Definition of “Waters of the U.S.”
Why Are We Here?

- The EPA and Army are continuing our coordination with Tribal governments regarding our forthcoming rulemaking to redefine “waters of the United States.”

- This presentation will provide you with information and updates regarding the “waters of the United States” rulemaking efforts.

- The agencies are seeking your feedback about how our potential rulemaking might affect Tribes.
Clean Water Act

- **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

“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
Background on Definition of WOTUS

- **“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  - 2011 draft guidance (superseded by 2015 rule)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
Executive Order 13778

- Signed February 28, 2017
- Directs EPA and the Army to review the 2015 Rule and issue a proposed rule rescinding or revising the 2015 Rule
- Directs the agencies to 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
Two-Step Rulemaking Process

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:

**Step 1:** Publication of a proposed rule to repeal 2015 Rule and recodify prior regulation.

**Step 2:** Development of a revised definition.

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.
Step 1: Status

- July 27, 2017: Publication of the proposed rulemaking in the *Federal Register*
- September 27, 2017: Public comment period closed
- Approximately 685,000 comments submitted to the Step 1 docket
  - Agencies decided to develop a supplemental notice to provide the public with additional clarity on the scope of the agencies’ efforts and an opportunity to provide further comments to the agencies.
- July 12, 2018: Publication of supplemental notice of proposed rulemaking in the *Federal Register*
- August 13, 2018: Comment period closed on supplemental notice
Step 2: Status

- April-June 2017: Formal Federalism consultation and Tribal consultation periods for Step 2 rulemaking
- September-November 2017: Public outreach listening sessions and pre-proposal recommendations docket open for Step 2 redefinition
- Dec. 2017-Early 2018 – Continued engagement with states and tribes
- June 15, 2018: Submitted the proposed rule to the Office of Management and Budget for interagency review.
Final Rule on Addition of Applicability Date to 2015 Rule

- November 22, 2017: Proposed to add an applicability date to the 2015 Rule.

- December 13, 2017: Public comment period closed. ~4,600 comments received.

- **February 6, 2018**: Final rule published in the *Federal Register*. The 2015 Rule will not be applicable until February 6, 2020.

- The agencies’ final rule is separate from the two-step process the agencies propose to take to reconsider the 2015 rule.
2017-2018 Efforts to Date: Overall Process

- February 2017: Executive Order 13778
- April 2017: Announced two-step rulemaking process
  - Rescind (Step 1) and New Definition (Step 2)
- July 2017: Proposed to rescind 2015 Rule and replace with preexisting regulations (Step 1)
- February 2018: Applicability date added to 2015 rule in final rulemaking.
- June 2018: Interagency review for Step 2 began
- July 2018: Issued supplemental notice for Step 1
Step 2: Tribal Consultation Process

April 20, 2017 – June 20, 2017 Tribal Consultation Period

- Followed EPA’s tribal consultation policy
- 41 comment letters from 32 tribes and 7 tribal organizations – available at https://www.epa.gov/wotus-rule/tribal-consultation
- Outreach During Consultation Period: 5 national webinars/calls or meetings (including NCAI), 5 RTOC calls/meetings, and 2 staff-level calls with individual tribes

Meetings Following Consultation Period

- Listening sessions at the Tribal Lands and Environment Forum (2017, 2018)
- Seven staff-level calls and three leader-to-leader calls/meetings with individual tribes held
- Additional meetings scheduled upon request
- Continue to provide updates at national and regional meetings
- National update webinars on December 12, 2017 and February 20, 2018
- In-person Tribal Workshop March 6-7, 2018 in Washington, DC
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 other tribes supported an approach based on Justice Kennedy’s significant nexus
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
Next Steps

- Agencies are working to honor requests from individual tribes requesting consultation
- Step 1: Agencies will read and analyze public comments (for both the supplemental and initial notices) and work to finalize
- Step 2: Agencies plan to issue a proposed redefinition for public comment after interagency review concludes

Additional outreach to tribes

- Will continue to give updates at National Tribal Caucus and National Tribal Water Council monthly meetings and Regional Tribal Operations Committee calls/meetings, as requested
- Will look for other opportunities for continued outreach
Questions and Discussion

- What are effective ways and opportunities to reach out to Tribes and tribal consortia during the upcoming comment period for the Step 2 proposed rule?
- If the definition changes, what would be the best way to “get the word out” and provide training and information to Tribes?
- What types of tools or resources would best assist tribal needs for implementation of the definition of “waters of the United States”?
Contacts

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For Additional Information

- Please visit our website at:
  - https://www.epa.gov/wotus-rule