S. HRG. 114–23

IMPACTS OF THE PROPOSED WATERS OF THE UNITED STATES RULE ON STATE AND LOCAL GOVERNMENTS AND STAKEHOLDERS

FIELD HEARING

BEFORE THE

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS UNITED STATES SENATE

ONE HUNDRED FOURTEENTH CONGRESS

FIRST SESSION

MARCH 14, 2015—Lincoln, NE

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ONE HUNDRED FOURTEENTH CONGRESS
FIRST SESSION

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C O N T E N T S

IMPACTS OF THE PROPOSED WATERS OF THE UNITED STATES RULE ON STATE AND LOCAL GOVERNMENTS AND STAKEHOLDERS

SATURDAY, MARCH 14, 2015

U.S. SENATE,
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS,
Lincoln, NE

The committee met, pursuant to notice, at 10:00 a.m. in the Harden Hall Auditorium, University of Nebraska-Lincoln, Hon. Deb Fischer presiding.

Present: Senator Fischer.

OPENING STATEMENT OF HON. DEB FISCHER, U.S. SENATOR FROM THE STATE OF NEBRASKA

Senator FISCHER. Good morning. Good morning everyone. This hearing will come to order.

I am pleased to bring the U.S. Senate to Nebraska and convene this hearing of the Senate Environment and Public Works Committee. Today's hearing is titled Impacts of the Proposed Waters of the United States Rule on State and Local Governments and Stakeholders.

I believe Nebraska is the perfect place to hold this hearing. Our surface water and groundwater are so important to this State. Nebraskans take great pride in their stewardship of these precious resources and they are rightly concerned with the Federal Government's attempt to seize control.

I am pleased to hold this hearing at our very own land-grant university.

So, to begin, I would like to say a special thank you to the University of Nebraska for providing today's accommodations.

I would also like to thank our staff that is present today. I have two of my Washington staff members present, Michelle Weber, who is from Blue Hill, Nebraska, and Jessica Clowser, who is from Seward, Nebraska. They are tucked back here around the corner. But I am happy that they were able to come home and serve here at the Committee to help me.

We also have two Committee staff people that our Chairman, Senator Jim Inhofe of Oklahoma has provided, Laura Acheson and Lauren Sturgeon. So thank you for being here.

And Senator Ben Cardin from Maryland on the Majority side has sent a staff person as well, Mae Stevens.

So welcome to all of you. I'm excited to welcome a diverse group of Nebraska's stakeholders this morning to share their perspectives on the proposed rule to revise the definition of waters of the United States for all Clean Water Act programs. This hearing will allow us to explore the issue in depth and determine the impact this rule would have on our State and on Nebraskan families. Last year, the EPA and the Army Corps of Engineers proposed a rule that redefines Federal regulatory reach to include everything from farm ponds and drainage ditches to low-lying areas that are dry for most of the year. This proposal is a massive expansion of Federal jurisdiction beyond congressional intent.

Congress limited the Federal Government's regulatory authority in the Clean Water Act to navigable waters. And the Supreme Court confirmed these limitations in the SWANCC and Rapanos cases. The Court expressly rejected attempts to expand Federal control over water, and made it clear that all water is not subject to Federal jurisdiction under the Clean Water Act. Instead of following the law, this administration has decided to twist the rule's definition to include almost every drop of precipitation that could eventually make it to navigable water. This was not the intent of the Clean Water Act.

Nebraskans take seriously their role in protecting and conserving our natural resources. Responsible resource management, including careful stewardship of our water, is the cornerstone of our state's economy. This is a vital interest to Nebraska's families, Nebraska businesses, our agricultural industry, and our local communities.

Nebraskans understand that the people closest to the resource are also those who are best able to manage it.

We are blessed to live in a State with 23 local Natural Resource Districts served by board members from those local communities, and to have landowners and communities that truly care about clean water and a healthy and productive environment. That's why it came as no surprise that Nebraskans were so offended when the Federal Government made its proposal without consulting State and local authorities, without considering their rights, and without realistically examining the potential impacts. I am grateful that Nebraskans were quick to recognize the far-reaching consequences of this rule, and to organize a group effort to raise the alarm. The common sense Nebraska coalition should be commended for its efforts to highlight the sweeping implications of this rule on everyone, from county officials trying to build a road, to a farmer managing rainwater runoff.

Clean Water Act permits are complex, time consuming and very expensive. They leave landowners and our local governments vulnerable to citizen suits. The proposal would make it difficult to build anything, whether it's a home for a family, a factory to provide needed jobs, or highways and bridges necessary to transport our people and goods.

I am entering into the hearing record a letter and analysis from Mike Linder, who served as the Director of the Nebraska Department of Environmental Quality from 1999 to 2013. He states that the rule is an erosion of cooperative federalism that will harm the success of Nebraska's conservation practices and programs.

Today's hearing will begin with a witness who can speak to the importance of the state's water protection programs and cooperative federalism.

Assistant Attorney General Justin Lavene is the chief of the Agriculture Environment and Natural Resources Bureau at the Nebraska Department of Justice. A native of Bertrand, Nebraska, Mr. Lavene supervises the litigation and legal support for the Nebraska agencies and boards, including the Department of Environmental Quality, Department of Natural Resources, Department of Agriculture, Game and Parks Division and the Environmental Trust.

Mr. Lavene, I thank you for being here. And when you are ready, please begin your testimony.

STATEMENT OF JUSTIN D. LEVENE, CHIEF OF THE AGRICULTURE ENVIRONMENT AND NATURAL RESOURCES BUREAU, NEBRASKA ATTORNEY GENERAL'S OFFICE

Mr. LEVENE. Thank you, Senator Fischer. Chairman Inhofe, and Ranking Member Boxer, Members of the Senate's Committee on Environment and Public Works, my sincere thanks for the opportunity to present the Nebraska Attorney General's Office concern regarding the joint proposal by the United States Army Corps of Engineers and the Environmental Protection Agency to define the Clean Water Act's use of the phrase "waters of the United States" in a manner that would appear to dramatically expand the scope of Federal authority under the Act. The Nebraska Attorney General's Office, alongside a number of our sister states, previously offered comments to the Agencies on the proposed—on the proposed expansive definition. The Attorneys General apprised the Agencies of those aspects of the proposed definition which are inconsistent with the limitations of the Clean Water Act, as interpreted by the U.S. Supreme Court, as well as the outer boundaries of Congress's constitutional authority over interState commerce, and the principal of cooperative federalism as embodied in the Act. However, it is not certain that those concerns will truly be considered, which is why we appreciate the opportunity to present additional testimony here today.

