

The Draft Revisions to Waters of the United States: A Roll Back to the 1970's February 28, 2019

The scientific understanding of how rivers, streams, wetlands and other water bodies interconnect and the importance of those insights for assuring clean drinking water to the American public and clean water for industrial needs has improved over time. These insights have contributed to a broadened definition of “waters of the US” for the purpose of setting up protections under the Clean Water Act (CWA). The Trump Administration’s proposal to re-define the reach of the CWA, known as its “jurisdiction,” contrary to a broad, decades-long consensus among EPA, the States, and the courts, would halt this progress. The implications of the Trump proposal are deep and significant, not only denying CWA protection to many headwater streams but also undercutting protection even of some waters the proposal does still recognize as under statutory protection.

Why does this matter? The nation’s surface waters provide drinking water to millions; wetlands are “nature’s kidneys,” removing pollutants as well as providing nurseries for fisheries and wildlife habitat. The benefits of clean water from a health perspective are obvious, but in addition, multiple commercial and recreational industries require clean water. Once polluted, rivers and lakes fall into a cycle of degradation. Once filled and built upon, wetlands are gone forever. The US has spent decades and invested billions of dollars to maintain and protect water quality. These efforts should not be placed in jeopardy with the proposed WOTUS re-definition.

What’s different and most troubling?

The rule lists six categories of waters that the Trump Administration would agree are “jurisdictional” or subject to protection under the CWA: (1) Traditional Navigable Waters (TNWs), (2) limited categories of tributaries to TNWs, (3) a very limited category of narrower drainage channels (“ditches”), (4) lakes and ponds that flow perennially or intermittently into categories (1) – (5); (5) impoundments of the above, and (6) wetlands directly adjacent to the above.

What is expressly excluded from the Administration’s WOTUS definition (and therefore from protection) is significant, including: (1) everything not identified above, (2) groundwater (including water flowing through tile drains), (3) ephemeral streams, (4) drainage channels/ditches not identified above, (5) prior converted croplands, (6) artificially irrigated areas that would revert to uplands without irrigation, (7) artificial lakes and ponds constructed in uplands, (8) water-filled depressions at mines, (9) stormwater control features, (10) wastewater recycling structures built in uplands, and (11) waste treatment systems. The proposed definition also drops non-navigable interstate waters.

Why does this matter?

- Waters that flow from one state into the neighboring one (Interstate waters) have disappeared from the definition.

This opens the door to a chaotic future of inconsistent state definitions. Flowing water obviously does not respect state borders, so leaving it in the hands of the upstream states to decide whether to protect interstate waters inevitably will clash with the desire of downstream states

for water quality standards that will protect their citizens. The downstream state could no longer rely on the Clean Water Act permit system to protect its waters from upstream polluters.

The Administration tries to justify this, arguing that “states may actually be in a better position than the federal government to regulate local environmental public goods (e.g., water quality). When given more flexibility over which waters to regulate, states may be able to direct resources toward their high priority waters and limit expenditures on their low priority waters.” The difficulty is that eventually this water flows across state borders, overriding the downstream state’s interest in protecting its citizens access to clean water.

- Streams and ditches that have flowing water for brief periods during and following rainfall but are normally dry (“ephemeral waters”) are no longer protected, even though their impact in terms of polluting downstream water bodies when they do fill up and drain is considerable.

Over 25 years the courts have confirmed protection for these critical water sources . Mountaintop mining could ruin such streams without permit review.

- The Administration narrows significantly the protections for wetlands, limiting its focus to those adjacent wetlands that have permanent, surface water connection to other waters.
- The “significant nexus” standard, authorized by the Supreme Court in 2006, has been dropped.

Protecting water bodies with a “significant nexus” is a critical way of recognizing the significant (i.e. more than speculative or insubstantial”) impacts on the chemical, physical or biological integrity of adjacent bodies. This has been the standard for more than ten years, recognizing the ecological reality of the role of excluded waters.

