

# “Waters of the United States” Tribal Consultation Kick-Off Meeting

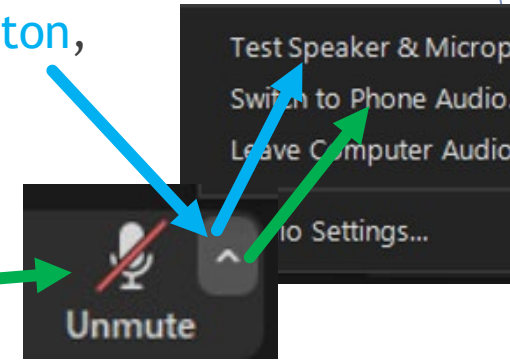
Thank you for joining, the presentation will start at 2pm ET.

You can listen to the presentation through your computer (or mobile device) speakers but need a microphone if you would like to speak.

To test your audio, click on the [arrow to the right of the Unmute button](#), select “[Test Speaker & Microphone](#),” and follow screen prompts.

If you do not have speakers, or a microphone, you can call into the meeting:

- ▶ Click on the [arrow to the right of the Unmute button](#),
- ▶ Select “[Switch to Phone Audio](#),” and
- ▶ Dial in using the information displayed on your screen, including your participant ID.



If you call into the meeting [via phone](#), please turn off your computer speakers to avoid an echo. All participants have been muted but can unmute themselves.

If you have any technical difficulties email [epa@horsleywitten.com](mailto:epa@horsleywitten.com), or chat Tech Support.

If you did not use your full name when you connected, please consider renaming yourself: find your name in the participant list, click on the right arrow, and select “Rename.”

# “Waters of the United States” Tribal Consultation Kick-Off Meeting

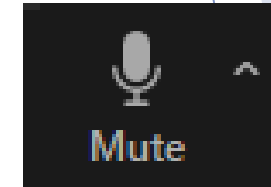
August 19, 2021

# Logistics

Please note that lines have been muted upon entry to avoid any echo or sound issues.

If you have unmuted your device or phone, please mute yourself

- (a) using the mute button on the left side of the screen,  
or
- (b) by pressing \*6 on your phone.



The presentation portion of this listening session will be recorded. Recording will start after the last logistics slide and end once we open the meeting up to discussion.

# Logistics: Options for Audio

## Option 1: Computer Audio

You can listen to the presentation through your computer (or mobile device) speakers.

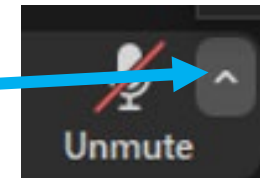
You will need a microphone on that device during the discussion portion of this session if you would like to speak.

## Option 2: Connect to Audio via Phone (discussed on the next slide)

# Logistics: Connect Phone

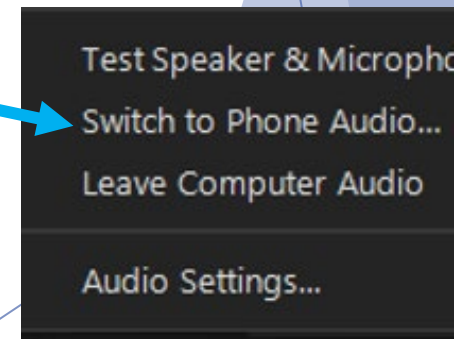
If you do not have speakers or a microphone on your device, you may call in via phone.

To do so, in the **Unmute** button, select the arrow on the right.



Then select “**Switch to Phone Audio**” and follow screen prompts.

This method will link your phone line to your computer, and allow you to use controls on your screen (e.g., mute/unmute yourself, raise hand to request to speak).



