



December 14, 2021

VIA EMAIL

The Honorable Radhika Fox
Assistant Administrator
Office of Water
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue NW
Washington, DC 20460

The Honorable Michael L. Connor
Assistant Secretary of the Army
for Civil Works
Department of the Army
108 Army Pentagon
Washington, DC 20310-0104

Attention: Docket Number EPA-HQ-OW-2021-0602

Re: Request for Extension of Comment Period Deadline

Dear Ms. Fox and Mr. Connor:

On December 7, 2021, the U.S. Environmental Protection Agency (“EPA”) and the Department of the Army (“Army”) (or, collectively, “agencies”) published a proposal in the Federal Register to define the term “Waters of the United States” (“WOTUS”) under the Clean Water Act. 86 Fed. Reg. 69372. The agencies are providing the public until February 7, 2022 – only 60 days after publication of the notice in the *Federal Register* – to provide comments on the proposal. For the reasons outlined below, the Waters Advocacy Coalition respectfully requests that the agencies extend the comment period by an additional 90 days – or by 60 days after the conclusion of the regional roundtables.

The Waters Advocacy Coalition (“WAC”) represents a large cross-section of the nation’s construction, real estate, mining, agriculture, manufacturing, energy, and wildlife conservation sectors, all of which are vital to a thriving national economy. How the term “waters of the United States” is defined has significant consequences for the agencies and their administration of the Clean Water Act’s regulatory, permitting, and enforcement programs, as well as for the public at large, which may be subject to civil and criminal penalties, including jail, for misconstruing the scope of the Clean Water Act’s jurisdiction. The struggle to define “waters of the United States” has already lasted decades, involved multiple administrations, and resulted in three Supreme Court decisions. You have noted in public statements and in testimony before Congress a desire to establish a regulatory definition that is durable and avoids the “ping pong” between changes in administration.

The current 60-day comment period does not provide a meaningful opportunity for interested stakeholders and the public at large to review all of the supporting documents in the docket (which were not all available when the comment period was opened) and comment on the

proposed regulation, the Economic Analysis, and the Technical Support Document .¹ A clear, easy-to-implement “waters of the United States” definition is essential to WAC’s members and the nation as a whole, and the process of establishing such a definition is too important to be rushed.

President Biden issued Executive Order 13990 (“Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis”) on his first day in office, directing agency heads to review and as appropriate revise or revoke regulations and other actions taken by the previous administration. On June 9, 2021, the agencies announced their plans to undertake a two-step series of rulemakings first to rescind the previous administration’s Navigable Waters Protection Rule and replace it with a temporary definition based on the 1986/88 regulatory definition and updated to reflect recent case law and second to issue a subsequent rule with a new regulatory definition. In August and September, the agencies hosted a series of public listening sessions to hear from stakeholders on their perspectives for how “waters of the United States” should be defined, and have since solicited nominations to participate in a series of roundtables focused on identifying regional similarities and differences that should be considered as part of a new “waters of the United States” definition. The deadline for submitting nominations to participate in the regional roundtables was extended almost a month from November 3, 2021, to December 1, 2022. The roundtables are now expected to take place in early 2022 and are intended to focus on issues to address in a second rulemaking.

While such attempts to engage the regulated community and other stakeholders throughout the regulatory process are important, they do not substitute for a meaningful opportunity to comment on a proposed regulation itself. Executive Order 12866 indicates that the obligation to provide the public with a meaningful opportunity to comment on a proposed regulation is separate from and in addition to other forms of public engagement during the rulemaking process. In fact, the schedule the agencies have established for the regional roundtables overlaps with and is occurring in the midst of the time period when stakeholders are also being asked to comment on the proposed regulation. These competing invitations to participate in overlapping public engagement processes may frustrate the agencies’ ability to obtain meaningful input on the proposed regulation from diverse stakeholders or stakeholders with limited resources, including many individual members of the associations that comprise WAC. An extension to the comment period would allow the public to focus on reviewing the proposed regulatory text and docket separate from preparing for and participating in the regional roundtables.

