



**Summary Report on Consultation
with State and Local
Governments for the
Navigable Waters Protection Rule:
Definition of
“Waters of the United States”**

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

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Background

This consultation report was prepared to support the EPA and Department of the Army (the agencies) rulemaking to finalize the Navigable Waters Protection Rule: Definition of “Waters of the United States.” Executive Order (E.O.) 13778: *Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the Waters of the United States’ Rule*, dated February 28, 2017, states that it is in the national interest to ensure that the Nation’s navigable waters are kept free from pollution, while at the same time promoting economic growth, minimizing regulatory uncertainty, and showing due regard for the roles of Congress and the states under the Constitution. To meet these objectives, the agencies embarked upon a two-step rulemaking process to promulgate a new definition of “waters of the United States,” which establishes the scope of waters federally regulated under the Clean Water Act (CWA).

On October 22, 2019, the agencies completed the first step of the rulemaking process, which repealed the prior definition of “waters of the United States” promulgated in 2015 (the 2015 Rule) and recodified the 1986 regulations as an interim step. This rulemaking is the second step of the rulemaking process, which revises the definition of “waters of the United States.” The Navigable Waters Protection Rule is based on the text, structure, and legislative history of the CWA and on the core principles and concepts set forth in the three Supreme Court cases addressing the scope of the phrase “the waters of the United States.” The final definition will allow the regulatory agencies and members of the public to protect navigable waters from pollution while providing an implementable approach to determining regulatory jurisdiction under the CWA.

The agencies have determined that this final rule does not have federalism implications as defined by the EPA’s policy for implementing E.O. 13132¹ on Federalism. This definition strikes a balance between federal and state waters and carries out Congress’ overall objective to restore and maintain the integrity of the nation’s waters in a manner that preserves the traditional sovereignty of states over their own land and water resources. This rule does not impose any new costs or other requirements on states, preempt state law, or limit states’ policy discretion; rather, it provides more discretion for states as to how best to manage waters under their sole jurisdiction. This revised definition will not have substantial direct effects² on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. The rule preserves state

¹ Under the technical requirements of Executive Order 13132, agencies must conduct a federalism consultation as outlined in the Executive Order for regulations that (1) have federalism implications, that impose substantial direct compliance costs on state and local governments, and that are not required by statute; or (2) that have federalism implications and that preempt state law. Where actions are determined to have federalism implications as defined by agency policy for implementing E.O. 13132, 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 *I.e.*, imposed intergovernmental costs or preemption of state/local law.

authority to choose whether or not to regulate waters that are not “waters of the United States” under the CWA.

The agencies voluntarily conducted consultation under the terms of E.O. 13132 and applicable EPA guidance, beginning with an initial consultation briefing on April 19, 2017. The agencies convened several additional outreach meetings with states and communities to solicit input on both the proposed and final rule to define “waters of the United States” consistent with E.O. 13778, the CWA, and U.S. Supreme Court guidance.

The following report summarizes the agencies outreach efforts throughout the rulemaking process and discusses key themes heard in pre-proposal consultation efforts and post-proposal outreach.

Pre-Proposal Consultation Efforts

This report summarizes comments provided by participants at the federalism meetings, and the letters received during the 60-day period for written consultation at the outset of rule development. This summary does not distinguish comments submitted by a state government entity from those provided by local government entities. 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 consultation letters are publicly available on EPA’s website at: <https://www.epa.gov/wotus-rule/federalism-consultation>. They are also included in the docket for this final rule as attachments to the “Summary Report on Federalism Consultation: Revised Definition of ‘Waters of the United States’ Proposed Rule.”³

While each meeting involved a particular group, or groups, the agencies provided the same background information and questions to all the participants. Each meeting was led by one of the following senior agency representatives.⁴ For EPA: Byron Brown, Deputy Chief of Staff, Office of Policy; Sarah Greenwalt, Senior Advisor for Water and Cross Cutting Issues; Tate Bennett, (formerly) Deputy Associate Administrator for Congressional and Intergovernmental Relations; Mike Shapiro, Acting Assistant Administrator for Water; John Goodin, Acting Director of the Office of Wetlands, Oceans and Watersheds; Mindy Eisenberg, Acting Director of the Oceans, Wetlands and Communities Division; Donna Downing, Jurisdiction Team Lead; and/or Fran Eargle, Designated Federal Official for the Local Government Advisory Committee. For the Army: Douglas Lamont, the Senior Official Performing the Duties of the Assistant Secretary of the Army for Civil Works; Cindy Barger, “waters of the United States” point of contact for the Office of the Assistant Secretary of the Army (Civil Works); and/or Stacey Jensen, Regulatory Program Manager, Army Corps of Engineers (Corps). David Ross, EPA’s Assistant Administrator for Water, and Ryan Fisher, Principal Deputy Assistant

³ EPA-HQ-OW-2018-0149, available at <https://www.regulations.gov/document?D=EPA-HQ-OW-2018-0149-0088>.

⁴ The following names and titles were accurate at the times of meetings but may have changed since.

Secretary of the Army (Civil Works), participated in outreach meetings following the close of the federalism comment period.

