



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



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

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BACKGROUND

This document was prepared to support the U.S. Environmental Protection Agency (EPA) and Department of the Army (the agencies) in finalizing the agencies' "Revised Definition of 'Waters of the United States,'" which was signed by the agencies on November 18, 2021. This report summarizes the agencies' federalism consultation, outreach efforts, and the feedback received from states and local governments on the proposed rule. This report also serves as an update to the *Summary Report of Federalism Consultation for the Proposed Rule: Revised Definition of "Waters of the United States,"* which was published in December 2021.

The federalism consultation process described in this report follows the EPA's policy for implementing Executive Order (E.O.) 13132.¹ The agencies undertook the rulemaking in response 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 agency actions taken between January 20, 2017 and January 20, 2021, which includes the Navigable Waters Protection Rule (NWPR): Definition of Waters of the United States, published April 21, 2020. Following a federal district court decision vacating the 2020 NWPR on August 30, 2021, the agencies halted implementation of the 2020 NWPR and began interpreting "waters of the United States" consistent with the pre-2015 regulatory regime.^{2,3} The agencies proposed a rule revising the definition of "waters of the United States" ("Revised Definition of 'Waters of the United States,'" EPA-HQ-OW-2021-0602) on November 18, 2021.

This report is released in support of a final rule revising the definition of "waters of the United States" ("Revised Definition of 'Waters of the United States,'" EPA-HQ-OW-2021-0602) and summarizes all outreach and consultation efforts that were part of this rulemaking effort. The proposal was preceded by tribal and federalism consultations, initial public meetings, and a request for written recommendations in order to hear the perspectives of interested stakeholders and the agencies' co-regulators on defining "waters of the United States" under the Clean Water Act, as well as how to implement that definition. In addition to summarizing the consultation and outreach with state and local governments conducted before the rule was proposed, this report further summarizes comments and input provided by state and local participants at meetings following proposal, and the letters received from states and local governments during the public comment period.

In January 2022, following publication of the proposed rule, the agencies hosted two roundtable sessions for state and local officials, including breakout discussions at the regional level. The agencies also received comments from state and local organizations as a part of the proposed rule comment period from December 7, 2021, to February 7, 2022.

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

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

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

This summary is intended to describe the wide range of comments received from states, local governments, and their state and local government associations as part of consultation, outreach, and the proposed rule's comment period. In addition, this report provides a rationale for the determination that the final rule does not have federalism implications.

This summary does not generally distinguish comments submitted by a state government entity from those provided by local government entities, nor does it distinguish between comments submitted by letter or at meetings. All comments submitted on the proposed rule are located on the public docket (Docket ID No. EPA-HQ-OW-2021-0602), available at <https://www.regulations.gov/docket/EPA-HQ-OW-2021-0602/comments>.

PRE-PROPOSAL CONSULTATION

The agencies undertook a federalism consultation under E.O. 13132 and applicable EPA guidance. The agencies initiated the federalism consultation process with a letter to intergovernmental associations on July 29, 2021, and a meeting with the associations on August 5, 2021. At this consultation meeting, the agencies provided an overview of the forthcoming proposed rulemaking and received input from intergovernmental representatives about this action.⁴

After the end of the consultation comment period and before proposal, the agencies held three regional dialogues with states. The meeting dates and the states that participated include:

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

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

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

In addition to the meetings, the agencies received letters from state and local governments, as well as intergovernmental associations, as part of the federalism consultation process. A total of 37 letters were submitted to the agencies as part of the federalism consultation process from the following entities:

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

All submitted letters are publicly available on EPA's website at: <https://www.epa.gov/wotus/federalism-consultation-pre-proposal-revised-definition-waters-us>. The letters are also included in the docket as attachments to the report for the proposed rule (Docket ID No. EPA-HQ-OW-2021-0602-0105), available at: <https://www.regulations.gov/document/EPA-HQ-OW-2021-0602-0105>.

These meetings and the subsequent comments and input were provided before the proposed rule was signed. Therefore, state and local governments were asked to consider specific implementation experiences related to the 2020 NWPR, the 2015 Clean Water Rule, and the pre-2015 regulatory regime.

A copy of the agencies' July 2021 letter initiating federalism consultation and a copy of the August 13, 2021, letter extending the consultation comment period are available in the docket as attachments to the federalism consultation report for the proposed rule (Docket ID No. EPA-HQ-OW-2021-0602-0105, available at <https://www.regulations.gov/document/EPA-HQ-OW-2021-0602-0105>). The appendix lists the federalism consultation comment letters submitted by states, local governments, and state and local associations.

POST-PROPOSAL STATE AND LOCAL GOVERNMENT OUTREACH

The agencies hosted two roundtable sessions for state and local officials in January 2022. The two roundtable sessions, open to state and local officials, were held on January 24, 2022, and January 27, 2022. During the roundtables, senior agency representatives presented an overview on the status of "waters of the United States" and the proposed rule. After the overview presentation for each roundtable meeting, there were breakout groups for state officials, organized by regions, so they could discuss, ask questions, and provide feedback on the proposed rule to members of the agencies. The regions for the breakout groups were: arid West, Midwest, North/Mountain West, Northeast, and Southeast. There was also a breakout group at each session for local government representatives to provide feedback to members of the agencies.

At each roundtable, the agencies provided questions and discussion topics for each regional breakout session. State and local representatives were also encouraged to discuss any topics they thought were important pertaining to the proposed rule for "waters of the United States."

In addition to the meetings, the agencies received comments from state and local organizations on the proposed rule as part of the public comment period. A total of 70 comments were submitted by state government entities, and 32 comments were submitted by local government entities.

