



Summary Report on Tribal Consultation and Engagement 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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Table of Contents

Background	1
Summary of Consultation and Engagement Efforts	2
Themes Emerging from Tribal Consultation Letters, Consultation Meetings, Tribal Comments on the Proposed Rule, and Other Tribal Engagement (Including the Tribal Dialogues and Roundtable).....	5
Broad Opposition to the 2020 Navigable Waters Protection Rule	5
Tribal Consultation and Ongoing Engagement.....	6
Concerns about Treaty Rights and Federal Trust Responsibility.....	7
Need For Clean Water for Cultural, Religious, Subsistence, and Economic Uses.....	8
Specific Waters.....	8
Intermittent and Ephemeral Streams.....	9
Tributaries	9
Wetlands	9
Tribal Waters.....	10
Groundwater Connection	10
Interstate Waters	10
Waste Treatment System Exclusion	11
Climate Change	11
Environmental Justice	12
Other	12
Consultation with Individual Tribal Nations.....	13
Appendix A: Tribal Nations and Tribal Organizations Sending Consultation Comment Letters	14
Appendix B: Tribal Consultation, Coordination, and Outreach Meetings.....	17
Meetings and Outreach Occurring During the Consultation Period.....	17
Meetings and Outreach Occurring After the End of the Consultation Period.....	17
Appendix C: Tribal Nations and Tribal Organizations Sending Comment Letters on the Proposed Rule During the Comment Period.....	20

BACKGROUND

This document was prepared to support the U.S. Environmental Protection Agency (EPA) and Department of the Army (the agencies) rulemaking to finalize the “Revised Definition of ‘Waters of the United States.’” This report summarizes the agencies’ Tribal consultation and coordination efforts and the feedback they received throughout the consultation process.

This rulemaking and its associated consultation respond to Executive Order (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 directed the agencies to review the “Navigable Waters Protection Rule: Definition of ‘Waters of the United States’” (2020 NWPR), 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 implementing “waters of the United States” consistent with the pre-2015 regulatory regime.^{1,2}

On December 7, 2021, the agencies published a proposed rule in the *Federal Register* that would restore the longstanding Clean Water Act regulations that were in place for decades prior to 2015 (referred to as the pre-2015 regulations), with revisions to reflect the agencies’ interpretation of the statutory limits on the scope of the “waters of the United States” informed by relevant Supreme Court decisions. The public comment period for the proposed rule closed on February 7, 2022. The agencies’ final rule provides needed clarity by establishing regulations that are founded on the familiar framework of the pre-2015 regulations and generally consistent with the pre-2015 regulatory regime, and that are fully consistent with the statute, informed by relevant Supreme Court decisions, and reflect a reasonable interpretation based on the record before the agencies, including the best available science, as well as the agencies’ expertise and experience implementing the pre-2015 regulatory regime.

The Tribal consultation process described in this report follows the EPA’s policy for implementing E.O. 13175³ on *Consultation and Coordination with Indian Tribal Governments*. This report is being released in support of the final rule revising the definition of “waters of the United States” (“Revised Definition of ‘Waters of the United States,’” EPA-HQ-OW-2021-0602). This final rule was preceded by Tribal and federalism consultations, public meetings, and a request for written recommendations, all to hear the perspectives of interested stakeholders and the agencies’ co-regulators on how to define “waters of the United States” under the Clean Water Act and how to implement that definition. This action may have Tribal implications; however, it will neither impose substantial direct compliance costs on federally recognized Tribes, nor preempt Tribal law.

¹ See *Pascua Yaqui Tribe v. EPA*, 557 F. Supp. 3d 949 (D. Ariz. 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>; U.S. Army Corps of Engineers, *Navigable Waters Protection Rule Vacatur* (Jan. 5, 2022), <https://www.usace.army.mil/Media/Announcements/Article/2888988/5-january-2022-navigable-waters-protection-rule-vacatur/>.

² 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.

³ Executive Order 13175 directs agencies “to ensure meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.” *EPA Policy on Consultation and Coordination with Indian Tribes* provides guidance on when and how consultation should take place. EPA and the Army followed EPA’s consultation policy and the *Department of the Army American Indian and Alaska Native Policy* for this Tribal consultation.

EPA and the Army consulted with Tribal officials under the *EPA Policy on Consultation and Coordination with Indian Tribes* and the *Department of the Army American Indian and Alaska Native Policy* early in the process of developing this rule to ensure meaningful and timely input into its development. The agencies initiated the Tribal consultation and consultation process before proposing this rule by sending a “Notification of Consultation and Coordination” letter on July 30, 2021, to all federally recognized Tribal Nations, as discussed in more detail in the “Summary of Consultation and Engagement Efforts” section of this report. In addition to two national Tribal consultation kick-off webinars held in August 2021, the agencies convened several staff-level meetings and leader-to-leader consultations with individual Tribal Nations, at the Tribes’ request, and presented background on the history of the definition of “waters of the United States” at the various meetings the agencies held with Tribal representatives, as detailed further below. After the end of the consultation period, the agencies continued outreach and engagement with Tribal Nations and Tribal organizations and sought other opportunities to provide information and hear feedback at national and regional Tribal meetings, including by hosting four regional Tribal dialogues in October 2021 and a virtual roundtable with Tribal representatives on January 20, 2022. At these events, the agencies solicited input on the proposed rule to revise the definition of “waters of the United States” consistent with E.O. 13990, the Clean Water Act, and U.S. Supreme Court opinions.

