



# Proposed Revised Definition of “Waters of the United States”

## BACKGROUND

- On December 11, 2018, the U.S. Environmental Protection Agency (EPA) and the Department of the Army (Army) proposed a revised definition for “waters of the United States,” which would establish the scope of federal regulatory authority under the Clean Water Act in a more clear and understandable way.
- The agencies’ proposal would be clearer and easier to understand than previous regulations. It would help landowners understand whether a project on his or her property would require a federal permit or not—saving Americans time and money.
- Right now, because of litigation, the 2015 Clean Water Rule (2015 Rule) is in effect in 22 states, the District of Columbia, and the U.S. territories, and previous regulations, issued in the 1980s, are in effect in the remaining 28 states.
- If finalized, the agencies’ proposed rule would apply nationwide, replacing the patchwork framework for Clean Water Act jurisdiction that has resulted from litigation challenging the 2015 Rule. The proposal would also re-balance the relationship between the federal government, states, and tribes in managing land and water resources.
- The proposal respects the limited powers that the executive branch has been given under the Constitution and the Clean Water Act to regulate navigable waters. The proposal limits where federal regulations apply and gives states and tribes more flexibility to determine how best to manage waters within their borders. Together, the agencies’ proposal and existing state and tribal regulations and programs would provide a network of coverage for the nation’s water resources in accordance with the objectives and policies of the Clean Water Act.
- The EPA and the Army reviewed and considered the extensive feedback and recommendations the agencies received from states, tribes, local governments, and stakeholders throughout consultations and pre-proposal meetings and webinars. This input helped highlight the issues that are most important to state and tribal co-regulators and stakeholders, including those directly affected by the scope of Clean Water Act jurisdiction.

## THE PROPOSED DEFINITION

- This proposed rule would provide clarity, predictability, and consistency so that regulators and the public can understand where the Clean Water Act applies—and where it does not. Such straightforward regulations would continue to protect the nation’s navigable waters, help sustain economic growth, and reduce barriers to business development.
- The agencies’ proposal is consistent with the statutory authority granted by Congress, the legal precedent set by key Supreme Court cases, and the February 2017 Executive Order entitled “Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the ‘Waters of the United States’ Rule.”
- The role of federal government under the Clean Water Act is ultimately derived from Congress’ commerce power over navigation. As a result, this proposal clearly limits “waters of the United

States” under the Clean Water Act to those that are physically and meaningfully connected to traditional navigable waters.

- The proposed rule outlines six clear categories of waters that would be considered “waters of the United States:”
  - Traditional navigable waters (TNWs)
    - Under the proposal, traditional navigable waters would be large rivers and lakes, tidal waters, and the territorial seas—such as the Atlantic Ocean, the Mississippi River, the Great Lakes, and tidally influenced waterbodies, including wetlands, along coastlines—used in interstate or foreign commerce.
  - Tributaries
    - In the agencies’ proposal, tributaries would be rivers and streams that flow to traditional navigable waters—such as Rock Creek, which feeds to the Potomac River in Washington, D.C.
    - Under the proposal, these naturally occurring surface water channels must flow more often than just when it rains—that is, tributaries as proposed must be perennial or intermittent. Ephemeral features would not be tributaries under the proposal.
    - Tributaries can connect to traditional navigable waters directly, through other “waters of the United States,” or through other non-jurisdictional surface waters so long as those waters convey perennial or intermittent flow downstream.
  - Certain ditches
    - A ditch under the proposed rule would be an “artificial channel used to convey water.”
    - Under the proposal, ditches would be jurisdictional where they are traditional navigable waters, such as the Erie Canal, or subject to the ebb and flow of the tide.
    - Ditches may also be jurisdictional where they satisfy conditions of the tributary definition as proposed and either 1) were constructed in a tributary or 2) were built in adjacent wetlands.
  - Certain lakes and ponds
    - Lakes and ponds would be jurisdictional where they are traditional navigable waters, such as the Great Salt Lake in Utah or Lake Champlain along the Vermont-New York border.
    - Lakes and ponds would be jurisdictional where they contribute perennial or intermittent flow to a traditional navigable water either directly, through other “waters of the United States,” or through other non-jurisdictional surface waters so long as those waters convey perennial or intermittent flow downstream, such as Lake Pepin in Minnesota or Lake Travis in Texas.
    - Lakes and ponds would be jurisdictional where they are flooded by a “water of the United States” in a typical year, such as many oxbow lakes.
  - Impoundments
    - Under the proposal, impoundments of “waters of the United States” would be jurisdictional.
  - Adjacent wetlands
    - Under the proposal, wetlands that physically touch other jurisdictional waters would be “adjacent wetlands,” such as Horicon Marsh in Wisconsin.

