



October 25, 2021

VIA EMAIL and REGULATIONS.GOV

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

Mr. Jaime Pinkham
Acting Assistant Secretary of the Army
for Civil Works
Department of the Army
108 Army Pentagon
Washington, DC 20310-0104

Attention: Docket ID No. EPA-HQ-OW-2021-0328

Re: Request for Extension of Time and Request for Clarification Concerning Regional Roundtables

Dear Ms. Fox and Mr. Pinkham:

On October 13, 2021, the U.S. Environmental Protection Agency (“EPA”) and the Department of the Army (“Army”) (or, collectively, “agencies”) publicly released details about the process the agencies intend to use to organize a series of regional roundtables across the country to obtain input into the development of a new regulatory definition of the term “Waters of the United States” (“WOTUS”). Almost two weeks after the announcement, the official notice was published in the *Federal Register* today.

According to the announcement, the agencies plan to hold 10 virtual meetings with diverse stakeholders to provide regional perspectives on the opportunities and challenges with the definition of WOTUS. Rather than open participation to the public or any interested individuals, the agencies instead are undertaking a complicated and restrictive process that requires interested parties to propose a slate of participants representing the perspectives of agriculture; conservation groups; developers; drinking and wastewater management; environmental organizations; environmental justice communities; industry; and other key interests. EPA and the Army have established a deadline of November 3, 2021 – only three weeks from the date of the initial announcement, and just over a week from the notice’s publication in the *Federal Register* – to receive submissions, even though the roundtables themselves are not expected to be held until December 2021 or January 2022. The announcement asks that nominations include the specific name and affiliation of the proposed participants, as well as a summary of the perspective they plan to represent and key topics related to WOTUS implementation. The agencies state that after reviewing the nomination slates, they will select 10 of the self-nominated groups to participate in discussions, which will be hosted by the agencies.

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. The undersigned organizations

respectfully request reconsideration of the proposed regional roundtable format and request that the agencies instead utilize a meeting format that is more inclusive and not restricted to participants who must first be approved by the agencies. While we understand your intent is to foster dialogue among local stakeholders who have differing perspectives, we are concerned the approach may exclude organizations with important points of view. If the agencies are unwilling to alter the meeting format, we request that the agencies provide (1) at least 30 additional days in which to submit a proposed slate of participants and (2) detailed information about the criteria being used to select participants, how the events will be managed, and how the information gathered during this process will be used as part of any rulemaking.

In multiple statements before the public and in testimony before Congress, you both have pledged to undertake a robust and transparent process to solicit input as part of any new WOTUS rulemaking. EPA Administrator Michael Regan has made similar commitments. We support these commitments and look forward to working with you to better meet them.

First, the announced format allows the EPA and the Army to dictate who is allowed to participate in this important stakeholder process. Although the announcement seeks nominations from the public, it appears that only those who are willing and able to identify an organizational affiliation, state their point of view up front, and submit a complete slate of nominees will be considered. The agencies are then responsible for selecting which slate of nominees will be allowed to participate, based on their stated perspectives and organizational affiliations. The announcement does not explain what criteria the agencies will use to select among competing slates of nominees and how the forum participants will be curated so that particular viewpoints are not squelched.

Second, although the announcement states it is important for the agencies to understand the regional differences in how WOTUS has been implemented over the years, the announcement does not explain what role, if any, state and local governments will be allowed to play in the roundtable process. Similar to other stakeholders, States and local governments have diverse experiences in implementing the various regulatory definitions of WOTUS and operating their own regulatory programs managing and protecting state and local water resources.

Third, the announcement does not provide details about how the roundtables themselves will be conducted and how the information provided will be utilized during the rulemaking process. For example:

- Will the participants be provided any charge questions or other information in advance to help frame the discussions?
- Why were the five geographic regions grouped the way they were (rather than utilizing the existing 10 EPA regions), and is it expected that there will be two roundtables for each region?
- How will EPA and the Army consider the viewpoints of different nominees in selecting slates of nominees to ensure that a diversity of viewpoints and experiences are represented?

- Will the meetings and discussion topics be moderated, or will each participant be given a set amount of time to provide remarks?
- Will a transcript or recording of the meeting be prepared and entered into the record for any WOTUS rulemaking?
- Are the participants expected to reach consensus on any specific questions, or will they be allowed to provide viewpoints that may be different from or inconsistent with other participants?
- How will EPA and the Army evaluate opinions or anecdotal information versus restatements of the law, factual information, or scientific data?

There appears to be little precedent for the stakeholder approach EPA and the Army have outlined, which highlights concern about the fairness and transparency about the process.

Finally, the regional roundtable format that the agencies have announced – which depends on individuals and outside groups to develop slates of required interested participants representing diverse sectors and interest groups – is unusual and appears to be an attempt by the agencies to outsource a labor intensive and logistically challenging endeavor. The process appears especially cumbersome and resource intensive for individuals and entities that may not have a national network of activists or resources to tap. The amount of effort contemplated by the announcement – which would involve soliciting and vetting multiple participants, confirming their interest and availability, and preparing a formal nomination letter in less than three weeks – is unreasonable. While additional time to prepare nominations would be helpful, the fact remains that such a complex process likely will exclude participation of many of the very voices that EPA and the Army say they want to hear. Limiting the ability of all interested stakeholders to participate will undermine the agencies’ stated goal of developing a definition that is durable and that can withstand judicial review and political pressure, which we all support.

For these reasons, the undersigned organizations therefore request that the agencies further think through, revise, and formalize the proposed process for organizing regional roundtables to be more inclusive. In the alternative, we request that the agencies extend the time period in which to provide nomination slates be extended by 30 days. We appreciate your attention to these important issues and look forward to your response. 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 (CBriggs@nahb.org)
David Chung, Counsel to WAC (dchung@crowell.com)
Byron Brown, Counsel to WAC (bbrown@crowell.com)

1. American Exploration & Mining Association
2. American Exploration & Production Council
3. American Farm Bureau Federation
4. American Forest & Paper Association
5. American Fuel & Petrochemical Manufacturers
6. American Gas Association
7. American Iron and Steel Institute
8. American Petroleum Institute
9. American Public Power Association
10. American Road & Transportation Builders Association
11. American Society of Golf Course Architects
12. Associated Builders & Contractors
13. Associated General Contractors of America
14. Association of American Railroads
15. Association of Oil Pipelines
16. Club Management Association of America
17. Corn Refiners Association
18. Florida and Texas Sugar Cane Growers
19. Golf Course Builders Association of America
20. Golf Course Superintendents Association of America
21. Independent Petroleum Association of America
22. Industrial Minerals Association North America
23. Leading Builders of America
24. National Association of Home Builders
25. National Association of Realtors
26. National Association of State Departments of Agriculture
27. National Club Association
28. National Corn Growers Association
29. National Cotton Council of America
30. National Council of Farmer Cooperatives
31. National Mining Association
32. National Multifamily Housing Council
33. National Oilseed Processors Association
34. National Pork Producers Council
35. National Rural Electric Cooperative Association
36. National Stone Sand & Gravel Association
37. Responsible Industry for Sound Environment
38. Southeastern Lumber Manufacturers Association
39. Texas Wildlife Association
40. The Fertilizer Institute
41. Treated Wood Council
42. United Egg Producers
43. USA Rice Federation
44. US Chamber of Commerce