

# Two Critical Improvements for the New Proposed “Waters of the United States” Rule

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## KEY TAKEAWAYS

The EPA and Army Corps of Engineers have proposed a new rule defining the Clean Water Act’s term “waters of the United States” (WOTUS).

While an important step, the proposed WOTUS definition still needs improvements to promote clarity and respect the legal limitations placed on the two agencies.

Critical improvements are defining “traditional navigable waters” to require the transport of commerce, and not regulating waters with only intermittent flow.

On February 14, 2019, the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers proposed a new rule defining the Clean Water Act’s term “waters of the United States” (WOTUS).<sup>1</sup> This terminology is important because it helps to inform which waters the agencies can regulate under the Clean Water Act: Specifically, the agencies can regulate “navigable waters,” which include “the waters of the United States, including the territorial seas.”<sup>2</sup>

For decades, the two agencies have struggled to come up with a definition for WOTUS, primarily because they have repeatedly sought to go beyond what is authorized by law. Instead of respecting the legal limitations placed on them, including by the Commerce Clause and the Clean Water Act, the two agencies have instead sought to regulate almost every kind of water imaginable,

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down to depressions in land that are dry except for a few days each year when they hold water from heavy precipitation. To its credit, the Trump Administration is trying to develop a definition that is well within the law.

While the proposed rule is a significant step forward, there are still improvements that need to be made for the final WOTUS rule. This *Issue Brief* provides some brief background on the proposed rule, and highlights two critical improvements that are needed: (1) the definition of “traditional navigable waters” should require the transport of commerce on those waters, and (2) waters that only have intermittent flow should not be regulated.

## **Brief Background on the EPA’s and Corps’ New Proposed WOTUS Rule**

The two agencies appear to appreciate that there are proper legal constraints on how they can define “waters of the United States.” This includes respecting the primary state role in addressing water pollution that is expressly detailed in the Clean Water Act,<sup>3</sup> the importance of clear regulations to reduce the subjective and vague definitions that have plagued the law, and the limitations placed on the agencies by the Commerce Clause. Unlike past overbroad interpretations of the law, such as the Obama Administration’s 2015 Clean Water Rule,<sup>4</sup> the EPA and Corps would not regulate waters such as:

- Ephemeral waters,<sup>5</sup> meaning waters that may exist only a few days a year after heavy precipitation (although, as will be discussed, the definition of intermittent waters may undermine the goal to exclude ephemeral waters);
- Waters that do not meet any specific definition within the regulations, but can be regulated because the agencies, through an after-the-fact, case-by-case analysis, conclude that such waters have a significant nexus to certain waters;
- Non-navigable, isolated, intrastate waters; and
- Wetlands that are not truly adjacent to regulated waters.<sup>6</sup>

## Critical Improvement 1: Require the Transport of Commerce when Defining “Traditional Navigable Waters”

The scope of the WOTUS definition is largely informed by how the agencies define “traditional navigable waters.”<sup>7</sup> As in the proposed rule, these specific waters are the foundation of the WOTUS definition. Other waters are included within the WOTUS definition if they have the requisite relationship to these foundational waters. The proposed rule defines these foundational waters as:

Waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including the territorial seas and waters which are subject to the ebb and flow of the tide.<sup>8</sup>

This language is far too broad and inconsistent with the law. Merely requiring a water (which can even include intrastate waters<sup>9</sup>) to have some use in interstate or foreign commerce could lead to very expansive interpretations. This use need not even currently exist. The definition, as supported by the law, should at a minimum be limited to situations where the waters are used in the *transport of commerce*.<sup>10</sup>

A long line of cases starting with *The Daniel Ball*<sup>11</sup> have detailed consistent requirements to help determine which waters should be traditional navigable waters or “foundational waters.” In the 1870 case *The Daniel Ball*, the U.S. Supreme Court explained:

Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.<sup>12</sup>

*The Daniel Ball* and its progeny have consistently used the concepts of “highways for commerce” and “trade and travel.”<sup>13</sup> The “transport of commerce” captures the “highways for commerce” and “trade and travel” requirements in the case law.

