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BACKGROUNDER

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What *You* Need to Know About the EPA/Corps Water Rule: It's a Power Grab and an Attack on Property Rights

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Abstract

In April 2014, the Environmental Protection Agency and the Army Corps of Engineers published a proposed rule—"Definition of 'Waters of the United States' Under the Clean Water Act"—that defines what waters are covered under the Clean Water Act (CWA). This rule, often referred to as the "Waters of the United States" (WOTUS) rule, could cover almost any type of water, giving the two agencies far greater power than authorized under the CWA. The proposed rule is complicated and vague, with little clarity coming from the agencies. There are four key points that should be known about the proposed rule: (1) it is extremely broad; (2) it is an attack on property rights; (3) it exceeds the broadest interpretation of Supreme Court precedent on CWA jurisdiction; and (4) it was developed through a flawed process. Unless Congress acts, this proposed power grab could soon become a reality—the two agencies recently sent their final rule to the Office of Management and Budget for its approval. Congress should require that the agencies withdraw the rule, and then Congress must define what is meant by "waters of the United States."

On April 21, 2014, the Environmental Protection Agency (EPA) and the Army Corps of Engineers published a proposed rule—"Definition of 'Waters of the United States' Under the Clean Water Act" (CWA)—to define which waters are covered under the Clean Water Act (that is, jurisdictional waters).[1] The proposed rule could cover almost any type of water, giving the two agencies far greater power than authorized under the CWA. Unless Congress acts before the final rule is published, probably within the next few months, this proposed power grab could soon become a reality—the agencies

Key Points

- In April 2014, the Environmental Protection Agency and the Army Corps of Engineers proposed a rule that defines which waters are covered under the Clean Water Act (CWA).
- The rule, which attempts to define "waters of the United States" (WOTUS) could cover almost any water, giving the two agencies far greater power than authorized under the CWA.
- The proposed WOTUS rule is complex and vague—it is (1) extremely broad; (2) an attack on property rights; (3) based on a highly expansive interpretation of Supreme Court precedent on CWA jurisdiction; and (4) the result of a flawed process.
- The choice is not between the WOTUS rule and clean water. The choice is between an overreaching rule and applying the CWA in a manner consistent with the statute.
- Congress should require the agencies to withdraw the rule—and Congress, not the agencies, should define WOTUS.

This paper, in its entirety, can be found at **http://report.heritage.org/bg3012**

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recently sent their final rule to the Office of Management and Budget for its approval.[2]

The proposed "Waters of the United States" (WOTUS) rule is complex and vague, with little clarity coming from the agencies. EPA Administrator Gina McCarthy has simply dismissed some public concerns about the rule as "ludicrous" and "silly."[3] The agency has used video[4] and social media[5] to gain public support for the rule, asking: "Do you choose clean water?" As if critics of the rule want dirty water. Four key points can help to cut through the confusion and better explain the proposed rule.

1. The Rule Is Extremely Broad.

The sheer overreach of the proposed rule is chilling. Both the EPA and Corps have consistently sought to acquire more power under the CWA. In just over a decade, the United States Supreme Court has twice struck down the agencies' efforts to regulate more waters: in 2001, in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*,[6] and in 2006, in *Rapanos v. United States*.[7]

The proposed rule would assert jurisdiction over numerous types of waters, including "tributaries," "adjacent waters," and "other waters." The definition for "tributaries" covers any water with a bed, banks, and ordinary high water mark that contributes flow, either directly or through another water, to a traditional navigable water, interstate water, territorial sea, or impoundment.[8] This definition is even broader than it sounds. As explained by the American Farm Bureau Foundation:

> The agencies use the words "bed" and "bank" and "ordinary high water mark," which sound like parts of a river or stream. In reality, though, the agencies' explanation makes clear that those words just mean some kind of channel (land with higher elevation on each side of land with a lower elevation) plus any physical marks left by flowing water.[9]

The "tributaries" definition would include streams with ephemeral flow[10]—in other words, a stream that only exists after heavy precipitation.[11] A depression in the land could be a tributary if it sometimes has water flowing in it. For all practical purposes, the agency could be regulating land, not water. According to the agencies, a tributary could be "small" and a "substantial distance" from a jurisdictional water.[12] As defined, a tributary would cover almost any ditch, including man-made ditches.[13]