The preamble of the rule encouraged stakeholders to comment on:

- Streamlining the proposed rule by consolidating the traditional navigable waters, interstate waters, and the territorial seas provisions into one provision;
- Implementing interstate waters;
- Implementing the significant nexus standard;
- Factors that determine a significant nexus;
- How the relatively permanent standard should be implemented;
- How to define the flow classification for tributaries;
- Whether to remove the parenthetical “other than waters that are themselves wetlands;”
- Whether any changes could enhance consistency between the prior converted cropland status under the Food Security Act and the exclusion of prior converted cropland under the Clean Water Act;
- How prior converted cropland could lose its status and if the EPA should retain the 2020 NWPR’s interpretation;
- The waste treatment system exclusion; and
- Interpretation of relevant reach for ditches.

The agencies also encouraged the public to comment on all aspects of the proposed rule to help support the development of the final rule.

GENERAL SUMMARY FROM POST-PROPOSAL MEETINGS AND COMMENTS

State and local government feedback during the post-proposal outreach and comment period conveyed similar comments to those the agencies received in the pre-proposal consultation process. Some states supported the rulemaking, and others opposed it. Some letters predominantly addressed the questions posed by the agencies in the preamble without providing an opinion about the overall proposed rule. Topics that emerged both before and after the rule was proposed include:

- Many commenters highlighted the important role of cooperative federalism and state authority, noting that states are co-regulators. These commenters often mentioned that states have their water quality regulations and are best positioned to regulate waters within their boundaries. In addition, many commenters requested that the agencies continue to engage in meaningful consultation with the states during the rulemaking process.
- Many commenters stated that they generally supported using the proposed combination of the relatively permanent standard and the significant nexus standard to determine jurisdiction. Some commenters provided input on how to implement or define elements of these standards.
- Conversely, many commenters opposed using the significant nexus standard, and instead requested that the agencies rely solely on Justice Scalia’s plurality opinion (*i.e.*, the relatively permanent standard) in *Rapanos v. United States*, 547 U.S. 715 (2006) (*Rapanos*) to determine jurisdiction. Many of these commenters noted that they believe the agencies’ interpretation of the significant nexus standard was impermissibly broad, was not consistent with *Rapanos*, and exceeded the agencies’ authority.
- Many commenters requested that the agencies wait until a Supreme Court decision on the *Sackett v. EPA* case to avoid promulgating a rule inconsistent with the decision.
- Some commenters asked the agencies to consider delaying implementation for any new rule to allow states time to update their legislative and administrative processes.

- Many commenters requested that the agencies include all or some of the categorical exclusions and exemptions⁵ found in the 2015 Clean Water Rule and the 2020 NWPR, often stating that the exclusions provided clarity and were easier to implement. Many commenters suggested how to further clarify these exclusions and exemptions, particularly related to the exclusions for prior converted cropland and for ditches.
- Many commenters requested that the agencies incorporate regional differences into the definition of “waters of the United States” and prepare regional guidance documents. Some commenters were in favor of including an interstate waters category in the definition of “waters of the United States,” citing the importance of having a national-scale floor for Clean Water Act protection. However, consistent with the 2020 NWPR, some commenters were in favor of removing interstate waters as a jurisdictional category.

THEMES EMERGING FROM STATE AND LOCAL GOVERNMENT CONSULTATION LETTERS, MEETING DIALOGUES, AND PROPOSAL COMMENTS

The consultation meetings, roundtable meetings, federalism letters, and comments on the proposal indicate the wide and diverse range of interests, positions, comments, and recommendations provided to the agencies by meeting participants and commenters from state and local governments. A number of key themes emerged throughout the meetings, comments, and letters. These themes are summarized below.

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

Most state, local, and association commenters provided some feedback on implementing of the definition of “waters of the United States,” as requested under docket EPA-HQ-OW-2021-0328. Many commenters stated their views on recent regulatory definitions, made general suggestions about how to improve implementation, or provided specific ideas for tools and guidance. Many commenters also stated their opinions on improving the rule’s clarity by reducing case-specific determinations, the need for a durable rule, and the importance of a regionalized approach to the rule.

States and local governments held divergent views on the agencies’ plans to promulgate a rule similar to the pre-2015 regulatory regime. Some supported the 2020 NWPR and recommended the agencies generally retain and revise that rule. These state and local entities believed that the 2020 NWPR provided a clear definition for “waters of the United States,” maintained a balance between federal and state jurisdiction, protected waters while also enhancing agriculture and industry, and appropriately excluded waters that should not be subject to the Clean Water Act. Some of these commenters encouraged the continued use of a “typical year.” Others supported the agencies’ current rulemaking efforts as they thought the 2020 NWPR was not protective enough, shifted the regulatory burden onto states, and did not account for the complexities of the hydrologic cycle, the importance of ephemeral waters, or the

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

connections among waters on the landscape. State and local governments held differing opinions on how the criteria for jurisdiction of ephemeral streams, ditches, tributaries, and wetlands should be determined, and which resources should be included in the scope of the Clean Water Act.

Some commenters who supported the 2020 NWPR expressed concern that, as proposed, the revised definition of “waters of the United States” will increase permitting and compliance costs as well as potential litigation, including in small and rural communities and in Alaska. They stated that wait times for U.S. Army Corps of Engineers (USACE) approval are already very long, and if jurisdiction is expanded, wait times could be further extended. To help reduce burden on states, local governments, and stakeholders, some commenters requested the agencies’ jurisdictional determination and permitting process be simplified and streamlined. Several commenters suggested that the agencies create a “one-stop-shop” for permitting to streamline the current multi-agency process.