Further, the term “highways for commerce” is a clear indication of *movement* of commerce on the water. Therefore, the necessary commerce that must take place on the water is not a stationary activity, such as something recreational, but instead part of a commercial activity that helps move that activity along a channel of interstate or foreign commerce.<sup>14</sup>

**Recommendation.** There is language in Section 404(g)(1) of the Clean Water Act, as discussed in the proposed rule, which provides an indication as to what Congress considered to be traditional navigable waters or foundational waters.<sup>15</sup> This language can help to inform a revised definition of “traditional navigable waters” for the final rule while being consistent with the case law. The following is a recommended revised definition:

Waters which are currently used, or were used in the past, or may be susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce, including the territorial seas and waters which are subject to the ebb and flow of the tide.<sup>16</sup>

## Critical Improvement 2: Exclude Intermittent Waters

While the proposed rule would exclude ephemeral waters, it would still regulate intermittent waters. This is a major difference between the proposed rule and Justice Antonin Scalia’s plurality opinion in the 2005 Supreme Court case *Rapanos v. United States*. The plurality opinion expressly and properly rejected the inclusion of intermittent waters.<sup>17</sup>

The “intermittent” definition in the proposed rule states that “‘intermittent’ means surface water flowing continuously during certain times of a typical year and more than in direct response to precipitation” (such as when the groundwater table is elevated or when snowpack melts).<sup>18</sup>

The duration that is meant by “certain times of a typical year” is far from clear, but it certainly appears to include anything from a matter of days to a duration that is not year-round (not a perennial water). This would include a vast amount of waters, including waters that in many ways might look like ephemeral waters.

The 2015 Clean Water Rule regulated too many waters, including trying to regulate waters that would generally be considered land. The proposed rule as drafted appears to have some of the same problems. Justice Scalia’s plurality opinion in *Rapanos* is so important because it would help to avoid such an outcome.

The opinion stresses the importance of the waters being “relatively permanent” and “standing or continuously flowing.” It stresses the Supreme Court’s past use of terms such as “discrete bodies of water,” “open water,” and “open waters” to describe regulated waters. The plurality also argues that at a bare minimum there must be “the ordinary presence of water.”<sup>19</sup> By including intermittent waters, the proposed rule would be ignoring these requirements that help to provide clarity and limits to the waters that can be regulated under the Clean Water Act.

**Recommendation.** The agencies should exclude intermittent waters and take out references to intermittent flow in the proposed definitions of tributaries and lakes and ponds.<sup>20</sup> While the *Rapanos* plurality opinion excludes intermittent waters, it would regulate more than perennial (year-round) waters. Footnote 5 of the plurality opinion explains:

By describing “waters” as “relatively permanent,” we do not necessarily exclude streams, rivers, or lakes that might dry up in extraordinary circumstances, such as drought. We also do not necessarily exclude seasonal rivers, which contain continuous flow during some months of the year but no flow during dry months—such as the 290-day, continuously flowing stream postulated by Justice Stevens’ dissent.<sup>21</sup>

The agencies should develop an objective definition that mirrors footnote 5 and other key aspects of the plurality opinion.<sup>22</sup> This would include clarifying that while waters with intermittent flow are excluded, this does not mean that waters would be excluded if there are extraordinary circumstances such as drought, and for seasonal rivers, streams, or similar naturally occurring surface water channels<sup>23</sup> with continuous flow for a minimum of 183 consecutive days within the year.<sup>24</sup>

Requiring these “seasonal waters” to have continuous flow for a majority of the year (a minimum of 183 days) ensures that the water is not always coming and going (that is, it is not always “fitful”) and that there is the “ordinary presence of water” and the water can still be considered “relatively permanent.”<sup>25</sup>

In addition to this objective measure, there should also be an ordinary person requirement.<sup>26</sup> A tributary (or other water where flow is analyzed under the rule)<sup>27</sup> should only be regulated if an ordinary person would consider it to be a discrete body of water such as a stream, river, or lake, and the water is relatively permanent and has standing or continuous flow.

This may seem subjective, but for property owners and agency officials such a standard would likely be easier to understand than trying to figure out whether a water meets the 183-day continuous flow/extraordinary-circumstances requirement. It also helps property owners (and the agencies) by giving them both this non-technical, commonsense-based approach to determine what waters are regulated and the additional objective requirement.<sup>28</sup>

## Conclusion

In defining “waters of the United States,” the EPA and Corps are bound by legal constraints: the Clean Water Act and the U.S. Constitution. They

also have the practical considerations of developing a workable definition that property owners can understand and agencies can enforce.

The agencies appear to recognize these important points. The proposed rule is a good start, and by making changes, such as the two important changes identified in this *Issue Brief*, the agencies can succeed where their predecessors have failed.

