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Submitted via Regulations.gov

RE: EPA-HQ-OW-2021-0602, Revised Definition of “Waters of the United States”

Mr. Christensen and Ms. Jensen:

I appreciate this opportunity to provide comments¹ to the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps)² regarding your proposed rule redefining “Waters of the United States” (WOTUS).

1) In light of *Sackett v. EPA*, the agencies should withdraw the proposed rule. When the agencies published their proposed rule in the Federal Register in December, 2021, the United States Supreme Court had not yet decided to hear what will be the biggest WOTUS case since *Rapanos v. EPA*.³

On January 24, 2022, the Court decided to hear *Sackett v. EPA* and listed the question to be answered in this way: “Whether the Ninth Circuit set forth the proper test for determining whether wetlands are “waters of the United States” under the Clean Water Act, 33 U. S. C. §1362(7).”⁴

This is not some ancillary question that will have no bearing on the current proposed rule. The Court’s eventual opinion, even if narrowly drawn, will have a major impact on how the agencies will have to develop any new WOTUS definition. The question presented gets to what wetlands

¹ The views I have expressed in this comment are my own and should not be construed as representing any official position of The Heritage Foundation.

² In this comment, the EPA and Corps will collectively be referred to as the “agencies.”

³ *Rapanos v. United States*, 547 U.S. 715 (2006), <https://www.law.cornell.edu/supct/html/04-1034.ZS.html>

⁴ See the U.S. Supreme Court web page on *Sackett v. EPA*, <https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/21-454.html>

constitute jurisdictional waters, and further, it is very likely that the Court will further elaborate on the full scope of the waters that constitute “Waters of the United States.”

The agencies have claimed they want to provide greater clarity regarding the definition of WOTUS. However, the agencies will only be creating more confusion by trying to push an entirely new definition that will be moot as soon as the Supreme Court publishes its opinion. Such a process is a waste of the agencies’ time and taxpayer resources.

The agencies are not to blame for not knowing that a major intervening event would occur during the rulemaking process. But the reality is that a game-changing intervening act has occurred (the Sackett case) and the agencies should now act responsibly and take action that reflects this reality. Instead of continuing with this rulemaking, the agencies should withdraw the proposed rule.⁵

2) The comment period was inappropriately short in length and fails to meet RFA requirements. As I communicated in my oral comments,⁶ and as other commenters have pointed out, a 60-day comment period for a rule of this magnitude is unreasonable.

This proposed rule is not 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.

Further, given the numerous and significant changes imposed by this new proposed rule, the agencies are incorrect in claiming that “[t]his rule would codify a regulatory regime generally comparable to the one currently being implemented nationwide due to the vacatur of the 2020 definition of ‘waters of the United States.’” It would have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (RFA) despite the agencies’ claims to the contrary, and therefore the agencies must meet the critical procedural requirements that arise under the RFA. This is something the agencies have failed to do.

This proposed rule requires careful consideration and a longer comment period, one that is at least another 90 days, and the agencies should take the necessary steps to properly comply with the RFA.

⁵ The agencies could not merely adjust any final rule in light of the Court’s opinion without getting into logical outgrowth doctrine problems with the rule.

⁶ My oral comments, which were submitted to the agencies, can be found at <https://www.regulations.gov/comment/EPA-HQ-OW-2021-0602-0145>

Conclusion

Once again, I appreciate this opportunity to provide comments. I strongly urge the agencies to withdraw the proposed rule in light of the Supreme Court's decision to hear *Sackett v. EPA*.

Sincerely,

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