# Logistics: Dial-in

Alternatively, you may dial in using the following numbers:

Call-in number: 669-254-5252

Meeting ID: 161 442 7992

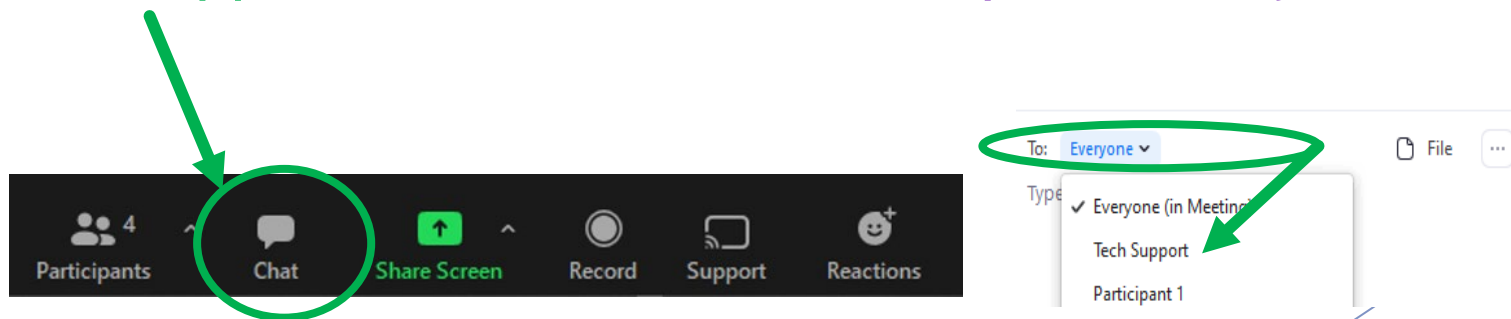
Passcode: 390533

Participant ID: press # if you do not have one

If you call in, turn off your computer speakers to avoid an echo.

If you still have trouble connecting to audio,

chat with Tech Support or send an email to [epa@horsleywitten.com](mailto:epa@horsleywitten.com).

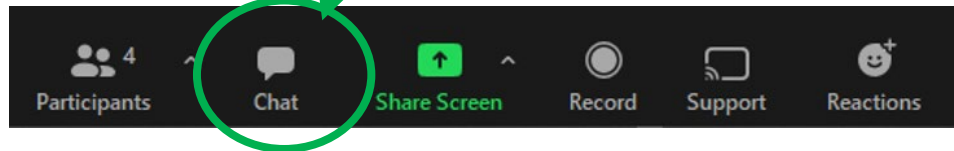


A copy of this presentation has been posted in the chat window.

# How to Submit Written Questions or Comments During the Webinar

If you would like to submit a written question or comment to the agencies during this session:

- Open the **Chat**,



- In the Chat window, select To “Everyone”
- Type your question in the Text Box, and
- Hit Enter.



**We will now start the recording.**

# Tribal Consultation Kick-Off Meeting for “Waters of the United States”

- ▶ Welcome
- ▶ Opening Remarks
- ▶ Presentation
- ▶ Discussion and Questions

Executive Order 13175 sets out considerations for consultation and coordination with federally recognized tribal governments.





# “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.



# Previous “WOTUS” Definitions

- ▶ The EPA and the Department of the Army (Army) have defined WOTUS by regulation since the 1970s, including:
  - ▶ Pre-2015 Regulations and Practice
  - ▶ 2015 Clean Water Rule
  - ▶ 2020 Navigable Waters Protection Rule

# 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

## Definition of “Waters of the United States”

- Affects the extent to which CWA provides protection over waters for the listed programs
- Influences how states and authorized tribes for certain CWA programs can implement those programs
- May influence how states and tribes strategize for protecting their resources into the future—such as whether to pursue authorization for additional CWA programs
- Influences how EPA and the Corps will directly implement CWA programs on tribal lands in the absence of an authorized tribal program

# Executive Order 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: Build upon that regulatory foundation with the benefit of additional stakeholder engagement

## ▶ 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, tribes, states, local governments, landowners, the agricultural community, community organizations, environmental groups, and communities with environmental justice concerns

# Rule 1: Restoring a Foundation

- ▶ Pre-2015 regulations
- ▶ Updated for consistency with Supreme Court decisions
- ▶ This is the proposed rule that is the subject of the tribal consultation and coordination process

# “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

- ▶ ***United States v. 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 sole basis that they provide habitat for migratory birds.