This report summarizes the consultation and outreach conducted with Tribal Nations and Tribal organizations during the rulemaking process. It also summarizes comments and input provided by participants at Tribal meetings, the letters received during the Tribal consultation period, feedback provided by Tribal Nations during individual consultation meetings, and additional comments provided by Tribal Nations and Tribal organizations during the public comment period. This summary is intended to provide a description of the wide range of comments received from Tribal Nations and Tribal organizations as part of this consultation and coordination process.

SUMMARY OF CONSULTATION AND ENGAGEMENT EFFORTS

The agencies began consultation with federally recognized Tribes on this rulemaking on July 30, 2021. On July 28, 2021, Jaime Pinkham, Acting Assistant Secretary of the Army for Civil Works, signed the Notification of Consultation and Coordination letter, and Radhika Fox, EPA’s Assistant Administrator for Water, signed the letter on July 29, 2021. This letter invited Tribal officials and their designated consultation representatives to participate in the consultation and coordination process and provide comments to the agencies on the forthcoming proposed rule. The agencies sent the letter and the consultation plan to all federally recognized Tribes on July 30, 2021, thereby initiating the Tribal consultation period. EPA also notified Tribes of the consultation via the Tribal Consultation Opportunities Tracking System (<http://tcots.epa.gov>). On August 16, 2021, the agencies extended the Tribal consultation comment period to October 4, 2021. Additional input was provided by Tribal Nations, Tribal organizations, and Tribal members during the 60-day public comment period associated with the proposed rule held from December 7, 2021, to February 7, 2022.

A copy of the agencies’ letter initiating Tribal consultation and a copy of the letter extending the consultation comment period are available as attachments to the consultation report for the proposed rule in the docket (Docket ID No. EPA-HQ-OW-2021-0602-0106, available at <https://www.regulations.gov/document/EPA-HQ-OW-2021-0602-0106>). Appendix A lists the Tribal consultation comment letters submitted by Tribal Nations and Tribal organizations, Appendix B lists Tribal

outreach meetings and individual consultations, and Appendix C lists comment letters submitted by Tribes and Tribal organizations during the public comment period for the proposed rule.

The agencies held two identical national Tribal consultation kick-off webinars on August 19, 2021, and August 24, 2021, to provide an overview of the forthcoming rulemaking and background on previous rules and to receive input from Tribal representatives about this action. The agencies consulted with Tribes to gain Tribal perspectives and pre-proposal comments on the agencies' forthcoming rulemaking on a revised definition of "waters of the United States." The agencies continued collective outreach with Tribal Nations and Tribal organizations, as well as consultation with individual Tribal Nations, and continued to accept Tribal consultation comments after the close of the consultation period.

Many of the consultation sessions were led by or attended by one or more of the following representatives: for EPA, Radhika Fox, Assistant Administrator for Water; Sylvia Quast, Senior Advisor to the Assistant Administrator for Water; Zach Schafer, Senior Advisor to the Assistant Administrator for Water; Brian Frazer, Director of the Oceans, Wetlands and Communities Division; Russell Kaiser, Chief of the Program Development and Jurisdiction Branch; Damaris Christensen, Jurisdiction Team Lead; Rose Kwok, Tribal consultation lead for the rulemaking; Karen Gude, Office of Water Tribal Program Coordinator; Elise O'Dea, Office of General Counsel; for the Army, Jaime Pinkham, Acting Assistant Secretary of the Army for Civil Works and later Principal Deputy Assistant Secretary of the Army for Civil Works; Stacey Jensen, Assistant for Regulatory and Tribal Affairs, Office of the Assistant Secretary of the Army for Civil Works; Elliott Carman, Water Resources Regulation and Policy Advisor, Office of the Assistant Secretary of the Army for Civil Works; Zaheer Tajani, Associate Deputy General Counsel, Department of the Army; Matt Wilson, Regulatory Program Manager, Corps of Engineers; and Lisa Morales, Tribal liaison, Corps of Engineers.

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

The agencies presented relevant rulemaking updates and information in meetings with the National Tribal Water Council, the National Tribal Caucus, and Regional Tribal Operations Committees (RTOCs) upon request. Additionally, the agencies held a listening session with the Mendocino, Lake, Sonoma Tribal Environmental Professionals (MLSTEP). The full list of Tribal consultation, coordination, and outreach meetings that the agencies participated in is available in Appendix B.

