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## **EPA MUST PROVIDE MORE ACCESSIBLE AND INFORMATIVE RESOURCES FOR AUTHENTIC PUBLIC COMMENT**

Environmental Data and Governance Initiative's Comment on the  
Environmental Protection Agency (EPA) Proposed Rule: Revised Definition of  
Waters of the United States (Docket No. EPA-HQ-OW-2018-0149)

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*The Environmental Data and Governance Initiative (EDGI) is a network of academics, developers, and non-profit professionals that promotes evidence-based policy-making and public interest science. We document, contextualize, and analyze current changes to environmental data and governance practices through multidisciplinary and cross-professional collaborative work. We foster the stewardship and expansion of public knowledge through building participatory civic technologies and infrastructures to make data and decision-making more accessible. EDGI creates new communities of practice to enable government and industry accountability. In particular, we promote models and tools that emphasize community participation at all scales, both within EDGI and in our public-facing tools.*

*EDGI is comprised of over 150 members in North America residing in 19 U.S. states, including California, Colorado, District of Columbia, Florida, Illinois, Indiana, Maryland, Massachusetts, Michigan, New Jersey, New York, North Carolina, Ohio, Pennsylvania, Texas, Vermont, Virginia, Washington, and Wisconsin.*

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## I. INTRODUCTION

EDGI's comments on the proposed 'Revised Definition of "Waters of the United States"' (Docket ID No. EPA-HQ-OW-2018-0149) focus on removals of and reductions in access to online resources directly relevant to the proposed redefinition of Waters of the U.S. (WOTUS) under the Clean Water Act. In order to provide informed comments about the proposed WOTUS redefinition, the public needs a clear comparison of which streams and wetlands are protected under the 2015 Clean Water Rule versus which would be protected under the new Rule, and the scientific evidence supporting that change. Neither of these needed resources are provided, and resources that had previously been available about the underlying science and the 2015 Rule have been removed. These removals constrain the public's ability to effectively participate in this rulemaking process, to understand the impacts of the proposed changes to which aquatic resources would be designated as jurisdictional, and to track implementation of the Clean Water Act.

The EPA's website ([www.epa.gov](http://www.epa.gov)) is intended to be a trusted and easily accessible resource used by members of the general public, regulated entities, and the research community to search for information regarding the ecological functions and protection of aquatic ecosystems, and to understand and participate in proposed rulemaking that shifts which streams and wetlands are covered by the Clean Water Act. However, beginning in May 2017, resources that the EPA formerly posted about aquatic ecosystems and the Clean Water Act itself were made less accessible, and in many cases, removed entirely. These resources included introductory materials intended to educate the public about aquatic systems, summaries and links to the extensive research reviews on which the current Rule is based, and tables comparing the reaches of jurisdictional waters under different interpretations of the Waters of the United States. Of particular note are the removals of Spanish language pages, some of which are no longer available in online EPA archives or anywhere on the EPA's web domain.

These removals and access reductions are striking given the complexity and uncertainty of determining what comprises Waters of the U.S. (WOTUS): the aquatic resources that are protected under the Clean Water Act. Over the last four decades, the definition of WOTUS has been substantially altered through decisions by the EPA and the Supreme Court.<sup>1</sup> Given the challenge even for specialists to determine how these shifts have materially impacted the hydroscape of the U.S., it is especially important that the public has clear access to the basic informational resources needed to determine whether or not the proposed changes are worthy of support. It is deeply troubling that the EPA has removed such resources. It is

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<sup>1</sup> For a very helpful explanation of how what is defined as jurisdictional, and thus worthy of protection under the Clean Water Act, has been affected by past rule changes and would be reshaped by the proposed Rule, see Walsh and Ward. 2019. "Redefining clean water regulations reduces protections for wetlands and jurisdictional uncertainty." *Frontiers in Water*. doi: 10.3389/frwa.2019.00001 . <https://www.frontiersin.org/articles/10.3389/frwa.2019.00001/full>

also deeply ironic, given the EPA administration's current claim to support strengthening transparency in regulatory science; transparency about the scientific basis for the proposed WOTUS Rule has been substantially reduced.

