

**TESTIMONY OF
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**BEFORE THE
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS
UNITED STATES SENATE
AND THE
COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE
UNITED STATES HOUSE OF REPRESENTATIVES**

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Good morning Chairman Inhofe, Ranking Member Boxer, Chairman Shuster, Ranking Member DeFazio and members of both Committees. I am Gina McCarthy, Administrator of the U.S. Environmental Protection Agency. I am pleased to be here today to discuss the EPA's and the U.S. Army Corps of Engineers' proposed Clean Water Rule, which would clarify the jurisdictional scope of the Clean Water Act (CWA), simplifying and improving the process for determining waters that are, and are not, covered by the Act, consistent with the decisions of the Supreme Court. The agencies' proposed Clean Water Rule was published in the Federal Register for public comment on April 21, 2014. The public comment period was extended twice, until November 14, 2014, to provide a full and effective opportunity for public input on the proposed rule.

The agencies received over one million public comments on the proposed rule. We are currently working to review these comments as we prepare revisions that further clarify our regulations and make them more effective in implementing the statute, consistent with the law and sound science. Our goal in revising the rule is straightforward: to respond to requests from stakeholders across the country to make the process of identifying waters protected under the CWA easier to understand, more predictable, and more consistent with the law and peer-reviewed science. We believe the result of this rulemaking will be to improve the process for making jurisdictional determinations under the CWA by minimizing delays and costs, to make protection of the nation's clean water more effective, and to improve predictability and consistency for landowners.

In my testimony today, I plan to highlight the reasons that prompted stakeholders to ask the agencies to develop a proposed rule. I will then describe the primary elements of the proposed rule and how it would provide clarity regarding waters that are and are not “waters of the United States.” I will discuss our agencies’ efforts to reduce burdens for the nation’s farmers, avoid effects on jobs and on the small business community, and enhance our relationships with states and municipalities. Finally, I will describe our work to improve the scientific basis for our decision-making and to gather public input on the proposed rule.

The Importance of Clean Water

The foundation of the agencies’ rulemaking efforts to clarify protection under the CWA is the goal of providing clean and safe water for all Americans. Clean water is vital to every single American – from families who rely on affordable, safe, clean waters for their public drinking water supply, and on safe places to swim and healthy fish to eat, to farmers who need abundant and reliable sources of water to grow their crops, to hunters and anglers who depend on healthy waters for recreation and their work, to businesses that need a steady supply of clean water to make their products. The range of local and large-scale businesses that we depend on—and who, in turn, depend on a reliable supply of clean water—include tourism, health care, farming, fishing, food and beverage production, manufacturing, transportation and energy generation.

In addition to providing habitat, rivers, lakes, ponds and wetlands supply and cleanse our drinking water, ameliorate storm surges, provide invaluable storage capacity for some flood waters, and enhance our quality of life by providing myriad recreational opportunities, as well as important water supply and power generation benefits. Consider these facts about the value of clean water to Americans:

- Manufacturing companies use nine trillion gallons of fresh water every year.
- 31 percent of all water withdrawals in the U.S. are for irrigation, highlighting the extent to which the nation’s farmers depend on clean water.

- About 40 million anglers spend \$45 billion annually to fish in U.S. waters.
- The beverage industry uses more than 12 billion gallons of water annually to produce products valued at \$58 billion.
- About 60 percent of stream miles in the U.S. only flow seasonally or after rain, but are critically important to the health of downstream waters.
- Approximately 117 million people – one in three Americans – get their drinking water from public systems that rely on seasonal, rain-dependent, and headwater streams.

Clean water is something that is all too easy to take for granted. It is only when our daily routines get interrupted that we notice. Perhaps the water shuts off, or our favorite beach closes. But these are the reasons why we need to remember why we have a Clean Water Act, and why it's important that we have a strong and consistent rule. Strong so our water stays clean, and we can continue to have the safest and cleanest water. And consistent so businesses and communities can plan ahead and invest with certainty.

Legal Background and Recent Confusion Regarding CWA Jurisdiction

In recent years, several Supreme Court decisions have raised questions regarding the geographic scope of the Act. In *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001), the Supreme Court in a 5-4 opinion held that the use of “isolated” non-navigable intrastate ponds by migratory birds was not by itself a sufficient basis for the exercise of Federal regulatory authority under the CWA. Five years after this case, the Court again addressed the Clean Water Act term “waters of the United States” in *Rapanos v. United States*, 547 U.S. 715 (2006), which involved two consolidated cases in which the CWA had been applied to wetlands adjacent to non-navigable tributaries of traditional navigable waters. While all Members of the Court agreed that the term “waters of the United States” encompasses waters, including wetlands, beyond those that are navigable in the traditional sense, the case yielded no majority opinion. Neither the plurality nor the concurring opinion in *Rapanos* invalidated any of the agencies’ existing regulations defining “waters of the United States,” but these opinions did raise questions concerning how to determine which waters were jurisdictional

pursuant to their regulations.

