



Transcript of CleanLaw Episode 10: Caitlin McCoy and Sarah Winner discuss WOTUS/Clean Water Act, December 14, 2020

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Robin Just: Welcome to this podcast from the Environmental and Energy Law Program at Harvard Law School. In this episode, our Climate Clean Air and Energy fellow, Caitlin McCoy, speaks with Sarah Winner, Staff Attorney at the Center for Coalfield Justice and Interim Executive Director of the Three Rivers Waterkeeper. Caitlin and Sarah discuss the proposed Clean Water Act rule on the revised definition of waters of the United States, and the potential implications of the new rule for stream and wetland protection. We hope you enjoy the podcast.

Caitlin McCoy: Hello, this is Caitlin McCoy, the Climate, Clean Air and Energy fellow at the Environmental and Energy Law Program at Harvard Law School. Today I am joined by Sarah Winner for a podcast about the Waters of the US Rule. Sarah is the Staff Attorney of the Center for Coalfield Justice, which is located in Southwestern Pennsylvania where underground coal mining overlaps with shale gas drilling. So there is a wide range of environmental and public health issues there, including impacts to streams and wetlands from these industries.

Caitlin: Sarah is also the acting Interim Executive Director of the Three Rivers Waterkeeper whose mission it is to protect the water quality of the three rivers that intersect in Pittsburgh, the Monongahela, Allegheny and Ohio rivers as well as their respective watersheds. Much of Sarah's work is focused on the protection of surface waters. She has litigated a number of cases concerning the protection of streams from damage caused by longwall coal mining. So Sarah, thank you so much for joining us today by phone.

Sarah Winner: Yeah, thank you for having me.

Caitlin: I want to start by sort of explaining the format of today's podcast because it's going to be a little different from what we usually do here on Clean Law. This will be more of a conversation between Sarah and I discussing this new proposal. I say new proposal because they haven't given it a nice, easy-to-use name. It's just called Revised Definition of Waters of the United States. So please forgive me for just bouncing around with "proposal" and "proposed rule". That's a little easier than saying all of that.

Caitlin: So we'll be posing questions to each other and discussing some of the key features of the proposed rule and potential implications. So, Sarah, thank you for being



here, and sorry to do this because, right as soon as I introduce you, I'm going to continue talking and give some brief background on the Clean Water Act for our listeners who may not be as familiar with why we are in this situation we're in today with this definition. With that, let's jump right in.

Caitlin: The purpose of the Clean Water Act is to restore and maintain the chemical, physical and biological integrity of the nation's waters. And back when Congress originally wrote the Clean Water Act, they applied it to navigable waters, which they in turn defined as waters of the United States. This raises the obvious question, what are waters of the United States? Under the act, EPA is in charge of streams, rivers, lakes, and bays, and the Army Corps of Engineers is in charge of wetlands. So these two agencies then had to interpret what Congress meant when they said waters of the US in order to implement the act.

Caitlin: Over the years we've seen the agencies use different interpretations of waters of the US. Many of those interpretations have been challenged. And over time, three major cases on the definition reached the Supreme Court. Even after the most recent decision, which was Rapanos versus United States in 2006, there was still uncertainty around which waters were included and which waters were not. And Sarah, as you know, is a lawyer like myself, so we can't resist giving you the necessary background into exactly how the Rapanos decision came out because it's relevant to what we're going to talk about later.

Caitlin: But the court was split in that decision, 4-1-4. Justice Scalia wrote for the four justice plurality, and Justice Kennedy agreed with them in the final decision, but did not really agree with their reasoning. So he wrote a separate concurring opinion where he advanced his own reasoning. And so, what happens in a situation like that where we don't have a majority of justices aligned, both in the decision and the reasoning, I often think of it sort of like a Venn diagram where we have Justice Scalia and his three justices with their circle of reasoning and Justice Kennedy with his circle of reasoning. And where those two circles overlap, that's the law that lower courts and the agencies will eventually apply. And so, even the proposal itself admits, and reality shows that lower courts have relied actually more on Justice Kennedy's vision, which is this vision of the significant nexus in order to figure out which waters are waters of the US and which waters are not waters of the US.

Caitlin: Sarah, not to put you on the spot, but yesterday when we were talking about recording our podcast, we had talked about Kennedy's significant nexus, and you had a theory on why it goes beyond just making an easy test for agencies to apply. Do you want to share your thoughts on that?