The agencies also received letters from Tribal Nations and Tribal organizations as part of this Tribal consultation and coordination process. A total of 26 comment letters were submitted to the agencies as part of the Tribal consultation process, with the agencies hearing from 25 individual Tribal Nations (including one letter representing five Tribal Nations) and three Tribal organizations. The agencies acknowledge that one Tribal consultation comment letter submitted during the consultation period was inadvertently not included in the Tribal consultation report for the proposed rule but has been incorporated into this final report. One Tribe (the Makah Tribe) submitted two consultation comment letters. See Appendix A for a list of the Tribal Nations and Tribal organizations that submitted consultation comment letters to the agencies.

In addition to these 26 comment letters, the agencies received five separate letters requesting government-to-government consultation or staff-level engagement from Tribal Nations, totaling 12 Tribal Nations requesting consultation. This is discussed further in the “Tribal Nations Requesting Consultation” section.

After the close of the consultation period, the agencies held four Tribal dialogues highlighting regional considerations. Specific questions were circulated to Tribes prior to the dialogues. A summary of the Tribal dialogues, the list of questions shared with Tribes, and the presentations for the dialogues are available in the docket for this action in a separate entry. Tribal participants at the dialogues were invited to introduce themselves and make opening statements before agency representatives posed discussion topics and requested input. When possible, the agencies provided responses to the participant questions raised during the dialogues. Minutes taken during each meeting were used in the preparation of this summary. The Tribal dialogues occurred on:

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

The agencies held a virtual roundtable with Tribes on January 20, 2022, to receive feedback and address any questions the Tribes may have about the proposed rule, published on December 7, 2021.⁴

Similar to the regional Tribal dialogues, the virtual roundtable began with an initial background presentation to discuss the evolution of the definition of “waters of the United States” and a brief explanation of the proposed rule. After the presentation, the larger group was separated into breakout rooms to facilitate a more open discussion and allow agency representatives to answer questions as appropriate. Participants were encouraged to provide feedback and ask any questions about the proposed rule.

During the public comment period, the agencies received 19 letters from individual Tribal Nations (one letter was sent by Earthjustice on behalf of nine Tribal Nations) and four letters from Tribal organizations. See Appendix C for a list of the Tribal Nations and Tribal organizations that submitted comment letters to the agencies during the comment period for the proposed rule.

This report summarizes comments and input provided by participants at individual Tribal consultations, other Tribal meetings as well as webinars, and comments submitted during the public comment period. This summary does not generally distinguish comments submitted by an individual Tribal Nation from those provided by other Tribal entities, nor does it distinguish between comments submitted by letter or at individual meetings. The summary is intended to describe the wide range of comments received from Tribal Nations and Tribal organizations as part of this consultation and coordination process and in additional engagements with Tribes. All consultation comment letters submitted are publicly available on EPA’s website at: <https://www.epa.gov/wotus/tribal-consultation-pre-proposal-revised-definition-waters-us>. These letters are also included as attachments to this report in the docket (Docket ID No. EPA-HQ-

⁴ EPA-HQ-OW-2021-0602

OW-2021-0602). All comment letters submitted as part of the public comment period are available in the docket (<https://www.regulations.gov/docket/EPA-HQ-OW-2021-0602>).

Some of these meetings and the subsequent comments and input were provided before the proposed rule was signed. Therefore, at such meetings, Tribal participants were asked by the agencies to consider and share specific implementation experiences related to the 2020 NWPR, the 2015 Clean Water Rule, and the pre-2015 regulatory regime, as follows:

1. Significant Nexus Analyses – *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) (*SWANCC*) and *Rapanos v. United States*, 547 U.S. 715 (2006) (*Rapanos*) (Justice Kennedy’s concurring opinion)
2. Typical Year Analyses – from 2020 NWPR, what worked, what did not?
3. Tributaries – flow classifications vs “relatively permanent”?
4. Ditches
5. Adjacent Wetlands
6. Exclusions – General, Prior Converted Cropland, Waste Treatment Systems
7. Needed Tools for Implementation
8. Regional, State, and Tribal Interests – regionalization, key issues to identify for agencies
9. Science, Environmental Justice, Climate Change, and other topics

When developing the final rule, the agencies carefully considered all Tribal consultation comments received before and following publication of the proposed rule, all on-time Tribal comments received during the public comment period associated with the proposed rule, and all input from Tribal Nations and Tribal organizations from the various meetings held throughout the Tribal consultation and public comment periods.

THEMES EMERGING FROM TRIBAL CONSULTATION LETTERS, CONSULTATION MEETINGS, TRIBAL COMMENTS ON THE PROPOSED RULE, AND OTHER TRIBAL ENGAGEMENT (INCLUDING THE TRIBAL DIALOGUES AND ROUNDTABLE)

BROAD OPPOSITION TO THE 2020 NAVIGABLE WATERS PROTECTION RULE

Most Tribal consultation letters expressed support for repealing the 2020 NWPR and reinstating the pre-2015 rule, with revisions. Many Tribal commenters expressed opposition to the 2020 NWPR policies, citing harm to the environment, a disregard for science, and the potential for upstream pollution degrading Tribal waters. One Tribal Nation stated that the 2020 NWPR had removed protections for all waters on their reservation. Additionally, there was a stated concern that the 2020 NWPR rewarded polluters by removing federal protections and oversight.