Following these decisions, there has been a lack of clarity regarding CWA jurisdiction over some streams and wetlands. Members of Congress, state and local officials, industry, agriculture, environmental groups, and the public have asked our agencies for a rulemaking to provide clarity. This complexity has made enforcement of the law difficult in many cases, and has increased the amount of time it takes to make jurisdictional determinations under the CWA.

In response to these implementation challenges and significant stakeholder requests for rulemaking, the agencies began developing a proposed rule. To help inform the proposed rule, the agencies began reviewing available peer-reviewed science regarding the connectivity or isolation of aquatic resources and effects on downstream waters, a topic we will discuss in more detail later. Consistent with EPA and U.S. Army Corps of Engineers (“the Corps”) policy to promote communications among the agencies, states and local governments, and in recognition of the vital role states play in implementation of the CWA, the EPA undertook federalism consultation for this effort. The EPA reached out to states in advance of the proposed rule, taking advantage of regularly scheduled meetings to hear key implementation concerns and issues raised in the confusing wake of the Supreme Court rulings. After the proposal was published, the EPA held dozens of meetings and outreach calls across the country with state and local governments and their representatives soliciting input. We made ourselves available to talk with every state in the country – and participated in conversations with as many as 2500 individuals representing states, counties, cities and townships. We also gained tremendous insight from local governments through the work of our Local Government Advisory Committee that met across the country and heard from the actual commissioners, public works directors, and managers that deal with clean water issues. Their final report articulates a number of conclusions helpful to the Agencies rulemaking efforts. In addition, toward the end of the comment period, the Agencies convened a series of four calls with state representatives on topics related to the proposal to hear specific comments and ideas on the best ways to respond to key implementation concerns from the states. During this extensive process of engagement, state and local governments identified a number of issues, which the agencies

are carefully evaluating as we prepare a final rule – among them, how to be more responsive to stormwater management issues, better approach roadside ditch maintenance, improve the discussion of significant nexus, and increase clarity for the upper extent of jurisdiction for tributaries.

Key Elements of the Proposed Clean Water Rule

The agencies' proposed rule promotes effective protection of the nation's clean water, makes the process of identifying covered waters more consistent and predictable, and is consistent with the law and currently available scientific and technical expertise. The rule provides continuity with the existing regulations, where possible, which will reduce confusion and will reduce transaction costs for the regulated community and the agencies. Toward that same end, the agencies also proposed, where consistent with the law and their scientific and technical expertise, categories of waters that are and are not jurisdictional, as well as categories of waters and wetlands that require a case-specific evaluation to determine whether they are protected by the CWA.

Specifically, the proposed rule clarifies that, under the CWA:

- All tributaries to the nation's traditional navigable waters, interstate waters, the territorial seas, or impoundments of these waters would be protected because they are critical to the chemical, physical, and biological integrity of these waters.
- Waters, including wetlands, that are adjacent to traditional navigable waters, interstate waters, the territorial seas, jurisdictional tributaries, or impoundments of these waters would be protected because such waters significantly influence the traditional navigable waters, interstate waters, or the territorial seas.
- Some waters would remain subject to a case-specific evaluation of whether or not such waters meet the legal standards for federal jurisdiction established by the Supreme Court.
- Categories of waters are excluded, as described below.

The proposed rule also discusses several regulatory alternatives that would reduce or eliminate the need for case-specific evaluations, to provide even greater clarity for the public. The proposed rule retains the

agencies' longstanding exclusions for waste treatment systems and prior converted cropland, from the definition of "waters of the United States." Moreover, the agencies also propose to clarify for the first time, by rule, that certain features and types of waters are not considered "waters of the United States." These include features such as certain intermittent and ephemeral ditches; artificially irrigated areas that would revert to uplands if irrigation were to cease; artificial lakes and ponds used for purposes such as stock watering, irrigation, settling basins, or rice growing; and groundwater, including groundwater drained through subsurface drainage systems.

The agencies' proposed rule continues to reflect the states' primary and exclusive authority over water allocation and water rights administration, as well as state and federal co-regulation of water quality. The agencies worked hard to assure that the proposed rule reflects these fundamental CWA principles, which we share with our state partners. We greatly appreciate the extensive discussions, comments and input provided by state and local governments on the proposed rule and we are committed to reflecting this input in improvements to the final rule.

Concurrent with the release of the proposed rule, the agencies published an economic analysis of the benefits and costs of the proposed rule based on implementation of all parts of the CWA. We concluded that the proposed rule would provide an estimated \$388 million to \$514 million annually of benefits to the public, including reducing flooding, filtering pollution, providing wildlife habitat, supporting hunting and fishing, and recharging groundwater. The public benefits significantly outweigh the costs of about \$162 million to \$278 million per year for mitigating impacts to streams and wetlands, and taking steps to reduce pollution to waterways. The agencies will update the economic analysis as a part of the process to prepare a final rule to ensure the analysis incorporates the best and latest information available to us.