Many commenters requested that the agencies minimize subjectivity in determining jurisdiction. States and local governments differed in how they thought the agencies could best accomplish this, but most wanted technical guidance, training, and assistance to improve implementation of any new definition. Numerous commenters stated that this guidance should be based on regional hydrology and geology. A commenter suggested that the agencies create regional field checklists as a tool for jurisdictional determinations. Included in these comments requesting technical guidance were often requests to have maps of jurisdictional waters, created through a collaborative effort with states and tribes using the best available data and tools. Commenters also stated that there should be provisions for the maps to be updated and maintained regularly. Several commenters requested that implementation tools consider climate change. Many commenters requested that these tools and guidance be made available simultaneously (or before) changes to the definition are finalized. Overall, commenters wanted a clearer process with training and tools available at the time of promulgation to implement a revised definition of “waters of the United States.”

Many commenters requested that the agencies wait until a Supreme Court decision on the *Sackett v. EPA* before implementing the proposed rule that they believe is inconsistent with that decision. They believe this Supreme Court decision will help provide clarity on the jurisdiction determination. Commenters believe waiting will help preserve resources as this case will have an impact on future rules.

EXCLUSIONS AND EXEMPTIONS

A few commenters included specific suggestions for rule language with respect to exclusions and exemptions.⁶ Many commenters generally supported at least some exclusions available in the 2020 NWPR and the 2015 Clean Water Rule, and argued that clear exclusions provide needed clarity for applicants. There were also calls from commenters for more guidance and elaboration on the exclusions and exemptions, especially for stormwater, ditches, and prior converted cropland. Overall, many state and local commenters valued the current exclusions in the proposed rule and suggested further exclusions as they help provide clarity.

Exclusions requested by commenters included the following:

- Waste treatment systems.

- Commenters stated that it was important to exclude all components of these systems, although a commenter indicated there should not be a blanket exclusion for cooling reservoirs as part of the waste treatment exclusion;
- Prior converted cropland.
 - There were comments stating that the prior converted cropland exclusion should revert back to the 2020 NWPR’s definition, and other comments stating the agencies should use the Natural Resources Conservation Service (NRCS) definition for prior converted cropland, consistent with the pre-2015 regulations.
 - A few commenters added that if prior converted cropland is allowed to revert back to wetland, it should no longer be excluded.
 - Some supported a “change in use” analysis for determining when an area is no longer prior converted cropland; others opposed this approach.
 - Some commenters generally stated they want increased clarity on the prior converted cropland exclusion.
- Public water system infrastructure such as:
 - Wastewater recycling structures/systems
 - Stormwater systems and Municipal Separate Storm Sewer Systems (MS4s), including runoff detention ponds
 - Stormwater runoff control facilities to hold back debris and sediment for disaster response (*e.g.*, wildfire)
 - Drinking Water Facilities and infrastructure
 - Water Reuse Infrastructure
 - Human-made public safety water and stormwater conveyances
 - Water storage reservoirs
- Groundwater.

A commenter stated that the exclusion should not include discharges into groundwater that has a direct hydrologic connection to surface water, while another wanted to expand the groundwater exclusion to include shallow flow.
- Artificial lakes and ponds. At least one commenter indicated that these should not be excluded if they have a significant nexus to jurisdictional waters
- Ephemeral and isolated waters
- Ditches
- Canals, and stock ponds
- Water filled depressions created in uplands incidental to mining or construction activity
- Some commenters requested exclusions for state specific features that the proposed rule may unintentionally regulate
- Some commenters mentioned they valued all the current exemptions that were listed in the proposed rule
- A few commenters stated that the farm-related exemptions under Clean Water Act section 404(f), including those for normal farming, should remain.

ROLE OF STATES VERSUS FEDERAL GOVERNMENT

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

Many commenters stressed that states are best positioned to manage water within their boundaries because of their on-the-ground knowledge of local conditions; multiple commenters from Alaska emphasized that its size and lack of interstate borders makes this especially relevant. Some commenters stated that they believe the 2020 NWPR improved states' ability to regulate their waters and that the 2015 Clean Water Rule was a federal overreach.

Many states supported limiting federal influence over waters within state boundaries. For example, a commenter from Wyoming pointed out that under the 2020 NWPR, their state started developing a program to cover discharges to non-waters of the United States. This demonstrates that states can provide necessary protections under state statutes. In contrast, other commenters stressed the importance of federal regulation of waters, focusing on concerns that some states do not have programs protecting all the waters that the new rule would protect, such as ephemeral streams and certain wetlands. These commenters also tended to criticize that the 2020 NWPR did not protect enough of the state waters.

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

NEED FOR CLARITY, CERTAINTY, AND DURABILITY

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

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

Several commenters contended that the 2015 Clean Water Rule definitions were vague and unworkable, while the 2020 NWPR definitions were clear. Another commenter expanded on this by stating that the agencies need to find the right balance so that definitions are clearer than the pre-2015 rule, but not

oversimplified as the 2020 NWPR. Many commenters agreed the need for a “durable” rule and that buy-in from states was needed to reduce future legal issues.

COOPERATIVE FEDERALISM

A common theme in the consultation letters, comments, and meetings was the need to take cooperative federalism seriously. There were some commenters who thought there was inadequate consultation as a part of the rule proposal process. Some commenters questioned how much of the input from states and local governments the agencies received was even considered in the rulemaking process. Many commenters emphasized that states and local governments are co-regulators and have a unique role in the development and implementation of Clean Water Act rulemaking. Many emphasized the need for state and local priorities to be considered in this rulemaking. Some commenters indicated that states need to be involved in the rulemaking process because of regional differences in hydrology, geology, and legal doctrines (*e.g.*, for water allocation in the west). Several commenters indicated that in addition to states, county governments and government associations need to be included in the rulemaking process. Several commenters thanked the agencies for the opportunity to comment during the federalism phase of the rulemaking, and further urged the agencies to continue to seek more input and to provide continuous, meaningful opportunities for dialogue.

