

## State and Tribal Engagement - Questions

*Focus on Implementation.* In these meetings, the agencies seek feedback on co-regulator and stakeholder experiences with implementing the various “waters of the United States” (WOTUS) regulatory regimes. We will benefit from learning about your experiences in the field and understanding how jurisdictional issues affect assumed/delegated programs and other state or tribal efforts. The agencies first intend to propose returning to the longstanding pre-2015 regulations, with amendments to be consistent with Supreme Court cases such as *Riverside Bayview Homes*, *SWANCC*, and *Rapanos*. A second rulemaking will then build on that framework with the benefit of additional stakeholder engagement. We recognize that these implementation-focused discussions may have implications for both rules but are planning to focus primarily on the first, forthcoming rule.

### *Overarching questions*

- What worked and what didn’t work for significant nexus analyses under the pre-2015 regulatory regime and the 2015 Clean Water Rule?
  - Do you have recommendations for how to identify “similarly situated waters” in a given “region” that should be considered together in the analysis? For instance, under the *Rapanos* Guidance, a stream segment and its adjacent wetlands were considered together (aggregated); in the Clean Water Rule, certain aquatic resources inside a watershed that drains to a traditional navigable water, interstate water, or the territorial seas were aggregated by type.
  - How could the agencies make analysis of a significant nexus more consistent and transparent?
- What worked and what didn’t work for the typical year analyses under the NWPR?
  - Is the concept of “typical year” useful?
  - Does typical year adequately take a changing climate into account? If not, could it be modified to do so?
  - Is the Antecedent Precipitation Tool sufficient for states/tribes in calculating a typical year, or are other resources often necessary?
- Are there implementation successes and challenges in assessing specific types of sites?
- What types of implementation assistance would be most helpful to states and tribes?

### *Interstate waters*

- What are effects for states and tribes if waters that cross, intersect or form a part of a state border are jurisdictional, particularly for waters that would not otherwise be jurisdictional?
- How should the agencies approach tribal or international boundaries?

### *Tributaries*

- Were the NWPR’s specific definitions of “perennial,” “intermittent,” and “ephemeral” helpful? Were these flow classifications more or less difficult to implement than the *Rapanos* characterization of flow classifications (i.e., relatively permanent tributaries need to have flow at least seasonally (e.g., typically three months; such relatively permanent tributaries are perennial or seasonally intermittent))?

- Are ditches that meet the requirements to be a tributary appropriately regulated as tributaries? What worked and what didn't about previous approaches to regulating ditches?
- What were state and tribal experiences implementing the different rules regarding jurisdiction over ephemeral streams? Do those experiences vary in different regions of the country? Agency practice under *Rapanos* was to perform a significant analysis for such streams.

#### *Adjacent Wetlands*

- What were state and tribal experiences implementing the different definitions of adjacency under the pre-2015 regulatory regime, the 2015 Clean Water Rule, and under the NWPR? Are there aspects of adjacency where the agencies should look to provide additional clarity?
- Are there additional implementation tools or resources that states and tribes need to assess the jurisdictional status of wetlands?

#### *Exclusions – General*

- Were there any challenges with implementing exclusions as laid out in the 1986 regulations, whereby those regulations include just two exclusions and the preamble includes a list of other features that were “generally not jurisdictional waters”?

#### *Exclusions – PCC*

- Was the pre-NWPR implementation of prior converted cropland appropriate under the Clean Water Act, easy to understand, and implementable? What about the NWPR definition of prior converted cropland?
- How important is consistency with USDA's definition of prior converted cropland?

#### *Exclusions – WTSE*

- Was the waste treatment system exclusion as defined under the NWPR appropriate under the Clean Water Act, easy to understand, and implementable? What about the waste treatment exclusion as defined under previous regulations?

#### *Regional, State, and Tribal interests*

- Are there certain waters that could or should be addressed by regionalized approaches? For instance, are there regionally specific implementation approaches that would be appropriate to include in any revised rule? Are there specific challenges that you face in your region when implementing the definition?
- Are there key issues important to your state or tribe that the agencies have not addressed in these questions or in our August 4, 2021 *Federal Register* notice?

#### *Other*

- Would states or tribes like to identify specific environmental justice interests the agencies should be aware of?
- How can the agencies consider a changing climate in implementation approaches described in any new rulemaking? What are some important considerations in your region for how WOTUS definitions might intersect with climate?