Congress intended the Clean Water Act to recognize, preserve, and protect the primary responsibilities and rights of the states to plan and—the development and use of land and water resources. Nonetheless, EPA, along with the Corps, persistently violates this principal of cooperative federalism in practice and now seeks to codify a significant intrusion on the states' statutory obligations with respect to intraState water and land management. Despite Nebraska's consistent and dutiful protection of its land and water resources, in a manner consistent with local conditions and needs, the Agencies seek to further their disregard for State primacy in the area of land and water preservation, and instead make the Federal Government the primary regulator of much of the intraState waters and sometimes-wet land in he United States. The Agencies may not arrogate to themselves the traditional State prerogatives over intraState waters and land use; after all, there is no Federal interest in regulating water activities on dry land and any activities not connected to interState commerce. Instead, States, by virtue of being closer to communities, are in the best position to

provide effective, fair, and responsive oversight of water use, and have consistently done so.

The Agencies propose a single definition of the phrase "water of the United States" for all of the Act's programs. Currently, there is a difference in use and application of the term "water of the United States" for various sections of the Act. In Nebraska, since the 1970's, EPA has delegated authority to the Department of Environmental Quality to implement all programs except Section 404 dredge and fill, and Section 311 oil spill programs. Thus, the Section 402, National Pollutant Discharge Elimination System, or NPDES program, the Section 303, water quality standards and total maximum daily load program, and the Section 401, State water quality certification process, are all administered at the State level. This same arrangement exists in all but a handful of states.

The continued State administration of the NPDES program requires the Department of Environmental Quality to have an equally stringent regulatory structure, including its own definition of jurisdictional waters. Accordingly, the Department has administered the various Clean Water Act programs using its own "waters of the state" definition for nearly 40 years with EPA approval. However, the regulatory approach used by the Agencies to develop a single definition of "waters of the United States," which will affect all the Clean Water Act programs, is modeled after the existing guidance provided by the Agencies and the U.S. Supreme Court which was limited on its face to the jurisdictional determinations for federally administered dredge and fill programs found in the Clean Water Act of 404.

When applied in the context of other Clean Water Act programs, the proposal creates significant cost and confusion, it increases unnecessary bureaucracy, and infringes on State primacy, and exposes agricultural producers to new liability. During the 40 years of State implementation of the "waters of the state" requirement, the Department has applied the definition to Section 402 permitting decisions thousands of times. In Nebraska, livestock producers in particular are subject to the requirements of either an individual or the general NPDES discharge permit. In accordance with the terms of their permits, which are often crafted in reliance on the definition of the "waters of the State," these producers often construct waste control facilities and mitigating land features, such as berms or waterways, to help divert runoff from waters of the State. If the proposed definition of "waters of the United States" is suddenly applied to the state-administered Section 402 program, the effectiveness of all the Department's permitting efforts is brought into question. The land features constructed by producers in a good-faith effort to comply with the permitting requirements may constitute a tributary or adjacent water. Moreover, long-exempted operations may unknowingly find themselves subject to Clean Water Act jurisdiction.

Similar increased administrative burdens may result with regard to the states' administration of Section 401, State water quality certifications, and Section 303, water quality standards. As the scope of Federal jurisdictional waters grows larger with the promulgation of the proposed definition, the number of Federal actions

requiring Section 401 certification of the State and the number of waters requiring the establishment of Section 303 standards and TMDLs will likely also increase. The Department of Environmental Quality will be responsible for shouldering this burden leading to increased budget and resource demands.

The Agencies suggest that the rule does no more than clarify what the Supreme Court has already declared with respect to the scope of Federal authority under the Clean Water Act. By now, the Committee members are likely familiar with the Supreme Court's holdings in Solid Waste Agency of Northern Cook County versus the Army Corps of Engineers, or SWANCC case, and Rapanos versus the United States. Respectively, the holdings in these cases confirmed the limits of the Federal Government's, and the primacy of the states, over intraState waters and required, at the least, a demonstrated significant nexus between nontraditional and traditionally jurisdictional waters before the agency may assert its authority.

However, the proposed categorical inclusion of broadly defined tributaries and adjacent waters looks to sweep a large mass of previously unregulated land within the ambit of Federal jurisdiction. And for any that might remain beyond the Agencies' reach per se, the catch-all is proposed to allow case-by-case determinations for any water meeting the vaguely defined significant nexus test. The effect of these newly included categories of land and water features is not clarity, but rather an inconsistent and overbroad interpretation of the Supreme Court's holdings and the limits of the Act which places virtually every river, creek and stream, along with vast amounts of neighboring lands, under the Agencies' Clean Water Act jurisdiction. Many of these features are dry the vast majority of time and are already in use by farmers, developers, or homeowners.

More importantly, the imposition of Clean Water Act requirements on waters and lands far removed from interState commerce or navigable waters is harmful not only to the states themselves, but to the farmers, developers and homeowners. Ninety-two percent of Nebraska's 77 thousand square miles of area is used for agricultural production. The proposal treats numerous isolated bodies of water as subject to the agencies' jurisdiction resulting in landowners having to seek permits or face substantial fines and criminal enforcement actions. Nor must lands have water on it permanently, seasonly, or even yearly to have it be a "water" regulated under the Act. And if a farmer makes a single mistake, perhaps not realizing that his land is covered under the Clean Water Act or Rapanos, he or she can be subject to thousands of dollars of fines and even prison time.