Some Tribal commenters stated that water does not adhere to political boundaries and that the 2020 NWPR created significant gaps in coverage due to certain state jurisdictions leaving downstream waters vulnerable to upstream discharges.

The agencies also received the following feedback on the 2020 NWPR:

- Several Tribal commenters provided maps allegedly showing a significant reduction in federal jurisdiction over Tribal waters as a result of the 2020 NWPR.
- A few Tribal commenters stated that the 2020 NWPR disregarded the science presented in the January 2015 EPA Office of Research and Development report, *Connectivity of Streams and Wetlands to Downstream Waters: A Review & Synthesis of the Scientific Evidence* (referred to herein as the “Science Report”).
- One Tribal commenter stated that many of the terms used in the 2020 NWPR had no scientific meaning.
- One Tribal commenter stated that the typical year analysis has no scientific validity and should not be used in any future rule. They added that the 2020 NWPR definition of “typical year” was vague.
- One Tribal commenter pointed out that since 2015, multiple scientific studies have reiterated the importance of upstream waters such as ephemeral tributaries and wetlands to the integrity of larger, downstream waters.
- One Tribal commenter expressed the view that the 2020 NWPR’s reduced scope of federal jurisdiction had effects on the ability of EPA to respond to oil spills in waters that were newly excluded under that rule.
- One Tribal commenter opined that the 2020 NWPR had effects on Clean Water Act programs, namely sections 401, 402, and 404.
- One Tribal commenter stated that the 2020 NWPR’s Tribal consultation process was inadequate and that the agencies did not adequately incorporate Tribal feedback provided as a part of that rule’s consultation process.
- One Tribal commenter expressed support for the new rule leaning on a more comprehensive and holistic approach to the definition.
- Several Tribal commenters stated that in light of the vacatur of the 2020 NWPR, the agencies should not pursue rulemaking to repeal the 2020 NWPR and should instead focus efforts on a rulemaking to strengthen protections for the nation’s waters.
- One Tribal commenter did not express support or opposition to the agencies’ efforts to replace the 2020 NWPR but expressed concern that the agencies’ efforts to revise the definition of “waters of the United States” could expand jurisdiction beyond the limits of the Clean Water Act and the Commerce Clause, particularly if the definition of “tributary” resembled that of the 2015 Clean Water Rule.

TRIBAL CONSULTATION AND ONGOING ENGAGEMENT

Many Tribal Nations and Tribal organizations encouraged the agencies to continue working with Tribes in developing new rules to recognize their stewardship of the land. Several Tribal Nations requested individual Tribal consultation. Additionally:

- Multiple Tribal commenters asserted that the agencies have a duty to meaningfully consult with Tribes and to consider how proposed rules will affect Tribes.
- Several Tribal commenters thanked the agencies for the opportunity to participate in the Tribal dialogue meetings.

- Several Tribal commenters called for robust and meaningful consultation and stated that providing opportunities to comment without documenting or incorporating those comments does not constitute meaningful consultation. One Tribal nation told the agencies that Tribes are more than co-regulators and that the agencies should expand the consultation before the rule is finalized for the consultation to be meaningful.
- A few Tribal commenters expressed concern that the agencies are fast-tracking the consultation process and that consultation with the Tribes is just another box to check.
- Several Tribal commenters noted that the agencies' expectation for Tribes to give comment, schedule consultation, and provide insight to their experience with implementation does not acknowledge how much responsibility that puts on Tribes as opposed to the agencies. One Tribal Nation said they feel like they have to show or prove what they are saying. The Tribe noted that the issue is not with what the agencies are doing or saying, but rather what is left unsaid/undone.
- Another Tribal Nation stated that they do not have the resources or staffing to keep up with all consultation requests and therefore they feel the agencies need to respect that limitation when asking for input, stressing that Tribes are doing the best they can but are not feeling heard.
- Several Tribal commenters stated that there may be hesitancy from some Tribal Nations to comment because the Tribes put a lot of effort into commenting, but do not want that effort to have no meaningful results, as they believed that the agencies did not adequately consider Tribal comments under past rulemaking efforts such as the 2020 NWPR.
- One Tribal commenter mentioned that for meaningful consultation to occur, the agencies must have a thorough understanding of the inherent rights and interests of Tribal Nations and that the process of meaningful consultation requires a two-way exchange of information.
- One Tribal commenter encouraged the agencies to continue their consultation efforts and recommended that consultation include more basic background information provided in "layman's terms."
- One Tribal commenter encouraged the agencies to reach out to Tribal Nations who have significant concerns to make sure those concerns are resolved.

