



Compilation of Questions Posed by US EPA and US Army to Commenters for “Revised Definition of Waters of the United States”

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This document is a compilation of questions posed by US EPA and US Army (“the agencies”) for commenters on various terms and definitions in their proposed rule “[Revised Definition of Waters of the United States](#)”, based on the pre-publication version of the proposed rule released December 11 2018. This document is meant to be a companion document to both ACWA’s summary of the proposed rule as well as the proposed rule itself, allowing ACWA members to easily reference questions the agencies seek comment. **All text included below is directly copied from the proposed rule.**

Interstate Waters

The agencies welcome comment on this proposed change, including the rationale for and against having interstate waters as a separate jurisdictional category. Alternatively, the agencies seek comment on an approach that would retain interstate waters as a separate category, reflecting longstanding agency practice. In the event the agencies were to pursue that alternate approach, the agencies solicit comment on which waters should remain jurisdictional and on what basis, and whether the term “interstate” should be interpreted as crossing between States, between States and tribal lands, between States and/or tribal lands and foreign countries, or other formulations. Finally, if a commenter believes that the agencies have in the past asserted jurisdiction over waters based solely on the fact that such waters were interstate and otherwise not connected to a traditional navigable water, the agencies solicit examples of such jurisdictional determinations or other available data that may allow the agencies to further analyze the differences between the 1986 and 2015 rules and today’s proposed definitions.

Tributaries

While the public may comment on all aspects of the agencies’ proposed rule, the agencies have identified several specific areas related to the proposed tributary definition for which they seek comment. As a threshold matter, the agencies solicit comment on their interpretation of the Rapanos opinions and whether the significant nexus standard, articulated by a single justice, must be a mandatory component of any future definition of “waters of the United States.” Or, may the agencies apply the principles and rationale of the plurality and concurring opinions to craft a new standard established by rule?

The agencies also solicit comment on whether the definition of “tributary” should be limited to perennial waters only. The agencies also request comment whether the definition of “tributary” as proposed should indicate that the flow originate from a particular source, such as a requirement for groundwater interface, snowpack, or lower stream orders that contribute flow. The agencies also solicit comment on how effluent-dependent streams (e.g., streams that flow year-round based on wastewater treatment plant discharges) should be treated under the tributary definition. As proposed, effluent-dependent streams would be included in the definition of “tributary” as long as they contribute perennial or intermittent flow to a traditional navigable water or territorial sea in a typical year.

The agencies also solicit comment on whether the tributary definition should include streams that contribute less than intermittent flow to a traditional navigable water or territorial sea in a typical year. Additionally, the agencies request comment on whether less than intermittent flow in a channel breaks jurisdiction of upstream perennial or intermittent flow and under what conditions that may happen. The agencies recognize that the proposed definition may present a challenge for certain landowners upstream of an ephemeral feature. For example, landowners may find it difficult to determine whether there is a jurisdictional break downstream of a feature on their property. The agencies therefore solicit comment on this issue. The agencies also seek comment on the proposed treatment of natural and man-made breaks regarding the jurisdictional status of upstream waters, including whether these features can convey perennial or intermittent flow to downstream jurisdictional waters. The agencies also seek comment on the jurisdictional status of the breaks themselves.

The agencies are also soliciting comment on an alternate definition that would change the focus of the proposed definition from intermittent flow occurring during certain times of the year to “seasonal flow.” Under this alternative definition, a tributary would be a river, stream, or similar naturally occurring surface water channel that contributes flow at least seasonally to a traditional navigable water or territorial sea in a typical year. The alternate definition could add that “seasonal flow is predictable, continuous surface flow that generally occurs at the same time in a typical year.” The agencies welcome comments on the concept of a “seasonal” flow regime, what that term may include, and how it may be implemented, including tools to identify “seasonal” flow.

