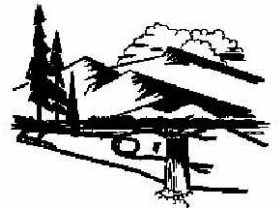




# Department of Environmental Quality

To protect, conserve and enhance the quality of Wyoming's environment for the benefit of current and future generations.



Mark Gordon, Governor



Todd Parfitt, Director

September 2, 2021

United States Environmental Protection Agency  
1200 Pennsylvania Avenue, N.W.  
Washington, DC 20460

United States Army Corps of Engineers  
108 Army Pentagon  
Washington, DC 20310

Submitted online via: <http://www.regulations.gov>

Re: Document ID No. EPA-HQ-OW-2021-0328: Notice of Public Meetings Regarding "Waters of the United States"; Establishment of a Public Docket; Request for Recommendations

To Whom It May Concern,

Please accept the following comments in response to the August 4, 2021 Federal Register notice that solicited feedback to revise the definition of "waters of the United States" (WOTUS). The U.S. Environmental Protection Agency and the Department of the Army, hereinafter referred to as the "agencies," intend to initiate two rulemakings pertaining to WOTUS. The first is a repeal of the 2020 Navigable Waters Protection Rule (NWPR) and recodification of the regulatory definition of WOTUS that existed prior to the 2015 Clean Water Rule, as amended to be consistent with relevant Supreme Court decisions. Following this action, the agencies intend to develop a new definition of WOTUS.

As a co-regulator in implementing the Clean Water Act (CWA), the Wyoming Department of Environmental Quality (WDEQ) is responsible for the implementation of the NPDES program under Section 402; adoption of state water quality standards, water quality assessments, and TMDLs under Sections 303 and 305; water quality certifications under Section 401; and addressing nonpoint source pollution under Section 319; in addition to implementing state water quality requirements under the Wyoming Environmental Quality Act (WEQA).

The agencies state in the notice, without a convincing rationale, that they have "substantial and legitimate concerns that the NWPR did not appropriately consider the [harmful] effect of the revised definition of "waters of the United States" on the [chemical, physical and biological] integrity of the nation's waters." Substantial concerns without rational support do not alone establish cause for repeal and replacement of the NWPR. Similar to the 2015 Clean Water Rule, we are concerned that the agencies' current proposal represents another attempt to expand federal authority over matters most appropriately handled by states. The WDEQ therefore does not support the agencies' proposal to repeal and replace the NWPR.

### Revise rather than repeal the Navigable Waters Protection Rule

The current NWPR is more consistent than the 2015 Clean Water Rule with the limits of federal authority envisioned by Congress and the three United States Supreme Court decisions that established precedent in the definition of WOTUS: *Rapanos v. United States*, 547 U.S. 715 (2006); *Solid Waste Agency of Northern*

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*Cook County v. United States*, 531 U.S. 159 (2001) (SWANCC); and *United States v. Riverside Bayview Homes, Inc. et al.*, 474 U.S. 121, (1985). In addition, the NWPR increased clarity and regulatory certainty on the criteria used to define WOTUS and better recognizes the state-federal co-regulation of surface water quality in the protection of the nation's waters. Although the NWPR is an improvement over prior rules, it would benefit from some revisions to the definition of WOTUS that pertains to intermittent waters that better align with judicial precedent and regional differences. We encourage the agencies to build on the existing rule with reasonable revisions that provide more clarity and certainty but do not expand federal jurisdiction. To aid in this we offer the following comments.

### **Implementation**

The implementation of the NWPR has been straightforward and effective in Wyoming. Compared to the ill-defined 'significant nexus' analyses under the pre-2015 federal regulatory regime, the NWPR's 'typical year' analysis for determining federal jurisdiction has been largely implementable since it's grounded in the hydrologic processes and direct connectivity of surface waters and makes practical sense in arid states like Wyoming. In contrast, the 'significant nexus' test under the 1986/1998 rule with the 2008 *Rapanos* guidance was a difficult concept to implement in a regulatory setting. This was due in large part to inconsistent interpretation combined with professional bias in assessing the flow and ecological characteristics as well as functions for each surface water along with preferential weight given to scientific interpretation over statutory language and judicial precedent. This is because the 'significant nexus' test was ambiguous and based only on the concurring opinion in *Rapanos* while ignoring the plurality opinion that a water must have a direct surface water connection and contribute 'relatively permanent flow' to a navigable water.

