

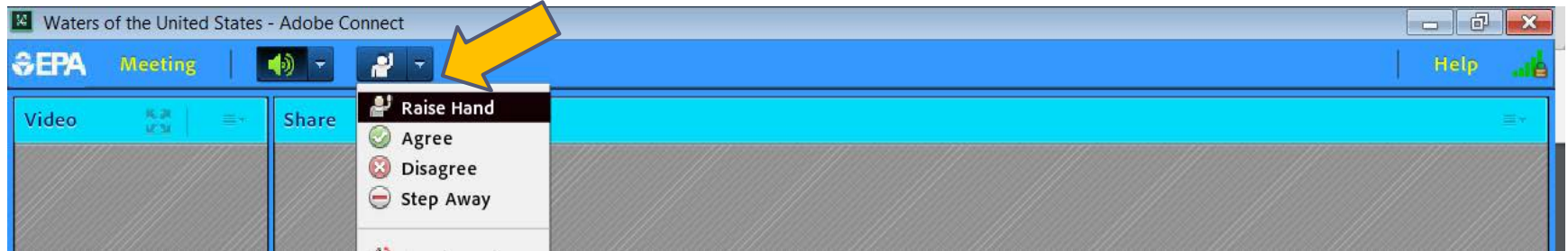
# Definition of “Waters of the U.S.”

Informational Webinar for Tribes in Consultation and  
Coordination Process

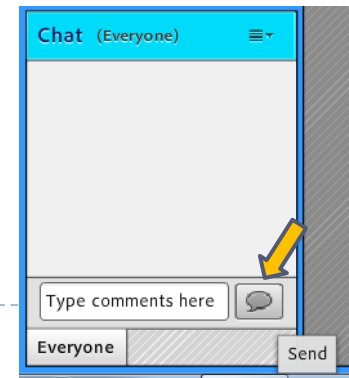
May 18, 2017

# Webinar Logistics

- ▶ Call in: 1-866-299-3188, code 202-566-0657#
- ▶ Please raise your hand if you have any questions or comments during the “Questions and Discussion” portion of the webinar. To “raise your hand,” click the drop down menu next to the status icon at the top of the screen



- ▶ You can also type questions or comments into the “chat” box, and click the comment bubble to send. Report any technical issues via chat



# Why Are We Here?

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- ▶ The EPA and Army are beginning our consultation and coordination with Tribal governments early in the process of our agencies' rulemaking.
- ▶ This presentation will provide you with information regarding EPA and Army's preliminary thoughts and ideas as to which waters the Clean Water Act applies.
- ▶ The agencies are seeking your feedback about how our potential rulemaking might affect Tribes.

# Clean Water Act

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- ▶ Goals:
  - ▶ “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters”
  - ▶ “to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution”
- ▶ Section 518: Treatment in a Similar Manner as States



# Why “Waters of the U.S.” Matter

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“Navigable” Waters: Waters of the U.S.,  
including Territorial Seas

**303**  
Water  
Quality  
Standards  
& TMDLs  
  
**States**  
**Tribes**  
**EPA**  
**FWS**

**311**  
Oil Spill  
Programs  
  
**EPA**

**401**  
State/Tribal  
Certification  
  
**States**  
**Tribes**  
**EPA**

**402**  
Pollutant  
Discharge  
Permits  
  
**States**  
**EPA**  
**Tribes**

**404**  
Discharge of  
dredged  
and/or fill  
material  
  
**USACE**  
**States**  
**EPA**  
**Tribes**

# “Waters of the U.S.” Over Time

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- ▶ From the 1970s through the 1990s, the majority of federal courts, as well as the agencies, consistently interpreted a broad scope of CWA jurisdiction.
- ▶ Supreme Court decisions in 2001 and 2006 held that the scope of navigable waters must be linked more directly to protecting the integrity of waters used in navigation. The justices in the 2006 *Rapanos* decision were split on how this was to be accomplished.
- ▶ The agencies 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 that needed clarification and predictability. Many stakeholders, including some Tribes, expressed concerns with the 2015 Rule and it is currently being litigated.
- ▶ The agencies are now embarking on another effort to provide clarity and predictability to members of the public.