As an alternative to the proposed definition of “intermittent,” the agencies are soliciting comment on whether the term could instead mean “water flowing continuously during certain times of a typical year as a result of melting snowpack or when the channel bed intersects the groundwater table.” Although the identification of groundwater input is found in most definitions for intermittent flow, 30 the agencies note that identifying whether the channel bed intersects the groundwater table may be challenging to accomplish in the field, that gathering the relevant data could be time consuming, and could require new tools and training of field staff and the regulated public. Some options for identifying whether groundwater is providing a source of water to the tributary may involve the installation of monitoring wells or staff gauges to identify the presence of the water table and/or to estimate the base

flow using a hydrograph. Identifying the appropriate depth of installation for a monitoring well can be challenging, especially in the case of intermittent streams that have seasonally fluctuating water tables. Installing these devices in certain substrates, such as rocky substrates, can also be challenging. There may be other methods which could be researched and developed by the agencies over time, including the identification of field indicators, which could be regionalized, as well as the development of modeling tools. However, both of these methods (field indicators and modeling tools) would only provide an indication of groundwater generated base flow and would not directly measure its presence. The agencies are soliciting comment on whether these or other methods may be most appropriately used to identify groundwater in the field.

The agencies are also soliciting comment on whether the definition of “intermittent” should contain the requirement of continuous flow for a specific duration, such as “at least one month of the calendar year,” instead of the phrase “during certain times of a typical year.” See, e.g., 30 CFR 710.5 (definition of “intermittent” used in a U.S. Department of the Interior regulation).

The agencies note that such an approach would provide for national consistency but may not offer a more regionalized implementation of intermittent tributaries as some States recommended (i.e., intermittent would be viewed the same across the country, from the arid West to the Southeast). Some pre-proposal commenters recommended this approach to provide certainty for determining flow regime. The agencies are also soliciting comment on whether the seasonal continuous surface flow consideration (e.g., typically three months) from the Rapanos Guidance could be used as a definitional flow regime in the regulation. Rapanos Guidance at 6. Several commenters recommended this approach be used to define tributaries. The seasonal “typically three month” approach is current practice, subject to case-by-case analysis, and is therefore familiar to agency staff and the regulated public, but like a one-month limitation, it may not provide for regional variation in the implementation of flow regime.

The agencies therefore seek comment as to whether the tributary definition should include specific flow characteristics (e.g., timing, duration, frequency, or magnitude), and if so, what flow values or ranges of values (including supporting rationale) would satisfy the tributary definition and what methods, tools, or data could be used to determine such values. Certain flow requirements might include, for example, an average annual flow volume of five or more cubic feet per second in a typical year and/or that a river or stream flow continuously for a certain number of days (e.g., 30, 60, or 90 days) in a typical year.

The agencies are also soliciting comment on whether the concepts of bed and banks and ordinary high water mark should be added to the definition of tributary, and if so, how. Several commenters recommended including these characteristics in the proposed definition of “tributary,” similar to the definition of tributary in the 2015 Rule, while others opposed the addition, stating that it would inappropriately result in regulation over certain waters that should not be jurisdictional under the CWA, such as ephemeral features.

The lateral jurisdictional limit of a tributary currently is established by a tributary's ordinary high water mark. The agencies solicit comment on the usefulness of incorporating into the tributary definition the following sentence: "the lateral extent of a tributary is established by its ordinary high water mark." The agencies note that the Corps has existing regulations at 33 CFR 328.4 regarding the limits of jurisdiction for categories of "waters of the United States."

The agencies solicit comment on including these Corps regulations in the EPA's regulations or simply cross-referencing the Corps regulations in EPA's to apply to the definition of "waters of the United States." The agencies are proposing to define a typical year as "within the normal range of precipitation over a rolling 30-year period for a particular geographic area." The agencies solicit comment on whether it is necessary to define "typical year" given the agencies' understanding that it is a commonly understood term in field application. Alternatively, the agencies seek comment on whether they should provide additional details in the rule text about what constitutes a typical year or provide further guidance in a final preamble about appropriate tools for determining whether a year is "typical." Finally, the agencies solicit comment on alternative approaches in the rule text to convey that times of drought or extreme floods would not be a factor when determining if a river or stream meets the conditions of the definition of "tributary."

The agencies are also soliciting comment on implementation methods and tools that could be used to identify and distinguish perennial and intermittent flow regimes from ephemeral flow regimes as defined in this proposal. As mentioned above, such tools could include field-based tools, such as visual observations, or remote desktop tools, such as aerial photos. The agencies are also soliciting comment on the appropriate watershed scale for use in the geographic area as defined in a "typical year" of the proposed rule, for example, hydrologic units at the level of Hydrological Unit Code (HUC)-8s, HUC-10s, or HUC-12s could be used. A broad geographic area may include multiple micro-climates and may not be representative of precipitation conditions on the ground for the subject tributary. The agencies are soliciting comment on other approaches to determine the geographic area.

