

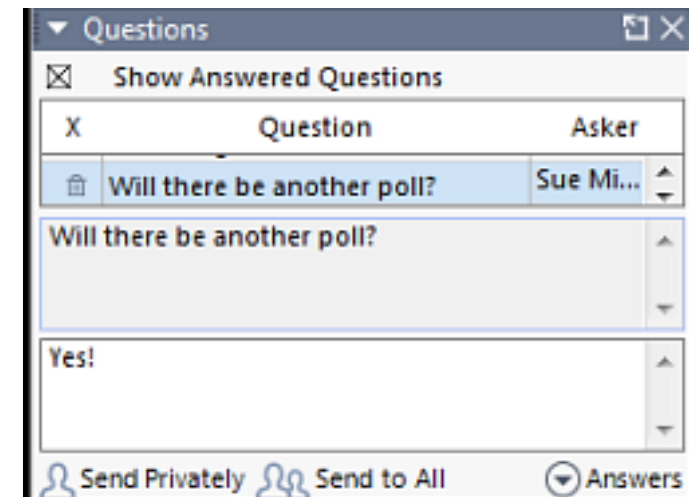
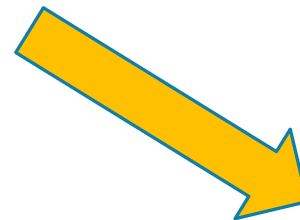
# The Definition of “Waters of the U.S.” Stakeholder Recommendations Listening Session

General Public Stakeholders  
November 21, 2017



# Webinar Logistics

- Call in: (833) 424-6863, Conference ID: 78567343
- 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.

# 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

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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.

# New Rulemaking: Amend the Effective Date of the 2015 Rule

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- The EPA and the Department of the Army (“the agencies”) are proposing a two-year extension of the effective date of the 2015 Rule in order to ensure that there is sufficient time for the regulatory process for reconsidering the definition of “waters of the United States” to be fully completed.
- The agencies will be collecting public comment on this proposal for 21 days after publication in the Federal Register and plan to move quickly to take final action in early 2018.
- Following publication, comments can be identified by Docket ID No. EPA-HQ-OW-2017-0644 and submitted to <http://www.regulations.gov>.

# 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

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**For one more week**, the 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 Listening Sessions are now completed:**

- Sessions were 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 the General Public:

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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. Does CWA jurisdiction affect you directly, and if so, how?
2. For purposes of the Clean Water Act, what rivers, streams, and wetlands should be jurisdictional? What features should be non-jurisdictional?
3. Are there particular features or implications of any such approaches that you 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. Many groups have requested better clarity regarding where the Clean Water Act applies. What would clarity look like to you?

# Especially For Consideration by the General Public (Cont.):

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6. 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"?
7. Is there any information or data about costs and benefits that the agencies should consider in their economic analysis? Do you foresee any unintended economic effects as a result of a changes to the definition?
8. 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 you?
9. In your experience, will state, local or tribal programs effectively cover water resources excluded from federal jurisdiction?
10. Is there anything else the agencies should be considering as we revise the definition of the waters of the U.S.?

# Facilitated Listening Session



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

**The docket closes next week, on November 28.**

# Contacts

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## Project Leads

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