- Wetlands with a surface water connection in a typical year that results from 1) inundation from a “water of the United States” to the wetland or 2) perennial or intermittent flow between the wetland and a “water of the United States” would be “adjacent.”
    - Wetlands that are near a jurisdictional water but don’t physically touch that water because they are separated, for example by a berm, levee, or upland, would be adjacent only where they have a surface water connection described in the previous bullet through or over the barrier, including wetlands flooded by jurisdictional waters in a typical year.
- The proposal also clearly outlines what would not be “waters of the United States,” including:
  - Waters that would not be included in the proposed categories of “waters of the United States” listed above—this would provide clarity that if a water or feature is not identified as jurisdictional in the proposal, it would not be a jurisdictional water under the Clean Water Act.
  - Ephemeral features that contain water only during or in response to rainfall.
  - Groundwater.
  - Ditches that do not meet the proposed conditions necessary to be considered jurisdictional, including most farm and roadside ditches.
  - Prior converted cropland.
    - This longstanding exclusion for certain agricultural areas would be continued under the proposal, and the agencies are clarifying that this exclusion would cease to apply when cropland is abandoned (*i.e.*, not used for, or in support of, agricultural purposes in the preceding five years) and has reverted to wetlands.
  - Stormwater control features excavated or constructed in upland to convey, treat, infiltrate, or store stormwater run-off.
  - Wastewater recycling structures such as detention, retention and infiltration basins and ponds, and groundwater recharge basins would be excluded where they are constructed in upland.
  - Waste treatment systems.
    - Waste treatment systems have been excluded from the definition of “waters of the United States” since 1979 and would continue to be excluded under this proposal; however, waste treatment systems are being defined for the first time in this proposed rule.
    - A waste treatment system would include all components, including lagoons and treatment ponds (such as settling or cooling ponds), designed to convey or retain, concentrate, settle, reduce, or remove pollutants, either actively or passively, from wastewater or stormwater prior to discharge (or eliminating any such discharge).

## **FEDERAL-STATE RELATIONSHIP**

- In accordance with section 101(b) of the Clean Water Act, EPA and Army’s proposed rule would recognize and respect the primary responsibilities and rights of states and tribes to regulate and manage their land and water resources.
- Under this proposal, there is a clear distinction between federal waters and waters subject to the sole control of the states and tribes.

- The Clean Water Act envisions an approach whereby states, tribes, and the federal government work in partnership to protect the nation’s waters from pollution.
- The agencies’ proposal is in line with that intent, and appropriately identifies waters that should be subject to federal regulation under the Clean Water Act.
- States and many tribes have existing regulations and programs that apply to waters within their borders, whether or not they are considered “waters of the United States.”
- Together, the agencies’ proposed definition and existing state and tribal regulations and programs would provide a network of coverage for the nation’s water resources in accordance with the objective and policies of the Clean Water Act.

## **EFFECTS OF THE PROPOSAL**

- EPA and the Army developed an illustrative economic analysis for the proposed rule that looks at the potential costs, benefits, and economic impacts of the proposed changes to the definition of “waters of the United States” relative to existing regulations.
- EPA and the Army have identified, where possible, how the proposal would affect categories of water resources across the country and potential effects on Clean Water Act programs. The agencies have also highlighted data limitations that prevent quantitative national estimates for most Clean Water Act programs.
- As a result of these data limitations, the agencies conducted a two-stage analysis of the proposed rule using available data to assess the change from the 2015 Rule to the pre-2015 practice, and then the change from pre-2015 practice to the proposed rule. Additional information is included in the economic analysis fact sheet.

## **PUBLIC COMMENT SOUGHT**

- In addition to seeking comments on the specifics of the proposed “waters of the United States” definition itself, the agencies are requesting comment on the discussion and definition of terms within it, such as whether tributaries should be limited to rivers and streams that flow year-round and whether lakes and ponds should be defined more precisely.
- In response to requests from some states, the agencies will be exploring how to develop a data or mapping system to provide a clearer understanding of the presence or absence of jurisdictional waters that landowners and members of the regulated community could rely on in the future.
- The agencies are also taking comment on the underlying legal interpretations that provide the foundation for the proposed rule.
- Finally, the agencies are requesting comment on how the proposed rule can best be implemented so as to maintain clarity when it is used in the field; examples of such implementation questions include whether to establish specific flooding frequency or magnitude to determine when certain wetland features may be jurisdictional.

## **HOW TO COMMENT**

- The agencies will take comment on the proposal for 60 days after publication in the Federal Register. The agencies will also hold an informational webcast on January 10, 2019, and will host a public listening session on the proposed rule in Kansas City, KS, on January 23, 2019. Additional information on both engagements is available at <https://www.epa.gov/wotus-rule>.

- Comments on the proposal should be identified by Docket ID No. EPA-HQ-OW-2018-014 and may be submitted online. Go to <https://www.regulations.gov> and follow the online instructions for submitting comments to Docket ID No. EPA-HQ-OW-2018-0149.
- For additional information, including the full EPA public comment policy, please visit <https://www.epa.gov/dockets/commenting-epa-dockets>.

#### **FOR MORE INFORMATION**

- Additional fact sheets along with copies of the proposed rule and supporting analyses are available on EPA's website at <https://www.epa.gov/wotus-rule>.