPLEMENTATION SUGGESTIONS FOR UPDATES TO THE DEFINITION OF “WATERS OF THE UNITED STATES”

Most state, local, and association commenters provided some feedback related to implementation of the definition of “waters of the United States,” as was requested under docket EPA-HQ-OW-2021-0328. Many commenters stated their views on recent regulatory definitions, made general suggestions about how to improve implementation, or provided specific ideas for tools and guidance.

States and local governments held divergent views on the agencies’ plans to revert to the pre-2015 regulatory regime. Some supported the NWPR and recommended the agencies generally retain and revise that rule. These state and local entities believed that the NWPR provided a clear definition for “waters of the United States,” maintained a balance between federal and state jurisdiction, and appropriately excluded waters that should not be subject to the Clean Water Act. Some of these commenters encouraged the continued use of a “typical year.” Others supported the agencies’ current rulemaking efforts as they thought the NWPR was not protective enough and did not account for the complexities of the hydrologic cycle, the importance of ephemeral waters, or the connections among waters on the landscape. State and local governments held differing opinions on how the criteria for jurisdiction of ephemeral streams, ditches, tributaries, and wetlands should be determined, and which resources should be included in the scope of the Clean Water Act.

Some commenters who supported the NWPR expressed concern that a revised definition of “waters of the United States” will lead to increased need for permitting and compliance costs as well as potential litigation, including in small and rural communities and in Alaska. They stated that wait times for U.S. Army Corps of Engineers (USACE) approval are already very long and if jurisdiction is expanded, wait times could be further extended. To help reduce burden on states, local governments, and stakeholders some commenters requested the agencies’ jurisdictional determination and permitting process be simplified and streamlined. Several commenters suggested that the agencies create a “one-stop-shop” for permitting to streamline the current multi-agency process.

Many commenters requested that the agencies minimize subjectivity in determining jurisdiction. States and local governments differed in how they thought the agencies could best accomplish this, but most wanted technical guidance, training, and assistance to improve implementation of any new definition. Numerous commenters stated that this guidance should be based on regional hydrology and geology. One commenter suggested that the agencies create regional field checklists as a tool for jurisdictional determinations. Included in these comments requesting technical guidance were often requests to have maps of jurisdictional waters, created through a collaborative effort with states and tribes using the best

available data and tools. Commenters also stated that there should be provisions for the maps to be updated and maintained regularly. Several commenters requested that implementation tools consider climate change. Many commenters requested that these tools and guidance be made available at the same time (or before) changes to the definition are finalized. Overall, commenters wanted a clearer process with training and tools available at the time of promulgation to implement a revised definition of “waters of the United States.”

Additional comments related to this theme are stated below.

- One commenter indicated there was a lack of transparency regarding jurisdictional determinations prior to 2015 and that, going forward, the Corps database should clearly identify why a waterbody is, or is not, jurisdictional.
- One commenter asked the agencies to consider requiring a certification program for wetland consultants and those in a position to determine jurisdiction.
- A few commenters suggested using historical aerial photographs, combined with field inspection, to make these determinations.
- One commenter suggested reviewing the USGS StreamStats tool for use instead of “typical year.”
- Another commenter suggested that the agencies go back to a process where the agencies query respective state agencies to help discern jurisdiction for water bodies that were not clearly jurisdictional.
- One commenter opposed any federal regulation that requires a case-by-case determination that does not include field analysis.
- At least one commenter stated that a new rule should have a clear process for resolving disputes over federal versus non-federal jurisdiction, as well as disputes between different states and tribes.
- One commenter urged the agencies to review and update the Nationwide Permits issued under Section 404 of the Clean Water Act by the U.S. Army Corps of Engineers.

EXCLUSIONS AND EXEMPTIONS

A few commenters included specific suggestions for rule language with respect to exclusions and exemptions.⁵ Many commenters generally supported at least some exclusions available in the NWPR.

- Exclusions that were requested by commenters included the following, with some exceptions and additions stated:
 - Groundwater – one commenter stated that the exclusion should not include discharges into groundwater that have a direct hydrologic connection to surface water, while one commenter wants to expand the groundwater exclusion to include shallow flow;
 - Wastewater recycling structures/systems;
 - Stormwater systems and Municipal Separate Storm Sewer System (MS4s) – a few commenters requested specific exclusions for conservation infrastructure found on agricultural land and runoff detention ponds;

⁵ An exclusion is an exclusion from the definition of “water of the United States” even where a feature might otherwise meet the terms of the definition; an exemption is a permitting exemption indicating that particular kinds of activities do not need permits even where they affect “waters of the United States.”

