



**American Water Works  
Association**

*Dedicated to the World's Most Important Resource®*

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Office of Water  
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LTG Scott Spellmon  
Department of the Army  
108 Army Pentagon  
Washington, DC 20310

RE: **Revised Definition of “Waters of the United States” (EPA-HQ-OW-  
2021-0602)**

Dear Ms. Fox and LTG Spellmon:

The American Water Works Association (AWWA) appreciates the opportunity to comment on the proposed rule “Revised Definition of ‘Waters of the United States’” (EPA-HQ-PW-2021-0602). Our comments build upon those submitted to the previous docket “Request for Recommendations: Waters of the United States”<sup>1</sup> as well as the federalism consultation for this action.<sup>2</sup>

AWWA recognizes that this process is to formally revoke the Navigable Waters Protection Rule (NWPR) and return to the pre-2015 definition of WOTUS. However, as the agencies have also announced an intent to create a new definition in a subsequent rulemaking and many of the issues inevitably will impact both rulemakings, these comments include information relevant to both actions.

### **Need for proposed action and stable definition**

Recently in *Pasqua Yaqui Tribe v. EPA* (case 4:20-cv-00266 in the U.S. District Court for the District of Arizona) the NWPR has been effectively overturned and the agencies are already returning to a pre-2015 definition for the purposes of jurisdictional determinations. However, we believe that given the contentious and litigious nature of the definition of

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<sup>1</sup> September 3, 2021 AWWA comments on “Request for Recommendations: Waters of the United States”  
<https://www.regulations.gov/comment/EPA-HQ-OW-2021-0328-0317>

<sup>2</sup> October 4, 2021 AWWA federalism comments on “Notification of Consultation and Coordination on Revising the Definition of ‘Waters of the United States’”

WOTUS, that a rulemaking remains essential to codify this change in approach to the greatest extent possible.

Given the repeated changes to the definition of WOTUS over the last 7 years, many stakeholders are understandably concerned that additional changes may be difficult to sustain. As it has been long-standing practice and represents a reasonable middle ground amongst many of the key definitional issues, the agencies should formally repeal the NWPR, officially return to the pre-2015 rules, and then take no additional action (other than any required to conform to judicial decisions and other essential minor changes). This would not only return to a well-known (albeit imperfect) definition while assuring clarity on what is and is not jurisdictional but also allow all stakeholders to begin with implementation on a much earlier timeframe than should another rulemaking be needed.

### **EPA and USACE should reaffirm and retain pre-existing (pre-2015) rules**

A common theme woven across AWWA's prior comments is the need for EPA and USACE to balance the importance of the Clean Water Act as a critical tool for protecting sources of drinking water with the need for expedited and straightforward permitting to allow efficient water infrastructure construction and maintenance. To achieve this objective, EPA and USACE should retain the post-SWANCC<sup>3</sup> status quo practice (referred to in this proposal as "pre-2015 rules").<sup>4</sup> EPA and USACE can accomplish this by:

1. Completing the currently proposed rulemaking designed to return the post-SWANCC status quo (pre-2015) definition, and
2. Withdrawing the intent to further modify the definition of WOTUS other than modifying it through additional guidance based upon *Rapanos*.<sup>5</sup>

We believe this is the most appropriate mixture of protecting sources of drinking water and streamlining infrastructure and permitting among the options currently being considered.

Reaffirming the pre-2015 definition<sup>6</sup> is also appropriate from a cooperative federalism perspective. In a 2013 study, the Environmental Law Institute found that 36 states had at least one provision of state law that could limit their ability to regulate waters beyond those in the federal definition.<sup>7</sup> If the definition of WOTUS were to be limited as is currently enacted in the NWPR, in order to achieve the pre-2015 level of protection of sources of drinking water, most of these states would have to make substantial statutory and regulatory changes to retain environmental and public health protection. Requiring 36 states to undergo legislative and regulatory actions would require considerable state resources and lead to more variability in state requirements. This outcome would not be

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<sup>3</sup> Solid Waste Agency of Northern Cook Cty. v. Army Corps of Engineers, [531 U.S. 159](#) (2001).

