

# The Definition of “Waters of the U.S.” Update Webinar

Tribes

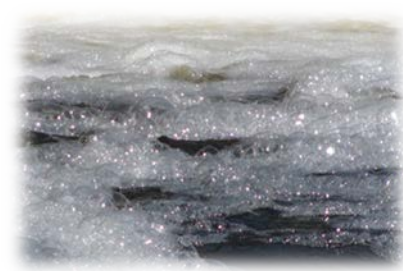
State and Local Governments

Federal Agencies

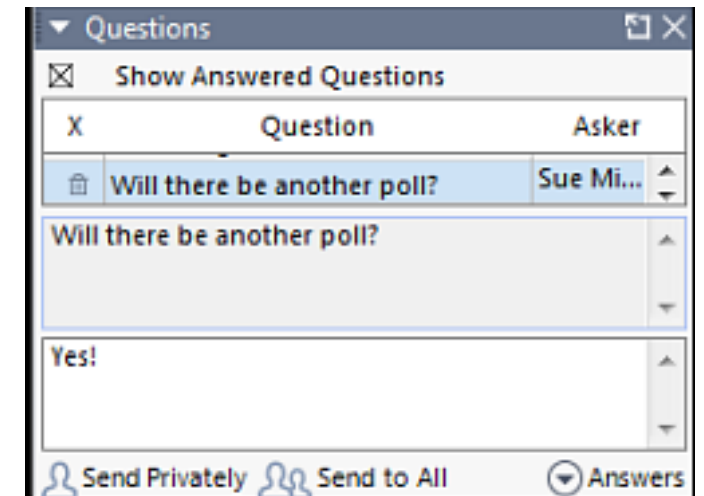
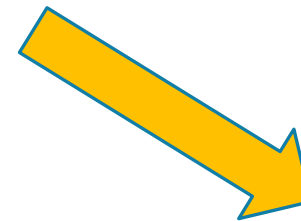
December 12, 2017



# Webinar Logistics



- Call in: (844) 271-6333, Conference ID: 3499888
- All lines are muted.
- For technical issues with the phone line, dial \*0 for operator assistance.
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# 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

Special Advisor to the Assistant Secretary of the Army  
(Civil Works)



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

Mr. Douglas W. Lamont, P.E. is the Special Advisor to the Assistant Secretary of the Army (Civil Works) [ASA(CW)]. From January to October 2017, Mr. Lamont served as the Senior Official Performing Duties as the ASA(CW). In this capacity, he served 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 & Overview

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## **Purpose**

- Update states, tribes, local government and other federal agencies on progress and next steps

## **Outline**

- Background
- Status of three rulemakings
- Pre-proposal input on new WOTUS definition
- Analyses
- Next steps

# Background and Current Status

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# Background on Definition of WOTUS

