

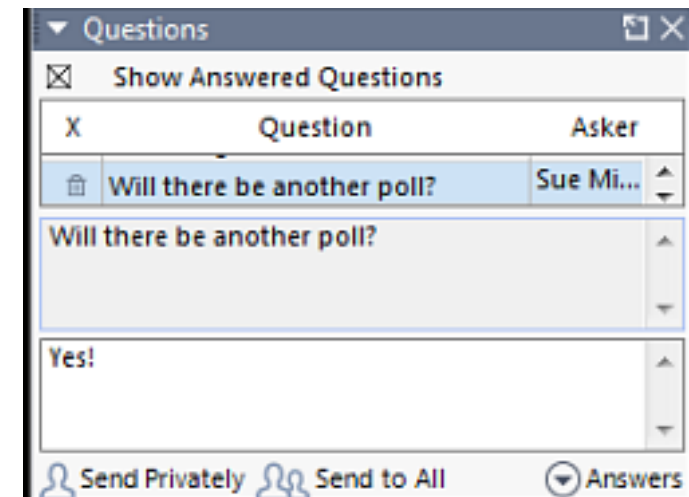
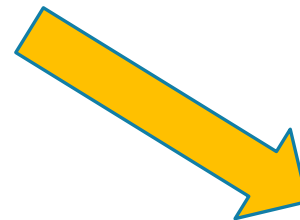
# The Definition of “Waters of the U.S.” Stakeholder Recommendations Listening Session

Conservation Webinar  
October 3, 2017



# Webinar Logistics

- Call in: (833) 424-6863, Conference ID: 76789188
- We will open up the phone lines for verbal recommendations following a brief presentation. The moderator will call on pre-registered speakers in the order that was provided prior to the start of the listening session.
- Please keep your phone on mute if you are not speaking. You can press \*6 to mute/unmute your line.
- For technical issues with the phone line, dial \*0 for operator assistance. For technical issues with the webinar, please use the Questions box.



# Michael H. Shapiro

## Acting Assistant Administrator for Water

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### **Deputy Assistant Administrator Office of Water U.S. EPA**

Michael Shapiro joined the Office of Water as the Deputy Assistant Administrator in November 2002. Prior to that, he was the Principal Deputy Assistant Administrator for the Office of Solid Waste and Emergency Response (OSWER). Mr. Shapiro has also served as Director of the Office of Solid Waste, and Deputy Assistant Administrator for the Office of Air and Radiation, where he directed implementation of the 1990 Clean Air Act Amendments. From 1980 to 1989, Mr. Shapiro held a variety of positions in the Office of Pesticides and Toxic Substances, where one of his responsibilities was developing EPA's Toxic Release Inventory.

Mr. Shapiro has a B.S. in Mechanical Engineering from Lehigh and a Ph.D. in Environmental Engineering from Harvard. He has also taught in the public policy program at the John F. Kennedy School of Government.

# Douglas W. Lamont

## Senior Official Performing the Duties of the Assistant Secretary of the Army for Civil Works

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### **Deputy Assistant Secretary of the Army (Project Planning and Review)**

Mr. Douglas W. Lamont, P.E. was selected to the Senior Executive Service in November 2004 with the Department of Army. He is serving as the Senior Official Performing Duties as the Assistant Secretary of the Army (Civil Works) (ASA(CW)). In this capacity, he serves as the senior Policy oversight over the US Army Corps of Engineers (Corps) Civil Works Program. Previously he served as the Deputy ASA(CW) for project planning and review, providing objective and independent evaluation of Corps projects (including navigation, flood risk reduction, environmental restoration, water supply, hydropower, and recreation projects) and providing Army policy and procedural direction governing the planning and evaluation of Corps projects. Mr. Lamont has over 30 years of experience with the Corps in the Planning, Engineering, Construction-Operations and Regulatory programs.

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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 Executive Order

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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

# Some 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

# Written Recommendations & Next Steps for Step 2 Proposed Rule



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.

## **Small Entities In-Person Meeting**

- Monday, October 23, 2017, from 9:00 to 11:00 am Eastern at EPA Headquarters
- RSVP to Joan B. Rogers, EPA Small Business Ombudsman (202-564-6568 or [rogers.joanb@epa.gov](mailto:rogers.joanb@epa.gov)).
- RSVPs accepted until Friday, October 13, 2017, or until room capacity has been reached (100 max), whichever occurs first.

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



# Especially For Consideration by Conservation 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. For purposes of the Clean Water Act, what waters should be jurisdictional? Why?
2. Are there certain types of waters or features that you recommend the agencies consider excluding from the proposed definition?
3. Following *SWANCC* or *Rapanos*, did you or your constituents experience consequences (positive or negative) as a result of reduced federal assertion of jurisdiction? Can you provide documentation regarding any resulting changes to aquatic habitat and any effects on your constituencies' ability to hunt, fish, or recreate?
4. Do you have recommendations for how the agencies should interpret key terms in Justice Scalia's opinion, such as "relatively permanent," and "continuous surface connection"?
5. What sources of costs and benefits should the agencies especially consider when considering a change in the definition of "waters of the U.S." as suggested by the E.O.? Is there any information about recreational use the agencies should consider in their economic analysis?
6. If particular water resources, such as ephemeral streams, intermittent streams, wetlands that don't connect to the tributary system, or wetlands that don't directly touch the tributary system are excluded from federal jurisdiction, how might this affect hunters, anglers, and recreational use of such waters?
7. Are there any additional considerations or effects on hunters, anglers, outfitters, providers of recreational gear, or businesses that provide outdoor recreational experiences, the agencies should understand as a result of any changes to the definition?
8. Are there potential variations across states or tribal programs resulting from a new federal definition that may have an effect on aquatic habitat and therefore your constituencies' recreational activities?

# 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 these comments before the docket closes on November 28.

# Contacts

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## Project Leads

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