

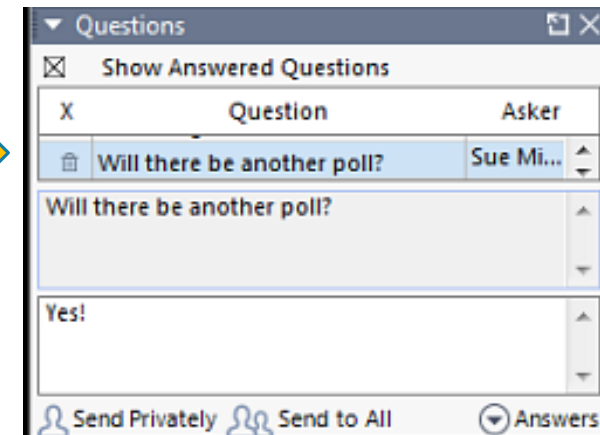
# The Definition of “Waters of the U.S.” Webinar for States

February 20, 2018

# Webinar Logistics

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- Call in: **(844) 271-6333, Conference ID: 3499888**
- All lines are muted.
- For technical issues with the phone line, dial \*0 for operator assistance.
- For technical issues with the webinar, please use the Questions box.
- For Q&A, please press \*1 to be placed in a queue. Your line will be unmuted as your turn arrives.



# Introductions & Purpose of Webinar

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## **Purpose**

To share and discuss the current status of our WOTUS rulemaking efforts with the states, and to identify some initial questions that we hope will contribute to a robust discussion at our in-person meetings in March.

# Overview of Webinar

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- Timeline and Status of Rulemakings
- Initial Federalism Consultation Results
- Draft State Assessments
- Considerations for Step 2 Proposal
- Next Steps

# Timeline & Process

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February 2017: Executive Order (E.O.) 13778

April 2017: Announced two-step rulemaking process

- Rescind 2015 Rule and Recodify Prior Regulations (Step 1)
- Propose Revised Definition of WOTUS (Step 2)

July 2017: Initiated Step 1 of rulemaking effort to rescind 2015 Rule and recodify prior regulations; comment period closed on September 27, 2017

February 6, 2018: Additional rulemaking effort finalized to add applicability date to 2015 Rule (February 6, 2020)

Summer 2018: Targeting proposal for Step 2

# Step 2 Federalism Consultation Process

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E.O. 13132: Federalism: agencies held 24 meetings between April 19 – June 19 and received 170 letters

<https://www.epa.gov/wotus-rule/federalism-consultation>

EPA's Local Government Advisory Committee (LGAC) met ten times and issued a report

<https://www.epa.gov/sites/production/files/2017-07/documents/lgac-final-wotusreport-july2017.pdf>

# Examples of Feedback from States

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State and local governments recommendations varied 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
- 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

# Examples of Feedback from States

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State and local governments recommendations varied for adjacent wetlands including, but 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



# Examples of Feedback from States

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States and local governments provided recommendations to the agencies on adding certain exclusions to the rule:

- 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) features
- Exclude irrigation ditches, roadside ditches excavated in non-WOTUS, and all man-made ditches without perennial flow
- Exclude ephemeral streams, wet meadows, sheet flow, drain tiles, dry arroyos, prairie potholes and playa lakes

# Preliminary Assessment of State Authorities and Programs

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- To facilitate the agencies' assessment of potential changes to the definition of WOTUS, we would like to understand more accurately the potential change in scope, if any, the states may experience in their surface water quality and wetlands programs under both federal and state authorities.
- The agencies have prepared draft assessments of the state programs and plan to transmit those to the states next week.
- Please review the information and provide any feedback to the agencies at [CWAwotus@epa.gov](mailto:CWAwotus@epa.gov) including whether the assessments are accurate and any recommendations that you may have to improve the draft work product.

# Preliminary Assessment of State Authorities and Programs

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## **“Waters of the State”**

- All states have a legal definition for state waters, or “waters of the state”.
- Most states broadly include all waters within the boundaries of the state in their definition, specifying aquatic resources like all rivers, streams, lakes and ponds, and surface water.
- Many states further expand their definition to include springs, groundwater, brooks, marshes, coastal waters, estuaries, tidewaters, wells, drainage systems, wetlands, and other bodies of water, natural or artificial.