CONCERNS ABOUT TREATY RIGHTS AND FEDERAL TRUST RESPONSIBILITY

Several Tribal commenters asserted that it is important that EPA and the Army protect all waters due to treaty rights and that the definition of "waters of the United States" must reflect the agencies' federal trust responsibilities to Tribal Nations and protect Tribal waters. As one Tribal commenter described it, "Tribes' ability to exercise their treaty rights relies on clean water and healthy ecosystems." Additionally:

- Many Tribal commenters stated that the federal government's treaty obligations require it to provide water resources used by Tribal Nations with the greatest federal protection possible and to do less would be a failure of trust responsibilities and violation of Tribal treaty rights.
- Several Tribal Nations stated that they have treaty rights that include the right to hunt and/or fish and that those treaty rights require water quality sufficient to protect the habitat supporting those rights.
- A few Tribal commenters emphasized that the United States has a federal trust responsibility to recognize and protect Tribal lands, assets, and resources, which includes water that flows over and through the Tribal lands and the natural resources that depend on that water.

- Some Tribal commenters asserted that treaty rights require interstate designation for Tribal boundaries so that Tribal Nations can have some say in how upstream users impact the water that crosses into Tribal lands.
- One commenter stated that without federal funding and resources, their Tribe is not equipped to develop and administer Clean Water Act permitting programs to protect waters rendered non-jurisdictional by the 2020 NWPR.
- One Tribal commenter suggested that the agencies must at least include in the definition of “waters of the United States” all water sources that serve treaty rights and reserved water rights, whether on or off Tribal lands. The commenter further asserted that the definition should protect waters on Tribal lands and waters that lead to Tribal lands, regardless of the category of water.
- One Tribe stated that they do not have a reservation, so water rights are complex.
- One Tribal commenter stated that the rulemaking process prior to the finalization of the 2020 NWPR did not respect the federal trust responsibility and did not have Tribal consultation prior to taking action that impacted their lands. The commenter asserted that this approach went against the trust responsibility to protect waters from pollution and to protect Tribal lands.

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

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

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

SPECIFIC WATERS

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

Intermittent and Ephemeral Streams

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

Tributaries

- Many Tribal commenters support broad protection over tributaries nationally, or at least regionally.
- One Tribal commenter stated that the narrowing of protections for tributaries in the 2020 NWPR contradicted Congress's intent to protect all "waters of the United States" with the broadest possible interpretation of the term, so a new rule must contain broad protections for tributaries.
- One Tribal commenter encouraged the agencies to include intermittent flow in a tributary due to snowpack melt as a condition that allows a stream to be considered jurisdictional.
- One Tribal commenter stated that for added clarity, in the new rule, the duration of flow should be clearly defined as any amount of flow over a given duration.
- One Tribal commenter expressed support for irrigation canals and drains to be jurisdictional where they have the potential for seasonal flow and a connection to downstream waters.
- One Tribal commenter asserted that all tributaries should be jurisdictional, while another Tribal commenter stated that an expansive definition of "tributary" exceeds the power of Congress under the Commerce Clause and suggested a paradigm for a different definition of tributary.

Wetlands

- Multiple Tribal commenters emphasized the importance of wetlands and suggested that the new rule defining "waters of the United States" should not include any exclusions for wetlands.
- A few Tribal commenters stated that wetlands are connected to other jurisdictional waters and are a valuable ecological and environmental resource worth protecting. These commenters recommended the agencies look to science as justification for protecting wetlands.
- One Tribal commenter supported protecting all wetlands, regardless of the presence or absence of surface water connection.

- One Tribal commenter emphasized the importance of isolated wetlands, stating that the Tribe’s reservation had many such wetlands that provide critical ecological functions. The Tribal Nation asserted that it has lost about 20% of its wetlands over the past 25 years.
- One Tribal commenter encouraged the agencies to provide guidance on how regulations impact wetlands in “layman’s terms.” The Tribal commenter expressed concern for wetlands and a desire to make sure they are protected.

Tribal Waters

- Several Tribal commenters urged the agencies to include any waters within or flowing through Tribal trust lands that are designated by a Tribal Nation as “Waters of the Tribe,” a new category of “waters of the United States.”
- Some Tribal commenters stated that a new definition of “Tribal waters” should include any water type on Tribal land that a Tribal Nation deems significant and states a beneficial or designated use for such water.
- One Tribal commenter emphasized that unlike states, Tribal Nations cannot easily enforce a definition of “Tribal waters” that is broader than the agencies’ definition of “waters of the United States.” The commenter stated that a narrow definition of “waters of the United States” thus places Tribal Nations at a disadvantage and leaves waters unprotected.

Groundwater Connection

- Multiple Tribal commenters emphasized that surface water and groundwater are connected resources, and any new rule should recognize the subsurface connections between water resources.
- Some Tribal commenters discussed the connection between groundwater and drinking water to emphasize why groundwater should be protected, including from emerging contaminants, such as per-and polyfluoroalkyl substances (PFAS).
- One Tribal commenter stated that they would like to see first-order streams, groundwater, and wetlands all included in the new definition of “waters of the United States” because such waters are all connected and critically important.