The agencies held nineteen Federalism meetings between April 19 and June 16, 2017. Seventeen intergovernmental associations, including nine of the ten organizations identified in the E.O. 13132 Guidance,⁵ attended the initial Federalism consultation meeting, as well as several associations representing state and local governmental representatives with expertise in water, aquatic resources management, and agriculture. The agencies presented general update webinars for tribes, state governments, local governments, and federal agencies on December 12, 2017 and for state and local governments on February 22, 2018. The agencies also met with representatives from 9 states for a co-regulators workshop on March 8-9, 2018.

The Local Government Advisory Committee (LGAC), which includes local, tribal, and state government representatives, met 10 times during this pre-proposal period to address the charge given to its members by EPA Administrator Pruitt on a revised rule for the definition of “waters of the United States,” and completed a report addressing the questions outlined in their charge.

A total of 167 letters were submitted to the agency as part of the Federalism consultation process; some of these letters were signed by multiple representatives. This total count includes signatures from:

- 19 Governors (3 signed on behalf of 2 intergovernmental associations rather than their state)
- 2 Lieutenant Governors
- 1 State Senator
- 20 Attorneys General (all signing one letter, plus an additional individual letter from one of the 20 Attorney Generals)
- 63 State agencies
- 60 Local government agencies
- 15 State-level associations of local governments
- 10 Water districts
- 19 Intergovernmental associations

⁵ Represented organizations included: the National Governors Association, the National League of Cities, the National Association of Counties, the U.S. Conference of Mayors, the Council of State Governments, the National Conference of State Legislatures, the County Executives of America, the National Association of Towns and Townships, the Environmental Council of the States, the Western Governors Association, the National Association of Clean Water Agencies, the Association of Clean Water Administrators, the National Association of State Departments of Agriculture, the Association of State Wetlands Managers, the Association of State Floodplain Managers, the National Water Resources Association, the State/Local Legal Center, and several members of EPA’s Local Government Advisory Committee.

Themes Emerging from the Pre-Proposal Meetings and Letters

The meetings and letters reflected the wide and diverse range of interests, positions, comments, and recommendations provided to the agencies by participants and commenters. However, a number of key themes emerged throughout comments and letters. These themes are summarized below.

Requests for Ongoing State and Local Engagement

State and local governments and their representative associations expressed a strong desire for cooperative or collaborative Federalism and thanked the agencies for undertaking Federalism consultation. Participants suggested a number of ways in which the agencies might ensure continued involvement of states and their intergovernmental associations during the rulemaking process.

Many participants expressed a strong interest in receiving additional information and in continued outreach by the agencies during development of the step two proposed rule, following proposal, and after the rule is finalized, to ensure widespread understanding of final provisions of the new rule. Many commenters requested further participation in the rulemaking process given their local knowledge and expertise, and role in practical implementation of the rule. Some commenters requested the agencies draft the rule in partnership with state and local governments to facilitate consensus and ensure the rule is implementable. Other commenters suggested to the agencies that they co-draft the rule, noting the diverse perspectives states could provide. Several commenters indicated interest in reviewing rule language as it was being developed by the agencies. Other commenters urged that the agencies take whatever time needed to ensure that a final rule is the result of a thorough examination of the science, addresses implementation concerns, and reflects extensive consultation with all states.

Clarity and Predictability

A number of commenters reiterated the need for clarity and predictability. Others indicated a need to identify any consequences of a new rule, and potential associated costs to states, such as implementing changes to water treatment, permitting programs, or other unforeseen effects of a proposed rule. Some representatives requested additional analytical tools and mapping to support the proposed rule and its implementation.

Many commenters requested that the agencies define terms that can be readily understood and implementable. Some commenters requested that the agencies provide clarity through a strict interpretation of Justice Scalia's plurality opinion in the *Rapanos* case to make jurisdictional determinations more efficient, reduce administrative costs, and reduce the burden on agriculture and infrastructure activities. Some commenters suggested that only interstate waters transporting goods and services should be included in the agencies' definition. Some states further noted that land and water use is a traditional and primary state power, and that where possible regulation should be left to the states. Some commenters noted that states are in a better position to make decisions regarding the use, management, and protection of waters than

the federal government, and urged agencies to consult with states in order to benefit from their knowledge. Some commenters raised concerns about a perceived loss of federal oversight if the federal government implements CWA programs over a narrower range of waters. One commenter cautioned the agencies to consider the risk of litigation as they provide clarity. One commenter felt clarity could only be provided if the definition was based on the best current scientific understanding of waters. One commenter recommended a new rule be based on objectively identifiable characteristics. One commenter proposed that clarity could be achieved using geographic features and describing on-the-ground objectively identifiable indicators to determine jurisdiction.

Some commenters raised concerns that a very narrow definition could leave some geographical regions with many unprotected streams. Some commenters raised concerns about unintended consequences of a narrow rule, such as the elimination of protections for secondary sources of drinking water. Others raised concerns about unintended and potentially adverse consequences for waters regulated by Sections 402 and 303 of the CWA. Some commenters requested the agencies assess the economic impacts of a new rule on businesses, homeowners, and property owners across the nation. Western Governors expressed concern about potential impacts of any new rule on states' economies and urged agencies to examine the potential effects on state and local economies of any new rule. One commenter noted that a strong federal water protection program is vital to ensuring the health and integrity of the nation's waters, and if redefining the waters of the United States significantly reduces federal jurisdiction, the public could see increased costs due to uncertainty in jurisdiction and increased pollution of waters. One commenter supported a strong federal water protection program to prevent other states from passing polluted water to downstream states and highlighted the importance to the economy of drinking water, agriculture, shellfish industries, tourism, recreation and growth.

