



Summary Report of Tribal
Consultation and Engagement
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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Table of Contents

Background	1
Summary of Consultation and Engagement Efforts	2
Themes Emerging from Tribal Consultation Letters, Consultation Meetings, and Other Pre-Proposal Tribal Engagement (Including the Tribal Dialogues).....	4
Broad Opposition to the Navigable Waters Protection Rule	4
Tribal Consultation and Ongoing Engagement.....	5
Concerns about Treaty Rights and Trust Responsibility	6
Need For Clean Water for Cultural, Religious, Subsistence, and Economic Uses.....	7
Specific Waters.....	7
Intermittent and Ephemeral Streams:.....	7
Tributaries	8
Wetlands	8
Tribal Waters.....	8
Groundwater Connection	8
Interstate Waters	9
Waste Treatment System Exclusion	9
Climate Change	9
Environmental Justice	10
Other	10
Tribes Requesting Consultation	11
Staff-level Meetings	12
Leader-to-Leader Meetings	12
Pending Tribal Consultation Requests	12
Appendix A: Tribes/Tribal Organizations Sending Consultation Comment Letters	13
Appendix B: Tribal Consultation, Coordination, and Outreach Meetings.....	15
Meetings and Outreach Occurring During the Consultation Period.....	15
Meetings and Outreach Occurring After the End of the Consultation Period.....	15

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’ tribal consultation and coordination efforts and the feedback they received.

The tribal consultation process described in this report follows the U.S. Environmental Protection Agency’s (EPA) policy for implementing Executive Order (E.O.) 13175¹ on Consultation and Coordination with Indian Tribal Governments 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 a 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 the Executive Order 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 (referred to as the pre-2015 regulations), with revisions to reflect consideration of relevant Supreme Court decisions. The agencies then anticipate proposing a second rule which would build upon the foundation of the proposed rule.

This report is being released in support of the first 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 impact tribes, the agencies undertook tribal consultation under the *EPA Policy on Consultation and Coordination with Indian Tribes* and the U.S. Army Corps of Engineers Tribal Consultation Policy. The agencies initiated the tribal consultation and consultation process before proposing this rule by sending a “Notification of Consultation and Coordination” letter on July 30, 2021, to all federally recognized tribes, as discussed in more detail in the “Summary of Consultation and Engagement Efforts” section of this report. In addition to two national tribal consultation kickoff webinars held in August 2021, the agencies convened several staff-level meetings

¹ Executive Order 13175 requires that agencies consult with tribal governments on rules, policies, and guidance with tribal implications. *EPA Policy on Consultation and Coordination with Indian Tribes* defines when and how consultation takes place. EPA and the Army followed EPA’s consultation policy and the Corps’ consultation policy for this tribal consultation.

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.

and leader-to-leader consultations with individual tribal governments and presented at EPA tribal meetings. In addition, the agencies continued outreach and engagement with tribes and sought other opportunities to provide information and hear feedback from tribes at national and regional tribal meetings after the end of the consultation period, including by hosting four regional tribal dialogues in October 2021. The agencies also are working to honor requests from individual tribes for consultation. In all of these activities, the agencies solicited 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 summarizes the consultation and outreach conducted with tribes and tribal organizations during the rulemaking process to date. It also summarizes comments and input provided by participants at tribal meetings, the letters received during the tribal consultation period, and comments provided by tribes during individual consultation meetings. The summary is intended to provide a description of the wide range of comments received from tribes and tribal organizations as part of this consultation and coordination process.

SUMMARY OF CONSULTATION AND ENGAGEMENT EFFORTS

The agencies began consultation with federally recognized tribes on this rulemaking on July 30, 2021. On July 28, 2021, Jaime Pinkham, Acting Assistant Secretary of the Army for Civil Works, signed the Notification of Consultation and Coordination letter, and Radhika Fox, EPA’s Assistant Administrator for Water, signed the letter on July 29, 2021, which invited tribal officials and their designated consultation representatives to participate in the consultation and coordination process and provide comments to the agencies on the forthcoming proposed rule. The agencies sent the letter and the consultation plan to all federally recognized tribes on July 30, 2021, initiating the tribal consultation period. EPA also notified tribes of the consultation via the Tribal Consultation Opportunities Tracking System (<http://tcots.epa.gov>). On August 16, 2021, the agencies extended the tribal consultation comment period to October 4, 2021. The letters initiating tribal consultation and extending the consultation comment period are attached to this consultation report in the docket for the proposed rule.