Ditches

While the public may comment on all aspects of the agencies' proposed rule, the agencies are proposing a number of ways to address and clarify jurisdiction over ditches as described above and are seeking comment. The agencies seek comment on the utility and clarity of proposing a separate category of jurisdictional ditches and how the agencies have delineated those ditches that would be "waters of the United States" and those that would be excluded. In the alternative, the agencies seek public comment on whether the agencies should retain the historical treatment of jurisdictional ditches within the definition of "tributary" and not in a separate category. The agencies also seek comment on their proposed definition of "ditch."

As the agencies consider how to implement this provision, the agencies seek comment on whether they should add a temporal component to distinguish jurisdictional ditches when evaluating ditches that may

have been constructed in tributaries or adjacent wetlands. For example, the agencies could consider a ditch that appears to have been constructed in upland to be non-jurisdictional unless there is evidence that the ditch was in fact constructed in a natural waterway prior to the adoption of the 1972 CWA amendments. The agencies also solicit comment as to what tools can be used to help identify whether a ditch is constructed in upland or whether it was constructed in a tributary or adjacent wetland that meets the respective proposed definitions, and in particular what sort of showing would constitute evidence that a ditch was constructed in upland or in a jurisdictional tributary or adjacent wetland. The agencies seek comment as to whether there are other approaches for addressing the evidentiary concerns that may arise in a permitting context for historic ditches. For example, the agencies solicit comment on the role of historic photographs and records, in determining whether a ditch was built in a tributary and more generally what constitutes evidence that a ditch was constructed in a tributary or an adjacent wetland.

In addition, the agencies solicit comment on the exclusion of all ditches constructed in upland, regardless of flow regime, and whether that is consistent with the plurality and concurring opinions in *Rapanos*. For example, ditches constructed in upland that flow perennially would be presumed non-jurisdictional under today's proposal, even if they would also satisfy the conditions of the proposed tributary definition. Finally, the agencies solicit comment on whether a ditch can be both a point source and a "water of the United States," or whether these two categories as established by Congress are mutually exclusive.

Lakes and Ponds

The agencies welcome comment on the proposal to establish a distinct jurisdictional category for lakes and ponds and whether this provides additional clarity and regulatory certainty. In the alternative, the agencies solicit comment on incorporating jurisdictional lakes and ponds into another category, such as tributaries. The agencies note that there is considerable uncertainty about defining the difference between lakes and ponds, and no current accepted definition of either term across scientific disciplines exists. The agencies are soliciting comment on whether a specific definition of lakes and ponds should be provided in the rule language or whether any such definition is necessary. For example, the Corps has a definition of "lake" provided at 33 CFR 323.2, which includes, "The term lake means a standing body of open water that occurs in a natural depression fed by one or more streams from which a stream may flow, that occurs due to the widening or natural blockage or cutoff of a river or stream, or that occurs in an isolated natural depression that is not a part of a surface river or stream. The term also includes a standing body of open water created by artificially blocking or restricting the flow of a river, stream, or tidal area...." Alternatively, other definitions could be used to define lakes and ponds, such as the Cowardin classification system developed by the U.S. Fish and Wildlife Service which could use the permanently flooded and semi-permanently flooded for non-tidal waters categories. Such definition could be, "Lakes and ponds are either semi-permanently or permanently flooded during a typical year and may or may not exhibit hydrophytic vegetation." There may also be other parameters used to

define lakes and ponds, such as size and depth. For example, in the 1975 regulations, the Corps had proposed a minimum size requirement on lakes of five acres to be waters of the United States. See 40 FR 31321. However, such size requirement received many negative comments that the size was too small or too large or did not account for seasonal changes in sizes of lakes, while others commented on the legality of imposing size limitations on lakes. See 42 FR 37129. Also, the agencies recognize that States and Tribes may have specific, validated tools they employ to identify lakes or ponds and are soliciting comment on those approaches which may be useful for application in this proposed rule.

The agencies solicit comment on whether more specific parameters should be included for the type of flooding that should be included for lakes and ponds when flooded by an (a)(1)-(5) water in a typical year. For example, the agencies request comment as to whether to establish a specific flooding periodicity or magnitude or frequency. The agencies also solicit comment on other implementation tools available to determine the presence of a contribution of perennial or intermittent flow from the lake or pond in a typical year. Additionally, the agencies request comment on whether less than intermittent flow from lakes and ponds to an (a)(1) water in a typical year could be sufficient to extend jurisdiction to such lakes and ponds.