1. *Federal Register*, Vol. 79, No. 76 (April 21, 2014), pp. 22188–22274, http://www.gpo.gov/fdsys/pkg/FR-2014-04-21/pdf/2014-07142.pdf (accessed April 15, 2015).
2. Georgia Farm Bureau, "WOTUS Rule Sent to Office of Management and Budget for Review," April 9, 2015, http://www.gfb.org/agnews/story.asp?RecordID=5453 (accessed April 15, 2015).
3. National Cattlemen's Beef Association, "EPA Administrator Calls Cattlemen's Concerns Ludicrous," http://www.beefusa.org/ourviewscolumns.aspx?newsid=4318 (accessed April 15, 2015).
4. Environmental Protection Agency, "Do You Choose Clean Water?" video, September 24, 2014, http://www2.epa.gov/cleanwaterrule/videos-about-proposal-protect-clean-water#vid1 (accessed April 15, 2015).
5. Travis Loop, "Do You Choose Clean Water?" Greenversations EPA blog, September 9, 2014, http://blog.epa.gov/blog/2014/09/do-you-choose-clean-water/ (accessed April 15, 2015).
6. Legal Information Institute, *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001), https://www.law.cornell.edu/supct/html/99-1178.ZO.html (accessed April 20, 2015).
7. Supreme Court of the United States, *Rapanos v. U.S.*, 547 U.S. 715 (2006), http://www.epa.gov/owow/wetlands/pdf/Rapanos_SupremeCourt.pdf (accessed April 20, 2015).
8. *Federal Register*, Vol. 79, No. 76, p. 22199.
9. American Farm Bureau Federation, "Trick or Truth? What EPA and the Corps of Engineers are *Not* Saying About their 'Waters of the U.S.' Proposal," October 30, 2014, p. 5, http://ditchtherule.fb.org/wp-content/uploads/2014/10/Trick_or_Truth.pdf (accessed April 15, 2015).
10. *Federal Register*, Vol. 79, No. 76.
11. See for example, Environmental Protection Agency, "Streams," October 30, 2013, http://water.epa.gov/type/rsl/streams.cfm (accessed April 15, 2015).
12. Specifically, this could cover tributaries that are a significant distance from one of the following jurisdictional waters: traditional navigable water, interstate water, or territorial sea. *Federal Register*, Vol. 79, No. 76, p. 22206.
13. Bob Stallman, "Potential Impacts of Proposed Changes to the Clean Water Act Jurisdiction Rule," testimony before the Subcommittee on Water Resources and Environment, Transportation and Infrastructure Committee, U.S. House of Representatives, June 11, 2014, http://www.fb.org/newsroom/nr/nr2014/06-11-14/WOTUS_testimony_6-11-14.pdf (accessed April 15, 2015).

There is also a definition for "adjacent waters." For the two agencies, "adjacent" does not simply mean next to jurisdictional waters. For example, if a body of water[14] is located anywhere in a floodplain of a jurisdictional water, it would be considered an adjacent water. The size and scope of this floodplain area are not clarified in the proposed rule. An isolated wetland or ephemeral stream in a floodplain could presumably be many miles away from the jurisdictional water and still be considered an adjacent water.

An adjacent water would also include "waters, including wetlands, *separated from* other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like."[15] (Emphasis added.) Once again, the agencies define "adjacent" to mean something far beyond the meaning of the word.

If a water does not fall under the definition of "tributaries," "adjacent waters," or another category, there is the catch-all "other waters" to assert jurisdiction. "'Other waters' are jurisdictional provided that they are found, on a case-specific basis, to have a significant nexus to" a traditional navigable water, interstate water, or territorial sea.[16]

Through this definition, an isolated water could presumably be deemed jurisdictional if the water by itself or in combination with "similarly situated waters in the region ... significantly affects the chemical, physical, or biological integrity of a traditional navigable water, interstate water, or territorial sea."[17] The agencies can lump a bunch of waters together until they get the required impact and there is no apparent limit to the size of the region. A water does not even have to be close to a "water of the United States" to be considered jurisdictional.[18]

2. The Rule Is an Attack on Property Rights.

The proposed rule could drastically infringe on property rights. Under the CWA, the federal government has jurisdiction over "navigable waters," which the CWA further defines as "the waters of the United States, including the territorial seas."[19] The proposed rule defines what is meant by "waters of the United States," which is critical since that helps clarify the scope of the CWA. If a water is covered under the law, property owners could be required to secure costly and time-consuming permits to take actions that impact these waters.

