

For the past year, an overriding concern of many Californians has been whether and how state legislators and regulators can fill the environmental law and policy gap left by a Trump Administration that is in the process of reversing a host of Obama-era environmental rules and that has otherwise largely abandoned the field of environmental protection. In some areas—like forestalling renewed federal interest in offshore oil and gas development and proposed reductions to our national monuments—that’s a daunting task. In other instances, however, California state intervention can be straightforward and effective—at least within state borders.



Wetlands protection falls squarely into the latter category. California regulators currently possess the legal authority, resources and a clear field to protect the state’s remaining wetlands from destruction. (To be sure, the vast majority of California’s wetlands were lost decades or even centuries ago; fully 90% of California’s original wetlands and 95% of its coastal wetlands have already been destroyed as a result of historic development practices.)

My Legal Planet colleagues and I have previously chronicled the Trump Administration’s announced plans to “repeal and replace” the so-called Waters of the United States (“WOTUS”) Rule adopted by the Obama Administration in 2015. (The WOTUS Rule was itself an overdue regulatory response to a pair of U.S. Supreme Court rulings in 2001 and 2006 that have created considerable uncertainty about just what waterways the Clean Water Act [CWA] actually protects.) Responding to President Trump’s directive, Scott Pruitt’s USEPA and the U.S. Army Corps of Engineers have initiated the formal rulemaking proceedings to repeal the WOTUS Rule, which was designed to clarify the extent of permit jurisdiction under the CWA. Even if the feds make good on President Trump’s pledge to

replace it with a new federal rule interpreting the extent of federal permit jurisdiction under the CWA—and don't hold your breath that that will actually happen—any such new rule would doubtless construe federal regulatory jurisdiction narrowly—probably along the constrained lines set forth in the late Justice Antonin Scalia's plurality opinion in the Supreme Court's landmark 2006 [*Rapanos v. United States*](#) case.

So while the prospects for effective federal protection of our nation's wetlands under the CWA are dim at best, the State of California can (and should) act independently to protect California's remaining wetlands. Indeed, it has broader authority to regulate proposed development of state wetlands than the federal government has—even under the Obama Administration's WOTUS Rule that's currently in the Trump Administration's crosshairs.

California regulators have had the legal authority to protect and preserve state wetlands since before the CWA was enacted by Congress in 1972. Specifically, the California Legislature gave that power to the State Water Resources Control Board when it passed [*the Porter-Cologne Act*](#) in 1969.

Unfortunately, over the past four decades the Water Board has not done much to implement and enforce its Porter-Cologne Act authority to preserve California wetlands. Until now.

This past summer, [*the Water Board announced it was considering adopting new and more stringent rules defining and protecting from development California's remaining wetlands*](#).

In publishing its new draft rules, the Board noted that until now there has been “no single accepted definition of wetlands at the state level” and that the nine Regional Water Quality Control Boards overseen by the State Board have inconsistently defined and regulated wetlands across the state. The State Board further acknowledged that its prior, rather languid wetlands rules were a product of the fact that the State and Regional Boards “have historically relied on [federal] CWA protections” to preserve California's remaining wetlands. Finally, while the State Board's draft rules observe that stronger state wetlands rules are needed due to restrictions on federal wetlands jurisdiction imposed by the U.S. Supreme Court's recent CWA/wetlands rulings, those draft rules curiously fail to reference the urgent need for a stepped-up state wetlands regulatory presence due to the Trump Administration's announced, planned repeal of the federal WOTUS Rule.

California has *always* had *broader* legal authority to regulate and preserve state wetlands than does the federal government. That's because the Supreme Court has indicated in its recent CWA/wetlands decisions that federal regulators only have constitutional authority to regulate wetlands that potentially affect interstate commerce. By contrast, California regulators are subject to no such constitutional restrictions on their exercise of wetlands

jurisdiction under *state* law. They can and should exercise that state law jurisdiction in a more muscular fashion than either they or the federal government have previously done.

The draft wetlands rules proposed by the State Board earlier this year represent a good start, but they can and should be strengthened before they're adopted. For example, the Board should clarify that all applicants who seek to develop wetlands will be required to study alternatives to ensure that existing wetlands are preserved and protected whenever possible. Additionally, the new Board rules should mandate that any developers who *are* allowed to develop existing wetlands be required to restore at least one acre of wetlands habitat for each acre lost to development. (The latter requirement would be fully faithful to former California Governor Pete Wilson's "no-net-loss" wetlands policy, first announced in 1993.)

The State Board has reported received some 6000 public comments in response to its draft wetlands rule. The Board is expected to formally adopt a final wetlands rule this winter.

As a result of several excellent, recent appointments by Governor Jerry Brown, California has in place the most farsighted and competent State Board in decades. Board members should resist the inevitable pleas from developers and property owners to weaken its draft wetlands rules and, instead, strengthen and improve upon the draft as suggested above.

California's often-seasonal wetlands and streams are critically important to filter pollutants and provide habitat for millions of waterbirds that migrate annually through the Central Valley and Bay Area. Additionally, California wetlands absorb flood waters during extreme rainfall and coastal flooding events. We need look no further than Houston to see the folly of developing our precious state wetlands.

The Trump Administration's announced plans to repeal the federal WOTUS Rule represent a clear and present danger to our nation's wetlands. Fortunately, California has a strong and longstanding set of tools that allow it to step in to protect the state's precious wetland resources. The State Water Resources Control Board should neither weaken nor delay adoption of critically-required state rules to preserve California's remaining wetlands. The need for the Board to step up its wetlands protection efforts has never been so urgent.