The lengthy Preamble discussion and the supporting documents are disingenuous and very troubling. Unlike the 2015 definition of jurisdictional waters, the proposed new definition provides no distinguishing physical characteristics for jurisdictional waters or specific distances to jurisdictional wetlands. As a result, case specific determinations could be needed for all waters which are not traditional navigable waters or territorial seas and for most wetlands. While the greatest difficulty will be in distinguishing intermittent from ephemeral streams, even perennial waters will need case specific determinations if they become ephemeral further downstream due to natural conditions (e.g., losing stream) or anthropogenic conditions (e.g., water withdrawals). The proposed new approach requires highly complex hydrological analyses that will require enormous resources and result in years of uncertainty about the status of waters and wetlands.

The Economic Analysis is also deeply flawed. For example, the Economic Analysis does not even try to assign value to the most consequential benefits lost under the proposal. It spends a lot of time explaining why the proposal did not monetize the impacts on public health, welfare, and ecology from increased pollution and oil spills from newly unregulated entities. The Economic Analysis does not value the lost benefits from deregulation under the CWA Section 402 water quality permit program, Section 311 oil spill and prevention program, or state certification of Section 404 permits. The Economic Analysis also fails to evaluate the increased wastewater treatment and drinking water treatment costs (including energy costs) which will be incurred when those facilities are required to clean highly polluted upstream

waters of industries, POTWs, and utilities as a result of this new definition of WOTUS. The Economic Analysis has a detailed discussion of how compliance costs with the 2015 rule would be expected to filter through to consumers in the form of higher prices for agricultural goods and housing, citing that this could be particularly burdensome for low income households. However, there is no equivalent discussion of how deregulation of upstream polluters resulting from this new restrictive definition of jurisdictional waters will lead to higher prices for products from any industry with higher treatment costs as well as higher sewer bills and higher water bills. Higher water and sewer bills could be particularly burdensome for low income households.

The Economic Analysis focuses solely on the cost savings and forgone benefits associated with the Section 404 dredge and fill program, managing to find greater than an order of magnitude drop in benefits of wetlands mitigation compared to the 2015 analyses, resulting in the cost savings now exceeding the forgone benefits. The new approach is based on four of the same studies used for the 2015 analysis with only one new study added. The discussion is particularly odd because, using essentially the same information that supported the 2015 WOTUS definition, the documents try to support a very different outcome.

The assumptions of the proposal are contrary to the history of the Clean Water Act. In fact, 13 states under state law are required to be equivalent to and no more stringent than federal regulation. In addition, 26 states under state laws are required to justify any attempt to be more stringent with a high bar for this justification. That leaves only 11 states free to regulate waters and wetlands under state laws which are non jurisdictional under federal regulation. Despite these facts, the Economic Analysis scenarios are based on the following estimates: 23 states are likely to continue regulating streams excluded by the new rule, 21 states may continue, 7 states may reduce regulation; and 21 states are likely to continue regulating excluded wetlands, 8 states may continue, 16 states may reduce regulation, 5 states are likely not to regulate. EPA does not recognize the significant legal constraints on states' ability to continue regulating non jurisdictional waters and thus underestimates the lost benefits of this more restricted jurisdiction definition.

In addition, EPA does not acknowledge that states will need to have more state dollars and staff to replace federal resources if they continue to regulate non jurisdictional waters, therefore the cost savings of this new proposed rule are overestimated. Because EPA, not the states, currently administers some programs, if the state decides to continue those programs, there will be additional incurred expenses. The proposal assumes only short term costs to take over the Section 404 program in newly non-jurisdictional waters; this does not make much sense from our experience.

In sum, by exaggerating the extent of state regulation that would remain, the proposal underestimates the environmental losses of this proposal compared to the 2015 rule. The less the states are able to take over regulation, the greater the environmental losses. The proposal also overestimates the costs saved by this proposal compared to the 2015 rule by not accounting for increased state costs to continue regulation in non-jurisdictional waters in the absence of EPA support.