# The Executive Order

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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 Clean Water Rule 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>

# Two-Step Rulemaking Process

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- ▶ The agencies are implementing the E.O. in two steps to provide as much certainty as possible as quickly as possible to the regulated community and the public during the development of the ultimate replacement rule.
  1. The agencies are taking action to establish the legal status quo in the Code of Federal Regulations, by recodifying the regulation that was in place prior to issuance of the Clean Water Rule and that is being implemented now under the U.S. Court of Appeals for the Sixth Circuit's stay of that rule.
  2. The agencies plan to propose a new definition that would replace the approach in the 2015 Clean Water Rule with one that reflects the principles that Justice Scalia outlined in the *Rapanos* plurality opinion.
- ▶ The agencies are aware that the scope of CWA jurisdiction is of intense interest to many Tribes and stakeholders and therefore want to provide time for appropriate consultation and deliberations on the ultimate regulation.
- ▶ In the meantime, the agencies will continue to implement regulatory definition in place prior to the 2015 rule, consistent with the 2003 and 2008 guidances, in light of the *SWANCC* and *Rapanos* decisions, pursuant to the Sixth Circuit stay of the Clean Water Rule.



# Step 1: Withdraw 2015 Clean Water Rule

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- ▶ While the Sixth Circuit stay may remain in effect for some time, its duration is uncertain.
- ▶ To provide greater certainty, the agencies will move to reinstate the pre-existing regulations and guidance and to withdraw the 2015 Clean Water Rule.
- ▶ In the Step I proposed rule, the agencies will define “waters of the United States” using the regulatory definition in place before the 2015 Clean Water Rule, which the agencies will continue to implement according to longstanding practice, just as they are today.
- ▶ The Step I proposed rule would maintain the approach in place for decades until a revised rule with a new definition can be promulgated.

## Step 2: Develop New Rule Consistent with the Executive Order

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The E.O. directs the agencies to consider interpreting the term “navigable waters,” as defined in 33 U.S.C. 1362(7), in a manner consistent with the opinion of Justice Antonin Scalia in *Rapanos v. United States*, 547 U.S. 715 (2006).

- ▶ 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 agencies are consulting with Tribes and with state and local government officials as we begin to develop the new definition.

# Potential Approaches to “Relatively Permanent” Waters

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Perennial plus  
streams with  
“seasonal” flow

Current  
practice:  
seasonal  
flow = about  
3 months  
(varies  
regionally)

Perennial plus  
streams with  
another measure  
of flow

Use  
appropriate,  
implementable  
metrics, e.g.,  
frequency of  
flow,  
intersecting  
water table

Perennial  
streams only

Streams  
that carry  
flow  
throughout  
the  
year except  
in extreme  
drought

Other

Thoughts?

# Potential Approaches to Wetlands with 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

Other

Thoughts?

# Questions and Discussion

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- ▶ How would you like to see the concepts of “relatively permanent” and “continuous surface connection” defined and implemented?
- ▶ How do you think a reduction in Clean Water Act jurisdiction might affect your Tribal water programs, such as 401 water quality certification or water quality standards?
- ▶ How might a change in definition and reduction in federal permitting affect other Tribal programs and interests?
- ▶ If the definition changes, what would be the best way to “get the word out” and provide training and information to Tribes?

# Next Steps

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- ▶ **Regional Tribal Operations Council Conference Calls**
  - ▶ May 18 – Region 10
  - ▶ June 7 – Region 4
  - ▶ Scheduling additional sessions at other RTOC calls/meetings
- ▶ **June 12-15** – Tentatively scheduled for a session(s) at the National Congress of the American Indians Mid Year Conference
- ▶ **June 20** – Tribal consultation period concludes
  - ▶ Comments can be submitted to [CWAwotus@epa.gov](mailto:CWAwotus@epa.gov) and copied to [Gude.Karen@epa.gov](mailto:Gude.Karen@epa.gov)
- ▶ **August 14-17**– Planning a session at the Tribal Lands & Environment Forum

# Contacts

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## For Additional Information

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- ▶ **Please visit our new website at:**
  - ▶ <https://www.epa.gov/wotus-rule>