



## ACTION ALERT: Proposed Clean Water Rule Change

Comment Deadline: Monday, April 15, 2019

USEPA Docket No: Docket No. EPA-HQ-2018-0149

Submit Comments at:

<https://www.regulations.gov/comment?D=EPA-HQ-OW-2018-0149-0003>

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### Summary:

*Per the USEPA and US Army Corps of Engineers* - The Environmental Protection Agency and the Department of the Army ("the agencies") are publishing for public comment a proposed rule defining the scope of waters federally regulated under the Clean Water Act (CWA). This proposal is the second step in a comprehensive, two-step process intended to review and revise the definition of "waters of the United States" consistent with the Executive Order signed on February 28, 2017, "Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the 'Waters of the United States' Rule." This proposed rule is intended to increase CWA program predictability and consistency by increasing clarity as to the scope of "waters of the United States" federally regulated under the Act. This proposed definition revision is also intended to clearly implement the overall objective of the CWA to restore and maintain the quality of the nation's waters while respecting State and tribal authority over their own land and water resources.

*Per OWA and Water Quality Professionals Nationwide* – This proposed rule change removes federal protection from many wetlands and ephemeral and intermittent streams, lowering our national standard and leaving the responsibility for these wetlands and headwater streams to each individual state – only some of which are prepared to create or expand programs to take on this additional responsibility/regulatory work load. Most environmental professionals are gravely concerned about the reduction in protections and the implications to the health of our streams, rivers, wetlands and lakes. The OWA joins The Nature Conservancy, the Ecological Society of America, the American Fisheries Society, the Society for Ecological Restoration, the American Society of Landscape Architects, the Society of Wetland Scientists, Sierra Club, Ohio Environmental Council, and many other professional and environmental organizations in opposing this proposed rule change. To get a sense of the impact to the rollback of federal protections, OWA recommends you review this user-friendly analysis compiled by St. Mary's University of Minnesota:

<http://smumn.maps.arcgis.com/apps/Cascade/index.html?appid=f3de6b30c0454c15ac9d3d881f18ae33>

Full details from Federal Register can be found here:

<https://www.federalregister.gov/documents/2019/02/14/2019-00791/revised-definition-of-waters-of-the-united-states>

## Recommended Talking Points:

- EPA worked from 2010 to 2015 to analyze the importance of wetlands and streams to downstream waters. Their report cited over 1,200 peer-reviewed publications. Additionally, their report was peer-reviewed three times. The report concluded that ephemeral and intermittent streams strongly influence downstream waters and states “The literature clearly shows that wetlands and open waters in riparian areas and floodplains are physically, chemically, and biologically integrated with rivers via functions that improve downstream water quality.” It also concluded that “Wetlands and open waters in non-floodplain landscape settings provide numerous functions that benefit downstream water integrity.” An update of this report was published in 2018 after being peer-reviewed.
- Wetlands remove sediments and contaminants, provide habitats, protect against floodwaters and erosion, and reduce carbon. The EPA’s Science Advisory Board recognized that wetlands influence downstream waters in many different ways. One aspect of how wetlands and downstream waters are connected is through relatively permanent surface water connections. But many wetlands are critical to downstream waters without surface water connections.
- A proposed rule to the Clean Water Act is considering relying on relatively permanent surface water connections alone. If this occurs, many critical wetlands will be stripped of protections. When wetlands are no longer protected, water supplies and the health of downstream communities are jeopardized. The Clean Water Act’s intention is to restore and maintain the chemical, physical, and biological integrity of the nation’s waters. But this rule limiting jurisdiction on wetlands does the opposite.
- Under this new WOTUS rule, wetlands adjacent to ephemeral streams and non-floodplain wetlands, including prairie potholes, Carolina bays, and vernal pools, are no longer considered waters. Many floodplain wetlands have shallow subsurface flow rather than a relatively permanent surface water connection. Additionally, waters separated by roads or berms are no longer considered connected and slope wetlands may not be jurisdictional. Streams that only run off of rainwater runoff will not be regulated, even though many streams rely greatly or completely on rain water drainage. An estimated 50 percent of wetlands will lose protection.
- This proposed rule directly states jurisdiction must be based on written law and science should not be used. It’s claimed this proposal will eliminate fact-intensive, case-by-case analyses for new projects, but due to the process described in this rule, ambiguity is higher and therefore there will be more need for site visits.
- The EPA’s own website states, “Wetlands are among the most productive ecosystems in the world, comparable to rain forests and coral reefs. An immense variety of species of microbes, plants, insects, amphibians, reptiles, birds, fish and mammals can be part of a wetland ecosystem...Wetlands can be thought of as ‘biological supermarkets’. They provide great volumes of food that attract many animal species. These animals use wetlands for part of or all of their life-cycle. Dead plant leaves and stems break down in the water to form small particles of organic material called ‘detritus’. This enriched material feeds many small aquatic insects, shellfish and small fish that are food for larger predatory fish, reptiles, amphibians, birds and mammals.” A 1991 study of the 595 federally endangered or threatened plant and animal species found that 43 percent are considered wetland dependent. Approximately one-third of the 1,900 bird species in North America require wetlands for parts of their life cycle and 80 percent of the federally endangered or threatened bird species are in the category of being wetland dependent. Additionally, the EPA has a website titled, “Why are Wetlands Important”.
- The rule states that federal protection lost through the Clean Water Act will be replaced by state governments. In 2015, the Association of State Wetland Managers conducted a study on state wetland programs across the country. The study found that 31 states rely on the Corps for administration and enforcement of their State Programmatic General Permits and 27 states rely on the Corps for all aspects of the state’s wetland programs. Additionally, the EPA has only approved 25 states’ wetland programs and 15 states have no plans for an approvable wetland program. Further, only 5 states have developed a program to protect the large number of wetlands that fell out of federal jurisdiction since the 2001 SWANCC decision. Also, under the Clean Water Act there are no dedicated sources of funding for state wetland program implementation.