Sarah: Sure. The significant nexus test I think encompasses all of the things that encompass a stream. So we know that these watersheds are complex. The



significant nexus test is somewhat complex, but I think for good reason, because each watershed is going to have some unique features. It's going to have unique biology. It's going to have unique chemical properties. And depending on where you are in the country, the flow regimes are going to be unique. And so, what the significant nexus test allows you to do is apply a theory basically to any watershed and think about the protection of all of those aspects of the watershed. So that includes first, second, and third order streams. It includes wetlands because they all contribute to the bigger ecology of that system.

Caitlin: Right, right. Yeah. I agree completely with that. Significant nexus not only gives you that freedom to apply something that's not a one-size-fits-all approach, but it's really consistent with the goals and the purpose of the Clean Water Act, and ultimately with what we're trying to regulate, which are these water systems. So I think that that's also what made it so popular. You'll by the way hear some rustling of papers here today. We will be reading some exact definitions as we go along. And that's important to trying to get to the bottom of whether this rule actually provides the clarity that Acting Administrator of the EPA, Andrew Wheeler has said it applies to these waters. So bear with me on that.

Caitlin: Ultimately, coming out of this situation where lower courts and the agencies were working with Scalia's plurality opinion, Justice Kennedy's significant nexus test. And as we know, leaning really heavily on the significant nexus approach, EPA eventually decided to codify all of this and create the Clean Water Rule in 2015, and that set about defining what waters of the US means and trying to provide some clarity for agencies, for the public, and the regulated community so that people could determine which waters receive the protections of the Clean Water Act and it's permitting programs.

Caitlin: Those are the National Pollutant Discharge Elimination System and the Section 404 permits, the first being for waterways and the second one being for wetlands. Okay. So with all of that background out of the way, let's turn to the new rule. It just came out on Tuesday morning at a big press conference. So is it what we expected? It's kind of an open question. I don't know. Many people speculated that the new rule would remove protections that were put in place by the Clean Water Rule for intermittent perennial and ephemeral streams.

Caitlin: And so far, when you look at it, the new rule removes protections for ephemeral streams, but it appears to maintain protections for intermittent and perennial streams. Before we go any further into the world of ephemeral, intermittent, and perennial, Sarah, I'll just ask you to give us a definition. How would you define them?

Sarah: Sure. Typically, we think about streams in terms of flow. So some real streams are those that flow during and immediately after a rain event. They're an important



component of headwater system and provide habitat for a variety of biota, including other physical and chemical properties downstream. Again, the watershed system is important and every aspect of that system contributes something.

Sarah: Intermittent streams primarily flow during the wet season and they may lose flow during drier times of the year. Perennial streams are those that flow continuously except during extreme drought conditions, so since flow conditions can be sometimes challenging to determine in the field depending on whether or not we've had a particularly wet year or whether or not we're in drought conditions or in a drought warning. Another way that you can classify ephemeral, intermittent, and perennial streams is through the biology.

Sarah: Their biology can tell us a lot about the stream and about the flow regime. So the presence or absence of certain biological species can tell us all of those things. So, for example, the presence of long-lived macroinvertebrates in a stream indicates the presence of water year-round, because without water, those long-lived macroinvertebrates wouldn't be there.

Caitlin: Right. That's fantastic. And I think that's really important to keep that in mind in our discussion today because so often when we talk about streams, we just talk about the water and the flow, as you first said. We kind of lose sight of the fact that they really are part of this biological system, and you are seeing them interact with other species in the areas where they exist, and indeed they have a whole world of aquatic life inside of them that we often don't think about.

Caitlin: Let's turn then to the agency's definition of a intermittent stream that's been proposed in this rule. So I'm going to read it. As I promised, we'll be reading some definitions. They define it as a surface water flowing continuously during certain times of a typical year, not nearly in direct response to precipitation, but when the groundwater table is elevated, for example, when snowpack melts. Just listening to that raises some obvious questions, right? What's meant by certain times of a typical year, and what is meant by snowpack?

Caitlin: Well, thankfully they give us a definition for snowpack. Layers of snow that accumulate over extended periods of time in certain geographic regions and high altitudes. Unfortunately, that also raises some further questions for us. And living here in Boston feel like I'm going to get an idea of what snow pack looks like over this winter, but it's not immediately clear how these things are going to interface. Sarah, what's your take on this definition?