We advocate geospatial mapping of WOTUS. The agencies note they are interested in developing tools to assist in determining jurisdiction. To this end, the WDEQ encourages the development, through federal-state partnerships, of publicly-available national geospatial mapping tools as proposed under the prior administration. Though technical and procedural challenges exist, phased-development of a national WOTUS map certainly is feasible. Mapping the traditional navigable waters, territorial seas, and many of the excluded waters would be a large step forward, followed by the more complex jurisdictional waters such as tributaries, lakes and ponds, and finally adjacent wetlands. Such maps would improve regulatory certainty, consistency and transparency, and also recognize and embrace cooperative federalism. These maps should be periodically updated (e.g., every 5 years to be consistent with the effective duration of jurisdictional determinations) using the latest scientific data to reflect long-term changes in the hydrology of the nation's waters.

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

Wyoming has taken positive actions in response to the NWPR. The WDEQ is currently developing a permitting process based on the WEQA to cover dredged and fill discharges to non-WOTUS waters. The correction in federal jurisdiction provided by the NWPR, particularly with respect to the clear exclusions of ephemeral features and non-adjacent wetlands, provided the opportunity for the WDEQ to follow through on development of such a process. Anticipated for release in 2022, the WDEQ has developed a state general permit for discharges of dredged or fill material to non-WOTUS waters in Wyoming. Through a state-federal partner agreement, the U.S. Army Corps of Engineers (Corps) will continue to conduct jurisdictional determinations for all waters in the state, though will provide determinations of non-WOTUS waters to the WDEQ and the applicant, whereby proposed dredge/fill discharges on that water will be covered under the state general permit. Our collaborative relationships with the Corps, other state and federal partners, and the regulated community helped accelerate the process of developing a state dredge/fill permit. This demonstrates that states can provide the necessary protections under state statutes to ensure protection of surface water quality.

We do not support re-insertion of the interstate water category. It is our position that the interstate water category contributed to long-standing confusion in the definition of WOTUS. The term is a relic of the original Water Pollution Control Act of 1948 that was subsequently replaced with the term ‘navigable waters’ in the 1972 CWA amendments, which is not constrained by state political boundaries. The *Rapanos* plurality opinion recognized that all waters, regardless of whether they cross state political boundaries, must have a direct hydrologic connection and relatively permanent flow to navigable waters to be a WOTUS. To re-insert the obsolete ‘interstate water’ as a jurisdictional category would only add confusion and detract from the fundamental requirements for a water to be a WOTUS.

### **Science**

We support the integration of science in development of WOTUS within regulatory constraints. The agencies are requesting identification of relevant scientific literature about how surface waters maintain the integrity of the nation’s waters. Though we support and encourage the use of the most relevant science to help inform the definition of WOTUS, it must be balanced with the constraints established by statute and judicial precedent. An unbalanced approach risks going beyond the intent and scope of the CWA. A case in point was the 2015 Clean Water Rule, where the EPA’s 2015 Report *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence* was given preferential weight over case law in developing a definition of WOTUS. We believe that the NWPR generally strikes the appropriate balance between the use of relevant science and conforming to the limits set forth by Congress and the Supreme Court.

### **Environmental Justice**

WOTUS is not the appropriate venue to address environmental justice concerns. The concept of environmental justice is an important element of sound environmental policies and processes, though we do not believe the definition of WOTUS is the appropriate regulation for its integration. As already mentioned, the WOTUS rule should be defined by applicable hydrological, physical, and legal precedent.

### **Climate implications**

Appropriately defined WOTUS are adaptable to climate change. The definition of WOTUS does not determine how environmental issues should be addressed, only whether the sources, causes and effects of those issues fall under the CWA or are subject to protections under state statutes. A properly constructed definition of WOTUS will be resilient to changes in surface hydrology and connectivity to navigable waters. To integrate factors that consider how climate change affects jurisdiction or to designate groups of sensitive waters as WOTUS in the face of climate change would lead to confusion and potential federal overreach beyond what Congress and the holdings of the Supreme Court envisioned.