Members of the Committee, we ask that Congress continue to work to ensure that the EPA and the Corps recognize, preserve, and protect the primary responsibilities and rights of the states to plan the development and use of land and water resources in our State. Thank you for the opportunity to be heard.

[The prepared statement of Mr. Lavene follows:]

DOUGLAS J. PETERSON
ATTORNEY GENERAL OF NEBRASKA

FIELD HEARING BEFORE THE SENATE COMMITTEE ON ENVIRONMENT & PUBLIC WORKS

"IMPACTS OF THE PROPOSED WATERS OF THE UNITED STATES RULE ON STATE AND LOCAL GOVERNMENTS AND STAKEHOLDERS"

TESTIMONY PROVIDED BY
JUSTIN D. LAVENE
CHIEF OF THE AGRICULTURE ENVIRONMENT AND NATURAL RESOURCES BUREAU
NEBRASKA ATTORNEY GENERAL'S OFFICE

MARCH 14, 2015

Chairman Inhofe and Ranking Member Boxer, Members of the Senate's Committee on Environment and Public Works, my sincere thanks for the opportunity to present the Nebraska Attorney General's Office concern regarding the joint proposal by the United States Army Corps of Engineers and the Environmental Protection Agency to define the Clean Water Act's use of the phrase "waters of the United States" in a manner that would appear to dramatically expand the scope of federal authority under the Act. The Nebraska Attorney General's Office, alongside a number of our sister states, previously offered comments to the Agencies on the proposed expansive definition. The Attorneys General apprised the Agencies of those aspects of the proposed definition which are inconsistent with the limitations of the Clean Water Act, as interpreted by the United States Supreme Court, as well as the outer boundaries of Congress' constitutional authority over interstate commerce, and the principal of cooperative federalism as embodied by the Act. However, it is not certain that those concerns will be truly considered which is why we appreciate the opportunity to present additional testimony today.

Congress intended the Clean Water Act to "recognize, preserve, and protect the primary responsibilities and rights of States . . . to plan the development and use . . . of land and water resources . . . ." 33 U.S.C. § 1251(b). Nonetheless EPA, along with the Corps, persistently violates this principal of cooperative federalism in practice and now seeks to codify a significant intrusion on the States' statutory obligations with respect to intrastate water and land management. Despite Nebraska's consistent and dutiful protection of its land and water resources, in a manner consistent with local conditions and needs, the Agencies seek to further their disregard for State primacy in the area of land and water preservation, and instead make the Federal Government the primary regulator of much of intrastate waters and sometimes-wet land in the United States. The Agencies may not arrogate to themselves traditional state prerogatives over intrastate water and land use; after all, there is no federal interest in regulating water activities on dry land and any activities not connected to interstate commerce. Instead, States by virtue of being closer to communities are in the best position to provide effective, fair, and responsive oversight of water use, and have consistently and conscientiously done so.

The Agencies propose a single definition of the phrase "waters of the United States" for all of the Act's programs. 79 Fed. Reg. 22188 (April 21, 2014). Currently, there is a difference in use and application of the term "waters of the United States" for various sections of the Act. In Nebraska, since the 1970's EPA has delegated authority to the Department of Environmental Quality to implement all programs except the § 404 dredge and fill and § 311 oil spill programs. Thus, the § 402 National Pollutant Discharge Elimination System ("NPDES") program, the § 303 water quality standards and total maximum daily load program, and the § 401 state water quality certification process are all administered at the state level. This same arrangement exists in all but a handful of states.

The continued state-administration of the NPDES program requires the Department of Environmental Quality to have an equally-stringent regulatory structure, including its own definition of jurisdictional waters. Accordingly, the Department has administered the various Clean Water Act programs using its own "waters of the state" definition for nearly forty years with EPA approval. However, the regulatory approach used by the Agencies to develop a single definition of "waters of the United States," which will affect all Clean Water Act programs, is modeled after the existing guidance provided by the Agencies and the Supreme Court which was limited on its face to jurisdictional determinations for the federally-administered dredge-and-fill program found in Clean Water Act § 404.

When applied in the context of other Clean Water Act programs, the proposal creates significant cost and confusion, increases unnecessary bureaucracy, infringes on state primacy, and exposes agricultural producers to new liability. During the forty years of state implementation of the "waters of the state" requirement, the Department has applied the definition to § 402 permitting decisions thousands of times. In Nebraska, livestock producers in particular are subject to the requirements of either an individual or the general NPDES discharge permit. In accordance with the terms of their permits which are crafted in reliance on the definition of "waters of the state", these producers often construct waste control facilities and mitigating land features such as berms or waterways to divert runoff from waters of the state. If the proposed definition of "waters of the United States" is suddenly applied to the state-administered § 402 program, the effectiveness of all the Department's permitting efforts is brought into question. The land features constructed by producers in a good-faith effort to comply with permitting requirement may constitute a "tributary" or "adjacent" water. Moreover, long-exempted operations may unknowingly find themselves subject to CWA jurisdiction.

Similar increased administrative burdens may result with regard to the State's administration of the § 401 state water quality certifications and § 303 water quality standards. As the scope of federal jurisdictional waters grows larger with the promulgation of the proposed definition, the number of federal actions requiring § 401 certification from the State and the number of waters requiring the establishment of § 303 standards and TMDLs will likewise increase. The Department of Environmental Quality will be responsible for shouldering this burden leading to increased budget and resource demand.

The Agencies suggest that the rule does no more than clarify what the Supreme Court has already declared with respect to the scope of federal authority under the Clean Water Act. By now, the Committee members are likely familiar with the Supreme Court's holdings in *Solid*

Waste Agency of Northern Cook County v. Army Corp of Engineers, 531 U.S. 159 (2001) and *Rapanos v. United States*, 574 U.S. 715 (2006). Respectively, the holdings in these cases confirmed the limits of the federal government's – and the primacy of the States - over wholly-intrastate waters and required, at the least, a demonstrated "significant nexus" between non-traditional and traditionally-jurisdictional waters before the Agencies may assert their authority.