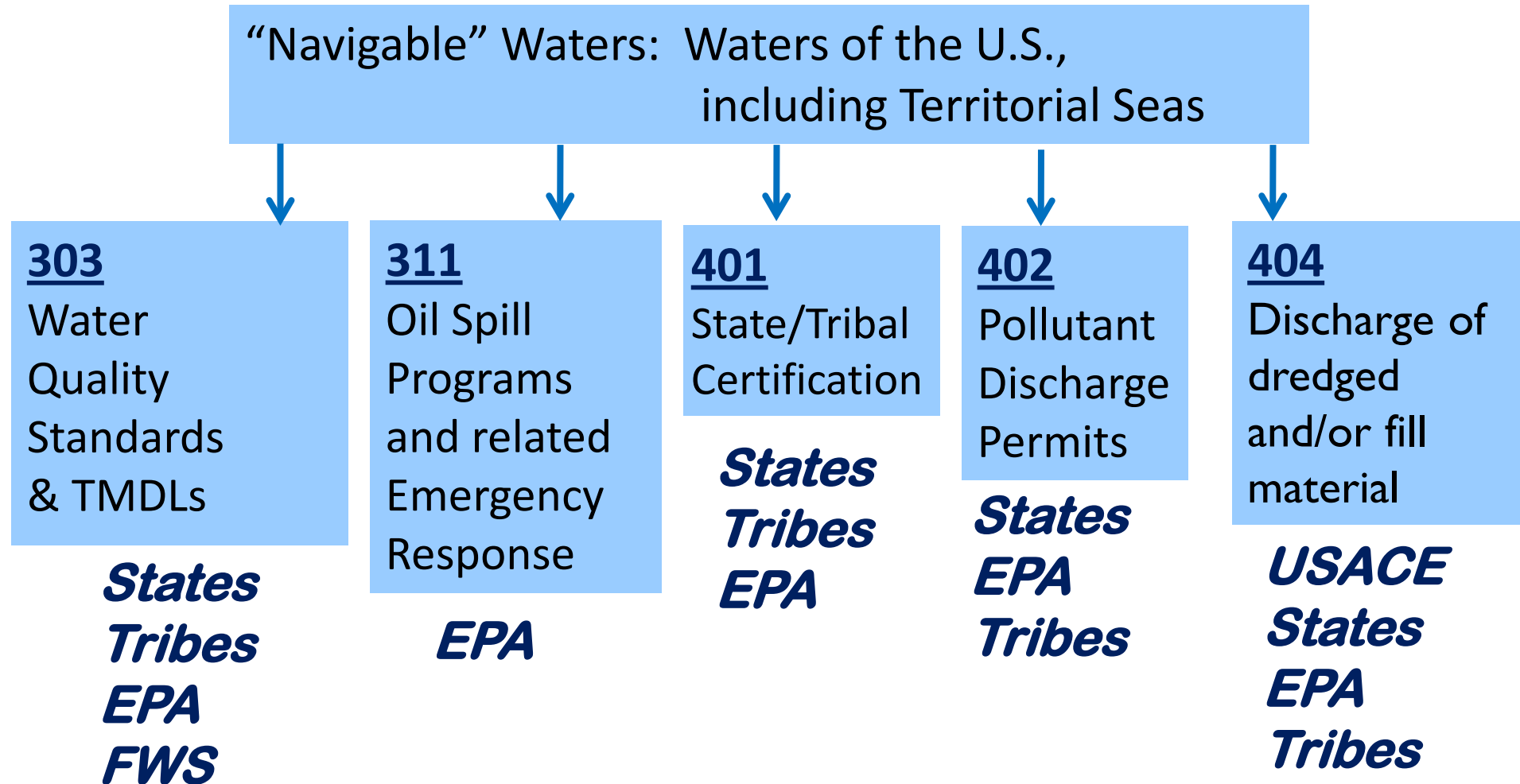
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- **“Navigable waters”** are defined in CWA as “waters of the United States, including the territorial seas”
- **Agencies’ regulations and preamble language**
- **Key Supreme Court cases:** *Riverside Bayview*, *SWANCC*, *Rapanos*
- **Guidance and Rulemaking:** Agencies have been working since these Supreme Court decisions to provide clarification and predictability of waters that are – and are not – covered by the CWA
  - 2003 *SWANCC* guidance for non-navigable, intrastate, isolated waters
  - 2007/8 *Rapanos* guidance for tributaries and adjacent wetlands
  - 2011 draft guidance (superseded by 2015 rule)
  - 2015 Clean Water Rule



# Why “Waters of the U.S.” Matter



# 2017 Efforts: Overall Process



- February: Executive Order 13778
  - 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...”
  - "It is in the national interest to ensure Nation's navigable waters are kept free from pollution, while at the same time promoting economic growth, minimizing regulatory uncertainty, and showing due regard for the roles of the Congress and the States under the Constitution."
  - 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*.
- April: Announced two-step rulemaking process
- November: Agencies proposed to add an applicability date to the 2015 rule
- *Note:* Until a new rule is finalized and pursuant to the 6<sup>th</sup> Circuit stay of the 2015 Rule , 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.

# Proposed Rule on Applicability Date of 2015 Rule

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- November 22, 2017: Agencies proposed to add an applicability date to the 2015 rule
- December 13, 2017: Public comment period closes
- Early 2018: Take final action
- The 2015 rule is currently on hold as a result of the Sixth Circuit's nationwide stay of the rule, but that stay may be affected by a pending Supreme Court case
- EPA and the Army are taking this action to provide certainty and consistency to the regulated community. This amendment would give the agencies the time needed to reconsider the definition of "waters of the United States."
- The agencies' proposal is separate from the two-step process the agencies propose to take to reconsider the 2015 rule