A few commenters asked to be involved in coordinating jurisdictional determinations by the agencies. Some commenters requested GIS mapping tools for identifying waters of the United States. These commenters thought that mapping tools would help increase efficiency, ease implementation, and avoid individual jurisdictional determinations. One commenter recommended the use of regional general permits to address local conditions and provide streamlining and predictability in permitting. One commenter asked for specific criteria that states could apply to make jurisdictional determinations upfront.

Specific Suggestions for Rule Language

States, local governments and their association representatives made a wide range of suggestions for specific language addressing streams and adjacent wetlands, many of which were regionally specific. Many commenters were generally supportive of Justice Scalia's plurality opinion in *Rapanos*. Other commenters supported a broader jurisdictional scope. A few commenters expressed support for maintaining the 2015 Rule. Several commenters suggested that finalizing the first step of the new rulemaking process would suffice and there is no need to redefine "waters of the United States" further.

Some commenters did not support Justice Scalia’s plurality opinion on the grounds that it maintains ambiguity. More specifically, these commenters stated that hydrological sciences do not support the terms “relatively permanent” and “continuous surface connection.” Some commenters requested that the new rule ensure states maintain primary authority over waters they currently regulate and allow for a clearer division of authority between federal agencies and states. Some commenters stated that the rule should use specific, quantifiable measures or metrics, and that waters that satisfy the specified measures should be presumed to be jurisdictional, while waters that do not would be presumed to not be jurisdictional. Some commenters believe the options the agencies presented on the teleconference meetings and webinars were too rigid and overly simplistic. They stated that the options would not likely be conducive to regional flexibility and consideration of hydrographic impacts of some non-perennial streams. Some commenters wanted all waters protected. Some commenters urged agencies to rely on the comprehensive review of connectivity science, reflected in the EPA’s *“Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence.”*

Many commenters stated that the definition of “waters of the United States” should encompass only perennial streams that contain water at all times except in extreme drought, as well as permanent lakes. Some commenters requested that the definition include both perennial and intermittent streams. One commenter expressed concern that if intermittent streams are not included, they could become point sources under the National Pollutant Discharge Elimination Systems (NPDES) program. Some commenters requested including seasonal waters that are important for water quality, recreation, and public health. Some commenters requested perennial and seasonal streams (flowing at least three months a year, varying regionally) be included. One commenter proposed flow metrics, biological connectivity, and chemical connectivity for streams.

Many commenters proposed that only wetlands that directly connect to waters of the United States be included as adjacent. A few commenters requested the rule not include set distance limits for adjacent wetlands. One commenter requested set distance limits for adjacent wetlands. Another commenter requested only wetlands that are within a set distance limit and have a direct hydrologic connection be included as adjacent. One commenter requested that continuous surface connection for adjacency require flows during at least six months of the year. One commenter stated that a continuous surface connection could be either a natural or a man-made conveyance. One commenter requested that only bordering wetlands be considered adjacent. One commenter requested that wetlands not be adjacent if connected via non-jurisdictional features.

Exclusions & Exemptions

Commenters generally stated that to promote national consistency the new rule should be clear about how to apply the exemptions and exclusions.⁶ Most commenters asked the agencies to maintain all current exemptions and exclusions for agriculture, silviculture, waste treatment, maintenance, and so on, including all exclusions contained in the 2015 Rule.

Many commenters requested exclusions for waste treatment, municipal separate storm sewer systems (MS4s), water delivery systems (conveyance systems), green infrastructure, water reuse, ditches, canals, conveyances, manmade structures used for agriculture, flood abatement, storm water control, and terminal reservoirs. Many commenters requested exclusions for farm ponds, artificial drains, stock ponds, and dip ponds for fire suppression. Some commenters requested an exclusion for groundwater, including shallow subsurface flow. Some commenters stated that dry washes and ephemeral streams should be non-jurisdictional. One commenter requested exclusions for features common throughout the West, including dry arroyos, sheet flow, and drain tiles. One commenter asked for exclusions for prairie potholes and playa lakes. One commenter requested that the definition explicitly exclude isolated waters, intermittent waters, and non-adjacent wetlands.

Many commenters requested that irrigation ditches be excluded. Several commenters requested excluding roadside ditches excavated in non-waters, and all man-made ditches without perennial flow. Some commenters requested the rule exclude channels, canals and man-made ditches. One commenter requested the rule exclude all ditches and infrastructure intended for public safety. One commenter noted that the 2015 Rule was not sufficiently explicit for counties evaluating infrastructure projects.

Some commenters stated that edge-of-field practices and definitions may affect the ability to receive U.S. Department of Agriculture (USDA) funds and asked to include the National Resource Conservation Services (NRCS) concerns and considerations in the rulemaking analysis. The Western States Water Council (WSWC) member states requested that the EPA and NRCS withdraw prior guidance related to enumerating agricultural practices that would clearly fall under the CWA 404(f) exemption, as that guidance raised the implication that any practice not specifically listed could then be considered to fall under the EPA regulation.⁷

Regionalization

A number of commenters stated that “one size does not fit all,” that regions have different needs stemming from different ecological conditions, such as hydrological regimes, soils, and other factors, and that a “regionalized” rule could address these needs. Many commenters wanted regionalization while maintaining national consistency in implementation. However,

⁶ An exemption provides relief from a permitting requirement (an example would be the 404(f)(1) exemption for normal agricultural activities); an exclusion falls outside the scope of jurisdiction of the definition of waters of the US (an example would be an exclusion for prior converted cropland).