IMPLEMENTATION ISSUES UNDER THE 2020 NWPR, INCLUDING THE TYPICAL YEAR ANALYSIS

Many commenters provided feedback and suggestions related to the implementation of the 2020 NWPR. As summarized below, some commenters indicated that they were able to successfully implement the 2020 NWPR, while others cited challenges with putting the 2020 NWPR into practice. Comments on state and local government experiences with using the 2020 NWPR’s typical year approach are also outlined below.

Implementation of the 2020 NWPR – Supportive/Neutral

- Many commenters from states and local governments stated that the 2020 NWPR provided regulatory certainty for their community about what is and is not jurisdictional.
- Some commenters supported implementation of the 2020 NWPR, stating that they believe it gave states more jurisdiction over their waters and was in line with the intentions of the Clean Water Act.
- Some commenters argue the 2020 NWPR accurately reflected the plurality’s rule in *Rapanos*, stayed within the limits of Commerce Clause authority, and corrected vague terms in the 2015 Clean Water Rule.
- A few commenters stated that the 2020 NWPR was an effective method to implement the objectives of the Clean Water Act.
- Some commenters stated that the 2020 NWPR simplified their county’s ability to maintain ditches, stormwater features, and ephemeral streams, as well as simplified wetland delineation.
- Several commenters stated that they did not alter their regulatory approach under the 2020 NWPR and did not have many implementation issues under the 2020 NWPR.
- A commenter stated that they have been able to work through any initial confusion with the 2020 NWPR (and past rules) because of their strong partnership with their local Corps office.

Implementation of the 2020 NWPR - Not Supportive

- Several commenters mentioned that the 2020 NWPR created uncertainty for their regulated community.
- Several states commented that they believe the 2020 NWPR failed to define “waters of the United States” so that it considered the objective of the Clean Water Act.
- There were comments that the 2020 NWPR severely impacted the states’ water quality by leaving ephemeral streams, interstate waters, and over half of the nation’s wetlands unprotected by the Clean Water Act.
- A state commenter stressed that the exclusion of ephemeral streams conflicts with hydrologic science.
- A commenter stated that projects implemented during the 2020 NWPR’s effect are causing harm to fragile watersheds.
- Some commenters stated that departing from the 2015 Clean Water Rule’s familiar significant nexus test for adjacency resulted in considerable confusion over regulatory boundaries and increased uncertainty in the permitting process.
- Many state and local government commenters stated that significant portions of their waters were no longer jurisdictional under the 2020 NWPR.
- Multiple commenters stated that the 2020 NWPR led to delays in the permitting process, resulting from additional steps and interpretation delays from the agencies.
- Several commenters stated that the 2020 NWPR conflicted with local regulations, which created implementation problems, especially when federal consistency was required (*e.g.*, under Clean Water Act section 401, Coastal Zone Management Act). They also noted the inability to use Nationwide Permits for waters that were formerly under federal jurisdiction.
- Several commenters stated that the 2020 NWPR has resulted in a loss of projects that can use mitigation banks that provide federal mitigation credits. They also stated that some wetland mitigation banks were no longer considered “wetlands” under the 2020 NWPR.
- Commenters stated that the loss of the interstate waters category in the 2020 NWPR led to frustration and confusion in their regulated community.

Typical Year Analysis

- Many commenters stated that the “typical year” analysis was unclear, added additional steps, caused delays, and sometimes conflicted with state or tribal methodologies for determining flow regime.
- A few commenters expressed concerns about the accuracy of the “typical year” analysis in light of climate change.
- A few commenters stated that implementation was difficult because the tools and training for determining flow regime under the typical year analysis were not available upon promulgation of the 2020 NWPR.
- Several commenters indicated that the typical year method has merit and should be considered in the forthcoming redefinition of “waters of the United States.”

RELATIVELY PERMANENT WATERS IN THE PROPOSED RULE

While there was general support for the relatively permanent standard, the agencies received many comments with suggestions on how to refine the rule and any guidance. Many comments requested the agency incorporate regional variability into the relatively permanent standard. There were comments suggesting that the proposed rule's relatively permanent standard language needs to have greater clarity as to what is relatively permanent. Other comments urged the agencies to clarify that all tributaries, including ephemeral and intermittent ones, that flow into or affect traditionally navigable waters are jurisdictional. Some commenters wanted the agencies to clarify that relatively permanent waters should be defined as having a continuous flow into traditionally navigable waters and that seasonal flow should not automatically mean a water is jurisdictional.

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

Commenters provided feedback on the significant nexus analyses conducted under the pre-2015 regulatory regime and the 2015 Clean Water Rule. Commenters also cited support for, or challenges with, overall implementation of the pre-2015 regulations and the 2015 Clean Water Rule. Commenters also stated their opinions on the effectiveness of the pre-2015 regulatory regime, with some supporting and some opposing the previous rules.

- Many commenters argued that the pre-2015 regulatory regime, especially the significant nexus standard, was not well defined and was often challenging, time consuming, and expensive to implement. Many argued the significant nexus test was difficult to implement because of inconsistent interpretation and professional bias. Some commenters thought the significant nexus standard was overly broad and that the agencies should rely exclusively on Justice Scalia's plurality decision in *Rapanos* describing "relatively permanent waters." Many commenters urged the agencies to return to pre-2015 practice, though the commenters disagreed on whether the agencies should build upon that regulatory regime with a second rule or permanently retain a rule equivalent to pre-2015 practice. Some believe the pre-2015 guidance, without modification, would be the best long-term rule because it is longstanding and familiar to the regulated community. Others commented that the agencies should have a second rulemaking effort to ensure a more clear and durable rule.

