

Oral Statement Regarding the EPA and Corps' Proposed Rule "Revised Definition of 'Waters of the United States'"

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Thank you for this opportunity to provide comments.<sup>1</sup>

My name is Daren Bakst and I'm a Senior Research Fellow at The Heritage Foundation. The views I express are my own and shouldn't be construed as representing any official position of The Heritage Foundation.

**Extend the Comment Period.** At the outset, I'd like to urge the agencies to extend the comment period. A 60-day comment period for an issue of this magnitude is unreasonable.

This proposed rule isn't merely going back to the pre-2015 regulatory scheme. Instead, as the agencies explain, this proposed rule is "updated to reflect consideration of Supreme Court decisions."

Respectfully, this is akin to saying that everything is the same so long as everybody ignores the fundamental and critical changes the agencies are proposing.

After all, if figuring out how to reflect Supreme Court decisions was something that everybody could agree upon, then it is highly unlikely that the agencies would need to be going through what is now a fourth different rule since 2015.

This proposed rule requires careful consideration and a longer comment period, one that is at least another 90 days.

**A Few Quick Points on the Substance of the Rule.** The proposed rule appears to be trying to combine some elements of Justice Scalia's plurality opinion in *Rapanos*<sup>2</sup> and Justice Kennedy's concurrence.

Using Justice Kennedy's significant nexus test, especially as the agencies propose to apply it, negates the limitations placed on the agencies through the plurality opinion. This proposed rule treats the plurality opinion as mere window dressing.

It also doesn't even properly characterize Justice Kennedy's significant nexus test. For example, the proposed rule changes the conjunctive "and" in the clause "significantly affect the chemical, physical, *and* biological integrity"<sup>3</sup> with the conjunctive "or." This major change would allow the agencies to just meet one of the requirements, not all three as was expressly stated by Justice Kennedy.

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<sup>1</sup> These comments were drafted to be presented orally.

<sup>2</sup> *Rapanos v. United States*, 547 U.S. 715 (2006), <https://www.law.cornell.edu/supct/html/04-1034.ZS.html>

<sup>3</sup> Emphasis added.

The proposed rule also ignores key elements of the plurality opinion.

For example, the “relatively permanent” language in the opinion stated that covered waters “are described in ordinary parlance as ‘streams[,] ... oceans, rivers, [and] lakes.’”

In addition, citing *SWANCC*,<sup>4</sup> the plurality explained that navigable waters would require “the ordinary presence of water.”

These key requirements are not reflected in the proposed rule.

**Big Picture.** Any rule should provide predictability and clarity for property owners and the agencies. For decades, the confusion regarding WOTUS hasn’t just been vague and overbroad regulatory definitions but the inconsistent application of the regulations.

The proposed rule wouldn’t solve these longstanding problems.

Finally, the proposed rule would minimize the role that states are expressly supposed to play as detailed in the Clean Water Act.<sup>5</sup>

This language doesn’t merely just recognize the primary role of states. The language proclaims that Congressional policy is to preserve and protect these primary responsibilities and rights of states.

The proposed rule doesn’t reflect this statutory language or the will of Congress.

Given all of the proposed rule’s problems, I strongly urge the agencies to withdraw it and develop a new rule that is consistent with the *Rapanos* plurality opinion.

I look forward to submitting written comments that will provide more details and explain why the agencies have proposed a rule that won’t help property owners, the agencies, or the environment, nor will it survive judicial scrutiny.

Thank you.

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<sup>4</sup> *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers et al.*, 531 U.S. 159 (2001), <https://www.law.cornell.edu/supct/html/99-1178.ZO.html>

<sup>5</sup> At the start of the Clean Water Act it states, “It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this Act.” 33 U.S. Code § 1251(b), <https://www.law.cornell.edu/uscode/text/33/1251>