## **303: Water Quality Standards**

- All states have approved CWA water quality standards.

## **402: National Pollutant Discharge Elimination System**

- 46 states have full or partial authority over the NPDES program and state permits.
- Only 4 states do not have authority; EPA issues all permits for: ID, NM, MA, NH.

# Preliminary Assessment of State Authorities and Programs

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## **404: Dredge and Fill**

- 2 states have assumed authority of the 404 program (NJ, MI).
- 23 states have a state dredge and fill permitting program for at least some waters and wetlands.
- 27 states do not have a state dredge and fill program and rely on §401 Certification.

## **State Limitations**

- Some states have limitations on their ability to expand state program authority beyond the federally authorized programs.
- Those limitations include, for example, prohibiting regulation beyond the federally authorized program authority and layering additional public participation or other processes when implementing the federal programs.

# Preliminary Assessment of State Authorities and Programs

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The agencies are interested in hearing from the states regarding the following topics:

- Are the state assessments accurate?
- How do the “no more stringent than” limitations under state law apply in the jurisdictional context?
- How have the states dealt with the significant uncertainty and changing landscape associated with the scope of Clean Water Act jurisdiction in the past?
- What do the states intend to do in the future should the federal government clarify the scope of Clean Water Act jurisdiction to address prior uncertainty over certain water bodies?
- What plans do the states have to respond to the updated clarification?
- Are there other questions the agencies should be asking in this context?

# Questions

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FEEDBACK FROM PARTICIPANTS

# Step 2 WOTUS Proposed Rule Considerations

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# Step 2: Tributaries and Other Flowing Waters

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The agencies are considering and will solicit comment on several regulatory options, but to focus the discussion today and at the in-person meetings, the following topics are being identified for initial discussion:

- Clarifying which tributaries are jurisdictional, including how to potentially identify the limits of jurisdiction based on sufficient seasonal flow.
- Several options exist for describing these tributaries, but each raises implementation questions.



# Step 2: Tributaries

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- How to define and implement “seasonal flow” in a nationwide regulation while recognizing regional variation?
- If basing jurisdiction on flow regime, should it be predominant flow or flow at downstream confluence?
- How should water withdrawals and augmentations be accounted for?
- What stream assessment tools, models and methods should be used if accurate stream gage data are unavailable?
- Should streams or drainages that only flow in response to precipitation events during normal years be regulated as jurisdictional tributaries?

# Step 2: Wetlands

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The agencies are considering and will solicit comment on several regulatory options, but to focus the discussion today and at the in-person meetings, the following topics are being identified for initial discussion:

- Using existing regulatory definition of wetlands (hydrology, soils, vegetation).
- Clarifying federal jurisdiction through evaluation of the surface connection between wetlands and other waters of the United States (like tidal waters, rivers, perennial streams, etc.).
- Defining abutting, adjacency, other similar terms.

# Step 2: Wetlands

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Example implementation issues the agencies are considering:

- Relevance to jurisdiction when wetlands are physically connected to, intersecting, or abutting jurisdictional waters and whether non-jurisdictional connections to WOTUS make a wetland abutting?
- How to reflect the concept of “indistinguishable” in a way that is consistent nationwide but also responsive to regional variation?
- Should man-made breaks in a wetland, such as a bisecting road or berm, affect the wetland’s jurisdictional status?

# Step 2: Exclusions

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The agencies are considering and will solicit comment on several regulatory options, but to focus the discussion today and at the in-person meetings, the following topics are being identified for initial discussion:

- The relationship between providing clarity by rule of what is jurisdictional and whether there is the need for exclusions.
- Whether to clarify exclusion for prior converted cropland (PCC).
- What longstanding practices should be incorporated in the rule as exclusions?
- The requests for exclusions that were submitted as part of federalism consultation and through public recommendations.

