

## Specific Requests from EPA and the Corps for Public Comment on the Waters of the U.S. Proposed Rulemaking

*Note – these requests for comment were culled from the Federal Register notice for the proposed rulemaking, Definition of “Waters of the United States” Under the Clean Water Act.<sup>1</sup>*

### **I. Comments requested on categories and definitions of waters in the proposed rule**

1. The agencies request comment on all aspects of the proposed definition of tributaries and in particular on whether and how this definition can be revised to provide increased clarity as to the distinction between jurisdictional tributaries, as defined, and non-jurisdictional features such as gullies, rills and non-wetland swales. The agencies seek comments on how to provide greater regulatory certainty as to which specific aquatic features are jurisdictional tributaries, and which are not. Commenters should explain how any suggestions are consistent with the Clean Water Act, applicable caselaw, and the scientific literature regarding connectivity of aquatic features.
2. The agencies request comment on how they could provide greater clarity on how to distinguish between erosional features such as gullies, which are excluded from jurisdiction, and ephemeral tributaries, which are categorically jurisdictional.
3. The agencies request comment on how they could provide greater clarity on how to distinguish swales, which are excluded from jurisdiction, and ephemeral tributaries, which are categorically jurisdictional.
4. The 2008 *Rapanos* guidance stated that the agencies generally would not assert jurisdiction over “ditches (including roadside ditches) excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water.” The agencies specifically seek comment on the appropriate flow regime for a ditch excavated wholly in uplands and draining only uplands to be covered/included by the exclusion in paragraph (b)(3). In particular, the agencies seek comment on whether the flow regime in such ditches should be less than intermittent flow or whether the flow regime in such ditches should be less than perennial flow as proposed.
5. The agencies request comment on whether the rule text should provide greater specificity with regard to how the agencies will determine if a water is located in the floodplain of a jurisdictional water.
6. The new definition of adjacency is designed to provide greater clarity by identifying specific areas and characteristics for jurisdictional adjacent waters, but the agencies request comment for additional clarification. Commenters should support where possible from scientific literature

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<sup>1</sup> 79 Fed. Reg. 22188-22274 (April 21, 2014)

any suggestions for additional clarification of current explicit limits on adjacency, such as a specific distance or a specific floodplain interval.

7. The agencies seek comment on specific options for establishing additional precision in the definition of “neighboring” through: explicit language in the definition that waters connected by shallow subsurface hydrologic or confined surface hydrologic connections to an (a)(1) through (a)(5) water must be geographically proximate to the adjacent water; circumstances under which waters outside the floodplain or riparian zone are jurisdictional if they are reasonably proximate; support for or against placing geographic limits on what waters outside the floodplain or riparian zone are jurisdictional; determining that only waters within the floodplain, only waters within the riparian area, or only waters within the floodplain and riparian area (but not waters outside these areas with a shallow subsurface or confined surface hydrologic connection) are adjacent; identification of particular floodplain intervals within which waters would be considered adjacent; and any other scientifically valid criteria, guidelines or parameters that would increase clarity with respect to neighboring waters.
8. Just as the agencies are seeking comment on a variety of approaches, or combination of approaches, as to which waters are jurisdictional, the agencies also request comment on determining which waters should be determined non-jurisdictional.

## **II. Comments requested on “other waters” and “significant nexus”**

1. The agencies propose determining “similarly situated” based on an ecoregional approach. They request comment on factors that could lead “other waters” to be aggregated in some areas but analyzed individually in other areas for purposes of informing a case-specific significant nexus analysis. The agencies request comment on whether some resource types are more or less likely to be similarly situated than others, and if there are ways to identify regions within which aggregation of “other waters” would be routinely applied rather than a case-specific determination. The agencies also request comment about whether “other waters” that are not found in identifiable mapped regions should be analyzed individually on a case-specific basis for a significant nexus, aggregated in some other way for a significant nexus analysis, or categorically excluded from jurisdiction.
2. A possible list of Level III ecoregions where waters are similarly situated and aggregation could be used include:
  1. Coast Range
  4. Cascades
  6. Central California Foothills and Coastal Mountains
  7. Central California Valley
  8. Southern California Mountains
  9. Eastern Cascades Slopes and Foothills
  10. Columbia Plateau
  27. Central Great Plains

34. Western Gulf Coastal Plain
42. Northwestern Glaciated Plains
44. Nebraska Sand Hills
46. Northern Glaciated Plains
47. Western Corn Belt Plains
48. Lake Agassiz Plain
50. Northern Lakes and Forests
51. North Central Hardwood Forests
59. Northeastern Coastal Zone
63. Middle Atlantic Coastal Plain
65. Southeastern Plains
75. Southern Coastal Plain
78. Klamath Mountains/California High North Coast Range
81. Sonoran Basin and Range
83. Eastern Great Lakes Lowlands
84. Atlantic Coastal Pine Barrens
85. Southern California/Northern Baja Coast

See Map A in docket.