Sarah: I think there's a lot of ambiguity and I'm not sure if it's intentional or not. So snowpack, I think, whether or not you have snow pack, is still going to be a question. I suspect that they might be thinking about very specific areas in the



country. And if that were the case, I'm not sure why they didn't provide even more specific examples. They say northern climates and mountainous regions. I can think of many that may have some amount of snowpack, but it may not be the kind of snowpack that they were contemplating while they were writing this rule.

Caitlin: Right. And that ends up being important. I mean, not to be so stereotypically lawyerly on this, but when you read a phrase like layers of snow that accumulate over extended periods of time, you immediately think, how many layers? Over what period of time? Not to be obnoxious, but because without that type of specificity, we see the definition sort of start to disappear before our eyes, because if we don't know with specificity what really qualifies as snow pack, and thus how many streams can be considered intermittent by getting their flow from this type of source, the universe of what's included in this definition for intermittent streams is unclear and could actually be very narrow or could be much broader than it seems on its face.

Sarah: Yeah, exactly. It says that melting snowpack can be the sole or primary source. Well, how much does it need to contribute if it's going to be a primary source of an intermittent stream's flow? We just don't know any of these, the answer to any of these questions.

Caitlin: Yeah. And the agency goes on to say... One of the phrases in that definition as well, certain times of a typical year, they go on to explain that that means extended periods of predictable, continuous, and seasonal surface flow. And they note that they're not proposing a specific duration, but it still raises a lot of questions about how much snowpack melting can help a stream qualify as intermittent, versus ephemeral, which we know is left out of this rule.

Caitlin: So, unfortunately, we are left with a lot of questions here. And looking at the definition of ephemeral, we see that ephemeral streams are left out from consideration as being part of the waters of the US. Ephemeral according to the agencies here means surface water flowing or pooling only in direct response to precipitation such as rain or snowfall. And then they go on to say they intend to distinguish flow from snowfall from sustained flow resulting from melting snowpack, but it never really materializes. And I think that that one might be sort of a difficult needle to thread for them, and yet a very important one, right, because ephemeral streams are not protected.

Sarah: Yeah, that's right. Snowfall, I guess, is distinguished from snow layers in the definition of snowpack.

Caitlin: Yeah, indeed. As you can tell, we are diving deep into some of the intricacies of these definitions here right away. And I think another thing that's interesting too about the definition of intermittent, the agency proposes that it's considering an



alternative definition that would involve a phrase to the effect of requiring an intersection with groundwater. But the agency goes on to talk about how difficult that might actually be to prove, and how difficult it is sometimes to install the types of monitoring gauges that you need to determine the groundwater contribution that's going into a specific stream, and how that can particularly be challenging in certain types of geology.

Caitlin: Sarah, I understand you have some knowledge of stream monitoring and these kinds of things. What can you say about the process of trying to determine what type of, or how much groundwater flow you're getting into a specific stream?

Sarah: Sure. So oftentimes what it requires, or at least one way to do it is to drill basically monitoring wells into groundwater zones. So there's usually a shallow groundwater zone, a medium depth groundwater zone, and then a deeper groundwater zone, until you've kind of had this cluster of what we call piezometer wells that's measuring or hoping to gain some amount of knowledge about the pressure of the groundwater zone and how much it could be contributing. That process is something that certainly the regulated community can do. The geology of the area may make it more difficult to do.

Sarah: It also requires that you cite those, that cluster of wells, in the correct location so that you can actually gather accurate information about where groundwater may or may not be contributing. And so, it takes a lot of planning. It takes certainly the right equipment, and you're also going to want a certain period of time in order to monitor those wells, just like with flow. So one flow measurement for the year isn't going to be enough. But you're going to want to see how the groundwater is reacting to season fluctuations in order to determine whether or not it is contributing to surface water flow.

Sarah: So by connecting the definition of the intermittent stream to groundwater contribution, it may increase the burden on the regulated community. I suspect that state agencies probably don't have the resources to go out there and drill these wells by themselves. And so, if you are trying to classify a stream in order to determine whether or not you need a permit, a federal permit, and you're looking at whether or not it is intermittent or ephemeral, and the way that you are trying to distinguish between those things is groundwater, it may require drilling, at least one if not many clusters of piezometer wells.