The agencies held two identical Tribal Consultation Kick-off Webinars on August 19, 2021, and August 24, 2021, to provide an overview of the forthcoming rulemaking and to receive input from tribal representatives about this action. The agencies consulted with tribes to gain an understanding of tribal views on a forthcoming 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 tribes as well as consultation with individual tribes after the end of the consultation comment period and continued to accept tribal consultation comments after the close of the consultation period.

Many of the sessions were led by or attended by one or more of the following representatives: for EPA, Radhika Fox, Assistant Administrator for Water; Sylvia Quast, Senior Advisor to the Assistant Administrator for Water; Zach Schafer, Senior Advisor to the Assistant Administrator for Water; Brian Frazer, Director of the Oceans, Wetlands and Communities Division; Russ Kaiser, Chief of the Program Development and Jurisdiction Branch; Damaris Christensen, Jurisdiction Team Lead; Rose Kwok, tribal consultation lead for the rulemaking; Karen Gude, Office of Water Tribal Program Coordinator; Elise O’Dea, Office of General Counsel; for the Army, Jaime Pinkham, Acting Assistant Secretary of the Army for

Civil Works; Stacey Jensen, Assistant for Regulatory and Tribal Affairs, Office of the Assistant Secretary of the Army for Civil Works; Elliott Carman, Water Resources Regulation and Policy Advisor, Office of the Assistant Secretary of the Army for Civil Works; Zaheer Tajani, Associate Deputy General Counsel, Department of the Army; Matt Wilson, Regulatory Program Manager, Corps of Engineers; and Lisa Morales, tribal liaison, Corps of Engineers.

The agencies provided similar background information on the definition of “waters of the United States” and its relation to various Clean Water Act programs and asked similar questions at each meeting during the consultation period. After the end of the consultation period, the materials presented continued to be similar, though some additional slides summarizing the tribal consultation process, a slide summarizing litigation, and slides providing additional background were added to later presentations. Representative copies of the presentations are available in the docket.

After the close of the consultation period, the agencies held four (4) tribal dialogues emphasizing regional concerns. Specific questions were circulated to tribes prior to the four tribal dialogues. A summary of the tribal dialogues, the list of questions shared with tribes, and the presentations for the dialogues are available in the docket in a separate entry. Tribal participants at the dialogues were invited to introduce themselves, make opening statements, and then the agency representatives posed discussion topics, on which participants were asked to provide input. When possible, the agencies provided responses to the participant questions posed during the meeting. Minutes taken during each meeting were used in the preparation of this summary. The tribal dialogues occurred on

- October 7, 2021 (East Coast tribes – Northeast, Mid-Atlantic, Southeast)
- October 13, 2021 (Central tribes – Midwest, Gulf Coast)
- October 27, 2021 (Arid West tribes)
- October 28, 2021 (Northwest and Alaskan tribes)

Upon request, the agencies engaged in individual consultation with five tribes, including two staff-level and three leader-to-leader consultations. The “Tribes Requesting Consultation” section of this report contains additional information about staff-level and leader-to-leader meetings with tribes. The agencies also presented updates and information in meetings with the National Tribal Water Council, the National Tribal Caucus, and Regional Tribal Operations Committees (RTOCs) upon request. The agencies also held a listening session with the Mendocino, Lake, Sonoma Tribal Environmental Professionals (MLSTEP). The full list of meetings is available in Appendix B.

The agencies received letters from tribes and tribal organizations as part of this tribal consultation and coordination process. A total of 24 comment letters were submitted to the agencies as part of the tribal consultation process, with the agencies hearing from 25 individual tribal nations (including one letter representing five tribes) and three tribal organizations. See Appendix A for a list of the tribes and tribal organizations submitting consultation comment letters to the agencies.