The agencies request comment on the list of ecoregions above and whether this list is appropriate, and whether there are other ecoregions or distinct areas that should be included or excluded from this list. This list does not include regions in Alaska or Hawaii and the agencies request comment on appropriate regions to use to analyze “other waters” in those states. The agencies also request comment on whether using Level III ecoregions is appropriate or whether a finer gradation of ecoregions would be more appropriate.

3. The factors the agencies used in developing the list above are:
  - a. Density of “other waters” such that there can be periodic surface hydrologic connections among the waters, for example in West Coast vernal pools.
  - b. Soil permeability and surface or shallow subsurface flow such that the “other waters” can be considered hydrologically connected, such as many Texas coastal prairie wetlands.
  - c. Water chemistry which indicates that the “other waters” are part of the same system and influenced by the same processes.
  - d. Physical capacity of “other waters” to provide flood and sediment retention; this is a case where several small wetlands together may have a different effect than a single large wetland providing the same function, for example prairie potholes in the Missouri Coteau.
  - e. Co-location of waters to each other or similarly to the tributary system such that their cumulative and additive effects on pollutant removal through parallel, serial, or sequential processing are apparent, such as the role of pocosins in maintaining water quality in estuaries.

- f. “Other waters” that are sufficiently near each other or the tributary system and thus function as an integrated habitat that can support the life cycle of a species or more broadly provide habitat to a large number of a single species.

The agencies request comment on the factors the agencies used in developing the list of ecoregions and whether this list of factors is appropriate, and whether there are other factors that should be included or excluded from this list. Comments should address the science that supports each comment.

4. The agencies recognize that it may add an element of uncertainty to the definition of tributary to include features as tributaries (wetlands) which do not have a bed and banks and OHWM. An alternate approach would be to clarify that wetlands that connect tributary segments are adjacent wetlands, and as such are jurisdictional waters of the United States under (a)(6). The agencies request comment on this alternate approach, as well as any other suggestions commenters may have on how to clarify the definition of tributaries and provide a clear explanation of their lateral and upstream extent.
5. The agencies request comment on the case-specific analysis and alternate approaches to determining whether “other waters” are similarly situated and have a “significant nexus” to a traditional navigable water, interstate water, or the territorial seas.
6. In addition to ecoregions, another method of mapping boundaries where waters could be considered to be similarly situated for a significant nexus analysis would be to rely on hydrologic-landscape regions. Hydrologic-landscape regions are groups of watersheds that are clustered together on the basis of similarities in land-surface form, geologic texture, and climate characteristics. The agencies seek comment on the technical bases for using ecoregions and hydrologic-landscape regions under this option. Commenters may also address whether some other method or combination of methods (certain ecoregions and hydrologic-landscape regions, for example) of mapping geographic boundaries is better supported by the science. Comments should also address whether and how this option is consistent with the science and the caselaw.
7. If the agencies choose to determine by rule that “other waters” in certain ecoregions or other geographic boundaries are similarly situated, the agencies could also determine that waters not located in identified ecoregions or otherwise specifically identified areas are not similarly situated for purposes of establishing a significant nexus and jurisdiction. The agencies also request comment on whether “other waters” that are not found in identifiable mapped ecoregions or other areas should be analyzed individually on a case-specific basis for determining a significant nexus, and on whether or not case-specific analysis of whether there are similarly situated “other waters” in the area is advisable.
8. While the agencies do not propose to determine that no “other waters” are similarly situated and aggregated, the agencies specifically seek comment on whether and how choosing to find

no “other waters” similarly situated would be consistent with the science, the CWA, and the caselaw.

9. The agencies also considered and seek comment on all “other waters” in a single point of entry watershed being evaluated as a single landscape unit with regard to their effect on traditional navigable waters, interstate waters, and the territorial seas.