- Waste treatment systems – at least one commenter stated that it was important to exclude all components of these systems, while one commenter indicated there should not be a blanket exclusion for cooling reservoirs as part of the waste treatment exclusion;
- Artificial lakes and ponds – however, at least one commenter indicated that these should not be excluded if they have a significant nexus to jurisdictional waters;
- Water storage reservoirs;
- Public water system infrastructure;
- Stormwater runoff control facilities to hold back debris and sediment for disaster response (e.g., wildfire);
- Prior Converted Cropland (PCC) – a few commenters added that if PCC is allowed to revert back to wetland, it should no longer be excluded, while one suggested that the PCC exemption revert back to what was in place prior to 2020 and another said the period of non-use for PCC should be extended;
- Farm ditches, canals, and stock ponds; and
- Water filled depressions created in uplands incidental to mining or construction activity.
- A commenter from Alaska provided a list of recommended Alaska-specific exclusions, including permafrost as groundwater and permafrost wetlands.
- At least one commenter requested that karst terrains specifically not be excluded from the definition of “waters of the United States.”
- A few commenters stated that the normal farming exemption should remain.

ROLE OF STATES VERSUS FEDERAL GOVERNMENT

Many commenters stated that the agencies need to respect the role of states in managing their water resources and that Clean Water Act section 101(b) supports the states’ critical role in protecting water quality. In addition, numerous commenters stated that states often have water quality regulations that are more protective and have jurisdiction that extends beyond the limits of federal jurisdiction under the Clean Water Act. Several stated that excluding waters from federal jurisdiction does not mean that they will be exempt from state regulation.

Many commenters stressed that states are best positioned to manage water within their boundaries because of their on-the-ground knowledge of local conditions; a commenter from Alaska emphasized that its size and lack of interstate borders makes this especially relevant. A few of these commenters stated that the NWPR improved states’ ability to regulate their own waters and that the 2015 Clean Water Rule was a federal overreach. One commenter stated that the Clean Water Act should not directly or indirectly interfere with state water allocation systems, compacts, or water rights.

Several commenters requested that the agencies examine how any new rule will affect implementation of state permitting programs, voluntary conservation efforts and the regulated community. Further, these commenters requested that the agencies consider state laws that restrict states from regulating waters that are no longer “waters of the United States.”

While many states supported limiting federal influence over waters within state boundaries, one commenter from a New Mexico county stated that New Mexico does not have its own state laws and regulations over surface waters, so they stressed the need for federal laws that protect water quality. A representative from the State of New Mexico clarified that they do not have a permitting program for

Clean Water Act activities and therefore state waters that do not fall under the definition of “waters of the United States” are unregulated. In contrast, a commenter from Wyoming pointed out that under the NWPR, their state started the process of developing a program to cover discharges to non- waters of the United States and that this demonstrates that states can provide necessary protections under state statutes.

NEED FOR CLARITY, CERTAINTY AND DURABILITY

An overarching theme amongst almost all commenters was the need for certainty and clarity with any revised definition. Commenters expressed some frustration with the back-and-forth changes to the definition of “waters of the United States” and urged the agencies to create a rule that would prove durable and allow them to regulate consistently.

Most commenters stressed the need to reduce subjective interpretations of jurisdiction. Suggestions to improve this were to clarify definitions and have less technical jargon in the definitions. Many commenters stated that changes to the definition of “waters of the United States” over the past decades have led to “regulatory whiplash.” According to commenters, this regulatory uncertainty has affected economic development, planning, and investment of finite public resources. Another commenter noted the importance of clarity because of the civil and criminal penalties associated with violations.

Several commenters contended that the 2015 Clean Water Rule definitions were vague and unworkable, while the NWPR definitions were clear. Another commenter expanded on this by stating that the agencies need to find the right balance so that definitions are clearer than the pre-2015 rule, but not as oversimplified as the NWPR. Many commenters agreed the need for a “durable” rule and that buy-in from states was needed to reduce future legal issues.

COOPERATIVE FEDERALISM

A common theme in the consultation letters and meetings was the need to take cooperative federalism seriously. Many commenters emphasized that states and local governments are co-regulators and have a unique role in the development and implementation of Clean Water Act rulemaking. Many emphasized the need for state and local priorities to be considered in this rulemaking. Some commenters stated that states need to be involved in the rulemaking process because of regional differences in hydrology, geology, and legal doctrines (e.g., for water allocation in the west). Several commenters indicated that in addition to states, county governments and government associations need to be included in the rulemaking process. A few commented on a perceived lack of federalism consultation with the 2015 Clean Water Rule⁶ and with this proceeding. Several commenters thanked the agencies for the opportunity to comment on this phase of the rulemaking, but urged the agencies to continue to seek more input and to provide continuous, meaningful opportunities for dialogue. Additional comments related to this theme are stated below.

