The Trump Administration has a proposed rule revising the definition of "waters of the United States" for the Clean Water Act (comment period closing on Monday, if you want to get your two cents in). The definition is important (and has been the subject of a lot of litigation) because it defines the scope of what the Clean Water Act applies to – both the requirement that discharges of pollutants into waters of the United States require a permit (under Section 402 of the Act), and that discharges of dredge and fill material into waters of the United States also require a permit (under Section 404 of the Act). The 404 permit program became a national wetlands protection program starting in the 1980s – and it is that permitting program that is most significantly affected by trimming back the scope of what "waters of the United States" means.

And the Supreme Court has done a lot of trimming back, in particular in the Sackett case from 2023, which required that for wetlands to be covered by the CWA, they must be "adjacent" to "waters of the United States," which in turn must be "relatively permanent, standing or continuously flowing bodies of water forming geographical features that are described in ordinary parlance as 'streams, oceans, rivers, and lakes." The regulations proposed here follow-up on Biden Administration efforts to conform the regulations to the new standard in Sackett.

And thus, while it is quite true that the proposed regulation might well result in the loss of protection for 80 percent (!) of currently protected wetlands in the United States, much of that is the result of the Supreme Court, not the proposal.

That being said, there are some important angles in the proposal worth pursuing (and which the proposed rule asks for feedback on, if you want). Here are some of the most important ones:

First, the proposed rule eliminates waters that are "interstate" (i.e., cross state borders) as necessarily jurisdictional – to be jurisdictional they must still be "relatively permanent." This might well follow from the holding in Sackett, which never identified a carveout for interstate waterways that are not "relatively permanent." But it's also true that question was never at issue in Sackett, and the constitutional concerns the Court had about broad CWA jurisdiction (infringing on state land-use powers that have only intrastate impacts) are not as present when we have an interstate waterway. It's possible that if this provision was retained, and litigated, the courts might uphold it.

Second, the proposal defines "relatively permanent" as "standing or continuously

flowing bodies of surface water that are standing or continuously flowing year-round or at least during the wet season." The last clause is in there because the opinion by Justice Scalia in Rapanos (which the majority in Sackett adopted) said that "seasonal" flow counts as "relatively permanent." But that begs the question, what is the "wet season"? The proposal spends a lot of time exploring different options for assessing this, none of which may be easy to implement. In addition, "wet season" may not align well with when seasonal flow occurs in a waterway – as the proposal notes, in the Western US, rivers may only flow seasonally as a result of snowpack melt, which may not coincide with the wet season. I think the proposal is correct to account for seasonal flows (and arguably the judicial precedent compels this), but the seasonal definition should be written to account for when the waterway has seasonal flow (regardless of whether this coincides with precipitation). (Indeed, the Scalia opinion in Rapanos made a big deal about how flow that is just because of precipitation does not make a waterway "relatively permanent" – so it seems odd for the agency to peg its standard for "relatively permanent" based on when there is precipitation, as opposed to flow.)

The proposal also asks for input about other ways to define relatively permanent, such as a minimum number of days or months of continuous flow per year, or a minimum flow rate. The problem with all of these options (as the agency notes) is that "relatively permanent" probably should be understood in the context of the hydrology and climate of a particular location – rivers in the arid West often only flow a few weeks a year, but they are generally understood as rivers and having flow. Such a pattern would not qualify as a river in the wet East, however. The proposal does flag continuing to use past guidance (from 2008) in which three months of flow would always count, but allowing for shorter periods in arid areas – this might, in fact, be the best approach, as it is rather clear to apply in most of the country.

Third, the proposal would define tributaries – these are waterways that are not navigable waters (which always count for jurisdiction under the CWA), but flow into them, and thus are jurisdictional because of that flow. The proposal would require tributaries to have a "bed" and "banks" – but it's not clear how that follows from either the text of the Act, or from Rapanos or Sackett. The proposal makes an argument that "streams, oceans, rivers, and lakes" have beds and banks, but that's not always true. Think of the wetland fringes of streams, rivers, or lakes, for instance, or tidal flats for oceans and estuaries. This provision is a carry-over from the first Trump Administration effort to shrink wetlands coverage, but I'm not sure it

works so well in a post-Loper Bright world. It has nothing to do with whether there is “relatively permanent” flow.

In addition, tributaries might become non-jurisdictional if they are cut off from navigable waters by an intervening tunnel or boulder field, or by a reach that does not have “relatively permanent” flow. These provisions might invite mischief in which people try to manipulate the structure of tributaries to cut off upstream CWA jurisdiction.

Fourth, the proposal would define an “wetland” that has a “continuous surface connection and thus is covered by the CWA as one that has both “surface water at least during the wet season and abutting (i.e., touching) a jurisdictional water.” But the requirement for surface water may not be consistent with earlier Supreme Court caselaw – the Riverside Bayview case. In that case, the Court upheld application of Section 404 of the CWA to a wetland, rejecting an appeals court decision that required that for wetlands to be covered by Section 404 they had to be inundated by an “adjacent body of water” covered by the CWA. The key question is how broad the holding in Riverside Bayview was. If the case is narrowly understood as just rejecting the lower court position that inundation must occur from an adjacent body of water, then the proposed requirement that wetlands have “surface water” probably is consistent with Riverside Bayview. On the other hand, one can understand Riverside Bayview as upholding the agency’s regulation that wetlands are covered by the CWA when they are “saturated” enough to support “aquatic regulation” and thus rejecting the “inundation” requirement entirely. If so, then the agency’s proposed rule runs afoul of Riverside Bayview, which (should be) still good law. (I would note that the agency asked for comment on an even stricter definition of “continuous surface connection” that would require the surface water in the wetland to directly touch the surface water in the adjacent water – that standard seems to be even more in tension with Riverside Bayview.)