# Supreme Court Language

## *Rapanos v. United States* (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 United States” encompasses all tributaries and wetlands that satisfy “either the plurality’s [standard] or Justice Kennedy’s”

# Consultation and Public Outreach

- ▶ Identical Tribal Consultation Kick-Off Webinar will be held on August 24th from 4-6 PM ET.
- ▶ Public meetings are planned for August 18, 23, 25, 26, and 31. Tribes are welcome to participate.
  - The meeting on August 25th is for small entities.
- ▶ There is also a public docket open (Docket No. EPA-OW-2021-0328) until **September 3**.
- ▶ 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

- ▶ Tribal governments may request one-on-one consultation meetings. Please make such a request before September 17, 2021, so that the agencies can make arrangements.
- ▶ EPA and Army are accepting written feedback on this consultation until October 4, 2021.
- ▶ Please request one-on-one consultation and email letters to **CWAwotus@epa.gov** and **usarmy.pentagon.hqda-asa-cw.mbx.asa-cw-reporting@mail.mil**.
- ▶ For more information on the rulemaking or to register for public meetings, please visit <https://www.epa.gov/wotus>.

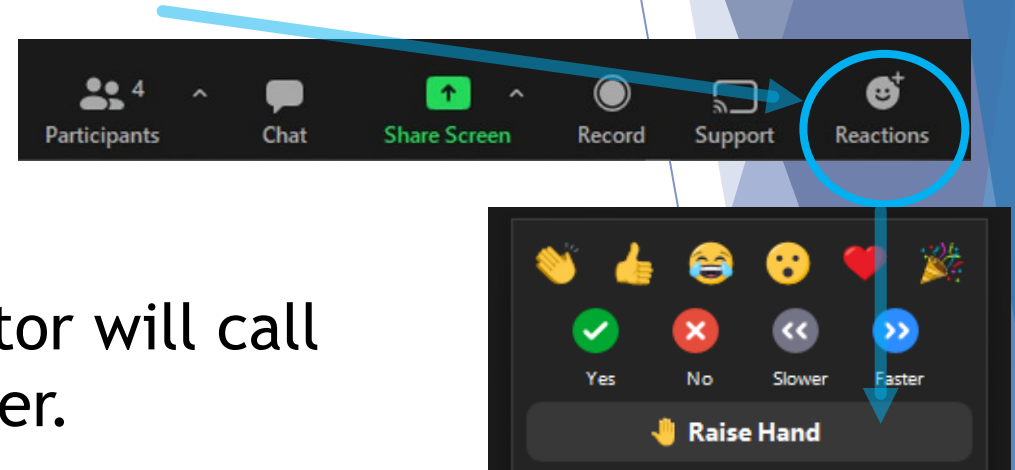
# Questions and Discussion

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

# How to Submit Questions or Comments Verbally

If you would like to speak to ask a question or make a comment, please raise your hand.

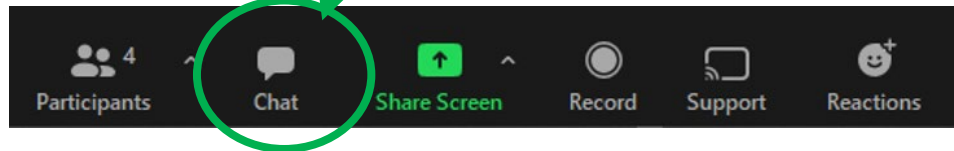
- On a computer (or mobile device), select the **Reactions** button then click on “**Raise Hand**”.
- If you called in and did not enter an attendee number, please press \*9 on your phone to raise your hand.
- When it is your turn to speak, the moderator will call on you by using your name or phone number.
- At that time, you can unmute yourself by pressing the unmute button on your screen or pressing \*6 on your phone.
- Please state your full name and affiliation before speaking. Please feel free to turn on your video while you are speaking.
- If you have technical issues, start a chat with Technical Support.



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**Please note you may hear silence as we wait for questions to be submitted.**