⁶ U.S. Environmental Protection Agency and Department of the Army. Report on the Discretionary Consultation and Outreach to State, Local, and County Governments for the Clean Water Rule: Definition of “Waters of the United States” Under the Clean Water Act; Final Rule. May 2015. Accessed at https://archive.epa.gov/epa/sites/production/files/2015-05/documents/clean_water_rule_federalism_report.pdf.

- A commenter from Alaska said that the agencies should be required to set up a rule-writing office in Alaska because of the state’s large proportion of water resources.
- A commenter indicated that the agencies should formally acknowledge that Federalism Executive Order (EO) 13132 applies to the “waters of the United States” rulemaking, and that their understanding of the Federalism EO precludes further work to expand the definition of “waters of the United States” in Alaska.
- One commenter stated that “information sharing” does not equate to meaningful consultation.
- One commenter stated that changes to the Clean Water Act have federalism implications that alter the distribution of power between states and the federal government.
- One commenter found the consultation meeting format difficult and suggested smaller forums with fewer participants and topics.

IMPLEMENTATION ISSUES UNDER THE NWPR, INCLUDING THE TYPICAL YEAR ANALYSIS

Many commenters provided feedback and suggestions related to the implementation of the NWPR. Some commenters indicated that they were able to successfully implement the NWPR, while others cited challenges with putting the NWPR into practice. These comments are summarized below. Comments on state and local government experiences with using NWPR’s typical year approach are also outlined below.

Implementation of NWPR – Supportive/Neutral

- Many commenters stated that the NWPR provided regulatory certainty for their community about what is and is not jurisdictional.
- One commenter stated that the NWPR was an effective method to implement the objectives of the Clean Water Act.
- One commenter stated that the NWPR simplified their county’s ability to maintain ditches, stormwater features, and ephemeral streams, and simplified wetland delineation.
- Several commenters stated that they did not alter their regulatory approach under the NWPR and that they did not have many implementation issues under the NWPR.
- One commenter stated that, while they did not have many implementation issues under the NWPR, having to distinguish between intermittent and ephemeral streams for permitting led to disagreements between applicants and regulators. The commenter stated that this highlights the need for a defensible method for making flow regime determinations.
- One commenter stated that, while there was a significant loss in jurisdictional waters under the NWPR, state laws protect those waters, so the rule did not lead to any significant loss of protection for the resources.
- One commenter stated that they have been able to work through any initial confusion with the NWPR (and past rules) because of their strong partnership with their local Corps office.

Implementation of NWPR - Not Supportive

- Several commenters mentioned that the NWPR created uncertainty for their regulated community.
- Many state and local government commenters stated that significant proportions of their waters were no longer jurisdictional under the NWPR.

- Several commenters stated that implementation under the NWPR was dependent on a state’s existing regulations. For those states with strong dredge and fill permitting programs, the impacts of the NWPR on their waters may have been minimal. The most significant impact in this case was the increased time and resources needed to protect waters that were non-federal under the NWPR. For states without their own dredge and fill permitting program, the NWPR had a greater impact on waters. This has been especially true in the arid west, where many waterways are ephemeral.
- One commenter stated how, under the NWPR, the burden fell on state regulators to explain to parties why the state regulations were so much more protective than the federal regulations under the NWPR.
- Multiple commenters stated that the NWPR led to delays in the permitting process, because of additional steps and because of interpretation delays from the agencies.
- Several commenters stated that the NWPR was in conflict with local regulations, which created implementation problems, especially when federal consistency was required (e.g., Clean Water Act section 401, Coastal Zone Management Act). They also noted the inability to use Nationwide Permits for waters that were formerly under federal jurisdiction.
- One commenter outlined how some states have attempted to respond to the NWPR by changing their state regulatory program but stated that not all states have been successful in doing so.
- Some states stated that implementation of the NWPR has affected their decisions regarding 404 program assumption.
- Several commenters stated that the NWPR has resulted in a loss of projects that can use mitigation banks that provide federal mitigation credits. They also stated that some wetland mitigation banks were no longer considered “wetlands” under the NWPR.
- One commenter stated that the loss of the interstate waters category in the NWPR led to frustration and confusion in their regulated community.

Typical Year Analysis

- Many commenters stated that the “typical year” analysis was unclear, added additional steps, caused delays, and was sometimes in conflict with state or tribal methodology for determining flow regime.
- A few commenters expressed concerns about the accuracy of the “typical year” analysis in light of climate change.
- A few commenters stated that implementation was difficult because the tools and training for determining flow regime under the typical year analysis were not available upon promulgation of the NWPR.
- Several commenters indicated that the typical year method has merit and should be considered in the forthcoming redefinition of “waters of the United States.”
- At least one commenter indicated that the typical year analysis has been “largely implementable.”
- Several commenters stated that the NWPR was not in effect for long enough to really test the effectiveness of the typical year analysis.