⁷ The agencies withdrew this agriculture interpretive rule on January 29, 2015.

there were few commenters with specific suggestions on how the agencies could best approach this request.

Many commenters requested consideration of regional and local variation in climate, geology, geomorphology, and hydrology, such as flow-based metrics and regional indicators for geomorphology. One commenter was opposed to regionalization, arguing that it is constitutionally defensible to apply a single definition across all regions. The commenter stated that regional variations would increase complexity and inconsistency in the rule. The commenter recommended using regional guidance for specific terms.

Commenters representing the arid West and the wetter Southeast had specific requests. Several commenters highlighted the need for protection of arid ecosystems and intermittent streams in the West. One commenter suggested that the agencies facilitate dialogue with the western states through the Western Federal Agency Support Team (WestFAST), a federal working group with a liaison in the WSWC offices. EPA and the Corps have WestFAST representatives that could serve as a bridge to the western states as part of an ongoing conversation. Commenters from Florida noted that the state's rainfall, flat topography, and broad expanses of floodplains, wetlands, and sloughs could subject virtually all Florida's waterbodies to the CWA without careful definitions of terms in the rule to distinguish between jurisdictional and non-jurisdictional features. Other commenters stated that pumping in Florida has significantly reduced wetlands.

Procedural Questions and Concerns

Many commenters in the meetings expressed concerns related to the agencies' rulemaking timeline; requested additional information and analysis on state law implications resulting from a revised definition; and raised questions related to permitting and section 404 of the CWA (including permitting costs to the states). Some commenters asked the agencies to include a state-by-state analysis as part of their rulemaking, showing how state authorities dovetail with federal jurisdiction. Other commenters recommended that the agencies include a chart with existing state laws, though noting that these laws are subject to change.

Several commenters noted the difficulty inherent in providing feedback because of what commenters described as the "nebulous nature" of the initial options as presented in the meetings. Generally, commenters asked for more engagement and detail about the rulemaking process. Many commenters asked for more detail about the rulemaking timeline and the agencies' two-step process. One representative underscored that the timeline should not dictate the outcome. Several commenters requested that the agencies issue a rule that can withstand legal challenges. Some commenters were concerned about the new rule's potential effect on delineation and permitting under section 404 of the CWA, including the costs of permitting. Several commenters requested clarification on the status of the EPA's 2015 Connectivity Study and how it would be utilized by the proposed rule. Some commenters expressed concern that the authors of the Connectivity Study did not have an understanding of the CWA. One commenter strongly supported the use of this study in the development of the new rule. One commenter asked about the status of the

1987 Corps Wetlands Delineation Manual, and the 2010 Supplement for the Atlantic Coast. One commenter asked how the process would accommodate the federal government's special relationship with the tribes.

2017 Local Government Advisory Committee Report

In its 2017 “Waters of the U.S. Report,” the Local Government Advisory Committee (LGAC) provided specific responses to the charge questions posed by the Administrator to help guide the agencies in moving forward with rulemaking. The LGAC transmitted the final report to former Administrator Pruitt on July 14, 2017. Some of the major themes of the report are as follows:

Narrow Interpretation

Local governments in general supported a narrow interpretation of CWA jurisdiction. The report proposed an interpretation that would extend jurisdiction to “relatively permanent, standing or continuously flowing bodies of water connected to navigable waters, and to “wetlands with a continuous surface connection to” such relatively permanent waters. The LGAC also indicated that they would be comfortable with an approach similar to the one taken in the 2008 *Rapanos* Guidance, which they viewed as consistent with but broader than Justice Scalia's opinion.

Clarity and predictability

The LGAC noted that clear definitions and criteria are needed for jurisdictional determinations. They stated that simplifying the jurisdictional determination process is a top priority. The permitting process must be more predictable. They suggested that jurisdictional determinations of “yes,” “no,” or “maybe” within a definitive time frame, such as 60-90 days, would be a tremendous improvement, and that technology, including mapping and other innovations, can improve efficiency and effectiveness. They further noted that utilizing the 2008 *Rapanos* Guidance (with definitional changes) could be a good foundation for jurisdictional determinations.

Flexibility

The LGAC called for flexibility and consideration of regional differences. Examples of suggested regional exemptions are included in the report. Local and state governments support a more flexible, decentralized permitting process, more integrated with community goals, with the provision of appropriate resources. Local governments are generally in favor of state assumption of the CWA section 404 program, as well as use of State Programmatic General Permits under the federal 404 program.

Drinking Water

The LGAC noted that local governments' primary concern is the protection of source water as this is the foundation of the drinking water system. LGAC also stated that ratepayers absorb the cost of treating source water, which can become unmanageable as source water quality

deteriorates; local governments can assist to identify and delineate significant waters; and an affordable rate structure is key to safe drinking water, such as cost of source water treatment, compliance costs and penalties, infrastructure development or other costs.