### **The scope of jurisdictional tributaries**

We support the current scope of jurisdiction under the NWPR with revisions for intermittent tributaries. Relative to past rules, the NWPR advanced clearer distinction between navigable waters that are WOTUS and regulated under the CWA versus non-navigable waters that are non-WOTUS. We support the current rule’s scope as it conforms to both the plurality and concurring opinions in *Rapanos* as well the decision in *SWANCC*. The precedents set forth in *Rapanos* and *SWANCC* upheld that traditionally navigable waters and territorial seas are WOTUS. Moreover, these cases clarified that connections to traditionally navigable waters must be physical, not solely ecological, and that for a tributary to be a WOTUS, it must have “relatively permanent flow” (i.e., perennial and some intermittent waters). This requirement integrates the concurring opinion in *Rapanos* that a substantial and non-speculative significant nexus must exist between a tributary and a traditionally navigable water. It is therefore clear and recognized under the current rule that ephemeral tributaries are not WOTUS under the holdings of *Rapanos* and *SWANCC*. A redefinition of WOTUS that goes beyond these precedents or is incongruent with *Rapanos* or *SWANCC* is an unwarranted expansion

of federal authority beyond the principal objectives of the CWA and an infringement on state’s rights to regulate surface water quality with no rational connection to traditionally navigable waters.

Though perennial tributaries with continuous hydrologic connections to traditionally navigable waters clearly are WOTUS, the plurality in *Rapanos* opined that some “seasonal rivers” may have “relatively permanent flow.” Through inference and considering the concurring opinion in *Rapanos*, a “seasonal river” could be an intermittent water as the current rule recognizes. Recognizing this, and prior to the 2015 Clean Water Rule, federal agencies asserted jurisdiction over tributaries that contributed perennial or seasonal flow (e.g., typically at least three months) to traditionally navigable waters. However, the ambiguous definition of “intermittent” and its referenced definition of “snowpack” along with an absence of a flow duration component in the current rule, taken at their broadest interpretations, effectively results in the categorical inclusion of all intermittent waters tributary to navigable waters as WOTUS. This represents an inconsistency with Supreme Court precedent and an unnecessary expansion of federal jurisdiction.

The clearest and most defensible solution that aligns with both the plurality and concurring opinions in *Rapanos* and past agency practice is to include a duration component of continuous flow for at least three consecutive months (equivalent to a season) during a calendar year within the definition of ‘intermittent’. The flow duration component provides a much-needed quantification of “relatively permanent flow” necessary to establish a significant nexus with a navigable water and draw a clear line between jurisdictional intermittent waters and non-jurisdictional waters with impermanent flow (e.g., ephemeral waters and intermittent waters with less than three consecutive months of continuous flow).

For any new rulemaking, we also recommend including provisions for cooperative state-federal development of regionally-specific definitions of intermittent that could replace our recommended default three consecutive month definition where appropriate. This would recognize regional differences in what constitutes an ‘intermittent’ water, incorporate regional science, and foster state and federal collaboration in the spirit of cooperative federalism. As part of this collaboration, state-federal partners should develop a standardized decision process for determining the regional definition of “relatively permanent flow.”

### **The scope of jurisdictional ditches**

We support the NWPR’s treatment of ditches in determining federal jurisdiction.

### **The scope of adjacency**

We support the NWPR’s scope and definition of adjacency. The NWPR utilizes the term adjacency only in reference to determining whether a wetland is WOTUS. The WDEQ supports the current rule’s definition of adjacent wetlands as those that physically abut, are separated by a natural berm or similar feature, are inundated by, or have a direct hydrologic connection to another WOTUS. This commonsense and clear definition of adjacency falls in line with *Riverside Bayview Homes*, where wetlands adjacent to or abutting navigable waters are WOTUS while conforming with *SWANCC* that geographically isolated waters are not WOTUS. The *Rapanos* plurality opinion further supports the inclusion of physically abutting in the definition as “wetlands are waters of the United States if they bear the ‘significant nexus’ of physically connection.” In our experience, this definition has improved clarity over prior rules regarding what wetlands fall under state versus federal jurisdiction, increases transparency with applicants, and is easily implemented by both state and federal agencies. Redefining adjacency to apply to other waters or adding arbitrary or case-specific criteria into a national definition would only introduce ambiguity and regulatory uncertainty in defining whether a waterbody is WOTUS. Moreover, any inclusion of distance-based criteria in the definition of adjacent wetlands would conflict with *Rapanos*, which reaffirmed the holding in *SWANCC* that physically isolated waters are not jurisdictional regardless of their proximity to a jurisdictional water.