In *Rapanos v. United States*, Justice Antonin Scalia cited a study[20] highlighting the following costs and delays for one of the major types of permits (Section 404 dredge and fill permits): "The average applicant for an individual permit spends 788 days and $271,596 in completing the process, and the average applicant for a nationwide permit spends 313 days and $28,915—not counting costs of mitigation or design changes."[21]

14. *Federal Register*, Vol. 79, No. 76, p. 22191, footnote 3. "The agencies use the term 'water' and 'waters' in the proposed rule in categorical reference to rivers, streams, ditches, wetlands, ponds, lakes, playas, and other types of natural or man-made aquatic systems. The agencies use the terms 'waters' and 'water bodies' interchangeably in this preamble. The terms do not refer solely to the water contained in these aquatic systems, but to the system as a whole including associated chemical, physical, and biological features."
15. Ibid., p. 22274.
16. Ibid., p. 22211.
17. Ibid.
18. As explained in the proposed rule, "Other waters, including wetlands, are similarly situated when they perform similar functions and are located sufficiently close together *or* sufficiently close to a 'water of the United States' so that they can be evaluated as a single landscape unit with regard to their effect on the chemical, physical, or biological integrity of a water identified in paragraphs (a)(1) through (a)(3)." *Federal Register*, Vol. 79, No. 76, p. 22200.
19. 33 U.S. Code §1362, https://www.law.cornell.edu/uscode/text/33/1362 (accessed April 15, 2015).
20. David Sunding and David Zilberman, "The Economics of Environmental Regulation by Licensing: An Assessment of Recent Changes to the Wetland Permitting Process," *Natural Resources Journal*, Vol. 42 (Winter 2002), pp. 59–90, http://are.berkeley.edu/~sunding/Economcs%20of%20Environmental%20Regulation.pdf (accessed April 15, 2015).
21. *Rapanos v. U.S.* The costs of obtaining a Section 404 individual permit are $61,924 plus $16,722 per acre impact; and $23,911 plus $13,161 per acre impact for a general permit. These numbers were calculated using the EPA's own data from "Economic Analysis of Proposed Revised Definition of Waters of the United States" and adjusting for inflation using the Consumer Price Index for Urban Consumers (CPI-U) from the Bureau of Labor Statistics. Numbers are based on 2015 dollars. Environmental Protection Agency, "Economic Analysis of Proposed Revised Definition of Waters of the United States," March 2014, p. 16, exhibit 6, http://www2.epa.gov/sites/production/files/2014-03/documents/wus_proposed_rule_economic_analysis.pdf (accessed April 16, 2015).

At a National Farmers Union meeting, EPA Administrator Gina McCarthy stated: "Remember, being jurisdictional doesn't mean a thing unless you want to pollute or destroy a jurisdictional water."[22] This statement is misleading and insulting to property owners. It implies someone dumping toxic waste into a pristine lake. The reality is that the statute prohibits actions that do not even cause environmental harm.

Someone might need a permit for kicking some sand into a jurisdictional water.[23] Property owners could be required to secure a permit if there is a discharge of dredged material (material excavated or dredged from waters of the U.S.) or fill material ("material placed in waters such that dry land replaces water—or a portion thereof—or the water's bottom elevation changes").[24]

In other words, common activities, from farming to home building, could require a permit. Farmers, local governments, and others who would be affected do not "want to pollute or destroy a jurisdictional water," but instead want to use their property for ordinary everyday uses. Many people simply want to use their property to make an honest living. A 2012 Supreme Court case, *Sackett v. EPA*,[25] highlights an egregious instance of regulatory enforcement whereby the EPA sought to impose fines of $75,000 a day on a couple for placing gravel on virtually dry land to build a home in a built-out subdivision.[26] This couple wanted to build a home, not "pollute or destroy a jurisdictional water."