IMPLEMENTATION ISSUES WITH THE PRE-2015 REGULATIONS AND 2015 CLEAN WATER RULE, INCLUDING SIGNIFICANT NEXUS

Commenters provided feedback on the significant nexus analysis under the pre-2015 regulatory regime and the 2015 Clean Water Rule and also cited support for, or challenges with, overall implementation of the pre-2015 regulations and the 2015 Clean Water Rule. Key elements of these comments are provided below.

- Several commenters stated that, under the 2015 Clean Water Rule, significant nexus was not well defined and was often challenging, time consuming, and expensive to implement. Another commenter urged the agencies to provide clarity, particularly in what constitutes “significant.”
- A few commenters stated that the significant nexus test was difficult to implement because of inconsistent interpretation and professional bias.
- One commenter stated that it took time to adjust to the significant nexus concept when it first came out and that the agencies took too long to set up field protocols which caused delays in jurisdictional determinations.
- One commenter indicated that the 2015 Clean Water Rule definition required consultants to implement, which added cost and delays to permitting actions.
- One commenter stated that the Corps often took too long to review permit applications under the 2015 Clean Water Rule.
- A few commenters expressed general support for the use of the significant nexus analysis.
- A few commenters stated that significant nexus tests used under the pre-2015 regulations and the 2015 Clean Water Rule were consistent with the determinations of the state.
- One commenter stated that there were few changes in jurisdictional determination between the pre-2015 regulations and the 2015 Clean Water Rule. Significant nexus decisions ensured that wetlands and waters affecting downstream “waters of the United States” were appropriately accounted for.

WETLANDS AND THE DEFINITION OF ADJACENCY

Commenters provided recommendations and feedback related to wetlands in their consultation letters and at meetings. General comments made about the treatment of wetlands are included below.

Recommendations on the scope of adjacency, which has changed under different definitions of “waters of the United States,” are included below.

General Comments on Wetlands

There were divergent views on the importance of wetlands and how their jurisdiction should be determined in a new rule. There were several comments on the importance of wetlands for either drinking water quality or for climate change adaptation. Some commenters mentioned that wetlands themselves are at risk from climate change-related impacts and one commenter suggested including buffer zones to wetlands in the definition to account for climate change. One commenter expressed support for the “No Net Loss” policy for wetlands. Conversely, a few other commenters recommended that wetlands not be included in a revised definition of “waters of the United States,” or that the agencies should limit federal jurisdiction to wetlands that cannot be distinguished from a neighboring jurisdictional water.

Definition of Adjacency

There were many opinions expressed on how wetland adjacency should be defined. Many commenters recommended a return to the agencies' longstanding definition of adjacency as "bordering, continuous or neighboring," and that wetlands that are separated by dikes, barriers, or similar structures should be considered adjacent and jurisdictional. Some of these commenters expressed frustration with the NWPR definition of adjacency as they believed it was not protective or clear, and allowed physical features (such as infrastructure) to serve as a border for an adjacent wetland. These commenters supported the use of the significant nexus analysis in determining adjacency. A subset of these comments recommended that subsurface hydrologic connections be included in the definition, as well as surface connections. A few commenters stated that adjacent wetlands with any surface connection, even if only temporary due to flooding, should be considered jurisdictional. Other commenters supported the NWPR definition, with multiple commenters pointing out the longstanding definition of adjacency to include bordering, contiguous and neighboring wetlands was too broad and that the 2015 Clean Water Rule definition of neighboring is impractical for farmers and ranchers.

Additional recommendations for the definition of adjacency are listed below:

- A few commenters stated that the definition of adjacency should be informed by proximity but should avoid numerical distance standards.
- A few commenters recommended considering regional variation in the definition of adjacent.
- One commenter requested that the revised definition of "waters of the United States" consider both wetlands and open waters in its concept of adjacency, in line with aquatic resource science and the goals of the Clean Water Act.
- One commenter requested that bright-line administrative boundaries be included for wetlands, measured at a set distance from the ordinary high water mark (OHMW) of a jurisdictional water. They also requested clarification on how "direct" a connection must be for a wetland to be jurisdictional.
- A commenter from Alaska supported the idea of requiring a direct surface connection for jurisdiction but noted some issues with this in certain seasons when permafrost melts and encouraged a more limited or regional definition.

DITCHES

Many commenters provided comments and suggestions regarding the treatment of ditches in the definition of "waters of the United States." Of these comments, there was a split with some commenters supporting the exclusion of more ditches and some supporting the exclusion of fewer ditches. In general, the commenters in support of fewer ditches being jurisdictional stated that the NWPR provided clear guidance on ditches, that states and local governments should determine regulation of ditches, and that a return to pre-2015 regulations will adversely affect many local governments that are responsible for many ditches. There were some comments in support of including relatively more ditches as jurisdictional under certain specific instances. In all the comments on ditches, many made specific suggestions for what should or should not be considered a jurisdictional ditch. A summary of these comments is provided below.