However, the proposed categorical inclusion of the broadly-defined "tributaries" and "adjacent waters" looks to sweep a large mass of previously unregulated land within the ambit of federal jurisdiction. And for any that might remain beyond the Agencies' reach *per se*, a catch-all is proposed to allow case-by-case determinations for any water meeting a vaguely-defined "significant nexus" test. The effect of these newly-included categories of water and land features is not clarity but rather an inconsistent and overbroad interpretation of the Supreme Court's holdings and the limits of the Act which would place virtually every river, creek, stream, along with vast amounts of neighboring lands, under the Agencies' CWA jurisdiction. Many of these features are dry the vast majority of the time and are already in use by farmers, developers, or homeowners.

And, of course, the imposition of CWA's requirements on waters and lands far removed from interstate, navigable waters is harmful not only to the States themselves, but to farmers, developers and homeowners. Ninety-two percent of Nebraska's 77,000 square miles of area is used for agriculture production. The proposal treats numerous isolated bodies of water as subject to the Agencies' jurisdiction, resulting in landowners having to seek permits or face substantial fines and criminal enforcement actions. Nor must land have water on it permanently, seasonally, or even yearly for it to be "water" regulated under the Act. And if a farmer makes a single mistake, perhaps not realizing that his land is covered under the CWA's permit requirements, he/she could be subject to thousands of dollars in fines and even prison time.

Members of the Committee, we ask that Congress continue to work to ensure that EPA and the Corps recognize, preserve, and protect the primary responsibilities and rights of States to plan the development and use of land and water resources.

Thank you for the opportunity to be heard.

Senator FISCHER. Thank you, Mr. Lavene. Now I'd like to go through a series of questions with you, if we could.

Mr. LEVENE. OK.

Senator FISCHER. I have a number of questions here and I would appreciate your response to those.

Can you talk about the role of the State in protecting water quality and administering the water protection programs, and what is that cooperative federalism that we hear about and why is it so important that states have that strong role in water protection?

Mr. LEVENE. Sure.

With regard to the State protecting water, as I kind of mentioned in my testimony, and this kind of gets into, obviously, the cooperative federalism issue, we have a situation where under the Clean Water Act Federal Government regulates a portion of the Act's responsibilities. And the State of Nebraska separately administers some of the other programs. As I stated before, the Department of Environmental Quality in the State of Nebraska regulates discharge permits under Section 402, water quality standards, and total maximum daily loads under 303, and also water quality certifications under—under Section 401. Again, it's a shared responsibility that is—it's basically the function of the cooperative federalism. And that is basically shared responsibility between State and Federal Governments to implement these laws. Now, part of the reason that occurs is that both the Federal Government and the states have somewhat separate interests. The Federal Government does have an interest in protecting interState streams. So that is originally why the Act was passed dealing with "waters of the U.S." that were basically navigable in fact. But the states have always historically had a strong interest in protecting waters in the State itself. So interState land use and water issues. And so in examining that and looking at the Clean Water Act, it's appropriate that the State perform the function of dealing with those intraState waters. Especially those that would allow, in fact, interState commerce. And so, again, that cooperative federalism is out there, and I think it works well and has worked well for a number of years under the current definition of "waters of the United States". The problem here is you—you get to a point where that cooperative federalism could come into jeopardy, and I think that's because you have a situation where the Federal Government is—through this new definition, would be inserting itself or interjecting itself into some of the primary responsibilities of the State. And that is reaching out into intraState waters that should be solely regulated by the State and not the Federal Government.

Senator FISCHER. And when you talk about the permitting decisions that are—that are currently out there, those are state-administered programs; correct?

Mr. LEVENE. Yes.

Senator FISCHER. And this proposed rule—well, if we're going to apply this expanded definition now to State programs, what do you think the impact would be on the Nebraska Department of Environmental Quality?

Mr. LEVENE. Well, part of the problem here is, again, I probably mentioned a couple of themes or topics here a couple of times, but the State of Nebraska and its ability to implement and administer

those Federal programs under the Clean Water Act, the State of Nebraska must go through a process of adopting State statutes. And then the Department must go through a process of adopting rules and regulations. Now, those states and those rules and regulations need to be approved by the Environmental Protection Agency to make sure that they're consistent with the—the Clean Water Act and the provisions there. And they at least need to be as stringent as—as the Federal law. One good example that I think I discussed in my testimony is that the State of Nebraska has its own statutory definition of "waters of the State." And it is different than the definition placed on Federal laws of "waters of the United States." But that definition as codified in Nebraska State statutes has been approved by the Environmental Protection Agency and has been regulated. That definition has been used and regulative of Clean Water Act programs. The problem here, moving forward then, is in how it will affect the Department. I think there's a lot of uncertainty with regard to how the new definition is going to affect their administration. Will the agency have to go back and go through another review process with the EPA with regard to this new definition and our current State laws and rules and regulations? That's somewhat of an unknown. We don't know if we have to do that. We don't know if we'd have to change the definition of the "waters of the State." We don't know if we'd have to basically amend those rules and regulations. Basically what I'm saying is, we're not sure that our actions today are currently appropriate under the new definition or if the changes are going to have to be made for us to continue to administer those programs.

Senator FISCHER. And I understand that this rule is going to expand the practice on a case-by-case jurisdictional determination. How is that going to really impact our State operations; do you have any idea? I mean, I know there's a lot of unknowns out there, but how—how do you think that will impact the operations here in the State of Nebraska?

Mr. LEVENE. I—I think it's going to cause some confusion on behalf of both the Agencies and the individuals that will be regulated. I think what you have here is, under this new definition, you're going to have basically a per se—basically an increase in the per se categorical determination of what is a "water of the U.S." And so that's going to expand geographically in the State to encompass waters that probably were previously not under the 25 jurisdiction of the Clean Water Act. But in doing so you're also going to leave some isolated bodies of water out of there that there are going to be questions on. Basically, when you look at the proposed rule and definition and what these isolated waters are, these other waters, if you will, you do have to go through a case-by-case analysis of that, and it really determines or comes down to whether or not there's some significant nexus to a core water. Again, the problem is, we're uncertain how EPA is going to deal with that. And so because EPA hasn't given us that additional information and/or guidance on how they're going to handle that, the State of Nebraska's unsure on how we can implement our programs using that same definition.