SIGNIFICANT NEXUS IN THE PROPOSED RULE

The agencies received many comments that agreed with the proposed rule's use of the significant nexus standard. Some of these commenters supported the standard in the proposed rule and appreciated that it provided clarity and examples of tools to determine significant nexus. These commenters also noted that the significant nexus standard is based on Supreme Court precedent and identified criteria and factors based on science. Some commenters urged the agencies to preserve the significant nexus standard in future rules and to potentially expand the standard to include more science-based factors that could indicate a significant nexus. There was particular support for ensuring that the significant nexus standard would be used to protect ephemeral streams that flow into traditional navigable waters. There

was a suggestion by a commenter that the agencies establish categories of waters that are automatically protected without the need to conduct a case-specific analysis.

There were also many comments that did not support the inclusion of the significant nexus standard in the proposed rule. Some of these comments argued that the significant nexus standard is too broad, too ambiguous, too hard to implement, and would lead to federal overreach if implemented. Some commenters perceived that the proposed rule changes Justice Kennedy's opinion in *Rapanos* by altering the significant nexus standard to have “chemical, physical, or biological connections” from the original phrasing of “chemical, physical, *and* biological connections” (emphasis added). The commenters believe this difference will further expand federal jurisdiction and result in case-specific determinations. As a result, many of the commenters state that a significant nexus analysis should find substantive impacts on the biological, physical, and chemical integrity of a traditional navigable water to demonstrate a significant nexus. These commenters also claimed that the proposed rule’s approach to the factors determining “significantly affect” is ambiguous and should have specific measurable thresholds.

WETLANDS AND THE DEFINITION OF ADJACENCY

Commenters provided recommendations and feedback related to wetlands in their consultation letters, at meetings, and in their comments on the proposed rule. General comments made about the treatment of wetlands are included below. Recommendations on the scope of adjacency, which has changed under different definitions of “waters of the United States,” are included below.

General Comments on Wetlands

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

Definition of Adjacency

The scope of adjacency has changed under different definitions of “waters of the United States.” State and local governments and associations expressed many opinions on how adjacency should be defined. Some commenters supported the agencies’ definition of adjacency in the proposed rule. Many commenters recommended a return to the agencies’ longstanding definition of adjacency as “bordering, continuous or neighboring,” and that wetlands that are separated by dikes, barriers, or similar structures should be considered adjacent and jurisdictional. Some of these commenters expressed frustration with the 2020 NWPR definition of adjacency as they believed it was not protective or clear, and allowed physical features (such as infrastructure) to alter jurisdiction for an otherwise adjacent wetland. These commenters supported the use of the significant nexus standard in determining adjacency. A subset of these comments recommended that subsurface hydrologic connections be included in the definition of adjacency, as well as surface connections. A few commenters stated that adjacent wetlands with any

surface connection, even if only temporary due to flooding, should be considered jurisdictional. Many commenters supported the 2020 NWPR definition, with multiple commenters stating that the longstanding definition of adjacency to include bordering, contiguous, and neighboring wetlands were too broad, and that the 2015 Clean Water Rule definition of neighboring is impractical for farmers and ranchers.

Additional recommendations for the definition of adjacency are listed below:

- A few commenters stated that the definition of adjacency should be informed by proximity but should avoid numerical distance standards.
- A few commenters recommended considering regional variation in the definition of adjacent but did not make specific recommendations.
- A commenter believes the language in the proposed rule that goes beyond the pre-2015 regulatory regime will create confusion.
- A commenter supports the removal of the parenthetical statement “other than wetlands adjacent to wetlands,” claiming that it’s unnecessary and confusing.
- A commenter requested that the revised definition of “waters of the United States” consider both wetlands and open waters in its concept of adjacency.
- A commenter supported the idea of requiring a direct surface connection for jurisdiction but noted some issues with this in certain seasons when permafrost melts and thus encouraged a more limited or regional definition.
- A commenter recommended replacing the relatively permanent and significant nexus tests for adjacent wetlands with the demonstrated potential to impair downstream designated uses.

DITCHES

Many commenters provided feedback regarding the treatment of ditches in the definition of “waters of the United States.” Some commenters supported excluding many ditches, while others supported the limited exclusion of fewer ditches. In general, the commenters in support of broader exclusion of ditches stated that the 2020 NWPR provided clear guidance on ditches, that states and local governments should determine regulation of ditches, and that a return to pre-2015 regulations would adversely affect many local governments that are responsible for many ditches. In all the comments on ditches, many made specific suggestions for what should or should not be considered a jurisdictional ditch. There was also some support for a regional approach to regulating ditches, as the term “ditch” can vary widely across regions. A summary of these comments is provided below.

Comments Supporting Regulation of Fewer Ditches

- Several commenters suggested a clear and broad exclusion for roadside ditches.
- Several commenters stated that they were satisfied with the language used in the 2020 NWPR to exclude ditches and would like to see similar language in the final rule.
- A few commenters stated that the 2015 Clean Water Rule ditch exclusion was unclear and led to subjective interpretation, was inconsistently applied, and caused delays.
- Several commenters recommended that the construction, maintenance, repair, and rehabilitation of man-made ditches and canals should not be subject to Clean Water Act section 404 permitting.

- A few commenters indicated that all ditches should be excluded from the definition of “waters of the United States.”
- One commenter wanted ditches in the Municipal Separate Stormwater Sewer Systems and ditches serving water reuse facilities to be exempt.
- A couple of commenters requested that any ditch exemption be explicit in applying the exemption to agricultural features.
- Another commenter stated that ditches should not be jurisdictional if their intended purpose is for non-Clean Water Act uses, such as conveying irrigation water.
- Many commenters from local and rural governments stated that they are responsible for maintaining a wide variety of ditches and that this section of the definition is important to them. The commenters stated that if there is a return to the pre-2015 definition, ditches will be regulated under the Clean Water Act section 404 program, burdening county governments. County governments urged the agencies to include local government public works maintenance and repair projects in the Clean Water Act section 404 permitting exemptions.