<sup>4</sup> The following report contains detailed information on the "status quo", especially with regards to the Clean Water Rule being considered for repeal: Copeland, C. 5 January 2017. EPA and the Army Corps' Rule to Define "Waters of the United States" Congressional Research Service. Available at <https://fas.org/sgp/crs/misc/R43455.pdf>.

<sup>5</sup> *Rapanos v. United States and Carabell v United States*, [547 U.S. 715](#) (2006).

<sup>6</sup> As described in [82 FR 34899](#) or as anticipated to be proposed by EPA and USACE in the near future.

<sup>7</sup> Environmental Law Institute. May 2013. State Constraints: State-Imposed Limitations on the Authority of Agencies to Regulate Waters Beyond the Scope of the Federal Clean Water Act. Available at: <https://www.eli.org/sites/default/files/eli-pubs/d23-04.pdf>

ideal for water systems, states, EPA, USACE, or the public, especially when recognizing that watersheds do not follow political boundaries.

Moving forward, EPA and USACE should focus exclusively on updating the 1986/1988 regulatory definition<sup>8</sup> to fully conform to current practice, including post-SWANCC<sup>9</sup> and post-*Rapanos*<sup>10</sup> guidance (collectively, the pre-2015 definition). This pathway would lead to regulatory certainty by reducing the reliance on what many stakeholders consider to be a challenging set of legal opinions for decision-making. However, in achieving this regulatory certainty there would be a need only to fully conform this rule and associated guidance with the pre-2015 rule practice<sup>11</sup>, thereby continuing to provide protection of sources of drinking water while minimizing economic impacts, consistent with Executive Order 13990.<sup>12</sup>

### **EPA and USACE should assure regulatory certainty by withdrawing its intent to make further changes**

EPA and USACE have publicly announced their intent to undertake an additional rulemaking after this one, to create a new “durable definition” of Waters of the United States. Due to the repeated changing of the definition over the past 7+ years, EPA and USACE should withdraw this intent and instead use the pre-2015 definition as the permanent definition. Recognizing that EPA and USACE may proceed regardless, some of the below comments are designed to improve that process should it move forward.

### **Meaningful stakeholder engagement and appropriate analysis is essential**

An in-depth, open, and thorough stakeholder engagement process is essential to ensure consistent implementation for the final WOTUS definition. EPA should actively engage stakeholders across all impacted sectors and conduct meaningful technical discussion so that as the rule is finalized, associated guidance is prepared, and timely implementation can begin. While the underpinning of the rule must have a sound scientific basis, EPA and USACE should be sure that the nuts and bolts of implementation are fully considered and socialized in the course of the rulemaking. During the development of the NWPR, there was limited information presented on how big of a change to current practice the proposed rule will create, and therefore the analysis of the costs and benefits of the change, as well as the impacts on various sectors including water utilities, are not clear. Should EPA and USACE proceed with developing any definition beyond returning to the pre-2015 rules, this analysis will also need to entail whether source water quality of drinking water supplies will be adversely impacted, and if so, carefully weigh those costs against the benefits of the proposal.

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<sup>8</sup> 40 CFR 230.3(s), as of February 6, 2018.

<sup>9</sup> 2003 Joint legal memorandum (68 FR 1995, January 15, 2003)

<sup>10</sup> USEPA. 2 December 2008. Clean Water Act Jurisdiction Following the U.S. Supreme Court’s Decision in *Rapanos v. United States & Carabell v. United States*. Available at [https://www.epa.gov/sites/production/files/2016-02/documents/cwa\\_jurisdiction\\_following\\_rapanos120208.pdf](https://www.epa.gov/sites/production/files/2016-02/documents/cwa_jurisdiction_following_rapanos120208.pdf).

<sup>11</sup> As described in 82 FR 34899.

<sup>12</sup> Executive Office of the President. January 20, 2021. EO 13990: “Executive Order on Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis”. 86 FR 7037.

### **EPA and USACE should consider delayed implementation**

Should EPA and USACE move forward with any definition other than a return to the pre-2015 rules, they should consider a delayed implementation of the new definition. This will allow time for states to adjust their statutes and regulations to address changes to federal environmental and public health protections and will give impacted entities (including water sector utilities) time to analyze the potential impacts of the change and take action to address any specific concerns that will arise from it. This is the best pathway forward to afford the most appropriate protections to both federal and state waters at the lowest overall cost to states.