Benefits of the Clean Water Rule for Agriculture

The EPA and the Corps have worked hard to reach out to the agriculture community to listen to their concerns about the geographic scope of the CWA. Since proposing the rule, we met with agriculture,

ranching, and forestry organizations nationwide to facilitate their input on the proposal. Our visits with individual farmers on their farms has been particularly valuable as we have worked to ensure the rule achieves our goal of reducing potential burdens and costs. Using the input from those discussions, the EPA and the Corps are coordinating with the U.S. Department of Agriculture to ensure that concerns raised by farmers and the agricultural industry are effectively addressed in the final rule. The final rule will not change, in any way, existing CWA exemptions from permitting for discharges of dredged and/or fill material into waters of the U.S. associated with agriculture, ranching, and forestry activities, including the exemptions for:

- Normal farming, silviculture, and ranching practices, which include plowing, seeding, cultivating, minor drainage, and harvesting for production of food, fiber, and forest products;
- Upland soil and water conservation practices;
- Agricultural stormwater discharges;
- Return flows from irrigated agriculture;
- Construction and maintenance of farm or stock ponds or irrigation ditches;
- Maintenance of drainage ditches; and
- Construction or maintenance of farm, forest, and temporary mining roads, where constructed and maintained in accordance with best management practices.

I want to emphasize that farmers, ranchers, and foresters who are conducting the activities covered by the exemptions (activities such as plowing, tilling, planting, harvesting, building and maintaining roads, ponds and ditches, and many other activities in waters on their lands), can continue these practices after the new rule without the need for approval from the Federal government. Additionally, we expect to clarify for the first time in regulation that groundwater, including groundwater in subsurface tile drains, is not subject to the CWA. The proposed rule reduces jurisdiction over ditches, and maintains the existing exclusions for prior converted cropland and waste treatment systems, including treatment ponds and lagoons.

Science and Public Input in the Agencies' Rulemaking Efforts

The agencies' rulemaking efforts are being supported by the latest peer-reviewed science regarding the connections between aquatic resources and effects on downstream waters. In preparation for the proposed rule, the EPA reviewed and summarized more than 1,200 peer-reviewed scientific papers and other data, and the EPA's Office of Research and Development prepared a draft peer-reviewed synthesis of published peer-reviewed scientific literature discussing the nature of connectivity and effects of tributary streams, wetlands, and open waters on downstream waters. This draft report, "*Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*," informed the agencies' development of the proposed rule. The draft report itself underwent independent peer review led by EPA's Science Advisory Board (SAB). The SAB's review of the draft report was completed last fall and their recommendations have now been incorporated into a final report that was published in the **Federal Register** on January 15, 2015.

The final science report provides several key conclusions based on review of the peer-reviewed scientific literature:

1. *All tributary streams, including perennial, intermittent, and ephemeral streams, are physically, biologically, and chemically connected to downstream rivers and this connection influences the integrity of downstream rivers.*
2. *Wetlands and open waters in floodplains and riparian areas are physically, chemically and biologically connected with downstream rivers and influences the ecological integrity of such rivers.*
3. *Non-floodplain wetlands and open waters (i.e., isolated waters) provide many functions that benefit downstream water quality and ecological integrity.*
4. *The connectivity of streams, wetlands and other surface waters, taken as a whole, to downstream waters occurs along a continuum from highly connected to highly isolated – but*

these variations in the degree of connectivity are critical to the ecological integrity and sustainability of downstream waters.

- 5. The critical contribution of upstream waters to the chemical, physical, and biological integrity of downstream waters results from the accumulative contribution of similar waters in the same watershed and in the context of their function considered over time.*

The final Clean Water Rule will carefully reflect the SAB's recommendations and the data/information presented in the final report. We also want to emphasize that EPA responded to a request from the SAB to review our effectiveness in basing the agencies' proposed rule on the best available peer reviewed science. The SAB concluded their review of the science supporting the proposed rule in September 2014 by concluding that the available science supports key components of the proposed rule.

Conclusion

Thank you Chairman Inhofe, Ranking Member Boxer, Chairman Shuster, Ranking Member DeFazio, and members of the Committees, for this opportunity to discuss the agencies' efforts to provide additional clarity regarding the geographic scope of the Clean Water Act. I look forward to a robust and careful review of all public input on the agencies' proposed rule to ensure that the final rule achieves the goal of providing greater predictability, consistency, and environmental effectiveness in the process of identifying waters that are, and are not, covered by the CWA.

Thank you again, and I will be happy to answer your questions.