As more waters are deemed jurisdictional, property owners will have to secure more permits or simply choose not to engage in certain activities due to the cost and time of securing a permit. Through these new restrictions, the value of their property may very well decline. Many property owners may not even know that their property has a jurisdictional water because its existence will often be far from clear—even to the EPA and the Corps—and it will often be based on a subjective determination.

In the recent Eighth Circuit Court of Appeals case *Hawkes v. Corps*,[27] Judge Jane Kelly explains in her concurrence the problems with not knowing whether the CWA applies:

> In my view, the Court in *Sackett* was concerned with just how difficult and confusing it can be for a landowner to predict whether or not his or her land falls within CWA jurisdiction—a threshold determination that puts the administrative process in motion. *This is a unique aspect of the CWA; most laws do not require the hiring of expert consultants to determine if they even apply to you or your property.*[28] (Emphasis added.)

22. Gina McCarthy, "Remarks to the National Farmers Union," remarks at National Farmers Union, Wichita, Kansas, March 16, 2015, http://yosemite.epa.gov/opa/admpress.nsf/8d49f7ad4bbcf4ef852573590040b7f6/1a067fd006d60d4585257e0a005ed14e!OpenDocument (accessed April 15, 2015).
23. The definition of "pollutant" is extremely broad. Environmental Protection Agency, "Clean Water Act, Section 502 General Definitions," March 6, 2012, http://water.epa.gov/lawsregs/guidance/wetlands/sec502.cfm (accessed April 15, 2015).
24. Environmental Protection Agency, "Managing Your Environmental Responsibilities: A Planning Guide for Construction and Development," April 2005, http://www.epa.gov/compliance/resources/publications/assistance/sectors/constructmyer/ (accessed April 15, 2015). See also the EPA regulations at 33 U.S.C. §323.2, http://www.law.cornell.edu/cfr/text/33/323.2 (accessed April 15, 2015). The regulations provide more specific definitions of dredged material, fill material, and discharge of dredged or fill material. The precise definitions of terms such as "fill material" are a matter of controversy. See Claudia Copeland, "Controversies over Redefining 'Fill Material' Under the Clean Water Act," Congressional Research Service *Report for Congress*, August 21, 2013, http://fas.org/sgp/crs/misc/RL31411.pdf (accessed April 15, 2015).
25. *Sackett v. Environmental Protection Agency*, 132 S. Ct. 1367 (2012), http://www.supremecourt.gov/opinions/11pdf/10-1062.pdf (accessed April 20, 2015).
26. See, for instance, Pacific Legal Foundation, "*Sackett v. EPA* Fact Sheet," http://www.pacificlegal.org/old-site/document.doc?id=566 (accessed April 15, 2015); Damien Schiff, "*Sackett v. EPA:* Compliance Orders and the Right of Judicial Review," *Cato Supreme Court Review* (2012), pp. 112–138, http://object.cato.org/sites/cato.org/files/serials/files/supreme-court-review/2012/9/scr-2012-schiff.pdf (accessed April 15, 2015); and Timothy Sandefur, "Washington Post, ScotusBlog, L.A. Times on Sackett Case," Pacific Legal Foundation Liberty blog, January 5, 2012, http://blog.pacificlegal.org/2012/washington-post-scotus-blog-on-sackett-cas/ (accessed April 15, 2015).
27. *Hawkes Co., Inc. et al. v. United States Army Corps of Engineers*, No. 13-3067 (8th Cir., 2015), http://blog.pacificlegal.org/wp/wp-content/uploads/2015/04/Hawkes-Decision.pdf (accessed April 20, 2015).
28. Ibid.

3. The Rule Exceeds the Broadest Interpretation of Supreme Court Precedent on CWA Jurisdiction.

On its WOTUS rule website the EPA claims, "The proposed rule is consistent with the Supreme Court's more narrow reading of Clean Water Act jurisdiction."[29] In reality, the EPA and Corps have taken the Court's broadest reading and then gone beyond that.