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## Endnotes

1. U.S. Army Corps of Engineers, Department of the Army, Department of Defense and U.S. Environmental Protection Agency, “Revised Definition of ‘Waters of the United States,’” Proposed Rule, *Federal Register*, Vol. 84, No. 31 (February 14, 2019), pp. 4154–4220, <https://www.federalregister.gov/documents/2019/02/14/2019-00791/revised-definition-of-waters-of-the-united-states> (accessed September 3, 2019).
2. The CWA prohibits discharge of pollutants into “navigable waters” without a federal permit and clarifies that “navigable waters” include “the waters of the United States, including the territorial seas.” While the CWA states “discharge of pollutants,” this does not mean merely dumping toxic waste into pristine waters. It covers even ordinary activities that are dirt-moving, such as farming or building a home. Federal Water Pollution Control Act, Public Law No. 107–303, 107th Cong., November 27, 2002, Sec. 502, <https://www.epa.gov/sites/production/files/2017-08/documents/federal-water-pollution-control-act-508full.pdf> (accessed September 3, 2019).
3. Federal Water Pollution Control Act, Public Law No. 107–303, 107th Cong., November 27, 2002, Sec. 101(b), <https://www.epa.gov/sites/production/files/2017-08/documents/federal-water-pollution-control-act-508full.pdf> (accessed September 3, 2019).
4. U.S. Army Corps of Engineers, Department of the Army, Department of Defense and U.S. Environmental Protection Agency, “Clean Water Rule: Definition of ‘Waters of the United States,’” Final Rule, *Federal Register*, Vol. 80, No. 124 (June 29, 2015), pp. 37053–37127, <https://www.federalregister.gov/documents/2015/06/29/2015-13435/clean-water-rule-definition-of-waters-of-the-united-states> (accessed September 3, 2019).
5. As defined in the proposed rule, “ephemeral” means “surface water flowing or pooling only in direct response to precipitation (such as rain or snow fall).”
6. Stephen P. Mulligan, “Wading into the ‘Waters of the United States,’” Congressional Research Service, December 28, 2018, <https://fas.org/sgp/crs/misc/LSB10236.pdf> (accessed September 3, 2019).
7. The courts have made it clear that the Clean Water Act covers at least some waters that are not considered traditional navigable waters. See, for example, *Rapanos v. United States*, 547 U.S. 715 (2006), <https://www.law.cornell.edu/supct/html/04-1034.ZO.html> (accessed September 3, 2019).
8. U.S. Army Corps of Engineers and U.S. Environmental Protection Agency, “Revised Definition of ‘Waters of the United States,’” Proposed Rule, p. 4203.
9. Traditional navigable waters are already too broadly defined. For example, the U.S. Supreme Court has held that the interstate and foreign commerce requirement can be met by intrastate waters. *Utah v. United States*, 403 U.S. 9 (1971), <https://www.law.cornell.edu/supremecourt/text/403/9> (accessed September 3, 2019).
10. Without “transport” language or something comparable in the final rule, the agencies would be opening up the possibility of covering waters with a tenuous or speculative connection to interstate or foreign commerce, and as a result, inappropriately pushing the limits of the Commerce Clause in which Congress derives its power to regulate under the Clean Water Act.
11. *The Daniel Ball*, 77 U.S. 557 (1870), <https://caselaw.findlaw.com/us-supreme-court/77/557.html> (accessed September 3, 2019).
12. *Ibid.*, p. 563.
13. See, for example, U.S. Environmental Protection Agency and the U.S. Army Corps of Engineers, “Appendix D: Legal Definition of ‘Traditional Navigable Waters,’” [https://www.epa.gov/sites/production/files/2017-05/documents/app\\_d\\_traditional\\_navigable\\_waters.pdf](https://www.epa.gov/sites/production/files/2017-05/documents/app_d_traditional_navigable_waters.pdf) (accessed September 3, 2019), and Assumable Waters Subcommittee (individuals of the legal workgroup), “Outline of Section 10 Case Law: Summary of Key Concepts and Terms Relevant to the Work of the Assumable Waters Subcommittee,” Draft Prepared for the Assumable Waters NACEPT FACA Subcommittee, <https://www.epa.gov/sites/production/files/2016-05/documents/7mar16sec10legal.pdf> (accessed September 3, 2019).
14. The foundational waters definition is just one way that waters can be considered “waters of the United States.” For those who want Clean Water Act regulation of waters in which recreational activities take place (for example) but that do not meet the “transport” requirement, those waters could still be considered “waters of the United States” and subject to federal Clean Water Act regulation through another category of waters meeting the WOTUS definition.
15. The proposed rule explains: “[I]n 1977, when Congress authorized State assumption over the section 404 dredged or fill material permitting program, Congress limited the scope of assumable waters by requiring the Corps to retain permitting authority over Rivers and Harbors Act waters (as identified by the *Daniel Ball* test) plus wetlands adjacent to those waters, minus historic use only waters.” U.S. Army Corps of Engineers and U.S. Environmental Protection Agency, “Revised Definition of ‘Waters of the United States,’” Proposed Rule, p. 4164. The 404(g)(1) language states: “those waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce.” Federal Water Pollution Control Act, Public Law No. 107–303, 107th Cong., November 27, 2002, Sec. 404(g)(1), <https://www.epa.gov/sites/production/files/2017-08/documents/federal-water-pollution-control-act-508full.pdf> (accessed September 3, 2019).
16. This recommended language is based on the language in the proposed WOTUS rule, and also integrates the 404(g)(1) language. In addition to the transport language, this definition helps to provide some clarity on what it means for a water to be “susceptible to use.” The agencies should also remove the “used in the past” language, if authorized by law.
17. See, for example: “The restriction of ‘the waters of the United States’ to exclude channels containing merely intermittent or ephemeral flow also accords with the commonsense understanding of the term”; and “In sum, on its only plausible interpretation, the phrase ‘the waters of the United States’ includes only those relatively permanent, standing or continuously flowing bodies of water ‘forming geographic features’ that are described in ordinary parlance as ‘streams[,]...oceans, rivers, [and] lakes.’ The phrase does not include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall.” [Internal citations omitted]. *Rapanos v. United States*, 547 U.S. 715, 733–39, (2006), <https://www.law.cornell.edu/supct/html/04-1034.ZO.html> (accessed September 3, 2019).