### **EPA and USACE should provide exemptions necessary for water infrastructure**

Water utilities own and operate critical infrastructure to withdraw, treat, transport, store and return water in the provision of drinking water, reuse, wastewater, and storm water services. Pre-2015 practice did not treat all water system infrastructure as subject to WOTUS determinations so as to avoid potentially duplicative or inappropriate requirements where said services are managed through other means. Constructed conveyance structures, waste treatment systems, and other water infrastructure (other than impoundments, which generally are jurisdictional) could be misinterpreted as being jurisdictional under the 2015 Clean Water Rule, and there is risk that this could occur inadvertently occur if not explicitly addressed in the return to pre-2015 rules and in any future definition. Therefore, it should be clearly noted through an exemption so that constructed conveyance structures, drinking water treatment, wastewater treatment systems, and the waste treatment systems associated with water treatment are non-jurisdictional. Inappropriate application of a jurisdictional determination to water infrastructure could cause challenges to infrastructure maintenance and upgrades. Waste treatment systems have been included in NWPR and in previous exemptions (33 CFR 328.3(a) and 40 CFR 122.2).

This request for an exemption does not include new capital projects that are constructed in WOTUS, which should take appropriate steps to minimize or eliminate adverse impacts to waterbodies and wetlands. However, once operational, water infrastructure is best managed through other mechanisms and should be specifically excluded from this definition.

### **EPA and USACE should continue to review and update nationwide permits**

EPA and USACE should review and potentially expand their nationwide permits for activities by water providers (to the extent that clear jurisdictional exemptions are not in place and for water sector activities that cannot be exempted) as a mechanism to assure limited adverse impact to water sector utilities while assuring environmental protection. Although some changes have already been made<sup>13</sup> after a proposal<sup>14</sup> for which AWWA provided comments<sup>15</sup>, there may be additional opportunities to adjust the permits to assure

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<sup>13</sup> Reissuance and Modification of Nationwide Permits. [86 FR 2744](#)

<sup>14</sup> Proposal to Reissue and Modify Nationwide Permits. [85 FR 57298](#)

<sup>15</sup> <https://www.regulations.gov/comment/COE-2020-0002-0319>

that any changes to the definition of WOTUS does not inadvertently alter their applicability or limit the ability to use them. This would help to assure best practices to limit adverse impact while preventing delays to water infrastructure maintenance, repair, replacement, and construction. A clear “win” for all entities involved, potentially expanding these permits will:

- Ensure regulatory certainty at the same time as environmental and public health protection.
- Reduce regulatory burden on water sector utilities while deploying best practices.
- Allow regulators to focus their limited resources on site-specific activities.

### **EPA and USACE’s Pathway Forward**

EPA and USACE should retain the reasonable balance struck in post-SWANCC with post-*Rapanos* guidance by re-affirming the pre-2015 rules. Should EPA and USACE proceed with further revising the definition beyond this, we strongly encourage the inclusion of provisions that will limit the impacts to water utilities, including an exemption for many water infrastructure operations, a review and possible expansion of nationwide permits, and delayed implementation of any changes as to waters that are jurisdictional under the rule.

EPA and USACE’s attention to these important issues is essential and greatly appreciated. AWWA is grateful for the opportunity to comment on this important proposed rule. Please feel free to contact Adam Carpenter (202-628-8303, [acarpenter@awwa.org](mailto:acarpenter@awwa.org)) if you have any questions regarding these comments.

Respectfully,

FOR THE AMERICAN WATER WORKS ASSOCIATION



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**Who is AWWA?**

*The American Water Works Association (AWWA) is an international, nonprofit, scientific and educational society dedicated to providing total water solutions assuring the effective management of water. Founded in 1881, the Association is the largest organization of water supply professionals in the world. Our membership includes more than 4,500 utilities that supply roughly 80 percent of the nation's drinking water and treat almost half of the nation's wastewater. Our 50,000-plus total membership represents the full spectrum of the water community: public water and wastewater systems, environmental advocates, scientists, academicians, and others who hold a genuine interest in water, our most important resource. AWWA unites the diverse water community to advance public health, safety, the economy, and the environment.*