In order for the public to participate meaningfully in any regulatory process, information about the proposed Rule must be accessible before, and particularly during, public comment periods. Detailed information about the scientific basis of the proposed redefinition of Waters of the U.S. should have been easily available throughout the rulemaking process. Instead, the EPA significantly reduced access to information essential for understanding the costs and benefits of the proposed redefinition for people and the environment, as we describe in detail in the next section. Our detailed comments below address specific changes in EPA website access and content that compromise the public's ability to understand the likely physical and water quality impacts of the proposed redefinition of WOTUS.

We urge the EPA to uphold the integrity of the notice-and-comment rulemaking process by restoring access to resources relevant to the proposed redefinition, which would change which aquatic ecosystems in the U.S. are protected under the Clean Water Act, and which are not. Promoting transparency and public participation extends beyond the logistics of the rulemaking process to include access to information and data. Removed and reduced access to pertinent information harms the public's ability to understand the implications of the proposed redefinition, and thus their ability to comment knowledgeably on decisions that materially impact their interests in environmental and public health.

## II. WOTUS RULE WEBSITE LACKS KEY INFORMATION

The resources available to the public on EPA's WOTUS Rule website focus almost entirely on the rulemaking process, with little of the substantive information the public needs to evaluate the consequences of the proposed Rule. From the [WOTUS Rule homepage](#), the public can see links to two press releases announcing the dates of the public comment period and a public hearing, and links to the three main pages of the WOTUS Rule website. On these three main pages "[About Waters of the United States](#)," "[Rulemaking Process](#)," and "[Frequently Asked Questions](#)," there is no explanation of the underlying scientific basis or environmental purpose for this proposed Rule, nor a cost-benefit analysis of its likely impacts. Most fundamentally, there is no explanation in the text or accompanying figures of the differences between the 2015 Clean Water Rule and the proposed Rule. From the very limited resources EPA has made available on its WOTUS Rule website, there is no way for the public to know which aquatic ecosystems would lose protection, and which would gain protection under the proposed changes. The public is thus not provided with even the

most basic information needed to evaluate why, or how the proposed changes would impact streams and wetlands that matter to them.

The first main page linked, "[About Waters of the United States](#)," is the most informative, but even it provides no information about the proposed Rule itself, how it differs from the existing 2015 Rule, or how the proposed Rule may impact the water quality and physical condition of aquatic ecosystems. Instead, the page simply states that the 2015 Clean Water Rule is in effect in 22 states, the 1988 definition of "waters of the U.S." (WOTUS) is in effect in 28 states, and President Trump signed an executive order to rescind or revise the 2015 Rule. The page goes on to include the 1988 definition of WOTUS, and links to relevant Supreme Court rulings and responding agency guidance documents and legal memoranda, but does not include any synthesis, summary, or explanation of the court rulings or their bearing on the present proposed Rule.

Although a [unanimous Supreme Court decision in 2018 identified federal district courts as the appropriate venue for Clean Water Act \(and thus WOTUS\) cases](#), there are no links to district or appellate court rulings, and only on a linked page is there a [link to a list compiled in 2010 of 30 cases](#), but without hyperlinks or case summaries. Similar to the section devoted to Supreme Court cases, there is a section on this "About Waters of the United States" webpage with a few bullet points about the 2015 Clean Water Rule, but without any information about how the 2015 Rule differs from the 1988 version or the proposed 2019 Rule. Nor is there information about the impetus for repealing and replacing it. A sentence directs people to the EPA archive to look for the Clean Water Rule website [that was removed in 2017](#), but even amidst a lengthy list of links, the site does not provide a link to the [archived Clean Water Rule website homepage](#), or even to the [EPA archive homepage](#). At the bottom of the "About Waters of the United States" webpage, there is a set of links to substantive resources on [streams](#), [wetlands](#), and a handful of Clean Water Act regulatory programs. However, unlike in the Clean Water Rule site that EPA removed, there is no discussion of the relevance of any of these resources to the proposed Rule or public comment opportunity. Whereas the linked material was embedded previously in content focused explicitly on the significance of aquatic ecosystems (see part IV), the pivotal importance of streams and wetlands, and the proposed changes in how they would be protected under the proposed Rule, are difficult if not impossible to glean from the resources available on the WOTUS Rule website without prior knowledge of the issues.