Caitlin: Oh wow, that's fascinating. I think some people often forget, even though the Clean Water Act is a federal environmental statute, 47 States operate their own National Pollutant Elimination Discharge System permits. And so, that means that it's the state agency that has been delegated authority from the federal government to operate these programs. So we're talking about state environmental agencies that are responsible for understanding which waters



within their jurisdiction fall into this definition or not because they are the permitting authority acting on behalf of the federal government, subject, of course, to the oversight of EPA.

Caitlin: But if you think of your local state environmental agency, often a lot of them are understaffed. Their budgets are tight. And so, thinking about what types of requirements might go in to making these determinations is really important to understanding how easy or how difficult it's going to be to try to apply this new rule on the ground.

Caitlin: Now let's turn to the definition of tributary, because tributary is sort of the overarching definition that's used for perennial and intermittent streams under this rule. The proposed rule defines tributary as a river, stream, or similar naturally occurring surface water channel that contributes perennial or intermittent flow to a traditional navigable water or territorial sea. And the definition goes on to say it does so either directly or indirectly through other tributaries, jurisdictional ditches, lakes, ponds, impoundments, and adjacent wetlands.

Caitlin: So that definition is incredibly important because it also gets at something that I think a lot of people were concerned about with this new rule, is how far will the new rule allow streams to be traced up away from traditional navigable waters? Like those large waters that you imagine barges going down or really any water that you can put a boat on, that is very clearly part of our waters of the US. Now, we know that those smaller tributaries coming off of those navigable waters are incredibly valuable to those larger waters.

Caitlin: By providing those larger waters with their source, they can also contribute pollution unfortunately, if those smaller streams are polluted. And dilution is not always the solution to pollution. And sometimes those small streams, if enough of them are polluted, can really affect the water quality in those larger navigable waters. So looking at the definition here of tributary, we see that the rule does embrace this idea of tracing back from one tributary through another to go all the way to a navigable water. It allows for tracing up the watershed essentially. But it is limited to just perennial or intermittent tributaries.

Caitlin: I think a really interesting aspect of this definition is the proposed changes to it, in a sense. The agency has given us this definition for now in the proposed rule, but they make it clear that they're still seeking comment and trying to finalize this definition, and that they are open to potentially including specific flow characteristics like timing, duration, or frequency, and they want people to comment. Should the rule include specific flow characteristics for tributaries, what types of values or ranges of values would be appropriate, and what types of methods, tools or data could be used.



Caitlin: They actually give us an example. One of them, they say, an average annual flow volume of five or more cubic feet per second, or that for those intermittent tributaries, that they have a certain amount of time like 30, 60 or 90 days when they're continuously flowing. So that's another way that this definition could potentially be narrowed. Sarah, what do you think about this proposal here?

Sarah: I think that's really important because by attaching minimum flow rates to perennial and intermittent streams, what you may end up doing is taking streams that we typically think of as intermittent or streams that we typically think of as perennial, and support perennial or intermittent biology, and downgrading them to ephemeral. And if you do that, they're no longer protected. We don't have that clarity now. It's interesting to me that the agencies are still seeking comments on those things, but what it may do, the end result may be that even more streams are excluded under this new rule.

Caitlin: Yeah, I think that's a really important aspect of this rule, is on its face I think a lot of people were holding their breath to see a really dramatic shift away from a lot of aspects of the Clean Water Rule from 2015. But when you initially start reading the rule on its face, you see, oh, intermittent and perennial streams are still in here. Okay. The ability for tributaries to be connected to one another and connect all the way down to a navigable water, that is still in here. Okay.

Caitlin: But the fact of the matter is we're not out of the woods yet because we do have these unanswered questions about what types of specifications will be put on those different aspects of the definition of perennial. But also we have questions about whether specifications could be added to the definition of tributary. That could dramatically narrow what qualifies as a tributary. Before we leave the area of streams and go into wetlands, one last issue here is we've already talked about ephemeral streams being excluded from the new rule. But there is discussion in this new rule about ephemeral features, which is a really interesting term of art that the proposed rule does not provide a definition for, unfortunately. Sarah, could you walk us through why you and I latched onto this concept of the ephemeral feature and why this is important?