In addition to the 24 comment letters, the agencies received five separate letters requesting government-to-government consultation or staff-level engagement from tribes, with a total of 12 tribes requesting consultation. This is discussed further in the “Tribes Requesting Consultation” section.

This report summarizes comments and input provided by participants at individual tribal consultations and other tribal meetings and webinars the tribal consultation comment letters. This summary does not

generally distinguish comments submitted by an individual tribal nation from those provided by other tribal entities, nor does it distinguish between comments submitted by letter or at individual meetings. The summary is intended to provide a description of the wide range of comments received from the tribes and tribal entities as part of this consultation and coordination process and in additional engagements with tribes. All consultation comment letters submitted are publicly available on EPA's website at: <https://www.epa.gov/wotus/tribal-consultation-pre-proposal-revised-definition-waters-us>. They 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, tribes were asked to consider specific implementation experiences 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 tribal comments received and all input from tribes and tribal organizations from the various meetings. The agencies will continue to consider these comments, and other comments submitted by tribes during the public comment period or as part of individual consultations as they work to finalize the rule.

A copy of the agencies' letter initiating tribal consultation and a copy of the letter extending the consultation comment period are available as attachments to this report in the docket. Appendix A lists the tribal consultation comment letters submitted by tribes and tribal organizations, and Appendix B lists tribal outreach meetings and individual consultations.

THEMES EMERGING FROM TRIBAL CONSULTATION LETTERS, CONSULTATION MEETINGS, AND OTHER PRE-PROPOSAL TRIBAL ENGAGEMENT (INCLUDING THE TRIBAL DIALOGUES)

BROAD OPPOSITION TO THE NAVIGABLE WATERS PROTECTION RULE

Most of the tribal consultation letters expressed support for the agencies' effort to repeal the NWPR and support for the reinstatement of the pre-2015 rule, with revisions. Many tribes cited harm to the environment, the disregard for science, and the potential for upstream pollution degrading tribal waters as a result of the NWPR. One tribe stated that the NWPR had removed protections for all waters on their

reservation. Additionally, there was a stated concern that the NWPR in fact rewards polluters by removing federal protections and oversight.

Tribes commented that water does not adhere to political boundaries and therefore the NWPR created significant gaps in coverage due to state jurisdiction leaving downstream waters vulnerable to upstream discharges.

- Several commenters provided maps showing a significant reduction in federal jurisdiction over tribal waters.
- A few tribes stated that the NWPR disregarded the science presented in the January 2015 EPA Office of Research and Development report, *Connectivity of Streams and Wetlands to Downstream Waters: A Review & Synthesis of the Scientific Evidence* (referred to herein as the “Science Report”).
- One commenter stated that many of the terms used in the NWPR had no scientific meaning.
- One commenter emphasized the importance of the new rule leaning on a more comprehensive and holistic approach to the definition.
- One tribe did not express support or opposition to the agencies’ efforts to replace the NWPR but expressed concern that the agencies’ efforts to revise the definition of “waters of the United States” could expand jurisdiction beyond the limits of the Clean Water Act and the Commerce Clause, particularly if the definition of “tributary” resembled that of the 2015 Clean Water Rule.
- One tribe pointed out that since 2015, multiple scientific studies have reiterated the importance of upstream waters such as ephemeral tributaries and wetlands to the integrity of larger, downstream waters.
- Several tribes stated that in light of vacatur of the NWPR the agencies should not pursue rulemaking to repeal the NWPR and should instead focus efforts on a rulemaking to strengthen protections for the nation’s waters.

TRIBAL CONSULTATION AND ONGOING ENGAGEMENT

Many tribes encouraged the agencies to continue working with tribes in developing new rules in recognition of their stewardship of the land. Several tribes requested individual tribal consultation.