The second main page, "[Rulemaking Process](#)," focuses solely on the rulemaking process starting with the Executive Order to rescind or revise the 2015 Clean Water Rule, and the timeline for repealing and replacing it. Like the "About..." page, this page lacks information about the purpose of the repeal or the proposed Rule. Nor does it explain the purpose of the rulemaking process itself: there is no information about NEPA or the goal of inviting public comments. Rather, this page is simply a list of actions and dates, without context.

The third main page in the WOTUS Rule website, "[Frequently Asked Questions](#)," again focuses on the rulemaking process, with brief explanations of each step. One answer does allude to the purpose of this proposed Rule, stating, "This proposed rule provides clarity, predictability and consistency so that the regulated community can easily understand where the Clean Water Act applies—and where it does not." Note that it is the *general public*, not the regulated community, that EPA is mandated to serve.

There is no statement on this page about how the proposed Rule would influence water quality, or impact the public. The only use of the words "water quality" is as an example of a Clean Water Act program. The only uses of the word "clean" are in "Clean Water Act," and the only use of the word "pollution" is within the text of the executive order. There is no use of the words "science" or "scientific." None of the questions or responding answers provide comparative information for the public to assess. None of the questions or answers relate to the scientific underpinnings of any past or present interpretation of "waters of the United States," or even to any legal arguments about the scope of the definition and interpretation of "waters of the United States." The Frequently Asked Questions page does not prepare the public to comment knowledgeably on the necessity or merit of the proposed Rule.

### III. INCONGRUENCE BETWEEN RESOURCES PROVIDED AND EXPECTATIONS OF PUBLIC COMMENT

The two most important things the public needs in order to provide informed comments about the proposed WOTUS redefinition are a clear comparison of which streams and wetlands are protected under the 2015 Clean Water Rule versus which would be protected under the new Rule, and the scientific evidence supporting that change. Neither of these needed resources are provided. By contrast, when the 2015 Clean Water Rule was presented, the EPA created numerous [fact sheets](#) about the Rule and its impacts, provided [clear, tabular comparisons of the proposed Clean Water Rule and the previous Rule](#), designed [introductory material describing the downstream impacts of streams and wetlands](#), and wrote [a blog](#) summarizing in easily understandable language, and linking to, an extensive review of aquatic ecosystem connectivity.

EPA's WOTUS Rule website does not orient the public to the central issues at play. Crucial information about the environmental importance of particular kinds of aquatic ecosystems is still available, but downplayed via generic link titles: instead of navigating to resources through an informational page titled "Streams and wetlands matter," as in the above-linked archived 2015 fact sheet, the links are now listed among several bullet points and titled "General information on streams" and "General information on wetlands" with no indication that this is where information on the ecological impact of different kinds of

wetlands and streams can be found. Moreover, there is no analysis of the likely water quality or broader ecological impacts of the proposed 2019 Rule in comparison to the 2015 Rule, nor any kind of cost/benefit analysis of the proposed changes.

The primary scientific review that informed the 2015 Clean Water Rule is the "[Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence](#)" (Connectivity Report), the most comprehensive review of the scientific literature on the effects of various types of aquatic ecosystems on downstream waters. The proposed new WOTUS Rule does not contain a different or more recent scientific analysis; instead, it states that it is informed by the same Connectivity Report (84 FR 4175). Yet, the Connectivity Report is not made available on the WOTUS Rule website or in the Docket folder for this public comment, so there is no way for the public to assess the extent to which that scientific work is integrated into the proposed Rule. Further, the website for the proposed 2019 Rule does not explain the science of hydrologic connectivity, nor the extensive literature and peer review process that led to the Connectivity Report and the 2015 Clean Water Rule.

The lack of scientific information on the WOTUS Rule website is notable because the proposed Rule [explicitly seeks comments regarding the interpretation of which wetlands should be included under federal jurisdiction](#), hinging on hydrologic connectivity and various types of physical barriers (including permeable earthen walls). In fact, the words "hydrologic" and "hydrology" do not appear in the WOTUS Rule website, and the word "wetlands" only occurs five times, all on the "About Waters of the United States" webpage, four of which are contained within the 1988 WOTUS definition, and one of which as a link to "[General information on wetlands](#)." Similarly, the EPA explicitly invites comment about [the appropriate definition of tributary](#), which would also necessitate an understanding of hydrologic connectivity. It is still possible to access the Connectivity Report from the "[streams](#)" page, but the report is not highlighted in any way, and thus is easy to miss. Further, the blog post that explained the key findings of that report in clear and easily accessible language is no longer available via the WOTUS webpages. EPA is effectively burying its best science about aquatic ecosystems as it attempts to deregulate some of their most important components, such as wetlands not immediately adjacent to jurisdictional streams.