Wetlands

While the public may comment on all aspects of the agencies' proposed rule, the agencies have proposed a number of ways to try to address and clarify jurisdiction over wetlands as described above and are seeking comment. As a threshold matter, the agencies solicit comment on their interpretations of Riverside Bayview, SWANCC, and the Rapanos opinions, including specifically the proposal to provide regulatory certainty through categorical treatment of adjacent wetlands rather than on the case-by-case application of Justice Kennedy's significant nexus test.

While the agencies are not proposing to change the longstanding regulatory definition of "wetlands," they request comment on whether including in the regulatory text that areas must satisfy all three wetland delineation criteria (i.e., hydrology, hydrophytic vegetation, and hydric soils) under normal circumstances to qualify as wetlands would provide additional clarity. The agencies also seek comment on whether there are terms or phrases within the existing wetlands definition that require clarification (e.g., "under normal circumstances"), and if so how such terms might be defined and if clarification should be provided, for example, via regulatory text or future agency guidance.

The agencies are soliciting comment on other potential interpretations of adjacency, such as including a distance limit to establish the boundaries between Federal and State waters, which several pre-proposal commenters recommended. For example, some commenters have suggested using distance from another jurisdictional water as the basis for asserting jurisdiction over wetlands, even if those wetlands do not abut or have a direct hydrologic surface connection to such waters in a typical year. Others have suggested establishing a jurisdictional cut-off in a contiguous wetland for administrative purposes rather

than extending jurisdiction to the outer limits of the wetland where all three wetland characteristics are no longer satisfied. The agencies solicit comment on these alternate suggestions.

The agencies are also soliciting comment on whether the definition of “adjacent wetlands” should not include reference to dikes, barriers, and similar structures and instead those terms should be included in the definition of “upland.” The definition of “upland” would then mean, “any land area, including dikes, barriers, or similar structures, that under normal circumstances does not satisfy all three wetland delineation criteria (i.e., hydrology, hydrophytic vegetation, hydric soils) identified in paragraph (c)(15) of this section, and does not lie below the ordinary high water mark or the high tide line of a water identified in paragraph (a)(1)-(6) of this section.” Upland would include both natural and artificial land areas meeting the definition.

The agencies are also soliciting comment on an alternate approach, whereby wetlands that are separated from another jurisdictional water by upland or a dike, barrier or other similar structure would not be jurisdictional even if they have a direct hydrologic surface connection in a typical year to an otherwise jurisdictional water. Unlike the proposed approach, this alternative would not allow for seasonal overtopping, for example, to provide for a direct hydrologic surface connection during a typical year, but wetlands would be jurisdictional if the direct hydrologic surface connection is through the upland or structure (e.g., through a culvert). The agencies solicit comment on whether this approach is more consistent with the considerations articulated above than the approach in today’s proposed definition.

The agencies note that identifying remotely whether wetlands abut a jurisdictional water can be challenging, especially with 2-D aerial imagery and the resolution of remote tools. The agencies are soliciting comment on which indicators can be used to determine whether a wetland abuts a jurisdictional water, and whether surface hydrology indicators or remote tools exist that may be helpful. The agencies believe that it is also important to consider weather and climatic conditions, i.e., review recent precipitation and climate records, to ensure adjacency is not being assessed during a period of drought or after a major precipitation or infrequent flood event. These climatic assessments could employ the same tools used to evaluate whether it is a “typical year” for purposes of determining whether a tributary is jurisdictional.

The agencies seek comment on whether it is appropriate to describe a “direct hydrologic surface connection” as occurring due to inundation from an (a)(1)-(5) water or via perennial or intermittent flow between a wetland and an (a)(1)-(5) water in a typical year. Additionally, the agencies request comment on whether other types of hydrologic surface connections between wetlands and jurisdictional waters could constitute a “direct hydrologic surface connection” or if and under what circumstances subsurface water connections between wetlands and jurisdictional waters could be used to determine adjacency.