Comments Supporting Regulation of Fewer Ditches

- Several commenters stated that they were satisfied with the language used in the NWPR to exclude ditches. A few commenters stated that the 2015 Clean Water Rule ditch exemption was unclear and led to subjective interpretation, was inconsistently applied, and caused delays.
- Several commenters recommended that the construction, maintenance, repair and rehabilitation of man-made ditches and canals should not be subject to 404 permitting.
- A few commenters indicated that all ditches should be excluded from the definition of “waters of the United States.”
- One commenter requested that any ditch exemption be explicit in applying the exemption to agricultural features.
- One commenter stated that ditches should not be jurisdictional if their intended purpose is for non-Clean Water Act uses, such as conveying irrigation water.
- One commenter suggested that the agencies follow the existing guidance in RGL-07-02 as it pertains to the construction and maintenance of irrigation ditches and the maintenance of drainage ditches, while considering expanding RGL-07-02 to include municipal ditches as well.
- Many commenters from local and rural governments stated that they are responsible for maintaining a wide variety of ditches and that this section of the definition is important to them. They stated that if there is a return to the pre-2015 definition, ditches will be regulated under the 404 program and county governments will be significantly impacted. County governments urged the agencies to include local government public works maintenance and repair projects in the 404 permitting exemptions.
- One commenter supported excluding ditches constructed wholly in upland but stated that they must take into account the purpose of the ditch and whether it connects to jurisdictional waters.

Comments Supporting Regulation of More Ditches

- One commenter indicated that the NWPR distinction between jurisdictional and non-jurisdictional ditches was unclear.
- One commenter recommends a ditch be jurisdictional if it is ephemerally, intermittently, or perennially connected to another jurisdictional water.
- One commenter recommended that ditches be considered jurisdictional where they have the physical characteristics of a tributary and provide flow to a traditionally navigable water or interstate water, or if a ditch was created wholly in upland, but has at least intermittent flow or standing water.
- A few commenters supported regulation of tidally-influenced ditches.
- One commenter stated that channels that connect other waters might also be considered as jurisdictional.
- One commenter supported ditches as “waters of the United States” when: the ditch was previously a natural tributary; the human-made ditch originated in uplands or another “waters of the United States” (e.g., wetland), and has flow or other physical characteristics of a “waters of the United States” and is connected to other “waters of the United States” so that it may convey pollutants and pollution to the other “waters of the United States”; or the ditch conveys tidal flow.

General Comments on Ditches

- One commenter recommended replacing the term “ditch” with “conveyance channel” (or similar) because ditch has a negative connotation and is not clear.
- One commenter requested that the agencies work with stormwater entities to craft language and guidance regarding ditches.
- One commenter recommended using language to specifically exclude certain types of ditches (as was done in the 2015 Clean Water Rule) and define specific types of ditches (e.g., canals) if they are always jurisdictional.
- One commenter stated that ditches will be affected by climate change, including by sea level rise and saltwater intrusion.
- A few commenters suggested developing regional procedures and field guidance for identifying jurisdictional ditches.

TRIBUTARIES, INCLUDING EPHEMERAL STREAMS AND DRINKING WATER SOURCES

Commenters provided many suggestions for what should and should not be included under the definition of tributary, as well as suggestions for methodology and characteristics to define a tributary and on the exclusion of ephemeral streams under the NWPR. A summary of these comments is provided below.

Definition of Tributary – Ephemeral Streams

- Approximately the same number of state and local government commenters indicated that ephemeral features should be included in the definition of “waters of the United States” as those that felt ephemeral features should be excluded.
- A few commenters struck a middle ground and indicated that, while not all ephemeral streams should be regulated, there should be some regulation of ephemeral waters that considers their cumulative impact and functional value. These commenters urged the agencies to develop a process to help determine which ephemeral streams should be regulated.
- Many of the commenters who supported inclusion of ephemeral features also discussed the importance of ephemeral streams to ecological systems, flood control, and water quality, particularly in the arid west and in the face of climate change.
- One commenter stated that if significant nexus is included in the foundational rule, special consideration should be given to its application in ephemeral drainages, especially in the arid west.

Definition of Tributary - General

- One commenter requested clearer definitions for terms like “intermittent” and “ephemeral.”
- Several commenters specifically stated that they support the NWPR definition of tributary.
- One commenter said that the definition of tributary under “waters of the United States” should be limited to perennial streams with relatively permanent surface water connection to a navigable water, consistent with *Rapanos*. They added that a significant nexus requires a connection between waters that is more than speculative or insubstantial to establish jurisdiction, and that the new rule should quantify “significant” to ensure this.
- One commenter indicated that a jurisdictional stream must support the Clean Water Act uses defined by each state’s regulations.