# Step 1 Rulemaking – Rescind 2015 Rule and Re-codify Prior Regulations

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- June 27, 2017: Proposed rule signed by agencies; posted on EPA's WOTUS rule website
- July 27, 2017: Publication of the proposed rulemaking in the *Federal Register*
- September 27, 2017: Public comment period closed
- The agencies are reviewing approximately 700,000 comments submitted to the Step 1 rulemaking docket

# Step 2 Rulemaking – New Definition of “Waters of the United States”

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- April 2017: Initiated Federalism consultation and Tribal consultation for Step 2 rulemaking
- June: Formal consultation periods concluded (individual tribal consultations continue per tribe’s requests)
- September-November: Public outreach listening sessions and pre-proposal recommendations docket open for Step 2 redefinition
  - Ten webinars for various stakeholder communities; one in-person session with small entities
  - Recommendations docket closed November 28, 2017

# Pre-Proposal Feedback

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# Federalism Consultation Process

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- In support of the Step 2 rulemaking, under E.O. 13132: Federalism, the agencies held 24 meetings between April 19 – June 19 and received 170 letters
  - Letters include: Governors (19), Lieutenant Governors (2), Attorneys General (20), state agencies (63), local government (70), intergovernmental organizations (19), state associations (6), water and irrigation districts (10)
  - <https://www.epa.gov/wotus-rule/federalism-consultation>
- EPA's Local Government Advisory Committee met ten times and issued a report
  - Local governments in general support a narrow interpretation of CWA jurisdiction
  - Clarity and predictability are paramount to success; clear definitions and criteria are needed for jurisdictional determinations; technology can improve efficiency; consideration of drinking water sources
  - <https://www.epa.gov/sites/production/files/2017-07/documents/lgac-final-wotusreport-july2017.pdf>



# Federalism Consultation Themes

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## 1. Support for ongoing state engagement

- Strong interest in additional information, continued outreach, and further participation in consultation by states

## 2. Support for clarity and predictability

- Need for understanding the proposed scope of jurisdiction, benefits and costs, burden on economic activities and potential unintended consequences

## 3. Concrete suggestions for rule text

- Some examples provided as potential rule text for streams and wetlands in answer to the questions posed by agencies as part of consultation
- Varied from strong support of a Scalia approach, to some support for the 2015 rule; a few states support federal protection of all waters



# Federalism Consultation Themes

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## 4. Support for exclusions

- Strong interest in maintaining and expanding the exclusions in the 2015 rule – e.g., waste treatment, water reuse, farm ponds, artificial drains, stock ponds, and dip ponds for fire suppression
- Strong support for clarity on ditches

## 5. Suggestions for regionalization

- Some participants commented that “one size does not fit all” because regions have different needs stemming from different ecological conditions (e.g., Florida, Western arid ecosystems)
- However, some states support a national standard or baseline that will be “constitutionally defensible”

## 6. Procedural questions

- Widespread support for additional information and analysis
- Questions on the status of the 2015 Connectivity Report and the role of science

# Tribal Consultation Process

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- **April 20, 2017** – Letter sent to tribal leaders
  - Consultation process followed EPA guidance
- **June 20, 2017** – Tribal consultation period concluded
  - 35 comment letters from tribes (27) and tribal organizations (7) submitted (including one additional follow-up letter received after end of formal period)
  - Tribal letters are available at <https://www.epa.gov/wotus-rule/tribal-consultation>
- Outreach to Tribes During Consultation Period
  - Five national webinars/calls or meetings, five RTOC calls/meetings, as requested
  - Two staff-level calls with individual tribes during the consultation period
- Meetings Following Consultation Period
  - Three staff-level calls and one leader-to-leader call with individual tribes held
  - Additional meetings are being scheduled at a tribe's request

# Tribal Consultation Themes

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## 1. Support for continued engagement with tribes

- Strong interest in additional information, continued outreach, and further participation in consultation by tribes

## 2. Concerns about repeal of the 2015 Rule

- Most tribes expressed support for a broad scope of jurisdiction to protect tribal resources and oppose rescinding or revising the 2015 Rule
- Many of these tribes found the scientific record of the 2015 Rule (including the Connectivity Report) persuasive, and stated that any new regulation should be based in science

## 3. Concerns with a Scalia-only approach

- One tribe expressed support for a Scalia-only approach
- Many of other tribes supported an approach based on Justice Kennedy's significant nexus