Although the agencies have repeatedly claimed that the Navigable Waters Protection Rule was threatening widespread environmental harm, there is no urgency at present time to justify the abbreviated rulemaking timeframe the agencies have established. In fact, the agencies halted implementation of the Navigable Waters Protection Rule in early September, which resulted in a

¹ As described in section 6 of Executive Order 12866 (“Regulatory Planning and Review”), agencies are expected to “afford the public a meaningful opportunity to comment on any proposed regulation, which in most cases should include a comment period of not less than 60 days.” It is clear from the language of Executive Order 12866 that comment periods longer than 60 days may be necessary for the public to have a meaningful opportunity to comment on a proposed regulation.

reinstatement of the 1986/88 definition that had been in place for nearly three decades.² The agencies also took nearly 10 months since Executive Order 13990 was issued before proposing this rule, so it is unclear why two to three additional months of public comment period would prejudice the agencies. The preamble to the proposed rule also includes cursory statements about the purported environmental harms caused by the Navigable Waters Protection Rule, which will warrant a comprehensive review of the docket for supporting documentation and independent review by interested stakeholders.

Although the agencies have attempted to describe the proposed regulation as merely a reinstatement of the 1986/88 regulatory definition updated to reflect the agencies' interpretations in light of recent case law, such statements bely the potential scope of the proposed changes. The proposed regulatory text includes multiple changes from the 1986/88 regulations, but it is not always evident how such changes reflect developments in the caselaw or are supported by the record prepared by the agencies. The agencies also make numerous statements throughout the preamble concerning their interpretation of vague, undefined terms in the regulatory text and various alternatives for how they might implement the rule. And of course, the agencies solicit comment on more than 100 specific questions in the preamble of the *Federal Register* notice. It goes without saying that the proposed rule (and ultimately final rule) is more complex than a mere refresh of the 1986/88 regulations. According to the agencies, the proposal also reflects developments in the science since the "Connectivity Report" and an updated economic analysis, both of which require close review and comparison to the record for prior WOTUS rulemaking efforts.

The agencies cannot reasonably refuse to extend the comment period on grounds that additional time would delay their ability to issue a temporary replacement rule, when the current regulatory definition is the *status quo ante* and not the Navigable Waters Protection Rule.

Finally, there is ample precedent for extending a public comment period that is insufficient, including recent history involving the definition of "waters of the United States." For example, the Obama administration first published a proposed definition – with a notice totaling 88 pages – in the *Federal Register* on April 21, 2014. 79 Fed. Reg. 22187. That notice initially gave the public 90 days to comment, until July 21, 2014, but the deadline was extended multiple times to November 14, 2014. 79 Fed. Reg. 61590 (Oct. 14, 2014). And before that, the Obama administration gave the public a total of 90 days to comment on the much shorter 2011 draft WOTUS guidance. *See* 76 Fed. Reg. 39101 (July 5, 2011).

For these reasons, WAC requests that the agencies extend the public comment period by an additional 90 days – or at least 60 days after the regional roundtables conclude. We appreciate your attention to these important issues and look forward to your response.

² The agencies halted nationwide implementation of the Navigable Waters Protection Rule after the U.S. District Court for the District of Arizona issued an order on August 28, 2021 vacating and remanding the rule and have returned to interpreting "waters of the United States" based on the 1986/88 definition, which was recodified in 2019. 82 Fed. Reg. 56626 (Oct. 22, 2019).

If you wish to discuss any of these concerns, please contact David Y. Chung at (202) 624-2587 or Byron Brown at (202) 624-2546.

Sincerely,

Courtney Briggs, WAC Chair (courtneyb@fb.org)

David Chung, Counsel to WAC (dchung@crowell.com)

Byron Brown, Counsel to WAC (bbrown@crowell.com)