Comments Supporting Regulation of More Ditches

- A commenter indicated that the 2020 NWPR distinction between jurisdictional and non-jurisdictional ditches was unclear.
- Some commenters recommend a ditch be jurisdictional if it is ephemeral, intermittently, or perennially connected to another jurisdictional water.
- A commenter recommended that ditches be considered jurisdictional where they have the physical characteristics of a tributary and provide flow to a traditionally navigable water or interstate water, or if a ditch was created wholly in upland but has at least intermittent flow or standing water.
- A few commenters supported regulation of tidally-influenced ditches.
- A commenter stated that channels that connect other waters might also be considered as jurisdictional.
- A commenter supported ditches as “waters of the United States” when: the ditch was previously a natural tributary; the human-made ditch originated in uplands or another “waters of the United States” (*e.g.*, wetland), has flow or other physical characteristics of a “waters of the United States” and is connected to other “waters of the United States” so that it may convey pollutants and pollution to the other “waters of the United States,” or the ditch conveys tidal flow.

General Comments on Ditches

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

- A few commenters suggested developing regional procedures and field guidance for identifying jurisdictional ditches.
- One commenter suggested the agencies consider ditches to be jurisdictional where they have the physical characteristics of a tributary, are relatively permanent, or have a significant nexus to a foundational water and provide flow to that water.

TRIBUTARIES, INCLUDING EPHEMERAL STREAMS AND DRINKING WATER SOURCES

Commenters provided many suggestions for what should and should not be included under the definition of a tributary, as well as suggestions for methodology and characteristics to define a tributary and feedback on the exclusion of ephemeral streams under the 2020 NWPR. A summary of these comments is provided below.

Definition of Tributary – Ephemeral Streams

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

Definition of Tributary - General

- A commenter supported including lakes and ponds as tributaries if they meet the relatively permanent or significant nexus standards
- Another commenter states that lakes and ponds should be broken into discrete jurisdictional categories—as done in the 2020 NWPR—rather than included as tributaries.
- Another commenter agrees with the longstanding interpretation that there is no distinction among natural, human-altered, or human-made tributaries.
- A commenter requested clearer definitions for terms like “intermittent” and “ephemeral.”
- Several commenters specifically stated that they support the 2020 NWPR definition of tributary, which excluded ephemeral streams.
- Another commenter said that the definition of tributary under “waters of the United States” should be limited to perennial streams with relatively permanent surface water connection to a navigable water, consistent with the plurality decision in *Rapanos*. The commenter added that a significant nexus requires a connection between waters that is more than speculative or insubstantial to establish jurisdiction, and that the new rule should quantify “significant” to ensure this.

- A commenter indicated that in order to be jurisdictional, a stream must support the Clean Water Act uses defined by each state’s regulations.
- A commenter stated that a tributary must have relatively permanent flow.
- A commenter requested that springs carrying flow be considered jurisdictional, and another commenter requested that the agencies include hyporheic flow.
- Another commenter stated that human-made structures should not change the status of a “water of the United States,” such as if a levee or ditch discharges into a stream.

Interpretation of Tributary - Methodology

- A few commenters stated that both the significant nexus and relatively permanent standards should be applied to tributaries.
- One state recommended replacing the relatively permanent and significant nexus standards for tributaries with the demonstrated potential to impair downstream designated uses
- A few commenters supported the use of ordinary high water mark (OHWM) and suggested specific language on how to define the term.
- Another commenter stated that the use of OHWM was too broad under the 2015 Clean Water Rule but that the 2020 NWPR corrected this issue.
- A commenter recommended that the definition of tributary call for either “bed and bank or other evidence of flow” instead of requiring both a bed and bank and another indicator of OHWM to be considered jurisdictional. Similarly, a commenter indicated that the presence of bed and bank is not enough to determine jurisdiction because some streams do not have these.
- A few commenters requested that the definition of tributary not include reference to flow regime.
- A few commenters recommended that the agencies include a requirement of continuous flow for at least three consecutive months in the definition of intermittent.
- A commenter believes not using definitions for ephemeral, perennial, intermittent and typical year would reduce confusion.
- A commenter stated neither the definition of "tributary" nor "intermittent" should specify a particular source from which flow originates.
- Another commenter indicated that the definition of tributary must incorporate climate change by adding some consideration for the length and representativeness of the flow record because many streams that were once perennial are now intermittent.
- Another commenter suggested that a Rhode Island state methodology for determining connectivity could be a model for the agencies.
- A few commenters indicated that the new rule should allow for regionalization in the definition with regional guidance tools.

Drinking Water Sources⁷

- A few commenters stated that any rulemaking must consider implications for drinking water sources, noting that it is more efficient to prevent pollution at its source than to remove it at the consumers’ expense after pollution enters a drinking water supply.

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

- Another commenter from a drinking water association requested that the agencies ensure that groundwater discharges do not create surface water impairments (and vice versa), particularly for groundwater sources of drinking water.
- Another commenter stated the importance of considering drinking water sources because of climate change impacts such as saltwater intrusion.

REGIONAL APPROACH

Almost half of all federalism consultation feedback recommended that the new rule take a regional approach for the definition and implementation of “waters of the United States.” Many of the comments the agencies received on the proposed rule also emphasized the need for a regional approach for many aspects of the rule. There were no specific comments that opposed this concept. Many comments regarding regionalization are interwoven with other themes in this summary report.

