

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

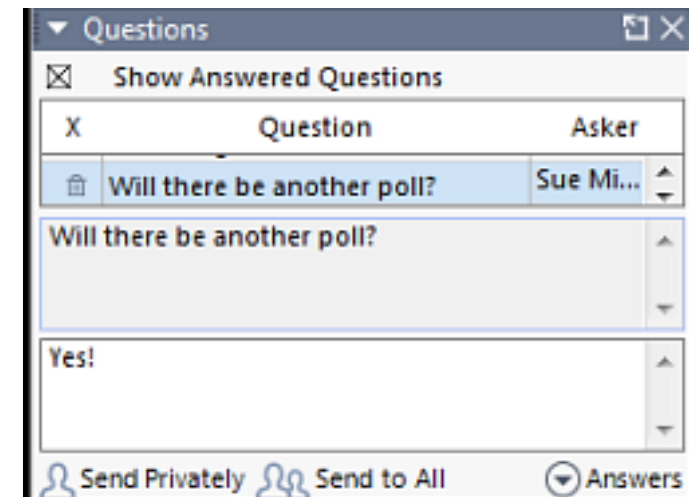
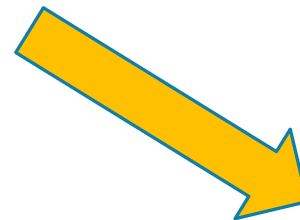
Stormwater, Wastewater Management,
and Drinking Water Agency Stakeholders

November 14, 2017



Webinar Logistics

- Call in: (833) 424-6863, Conference ID: 78567342
- 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



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.

Ryan A. Fisher

Acting Assistant Secretary of the Army (Civil Works)



Principal Deputy Assistant Secretary of the Army (Civil Works)

Mr. Ryan A. Fisher was appointed Principal Deputy Assistant Secretary of the Army (Civil Works) on November 6, 2017, and is serving as the Acting Assistant Secretary of the Army (Civil Works). As Principal Deputy to the Assistant Secretary he provides policy and performance oversight for the U.S. Army Corps of Engineers (Corps) Civil Works program. The Civil Works program consists predominantly of water resources development including navigation, flood control, hydroelectric power generation, municipal and industrial water supply, outdoor recreation activities, fish and wildlife habitat restoration, and ecosystems management. Mr. Fisher also provides direction on the development and articulation of the Department of the Army's policies and practices in support of the Clean Water Act, the Rivers and Harbors Act and related Corps regulatory programs.

Previously, Mr. Fisher served eight years with the U.S. Army Corps of Engineers with the last two years as the Chief of the Planning and Environmental Branch in the Pittsburgh District. He also served five years as the Legislative Director for Congressman Mike Pence. Mr. Fisher holds a B.A. in Political Science from Miami University in Oxford, OH.

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Purpose & Agenda

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



“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



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



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.)



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



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 6th 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 6th Circuit stay of the 2015 Rule.

Step 2: Develop New Rule Consistent with the Executive Order



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

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”

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



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: Tuesdays from 1:00 – 3:00pm (Eastern) – **last one next week**

- 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 Water Utilities:

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 sector?
2. For purposes of the Clean Water Act, what rivers, streams, and wetlands should be jurisdictional and why?
3. Are there particular features or implications of any such approaches that you, as part of the industrial sector, recommend the agencies be mindful of in developing the Step 2 proposed rule?
4. Can you describe typical on-site features in your facilities that contain surface water, such as ditches or retaining ponds? Are these jurisdictional under current practice?
5. Are there certain waters or features that you recommend the agencies consider excluding from the proposed definition? How would you alter relevant exclusions from either current practice or the 2015 rule's exclusions? Are there additional exclusions you would like to see in the new proposal?
6. Many utility groups have requested better clarity regarding where the Clean Water Act applies. What would clarity look like to you?

Especially For Consideration by Water Utilities (Cont.):

7. What, if any, aspects of Clean Water Act jurisdiction and/or the 2015 Clean Water Rule are/were most confusing for your operations?
8. 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"?
9. Many drinking water utilities do not own the resources in watersheds that supply their water. If these source waters are no longer protected under the Clean Water Act, do you anticipate a change in capital investment or operational costs for the drinking water treatment facilities? Does or will your state or local government implement programs to address source water protection?
10. Is there any information or data about costs and benefits to the industrial sector that the agencies should consider in their economic analysis? How do you suggest we balance competing priorities within your sector, such as source water protection and the desire to be able to intervene without permits where there is water managed by your facilities?
11. What kinds of discharges are permitted in your facility and do they typically release to intermittent or perennial waters?
12. Would a narrower federal definition of waters of the US result in varied regulation across states or tribes that may have an effect on your individual facilities or industry as a whole?

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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