Sarah: Sure. If the rule allows for creating a sort of chain, so to speak, from the traditionally navigable waterways and up through the watersheds, one of the things that can break that chain and therefore break jurisdiction is either an ephemeral stream or this ephemeral feature. And so, without a definition, it's hard for us to determine where streams could be at risk for falling outside of the Clean Water Act. Given that the rule's purpose was to provide clarity, it seems like ephemeral feature is something that they should have defined, if they had given us an example of what an ephemeral feature could be.



- Sarah: I think it's easy for all of us to sort of speculate as to what they may have been thinking. Unfortunately, you and I don't work at EPA, and so we weren't part of those discussions. But I think it's important both for the general public, both for the agencies, and the staff working at those agencies that may be evaluating proposed projects, and the regulated communities. So the regulated community wants clarity and consistency. And without these kinds of definitions, you're left with either speculation, inconsistent application, and potentially more litigation in trying to define what some of these things mean.
- Caitlin: Right, right. And just looking through the rule, you wouldn't I think realize that the stakes are so high for just this one phrase. But indeed, as I mentioned earlier, they give us this definition of ephemeral and they say, "Surface water flowing or pooling only in direct response to precipitation." I've tried to rack my brain of what that might look like in a series of otherwise intermittent or perennial streams that would create that sort of unbroken jurisdictional chain down to a navigable water, how and where we might end up with an ephemeral feature, and what that might look like, because if we truly have intermittent or and perennial flow throughout, it's just hard to imagine what this might look like in practice.
- Caitlin: And so, without any examples, which they did not provide, sadly, and without a specific definition for ephemeral feature, that also really poses a risk to what I was saying earlier about tributaries breathing a sigh of relief to see that the definition has maintained the ability to sort of draw these chains and connecting waters to one another to create this long chain of jurisdictional waters. Well, we know that that chain can be broken, but how it can be broken? With an ephemeral feature. And what is an ephemeral feature? We don't know. So yeah, this is definitely, definitely problematic.
- Caitlin: Okay. I think we have covered everything with regard to streams. So now we will turn to wetlands, and I think it's sort of appropriate that we are ending on wetlands here because the scope of the wetlands that are to be included in the definition of waters of the US depends on how the tributaries are classified and which types of tributaries are included as waters of the US and which ones are excluded. I've already seen some reporting online. Some journalists have gone back into some EPA and Army Corps data from 2017 and tracked down how many wetlands in the US are next to ephemeral streams or are not next to a waterway at all in an obvious way, and that's about 51% of the wetlands here in the US.
- Caitlin: So that's a huge number that is potentially at risk of losing their protections under this new rule. We know that if a stream is found to be ephemeral, then if you have a wetland near it that could potentially qualify on the basis of that stream, it's definitely not going to qualify under this new rule. So let's pause for a moment before I can get too far into this and just talk about the two ways that the agency is proposing for a wetland to qualify for protection.



- Caitlin: The agency lays out two pathways. One is when a wetland touches a water of the US at either a point or a side. And the other is when a wetland has a direct hydrologic surface connection to other waters of the US in a typical year. Sarah, what's your take on the clarity of those definitions and what it's going to be like to try to apply those in practice?
- Sarah: I don't know that it's going to be easy. Again, it seems quite vague, perhaps intentionally so to give the agencies and the regulated community and the public some flexibility. But I think it also raises a lot of questions. One of the biggest questions is still, from a starting point, what we classify as an intermittent or ephemeral stream. So, because it sounds like you need a stream that's nearby that either touches it or has this direct surface connection, then what it hinges on is whether or not the stream that is nearby, that it either touches or has this direct surface water connection, is considered ephemeral or intermittent.
- Sarah: That takes us back to the fact that the agencies are still looking perhaps to clarify what qualifies as an intermittent or ephemeral stream. It would mean, if we use the minimum flow rates, now all of a sudden you may have streams that we typically think of as intermittent being classified as ephemeral, and any of those wetlands that are nearby that stream may not qualify for protection under the Clean Water Act.
- Caitlin: Yeah. And so that's why, I mean, as it is in nature, it is in the rule. Everything relies on each other here and it all really overlaps and works together in this system. So it's really important which streams qualify for protection. And it's really interesting to me. Personally, I've been struggling with the use of the word touches in this definition. The agency uses this word touches as part of its definition for abut, right? So the whole full definition of adjacent wetlands, which are wetlands that qualify as waters of the US are wetlands that abut or have a direct hydrologic surface connection to a water of the US.
- Caitlin: And they define abut as meaning a wetland that touches a water of the US at either a point or a side. So that's just tracing back how we got there. It's interesting because I was looking through the rule and later on they explain the concept of abutting in today's proposal does not require the existence of a hydrologic connection between the wetlands that physically touch jurisdictional waters. That one really kind of made me scratch my head. I think that's interesting. So a hydrologic connection is not required, which I think is not a bad thing from a biological perspective. I think it's probably a good thing because we know that water systems work together, and even if you don't have a hydrologic connection between two waters that are quite close together, you're still working within an entire watershed and the health of the watershed is really what matters ultimately in what drains down into your navigable water.