Interstate Waters

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

- One Tribal commenter stated that not including interstate waters as a separate category of “waters of the United States” would undermine the agencies’ federal trust responsibility as well as treaty rights and reserved rights dependent on water quality.
- Several Tribal commenters asserted that the removal of protection for interstate waters under the 2020 NWPR resulted in the lowest common denominator driving down protection for waterbodies that cross state lines, or that form a border between states, with the less-protective states controlling the regulation and protections, or lack thereof, for those waters.
- One Tribal commenter supported retaining the jurisdictional category for interstate waters, which exists in both the pre-2015 regulations and the 2015 Clean Water Rule; the commenter believes the definition of “waters of the United States” should be expanded to include surface waters that flow between states and Tribal Nations and between adjacent Tribal Nation.

- One Tribal commenter expressed frustration about not receiving notifications of approved jurisdictional determinations and other permitting actions that affect waters that flow into their reservation.
- One Tribal commenter suggested that if a case-specific jurisdictional determination is being conducted, Tribal Nations need to be involved in those determinations that affect their land, even if the jurisdictional determination is not on a reservation, as the determination will affect them downstream.

Waste Treatment System Exclusion

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

CLIMATE CHANGE

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

- One Tribal commenter specifically pointed out that due to climate change, there are scientific predictions for a lot more water and rain in northeast Minnesota. They emphasized that streams that are currently ephemeral will become perennial, and the opposite will happen in areas where lower rainfall is predicted. The commenter stated that awareness of these climactic changes will prove to be integral to protecting resources in ways that are not currently recognized.
- One Tribal commenter stated that the impacts of climate change on water resources make the protection of those resources more important and speaks for having a broad and inclusive definition of “waters of the United States.”
- One Tribal commenter encouraged the agencies to consider and address the additive adverse ecosystems effects caused by removing Clean Water Act protections for any waters especially because of the threats to waters due to climate change.
- One Tribal commenter expressed the view that intermittent and ephemeral streams in the arid Southwest are important to the protection and maintenance of water resources, human health, and the environment, especially with changes to seasonal flow patterns that the region is experiencing.

ENVIRONMENTAL JUSTICE

Several Tribal commenters emphasized that reducing the scope of waters under federal jurisdiction would have “disproportionately high or adverse human health or environmental effects” on Tribes. Additionally:

- A few Tribal commenters mentioned environmental justice in the context of downstream water protection.
- One Tribal commenter encouraged the agencies to not only consider, but prioritize, the furtherance of environmental justice and the protection of Tribal interests. They added that undertaking a robust environmental justice review is especially critical since it was not done for the 2020 NWPR.
- One Tribal commenter stated that because of desert hydrology and the geographic location of many native communities, the 2020 NWPR had the effect of disparately stripping Clean Water Act protections from areas with higher Tribal populations, and that this violated Executive Order 12898.
- One Tribal Nation stated that gaps in protecting water and Tribal land from pollution is an environmental justice issue. This commenter further stated that their Tribal Nation cannot meet their water quality standards without treatment because of discharges in upstream waters.

OTHER

- Several Tribal commenters urged the agencies to consider regional differences and address factors such as climate, geology, and hydrology in developing a new definition of “waters of the United States.” Some added that including regional variability considerations in determining the definition of “waters of the United States” fulfills the agencies’ federal trust responsibility. One Tribal commenter stated that the significant nexus analyses conducted under the pre-2015 regulatory regime and the 2015 Clean Water Rule were appropriate both scientifically and legally for determining on a case-by-case basis the biological, chemical, and physical connectivity between ephemeral, intermittent, and perennial surface waters.
- A few Tribal commenters recommended that the agencies use the “significant nexus” standard to determine “waters of the United States.”
- One Tribal commenter asked the agencies’ that efforts to revise the definition of “waters of the United States” be guided by consideration of the effects of urbanization and industry (including oil and gas extraction) on water quality and quantity.
- One Tribal commenter encouraged the agencies to take the objectives of the Endangered Species Act into consideration when drafting the new definition of “waters of the United States.”
- One Tribal commenter requested that the agencies provide funding to Tribal Nations for the installation of tools that could assist in determining jurisdiction in all ephemeral, intermittent, and perennial surface waters.
- One Tribal commenter asserted that the agencies must comply with the requirements of the National Environmental Policy Act, which requires federal agencies to prepare an environmental impact statement for “major federal actions significantly affecting the quality of the human environment.”

- In the event the agencies succeed in adopting a more expansive definition of “waters of the United States” that allows for greater Clean Water Act protections, one Tribal commenter asked whether the agencies would make adequate plans and allowances for the legal resources and support that will be needed to defend that definition against the inevitable attacks that the Tribal Nation believes it will be subject to.
- One Tribal commenter encouraged the agencies to develop a rule that has practical implementation approaches for Tribes, including provisions for cultural and traditional values and uses of water.
- One Tribal commenter stated that the agencies should increase funding and training for Tribal governments for direct implementation of the Clean Water Act.