### **Exclusions from the definition**

We support the NWPR’s exclusions from the definition of WOTUS and dissuade the agencies from pre-determined outcomes. The categorical exclusions of groundwater, ephemeral features, non-adjacent wetlands, and other non-jurisdictional waters provide clear separation and certainty that these waters are not WOTUS and align with Congressional intent and objectives of the CWA and Supreme Court precedent. In particular, the categorical exclusion of ephemeral waters from WOTUS in the NWPR aligns with our past recommendations and conforms to the precedents set forth in *Rapanos* that for a tributary to be a WOTUS, it must have relatively permanent flow, which ephemeral streams do not. The benefits of these explicit exclusions, particularly ephemeral features, have increased regulatory efficiency, accountability, and decision making among state and federal partners. Moreover, these explicit exclusions have improved communication among stakeholders to secure the appropriate federal or state permit for protection of surface water quality.

It is concerning that the agencies are asking for feedback on “how to identify ephemeral streams that should be jurisdictional as tributaries, as they are the dominant stream type in the arid West and in many headwater regions.” Based on this request, it appears the agencies have already determined an outcome for their forthcoming redefinition of WOTUS – an expansion of jurisdiction into ephemeral streams. Including any ephemeral waters as WOTUS would be speculative, go beyond the limits of federal jurisdiction that the plurality and concurring opinions in *Rapanos* envisioned, and would interfere with the State’s authority to regulate surface water quality in these streams with no meaningful connection to traditionally navigable waters.

### **Economic analysis**

An integral component to any proposed rulemaking and absent from the agencies’ proposal is an analysis of the economic impacts associated with redefining WOTUS. It is certain that any new WOTUS rule that expands federal jurisdiction or creates regulatory uncertainty will result in increased implementation costs to the State and other private and public interests, but these impacts have not been evaluated by the agencies. Expanded federal jurisdiction would increase implementation costs to States that pertain to establishing standards under Section 303 of the CWA, discharge permitting under Section 402, and issuance of water quality certifications under Section 401. Without commensurate compensation for implementation, the agencies’ expanded redefinition of WOTUS would constitute an unfunded mandate to States in their obligations under the CWA.

### **Closing Statement**

In closing, the WDEQ does not support the agencies’ proposal to repeal the NWPR and replace with a new definition of WOTUS. The agencies assert, without evidence, that there have been harmful effects to the nation’s waters with implementation of the NWPR, though we are unaware of any demonstrable harm from its implementation in Wyoming. The notice’s request for feedback on how to identify ephemeral streams as jurisdictional underscores our concern that the agencies have a pre-determined outcome of expanding CWA jurisdiction beyond that established by the NWPR. Finally, there is an economic cost to the agencies’ proposal that has not been evaluated and may represent an unfunded mandate to states if implemented.

Though we believe the NWPR better comports with the CWA and judicial precedent than the previous WOTUS rules by achieving a more reasonable federal-state balance in the protection of the nation’s waters, there is room for improvement pertaining to intermittent waters. Therefore, the WDEQ urges the agencies to reconsider, in consultation with all states, their proposed path and instead build on the foundation established by the NWPR with reasonable revisions that improve clarity and regulatory certainty without an expansion of federal authority into waters that are best managed by states as co-regulators of water quality.

Thank you for the opportunity to comment and for your consideration. We look forward to working with you during the upcoming Federalism consultations, state dialogues and regional roundtable discussions on these proposed rulemakings.

Sincerely,

A handwritten signature in blue ink, appearing to read "Todd Parfitt". The signature is stylized with a large loop at the end.

Todd Parfitt, Director

TP/JZ/DW/EGH/cf

cc: Jennifer Zygmunt, Administrator, Water Quality Division, WDEQ  
Beth Callaway, Governor's Office  
Nicole Budine, Attorney General's Office