- Caitlin: But they just reiterate physically touch. And there is no definition for touch. Unlike the Obama Clean Water Rule where we had very specific definitions in this particular section related to wetlands. They talked about being within a hundred feet or being within 1,500 feet of the ordinary high watermark of a traditional navigable water. That provides us with some real clarity on what is meant. And here we're just left with touch and there is no definition for us that specifically gets into what they mean. So, to me, that just remains a big question mark in terms of how many waters can... Or how many wetlands can qualify as touching a water of the US for the sake of this definition.
- Sarah: Yeah. And whether or not do they need to touch all year. We don't know.
- Caitlin: Yeah.
- Sarah: Whereas before, under the 2015 rule where we had, like you said, the number of feet, before what you needed was a tape measure in order to determine whether or not you needed to go and apply for federal permit in order to kick back a certain activity. Now, all of a sudden we're wrestling with this definition of abut, that includes the word touch. And we're not sure if it needs to touch for one day, for one month, or if it needs to touch all year round. And we're not sure exactly what touch means.
- Caitlin: Yeah. And all of this is important, keeping into consideration the nature of wetlands, which is that they can flood and they can absorb over time and seasonally throughout the year. So there are times when the water in a wetland does actually come up a little bit above the ground water and you can really see how saturated the wetland is. And that might be maybe a time when you can get this direct hydrologic surface connection that they talk about as part of the second pathway.
- Caitlin: But when you have a wetland that's fully soaked in, it's going to be difficult perhaps to tell how it touches a stream. And I agree, if we're thinking about acting Administrator Wheeler's statement that he made about the goal of the rule is for ordinary people to go out in their backyard and know whether they had a federal water or a federal wetland in their backyard without a team of lawyers or consultants... As you said, I mean, all you needed under the Obama rule was a tape measure and now I think you're going to need that team of lawyers and consultants to try to help you get to the bottom of whether you have a wetland that is touching or abutting a water of the US.
- Sarah: Yeah. And Caitlin, did you get a sense of why they chose the definition of abut that they chose?



- Caitlin: Oh yes. This is a fantastic moment. I was going through the rule trying to understand where they came up with this definition because to me it struck me as strange to use this concept of touching a water at either a point or a side. It didn't seem like it had been developed in concert with principles of hydrology. And indeed they reveal that the definition was pulled from the Merriam-Webster's New Riverside University Dictionary.
- Caitlin: One more thing. We had talked earlier about how Justice Kennedy had created the significant nexus test, and talked about the chemical, and physical, and biological contributions of streams and wetlands to larger navigable waters, which are squarely within the definition of waters of the US. And in the rules discussion of the significant nexus test, they go into it, but they don't actually take the step of saying that they are not following the significant nexus test for a particular reason.
- Caitlin: That struck me is really interesting because in order to put themselves in the strongest position possible for future litigation around this rule, I would have thought it would have seen from the agency a pretty robust discussion of why the significant nexus test cannot be used for wetlands, why they need to rely on the abut definition or the direct hydrologic surface connection to truly kind of dispense with the significant nexus test. And that just wasn't in here. So I personally found that very interesting. Sarah, do you have any other thoughts about wetlands and 404 permitting?
- Sarah: Yeah. I agree with you that without telling us why significant nexus is both unclear and inappropriate to use in this permitting context, it's not clear, one, why the revisions are necessary that they're proposing. And, two, why the 2015 rule was so inappropriate. I think, in fact, as we discussed, that the 2015 rule has actually provided more clarity than this proposed rule in its current form.
- Caitlin: Yeah. And it's really interesting. I mean, just to bring context to all of this, Section 404 is the permitting program for wetlands, and it allows up to a half an acre of disturbance for most construction projects like single-family homes under a general nationwide permit. I know a lot of people get worried about real estate development and wetlands. That can be a big area of tension. But truly the people that you might imagine being affected like a family building their dream home, that's not really who would benefit from a narrower definition of wetlands. Indeed, they already have the possibility of using this nationwide permit to disturb up to half an acre.
- Caitlin: It's more of the larger real estate developers who stand to benefit from a narrowing of the amount of wetlands that are included within this definition because the more wetlands that are out, the more those wetlands can be dredged or filled, either filled for development, often dredged in order to be used for