CONSULTATION WITH INDIVIDUAL TRIBAL NATIONS

Twelve Tribal Nations notified the agencies that they wanted to engage in individual consultation or staff-level engagement on the proposed rulemaking. Most of these requests were contained in the Tribes’ comments during the consultation period or via a separate letter to the agencies during the consultation period. One Tribal Nation requested consultation on a potential second rule defining “waters of the United States.”

In all instances, the agencies followed up with Tribal Nations who had requested to consult on this action (or the organization representing the Tribal Nations, in the case of the Tribal Nations that requested consultation via the letter submitted by Earthjustice on their behalf). In some instances, the agencies were unable to schedule consultation meetings where a Tribal Nation did not respond to repeated outreach attempts. Additionally, one Tribal Nation asked to reserve their request for consultation for any subsequent rulemaking. Several Tribal Nations requested staff-level calls and webinars, at least as an initial step prior to leader-to-leader consultation. The agencies held staff-level meetings with four Tribal Nations at their request: the Pueblo of Santa Ana, the Buena Vista Rancheria of Me-Wuk Indians, the Pueblo of Laguna, and the Choctaw Nation. Two of these meetings occurred during the public comment period. Staff from EPA, the Department of the Army (including the U.S. Army Corps of Engineers), and the respective EPA Regional offices participated in these staff-level engagement meetings. Due to the ongoing COVID-19 pandemic, all meetings were held virtually via a web conferencing platform.

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

APPENDIX A: TRIBAL NATIONS AND TRIBAL ORGANIZATIONS SENDING CONSULTATION COMMENT LETTERS

Tribal consultation comment letters are included as attachments to the *Summary Report of Tribal Consultation and Engagement 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- 0106 (<https://www.regulations.gov/document/EPA-HQ-OW-2021-0602-0106>). The Pueblo of San Felipe’s consultation comment letter and the Makah Tribe’s supplemental consultation comment letter are included as attachments to this final tribal consultation report in the docket. The consultation comment letters are also available on EPA’s website at <https://www.epa.gov/wotus/tribal-consultation-pre-proposal-revised-definition-waters-us>.

Tribe/Organization Name	Type of Commenter
Bad River Band of Lake Superior Tribe of Chippewa Indians	Tribal leader
Barona Band of Mission Indians	Attorney for the Tribe
Buena Vista Rancheria of Me-Wuk Indians	Tribal staff
Earthjustice on behalf of the following five Tribal Nations: Pascua Yaqui Tribe, Tohono O’odham Nation, Quinault Indian Nation, Fond du Lac Band of Lake Superior Chippewa, and Menominee Indian Tribe of Wisconsin	Non-profit environmental law organization, on behalf of five Tribal Nations
Great Lakes Indian Fish & Wildlife Commission	Tribal organization
Intertribal Agriculture Council	Tribal organization
Keweenaw Bay Indian Community	Tribal leader
Little Traverse Bay Bands of Odawa Indians	Tribal staff
Makah Tribe*	Tribal leader
Makah Tribe*	Tribal leader
National Tribal Water Council	Tribal organization
Navajo Nation	Tribal leader
Port Gamble S’Klallum Tribe	Attorney for the Tribe

Tribe/Organization Name	Type of Commenter
Pueblo of Isleta	Tribal leader
Pueblo of Jemez	Tribal leader
Pueblo of Laguna	Tribal leader
Pueblo of San Felipe	Tribal leader
Pueblo of Santa Ana	Tribal leader
Pueblo of Santa Clara	Tribal leader
Pyramid Lake	Tribal leader
San Carlos Apache Tribe	Tribal staff
Sault Ste. Marie Tribe of Chippewa Indians	Tribal leader
Southern Ute Indian Tribe	Tribal leader
Stillaguamish Tribe	Tribal leader
Suquamish Tribe	Tribal staff
Swinomish Indian Tribal Council	Tribal leader

*The Makah Tribe submitted two consultation comment letters (both letters are listed above).

The following Tribal Nations sent separate letters to the agencies requesting consultation.

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

Pueblo of Santa Ana (consultation request)	Tribal staff
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APPENDIX B: TRIBAL CONSULTATION, COORDINATION, AND OUTREACH MEETINGS

Meetings with Tribal Nations requesting consultation held at the staff-level are in *italics*. Leader-to-leader consultation meetings are denoted in **bold**.

MEETINGS AND OUTREACH OCCURRING DURING THE CONSULTATION PERIOD

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

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

MEETINGS AND OUTREACH OCCURRING AFTER THE END OF THE CONSULTATION PERIOD THROUGH SIGNATURE OF THE PROPOSED RULE

After the consultation period, the agencies participated in the following meetings prior to signature of the proposed rule.