- One commenter stated that a tributary must have relatively permanent flow.
- One commenter requested that springs carrying flow be considered jurisdictional and another requested that the agencies include hyporheic flow.
- One commenter stated that man-made structures should not change the status of a “water of the United States,” such as if a levee or ditch discharges into a stream.

Definition of Tributary - Methodology

- A few commenters supported the use of ordinary high water mark (OHWM) and suggested specific language on how to define the term.
- One commenter stated that the use of OHWM was too broad under the 2015 Clean Water Rule but that the NWPR corrected this issue.
- One commenter recommended that the definition of tributary call for either “bed and bank or other evidence of flow” instead of requiring both a bed and bank and another indicator of OHWM to be considered jurisdictional. Similarly, one commenter indicated that the presence of bed and bank is not enough to determine jurisdiction because some streams do not have these.
- A few commenters requested that the definition of tributary not include reference to flow regime.
- A few commenters recommended that the agencies include a requirement of continuous flow for at least 3 consecutive months in the definition of intermittent.
- One commenter suggested that a Rhode Island state methodology for determining connectivity could be a model for the agencies.
- A few commenters indicated that the new rule should allow for regionalization in the definition with regional guidance tools.
- One commenter indicated that the definition of tributary must incorporate climate change by adding some consideration for the length and representativeness of the flow record because many streams that were once perennial are now intermittent.

Drinking Water Sources⁷

- A few commenters stated that any rulemaking must consider implications for drinking water sources, noting that it is more efficient to prevent pollution at its source than to remove them at the consumers’ expense after entering a drinking water supply.
- One commenter from a drinking water association requested that the agencies ensure that groundwater discharges do not create surface water impairments (and vice versa), particularly for groundwater sources of drinking water.
- One commenter stated the importance of considering drinking water sources because of climate change impacts such as saltwater intrusion.

REGIONAL APPROACH

Almost half of all federalism consultation feedback recommended that the new rule take a regional approach for the definition and implementation of “waters of the United States.” There were no specific

⁷ This information was included in this section because source water protection areas include tributaries and it did not receive enough comments to warrant a separate section.

comments that opposed this concept. Many comments regarding regionalization are interwoven with other themes in this summary report.

Several commenters stressed that a “one-size-fits-all” approach does not work. Many commenters indicated that providing a regional approach would help to consider geographic and hydrologic differences, particularly in the arid west and Alaska. Commenters stated that a regionalized definition of “water of the United States” would allow states flexibility in implementation and that it could be helpful for many localized issues, such as interstate water disputes, issues related to ephemeral/intermittent streams that are impacted by climate change, and groundwater discharges. Some urged the agencies to consult with states, tribes, and counties if regionalized definitions are created.

TIME AND COST ASSOCIATED WITH THE RULE CHANGE AND REQUESTS FOR A DELAY IN EFFECTIVE DATE

Many commenters stated that it will take time and resources for state and local governments to adjust to any new definition, including potential changes to their regulations and proper training in field methods. Most of these commenters requested that the agencies provide a delayed effective date (or allow for a transition period) to allow state and local governments time to adjust to the new definition. Several commenters indicated that the additional costs, delays, and potential for litigation associated with the rule changes could affect water quality and/or public health as well as slow down local infrastructure projects, especially in small and rural communities. In addition, several commenters requested that the agencies provide funding to state and local governments to cover administrative costs associated with adaptation to the rule changes. One commenter stated that, without commensurate compensation for implementation, an expanded redefinition of “water of the United States” would constitute an unfunded mandate to states regarding their obligations under the Clean Water Act. A few commenters stated that a revised definition may jeopardize investment and interrupt progress they had made under the NWPR. Overall, many commenters wanted EPA to recognize the effort and resources needed for states, local governments, and the regulated public to adjust to a new definition.

SUPREME COURT RULINGS AND OTHER LEGAL COMMENTS

Some commenters referenced the extensive legal history of the “water of the United States” rulemaking in their consultation letters and at meetings. A summary of these comments is provided below.

- With regards to *Rapanos*, several commenters stated that any changes to the definition should be based on Justice Scalia’s opinion in *Rapanos*, while one commenter requested that any changes to the definition be consistent with the Kennedy opinion. A few other commenters stated that *Rapanos* caused confusion because neither the plurality or concurrent opinion was a majority, and tension between the two increased cost and time for local projects.
- One commenter stated that the NWPR comports with Clean Water Act judicial precedent more closely than previous rules defining “water of the United States.”
- One commenter urged the agencies to use the entire docket of case law to amend the pre-2015 regulations.

