

The Definition of “Waters of the U.S.”

Stakeholder Recommendations

Listening Session

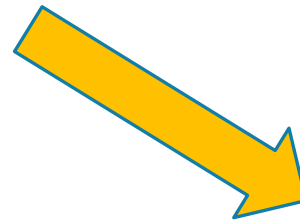


Small Entities Webinar
September 19, 2017



Webinar Logistics

- Call in: (833) 424-6863, Conference ID: 76780971
- We will open up the phone lines for verbal recommendations following a brief presentation. The operator will call on pre-registered speakers in the order that was provided prior to the start of the listening session.
- For technical issues with the phone line, dial *0 for operator assistance. For technical issues with the webinar, please use the Chat box.

A screenshot of a chat box window. The window has a title bar that says 'Chat' with a dropdown arrow on the left and a close button on the right. The main area is a large white text input field. Below the input field, there is a smaller text input field containing the text 'Send technical issues here'. At the bottom of the window, there is a 'To:' dropdown menu currently set to 'Send question to Staff' and a 'Send' button to its right.

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.

Douglas W. Lamont

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



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

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. Public comment period is open through 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 government 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 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.

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).
- RSVPs accepted until Friday, October 13, 2017, or until room capacity has been reached (100 max), whichever occurs first.

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

- Sessions geared towards: 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 Entities:

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

1. How does CWA jurisdiction affect you as a small entity?
2. For purposes of the Clean Water Act, what tributaries and wetlands should be jurisdictional?
3. Are there particular features or implications of any such approaches that you as small entities 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. Would you derive greater or fewer costs/benefits from a change in the definition of "waters of the U.S." as suggested by the E.O.? Is there any information or data about costs and benefits to small entities the agencies should consider in their economic analysis?

Facilitated Listening Session



Commenting on Step 1 Proposed Rule



The Step 1 proposed rule published in the *Federal Register* on July 27, with a public comment period open until September 27.

The proposed rule and the economics analysis are available on our website at: <https://www.epa.gov/wotus-rule/rulemaking-process#S1>

The public is encouraged to submit written comments, identified by Docket ID No. EPA-HQ-OW-2017-0203, at <https://www.regulations.gov>.

General guidance on making effective public comments is available on our website at <https://www.epa.gov/dockets/commenting-epa-dockets>.

Contacts



Project Leads

Donna Downing (EPA)

- (202) 566-2428
- CWAwotus@epa.gov

Stacey Jensen (Army Corps of Engineers)

- (202) 761-5903
- USACE_CWA_Rule@usace.army.mil