



Comments of the Regulatory Action Center

RE: [Request for Recommendations: Waters of the United States](#)

Docket ID No. EPA-HQ-OW-2021-0328

September 2, 2021

The Regulatory Action Center at FreedomWorks Foundation is dedicated to educating Americans about the impact of government regulations on economic prosperity and individual liberty. FreedomWorks Foundation is committed to lowering the barrier between millions of FreedomWorks citizen activists and the rulemaking process of government agencies to which they are entitled to contribute.

On behalf of our activists nationwide, FreedomWorks Foundation appreciates the opportunity to offer these comments regarding the Environmental Protection Agency's (EPA) request for recommendations on their intent to revise the definition of "waters of the United States" (WOTUS) under the Clean Water Act (CWA).

We write to you in firm opposition to both the proposed repeal of the 2020 Revised Definition of Waters of the United States and the forthcoming foundational rule that is ostensibly intended to bring the 2015 definition of "navigable waters" in line with *Rapanos v. United States* (2006) and other related Supreme Court rulings.

To begin with, FreedomWorks has long opposed the expanded definition imposed by the Obama administration in the 2015 Clean Water Rule as regulatory overreach. As we wrote in 2014 during the notice and comment process for the Clean Water Rule, the 2015 definition "would place virtually all bodies of water, no matter how small their size or impact on commerce, under EPA authority."¹ As it turned out, our analysis was correct. The expanded definition provided under the Clean Water Rule drastically expanded EPA authority over waters that no reasonable person would conclude are "navigable," creating a massive regulatory compliance burden for private landowners.

¹ Charles Katebi. "The EPA's New Water Rule Leaves the Economy High and Dry." *FreedomWorks*. July 9, 2014. <https://www.freedomworks.org/content/epa%E2%80%99s-new-water-rule-leaves-economy-high-and-dry>



One example of the effects of this overreach occurred in 2016 when John Duarte and the Duarte Nursery Inc. were slapped with exorbitant fines for plowing their land.² Although the Clean Water Act grants agriculturalists an exemption from Section 404 permitting requirements for "normal farming" activities, the Department of Justice, at the EPA's behest, threw the book at Duarte for plowing 22 acres of his land. While the EPA's goal of protecting America's waterways from pollution and ecological disruption is laudable, trampling over the private property rights of Americans in this way is entirely unacceptable.

To see the folly of the 2015 rule, one need only look to the fact that the Clean Water Rule was enjoined in more states than it was in effect. According to the Congressional Research Service, as of December 12, 2018, the Clean Water Rule was enjoined by the District of North Dakota, the Southern District of Georgia, and the Southern District of Texas in cases filed by multiple states.³ When a regulation is enjoined in 28 states and active in only 22 states, it is a clear sign of bad policy.

Due to these abuses of the CWA, and the economic burdens that came with them, FreedomWorks strongly supported the re-definition of WOTUS put forward under the Trump administration. As our President, Adam Brandon, wrote in a statement surrounding the 2020 final rule, "The [2015] WOTUS rule is one of the more invasive federal regulations on the books, and it is past time for it to be redefined."⁴ Put simply, the Clean Water Rule not only expanded EPA authority beyond the spirit of the CWA, but created even more regulatory uncertainty for landowners.

As former Administrator of the EPA, Andrew Wheeler, put it, "They need to understand what the law is." He continued to say, "a property owner should be able to stand on his or her property and be able to tell for themselves whether or not they have a federal water without having to hire an outside consultant or attorney to tell them."⁵

² Kenny Stein. "Federal Government Says a Farmer Broke the Law by Plowing His Land." *FreedomWorks*. June 29, 2016. <https://www.freedomworks.org/content/federal-government-says-farmer-broke-law-plowing-his-land>

³ Laura Gatz. "Waters of the United States" (WOTUS): Current Status of the 2015 Clean Water Rule." *Congressional Research Service*. Updated December 12, 2018. <https://fas.org/sgp/crs/misc/R45424.pdf>

⁴ Adam Brandon. "FreedomWorks Foundation Statement in Response to New WOTUS Definition." *FreedomWorks*. January 23, 2020.

<https://www.freedomworks.org/content/freedomworks-foundation-statement-response-new-wotus-definition>

⁵ Jack Dura. "In North Dakota visit, EPA chief vows new Waters of the US definition to 'stand the test of time'." *The Bismark Tribune*. October 7, 2019.

<https://www.epa.gov/newsreleases/icymi-north-dakota-visit-epa-chief-vows-new-waters-us-definition-stand-test-time>



Under the direction of President Trump and Administrator Wheeler, the EPA affirmatively redefined the definition of WOTUS in 2020 to restrict EPA authority to waters that are truly navigable. This rule also streamlined certain requirements, making it much easier for the average landowner to determine whether or not their land contained any United States waters. Regulatory clarity should be one of the chief goals of the EPA, and reverting back to the 2015 definition is a giant step in the wrong direction.

While the Agency's intent to work with multiple stakeholders on refining the definition of WOTUS is well-intentioned, the simple fact is that reverting back to the Obama-era Clean Water Rule -- even temporarily -- is bound to create further confusion and intensify the economic burden on landowners. It is for these reasons that we strongly urge the EPA to abandon its efforts to revert the definition of WOTUS back to that under the 2015 Clean Water Rule.

Respectfully submitted,

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