# Questions

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OPTIONS FEEDBACK FROM PARTICIPANTS

# Step 2: Potential Analyses

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# About the Potential Analyses

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- The agencies are considering developing analytical tools to help clarify the scope of Clean Water Act jurisdiction.
- The agencies are not aware of any current national data set or map that provides that tool.
- The agencies are interested in using the draft state assessments together with tools to analyze potential policy choices for how to provide regulatory certainty and clarity in the definition of WOTUS, and to assess the potential implications associated with modifying the current definition.
- Such an assessment may also inform the economic analysis in support of the Step 2 rulemaking.

# Potential Aquatic Resource Analysis

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**Inputs** – National Hydrography Dataset (NHD) and National Wetlands Inventory (NWI)

**Methodology** – use high resolution NHD to attempt to estimate stream mileage in the United States and differentiate between perennial, intermittent, and ephemeral streams

- Perennial – flows year-round during a normal year
- Intermittent – flows continuously only at certain times of year in a normal year, but more than just in response to precipitation events
- Ephemeral – flows briefly in response to precipitation events in a normal year

Consider using Corps data to help refine analytical tools



# About the Potential Analyses

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## **Data Limitations and Caveats**

- NHD and NWI are not designed for jurisdictional purposes.
- NHD does not accurately differentiate between stream types smaller than perennial streams, and has regional variation in data availability.
- NWI is traditionally used as a desktop tool to identify the potential locations of wetlands before the need for field verification. It does not map the location, nature and extent of individual wetlands with predictable accuracy.
- Given these limitations, the agencies are seeking input from the states as to whether the potential exercise aquatic resource analysis has regulatory utility or if states are aware of any other state-specific mapping resources or other recommended approaches.

# CWA Program Assessments

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The agencies are interested in performing qualitative assessments of key Clean Water Act programs and their relationship with the definition of WOTUS. Those programs include:

- Section 402 NPDES Permitting Programs
- Section 401 Water Quality Certifications
- Section 404 Dredged and Fill Permitting Programs
- Section 303 Water Quality Standards, 303(d) Lists, and TMDLs
- Section 311 Oil Spill and Emergency Response Programs

Should robust analytical tools be identified, the agencies will also consider using those tools to more quantitatively assess potential changes in the scope of CWA jurisdiction while considering the information in the draft state assessments and responses from the states.

# Drinking Water: Federal and State Authorities and Programs

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**Federal Program:** The Safe Drinking Water Act (SDWA) was established to protect the quality of drinking water. 1996 amendments required states and water suppliers to assess sources for vulnerability to contamination. SDWA does not confer regulatory authority to protect surface water.

The Drinking Water State Revolving Fund (SRF) is available to fund infrastructure upgrades and optional set-asides that may be used for source water protection.

**State and Local Programs:** Some states have regulations regarding source water assessments. Most source water protection happens occurs at the local level.

**Source Water Protection Areas:** The agencies will evaluate information regarding state source water protection areas and whether that information can be compared qualitatively or quantitatively against the aquatic resources mapping tool effort or similar data sets.

# Economic Analyses

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- The agencies are exploring whether sufficient data exists to quantify potential changes in the scope of CWA jurisdiction, given the uncertainty inherent in establishing the comparative regulatory baseline, the lack of robust mapping or similar analytical tools, and uncertainties regarding the current scope of state program jurisdiction and potential future changes in those programs.
- Feedback from the states regarding the draft state assessments, potential mapping and analytical tools that states may identify as part of this outreach effort, and related topics will help the agencies select an appropriate path forward for performing an economic analysis for the Step 2 rulemaking.

# Questions

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FEEDBACK FROM PARTICIPANTS ON POTENTIAL ANALYSES

# Next Steps

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March In-person Workshop: March 8-9

- State associations identified likely participants: AR, AZ, FL, MD, MN, NE, OR, PA, WY

Goal: In small working meeting, engage with states to identify -

- How best to make policy approaches work in their states.
- Any potential concerns or issues the agencies should consider.

Please send comments on the draft state assessments, feedback on other issues, and specific items any state would like raised at the March in-person workshop, to [cwawotus@epa.gov](mailto:cwawotus@epa.gov).

# Adjourn meeting

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THANK YOU & ADJOURN MEETING

[www.epa.gov/wotus-rule](http://www.epa.gov/wotus-rule)