

U.S. EPA and U.S. Army Corps of Engineers Proposed Rule: Revised Definition of “Waters of the United States”

Background on Definition of “Waters of the United States”

- “**Navigable waters**” are defined in Clean Water Act (CWA) as “waters of the United States, including the territorial seas”
- **Agencies’ regulations and preamble language**
- **Key Supreme Court cases:** *Riverside Bayview*, *SWANCC*, *Rapanos*
- **Guidance and Rulemaking:** Agencies have been working since these Supreme Court decisions to provide clarification and predictability of waters that are – and are not – jurisdictional under the CWA
 - 2003 *SWANCC* guidance
 - 2007/8 *Rapanos* guidance
 - 2011 draft guidance (superseded by 2015 rule)
 - 2015 Clean Water Rule
 - 2019 Step 2 Proposed Rule
 - 2019 Step 1 Final Rule (proposed in 2017)

Background: Rulemaking Process

- Agencies are pursuing a two-step process:
 - Step 1: Finalization of a rule to repeal the 2015 Rule and recodify prior regulation.
 - The agencies received 770,000 comments on the Step 1 proposed rule and supplemental notice.
 - Agencies announced the final rule on September 12, 2019.
 - Step 2: Publication of a proposed rule to revise the definition, consistent with Executive Order 13778.
 - Proposed on February 14, 2019, with public comment period closing on April 15, 2019.
 - Today's presentation focuses on the Step 2 proposed rule.

Categories of Waters Proposed to Be WOTUS

- Traditional Navigable Waters (TNWs) including territorial seas
- Tributaries
- Certain ditches
- Certain lakes and ponds
- Impoundments
- Adjacent wetlands

Waters/Features Excluded from Proposed WOTUS Definition

- Waters not listed as WOTUS
- Groundwater
- Ephemeral features and diffuse stormwater run-off
- Ditches not identified as WOTUS
- Prior converted cropland (PCC)
- Artificially irrigated areas that would revert to upland should irrigation cease
- Artificial lakes and ponds constructed in upland
- Water-filled depressions created in upland incidental to mining or construction activity
- Wastewater recycling structures constructed in upland
- Stormwater control features constructed in upland
- Waste treatment systems

Federalism Consultation and Tribal Consultation and Engagement

- Federalism Consultation for Step 2
 - April 19 - June 19, 2017
 - Received 167 letters as part of the federalism consultation – available at <https://www.epa.gov/wotus-rule/federalism-consultation>
- Tribal Consultation for Step 2
 - April 20 – June 20, 2017
 - 45 comment letters from 34 tribes and 7 tribal organizations – available at <https://www.epa.gov/wotus-rule/tribal-consultation>
 - Held staff-level or leader-level meetings with 21 individual tribes since 2017
 - Working to honor requests from individual tribes requesting consultation
- Engagement Following Consultation Periods
 - Listening sessions and updates at state and tribal meetings
 - Update webinar December 2017 and February 2018
 - In-person State and Tribal Workshops held March 2018 in Washington, DC
 - State and tribal forums in 2019 in Kansas City, Atlanta, Albuquerque, and Seattle

Next Steps

- Step 1: Final rule is awaiting publication in the *Federal Register*
 - Final rule will become effective 60 days after publication
 - Pre-publication version and the economic analysis are currently available on the EPA's website
- Step 2: Agencies are still in the process of reviewing the over 620,000 comments received on the proposed rule and considering those comments prior to making final decisions on the proposed definition

“Waters of the United States” Links and Contacts

www.epa.gov/wotus-rule

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