- Multiple tribes reminded the agencies of their duty to meaningfully consult with tribes and consider how proposed definitions will affect tribes.
- Several tribes called for robust and meaningful consultation and mentioned that providing opportunities to comment without documenting or incorporating those comments does not constitute meaningful consultation. One tribe told the agencies that tribes are more than co-regulators, and the agencies should expand the consultation before the first rule is finalized in order for the consultation to be meaningful.
- Several tribes thanked the agencies for the opportunity to participate in the tribal dialogue meetings.
- A few tribes felt that the agencies are fast-tracking this process and consultation with the tribes is just another box to check.

- Several tribes stated that the agencies are putting too much responsibility on tribes. One tribe also said that it feels like it has to show or prove what it is saying. It noted that the issue is not with what agencies are doing or saying, but rather what is left unsaid/undone.
- Several tribes stated that there may be hesitancy from some tribes to comment because the tribes put a lot of effort into the comments, but do not want that effort to have no meaningful results, as they believed that the agencies did not adequately consider tribal comments under past rulemaking efforts such as the NWPR.
- One tribe mentioned that for meaningful consultation to occur, the agencies must have a thorough understanding of the inherent rights and interests of the tribes and that the process of meaningful consultation requires a two-way exchange of information.
- One tribe stated that it does not have the resources or staffing to keep up with all consultation requests and therefore feel that the agencies need to respect that when asking for input, stressing that tribes are doing the best they can but are not feeling heard.
- One tribe encouraged the agencies to keep up with consultation, and recommended that such consultation include more basic background, provided in “layman’s terms”.
- One tribe encouraged the agencies to reach out to tribes who have significant concerns to make sure those concerns are resolved.

CONCERNS ABOUT TREATY RIGHTS AND TRUST RESPONSIBILITY

Several tribes emphasized the importance of EPA and the Army protecting all waters due to treaty rights, and also that the definition of “waters of the United States” must reflect the agencies' trust responsibilities to the tribes and protect tribal waters. As one commenter described it, “Tribes' ability to exercise their treaty rights relies on clean water and healthy ecosystems.”

- Many commenters stated that the federal government’s treaty obligations require it to provide water resources with the greatest federal protection possible and to do less would be a failure of trust responsibilities and violation of the tribes' treaty rights.
- Several tribes stated that they have treaty rights which include the right to hunt and/or fish and those treaty rights require water quality sufficient to protect the habitat supporting those rights.
- A few tribes emphasized that the United States has a trust responsibility to recognize and protect tribal lands, assets, and resources, which includes water that flows over and through the tribal lands and the natural resources that depend on that water.
- One commenter also mentioned that without federal funding and resources, their tribe is not equipped to develop and administer Clean Water Act permitting programs to protect waters rendered non-jurisdictional by the NWPR.
- One commenter suggested that the agencies must at the least include in the definition of “waters of the United States” all water sources that serve treaty rights and reserved water rights, whether on or off tribal lands. This definition should protect waters on tribal lands and waters that lead to tribal lands, regardless of the category of water.
- One tribe stated that they do not have a reservation, so water rights are complex.
- One tribe commented that the rulemaking process prior to the finalization of the NWPR did not respect the trust responsibility and did not have tribal consultation prior to taking action that

impacted their lands. This went against the trust responsibility to protect waters from pollution and to protect tribal lands.

NEED FOR CLEAN WATER FOR CULTURAL, RELIGIOUS, SUBSISTENCE, AND ECONOMIC USES

Most tribes emphasized the importance of clean water for cultural and traditional purposes, including fishing, for both subsistence and broader economic uses.

- Several tribes stated that they maintain a deep personal, cultural, and spiritual relationship to water and that it is sacred.
- Multiple tribes emphasized the importance of water quality for agricultural purposes.
- One tribe emphasized the importance of the agencies considering unique tribal rights and interests.
- One tribe emphasized the importance of having adequate supplies of clean water for economic growth, including tourism.
- One commenter stated they would like to see better protection from a cultural standpoint, including across tribal boundaries.