The agencies are also soliciting comment on other tools that may be helpful in implementation of the proposed adjacent wetlands category. For example, the agencies seek comment as to whether tools

such as NRCS Soil Surveys (Flooding Frequency Classes), tidal gauge data, and site-specific modeling (e.g., Hydrologic Engineering Centers River System Analysis System or HEC-RAS), as well as historical evidence, such as photographs, prior delineations, topographic maps, and existing site characteristics, could be helpful in implementation.

Exclusions

The agencies seek comment on all aspects of the proposed exclusions. In addition, the agencies solicit comment on whether they should enumerate additional specific exclusions for the purposes of clarity, or whether proposed paragraphs (a) and (b) are sufficiently clear as to account for all of the agencies' intended jurisdictional and non-jurisdictional waters. For example, features that move water (particularly in the arid West) that do not eventually reconnect into a tributary or other jurisdictional water would not be jurisdictional and therefore do not need their own specific exclusion. These features would not meet the definition of "tributary" or may meet the currently proposed ditch exclusion as an artificial conveyance of water. However, the agencies seek comment on the jurisdictional status of features (other than the ditches the agencies currently propose to exclude) whose purpose is to move water and which do eventually reconnect to the tributary system.

Further, the agencies seek comment on the clarity of the groundwater exclusion in proposed paragraph (b)(2) and ask commenters to consider whether the exclusion could instead read, "groundwater, including diffuse or shallow subsurface flow and groundwater drained through subsurface drainage systems." The agencies recognize that unique groundwater situations such as shallow aquifers and tile drainage systems exist around the country and welcome comments on the parameters of the groundwater exclusion and any implementation issues that may arise.

With respect to the proposed exclusion for ditches, the agencies solicit comment on whether certain ditches excavated in upland but with perennial or intermittent flow to an (a)(1) through (5) water should be treated as a jurisdictional tributary and why, and if so, what flow regime would apply (e.g., perennial only or both perennial and intermittent). Recognizing that excluded ditches must be used to convey water, the agencies also seek comment on whether the exclusion for ditches should instead focus on particular ditch use, such as roadside, railway, agriculture, irrigation, water supply, or other similar uses, and if so, why. As discussed in Section III.E, the agencies are soliciting comment on available tools to help identify whether a "ditch" is artificial or whether it was constructed in a tributary or adjacent wetland.

The agencies solicit comment on the proposed exclusion of prior converted cropland that uses the abandonment principle to determine whether prior converted cropland would be subject to CWA jurisdiction or if the agencies should apply the change in use analysis. The agencies also solicit comment on procedures that may be useful in implementing the proposed exclusion for prior converted cropland. In particular, the agencies solicit comment as to what constitutes "for, or in support of, agricultural purposes" as the term applies to the proposed prior converted cropland definition in today's proposal.

The agencies also seek comment on the kind of documentation a landowner must maintain to demonstrate that cropland has not been abandoned, or in the alternative, that the land has been used for, or in support of, agricultural purposes at least once in the immediately preceding five years. The agencies also solicit comment on what evidence, other than a USDA determination, the agencies should evaluate and rely upon to determine if cropland is eligible for the prior converted cropland exclusion. Finally, the agencies solicit comment on whether the five-year timeframe for maintaining agricultural purposes is appropriate.

The agencies also request comment on whether the proposed exclusion for artificially irrigated areas should include fields flooded to support the production of other wetland crop species in addition to rice and cranberries. Additionally, the agencies seek comment on whether the proposed artificially irrigated areas exclusion should be expanded to include areas flooded to support aquaculture, such as crayfish production.

The agencies also seek comment on whether the waters and features proposed to be excluded in paragraphs (b)(7), (b)(8), (b)(9), and (b)(10) must be constructed wholly in upland, not just in upland as provided in the proposed regulatory text, in order for the exclusion to apply and how such a requirement would affect the utility of these proposed exclusions. The agencies also request comment on whether the proposed exclusion in paragraph (b)(9) for stormwater control features should be expanded or clarified to include permitted municipal separate storm sewer systems (MS4s). If so, the agencies request comment on whether the exclusion would apply to the entire MS4 or limited portions thereof. The agencies also request comment on how they might implement such an exclusion.

The agencies intend for the exclusion in paragraph (b)(11) to apply only to lawfully constructed waste treatment systems. The agencies solicit comment on whether greater clarity is needed by including in the rule text that the exclusion only applies to “lawfully constructed waste treatment systems.”