# Tribal Consultation Themes

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## 4. Concerns about treaty rights

- Tribes expressed concerns about the effects of a reduction of jurisdiction on existing treaty rights and resources
- Some tribes expressed concerns that the agencies are not meeting their trust responsibility

## 5. Importance of wetlands and intermittent and ephemeral streams

- Many stated that such waters are vital to maintaining the integrity of downstream waters, noting their effects on water quality, healthy fish populations, and flood storage

## 6. Overarching concerns about the loss of CWA protections over tribal waters

- Some expressed concern that a reduction in federal jurisdiction would lead to reduced CWA protections and programs in tribal waters and waters upstream of tribal waters

## 7. Concerns about overall consultation process and timing

- Tribes raised concerns about EPA's Tribal Consultation policy as well as specific concerns about this consultation
- Several tribes have requested formal government-to-government consultation

# Suggestions for Tributaries (Jurisdictional Rivers and Streams):

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- Tribes consistently noted that a Scalia inspired approach was too narrow and would leave many important resources without federal protection. Many supported the 2015 Rule approach to tributaries or a Kennedy-based approach.
- State and local governments had a wide range of recommendations for jurisdictional rivers/streams including, but not limited to:
  - Traditional Navigable Waters (TNWs) only
  - Only perennial streams that contain water at all times except in extreme drought, as well as permanent lakes
  - Both perennial and intermittent streams
    - Concerns that if intermittent streams are not included they could become point sources under the National Pollutant Discharge Elimination Systems (NPDES) program.
  - Both perennial and seasonal streams that are important for water quality, recreation, and public health (flowing at least three months a year, varying regionally).
  - Perennial, intermittent, and ephemeral streams

# Suggestions for Jurisdictional Wetlands



- Tribes consistently noted that requiring a continuous surface connection, however broadly defined, was too narrow and would leave many important resources without federal protection. Many supported the 2015 Rule approach to tributaries or a Kennedy-based approach.
- State and local governments had a wide range of recommendations for adjacent wetlands. Recommendations included, but were not limited to:
  - Only wetlands that directly touch/intersect a WOTUS are jurisdictional
  - Set distance limits for adjacent wetlands
  - Define only wetlands that are within a set distance limit and have a direct hydrologic connection as adjacent
  - Define continuous surface connection for adjacency as requiring a minimum of 6 months flow each year
  - Define continuous surface connection for adjacency as either a natural or a man-made conveyance
  - Include only bordering wetlands as adjacent
  - Do not include wetlands connected via non-jurisdictional features as adjacent

# Suggestions for Exclusions

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- Tribes generally did not comment on exclusions, other than noting that intermittent and ephemeral streams and wetlands that lack a continuous surface connection should not be excluded.
- States and local governments suggested the agencies -
  - Retain or expand the exclusions in the 2015 rule or variations such as:
    - Groundwater, including shallow subsurface flow
    - Farm ponds, artificial drains, stock ponds, and dip ponds for fire suppression.
    - Municipal separate storm sewer system (MS4) feature
  - Exclude irrigation ditches, roadside ditches excavated in non-waters, and all man-made ditches without perennial flow
  - Exclude ephemeral streams, wet meadows, sheet flow, drain tiles, dry arroyos, prairie potholes and playa lakes

# What the Agencies Heard from Other Stakeholders

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Construction and Transportation; Agriculture; Industry; and Mining stakeholders generally supported a more narrow definition of jurisdiction

- Key themes
  - Need for clarity/certainty
  - States should have primary jurisdiction over non-navigable waters
  - Use clear, objective, easily observable characteristics that limit subjective interpretations and reduce variations in their application or impact across different regions
  - Reduce conflicts with potentially overlapping regulations or laws (SMCRA, state authority)
- Streams/Wetlands
  - “Relatively permanent” streams should include those that flow continuously and persistently, on at least a seasonal basis, not those that only flow after precipitation events.
  - Wetlands with a “continuous surface connection” should include only those directly abutting/touching traditional navigable waters
- Exclusions requested
  - Ditches and man-made structures
  - Prior converted cropland



# What the Agencies Heard from Other Stakeholders

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Stormwater, Wastewater and Drinking Water agencies highlighted a range of perspectives

