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# The Definition of “Waters of the U.S.” Stakeholder Recommendations Listening Session

Small Businesses, Governments, and  
Organizations

October 23, 2017



# Benita Best-Wong

Acting Principal Deputy Assistant Administrator  
for Water

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Benita Best-Wong has devoted almost 30 years of her career to fresh and marine water protection and restoration, and has managed the implementation of national efforts on watershed planning, water quality assessment and monitoring, source water and groundwater protection, and numerous other projects.

In December 2013 Benita was selected to head the Office of Wetlands, Oceans, and Watersheds (OWOW), advising the Assistant Administrator for Water on a broad area of policy issues related to wetland, marine, watershed, and estuary protection. Benita was named Acting Principal Deputy Assistant Administrator for Water in January 2017.

# Craig Schmauder

Deputy General Counsel – Installations, Environment & Civil Works  
Department of the Army

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Mr. Craig Schmauder was selected to the Senior Executive Service in November 2002 with the Department of Army, and has been serving as the Deputy General Counsel (Installations, Environment and Civil Works) in the Department of the Army since October 2004. In this position Mr. Schmauder provides legal advice and guidance to the Secretary of the Army and other Secretariat officials concerning a broad range of activities, including matters involving Army installations, lands, and facilities, environmental law, protection of wetlands, Civil Works construction, real estate condemnation, cultural and natural resources, and the administration of Arlington National Cemetery. Mr. Schmauder advises the Assistant Secretary of the Army (Civil Works) on all legal issues relating to the U.S. Army Corps of Engineers water resources development and regulatory programs. Prior to being appointed Deputy General Counsel in 2004, Mr. Schmauder was the Acting Chief Counsel for the U.S. Army Corps of Engineers. Mr. Schmauder also served as Deputy Chief Counsel, U.S. Army Corps of Engineers, from 2002-2003.

Mr. Schmauder received his J.D. from the University of Tulsa and his B.A. *summa cum laude* from C.W. Post College.

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# Purpose & Agenda

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## **Purpose:**

- Allow agencies to listen to pre-proposal recommendations from interested stakeholders on potential revisions to the definition of the “Waters of the U.S.” under the Clean Water Act (CWA).”

## **Agenda:**

- “Waters of the U.S.” over time
- The Executive Order
- Progress to date
- Discussion of potential approaches
- Next steps



# “Waters of the U.S.” and the Clean Water Act

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“Waters of the United States” (WOTUS) is a threshold term under the Clean Water Act (CWA) for the scope of the Act.

CWA programs address “navigable waters,” defined in the statute as “waters of the United States including the territorial seas.”

- CWA did not define WOTUS; Congress left further clarification to agencies.

EPA and the Department of the Army (Army) have defined WOTUS by regulation since the 1970s.

# “Waters of the U.S.” and the Supreme Court

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Supreme Court decisions in 2001 and 2006 held that the scope of navigable waters must be linked more directly to protecting the integrity of traditional navigable waters.

- Neither of the decisions invalidated the underlying WOTUS definition in regulation but did shape its implementation across all CWA programs.
- The justices in the 2006 *Rapanos* decision were split on how this was to be accomplished.

# “Waters of the U.S.” and Federal Efforts to Clarify

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EPA and the Army have been working since these Supreme Court decisions to provide clarification and predictability in the procedures used to identify waters that are – and are not – covered by the CWA.

The 2015 Clean Water Rule was an effort to provide clarification and predictability.

- Many stakeholders expressed concerns with the 2015 Rule, and litigation ensued.
- A North Dakota district court ruling meant the 2015 rule never went into effect in 13 states, and a Sixth Circuit Court of Appeals decision later resulted in a nationwide stay.

At the direction of the President, the agencies have embarked on an effort to provide clarity and predictability to members of the public through a new rulemaking.



# The Executive Order (E.O.)

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On February 28, 2017, the President signed the “Executive Order on Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the ‘Waters of the United States’ Rule.”

The E.O. calls on the EPA Administrator and the Assistant Secretary of the Army for Civil Works to review the final 2015 CWR and “publish for notice and comment a proposed rule rescinding or revising the rule....”

The E.O. directs that EPA and the Army “shall consider interpreting the term ‘navigable waters’” in a manner “consistent with Justice Scalia’s opinion” in *Rapanos*.

Justice Scalia’s opinion indicates CWA jurisdiction includes relatively permanent waters and wetlands with a continuous surface connection to relatively permanent waters.

<https://www.whitehouse.gov/the-press-office/2017/02/28/presidential-executive-order-restoring-rule-law-federalism-and-economic>



# Progress to Date

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In order to provide as much certainty to the regulated community as quickly as possible during the development of a new definition of “waters of the U.S.,” the agencies are pursuing a two-step process:

1. Publication of a proposed rule to recodify prior regulation. On July 27, the agencies proposed to recodify the regulation in place prior to issuance of the 2015 CWR and currently being implemented under the U.S. Court of Appeals for the 6<sup>th</sup> Circuit’s stay of the 2015 CWR. The public comment period closed September 27, 2017.
2. Development of a New Definition. The agencies plan to propose a new definition to replace the approach in the 2015 Rule with one that considers the principles that Justice Scalia outlined in the *Rapanos* plurality opinion.
  - The agencies held a formal consultation process with states, local governments and tribes this past spring.
  - Listening sessions are ongoing as an opportunity for stakeholders to provide pre-proposal recommendations through a series of listening sessions from September through November 2017.

