

The background features abstract geometric shapes in various shades of blue and white. On the left, a solid blue trapezoidal shape points towards the center. On the right, a complex arrangement of overlapping, semi-transparent blue triangles and polygons creates a dynamic, layered effect. The central text is positioned in the white space between these elements.

“Waters of The United States” Federalism Meeting

August 5, 2021

Federalism Consultation for “Waters of the United States”

- ▶ Welcome
- ▶ Roll Call
- ▶ Opening Remarks

E.O. 13132 sets out considerations for consultations with state and local governments



How to Participate - Webinar Logistics

- ▶ **Sound:** Participants will be muted upon entry and can access webinar sound through computer speakers or telephone line.
- ▶ **Technical Questions:** Please use the chat box for technical questions only or email kwok.rose@epa.gov
- ▶ **Other Questions:** At the end of the session, we will provide an opportunity for verbal feedback and questions. Please raise your hand and unmute yourself when we call on you.



“Waters of the United States” and the Clean Water Act

- ▶ “Waters of the United States” (WOTUS) is a threshold term in the Clean Water Act that establishes the geographic scope of federal jurisdiction under the Act.
- ▶ Clean Water Act regulatory programs address “navigable waters,” defined in the statute as “the waters of the United States, including the territorial seas.”
- ▶ The Clean Water Act does not define WOTUS; Congress left further clarification to the agencies.
- ▶ The EPA and the Department of the Army (Army) have defined WOTUS by regulation since the 1970s.



Why WOTUS Matters

“Navigable Waters”: Waters of the United States, including Territorial Seas



303

Water
Quality
Standards
& TMDLs



311

Oil Spill
Programs



401

State/Tribal
Certification



402

Pollutant
Discharge
Permits



404

Discharge of
Dredged
and/or Fill
Material

E.O. 13990 and “Waters of the United States”

- ▶ Executive Order on Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis (January 20, 2021)
- ▶ Directs agencies to review recent regulations, including the NWPR
- ▶ Identifies science, the environment, climate change, and environmental justice, among others, as issues to consider

Durable Definitions for WOTUS

▶ Two new rulemakings

- Rule 1: Restore pre-2015 regulations, amended to be consistent with Supreme Court decisions
- Rule 2: Refine that regulatory foundation

▶ Process considerations

- Protecting water resources and our communities consistent with the Clean Water Act
- Considering the direction in the Executive Order
- Recognizing the importance of practical implementation
- Reflecting the experience of, and input received from, landowners, the agricultural community, states, tribes, local governments, community organizations, environmental groups, and communities with environmental justice concerns

Rule 1: Restoring a Foundation

- ▶ 1986 regulations
- ▶ Updated with Supreme Court language

- ▶ This is the proposed rule that is the subject of the federalism consultation beginning today

“Waters of the United States” - 1986 Regulations

- (a)(1) - Traditional navigable waters
- (a)(2) - Interstate waters
- (a)(3) - All other waters...
- (a)(4) - Impoundments
- (a)(5) - Tributaries of waters identified in (1)-(4)
- (a)(6) - Territorial seas
- (a)(7) - Adjacent wetlands

- ▶ Identical language codified by EPA in 1988

Supreme Court Language

▶ *Riverside Bayview Homes (1985)*

- The Court unanimously upheld the Corps' inclusion of "adjacent wetlands" in the regulatory definition of "waters of the United States."

▶ *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (2001) (SWANCC)*

- The Court held, in a 5-4 decision, that the CWA does not confer jurisdiction over isolated waters on the basis that they provide habitat for migratory birds

Supreme Court Language

Rapanos v. US (2006)

- ▶ The Justices were divided in a 4-1-4 opinion on the question of CWA jurisdiction over wetlands adjacent to nonnavigable tributaries of traditional navigable waters.
- ▶ Scalia Plurality Opinion
 - “relatively permanent, standing or continuously flowing bodies of water...”
 - wetlands with a “continuous surface connection...” to such waterbodies
- ▶ Kennedy Concurring Opinion
 - “a water or wetland must possess a ‘significant nexus’ to waters that are or were navigable in fact or that could reasonably be so made.”
- ▶ Dissent
 - deferred to the Corps’ exercise of jurisdiction and concluded that the term “waters of the U.S.” encompasses all tributaries and wetlands that satisfy “either the plurality’s [standard] or Justice Kennedy’s.”

Public Outreach

- ▶ Public meetings are planned for August 18, 23, 25, 26, and 31st.
 - Small governments are invited to participate in the meeting for small entities on August 25th.
- ▶ There is also a public docket open until **September 3** and should be identified by Docket No. EPA-OW-2021-0328
- ▶ Planning for state and tribal meetings, regional roundtables, and further engagement

Recommendation Docket and Questions

- ▶ Implementation
- ▶ Regional, State and Tribal interests
- ▶ Science
- ▶ Environmental Justice interests
- ▶ Climate implications
- ▶ The scope of jurisdictional tributaries
- ▶ The scope of jurisdictional ditches
- ▶ The scope of adjacency
- ▶ Exclusions

Next steps

- ▶ EPA is accepting written feedback on this consultation for 30 days. Written feedback must be received by September 7, 2021
- ▶ Please email letters to **CWAwotus@epa.gov** and **usarmy.pentagon.hqda-asa-cw.mbx.asa-cw-reporting@mail.mil**.
- ▶ For more information or to register please visit <https://www.epa.gov/wotus>

Questions and Discussion

- ▶ Feedback and Considerations for the Agencies
- ▶ Clarifying Questions
- ▶ Thoughts on Future Engagement