18. U.S. Army Corps of Engineers and U.S. Environmental Protection Agency, “Revised Definition of ‘Waters of the United States,’” Proposed Rule, pp. 4154–4220.
19. *Rapanos v. United States*, 547 U.S. 715, 734 (2006), <https://www.law.cornell.edu/supct/html/04-1034.ZO.html> (accessed September 3, 2019).
20. Any final rule should exclude all waters with intermittent flow.
21. *Rapanos v. United States*, 547 U.S. 715, 732 n.5 (2006), <https://www.law.cornell.edu/supct/html/04-1034.ZO.html> (accessed September 3, 2019).
22. The agencies should be providing the answer to the continuous flow questions within any final rule. As currently proposed though, the length of continuous flow is an open question that the proposed rule does not answer. The agencies will be required to provide answers to these questions, and unless the answers are provided within the rule, they would have to be provided in agency actions after the rulemaking process, possibly on a case-by-case basis. This type of approach is in fact arbitrary and perpetuates the vague language problems that have undermined past definitions of “waters of the United States.”
23. This recommendation uses “naturally occurring surface water channels” because this language was included in the proposed rule.
24. Deciding the length of continuous flow is somewhat subjective, but it is far from arbitrary. After all, the agencies would be developing a workable standard that can provide clarity to regulated parties based on the plurality opinion in *Rapanos* and consistent with past Supreme Court opinions. Based on footnote 5 in Justice Scalia’s *Rapanos* plurality opinion, there are a few ways to define the length of time that a tributary must have continuous flow. The approach discussed in this *Issue Brief* includes a majority of the year to ensure that there is the “ordinary presence of water” and the water is “relatively permanent.” Another reasonable approach is to include three seasons (a minimum of 270 days), allowing for one dry season. The length of time could also be a minimum of 290 days, consistent with the stream postulated by Justice Stevens. One other possible option is to define continuous flow as a minimum of 90 days, or one season within the year. This, however, is problematic because it certainly does not meet the “ordinary presence of water” requirement and arguably not the “relatively permanent” requirement. *Rapanos v. United States*, 547 U.S. 715 (2006), <https://www.law.cornell.edu/supct/html/04-1034.ZO.html> (accessed September 3, 2019).
25. The agencies should determine continuous flow based on multiple years, not unlike the “typical year” definition in the proposed rule.
26. In *Rapanos*, Justice Scalia argues that “waters of the United States” should only cover those waters described in ordinary parlance as “streams[,]... oceans, rivers, [and] lakes.” This “described in ordinary parlance” requirement is a very important aspect of the plurality opinion. It provides a clear indication that regulated waters, at least according to the plurality opinion, should be those waters that are commonly understood to be streams, rivers, and similar waters. *Rapanos v. United States*, 547 U.S. 715 (2006), <https://www.law.cornell.edu/supct/html/04-1034.ZO.html> (accessed September 3, 2019).
27. The language in the parentheses was added because intermittent flow can apply beyond just tributaries as defined under the proposed rule. For example, it is also included in the definition of lakes and ponds.
28. For a water to be covered, it should meet both the ordinary person requirement *and* the 183-day/extraordinary-circumstances requirement.