



The Daily Dish

A Little Less WOTUS

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Eakinomics: A Little Less WOTUS

One of the joys (I don't have much of a life) of the Trump Administration's regulatory reforms is the chance to relive the greatest hits of the Obama Administration's regulatory tsunami. No rule fits that metaphor better than the so-called "Waters of the United States" ([WOTUS](#)) rule, which defines the bodies of water that will be regulated under the Clean Water Act of 1972. The rule was necessitated by a series of Supreme Court decisions that ruled the Environmental Protection Agency (and the Army Corps of Engineers) had overstepped their authority under the Clean Water Act. The first cut replaced a standard definition of bodies of water, "such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds," with a case-by-case judgment framework that depended on whether a body of water has a "significant nexus" with other navigable bodies traditionally covered by the Act. This vagueness created a political firestorm and the final rule resorted to simply having a set of "automatic jurisdictions" much like having a broad, standard definition.

The Trump Administration first sought to repeal the WOTUS rule, and then develop its own definition. The text of the proposed rule was released Tuesday. As [described](#) by AAF's Dan Bosch, "The agencies propose to interpret WOTUS as 'traditional navigable waters, including the territorial seas; tributaries that contribute perennial or intermittent flow to such waters; certain ditches; certain lakes and ponds; impoundments of otherwise jurisdictional waters; and wetlands adjacent to other jurisdictional waters.' The agencies further describe their approach as taking the 'ordinary meaning' of the term waters – basically, oceans, rivers, streams, lakes, ponds, and adjacent wetlands – and argue that not all waters are 'waters of the United States.' The proposed rule specifically excludes ephemeral streams and also says that only features defined as WOTUS can be covered."

This proposed rule is less costly than its predecessor and, thus, consistent with the pro-growth aspects of the administration's agenda. Although intentionally narrower in scope, it does attempt to adhere to protecting the intended target of the original Clean Water Act legislation. In these ways, the rule looks like progress. To the extent that it engenders litigation over the authority of the Environmental Protection Agency and Army Corps of Engineers to write the rule in this way, it will not reduce regulatory uncertainty. In that event, it will fall to Congress to legislate more clearly the boundaries of regulable waters in the United States.