SPECIFIC WATERS

As stated above, the agencies requested that the tribes speak specifically of their experience with certain waters. Many tribes requested that the agencies adopt rules defining “waters of the United States” that are as broad as possible and regulate waters to the maximum extent possible. Water-specific comments are summarized below. Generally, many tribes encouraged the agencies to utilize the Science Report when considering protections for certain features, stating that the connections between wetlands, groundwater, intermittent and ephemeral streams, and other tributaries cannot be compartmentalized or understated when determining how to best protect the physical, chemical, and biological components of water.

Intermittent and Ephemeral Streams:

- Many tribes emphasized the importance of these waters being protected to the fullest extent possible.
- Some commenters emphasized that intermittent and ephemeral waters must be jurisdictional, especially when they affect the chemical, physical, and biological integrity of downstream waters.
- One tribe pointed out that many tribes rely on federal protection of ephemeral streams as the regulatory link for the federal Spill Prevention Control and Countermeasure (SPCC) program, which they depend on EPA to implement and enforce.
- One tribe pointed out that omitting and/or limiting jurisdictional authority over ephemeral and intermittent waters that are crucial to the survival of salmon and other fish has the potential to significantly impact fish populations listed under the Endangered Species Act.
- One commenter emphasized that human activities are changing the course of waterways, which makes it difficult to define ephemeral vs. perennial vs. non-existent vs. stream-fed and other sources of water. This commenter asked how the agencies will address that issue and emphasized the need for federal protection for springs that flowed or would have flowed had human activity not impacted them.

Tributaries

- Many tribes support broad protection over tributaries nationally, or at least regionally.
- One commenter pointed out that the narrowing of protections for tributaries in the NWPR contradicted Congress' directive to protect all "waters of the United States" with the broadest possible interpretation of the term, so a new rule must contain broad protections for tributaries, as Congress intended.
- One commenter encouraged the agencies to include intermittent flow in a tributary due to snowpack melt as a condition that allows a stream to be considered jurisdictional.
- One commenter stated that for added clarity, in the new rule, the duration of flow should be clearly defined as any amount of flow over a given duration.
- One commenter emphasized that all tributaries should be jurisdictional, while another commenter described that an expansive definition of "tributary" exceeds the power of Congress under the Commerce Clause and suggested a paradigm for a different definition of tributary.

Wetlands

- Multiple commenters emphasized the importance of wetlands and that the new rule defining "waters of the United States" should not include any wetland exclusions.
- A few commenters pointed out that wetlands are connected to other jurisdictional waters and are a valuable ecological and environmental resource worth protecting. These commenters recommended the agencies look to science as justification for protection.
- One commenter supported protecting all wetlands, regardless of surface water connection.
- One commenter emphasized the importance of isolated wetlands, as the tribe's reservation has many of them that provide critical ecological functions. The tribe has found that it has lost about 20% of wetlands over the past 25 years.
- One tribe encouraged the agencies to provide guidance on how regulations impact wetlands in "layman's terms." The tribe emphasized its concern for wetlands and wants to make sure they are protected.

Tribal Waters

- Several commenters urged the agencies to include any waters within or flowing through tribal trust lands that are designated by a tribal government as "Waters of the Tribe" ("WOTT"), a new category of "waters of the United States."
- Some commenters stated that a new definition of "tribal waters" should include any water type on tribal land that a tribe deems significant and states a beneficial or designated use for such water.
- One commenter emphasized that unlike states, tribes cannot easily enforce a definition of "tribal waters" that is broader than the agencies' definition of "waters of the United States." Therefore, a narrow definition of "waters of the United States" places tribes at a disadvantage, and leaves waters unprotected.

Groundwater Connection

- Multiple tribes emphasized that surface water and groundwater are connected resources, and any new rule should recognize the subsurface connections between water resources.

- Some tribes made the connection between groundwater and drinking water to emphasize why groundwater should be protected, including from emerging contaminants, such as per-and polyfluoroalkyl substances (PFAS).
- One tribe emphasized that they would like to see first-order streams, groundwater, and wetlands all be included in the new definition of “waters of the United States” because they are all connected and critically important.

Interstate Waters

Several tribes urged the agencies to include interstate waters as a separate category of “waters of the United States,” as it was in the 2015 Clean Water Rule and the pre-2015 regulations.

