

SPECIAL PUBLIC NOTICE

CLEAN WATER ACT PROPOSED RULE FOR A REVISED DEFINITION OF THE “WATERS OF THE U.S.”

On February 14, 2019, the U.S. Environmental Protection Agency (EPA) and the Department of the Army (Army) published for public comment a proposed rule revising the definition of “waters of the United States,” which would establish the scope of federal regulatory authority under the Clean Water Act (CWA). The proposed rule is intended to satisfy the requirements of Executive Order (EO) 13778 that directed the EPA and the Army to review and rescind or replace the 2015 Clean Water Rule (80 FR 37053) and consider interpreting the scope of “waters of the United States” consistent with the Justice Scalia opinion (plurality standard) from *Rapanos v. United States* (2006). The EO instructed that any new proposed rule shall ensure that the Nation’s navigable waters are kept free from pollution, while at the same time promoting economic growth, minimizing regulatory uncertainty, and showing due regard for the roles of the Congress and the States under the Constitution.

The proposed revised definition outlines six categories of waters that would be considered “waters of the United States” in section (a), including: traditional navigable waters, including the territorial seas; tributaries that contribute perennial or intermittent flow to such waters; certain ditches; certain lakes and ponds; impoundments of otherwise jurisdictional waters; and wetlands adjacent to other jurisdictional waters.

The proposed revised definition also outlines what would not be considered “waters of the United States” in section (b), including: waters not identified in section (a); groundwater; ephemeral features; ditches not included in section (a); prior converted cropland, as defined; certain artificially irrigated areas; certain artificial lakes and ponds; certain water-filled depressions; certain stormwater control features; certain wastewater recycling structures; and waste treatment systems, as defined.

Additionally, the proposed rule provides definitions for key terms used in the regulation in section (c). Some of these are unchanged from the current regulations, including the definitions for “wetlands”, “ordinary high water mark”, and “high tide line”. Some of these have been redefined, including definitions for “tributary” and “ditch”. The rule also defines several key terms, that while used colloquially, are added to the regulation for the first time, including definitions for “ephemeral”, “intermittent”, “perennial”, “prior converted cropland”, “snowpack”, “typical year”, “upland”, and “waste treatment system”.

The EPA and the Army are seeking comments on the specifics of the proposed “waters of the United States” definition, and are requesting comment on the discussion and definition of terms within it. In addition, the EPA and the Army are seeking comments on a multitude of items such as underlying legal interpretations, rule implementation, and the associated Economic Analysis and Resource and Programmatic Assessment (and their data). Finally, in response to requests from some states, the EPA and the Army are exploring and seeking comments on the development, and feasibility, of creating geospatial datasets or a mapping system for jurisdictional waters in an effort to improve administration of CWA programs and provide clarity for federal, state, and tribal agencies and the general public.

More information regarding this proposed rule can be found at EPA’s website: <https://www.epa.gov/wotus-rule/step-two-revise>. Additionally, the Federal Register Notice can be found at the Federal Register’s website: <https://www.federalregister.gov/documents/2019/02/14/2019-00791/revised-definition-of-waters-of-the-united-states>.

DATES: Comments must be received on or before April 15, 2019.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA-HQ-OW-2018-0149, by one of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov/> (preferred method). Follow the online instructions for submitting comments.
- *E-mail:* OW-Docket@epa.gov. Include Docket ID No. EPA-HQ-OW-2018-0149 in the subject line of the message.
- *Mail:* U.S. Environmental Protection Agency, EPA Docket Center, Office of Water Docket, Mail Code 28221T, 1200 Pennsylvania Avenue NW, Washington, DC 20460.
- *Hand Delivery / Courier:* EPA Docket Center, WJC West Building, Room 3334, 1301 Constitution Avenue, NW, Washington, DC 20004. The Docket Center's hours of operations are 8:30 a.m. – 4:30 p.m., Monday – Friday (except Federal Holidays).

All submissions received must include the Docket ID No. for this rulemaking. Comments received may be posted without change to <https://www.regulations.gov/>, including any personal information provided.

FOR FURTHER INFORMATION CONTACT: Michael McDavit, Oceans, Wetlands, and Communities Division, Office of Water (4504-T), Environmental Protection Agency, 1200 Pennsylvania Avenue, NW, Washington, DC 20460; telephone number: (202) 566-2428; email address: CWAwotus@epa.gov; or Jennifer A. Moyer, Regulatory Community of Practice (CECW-CO-R), U.S. Army Corps of Engineers, 441 G Street, NW, Washington, DC 20314; telephone number: (202) 761-5903; e-mail address: USACE_CWA_Rule@usace.army.mil.