Exclusions (from “waters of the United States”) and Exemptions (from permitting requirements)

The LGAC recommended that the waste treatment exclusion should be codified, including MS4s and stormwater features such as storage ponds, basins, artificially created wetlands, recycled water reservoirs, and other features associated with wastewater treatment and water recycling. They indicated the agencies should maintain exemptions for normal agricultural and silviculture practices, exemptions for NPDES permitting for application of pesticides and herbicides, as well as the exclusion of “prior converted croplands” that are certified by NRCS. They stated that if land changes to non-agricultural use or is abandoned, it should be regulated under the CWA. The LGAC also stated that the agencies should maintain roadside ditch exemptions.

Other Considerations

The LGAC suggested that the agencies work with states to develop specific geographic criteria for defining “seasonal flows” for streams and “some degree of connectivity” for adjacent wetlands, stating that this approach would avoid a “one-size fits all” result. They also stated that criteria should be set for developing guidelines (but not standards) consistent with the Science Advisory Board’s review of the Connectivity Report; that regulatory reform should include incentives for best practices, including green infrastructure, stormwater management systems, and agricultural and other innovations; that a comprehensive communication strategy is needed for local governments that improves the channels of information distribution and explicit communication at all levels of government; and that the public should have the opportunity to comment on revised definitions.

Post-Proposal Consultation Efforts

The proposed rule revising the definition of “waters of the United States” was published in the Federal Register on February 14, 2019. 84 FR 4154. The public comment period lasted for sixty days and closed on April 15, 2019. During the public comment period the agencies held a series of in-person meetings with state representatives across the country. These meetings occurred in Kansas City, KS, on February 26; Atlanta, GA, on March 11; Albuquerque, NM, on March 26; and Seattle, WA, on April 3. During these meetings, the agencies provided an overview of the proposed rule, responded to clarifying questions from participants, discussed implementation considerations, and heard feedback on the agencies’ interest in developing geospatial datasets. Summaries of these meetings are located in the docket for the final rule.

While each meeting involved a particular group, or groups, the agencies provided the same background information and questions to all the participants. Each meeting was led by one of

the following senior agency representatives.⁸ For EPA: Lee Forsgren, Deputy Assistant Administrator for the Office of Water; Owen McDonough, Senior Science Advisor to the Assistant Administrator for the Office of Water; and/or Mindy Eisenberg, Associate Director of the Oceans, Wetlands and Communities Division. For the Army: Ryan Fisher, Principal Deputy Assistant Secretary of the Army (Civil Works); Cindy Barger, “waters of the United States” point of contact for the Office of the Assistant Secretary of the Army (Civil Works); Brad Guarisco, Acting Regulatory Program Manager, Army Corps of Engineers; and Tammy Turley, Acting Chief, Regulatory Program, Army Corps of Engineers.

The agencies also received comments from state and local government representatives through the public comment process. These comment letters represented diverse views and approaches to the many issues that the agencies sought to address in the proposed rule. These comment letters are located in the docket for the final rule and are incorporated into the agencies’ response to comments, which is also located in the docket for the final rule.

The LGAC also met during this period to address the charge given to its members by Administrator Wheeler to review and give recommendations on the proposed rule. The LGAC completed another report addressing the questions outlined in that charge.

Themes Emerging from the Post-Proposal Meetings and Letters

The full summaries for the post-proposal in-person meetings with state representatives are included in the docket for the final rule. Key points and themes from the various discussions during the meetings included the following:

Clarity

Some participants indicated that the proposed rule brings improvements and clarity to a poorly-written law. Participants stated that there will be challenges that arise from a proposed change in the rule due to the complex nature of some aspects of the proposed definition; however, they noted such challenges come about with any change in federal regulations.

State Regulation

Some participants said that many states define their “waters of the state” more broadly than the proposed “waters of the United States” definition, and that therefore these states are not concerned about a regulatory gap resulting from the proposed rule. Some participants also said that this proposed rule, seems to establish a presumption that for states whose “waters of the state” definitions are broader than the “waters of the United States” definition, their laws will immediately address any changes as a result of changing the federal scope. Some participants cautioned that broader state definitions will not necessarily result in regulatory

⁸ The following names and titles were accurate at the times of meetings but may have changed since then.

authority broader than the scope of the proposal because under the pre-2015 Rule framework they generally did not have to define which wetlands or tributaries were jurisdictional under federal vs. state laws. Some participants explained that given extensive overlap of “waters of the United States” and “waters of the state,” many states relied on CWA section 401 certification of federal permits for regulated activities in federal waters, rather than issuing state permits for regulated activities in state waters. Some participants said that under the proposed definition of “waters of the United States,” states would now have to take the time to clearly define where federal jurisdiction ends and state jurisdiction begins, which would require time and effort.

Some participants indicated that if the proposed rule were finalized, there would likely be a regulatory gap for at least a period of time while states determine the best mechanisms for maintaining protections for waters no longer included in the revised definition of “waters of the United States.” Some participants indicated they felt that the agencies were unfairly shifting the burden of water protection onto the states. Some participants said that, in the absence of direct funding to assist states in adjusting to a revised “waters of the United States” definition, the agencies should delay implementation of the rule, so that states could have more time to determine how to fill potential gaps and set up new programs, laws, or regulatory regimes if desired. Some participants identified states with regulations in place preventing them from enacting rules or regulations that are more stringent than those set by the federal government, unless a law is passed by the legislature. Participants expressed concern about potential funding implications for various EPA water or environmental protection programs if the proposed rule were implemented and resulted in a reduction in the jurisdictional waters in the state. Participants stated that Western states have large tracts of federally-owned and managed lands, and some states expressed concern that the federal agencies that oversee these lands would push back against any state laws that were more stringent than the federal CWA.