- One commenter urged agencies to revisit the North Dakota case against the 2015 Clean Water Rule.
- A few commenters urged the agencies to comply with the limits set by Congress on the scope of federal jurisdiction under the Clean Water Act. Another commenter added that the agencies need to articulate where they view the bounds of the Commerce Clause as well as how the revised definition avoids approaching that limit.
- One commenter asked how the agencies plan to incorporate EPA’s January 2021 *Maui* Guidance, and one commenter recommended that the agencies use content from the *Maui* Guidance in the new rulemaking. One commenter specifically suggested the Agencies incorporate the eighth element of the *Maui* Guidance into the revised rule.⁸
- One commenter urged the agencies to delay final action until the Supreme Court completes its review of the Sept 22, 2021 Petition for Writ of Certiorari for *Sackett v. EPA* No. 19-35469, 8 F.4th 1074 (9th Circuit, Aug 16, 2021).
- One commenter stated that a better definition of interstate commerce is required and that recreational uses should not be considered “commerce.”

SCIENCE

A few federal consultation letters included references to specific literature in support of the agencies’ pre-proposal request for identification of relevant science, including relevant literature that has been published since the EPA’s 2015 Connectivity Report. More often, the commenters made general statements about the use of science to support a revision to the definition of “waters of the United States” or about the 2015 Connectivity Report. Many commenters requested that the agencies respect, apply, and follow the best available science. Several commenters were supportive of the 2015 Connectivity Report being used to support rulemaking while a couple of commenters opposed the use of the 2015 Connectivity Report because they felt the conclusions contradicted Supreme Court decisions.

INTERSTATE WATERS

The NWPR removed the previously established category for interstate waters from the definition of “waters of the United States.” Many commenters recommended that a revised definition reinstate a category for interstate waters, citing the need to protect water quality in downstream states, to provide consistency, and to manage interstate disputes. One commenter added that tributaries to interstate waters should be identified as “waters of the United States,” as well as waters adjacent to such tributaries. They also suggested that a revised definition define “interstate waters” as including waters that cross or form tribal boundaries. Only one commenter requested that interstate waters not be included as a category of “waters of the United States.”

⁸ On September 15, 2021, EPA Assistant Administrator Radhika Fox signed a memo rescinding EPA’s January 2021 guidance document titled “Applying the Supreme Court’s *County of Maui v. Hawaii Wildlife Fund* Decision in the Clean Water Act Section 402 National Pollutant Discharge Elimination System Permit Program.” 86 Fed. Reg. 53,653 (Sept. 28, 2021).

ECONOMIC ANALYSIS

Several commenters addressed the need for an economic analysis with the new rulemaking and provided suggestions for what to include, often based on what was important to their respective communities. Commenters requested that the agencies examine the impacts on the farming and ranching community, as well as the costs and benefits of the proposed redefinition on source water quality for drinking water supplies. They also stated that new rule needs to consider the full range of benefits of having clean water and healthy watersheds, including benefits to outdoor recreation, ranching, farming, and municipalities. Similarly, one commenter stated that good water quality is critical to their state’s water-based industries and tourism.

Several commenters requested that the agencies conduct a review of the actual costs of a revised “waters of the United States” definition on all Clean Water Act implementation programs, not just the 404 program. In addition, several commenters stated that this rulemaking will have significant impacts on critically needed infrastructure projects nationwide, in light of the Infrastructure Investments and Jobs Act. These commenters requested more information on how returning to the pre-2015 definition will impact these infrastructure projects.

ENVIRONMENTAL JUSTICE

Several commenters indicated that environmental justice is an important issue and that any new definition should take this into account. These commenters were supportive of the concept that underserved communities stand to lose the most with a narrower definition of “waters of the United States,” with specific reference to tribes and Latino communities in the Southwest and tribes the Pacific Northwest.

A few commenters stated that the new rulemaking must conduct an impact analysis on underserved communities in areas that are reliant on ephemeral waters and that have minimal capacity to fill regulatory gaps. One commenter suggested that any new rule should include historical connectivity, especially in urban areas, and should ensure protection of remaining fragmented wetlands and streams. Another commenter suggested that geospatial tools can be used to examine the concentration of disadvantaged communities in watersheds.

A few commenters indicated that “waters of the United States” is not the appropriate venue to address environmental justice concerns. Instead, one commenter suggested these issues be handled by Congress as amendments to the Clean Water Act or via litigation in court. Another commenter stated that the connection between the jurisdictional status of a water and the social or economic setting is not clear and that it should not be an attribute to assign to a waterbody to give it more weight for a jurisdictional determination. This commenter felt that environmental justice is a matter to be addressed through implementation of environmental programs.

CLIMATE IMPLICATIONS

Some commenters supported the new rule accounting for climate change while others believe climate implications should not be included in any new definition of “waters of the United States.” Several commenters in support of climate change language in the new rule suggested that a liberal interpretation

of “waters of the United States,” such as including buffer zones and ephemeral streams, would help account for climate change impacts. Comments in opposition of climate change language in the new rule stated that the issue should be handled by Congress, such as by amendments to the Clean Water Act or through litigation in court. One commenter said an appropriate definition of “waters of the United States” would be adaptable to climate change without accounting for it specifically in the definition. Another commenter added that state programs are used to incorporate climate change factors and therefore climate change does not need to be a part of the federal definition.

