



February 7, 2022

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Oceans, Wetlands, and Communities Division
Office of Water (4504-T)
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
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Ms. Stacey Jensen
Office of the Assistant Secretary of the Army for Civil Works Department of
the Army
108 Army Pentagon
Washington, DC 20310-0104

Re: Revised Definition of "Waters of the United States" (Docket # EPA-
HQ-OW-2021-0602; FRL -6027.4-03-OW)

The Association of Clean Water Administrators (ACWA) is the independent, nonpartisan, national organization of state and interstate (hereinafter "states") water program directors, responsible for the daily implementation of the Clean Water Act's (CWA) water quality programs. We appreciate the difficulty of the task facing the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) as you work to craft a "durable" definition of "waters of the United States (WOTUS)." To assist with the development of a foundational rule, ACWA offers the following comments and recommendations.

The definition of WOTUS establishes the geographic scope of federal jurisdiction under the CWA, potentially impacting federal water quality management programs, including those administered by states. While not all states have regulations that apply to waters beyond those covered by the Clean Water Act (CWA), it is inaccurate for the agencies to assert that in the absence of federal protections that state waters will be unprotected. While this is true for some states, many states have long standing regulations and definitions of "waters of the state" that protect their waters even in the absence of federal jurisdiction. The states recommend that the agencies adjust their narrative to accurately recognize the combination of federal and state protection for water quality.

The definition of WOTUS and associated rulemaking efforts by the Agencies have been the subject of extensive litigation, which has resulted in considerable uncertainty, confusion, and fatigue. EPA suggests that returning to the 1986 definition of the "waters of the United States", plus relevant Supreme Court decisions, will minimize confusion and provide regulatory clarity for state co-regulators, the regulated community and provide protection for the nation's waters. One state suggests that the agencies have stretched federal WOTUS power to cover more ground than ever before thereby decimating cooperative federalism and State's rights. Some states

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believe the agencies should stop here and not proceed with a second rule while other states believe the agencies should proceed with a second rule to further provide clarity, durability, and increased protections.

As the agencies proceed with this process to revise WOTUS and work to create a durable rule the states remind the agencies of several foundational principles that must be adhered to. (1) respect the role of the states as co-regulators and provide early, continuous, and meaningful opportunities for dialogue and input as any new rule is developed; (2) respect and follow the science though balanced within the limitations of statute and judicial precedent; (3) recognize the geographic, geologic, climatic, hydrologic, and leadership diversity among states and craft a definition that provides clarity but also flexibility for state implementers; (4) prepare to provide the states, well in advance, with technical assistance, tools, and trainings to assist with implementation of any revised definition; and (5) consider a delayed effective date dependent on the significance and scope of the final rule to give state partners adequate time to revise state regulations and/or to develop new state policy to cover any changes in coverage as a result of the revised jurisdictional definition.

Co-Regulator Engagement & Collaboration

Because of states' unique and congressionally designated role under the CWA as co-regulators, ACWA recommends that EPA consider this journey to be a partnership; a genuine partnership that includes regular contact and interactive, meaningful dialogue through workgroups, focus groups, forums, calls, and other communication, throughout the life of this effort. Just as with past rules, state commissioners and elected officials will turn to ACWA members as the state implementing experts who will grapple with a new rule and its effects on state government, local landowners, and other stakeholders, on permitting efficiency, and on water quality. ACWA urges EPA to continue to take advantage of this expertise and experience by working directly with ACWA and its members as the proposed rule is drafted.

At a minimum, we ask that EPA provide an early draft of regulatory text, or options with sufficient detail, for our members to give EPA useful and specific feedback on the proposal. Providing this information to state surface water program directors would be tremendously beneficial for EPA, as our members are uniquely qualified to evaluate the regulatory text in terms of technical details, implementation challenges and barriers, and unintended consequences.

Importance of Science

The use of relevant science is important to help inform the definition of WOTUS, but it must be balanced with the constraints established by statute and judicial precedent. It is important that individual determinations of whether a water is a WOTUS should be based upon real evidence and not speculation or assumptions.

Clear & Pragmatic Definitions

The rule should include clear and pragmatic definitions and thresholds for the two standard tests—the Scalia relatively permanent or the Kennedy significant nexus --for determining jurisdiction. Additionally, it is essential that the agencies also lay out clear, standard methods for assessing jurisdiction. Without such clarity, inconsistent interpretation, and application will result in further uncertainty and undercut the goal of creating a clear and durable definition. Several states request the agencies develop key implementation

guidance for the foundational rule to accompany the historical context and general approach to Section D. Implementation of Proposed Rule presented on pages 69433-69445 in the December 2021 proposal.

Some states also recommend that the agencies provide further clarification on the definition of “ordinary high-water mark.” The proposed rule indicates that an ordinary high-water mark is a requisite component of a WOTUS, but the agencies fail to identify the relevance of ordinary high-water mark in the proposal. If the agencies intention is that a reviewed feature without an ordinary high-water mark can still be a WOTUS, then the agencies need to clarify in the proposal what those physical conditions are. Moreover, if the agencies intend that a reviewed feature without an ordinary high-water mark can still be a WOTUS, the agencies need to clarify this in the proposal.