Participants raised questions about whether the EPA would still implement the pre-treatment requirements for publicly owned treatment works (POTWs) or whether the states would become responsible for pretreatment in instances where POTWs are discharging into ephemeral streams that would not be considered “waters of the United States” under the proposed definition. They also discussed potential strategies for addressing related regulatory gaps that may result from the proposed rule.

Flow Criteria

Participants stated that greater clarity may be needed regarding the jurisdictional status of streams that flow intermittently, then have an ephemeral portion, then flow intermittently to a traditional navigable water, especially where most of the waterbody is intermittent or where the ephemeral section is attributable to human alteration. Participants stated that pumping patterns in their region can affect whether streams and rivers flow down into the ground toward the water table or whether they maintain a consistent surface flow. One participant suggested including a flow duration (e.g., 3 months) in the definition of “intermittent,” or for determining the direct hydrological surface connection needed for

wetlands to satisfy the “adjacent wetlands” definition. Some participants expressed concern about the use of only the 30th-70th percentile range in the “typical year” concept, and those commenters stated that it leaves out 60% of the range of precipitation. They stated that in some parts of the country, floods or droughts are actually quite common, and participants expressed some concern related to whether the “typical year” definition would adequately capture these extreme, yet commonplace, events. Participants asked for greater clarity regarding flooding or inundation in a typical year serving as a direct hydrological surface connection, particularly regarding the amount or frequency of inundation to meet the “waters of the United States” definition.

Ditches

Some participants sought more clarity regarding the scope of ditches excluded from the proposed rule. While some participants stated that the proposed definition provides some clarity regarding ditches, there was some confusion regarding the Mississippi River alluvial plain, since it is a complex system of waterways that seem to meet some or all of the conditions to be tributaries. Participants stated that ditches constructed to drain wetlands located on farm land are likely to be some of the most difficult when it comes to determining whether or not they are jurisdictional.

Exclusions

Participants were generally supportive of the proposed exclusions to the definition, although not all supported the exclusion for ephemeral features and some recommended additional specific features be added to the list of excluded waters and features in the final rule. Participants discussed the need for additional clarity in the provided definition of prior converted cropland (PCC). Participants expressed a need for greater clarity regarding the exclusion for waste treatment systems and types of features that would be included. In Texas, there may be a regulatory gap caused by the explicit exclusion of cooling ponds, since the relevant state law references federal rules.

Impoundments

Some participants asked questions about the impact of this proposal on impoundments, and whether impounding certain features and creating a downstream ephemeral flow would reduce protection for upstream waters or create disincentives for fixing or appropriately maintaining dams. Participants discussed relief wells and other flood control structures on the “other side” of levees, and whether the flow into or from these features would create a connection such that a wetland on the other side of a levee with a relief well would meet the definition of adjacent and thus be jurisdictional.

Potential Effects of Proposal

Participants raised questions about the status of NPDES permits for sources that discharge directly into waters that are no longer waters of the United States, but the discharge eventually does reach a “waters of the United States.” Some states noted that unlike a piped

conveyance, pollutants can infiltrate into the ground or surrounding environment while flowing through a water that is no longer considered a water of the United States. There were also concerns that this scenario will be difficult to regulate. Some participants expressed concern that someone could potentially fill in a non-jurisdictional feature and then sever jurisdiction of the upstream tributary.

States noted that changes in flooding and storm patterns are likely to make coastal wetlands and ditches more challenging to assess for purposes of jurisdiction. One participant expressed concern about situations that may be considered “hydrological trespass,” in which a non-jurisdictional water feature could convey a pollutant discharge to a water of the United States, crossing another person or entity’s property to do so, thereby allowing the pollutant to flow through someone else’s property and rendering the location of the point source on that other entity’s property, as well. Participants discussed whether the rule should include a temporal component or greater clarification about the timeframe in which a water feature that is no longer jurisdictional was converted. They said that this is particularly relevant when determining whether certain ditches would be considered to have been constructed in upland or not, and therefore whether they would be jurisdictional.

Implementation

Participants noted that, once the rule is finalized, the agencies should develop additional guidance documents to assist those implementing the rule in doing so consistently across the country. It was noted that targeted training in concert with Corps offices, focused on new tools, may be useful for state programs. Participants expressed interest in states and tribes sitting down with the local Corps Districts to identify the implementation tools the states and tribes may have, and how they use them, in order to share information and increase trust and confidence in jurisdictional determinations that are issued.

One participant recommended that the agencies consider defining a “typical year” in a manner that is easier to implement than the proposal and uses existing criteria or tools. For instance, the National Oceanic and Atmospheric Administration (NOAA) uses a concept of climatic normal but it only rolls over every 10 years, rather than annually.

Participants discussed stream flow assessment methodologies used by different states for determining the difference between perennial/intermittent/ephemeral flows. Some of the approaches that were discussed included site visits and attainability assessments. Some participants indicated that there may be easier ways to determine frequency of surface flow connections between wetlands and other waters of the United States, such as utilizing floodplain data, rather than trying to directly observe them on a repeated or annual basis. Some participants stated that trying to distinguish between ephemeral and intermittent streams would likely pose significant challenges in implementing the proposed rule. Some states indicated that focusing on the issue of flow duration is a distraction from the central issue of pollutants being conveyed to navigable waters.