Until a new rule is finalized, the agencies will continue to implement the regulatory definition in place prior to the 2015 Rule, consistent with the 2003 and 2008 guidance, in light of the *SWANCC* and *Rapanos* decisions, pursuant to the 6<sup>th</sup> Circuit stay of the 2015 Rule.

# Step 2: Develop New Rule Consistent with the E. O.

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The E.O. directs that EPA and the Army “shall consider interpreting the term ‘navigable waters’” in a manner “consistent with Justice Scalia’s opinion” in *Rapanos*.

Justice Scalia’s opinion indicates Clean Water Act jurisdiction includes relatively permanent waters and wetlands with a continuous surface connection to relatively permanent waters.

The Plurality opinion written by Justice Scalia provides considerations about “relatively permanent waters” and “continuous surface connection” – for example:

- “not necessarily exclude streams, rivers, or lakes that might dry up in extraordinary circumstances, such as drought,” or “seasonal rivers, which contain continuous flow during some months of the year but no flow during dry months. . . .”
- “channels containing permanent flow are plainly within the definition, and the dissent’s ‘intermittent’ and ‘ephemeral’ streams... are not.”
- “only those wetlands with a continuous surface connection to bodies that are ‘waters of the United States’ in their own right, so that there is no clear demarcation between ‘waters’ and wetlands, are ‘adjacent to’ such waters and covered by the Act.”

# Potential Approaches to Defining “Relatively Permanent” Waters

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Perennial plus streams with “seasonal” flow

This is the current practice. “Seasonal” is currently implemented as meaning about 3 months of flow (varies regionally)

Perennial plus streams with another measure of flow

This could include intermittent streams defined by some metrics such as flow duration/ volume; or physical or biological indicators

Perennial streams only

Streams that carry flow throughout the year except in extreme drought

Other

Comments from consultations range from “traditional navigable waters” to “all tributaries with OHWM” to regionalize

# Potential Approaches to Defining a “Continuous Surface Connection”

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Surface connection even through non-jurisdictional feature

Current practice considers directly abutting wetlands and those with a continuous surface connection, regardless of distance, to be jurisdictional

Some degree of connectivity

Use appropriate, implementable metrics, e.g., distance

Wetland must directly touch jurisdictional waters

Only wetlands that directly touch a jurisdictional water (abutting under 2008 guidance)

Other

Examples of comments from consultations include a requirement for a connection within a specific distance limit; connection must flow at least 6 months; regionalize

# Themes from Federalism and Tribal Consultation

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## **Federalism Consultation:**

- Continued engagement with states
- Importance of clarity and predictability
- Specific rule text on streams and wetlands
- Inclusion of exclusions
- Opportunities for regionalization

## **Tribal Consultation:**

- Continued engagement with tribes
- Concerns about repeal of the 2015 Rule
- Concerns about a Scalia-only approach
- Concerns about treaty rights
- Importance of wetlands and intermittent and ephemeral streams
- Concerns about the loss of CWA protections over tribal waters

# Themes from Sept. 19, 2017 Small Entity Listening Session

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The CWA and definition of WOTUS have a significant impact on a range of small businesses and industries.

These businesses need clear, predictable, easy-to-interpret regulations in order to comply and minimize negative impacts to their business.

Some types of businesses (including outdoor recreation businesses and craft brewers) would likely benefit from a more expansive definition of WOTUS while others (including farming, building, aggregates) are likely to favor a narrower definition of WOTUS.

Local governments, as well as some business groups, are likely to support exclusion for artificial structures/features.



# Written Recommendations & Next Steps for Step 2 Rulemaking

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Public may submit written recommendations identified by Docket ID No. EPA-HQ-OW-2017-0480, at <https://www.regulations.gov>.

- Docket is separate from the docket for Step 1 proposed rule (now closed) and separate from a future docket for the Step 2 rule (once proposed).
- The agencies will consider verbal or written recommendations but will only respond to public comments subsequent to publication of a proposed rule.

**Stakeholder Sessions:** Every Tuesday from 1:00 – 3:00pm (Eastern)

- Sessions geared towards: small entities; environment and public advocacy; conservation (e.g., hunters and anglers); construction and transportation; agriculture; industry; mining; scientific organizations and academia; stormwater, wastewater management, and drinking water agencies; and the general public.

**For more information, visit <https://www.epa.gov/wotus-rule/outreach-meetings>**

# Especially For Consideration by Small Entity Stakeholders:

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The agencies look forward to receiving all recommendations, but given today's audience, especially those that help us answer the following:

1. How does CWA jurisdiction affect you and your small business, government, or organization?
2. For purposes of the Clean Water Act, what rivers, streams, and wetlands should be jurisdictional?
3. Are there particular features or implications of any such approaches that you, as part of the agriculture sector, recommend the agencies be mindful of in developing the Step 2 proposed rule?
4. Are there certain waters or features that you recommend the agencies consider excluding from the proposed definition?
5. Following Supreme Court cases restricting jurisdiction - *SWANCC* in 2001 or *Rapanos* in 2006 - did you experience any changes in your costs as a result of reduced assertion of jurisdiction? Can you provide any helpful information or data regarding any such changes?
6. Many small entities have requested better clarity regarding where the Clean Water Act applies. What would clarity look like to you?
7. Do you have feedback about how the agencies should interpret key terms in Justice Scalia's opinion, such as "relatively permanent," and "continuous surface connection"?
8. Is there any information or data about costs and benefits to your sector that the agencies should consider in their economic analysis?

# Facilitated Listening Session



Please submit written recommendations identified by Docket ID No. EPA-HQ-OW-2017-0480 at <https://www.regulations.gov/>. We encourage you to submit any comments early, before the docket closes on November 28.

# Contacts

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