- One commenter stated that not including interstate waters as a separate category of “waters of the United States” would undermine federal trust responsibility as well as treaty rights and reserved rights dependent on water quality.
- Several tribes emphasized that the removal of protection for interstate waters under the NWPR has resulted in the lowest common denominator driving down protection for waterbodies that cross state lines, or that form a border between states, with the less-protective states controlling the regulation and protections, or lack thereof, for those waters.
- One tribe supported retaining the jurisdictional category for interstate waters, which exists in both the pre-2015 regulations and the 2015 Clean Water Rule but believes the definitions should be expanded to include surface waters which flow between states and tribes and between adjacent tribes.
- One tribe expressed frustration about not receiving notifications of the jurisdictional determinations and other permitting actions that affect waters that flow into its reservation.
- One tribe suggested that if a case-by-case jurisdictional determination is being done, tribes need to be involved in those determinations that affect their land, even if the jurisdictional determination is not on a reservation, as the determination will affect them downstream.

Waste Treatment System Exclusion

- Several tribes recommended that the waste treatment system exclusion be eliminated.
- Several tribes characterized the exclusion as a “huge loophole” that is not protective of tribal rights and stated that the exclusion violates the language and intent of the Clean Water Act.
- Several tribes stated that many tribes are suffering damage to their resources as a result of wetlands being pressed into service as waste ponds.
- One tribe emphasized that fly ash ponds and waste treatment sources do not intercept or prevent polluted water from entering groundwater.

CLIMATE CHANGE

Multiple tribes emphasized the importance of the rule accounting for climate change, as weather patterns change and impact flows, pointing to precipitation changes sufficient to turn perennial streams into ephemeral or intermittent ones.

- One tribe specifically pointed out that due to climate change, there are scientific predictions for a lot more water and rain in northeast Minnesota. They emphasized that streams that are currently

ephemeral will become perennial, and the opposite will happen in areas where lower rainfall is predicted. The commenter stated that these changing features will prove to be integral to protecting resources in ways that are not currently recognized.

- One tribe stated that the impacts of climate change on water resources makes the protection of those resources all the more important and speaks for having a broad and inclusive definition of “waters of the United States.”
- One tribe encouraged the agencies to consider and address the additive adverse ecosystems effects caused by removing Clean Water Act protections for any waters especially because of the threats to waters due to climate change.

ENVIRONMENTAL JUSTICE

Several tribes emphasized that reducing the scope of waters that the agencies can protect would have “disproportionately high or adverse human health or environmental effects” on tribes.

- A few commenters mentioned environmental justice in the context of downstream water protection.
- One commenter encouraged the agencies to not only consider, but prioritize, the furtherance of environmental justice and the protections of the tribes’ interests. They added that undertaking a robust environmental justice review is especially critical since it was not done for the NWPR.
- One tribe stated that because of desert hydrology and the geographic location of native communities, the NWPR had the effect of disparately stripping Clean Water Act protection from areas with higher tribal populations, which violated Executive Order 12898.
- One tribe stated that gaps in protecting water and tribal land from pollution is an environmental justice issue because it had water quality standards approved by EPA in 1995, which have designated uses based on traditional acts and uses. It cannot meet its standards without treatment because of discharges in upstream waters.

OTHER

- Several commenters urged the agencies to consider regional differences and address factors such as climate, geology, and hydrology in developing a new definition of “waters of the United States.” Some added that including regional variability considerations in determining the definition of “waters of the United States” fulfills federal trust responsibility. One tribe stated that the significant nexus analyses conducted under the pre-2015 regulatory regime and the 2015 Clean Water Rule were appropriate both scientifically and legally for determining on a case-by-case basis the biological, chemical, and physical connectivity between ephemeral, intermittent, and perennial surface waters.
- One tribe recommended that the definition of “waters of the United States” include the “significant nexus standard.”
- One tribe stated that the typical year analysis has no scientific validity and should not be used in any future rule. It added that the NWPR definition of “typical year” was vague.
- One tribe encouraged the agencies to take the purposes of the Endangered Species Act into consideration when drafting the new definition of “waters of the United States.”