Some implementation tools mentioned by participants included seasonal water table sampling, using the presence of fish or aquatic life as a primary determinant of whether a stream is intermittent or ephemeral, National Hydrography Dataset (NHD) data, and United States Geological Survey (USGS) stream statistics. Several participants noted that there is no single, consistently accurate resource or data set they are aware of that would solve the issue of determining intermittent versus ephemeral tributaries. For instance, some participants said that NHD data are inconsistent and unreliable due to how the data were assembled.

Participants mentioned a variety of other tools and assessments that the agencies could use to assist in implementing the proposed rule. Participants mentioned that the Pacific Northwest Stream Flow Assessment may be a useful starting point, cautioning that it has been more about determining seasonal streams, not necessarily ephemeral or intermittent as defined in the proposed “waters of the United States” definition. The U.S. Forest Service has been working on a tool called the NorWest Regional Database and Modeled Stream Temperatures, which is focused on climate prediction but may involve some underlying data that states felt could be useful. A participant noted that North Carolina uses a rapid stream flow assessment that identifies features that flow at least intermittently; it includes 30 questions that can be answered quickly and easily, and categorizes waters based on point totals from those questions. Participants noted that Oregon’s field-based method, which uses biota to determine whether a stream flows perennially, intermittently, or ephemerally, could also be useful; however, it would need to be adapted, tested and verified for different states or regions. New Mexico described a qualitative tool it uses, involving 15 indicators, to determine if a tributary is perennial, intermittent, or ephemeral, noting the importance of having regional tools that take into account variations in hydrology, biology, etc. Participants discussed lower-cost options involving using crowdsourcing and cellular video cameras to help monitor flow of intermittent or ephemeral streams.

Geospatial Datasets of “Waters of the United States”

Some participants indicated an interest in potentially participating in work groups or other efforts related to mapping “waters of the United States” going forward. Participants recommended the agencies reach out to the Association of State Wetland Managers (ASWM), which has technical contacts for each state. Many participants indicated that there would need to be significant disclaimers or instructions on use for any “waters of the United States” map that would eventually be developed due to the wide range of concerns and challenges that exist in regard to identifying these waters and making that information publicly available, including concerns about privacy, accuracy, consequences for landowners, etc. Many participants felt a “waters of the United States” map could be useful as a screening tool that could narrow the set of waters for which field staff must be deployed in order to make an accurate jurisdictional determination.

Participants indicated that they have encountered a number of challenges in developing jurisdictional maps, including uneven data, and the lack of certainty regarding the

definition of “waters of the United States” due to pending court cases and ongoing rule changes. Participants listed a variety of other potential difficulties, including existing data sets that are outdated or inaccurate, difficulty in knitting datasets together due to compatibility issues, difficulty using aerial photographs due to pervasive canopy cover or due to the nature of the water bodies themselves, and continually updating maps as waters and landscape conditions change over time. Several participants indicated interest in the development of geospatial datasets but said that the resources required to identify and validate the data for their state could pose a significant challenge to their participation in such an effort. Participants said that regional or state differences in land ownership may affect mapping efforts, and states with a higher proportion of their land in private ownership versus public ownership may have different advantages or challenges related to mapping.

Participants stated that some states have already undertaken significant statewide mapping efforts for water resources within their state. Some states have started with existing map base layers like light detection and ranging (LiDAR) or NHD and then manually filled in the data gaps using other data sources and field work/site visits when needed. Some participants expressed concern that existing datasets, such as the NHD and National Wetlands Inventory (NWI), have varying levels of granularity and accuracy across the country, and also use different definitions than those in the proposed rule. While there may be compounding value provided from layering multiple different datasets together, there are also difficulties caused by relying on datasets that may have been developed for different purposes, especially since the definitions being used in the proposed rule are new, and therefore there are not yet existing datasets aligned specifically to these definitions. Participants stated that the NHD does not always distinguish between ephemeral and intermittent flow, and that ephemeral waters may only be mapped in some areas. Given the importance of the ephemeral versus intermittent distinction in this proposal, NHD may currently be of limited use in determining which waters may be waters of the United States.

One state indicated that it developed a geospatial dataset using NHD, NWI, and other statewide mapping layers overlaid together, called the Wetland Condition Assessment tool, which they said is most accurate in areas with simpler topography. It was suggested that if a dataset like this were combined with permitting databases to see if a permit has been issued in that area, it could be a useful tool.

Participants stated that one factor to consider would be the validity of maps as time passes and conditions change. For example, Corps jurisdictional determinations are only valid for 5 years and flows and topography may change as well; a map would need to be responsive to such changes in order to remain useful. One participant noted that there is an existing map and database of all approved jurisdictional determinations and permits issued, which may be useful in the development of a “waters of the United States” map. Participants also noted that there are challenges with relying on existing jurisdictional determination data, including uneven accuracy regarding boundaries of waters and the fact that a jurisdictional determination is only issued for a particular parcel or property, which could cause issues for neighboring properties.

Many participants noted that clarity about the purpose and goal of such a map is important. They also said the map could be approached incrementally, for instance, establishing a goal of gradually narrowing the scope of uncertainty related to particular types of waters or parts of the country, even if by a measure of 20%.