Justice Antonin Scalia, writing for a four-Justice plurality in *Rapanos v. United States,* took the narrowest (and most supportable) reading of CWA jurisdiction:

> [T]he 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.[30]

In discussing wetlands, specifically, the plurality explained "*only* those wetlands with a continuous surface connection to bodies that are 'waters of the United States' in their own right."[31] The agencies ignore the plurality[32] and rely on Justice Anthony Kennedy's "significant nexus" test that he developed in his concurrence in *Rapanos* that would cover more waters than would be allowed by the plurality. As outlined by Justice Kennedy:

> [W]etlands possess the requisite nexus, and thus come within the statutory phrase "navigable waters," if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as "navigable." When, in contrast, wetlands' effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term "navigable waters."[33]

Justice Kennedy's significant nexus test applies to *wetlands,* not to other waters, such as tributaries or adjacent waters. The agencies simply assert that they can use his rationale to determine when other types of waters are "waters of the United States." For example, when discussing tributaries, the agencies claim, "[w]hile Justice Kennedy focused on adjacent wetlands in light of the facts of the cases before him, it is reasonable to utilize the same standard for tributaries."[34] The two agencies are, by their own admission, expanding the coverage of Justice Kennedy's test. The agencies provide no explanation for using the standard for these other waters. Justice Kennedy's significant nexus test, which comes from a *wetlands* case, was focused exclusively on *wetlands*, including their ecological functions.

In its comment to the agencies regarding the proposed rule, the National Association of Home Builders explains:

> Not even in dicta does he [Kennedy] suggest the same test for other types of waterbodies. More recently, in *San Francisco Baykeeper v. Cargill Salt Division* the U.S. Court of Appeals for the Ninth Circuit squarely rejected the application of the significant nexus test to non-wetland waters, explaining that "*Rapanos*, like *Riverside Bayview*, concerned the scope of the Corps' authority to regulate adjacent *wetlands*."[35]

29. Environmental Protection Agency, "Clean Water Rule," April 7, 2015, http://www2.epa.gov/cleanwaterrule (accessed April 15, 2015).
30. *Rapanos v. U.S.*, 547 U.S. 715 (2006). Citations included in the opinion omitted here.
31. Ibid.
32. The Supreme Court addressed how courts should handle cases without majority opinions in *Marks v. United States*, 430 U.S. 188 (1977), http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=430&invol=188 (accessed April 20, 2015).
33. *Rapanos v. U.S.*
34. See also, for instance, from the proposed rule: "While the issue was not before the Supreme Court, it is reasonable to also assess whether non-wetland waters have a significant nexus." *Federal Register*, Vol. 79, No. 76, p. 22209.
35. Kevin P. Kelly, chairman of the Board, National Association of Home Builders, comment on the "Environmental Protection Agency Proposed Rule: Clean Water Act Definitions: Waters of the United States," Regulations.gov, November 14, 2014, http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OW-2011-0880-19574 (accessed April 15, 2015).

4. The Rule Was Developed Through a Flawed Process.

In July 2013, the EPA assembled a Scientific Advisory Board[36] to review a draft report that it had developed titled the "Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence."[37]

According to the EPA, "This report, when finalized, will provide the scientific basis needed to clarify CWA jurisdiction, including a description of the factors that influence connectivity [of streams] and the mechanisms by which connected waters affect downstream waters."[38] In January 2015, the report was finalized. In a fact sheet announcing the release of the report, the EPA stated:

> Now final, this scientific report can be used to inform future policy and regulatory decisions, *including the proposed Clean Water Rule* being developed by EPA's Office of Water and the U.S. Army Corps of Engineers.[39] (Emphasis added.)

There was a slight problem, however. The report was finalized *after* the proposed rule was published. By not waiting for the final report before developing the proposed rule, the EPA has made the policy decisions look like a foregone conclusion. If this type of process is allowed, government agencies could develop proposed rules with limited support and then use reports and studies after the fact to validate what the agencies have already proposed.[40]

Since the final scientific report[41] was developed after the proposed rule, it did not provide the "scientific basis" for the proposed rule. This greatly undermines the public notice and comment process, given that the public was unable to provide comments on a proposed rule that reflected science contained in the final report. The public was never given the chance, through the rulemaking process, to challenge the "scientific basis needed to clarify CWA jurisdiction" or the policies that arose out of that science.

