The Daily Dish

Can Congress Come Together on WOTUS?

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Eakinomics: Can Congress Come Together on WOTUS?
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If you own land, you want to have clarity about how it is regulated. You would understandably want to ensure that how you manage or alter your property does not run afoul of federal requirements, since civil penalties can be as much as about $50,000 per day.

Unfortunately, the definition of Waters of the United States (WOTUS) — a regulatory definition determined jointly by the Environmental Protection Agency and the Army Corps of Engineers — has been anything but clear since the passage of the Clean Water Act in the 1970s. The term's definition is important because it determines where the federal government can prohibit, or require permits for, certain discharges or activities, such as land development. While the agencies of jurisdiction have issued what they presumed to be clear definitions, courts have struggled to ascertain exactly how far Congress intended to extend the federal government's reach.

Consider that three U.S. Supreme Court decisions have altered the existing definition of WOTUS; the current precedent established that in order to be a WOTUS, the feature in question must have water flow with a "significant nexus" to a navigable water. That's interesting language, but what does a significant nexus mean? Is it a constant flow? Is it flow for three months? Is it flow for one day a year?

Congress clearly needs to provide a better definition. And just before leaving for August recess, Sens. Mike Braun and Joni Ernst offered one with their Define WOTUS Act. The bill, which is featured in our latest edition of The Week in Regulation series (subscribe today!), would essentially codify February's proposed definition from the Trump Administration.

Unfortunately, the partisan nature of Washington likely renders the Define WOTUS Act dead on arrival. Even if it were somehow able to achieve 60 votes to clear the Senate, it stands little chance in the House, where nearly all Democrats view the proposed definition as a major rollback of protections issued by the Obama Administration.

Congress should work to end decades of uncertainty, wasted resources, and perplexing litigation by crafting a definition that can become law and provide the needed clarity to landowners, developers, environmentalists, and everyone in between. Leaving the decision to regulators has proven unworkable.