- Key points
  - Account for regional variations in water management practices and needs
- Streams/Wetlands
  - General support for narrowed jurisdiction but highlighted need to protect source water
- Exclusions
  - Manmade stormwater, floodwater, drinking water and wastewater management features used for conveying, storage or recharge

# What the Agencies Heard from Other Stakeholders

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## Small Entities provided a mixed range of perspectives

- Key points
  - Need for clear, predictable, easy-to-interpret regulations
  - Some small entities see benefits from narrower definition; others see benefits from broader definition
  - Account for regional differences
- Streams/Wetlands
  - Some small entities stated that ephemeral streams and non-adjacent wetlands should **not** be WOTUS while others said they should be included in the definition
- Exclusions
  - Man-made features (irrigation, landscape, industrial uses)

# What the Agencies Heard from Other Stakeholders

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Environment and Public Advocacy; Conservation; Scientific Organizations and Academia; and the General Public generally supported a broad definition of jurisdiction

- Key points
  - Importance of clean water for public health, outdoor recreation, economic development
  - Procedural concerns about current rulemaking efforts
  - Scientific community has already weighed in on what waters should be jurisdictional in 2015 Connectivity report
  - Need to account for regional differences like desert washes and karst geology
- Streams/wetlands
  - Headwater streams, as well as intermittent and ephemeral tributaries, and wetlands provide important ecosystem services in and of themselves and also ensure the quality and health of downstream waters and water quality
  - Scalia definition is not supported by science
- Exclusions
  - Not a focus, but several individuals expressed support for 2015 rule exclusions

# Analyses for Step 2

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# Planned Analyses: Aquatic Resource and CWA Program Assessments

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- Inputs:
  - National Hydrography Dataset (high resolution) and National Wetlands Inventory (NWI)
  - CWA programmatic data, including 402 and 404 permitting data, 311 facility and oil spill response data
- Evaluate potential change in water resources covered under the CWA based on policy options
- Overlay the above analysis with data from CWA programs (*e.g.*, NPDES permits, 404 permits, TMDLs, 311 oil spill prevention/preparedness facilities and emergency response data) to assess potential effects associated with policy options

# Planned Analyses: Assess State, Tribal and other Federal Programs

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- The agencies will consider how and whether states and tribes might regulate waters whose federal CWA jurisdiction could change under Step 2 by compiling information on current programs, laws, regulations and other programmatic measures
- The agencies are interested in additional information, such as:
  - Non-CWA regulations or requirements that address streams and wetlands
  - Other federal programs that might be affected by CWA jurisdiction, such as Swampbuster or mining

# Planned Analyses: Environmental Justice

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- *E.O. 12898: Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations*
  - Evaluate potential impacts to minority, low income, and tribal/indigenous populations
  - Based upon this analysis agencies will assess outreach and engagement options with potentially affected communities and communities of interest
  - Impacts of both costs and benefits are not expected to be uniform across the nation following any change in the scope of the CWA

# Planned Analyses: Economic Analysis

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- The agencies are considering the use of a different unit of analysis for the Step 2 rule than the Step 1 proposed rule
- Using inputs below, the agencies plan to estimate the change in the number of regulated entities by CWA program, state, and to the extent possible industrial categories, as well as the effect on federal emergency response
  - Aquatic resource analysis
  - CWA, state and tribal program assessments
  - Analysis of states' and tribes' response to change in federal jurisdiction
- Using the change in regulated entities, the agencies would then estimate the costs and benefits



# What's Next?

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# Considerations for Developing Step 2 Proposal

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As the agencies consider recommendations and develop the step 2 proposal, we are striving toward:

- Protecting the quality of traditional navigable waters while recognizing the importance of state and tribal water management
- Clear terms, definitions, and explanations of what is a WOTUS and what is not
- Effective ways to implement the definition on the ground – in our review of comments and technical outreach we are seeking feedback toward that goal (e.g., how do you measure “seasonal flow” or what does “indistinguishable” look like)

# Near-Term Next Steps

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- Review and respond to comments on proposal to add applicability date
- Review and respond to comments on Step 1 proposal
- Review and consider pre-proposal recommendations for Step 2
- Work on analyses
- Hold technical discussions with co-regulators (states/tribes) and other federal agencies in Winter/Spring 2018
- Update discussions with intergovernmental stakeholders in early Spring

# Contacts

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## Project Leads

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