

Rand Paul recently won a [big victory](#) in the straw poll held by CPAC, the Conservative Political Action Conference. In the environmental area, his signature measure is the [Defense of Environment and Property Act](#). On its surface, the goal of the law is to cut back on federal jurisdiction over wetlands. The bill would drastically cut back on federal protection for wetlands, small streams, and rivers in the Western United States. But its stealth provisions are even worse. They would make it hard for EPA to exercise even its remaining jurisdiction and would make it much harder to enforce the law against polluters.

Mostly, the proposed statute tries to enact into law the conservative plurality's interpretation of the Clean Water Act in the Supreme Court's *Rapanos* case. It's hard to see the "Defense of Environment" part of this statute. It would prevent the government from protecting wetlands that are intimately connected with rivers and lakes, simply because it's necessary (literally) to scratch below the surface to see the connection. Only connections visible above ground count. Also, only continuously flowing streams would be covered, which leaves out some significant waters in the West that dry up during some summers. The law does purport to leave EPA some regulatory powers, but then takes away EPA's ability to effectively exercise those powers.

First, EPA and the Army Corps would be disabled from providing any interpretation of the language of the statute through regulations or guidance documents. Landowners would have to guess about how EPA interpreted ambiguous terms in the statute. No doubt many of them would choose the interpretation favoring their own interests. In a recent decision, the Eighth Circuit held that a letter by low-level EPA staff trying to explain the law to a Senator was a regulation, so this means that EPA would be banned from discussing the definition of navigable waters in writing with members of Congress.

Second, even if Congress later authorized EPA or the Corps to issue guidance, it would be financially risky for the government to do so. Any property owner who could find some "independent appraiser" to say that the regulation diminished property values would have to be paid *double* the loss in property values. That penalty would have to be paid even if the regulation was legally valid. In fact, the regulation could not go into effect "until the date on which each landowner with a claim under this section" has been compensated, so the government would have to imagine all possible claims, track down the landowners who might have those claims, and pay them off before a regulation would be effective — even if a later Congress expressly empowered EPA to issue such a regulation. It's hard to imagine a justification for making the government pay punitive damages for issuing a *valid* regulation.

Third, even outside of the contest of defining jurisdictional waters, EPA and the Corps would be forbidden from taking any action that would "impinge upon the traditional and primary

power of States over land and water use.” That’s a very open-ended prohibition that could curtail federal protection of water quality even in streams that are clearly under federal jurisdiction. It’s so broadly written that it could also cut back on other statutes dealing with air pollution or hazardous waste.

Finally, the bill would make it extremely difficult to enforce ordinary water pollution regulations. The government would be greatly handicapped to obtain the information needed to determine whether a water body or wetland was covered by the law or whether a company’s pollution violates the law. The law strikes out the subsection of the law that allows EPA to mandate record keeping and monitoring by industry. It also strikes out a subsection authorizing EPA to enter property to check on equipment operation or record keeping by polluters. Instead, government officials could only enter private property to collect information about navigable waters with the consent of the owner. The section is written so broadly that it would seem to prohibit use of a search warrant based on probable cause to investigate criminal violations of the statute — for example, deliberately filling wetlands when the polluter knows that’s illegal.

If this proposal is supposed to represent “conservative environmentalism,” I have to say I’m not impressed. Indeed, no sooner had I drafted this post than Paul decided to burnish his anti-environmental credentials by [calling](#) for the U.S. to “drill in every possible conceivable spot.” There’s certainly no reason why a person can’t be a conservative and also care about the environment — but Rand Paul does not seem to be that person.