- One tribe requested that the agencies provide funding to tribes for the installation of tools that could assist in determining jurisdiction in all ephemeral, intermittent, and perennial surface waters.
- One tribe reminded the agencies that they must also comply with the requirements of the National Environmental Policy Act as it requires all federal agencies to prepare an environmental impact statement for any “major federal actions significantly affecting the quality of the human environment”.
- In the event the agencies succeed in adopting a more expansive definition of “waters of the United States” that allows greater Clean Water Act protection, one tribe asked whether the agencies would make adequate plans and allowances for the legal resources and support that will be needed to defend that definition against the inevitable attacks the tribe believes it will be subject to.

TRIBES REQUESTING CONSULTATION

A total of 12 tribes notified the agencies that they wanted to engage in individual consultation or staff-level engagement on the proposed rulemaking. Most of these requests came in the tribes’ comments during the consultation period or via a separate letter to the agencies during the consultation period. One tribe requested consultation on the agencies’ anticipated second rule defining “waters of the United States.”

The agencies reached out to all tribes requesting consultation (or the organization representing the tribes, in the case of the tribes that requested consultation via the letter submitted by Earthjustice on their behalf) to clarify their request. Several tribes requested staff-level calls and webinars, at least as an initial step prior to leader-to-leader consultation. The agencies have held staff-level meetings with two tribes at their request during the consultation period: the Pueblo of Santa Ana and the Buena Vista Rancheria of Me-Wuk Indians. Staff from EPA, the Department of the Army, including the U.S. Army Corps of Engineers, and the respective EPA Regional offices participated in these staff-level engagement meetings. Due to the ongoing COVID-19 pandemic, all meetings were held virtually via a web conferencing platform.

The agencies have also held leader-to-leader discussions with three tribes: the Summit Lake Paiute Tribe, the Stillaguamish Tribe, and the Tohono O’odham Nation. Two of these leader-to-leader discussions occurred after the close of the consultation period. Senior leadership from EPA’s Office of Water and the Department of the Army participated in leader-to-leader discussions. In addition, staff from EPA, the Department of the Army, including the U.S. Army Corps of Engineers, and the respective EPA Regional offices participated in these meetings. Due to the ongoing COVID-19 pandemic, all meetings were held virtually via a web conferencing platform.

Now that the agencies have proposed the revised definition, the agencies plan to communicate again with all of the remaining tribes (or the organization representing the tribes) that have notified the agencies that they are interested in pursuing consultation on the proposed rulemaking to offer the tribes the opportunity to continue to engage and/or consult with the agencies on the rulemaking.

STAFF-LEVEL MEETINGS

- Pueblo of Santa Ana: Staff-level webinar held at the request of the tribe on September 28, 2021
- Buena Vista Rancheria of Me-Wuk Indians: Staff-level webinar held at the request of the tribe on September 30, 2021

LEADER-TO-LEADER MEETINGS

- Summit Lake Paiute Tribe: Leader-to-leader webinar held on October 1, 2021
- Stillaguamish Tribe: Leader-to-leader webinar held on October 20, 2021
- Tohono O’odham Nation: Leader-to-leader webinar held on November 16, 2021

PENDING TRIBAL CONSULTATION REQUESTS

- Choctaw Nation of Oklahoma
- Fond Du Lac Band of Lake Superior Chippewa
- Menominee Indian Tribe of Wisconsin (via Earthjustice)
- Pascua Yaqui Tribe (via Earthjustice)
- Pueblo of Laguna
- Pueblo of San Felipe
- Quinault Indian Nation (via Earthjustice)