The agencies seek comment that would inform a decision that these “other waters” in a single point of entry watershed perform similar functions and are located sufficiently close together or to a paragraph (a)(1) through (a)(5) water so that they can be aggregated and evaluated as a single landscape unit with regard to their effects on the nearest (a)(1) through (a)(3) water. Generally, the agencies anticipate that if the other waters in a single point of entry watershed are aggregated as a single unit, these waters would be determined to have a significant nexus and be jurisdictional.

The agencies recognize that if they choose to aggregate all other waters in a single point of entry watershed, there likely is insufficient existing scientific information to support the determination that all “other waters” in watersheds across the nation are similarly situated as provided in this rule and described in the caselaw. There are also questions of how determining “other waters” in a single point of entry watershed to be similarly situated reconciles with the portion of Justice Kennedy’s opinion discussing “similarly situated” waters in the region that “significantly affect” the chemical, physical, or biological integrity of waters more traditionally understood as navigable. While the agencies do not propose to determine that “other waters” in a single point of entry watershed are similarly situated and aggregated, the agencies seek comment on whether and how choosing to find such “other waters” similarly situated would be consistent with the science, the CWA, and the caselaw.

10. The agencies could choose to determine that there is science available to determine by rule that certain additional subcategories of “other waters” are similarly situated and have a significant nexus and are jurisdictional by rule rather than addressed with a case-specific significant nexus analysis under paragraph (a)(7). The agencies seek comment on how they should categorize the remaining “other waters.” The agencies seek comment on whether these remaining “other waters” should be non-jurisdictional because they would lack a significant nexus to a traditional navigable water, interstate water, or the territorial seas.
11. If waters are categorized as non-jurisdictional because of a lack of science available today, the agencies request comment on how to best accommodate evolving science in the future that could indicate a significant nexus for these “other waters.” Specifically, the agencies request comment as to whether this should be done through subsequent rulemaking, or through some other approach, such as through a process established in this rulemaking.

12. The agencies also seek comment on how the science supports retaining the case-specific determination for the remaining “other waters” that are neither specifically included nor excluded from jurisdiction. Retaining the case-specific analysis for these other waters would not enhance clarity of jurisdiction for these other waters, but it would retain the ability for a jurisdictional determination consistent with the objective of the CWA to restore and maintain the chemical, physical, and biological integrity of the nation’s waters. In the alternative, the agencies seek comment on whether it would be appropriate to categorize remaining “other waters” as not jurisdictional. The agencies specifically seek comment on how these “other waters” should be considered.
13. The agencies solicit comment on identifying subcategories of “other waters” that have a significant nexus to traditional navigable waters, interstate waters, and the territorial seas and could be jurisdictional by rule, and subcategories of “other waters” where a significant nexus or its absence could not be determined as a class and could be subject to a case-specific analysis under the rule. The Report indicates that there is evidence of very strong connections in some subcategories that are not included as jurisdictional by rule. The agencies solicit comment on making such subcategories of waters with very strong connections jurisdictional by rule as well as on making subcategories of waters that do not have such connections subject to a case-specific analysis or categorically non-jurisdictional under the rule. Such comment should explain with supporting documentation why a particular subcategory of “other waters” might or might not have a significant nexus to traditional navigable waters, interstate waters, or the territorial seas.
14. The agencies solicit comment regarding this [case-specific] approach to “other waters,” recognizing that a case-specific analysis of significant nexus is resource-intensive for the regulating agencies and the regulated community alike. In addition, the agencies solicit comment on additional scientific research and data that might further inform decisions about “other waters.” In particular the agencies solicit information about whether current scientific research and data regarding particular types of waters are sufficient to support the inclusion of subcategories of types of “other waters,” either alone or in combination with similarly situated waters, that can appropriately be identified as always lacking or always having a significant nexus.
15. To best meet their goals and responsibilities, the agencies solicit comment and information on the state of the science, and its relation to the CWA and the caselaw, to determine if there are opportunities to provide greater clarity, certainty, and predictability for establishing jurisdiction over “other waters.” This includes the possibility of determining that additional waters should be jurisdictional by rule such as in paragraphs (a)(1) through (a)(6), and the possibility that additional waters should be excluded from jurisdiction by rule such as in section (b).