Senator FISCHER. Have you requested guidance?

Mr. LEVENE. We have gone through—well, I know that there have been various meetings with EPA and the Department of Environmental Quality prior to this rule coming on, but I don't think that those—those meetings were—I wouldn't consider them consultation and collaboration, if you will, on trying to develop language for the proposed rule to basically meet needs and requirements at the State level. I don't think there was really that give and take, if you will, between the State and Federal Government.

Senator FISCHER. And you explained the State has been delegated authority over the Clean Water Act program since the 1970's?

Mr. LEVENE. Yes.

Senator FISCHER. And we have our unique "waters of the state" definition that's been in effect for 40 years; correct?

Mr. LEVENE. Yes.

Senator FISCHER. And if the certainty of that definition and the four decades of decisionmaking by the Nebraska Department of Environmental Quality is basically turned upside down by this proposed rule, what do you think's going to be the result? And address liability concerns, if you would.

Mr. LEVENE. Again, I go back to this common theme of confusion and uncertainty for the agency. And, again, that goes back to, we are uncertain how the Environmental Protection Agency is going to interject itself into the State's current administration of the Federal programs under the Clean Water Act. Again, we don't know if new laws need to be passed, new rules need to be adopted. I think the Department of Environmental Quality, and I think most everyone would agree, that the—that the Department of Environmental Quality has done an outstanding job in the last 40 years to protect the State's water quality. So if you look at it that way, we're not sure what issues need to be fixed. But here, without knowing how we're going to proceed forward, you're basically going to upend that 40 years of, basically, certainty that both the Agency had, along with the regulating community, and what they—what they understood. And so basically by doing that you're going to have producers out there that are now uncertain about whether or not an action that they might take could be or will be covered underneath the Clean Water Act, which causes concerns and also, again, for the agency side, for DEQ, until we get that guidance from EPA, we're—we're just uncertain. That uncertainty and that confusion basically, in my mind, breeds litigation, and it—it breeds potential liability on behalf of those producers. Because if they go out and take an action that is then, you know, after the fact determined to be the waters of the U.S., again, they can be exposed to fines and potential criminal penalties. And so when you have that situation of uncertainty along with the potential of fines and, you know, jail time, you're going to get to a point where there's going to have to be litigation on this between producers and the agencies that are enforcing these—these laws.

Senator FISCHER. For the benefit of the public here, if you could explain the holdings in those two Supreme Court cases that both of us mentioned in our statements about confirming the limits of the Federal Government's authority over water that Nebraska—or

that Congress has established in the Clean Water Act, if you could go into a little detail on those two cases, I'd appreciate it.

Mr. LEVENE. I will. And I'll kind of maybe put them together.

Senator FISCHER. OK.

Mr. LEVENE. They're pretty substantial. But the SWANCC case, or the earlier case in the State of Illinois, was against the Army Corps of Engineers. And both SWANCC and Rapanos basically dealt with bodies of water. In one case a pond, and in another case a series of wetlands. And that these bodies of water are—were adjacent to non-navigable tributaries. So they were not directly connected to a "water of the U.S." under the current definition, if you will. In the SWANCC case the entities that actually wanted to do a dredge and fill went to the Corps and asked whether or not they needed to have a 404 permit. The answer was no. Until it was later determined that some birds were flying overhead and landing on the pond and using it like a natural habitat. And because they were migratory birds, the Corps then felt that was something that affected interState commerce. And because it affected interState commerce, the Agency felt that it would be determined to be waters of the U.S., which would be then subject to the Clean Water Act jurisdiction and requirements of a 404 permit. In that case you basically had a decision that the Court said, that's way too tenuous of a line to draw between an interState commerce for migratory birds and a body of water that does not meet a navigable stream. And so that was one limitation on the Federal Government in SWANCC. The other one, in Rapanos, there are actually two opinions that came out, the plurality opinion and an opinion by Justice Kennedy. Both of these were dealing with the secondary water issues definitions. The two opinions kind of had a different viewpoint on how they should analyze it. However, they both came to the conclusion that these wetlands should not be considered waters of the U.S. and there's a limit on that jurisdiction by the Federal Government. The plurality opinion in that case basically stated that these secondary waters with these wetlands, that there needed to be some continuous surface water connection to a permanent water. And so you had to have a strong connection, a permanent connection to a navigable water. Justice Kennedy took a little different tack to it. But he basically came out and said, look, there at least has to be a significant nexus from the secondary water to an in fact navigable water. And when he was going through that—that ruling, or his decision in that, you know, if someone would look at that as a hydrologic connection, but it had to be more than a hydrologic connection, it had to be something that really dealt with the science or biological or chemical makeup of the wetland affecting that navigable water.

And so both of those cases, what they did was truly limit the scope of the agency in the jurisdictional waters of the U.S. by saying, if there's not a connection then it's not going to be underneath the purview of the Federal Government for a 404 permit.

Senator FISCHER. So let me ask you, in your legal opinion, do you think this proposal by the EPA and the Corps would adhere to or violate those Supreme Court decisions?

Mr. LEVENE. Well, along the lines with some previous comments that the Attorney General of the State of Nebraska, along with a

couple other Attorney Generals sent for comments on this, we feel that the rule does violate the previous decisions of the Supreme Court in limiting that jurisdiction. And the reason for that really comes down to is, we have a situation, as I explained before, is—is you're having a definition that now is going to have a per se expansion of and categorical jurisdiction over these lands and these waters. If it's in a tributary area with an adjacent water, that could be neighboring, in a repairing area or a floodplain area, if that is determined to be, as a fact, a definitional term, it doesn't matter what connection that body of water actually has to a navigable water. It simply is per se determined to be waters of the U.S. And so what that does is basically strip away the analysis that the Supreme Court said you had to go through, and that is, in the one instance, to at least have a continuous surface water connection to that core water, or at least have a very significant nexus to the core water. We're not making that determination. We're simply making a per se determination that, with a wave of our hands, it's under the jurisdiction of the Federal Government. That's going to be the problem moving forward and why this appears to violate the Supreme Court rulings.