LAKES, PONDS, OTHER WATERS, AND GEOGRAPHICALLY ISOLATED WETLANDS

Some commenters discussed the jurisdictional status of lakes, ponds, other waters, and geographically isolated wetlands. A few commenters did not want geographically isolated wetlands or other waters not connected to navigable waters included in the definition, while several commenters did want these features included and urged the agencies to review recent scientific literature on “other” waters to support their inclusion. One commenter requested that closed basin lakes be included, another wanted karst features included, and one stated that isolated wetlands are important for storing water from intense precipitation events that are becoming more prevalent due to climate change. Finally, one commenter stated that lakes and ponds should be a separate category of “waters of the United States.”

AGENCIES’ RATIONALE FOR THE RULE CHANGE

A few commenters did not agree with the agencies’ rationale for the proposed rule change, indicating that the agencies have not explained how the NWPR is not protective of the environment. One commenter stated that the agencies cited 330 sites where environmental harm has been caused by the NWPR, but failed to recognize that state and local regulations would have applied to these projects or that the projects could have been beneficial. They requested more transparency and justification related to these 330 sites. A few states stated that there are few or no instances where water quality could have been negatively impacted as a result of the NWPR and in which the state could not have taken action to enforce state laws.

ISSUES WITH THE RULEMAKING PROCESS

A few commenters provided direct comments on the rulemaking process. Two commenters recommended that the agencies shift focus to an anticipated second rule, because the Arizona District Court vacatur already addressed most of the proposed rule. One commenter suggested repealing the NWPR, reverting to the pre-2015 and taking no further action in order to return to a well-known definition that can allow for quicker implementation than if another rulemaking follows. Another commenter requested that the agencies revise the NWPR rather than repeal it. Finally, one commenter requested an early draft of the regulatory text to give feedback and identify unintended consequences.

OVERALL SCOPE OF THE RULEMAKING

A few commenters stated that a revised definition of “waters of the United States,” should cover only navigable waters.

CLEAN WATER ACT FUNDING

As part of any revised regulations defining “waters of the United States,” a few commenters requested that the Agencies continue to provide long term financial assistance to states to support state and tribal programs, including Water Pollution Control State grants or other grant funding.

APPENDIX: STATES, LOCAL GOVERNMENTS, AND ASSOCIATIONS SENDING CONSULTATION COMMENT LETTERS

All federalism consultation comment letters are available on EPA’s website at <https://www.epa.gov/wotus/federalism-consultation-pre-proposal-revised-definition-waters-us>.

State, Local Government, or Association Name	Type of Commenter
American Association of State Highway and Transportation Officials	Association
Association of Clean Water Administrators	Association
Association of Minnesota Counties	Association
Association of Metropolitan Water Agencies	Association
Association of State Drinking Water Administrators	Association
Association of State Wetland Managers	Association
American Water Works Association	Association
County Commissioners Association of Pennsylvania	Association
Minnesota Rural Counties	Association
National Association of Counties	Association
joint letter from the National Association of Counties, National League of Cities, and the United States Conference of Mayors	Association
National Association of Clean Water Agencies	Association
National Association of State Departments of Agriculture	Association
National Association of Towns and Townships	Association
National Conferences of State Legislatures	Association
National Municipal Stormwater Alliance	Association
National Rural Water Association	Association
National Water Resources Association	Association
Tennessee Municipal League	Association
Western States Water Council	Association
Alaska Department of Environmental Conservation	State agency
Indiana Department of Environmental Management and State Department of Agriculture	State agencies
Kansas Department of Health	State agency
Maryland Department of the Environment	State agency

Michigan Department of Environment, Great Lakes, and Energy	State agency
New Mexico Environment Department	State agency
Nevada Division of Environmental Protection	State Agency
State of Oklahoma Office of the Secretary of Energy & Environment	State agency
joint letter from the State of Oregon's Departments of Environmental Quality, Fish and Wildlife, Forestry, and State Lands	State agencies
Rhode Island Department of Environmental Management	State agency
joint letter from South Dakota's Departments of Agriculture and Natural Resources; Game, Fish, and Parks; and Transportation	State agencies
Wyoming Department of Environmental Quality	State agency
Clearwater County, MN Highway Department	Local government
Board of Commissioners for Cowlitz County, WA	Local government
Hawai'i County Council, HI	Local government
Board of County Commissioners in Lincoln County, NV	Local government
Santa Fe, NM County Board of County Commissioners (BCC)	Local government