## TIPS FOR SUBMITTING EFFECTIVE COMMENTS\*

### Overview

A comment can express simple support or dissent for a regulatory action. However, a constructive, information-rich comment that clearly communicates and supports its claims is more likely to have an impact on regulatory decision making.

These tips are meant to help the public submit comments that have an impact and help agency policy makers improve federal regulations.

### Summary

- ✓ Read and understand the regulatory document you are commenting on
- ✓ Feel free to reach out to the agency with questions
- ✓ Be concise but support your claims
- ✓ Base your justification on sound reasoning, scientific evidence, and/or how you will be impacted
- ✓ Address trade-offs and opposing views in your comment
- ✓ There is no minimum or maximum length for an effective comment
- ✓ The comment process is not a vote – one well supported comment is often more influential than a thousand form letters

### Detailed Recommendations

1. Comment periods close at 11:59 eastern time on the date comments are due - begin work well before the deadline.
2. Attempt to fully understand each issue; if you have questions or do not understand a part of the regulatory document, you may ask for help from the agency contact listed in the document.

**Note:** Although the agency contact can answer your questions about the document's meaning, official comments must be submitted through the comment form.

3. Clearly identify the issues within the regulatory action on which you are commenting. If you are commenting on a particular word, phrase or sentence, provide the page number, column, and paragraph citation from the federal register document.
  - a. If you choose to comment on the comments of others, identify such comments using their comment ID's before you respond to them.

4. If a rule raises many issues, do not feel obligated to comment on every one – select those issues that concern and affect you the most and/or you understand the best.
5. Agencies often ask specific questions or raise issues in rulemaking proposals on subjects where they are actively looking for more information. While the agency will still accept comments on any part of the proposed regulation, please keep these questions and issues in mind while formulating your comment.
6. Although agencies receive and appreciate all comments, constructive comments (either positive or negative) are the most likely to have an influence.
7. If you disagree with a proposed action, suggest an alternative (including not regulating at all) and include an explanation and/or analysis of how the alternative might meet the same objective or be more effective.
8. The comment process is not a vote. The government is attempting to formulate the best policy, so when crafting a comment it is important that you adequately explain the reasoning behind your position.
9. Identify credentials and experience that may distinguish your comments from others. If you are commenting in an area in which you have relevant personal or professional experience (i.e., scientist, attorney, fisherman, businessman, etc.) say so.
10. Agency reviewers look for sound science and reasoning in the comments they receive. When possible, support your comment with substantive data, facts, and/or expert opinions. You may also provide personal experience in your comment, as may be appropriate. By supporting your arguments well you are more likely to influence the agency decision making.
11. Consider including examples of how the proposed rule would impact you negatively or positively.
12. Comments on the economic effects of rules that include quantitative and qualitative data are especially helpful.
13. Include the pros and cons and trade-offs of your position and explain them. Your position could consider other points of view, and respond to them with facts and sound reasoning.
14. If you are uploading more than one attachment to the comment web form, it is recommend that you use the following file titles:
  - Attachment1\_<insert title of document>
  - Attachment2\_<insert title of document>
  - Attachment3\_<insert title of document>This standardized file naming convention will help agency reviewers distinguish your submitted attachments and aid in the comment review process.

15. Keep a copy of your comment in a separate file – this practice helps ensure that you will not lose your comment if you have a problem submitting it using the Regulations.gov web form.

## Form Letters

Organizations often encourage their members to submit form letters designed to address issues common to their membership. Organizations including industry associations, labor unions, and conservation groups sometimes use form letters to voice their opposition or support of a proposed rulemaking. Many in the public mistakenly believe that their submitted form letter constitutes a “vote” regarding the issues concerning them. Although public support or opposition may help guide important public policies, agencies make determinations for a proposed action based on sound reasoning and scientific evidence rather than a majority of votes. A single, well-supported comment may carry more weight than a thousand form letters.

\* Throughout this document, the term “*Comment*” is used in place of the more technically accurate term “*Public Submission*” in order to make the recommendations easier to read and understand.

**Disclaimer:** This document is intended to serve as a guide; it is not intended and should not be considered as legal advice. Please seek counsel from a lawyer if you have legal questions or concerns.

IMPORTANT RECOMMENDATION!  
PLEASE PERSONALIZE YOUR  
LETTER, USING YOUR OWN  
WORDS, BUT GLEANING  
INFORMATION AND INSIGHTS AS  
NEEDED FROM THE TALKING  
POINTS PROVIDED.