Senator FISCHER. And I understand one of your roles in the Justice Department is to enforce the Clean Water Act. Do you know what the consequences are with the penalties in violation of that Act? Can you explain those, please?

Mr. LEVENE. I'll explain the State level a little bit clearer than probably the Federal Government.

But in the State of Nebraska for—for having a, basically a discharge into the stream or adding a pollutant to the stream without a permit, that can be either a Class IV felony or you could have fines up to $10,000 per day. Under the Federal—Federal penalties, depending on whether it's a known violation or the like, the fines per day could go anywhere from $2500 up to $50,000 per day. And there are also various criminal sanctions that—if you're polluting the streams. And so, as I kind of stated before, those are pretty big fines, penalties, and possibly criminal sanctions that could be imposed against an individual if they're violating this act.

Senator FISCHER. OK. And, in your opinion, do you think this proposed rule is going to, I guess, offer any additional protections to water quality?

Mr. LEVENE. As I've stated before, I think the Department of Environmental Quality in the State of Nebraska, with its 40 years of history of implementing these Federal programs and the Clean Water Act, I think they've done a wonderful job. Without having further guidance and information from the Federal Government on how they're going to interpret this new rule, it really—it's really hard, if not impossible, to determine what benefits would come out of it.

Senator FISCHER. OK. So let me see if I have this correct from everything you said. We have a proposed rule that's going to infringe on the state's authority to protect and manage our water resources; it will disrupt the successful operation and certainty of our state-run programs; it will create administrative burdens for our Nebraska Department of Environmental Quality; it will increase litigation and liability exposure for our people and businesses; it

will violate Supreme Court rulings on the limits of Federal authority under the Clean Water Act; and you don't believe that there would be meaningful benefits to this in the end? Did I sum you up pretty well 19 here?

Mr. LEVENE. I'd say that's a pretty good summary, yes.

Senator FISCHER. OK. Good.

I thank you for your testimony before the Committee, Mr. Lavene, and appreciate you taking time to be with us today. Thank you.

Mr. LEVENE. Thank you, Senator Fischer.

Senator FISCHER. With that, I would ask that our second panel please come up.

(Short break taken accordingly—10:35 a.m.)

Senator FISCHER. Well, I would like to welcome the second panel to the table. There are several excellent witnesses representing a very diverse group of stakeholders, and they can speak more of the impacts of the proposed rule and what that will have on citizens, businesses, counties, and livelihoods.

We are going to begin with Mary Ann Borgeson. She is the Chair of the Douglas County Board of Commissioners. Commissioner Borgeson is a native of Omaha and became the first female to chair the Douglas County Board in 1997. In addition to serving as chair, Commissioner Borgeson serves on the Board of Directors for both the Nebraska Association of Counties and the National Association of Counties. She is currently the president-elect for Women of the National Association of Counties.

Commissioner, I am eager to hear how this proposed rule will impact our counties and communities. Please begin your testimony whenever you're ready.

STATEMENT OF MARY ANN BORGESON, CHAIR, DOUGLAS COUNTY BOARD OF COMMISSIONERS

Ms. BORGESON. Thank you, Senator Fischer, for the opportunity to testify on the "Waters of the United States" proposed rule and the potential impact on county governments.

For the record, I have submitted a narrative of my testimony that includes additional information.

On a National level, the National Association of Counties, or NACo, has urged the Federal agencies to withdraw the proposed rule until further analysis of its potential impacts has been completed. Douglas County concurs with that recommendation.

Clean water is essential to all our Nation's counties. The availability of an adequate supply of clean water is vital to our Nation, and integrated and cooperative programs at all levels of government are necessary to protecting water quality.

Douglas County is a "Phase II" community under the National Pollutant Discharge Elimination System, or NPDES, the section of the Clean Water Act. A major emphasis of the County's Stormwater Management Plan is to improve water quality by reducing stormwater runoff volumes. This approach is lockstep with EPA's push to implement "green infrastructure" as a key strategy to improve our Nation's overall water quality. Simply put, green infrastructure can have a significant positive benefit for water quality, and with this being an EPA priority, it is essential that the

proposed "Waters of the U.S." rule be supportive, and not contradictory to, the continued implementation of green infrastructure across the country. Put another way, if the "Waters of the U.S." rule negatively impacts the implementation of green infrastructure, it will mean more taxpayer dollars being wasted on process rather than being directly spent on water quality improvements.

Counties own and maintain a wide variety of infrastructure that is impacted by the current regulations and that would be further impacted by the proposed rule.

Projects we are working on already significantly impacted by the current regulations are given the lack of clarity in the proposed rule. We anticipate additional negative impacts. One of our current projects is a prime example of how cumbersome and expensive the for bidding process is, and the costly delays are largely due to the inconsistencies in the application of the rules and the lack of definitions. Our 180th Street project will improve the section line roads from the Old Lincoln Highway to West Maple Road. Besides providing easier access to new developing areas, it will relieve the traffic—it will relieve the traffic load on Old Lincoln Highway, which is on the National Registry, and on the section line road. The immediate area is currently being passed over for most development due to a lack of access to major roads—roadways, including the Expressway to the south. The project includes two 900-foot bridges over railroad tracks and a flowing creek and two other bridges over an unnamed tributary. The initial environmental permitting process for these bridges went relatively smoothly and involved a Categorical Exclusion, the lowest level environmental involvement. The process began in 2002, with the construction originally scheduled for 2010. Design and permitting work began in 2005. But the environmental documents are still not signed. The newest projected construction date is now 2018 because of these delays.

The reason for the delays is a small county road ditch which is several feet deep and wide and full of weeds and grasses with a rut at the bottom approximately eight inches wide and an inch deep. There is no ordinary, quote, high—quote, Ordinary High Water Mark, unquote, associated with this rut because when it rains it is completely under water. However, the Corps of Engineers has declared this rut a "water of the U.S.," prompting a redesign of the project costing the County hundreds of thousands of dollars in delaying this project.

