

Comments from Dr. Donald van der Vaart Regarding the SAB Commentary on the Proposed Rule Defining the Scope of Waters Federally Regulated Under the Clean Water Act, January 24, 2020

Addendum to the SAB's commentary of EPA's proposed rule defining the scope of Waters Federally Regulated Under the Clean Water Act

By Donald R. van der Vaart

I cannot concur with the memorandum from the SAB on EPA's proposed WOTUS rule.

The prefatory language of the Clean Water Act (CWA) states its broad purpose "...to restore and maintain the chemical, physical and biological integrity of the Nation's waters..." and that language is used to direct research grants and is even used as a goal for Section 300 in developing water quality standards. It is not used elsewhere in the CWA including that which is being amended by this rule. Reliance on that language for this rule is therefore not appropriate as such reliance would swallow up the entire Act.

In the previous administration's Waters of the United States (WOTUS) rule, EPA sought by once again expanding a definition, to significantly broaden the regulatory scope of the CWA without Congressional input. Legal experts at the EPA have since explained that, even if the definition were expanded, the implementation of the CWA would be still be limited by the authority granted to the federal government by the States in the U. S. Constitution. Fortunately, EPA has the benefit of multiple U. S. Supreme Court decisions in correcting the definition. What those decisions say is that the waters, and lands surrounding waters, that should be included as WOTUS is not a scientific inquiry unbounded by those constitutional restraints.

This does not mean that the SAB cannot comment on what additional waters and land areas should be considered by States as they consider if additional regulation is needed under state law. The Board can also opine on statutory changes Congress could consider that would authorize the kind of regulatory expansion the majority seems inclined to pursue although these changes must still recognize the limitations imposed by our Constitution on the federal government.