Categorical Waters

The proposed rule retains the 1986 provision defining WOTUS as including “all waters that are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters that are subject to the ebb and flow of the tide.” Several states support the proposal’s approach to traditional navigable waters, which is consistent with longstanding guidance. As the proposal preamble emphasizes, the longstanding approach is familiar with state co-regulators as well as regulated stakeholders. Several states recommend that the agencies refrain from consolidating the three categories, and that they remain separate and intact, because they provide longstanding clarity in interpretation and practice. Some states also support retaining the 1986 definition of “adjacent”; while other states prefer the definition included in the Navigable Waters Protection Rule (NWPR). Finally, several states seek clarity in describing the distance thresholds for categorically jurisdictional waters, and clearly differentiate among these provisions. As currently written, Title 33 Part 328.3(g)(1), “the distance from a water of the United States” and (2) “the distance from a water identified in paragraph (a)(1), (2), or (6) appear to be duplicative provisions, since (a)(1), (a)(2) and (a)(6) are categorically jurisdictional WOTUS according to the proposed foundational rule.

Other Waters

The proposal refers to waters and wetlands not physically proximate to WOTUS as “other” waters, incorporating the 1986 regulatory definition’s name for such waters. The proposed rule considers “other waters” as jurisdictional if they meet either the relatively permanent or significant nexus standards. Some states support this approach while other states recommend that the category of “other waters” should be eliminated from the proposed rule unless the agencies can provide more specifics on what waters are included in this category.

Interstate Waters

The proposed rule restores the 1986 provision defining WOTUS as including “all interstate waters including interstate wetlands.” The Proposal considers interstate waters as “foundational waters,” along with traditional navigable waters and the territorial seas, and as a result are considered categorically WOTUS without the need for further analysis.

Several states support inclusion of interstate waters as categorically WOTUS and foundational, with tributaries, adjacent wetlands, and “other” waters considered WOTUS based on their relationship to the integrity of interstate waters. Some states are concerned

that using stream order to determine whether a water is an interstate water is inadequate and unnecessarily restrictive. Similarly, several states also recommend that the foundational rule identify tributaries to interstate waters as WOTUS, as well as waters and wetlands adjacent to such tributaries. If tributaries to interstate waters are not within the scope of CWA protections as WOTUS it will be difficult to ensure the chemical, physical, and biological integrity of interstate waters are restored and maintained. Finally, one state would like the interstate waters category removed from the definition because it creates confusion and a WOTUS determination should not be based on political boundaries.

Regional Differences

As the agencies work to craft the foundational rule, the states recommend that the rule includes sufficient flexibility to address the regional geographic, geologic, climatic, hydrologic, and leadership diversity among the states. Several states recommend the agencies develop regional specific guidance or provisions in the rule to help states implement the foundational rule from a regional perspective.

Categorical Exclusions

The proposed rule includes several exclusions from the definition of WOTUS that were included in the 2015 and 2020 rules. Some states believe the additional exclusions included in 2015 and 2020 improved clarity, efficiency and certainty for both states and the regulated community. The states recommend that the agencies consider these pre-existing exclusions in the final foundational rule. Additionally, several states recommend the agencies codify additional exclusions including those for ditches that are not categorically WOTUS, and portions of which that do not satisfy functional definitions or meanings of tributaries and adjacent wetlands, groundwater, stormwater control features constructed or excavated in upland or in non-jurisdictional waters to convey, treat, infiltrate or store stormwater run-off, groundwater recharge, water reuse, and wastewater recycling structures, including detention, retention and infiltration basins in ponds, constructed or excavated in upland or in non-jurisdictional waters.

Environmental Justice

Some states recommend that the agencies do not include environmental justice components. The foundational rule is not the appropriate vehicle to address environmental justice. The foundational rule merely establishes the demarcation between federal jurisdiction and state jurisdiction.

Economic Analysis

Several states recommend the agencies rework the economic analysis included in the notice. There is a sense that the proposed rule will have a greater potential economic impact to states in implementation of delegated programs under Sections 303 and 402 of the CWA than what the November 17, 2021, *Economic Analysis for the Proposed "Revised Definition of Waters of the United States" Rule* concluded would only be insubstantial. A proposed rule that expands federal jurisdiction and creates substantial regulatory uncertainty may lead to greater economic impacts. Several states dedicated significant resources, time and money, to create or update existing programs to comply with the changing definitions of WOTUS. The longstanding regulatory uncertainty is costing state programs, and this is not adequately reflected in the economic analysis. Without a thorough and meaningful evaluation of the economic impacts, the proposed rule may misrepresent the economic impacts to states.

While ACWA's process to develop comments is comprehensive and intended to capture the diverse perspectives of the states that implement these programs, EPA should also seriously consider the recommendations that come directly from individual states, interstates, and territories. Thank you again for the opportunity to provide pre-proposal recommendations on this effort. Please contact ACWA's Executive Director Julia Anastasio at janastasio@acwa-us.org or (202) 756-0600 with any questions regarding ACWA's comments.

Sincerely,

A handwritten signature in blue ink that reads "Andrew J. Gavin". The signature is fluid and cursive, with the first letters of the first and last names being capitalized and prominent.

Andrew Gavin
ACWA President