

## Revising WOTUS

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By: Jonathan H. Adler | April 16, 2019

The EPA and Army Corps of Engineers are attempting to bring clarity to the muddy debate over the scope of federal regulatory jurisdiction under the Clean Water Act (CWA). In a new [rulemaking](#), the two agencies are proposing a new definition of “waters of the United States,” to replace the definition adopted by these same two agencies in 2015. This new definition will identify the scope of waters and related lands that are subject to federal regulation under the CWA.

As proposed, “waters of the United States” would be interpreted to encompass all those waters traditionally considered to be “navigable waters,” tributaries to such waters, some lakes, ponds, and ditches, and wetlands adjacent to all such waters. It would not, however, include “interstate waters” as a distinct category of water subject to federal jurisdiction. The proposed definition is both more clearly defined and more circumscribed than that promulgated by the Army Corps and EPA in 1986 and 2015. As such, this definition is more consistent with the text of the CWA and applicable Supreme Court precedent than prior definitions.

According to the agencies, the proposed rule is intended to increase the “predictability and consistency” of jurisdictional determinations by “increasing clarity” as to what constitute “waters of the United States” subject to federal regulation. Decades of litigation and legal conflict over the proper scope of CWA jurisdiction has produced substantial uncertainty as to the precise scope of federal regulation. Although there is no way to prevent additional litigation over the scope of federal regulatory jurisdiction, the agencies are attempting to develop a definition that comports with the Constitutional and statutory limits on federal regulatory authority while simultaneously advancing the CWA’s environmental protection purposes. The new definition is also intended to facilitate achievement of the CWA’s stated goals of restoring and maintaining the quality of covered waters while respecting the longstanding role of state, local, and tribal governments in regulating local land-use and protecting water resources.

In reviewing comments on the proposed revised definition and developing a final rule, to define “waters of the United States” under the CWA, the agencies should keep three principles in mind:

- First, the agencies’ regulatory power is circumscribed by the constitutional limits on federal power, as well as the limits of the power delegated to the agencies by Congress under the CWA. The power to

### In brief...

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regulate “waters of the United States” is not the power to regulate all water resources with environmental significance.

- Second, insofar as the statutory phrase “waters of the United States” is ambiguous, Congress has delegated to the agencies the authority to make a reasoned policy judgment about how this term should be defined. Thus, any definition of “waters of the United States” necessarily embodies a policy judgment by the agencies.
- Third, in exercising their regulatory jurisdiction, the agencies should focus on those areas where there is the greatest *federal* interest, including those areas where federal regulation is most necessary to supplement the environmental protection efforts of state, local and tribal governments and non-governmental entities. Such a focus is likely to maximize the value of federal regulation under the CWA and facilitate greater environmental protection efforts by non-federal actors.

Based upon these criteria, the proposed revision to the definition of the “waters of the United States” is a significant improvement over prior definitions, including that adopted in 2015. If the definition contained in the final rule is similar to that which has been proposed, it is likely to provide greater legal certainty for the regulated community and is likely to be less vulnerable to legal challenge than were prior definitions. In a [public interest comment](#) filed on the proposed rule, I suggest that additional refinements to the rule and greater consideration of those areas in which the federal government has a comparative advantage in regulating could help focus federal regulatory efforts and do more to maximize the benefits of federal regulation in this area. Such refinements should not come at the expense of clarity and legal certainty, nor should they risk extending the assertion of federal regulatory jurisdiction beyond what is authorized by the CWA or is permissible under the Constitution.

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