APPENDIX A: TRIBES/TRIBAL ORGANIZATIONS SENDING CONSULTATION COMMENT LETTERS

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

Tribe/Organization Name	Type of Commenter
Bad River Band of Lake Superior Tribe of Chippewa Indians	Tribal leader
Barona Band of Mission Indians	Attorney for the tribe
Buena Vista Rancheria of Me-Wuk Indians	Tribal staff
Earthjustice on behalf of the following five tribes: Pascua Yaqui Tribe, Tohono O'odham Nation, Quinault Indian Nation, Fond du Lac Band of Lake Superior Chippewa, and Menominee Indian Tribe of Wisconsin	Non-profit environmental law organization, on behalf of five tribes
Great Lakes Indian Fish & Wildlife Commission	Tribal organization
Intertribal Agriculture Council	Tribal organization
Keweenaw Bay Indian Community	Tribal leader
Little Traverse Bay Bands of Odawa Indians	Tribal staff
Makah Tribe	Tribal leader
National Tribal Water Council	Tribal organization
Navajo Nation	Tribal leader
Port Gamble S'Klallum Tribe	Attorney for the tribe
Pueblo of Isleta	Tribal leader
Pueblo of Jemez	Tribal leader
Pueblo of Laguna	Tribal leader
Pueblo of Santa Ana	Tribal leader
Pueblo of Santa Clara	Tribal leader
Pyramid Lake	Tribal leader
San Carlos Apache Tribe	Tribal staff
Sault Ste. Marie Tribe of Chippewa Indians	Tribal leader
Southern Ute Indian Tribe	Tribal leader
Stillaguamish Tribe	Tribal leader
Suquamish Tribe	Tribal staff
Swinomish Indian Tribal Council	Tribal leader

The following tribes sent separate letters to the agencies requesting consultation.

Tribe/Organization Name	Type of Commenter
Buena Vista Rancheria of Me-Wuk Indians (consultation request)	Tribal staff
Choctaw Nation of Oklahoma (consultation request)	Tribal staff
Pueblo of Laguna (consultation request)	Tribal staff
Pueblo of San Felipe (consultation request)	Tribal staff
Pueblo of Santa Ana (consultation request)	Tribal staff

APPENDIX B: TRIBAL CONSULTATION, COORDINATION, AND OUTREACH MEETINGS

MEETINGS AND OUTREACH OCCURRING DURING THE CONSULTATION PERIOD

During the consultation period, the agencies participated in the following meetings:

Date	Meeting
August 11, 2021	National Tribal Water Council and EPA Monthly Conference Call
August 19, 2021	National Tribal Consultation Kick-off Webinar
August 24, 2021	National Tribal Consultation Kick-off Webinar
September 8, 2021	National Tribal Water Council and EPA Monthly Conference Call
September 16, 2021	Tribal/EPA Mining Call with the Great Lakes Indian Fish & Wildlife Commission
September 22, 2021	EPA Tribal Wetlands Workshop
September 27, 2021	National Tribal Caucus-Office of Water Meeting
September 28, 2021	Pueblo of Santa Ana (Staff-level)
September 30, 2021	Buena Vista Rancheria of Me-Wuk Indians (Staff-level)
October 1, 2021	Summit Lake Paiute Tribe (Leader-to-Leader)

MEETINGS AND OUTREACH OCCURRING AFTER THE END OF THE CONSULTATION PERIOD

Date	Meeting
October 7, 2021	Tribal Dialogue on “Waters of the United States” (East Coast tribes – Northeast, Mid-Atlantic, Southeast)
October 13, 2021	Tribal Dialogue on “Waters of the United States” (Central tribes – Midwest, Gulf Coast)
October 13, 2021	National Tribal Water Council and EPA Monthly Conference Call
October 18, 2021	Fall 2021 Region 9 Tribal Operations Committee Meeting
October 19, 2021	Region 8 Tribal Operations Committee
October 27, 2021	Tribal Dialogue on “Waters of the United States” (Arid West tribes)
October 20, 2021	Stillaguamish Tribe (Leader-to-Leader)
October 28, 2021	Tribal Dialogue on “Waters of the United States” (Northwest and Alaskan tribes)
November 2, 2021	EPA Region 7 Virtual Enhancing State and Tribal Programs (ESTP) Meeting

Date	Meeting
November 16, 2021	Tohono O’odham Nation (Leader-to-Leader)
November 17, 2021	Listening Session with the Mendocino, Lake, Sonoma Tribal Environmental Professionals (MLSTEP)