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

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

Many commenters stated that it will take time and resources for state and local governments to adjust to any new definition, including potential changes to their regulations and proper training in field methods. Most of these commenters requested that the agencies provide a delayed effective date (or allow for a transition period) to allow state and local governments time to adjust to the new definition. Several commenters indicated that the additional costs, delays, and potential for litigation associated with the rule changes could affect water quality and/or public health as well as slow down local infrastructure projects, especially in small and rural communities. In addition, several commenters requested that the agencies provide funding to state and local governments to cover administrative costs associated with adaptation to the rule changes. A commenter stated that, without commensurate compensation for implementation, an expanded redefinition of “water of the United States” would constitute an unfunded mandate to states regarding their obligations under the Clean Water Act. A few commenters stated that a revised definition may jeopardize investment and interrupt progress they had made under the 2020 NWPR. Overall, many commenters wanted EPA to recognize the effort and resources potentially needed for states, local governments, and the regulated public to adjust to a new definition.

SUPREME COURT RULINGS AND OTHER LEGAL COMMENTS

In addition to the comments above, many commenters requested that the agencies wait until a Supreme Court decision on the *Sackett v. EPA* case to avoid promulgating a rule inconsistent with that decision. Some of these commenters urged EPA to implement the 2020 NWPR while awaiting further clarification

from the supreme court. Many of these commenters believe the proposed rule overreaches federal jurisdiction into state waters and is broader than the intent of the Clean Water Act.

Many other commenters expressed support for EPA efforts to return to pre-2015 regulations and to launch a second rulemaking effort. There were many arguments that the federal government must provide a baseline of protection for the nation's waters to protect downstream states and the most vulnerable.

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

- With regards to *Rapanos*, several commenters stated that any changes to the definition should be based on Justice Scalia's plurality opinion in *Rapanos*, while another commenter requested that any changes to the definition be consistent with Justice Kennedy's concurring opinion. A few other commenters stated that *Rapanos* caused confusion because neither the plurality or concurring opinion was a majority, and tension between the two increased costs and time for local projects.
- Another commenter stated that the 2020 NWPR comports with Clean Water Act judicial precedent more closely than previous rules defining "water of the United States."
- A commenter urged the agencies to use the entire docket of case law to amend the pre-2015 regulations.
- A commenter urged agencies to consider the North Dakota district court decision against the 2015 Clean Water Rule.
- A few commenters urged the agencies to comply with the limits set by Congress on the scope of federal jurisdiction under the Clean Water Act. Another commenter added that the agencies need to articulate where they view the bounds of the Commerce Clause, as well as how the revised definition avoids approaching that limit.
- A commenter asked how the agencies plan to incorporate EPA's January 2021 *Maui* Guidance, and another commenter recommended that the agencies use content from the *Maui* Guidance in the new rulemaking. Another commenter specifically suggested the Agencies incorporate the eighth element of the *Maui* Guidance into the revised rule.⁸
- A commenter stated that a better definition of interstate commerce is required and that recreational uses should not be considered "commerce."

SCIENCE

A few federalism comments included references to specific literature in support of the agencies' pre-proposal request for identification of relevant science, including relevant literature that has been

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

published since the Science Report.⁹ More often, the commenters made general statements about the use of science to support a revision to the definition of “waters of the United States” or about the 2015 Connectivity Report. Many commenters requested that the agencies respect, apply, and follow the best available science. Several commenters were supportive of the 2015 Connectivity Report being used to support rulemaking, while a couple of commenters opposed the use of the 2015 Connectivity Report because they felt the conclusions contradicted Supreme Court decisions.

INTERSTATE WATERS

The 2020 NWPR removed the previously established category for interstate waters from the definition of “waters of the United States.” Many commenters agreed with the agencies’ decision to reinstate a category for interstate waters in the proposed revised definition, citing the need to protect water quality in downstream states, provide consistency, and manage interstate disputes. A commenter added that tributaries to interstate waters should be identified as “waters of the United States,” as well as waters adjacent to such tributaries. They also suggested that a revised definition define “interstate waters” as including waters that cross or form tribal boundaries. Some of these commenters wanted jurisdiction to include all upstream tributaries of interstate waters.

A few commenters requested that interstate waters not be included as a category of “waters of the United States.” They wanted interstate waters to be jurisdictional only when they are navigable, citing an example of a 10-meter in diameter prairie pothole being jurisdictional because it’s on a state border being a federal overreach.

ECONOMIC ANALYSIS

There were some commenters that agreed with the agencies’ revised economic analysis on the impacts of the 2020 NWPR and the potential effects of the proposed rule. One comment discusses the implementation burden that the 2020 NWPR had on states and indicated that it harmed states’ economic and proprietary interests by harming wildlife and wildlife habitat, and the economic services wetlands provide. Another commenter believes returning to the pre-2015 regulations will have economic benefits.

Other commenters did not support the agencies’ economic analysis. A commenter argued that the agencies should compare the costs of the proposed rule with the 2020 NWPR, not with the pre-2015 regulatory regime, and that performing the correct analysis shows an increased cost. Another commenter stated that it is inaccurate for the agencies to assert that state waters will be unprotected in the absence of federal protections, because that is true only for some states. A few commenters want the agencies to consider that they believe the uncertainty and implementation of this rulemaking is impacting on state economies.

Several commenters addressed the need for an economic analysis with the new rulemaking and provided suggestions for what to include, often based on what was important to their respective communities. Commenters requested that the agencies examine the impacts on the farming and ranching community,

⁹ A comprehensive report prepared by EPA’s Office of Research and Development entitled “Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence” in 2015 synthesized the peer-reviewed science.

as well as the costs and benefits of the proposed redefinition of source water quality for drinking water supplies. They also stated that the new rule needs to consider the full range of benefits of having clean water and healthy watersheds, including benefits to outdoor recreation, ranching, farming, and municipalities. Similarly, another commenter stated that good water quality is critical to their state's water-based industries and tourism.