Addressing the Rule and Defining "Waters of the United States"

While developing a precise WOTUS definition may take some time, there are specific actions that Congress needs to take now:

Require the Agencies to Withdraw the WOTUS Rule. Congress needs to prohibit the implementation of the proposed WOTUS rule, be it through stand-alone legislation or through the appropriations process. The rule will be finalized soon, and the initial priority should be to stop this rule from moving forward.

Simply requiring the withdrawal of the rule is not enough if the agencies can simply re-propose the same rule or a similar rule. While even a simple "restart" would be better than nothing, the agencies should be limited in what they can do. This could be accomplished though specific language that clarifies the scope of any new rule or through a new process in which the agencies are directed to solicit much-needed feedback from affected parties, such as states and farmers. Congress should create its own process of developing recommendations on how best

36. Memorandum from Thomas M. Armitage, Designated Federal Officer, EPA Science Advisory Board Staff Office, to Christopher S. Zarba, Acting Director EPA Science Advisory Board Staff Office, July 29, 2013, http://yosemite.epa.gov/sab/sabproduct.nsf/fedrgstr_activites/7724357376745F48852579E60043E88C/$File/Final%20Determination%20memo_connectivity%20panel%20(unsigned).pdf (accessed April 15, 2015).
37. Environmental Protection Agency, "Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence (External Review Draft)," September 24, 2013, http://cfpub.epa.gov/ncea/cfm/recordisplay.cfm?deid=238345 (accessed April 15, 2015).
38. Ibid.
39. Environmental Protection Agency, Fact Sheet, "Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence," January 15, 2015, http://www.eenews.net/assets/2015/01/15/document_gw_02.pdf (accessed April 29, 2015).
40. Further, the EPA had incentive to limit the amount of changes to the final report because the final report is supposed to be the scientific basis for the final rule, and its findings should be reflected in the final rule. Too many changes could lead to logical-outgrowth-doctrine problems. When there is a significant difference between proposed and final rules, courts may decide that agencies must start the process all over again by drafting new proposed rules. According to the D.C. Circuit Court of Appeals, "Given the strictures of notice-and-comment rulemaking, an agency's proposed rule and its final rule may differ only insofar as the latter is a 'logical outgrowth' of the former." *Environmental Integrity Project v. U.S. Environmental Protection Agency*, 425 F.3d 992 (D.C. Cir. 2005).
41. Environmental Protection Agency, "Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence (Final Report)," January 15, 2015, http://cfpub.epa.gov/ncea/cfm/recordisplay.cfm?deid=296414 (accessed April 15, 2015).

to define WOTUS, *possibly* through hearings and a commission.[42]

Define WOTUS. Ultimately, Congress needs to define what "waters of the United States" means so that the EPA and Corps are not constantly seeking to use any ambiguities in the CWA to acquire power not authorized by law. Even if the agencies do get public feedback on better defining WOTUS, they should only be doing so to help Congress define which waters should be jurisdictional under the CWA.

Any definition should be consistent with the important goal of states playing a key role under the CWA, not a marginal one, when it comes to clean water. The beginning of the CWA states: "It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources."[43]

States were always seen as playing a leading role under the CWA. States have a better sense of their specific environmental needs than the federal government and can provide a tailored approach to regulation. The EPA and Corps are seeking to grab this state power and apply a one-size-fits-all model of regulation.

Finally, when developing a definition, Congress should respect private-property rights. This fundamental right should not be trampled by an overreaching federal government seeking to regulate almost any water in the country. There are no better stewards of property than the individuals who own the property.

Conclusion

The choice is not between this proposed WOTUS rule and clean water. The choice is between an overreaching rule and applying the CWA in a manner consistent with the statute. Congress should emphasize in statute that water resources are best protected when the federal and state partnership outlined in the CWA is respected. Congress should also develop clear definitions for jurisdictional waters through bright-line rules and define "waters of the United States" as generally being limited to traditional navigable waters. Congress must take these important actions now.

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42. The value of a commission depends on many factors, such as properly defining its mission, ensuring that any definitions do not go beyond reasonable boundaries, and developing a sound appointment process.
43. Federal Water Pollution Control Act, 33 U.S.C. §1251(b), Legal Information Institute, https://www.law.cornell.edu/uscode/text/33/1251 (accessed April 20, 2015).