An additional concern is storm water clean-up. We deal with disasters such as flooding and wind storms regularly, and these types of storms impact many ditches, culverts, and tributaries. Trying to get permits is already a problem in these situations. Our country has made tremendous strides in improving water quality since the inception of the Clean Water Act, but if the process is not clarified and streamlined, more counties will experience delays in safeguarding and caring for infrastructure and expend substantial dollars in doing so. Dollars that could instead be spent on direct improvement of water quality.

To reiterate my prior point, I ask that the proposed rule be withdrawn until further analysis and consultation with State and local representatives have been completed.

Again, I thank you for the opportunity to testify on the proposed "Waters of the U.S." rule, and I do welcome the opportunity to address any questions you may have later.

[The prepared statement of Ms. Borgeson follows:]

Thank you, Senator Fischer for the opportunity to testify on the "Waters of the United States" proposed rule and the potential impact on County governments.

My name is Mary Ann Borgeson and I serve as the Chair of the Douglas County Board of Commissioners having been first elected as County Commissioner in 1994. I also serve on the Board of Directors for the Nebraska Association of Counties, the Board of Directors for the National Association of Counties, Chair the Health Services Committee, and am a member of the Healthy Counties Advisory Board.

For the record, portions of my testimony have been taken verbatim from the testimony presented by the Honorable Sallie Clark, First Vice President of the National Association of Counties (NACo), to the U.S. Senate Committee on Environment and Public Works and the U.S. House of Representatives Committee on Transportation and Infrastructure, February 4, 2015. While Ms. Clark's testimony represents Counties nationwide, many of her points are particularly germane to Douglas County, Nebraska and therefore have been added to my testimony.

About Counties

Counties nationwide continue to be challenged with fiscal constraints and tight budgets. In addition, county governments in more than 40 states must operate under restrictive revenue constraints imposed by state policies, especially property tax assessment caps.

About Douglas County, Nebraska

While Douglas County, Nebraska is considered "urban," with a population of more than 537,000 residents, we have both rural and suburban areas, with substantial portions within FEMA designated floodplains. As you know, Douglas County lies on the eastern edge of Nebraska, encompasses 340 square miles, is home to the largest city (Omaha) in the state, and comprises a significant portion of the state's largest metropolitan area. The county has 11 square miles of open water not including rivers, farm ponds or wetlands. The western part of Douglas County is comprised entirely of floodplain between and adjacent to the Elkhorn and

Platte Rivers. Agriculture and sand and gravel extraction are major economic activities in this area, while agriculture and complementary land uses are common in the non-floodplain areas of the county. Most of the roads in this area are gravel roads. The water table is always high and maintaining the ditches is an ongoing challenge to protect both the roads and the surrounding fields.

Impacts of the current and proposed rule on County projects

Projects we are working on are already impacted by the current regulations. Those and future projects could be further and significantly affected by the changes to the definition of "waters of the U.S." that have been proposed by the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps). The National Association of Counties (NACo) has urged the agencies to withdraw the proposed rule until further analysis of its potential impacts has been completed. In addition, a number of prominent national associations of regional and local officials have expressed similar concerns including Colorado Counties Inc., U.S. Conference of Mayors, National League of Cities, National Association of Regional Councils, National Association of County Engineers, American Public Works Association and the National Association of Flood and Stormwater Management Agencies.

Douglas County concurs with this recommendation.

The Importance of Clean Water

Clean water is essential to all of our nation's counties. The availability of an adequate supply of clean water is vital to our nation and the best way to protect our water quality is to cooperate on programs at all levels of government.

Green Infrastructure, Land Use and Zoning Implications

Douglas County is a "Phase II" community under the National Pollutant Discharge Elimination System (NPDES) section of the CWA. A major emphasis of the County's

Stormwater Management Plan (SWMP) is to improve water quality by reducing stormwater runoff volumes. This approach is lock step with EPA's push to implement "green infrastructure" as a key strategy to improve our nation's overall water quality. Simply put, "green infrastructure" can have significant positive benefits for water quality and with this being an EPA priority, it is essential that the proposed "Waters of the U.S." rule be supportive of, and not contradictory to, the continued implementation of "green infrastructure" across the country. Put another way ..., if the "Waters of the U.S." rule negatively impacts the implementation of green infrastructure, it will mean that taxpayer dollars will be needlessly wasted on "process" instead of being directly spent on water quality improvements.

Counties play a key role in protecting the environment, primarily through zoning and other land use regulations that safeguard natural resources. Consistent with our NPDES permit requirements, we provide outreach and education to residents on water quality and stormwater impacts and we establish rules on illicit discharges and actively monitor stormwater outfalls and other areas, following up to eliminate any illicit discharges. For example, we have recently ramped up our coordination efforts with the Douglas County Health Department regarding septic systems, looking to identify potential contamination of creeks and streams and address the impaired streams and waterbodies within Douglas County. The County's current Comprehensive Land Use Development plan, adopted in 2007, has a major emphasis on the use of low impact development and green infrastructure in mitigating stormwater runoff – clearly illustrating Douglas County's early adoption of and leadership in implementing these techniques that improve water quality.

Counties must also plan for the unexpected and remain flexible to address regional conditions that may impact the safety and well-being of our citizens. Specific regional differences, including condition of watersheds, water availability, climate, topography and geology are all factored in when counties implement public safety and common-sense water quality programs.

For example, low-lying areas have consistently high groundwater tables and we must be diligent in maintaining drainage conveyances to prevent flooding. It should also be pointed out that

recharging aquifers is an important element in the overall water cycle and drainage elements such as ditch infrastructure, as well as the aforementioned "green infrastructure" can help to facilitate such groundwater recharge.