Date	Meeting
October 7, 2021	Tribal Dialogue on “Waters of the United States” (East Coast Tribes – Northeast, Mid-Atlantic, Southeast)
October 13, 2021	Tribal Dialogue on “Waters of the United States” (Central Tribes – Midwest, Gulf Coast)

Date	Meeting
October 13, 2021	National Tribal Water Council and EPA Monthly Conference Call
October 18, 2021	Fall 2021 Region 9 Tribal Operations Committee Meeting
October 19, 2021	Region 8 Tribal Operations Committee
October 20, 2021	Stillaguamish Tribe (Leader-to-Leader)
October 27, 2021	Tribal Dialogue on “Waters of the United States” (Arid West Tribes)
October 28, 2021	Tribal Dialogue on “Waters of the United States” (Northwest and Alaskan Tribes)
November 2, 2021	EPA Region 7 Virtual Enhancing State and Tribal Programs (ESTP) Meeting
November 16, 2021	Tohono O’odham Nation (Leader-to-Leader)
November 17, 2021	Listening Session with the Mendocino, Lake, Sonoma Tribal Environmental Professionals (MLSTEP)

MEETINGS AND OUTREACH OCCURRING AFTER SIGNATURE OF THE PROPOSED RULE

After signature of the proposed rule, the agencies participated in the following meetings. Note that for meetings that occurred after February 7, 2022, the agencies provided general updates and did not solicit new comments from participants.

Date	Meeting
December 1-2, 2021	National Tribal Water Council and EPA Virtual Fall 2021 Meeting
December 2, 2021	Region 4 Wetlands/Section 401 Workshop
December 2, 2021	Region 6 Regional Tribal Operations Committee (RTOC) Meeting
<i>December 14, 2021</i>	<i>Pueblo of Laguna (Staff-level)</i>
<i>December 16, 2021</i>	<i>Choctaw Nation (Staff-level)</i>
January 10, 2022	Region 9 Regional Tribal Operations Committee (RTOC) Clean Water Workgroup Meeting
January 12, 2022	National Tribal Water Council and EPA Monthly Conference Call

Date	Meeting
January 20, 2022	Virtual Tribal Roundtable Discussion
January 27, 2022	Region 9 Regional Tribal Operations Committee (RTOC) Meeting
February 9, 2022	National Tribal Water Council and EPA Monthly Conference Call
March 30, 2022	New Mexico Northern Wetlands Roundtable
April 5, 2022	Region 5 State and Tribal Meeting
April 17, 2022	New Mexico Southern Wetlands Roundtable
April 25, 2022	Tribal Science Council Monthly Conference Call
April 28, 2022	Region 6 Regional Tribal Operations Committee (RTOC) Meeting
July 13, 2022	National Tribal Water Council and EPA Monthly Conference Call
July 14, 2022	Region 6 Regional Tribal Operations Committee (RTOC) Meeting
July 20, 2022	Region 10 Regional Tribal Operations Committee (RTOC) Meeting
August 15, 2022	National Association of Wetland Managers Meeting
September 22, 2022	National Tribal Water Council and EPA Monthly Conference Call
November 7, 2022	Region 6 Regional Tribal Operations Committee (RTOC) Meeting
November 15, 2022	Region 4 404/401 Conference
November 16, 2022	Oregon Tribal Environment Forum

APPENDIX C: TRIBAL NATIONS AND TRIBAL ORGANIZATIONS SENDING COMMENT LETTERS ON THE PROPOSED RULE DURING THE COMMENT PERIOD

The following are on-time comment letters from Tribes on the proposed rule submitted as part of the public comment period. All Tribal comment letters can be found in the docket for the final rule at <https://www.regulations.gov/docket/EPA-HQ-OW-2021-0602/comments>.

Tribe/Organization Name	Type of Commenter
Confederated Tribes of the Umatilla Indian Reservation	Tribal staff
Confederated Tribes and Bands of Yakama Nation	Tribal leader
Earthjustice on behalf of the following nine Tribal Nations: Pascua Yaqui Tribe, Tohono O’odham Nation, Quinault Indian Nation, Fond du Lac Band of Lake Superior Chippewa, Menominee Indian Tribe of Wisconsin, Bad River Band of Lake Superior Chippewa, Suquamish Tribe, Swinomish Indian Tribal Community, and Iowa Tribe of Oklahoma	Non-profit environmental law organization, on behalf of nine Tribal Nations
Great Lakes Indian Fish & Wildlife Commission	Tribal organization
Inter-Tribal Association of Arizona (representing 21 Tribal Nations)	Tribal organization
Miccosukee Tribe of Indians of Florida	Attorney for the Tribe
National Tribal Water Council	Tribal organization
The Navajo Nation	Tribal leader
Norton Bay Inter-Tribal Council	Tribal organization
Pala Band of Mission Indians	Tribal staff
Port Gamble S’Klallum Tribe	Attorney for the Tribe
Pueblo of Isleta	Tribal leader
Pueblo of San Felipe	Tribal leader
Pueblo of Tesuque	Tribal staff
Pyramid Lake Paiute Tribe	Tribal leader
Seneca Nation of Indians	Tribal leader
The Tulalip Tribes	Tribal staff
United South and Eastern Tribes Sovereignty Protection Fund	Tribal organization
Ute Indian Tribe	Tribal leader