In failing to provide this necessary information through the WOTUS Rule website, the EPA has neglected its responsibility to provide the public with adequate information to participate knowledgeably in the rulemaking process, a process that is ostensibly so important to this administration as to have one-third of the WOTUS Rule website devoted to it.

#### IV. ACCESS TO IMPORTANT RESOURCES HAS BEEN REDUCED

The lack of provision of resources to the public for consideration of the proposed Rule is in stark contrast to resources provided regarding the Clean Water Rule. By at least February 2015, four months before the [final 2015 Clean Water Rule](#) was published in the Federal Register and six months before the Rule would go into effect, many resources had been made available to the public through [EPA's Clean Water Rule website](#) including explanations of the new Rule, the underlying scientific reasons for it, and a downloadable cost-benefits analysis. This website remained available to the public until May 2017 when the EPA, under Administrator Pruitt, [removed the Clean Water Rule website by redirecting each of its webpages to the new WOTUS Rule homepage](#); as described above, the new homepage includes only information about the rulemaking process and select case law, and no substantive environmental information. Notably, the EPA took down the Clean Water Rule website more than two months before publishing [its proposal to repeal the Rule](#), and more than a year before it published a [supplemental notice](#) clarifying its proposed actions. For nearly two years of active rulemaking, the public has been without key resources.

The resources that had been available to the public through the Clean Water Rule website included webpages tailored to people with limited background knowledge, to bring them up to speed on issues like [why wetlands and streams are important to aquatic ecosystems](#) and [areas that derive their drinking water from surface water](#). [Infographic resources](#) were provided in addition to textual resources. There was also a prominent link to a [blog](#) highlighting the major findings from the extensive scientific review that the EPA conducted to produce the [Connectivity Report](#). There were specific [fact sheets](#) made for each of a variety of stakeholders. From the Clean Water Rule website, the public could easily learn which issues were important in distinguishing the 2015 Rule from the previous WOTUS interpretations, could learn the basic science of each issue, and find links to more detailed resources, such as the resources available through [EPA's wetlands webpage](#), or the Connectivity Report itself.

All of these resources are as important to public understanding of the new proposed Rule as they were to understanding the 2015 Clean Water Rule. However, a member of the public would now need to have prior knowledge of the resources available through the Clean Water Rule website, in order to seek them out through the EPA Archive. All of those now-deleted resources were developed in the interest of public education, and were made possible through federal tax revenues from the public. All of these resources existed in the EPA domain, and should be restored to the EPA website, or at least have the archived versions of the resources directly linked from the WOTUS Rule website.



## V. CONCLUSION: ACCESSIBLE INFORMATION IS ESSENTIAL FOR MEANINGFUL PUBLIC COMMENT AND UPHOLDING THE INTENTIONS OF NEPA

The EPA's WOTUS Rule website does not provide information about how the proposed Rule substantively differs from the 2015 Clean Water Rule that is currently in effect in 22 states, and the 1988 definition of WOTUS that is in effect in 28 states. Nor does the website provide information on the scientific evidence supporting the change in definition, or how the change in definition may affect aquatic ecosystems throughout the nation. Moreover, substantial amounts of essential information about how waters of the U.S. are defined and why that definition matters have been removed from the EPA website in the past two years. It is important to note that some information pertinent to the proposed 2019 Rule is still available through EPA's website. However, for the public and regulated bodies to understand the feasibility of repealing the Clean Water Rule and redefining WOTUS, they must have access to comprehensive information about the rationale for, and likely consequences of, the proposed Rule. Without access to this information, the public cannot meaningfully understand whether the proposed Rule is worthy of support. By entirely removing from the public domain, or by severely limiting public access to, key resources, the EPA has abrogated its responsibility to facilitate meaningful public commentary on the proposed Rule.