Other Considerations

Participants noted that they appreciated the opportunity to hear directly from the agencies about the proposed rule and the intent behind it to enable them to provide well-informed comments during the public comment period. Participants asked that more detailed language and examples, like those discussed during these meetings, be included in the actual rule text in order to provide enough clarity to co-regulators. Participants recommended that the agencies consider an extension to the public comment period and a phased-in approach, saying that this would provide states the time they would need to develop and implement strategies to realign their legal and regulatory frameworks in response to the proposed rule change. They also noted that these efforts will be expensive and lengthy for states, even for those that already have expansive water protection programs. Some participants expressed concern that, if finalized, the proposed rule change may destabilize or affect the relationships between states, federal agencies, and tribes. Many participants reiterated concerns related to non-jurisdictional ditches and how activities conducted in those ditches may affect upstream or downstream “waters of the United States” features.

Comment Letters

The agencies also received significant feedback from state and local governments through numerous comment letters submitted to the docket during the comment period for the proposed rule. These comment letters include many of the same themes that were raised during post-proposal outreach as well as a variety of other topics. These comment letters are responded to in the agencies’ Response to Comments Document, which can be found in the docket for the final rule.

2019 Local Government Advisory Committee Report

The LGAC in its 2019 Waters of the U.S. Report, provided specific responses to the charge questions posed by the EPA Administrator to help guide the agencies in moving forward with rulemaking. The LGAC transmitted the final report to Administrator Wheeler on May 15, 2019. Some of the major themes of the report, as highlighted in the transmittal letter to the EPA,⁹ are as follows:

⁹ Letter from LGAC to Administrator Wheeler (May 15, 2019), available at https://www.epa.gov/sites/production/files/2019-05/documents/lgac_wotus_letter-may-2019.pdf.

Shared Governance and Flexibility

In comparison to the 2015 rule, the LGAC concluded that the proposed rule provides greater clarity regarding definitions and exclusions. However, with the greater clarity came the realization by the LGAC that the rule must allow for regional differences in order to properly protect water resources across the country without unnecessary regulatory burdens. The LGAC suggested that one way to address regional differences is to amend the rule to give greater flexibility for states, tribes, and local governments to manage and protect waters of the United States.

A shared governance model recommended by the LGAC would have federal jurisdiction remain over all interstate and navigable waters, their tributaries and all adjacent wetlands, and give states and tribal governments the authority to provide input on what isolated wetlands, intermittent and ephemeral streams, and ditches should be considered as waters of the United States. Following discussions with colleagues, it was clear to the LGAC that a regulation seen as too little in one part of the country could also be too much in another part of the country. The LGAC indicated they believed their proposed collaborative approach is a way to respect regional differences while providing a reasonable and appropriate nationwide regulatory framework.

Isolated Wetlands, Intermittent and Ephemeral Streams, and Headwaters

The LGAC found differing views as to the protection of isolated wetlands. Some local governments agreed with the more limited interpretation of “waters of the United States” in the proposed rule as opposed to prior rules, but others countered that all wetlands in their area are economic drivers and valuable natural resources warranting federal protection. The LGAC heard several concerns during listening sessions that the loss of wetlands due to lack of federal regulation could be catastrophic to a local fishing industry or coastal economy. Likewise, the LGAC stated that in some regions ephemeral and intermittent streams and especially headwater streams provide a key role in maintaining the source and quality of drinking water and livestock. Many LGAC Members expressed concern that protection of headwaters streams is important to preventing flooding hazards and to preventing degradation of the watershed and rivers. The LGAC said that these issues all require an approach that considers regional differences and engages state, local, and tribal governments in the process.

Ditches

The LGAC supported the exclusion of all ditches, except those ditches identified in paragraph (a)(3), from the definition of “waters of the United States.” As local governments, they stated that they regularly design, construct, and maintain ditches for a variety of purposes including public safety. Therefore, they said that it was imperative that ditches do not fall under an extensive regulatory burden. In order to develop additional guidance on ditches, the LGAC recommended a collaborative approach through an Interagency Task Force including the EPA, the Corps, and state, local, and tribal stakeholders. The goal would be to jointly develop greater clarity on ditches that can be understood and applied at the local level. This would also provide a forum for data sharing across jurisdictions.

Mapping and Tools

The LGAC report consistently emphasized the importance of data sharing and mapping tools. They said that waters of the United States could ideally be delineated utilizing Geographic Information System tools. Several local government representatives indicated the availability of reliable data to share in a collaborative approach, which could be another important assignment for the Interagency Task Force.

Implementation and Permitting

According to the LGAC report, if the “waters of the United States” rule is to be successfully implemented, the permitting process must be evaluated and redesigned for shared governance. The LGAC heard significant concerns from stakeholders about permitting delays and inconsistencies. The recent collaborative work between the EPA and the Corps is a significant step forward. The recommended Interagency Task Force could also play a leadership role in resolving these concerns.

Response to Themes Raised in Post-Proposal Outreach

The agencies are committed to ensuring that the comments and concerns of state and local governments are adequately considered in the final rule. Many of the comments from state and local governments presented differing views on many aspects of the proposed rule. The agencies considered the full scope of comments received on the proposed rule, from pre-proposal feedback to formal written comments to the additional outreach conducted during the public comment period. The preamble to the final rule explains the rationale for the final rule, including changes made from the proposed rule, and addresses many of the comments received on the proposed rule. Additionally, the agencies have responded to the comments received for this rule, including those from state and local governments, in the agencies’ Response to Comments Document located in the docket for this final rule.