

Last December, the Biden administration [issued](#) a rule defining the scope of the federal government's authority over streams and wetlands. Congressional Republicans [vowed](#) to overturn the rule, using a procedure created by the [Congressional Review Act](#). If Congress is going to repeal something, it should be the Congressional Review Act rather than the Biden rule.

The handwringing over the Biden rule is a textbook example of the knee-jerk reactions fostered by the Congressional Review Act. Every Republican senator joined the overrule motion based on claims that the Biden rule “upended” regulatory certainty and burdened “millions of Americans.” Sen. Thom Tillis (R-NC) [described](#) it as a “stifling regulation” that would “cripple” agriculture and do irreversible damage.

On the House side of things, E&E News [reported](#) that at a hearing about the bill, some GOP representatives “argued the rule from EPA and the Army Corps of Engineers was akin to actions taken under Soviet Union dictator Joseph Stalin.” Only one witness was able to testify in favor of the rule, San Francisco law professor Dave Owen, but his [sober legal analysis](#) was swamped in the flood of invective.

The angry denunciations were misplaced. It's true that the Biden rule is broader than the Trump rule it replaced, which itself was mired in litigation. But the Biden rule has affinities with earlier regulatory attempts going back to the 1970s. All of them have struggled with how to limit federal jurisdiction without compromising the goal of clean water.

There is a lot of [history](#) leading up to today's disputes about federal authority over wetlands and streams. Congress set the stage when it passed the Clean Water Act 50 years ago. The law gave the federal government jurisdiction over “navigable waters.” That term had a fairly well-defined historical meaning focused on waterways that can be used for transportation. But the Clean Water Act adds a definition of its own for the term as meaning “the waters of the United States.”

Everyone agrees that Congress meant to go beyond those traditional navigable waters. What's not clear is how far. The terms “waters” and “navigable” may suggest significant lakes and streams. But in scientific terms, those lakes and streams can't be separated from nearby wetlands or from the smaller flows of water around them. Congress passed the Clean Water Act with ambitious goals of eliminating pollution and restoring the nation's waters. That's why the U.S. Supreme Court [upheld](#) federal jurisdiction over wetlands adjacent to open water bodies in

1985. That [purpose](#) is central to the Biden administration's rule and was completely ignored in the Trump rule.

Broad claims of federal jurisdiction are nothing new. In 1986, the federal government took the [position](#) that it had jurisdiction over all wetlands that were usable by migratory birds. Fifteen years later, the Supreme Court [overturned](#) the so-called [Migratory Bird Rule](#). Even though that rule was far broader than the Biden rule today, the sky didn't fall during the time it was in effect: farmers, ranchers, and real estate developers all went about their business without any apparent crisis. Just before Obama took office, the George W. Bush administration issued [guidance](#) on federal authority that went well beyond the Trump regulation and took a flexible view of federal authority. In short, there wasn't a crisis before the Trump regulation, and there won't be one if the Biden regulation goes into effect.

In this particular case, the effort to use the Congressional Review Act may not have much practical impact. Biden would surely veto such a resolution, and the Supreme Court seems likely to provide more legal clarity in the near future. But the flaws in the process are all too typical. The act does not allow nuanced responses or political compromises: Congress must make an all-or-nothing choice between allowing a regulation to go into effect and axing it root and branch. To make things worse, the act also places limits on future agency regulations that make it harder for the agency to fix any flaws once a regulation has been overturned by Congress.

I [studied](#) the use of the act in 2017 at the hands of former President Donald Trump and a Republican Congress. What I found was that ideology and special interests were the driving factors, not economics or legal issues. The rhetoric surrounding the new Biden regulation is another illustration of how the act fosters partisanship rather than common sense.

It's time to repeal the Congressional Review Act and leave it to agencies to decide complex policy issues rather than have Congress oversee the process based on nothing but political grandstanding.