farmland. And so, we can see a lot more development or use of that land happening without any oversight at all. Sarah, the other day when we were talking, you had a really good point about the possible ripple effects, not only just for wetlands with narrowing the amount of wetlands that are included and thus reducing the amount of 404 permits that are needed.

Sarah: Yeah. Well, there are a number of implications. One is that it doesn't seem to contemplate the cumulative impact of not regulating some of these much larger projects. So we're not considering what's the impact of filling all of these wetlands that may not be included based on this new rule. And also, there are other statutes that rely on the 404 trigger. So, for example, the Endangered Species Act, it's typically implicated when someone goes to the federal agencies and applies for a fill permit. If they're exempted from even going through a minimal permit review process for some kind of general permit or another sort of truncated permitting process, that trigger never occurs.

Sarah: And so, there are even larger impacts than just filling the wetlands. There could be endangered species that live there and it alleviates the requirement to consider alternatives. So there may be a less disruptive alternative that is available but isn't cost prohibitive, and that would achieve the goal of both the developments and the protection of these water resources. That may never have to occur if a permitting process isn't necessary. And that permitting process doesn't need to be... It can look a variety of ways that makes it easier on a regulated community while also giving predictability and clarity, and still making sure that we are doing things in a responsible way.

Caitlin: I'm really glad you brought up the point about minimizing impacts because indeed that's a crucial part of obtaining a 404 permit, is in cooperation with the Army Corps. The entity that's seeking the permit needs to show that they are minimizing the impact to wetlands. And indeed that also brings me to the no net loss policy, which started under President George H. W. Bush, who recently passed away, and was taken up by all of the presidents since through President Obama. And that policy basically said we can no longer afford to lose wetlands. So we need to come to a compromise between development and between using our land for certain purposes.

Caitlin: And so, whenever we take a wetland and we dredge it, or drain it, or we fill it, we need to find a wetland somewhere else and enhance that wetland, or try to create a wetland somewhere else. So this is known as enhancement or mitigation. And that became a policy, the no net loss policy under all of these different presidents for all these years. At one time there was some speculation whether Trump would carry on with that policy, but I think that this rule is our answer, and I think the answer is no, we will not be carrying on with the no net loss policy. And wetlands that fall outside of this definition stand the risk of being filled and there



won't be a requirement for entities to go and do enhancements or mitigation elsewhere.

Sarah: Yeah. And there are consultants that are dedicated to helping developers achieve that no net loss. They call them wetland banking, where a developer can work with one of these consultants and bank credits. And that that consultant will then either enhance the wetland that was impacted or will construct a new wetland somewhere else.

Caitlin: I think that's actually even mentioned in the proposal. At a certain point they're talking about impacts to different industries. And I think they actually mention that the wetland banking and wetland mitigation industries are going to take a hit as a result of this proposed rule.

Sarah: Yeah. As well as industries that are devoted to outdoor recreation, which is a fairly big industry and one that a lot of people really enjoy.

Caitlin: Yeah. That was rather disheartening to see that they had a reference to outdoor companies that, for example, take people fishing, like fly fishing guides and things like that, that they anticipate will experience a significant loss of business due to this proposed rule. Okay. Sarah, do you have anything else you want to share with us before we wrap up?

Sarah: I don't think so.

Caitlin: Wonderful. Well, it has been a pleasure talking with you today about this proposed rule and trying to get to the bottom of some of its key features and definitions. The implications are huge. But it seems that we'll be left wondering at how some of these definitions will come out in the final rule. So, stay tuned.

Sarah: Yeah, thank you for having me. This was fun.

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