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

ENVIRONMENTAL JUSTICE

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

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

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

CLIMATE IMPLICATIONS

Some commenters supported the new rule accounting for climate change, while others believe climate implications should not be included in any new definition of "waters of the United States." Several commenters in support of climate change language in the new rule suggested that a liberal interpretation of "waters of the United States," such as including buffer zones and ephemeral streams, would help account for climate change impacts. Other commenters stated that the issue should instead be handled by Congress, such as by amendments to the Clean Water Act or through litigation in court. A commenter said an appropriate definition of "waters of the United States" would be adaptable to climate change without accounting for it specifically in the definition. Another commenter added that state programs are

used to incorporating climate change factors, and therefore, climate change does not need to be a part of the federal definition.

LAKES, PONDS, OTHER WATERS, AND GEOGRAPHICALLY ISOLATED WETLANDS

Some commenters discussed the jurisdictional status of lakes, ponds, other waters, and geographically isolated wetlands. A few commenters did not want geographically isolated wetlands or other waters not connected to navigable waters included in the definition of “waters of the United States,” while several commenters did want these features included and urged the agencies to review recent scientific literature on “other” waters to support their inclusion. Some commenters wanted the significant nexus standard to be applied to all waters. There were also a few suggestions by commenters for specific regional waters that they believe should be listed as “other waters” in the rule. For example, a commenter requested that closed basin lakes be included, another wanted karst features included, and another wanted vernal pools included. One commenter stated that isolated wetlands are important for storing water from intense precipitation events that are becoming more prevalent due to climate change. Finally, another commenter stated that lakes and ponds should be a separate category of “waters of the United States.”

AGENCIES’ RATIONALE FOR THE RULE CHANGE

A few commenters did not agree with the agencies’ rationale for the proposed rule change, indicating that they believe the agencies have not sufficiently explained how the 2020 NWPR fails to protect the environment. A commenter stated that the agencies cited 330 sites where environmental harm has been caused by the 2020 NWPR but failed to recognize that state and local regulations would have applied to these projects or that the projects could have been beneficial. The commenter requested more transparency and justification related to these 330 sites. A few state commenters claimed that there are few or no instances where water quality could have been negatively impacted as a result of the 2020 NWPR and in which the state could not have taken action to enforce state laws.

ISSUES WITH THE RULEMAKING PROCESS

A few commenters provided direct comments on the rulemaking process. Two commenters recommended that the agencies shift focus to an anticipated second rule, because they believe in their minds the Arizona district court vacatur already addressed most of issues driving adoption of the proposed rule. A commenter suggested repealing the 2020 NWPR, reverting to the pre-2015 regulatory regime, and taking no further action in order to return to a well-known definition that can allow for quicker implementation than waiting for another rulemaking to follow. Another commenter requested that the agencies revise the 2020 NWPR rather than repeal it. Finally, another commenter requested an early draft of the regulatory text in order to give feedback and identify unintended consequences.

CLEAN WATER ACT FUNDING

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

FEDERALISM IMPLICATIONS

The proposed rule does not have federalism implications. It will not have substantial direct effects on the states, the relationship between the national government and the states, or the distribution of power and responsibilities among the various levels of government.

Consulting with state and local government officials, or their representative national organizations is an important step in the process prior to proposing regulations that may have federalism implications under the terms of Executive Order 13132. The agencies engaged state and local governments over a 60-day federalism consultation period during development of the proposed rule, beginning with the initial federalism consultation meeting on August 5, 2021, and concluding on October 4, 2021. Twenty intergovernmental organizations, including eight of the ten organizations identified in EPA's 2008 Executive Order 13132 Guidance, attended the initial Federalism consultation meeting, as well as 12 associations representing state and local governments. Organizations in attendance included the following: National Governors Association, National Conference of State Legislatures, United States Conference of Mayors, National League of Cities, National Association of Counties, National Association of Towns and Townships, County Executives of America, Environmental Council of the States, Association of State Wetland Managers, Association of State Drinking Water Administrators, National Association of State Departments of Agriculture, Western States Water Council, National Association of Clean Water Agencies, National Rural Water Association, National Association of Attorneys General, National Water Resources Association, National Municipal Stormwater Alliance, Western Governors' Association, American Water Works Association, and Association of Metropolitan Water Agencies. In addition, the agencies received letters from state and local governments, as well as government associations, as part of this initial federalism consultation process. A total of 37 letters were submitted from 12 state government agencies, five local government agencies, 17 intergovernmental associations, and three state-level associations of local governments. All letters received by the agencies during this consultation may be found in the docket (Docket ID No. EPA-HQ-OW-2021-0602-0105) for the proposed rule, available at <https://www.regulations.gov/document/EPA-HQ-OW-2021-0602-0105>.

A Summary Report of Federalism Consultation for the proposed rule was published in December 2021. The agencies continued to engage with state and local governments during the public comment period. The agencies hosted two roundtable sessions for state and local officials on January 24 and January 27, 2022. These state and local government roundtables provided an overview of the proposed rule and discussions on a variety of topics, including significant nexus, specific waters, exclusions, and state regulatory programs. Each roundtable meeting included breakout groups for officials by region so they could discuss and provide feedback to the agencies. Organizations in attendance included a wide variety of state and local government agencies, intergovernmental associations and state-level associations of local governments. These meetings and the letters provided represent a wide and diverse range of interests, positions, comments, and recommendations to the agencies. Common themes from the feedback included the importance of promoting state-federal partnerships, the need for the agencies to take a regional approach to determinations of jurisdiction, and support for further clarity and consistency with significant nexus and relatively permanent determinations.

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

All federalism consultation comment letters are included as attachments to the *Summary Report of Federalism Consultation for the Proposed Rule: Revised Definition of “Waters of the United States,”* available in the docket at Docket ID No. EPA-HQ-OW-2021-0602-0105 (<https://www.regulations.gov/document/EPA-HQ-OW-2021-0602-0105>). The letters are also available on EPA’s website at <https://www.epa.gov/wotus/federalism-consultation-pre-proposal-revised-definition-waters-us>.

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

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