Through the Stormwater Management Regulation, Douglas County prohibits illegal discharges into the county's stormwater system and establishes financial penalties for violations. Also, consistent with our NPDES Phase II Stormwater Permit requirements, we provide public information and education, and have mechanisms in place to address stormwater on construction sites, and for the long term in both developed and rural areas, focusing on the use of green infrastructure to control runoff close to the source. Such techniques mimic natural systems, providing more sustainable and cost-effective stormwater management. It is important, therefore, that any "Waters of the U.S." rule be consistent with, and supportive of, our green infrastructure approach ... which, as I mentioned previously, is consistent with the nationwide approach championed by EPA. I mention these things because they contribute directly to improving water quality instead of being laden with "process" that is not necessarily providing any direct benefit to water quality but most certainly results in more expense for taxpayers.

Public Infrastructure.

Counties own and maintain a wide variety of public infrastructure that is already impacted by the current regulations and would be further impacted by the proposed rule. This infrastructure includes roadside ditches, flood control channels, stormwater culverts and pipes, Municipal Separate Storm Sewer Systems (MS4), and other facilities used to funnel water away from low-lying roads, properties and businesses. These infrastructure improvements not only protect our water quality, but prevent accidents and flooding. Defining what waters and their conveyances fall under federal jurisdiction has a direct impact on counties who are legally responsible for maintaining our drainage ditches and other infrastructure.

Counties are also the first line of defense in any disaster, particularly as it relates to public infrastructure. Following a major disaster, county local police, sheriffs, firefighters and emergency personnel are the first on the scene. In the aftermath, counties focus on clean-up, recovery and rebuilding. The county typically needs to take quick action to work with municipalities and utilities and multiple federal agencies to rebuild critical infrastructure.

For over a decade, counties have been voicing concerns on the existing "waters of the U.S." definition, as there has been much confusion regarding this definition even after several Supreme Court decisions. While there needs to be a clear, workable definition of "waters of the U.S.," the new proposed definition does not provide the certainty and clarity needed for operations at the local level.

The current system already presents major challenges—including the existing permitting process, multiple and often duplicative state and federal requirements, and unanticipated project delays and costs. The proposed rule, as currently written, only adds to the confusion and complicates already inconsistent definitions used in the field by local agencies in different jurisdictions across the country.

Ditches are pervasive in counties across the nation; until recently, they were not required to have federal CWA Section 404 permits. However, in recent years, some Corps districts have inconsistently required counties to have federal permits for construction and maintenance activities on drainage ditches. It is critical for counties to have clarity, consistency and certainty on the types of public safety infrastructure that require federal permits. Furthermore, there are green infrastructure improvements that clearly improve water quality and since the implementation of green infrastructure is a major emphasis of EPA it is imperative that this emphasis not be contradicted by a "Waters of the U.S." rule. To do so simply adds unnecessary confusion and costs while reducing the dollars that can be applied directly to water quality improvements.

The current process is already complex, time-consuming and expensive, leaving local governments and public agencies vulnerable to citizen suits. Counties across the nation have experienced delays and frustrations with the current Section 404 permitting process. If a project is deemed to be under federal jurisdiction, other federal requirements are triggered such as environmental impact statements, the National Environmental Policy Act (NEPA) process and Endangered Species Act (ESA) implications. These assessments often involve intensive studies and public comment periods, which can delay critical public safety upgrades to county owned infrastructure and add to the overall time and costs of projects.

Under the current federal program, counties can utilize a maintenance exemption to move ahead with necessary upkeep of ditches (removing vegetation, extra dirt and debris)—however, the approval of such exemptions is sometimes applied inconsistently. These permits come with strict special conditions that dictate when and how counties can remove grass, trees and other debris that cause flooding if they are not removed from the ditches.

Douglas County is responsible for bridges and culvert maintenance in numerous locations. These critical pieces of infrastructure cross streams, wetlands and rivers, and annual maintenance is essential for long-term stability and safety. If the proposed rule moves forward and dramatically increases the waters under federal jurisdiction, it would significantly impact daily county operations and our ability to serve constituents.

Unfortunately, the ongoing arguments on what states and locals consider to be an ever worsening situation with the EPA and Corps of Engineers overstepping the authority granted by Congress often ignores the tremendous strides made in improving water quality in this country since the Clean Water Act was first passed. For example, the eastern part of the county, tied to the City of Omaha sewer system, is currently undergoing a $2,000,000,000 sewer separation project, part of an unfunded mandate. It is a vital project related to cleaning the water going into the Missouri River from the half million residents in this area of Douglas County. The public does not like paying the two billion dollars in increased sewer use fees but can understand why this is necessary. On the other hand it is difficult for taxpayers to accept a situation like the following from our County Engineer's Office.

The proposed project will extend 180th St, a section line road, from the Old Lincoln Highway to West Maple Road. This is in an expanding area of the county. Besides providing easier access to newly developing areas, it will relieve the traffic load on Old Lincoln Highway, which is on the National Registry and on the section line roads at 168th and 192nd. The immediate area is being passed over for most development due to a lack of access to the major roads to the south, including the Expressway without going miles around. The project includes two 900 foot bridges over railroads tracks and a flowing creek and two other bridges over an unnamed tributary. The initial environmental permitting process for these bridges went relatively smoothly. The project

was designated a Categorical Exclusion, the lowest level of environmental involvement. The project was originally planned for construction in 2010. The process began in 2002. The original work on design and permit getting began in 2005. As of today, 2015, the environmental documents are still not signed. The newest projected construction date is 2018 because of the delays.

An example of uncalled for delays, the County simply has a road ditch intended to protect one of the adjacent roads from runoff from adjacent fields. In moderate or heavy rains it carries water. The ditch is several feet deep and wide. It is full of dry land weeds/grasses. There are no wetland plants. This ditch drains to an unnamed tributary that empties into the Papio Creek. At the bottom of the ditch, if you dig through the weeds, is a rut approximately 6" to 8" wide and less than an inch deep. Presumably, it developed when the ditch was dug before any vegetation began to grow. There is no Ordinary High Water Mark associated with this "bed and bank" because when there is rain it is completely underwater. The Corps of Engineers declared this rut a Water of the U.S. The redesign is costing the county hundreds of thousands of dollars and has held up the project for another two years. This is just one example of the Corps and EPA violating the intent of the law and the Supreme Court ruling.

To put this in perspective, if you had a child starting grade school when the process began, they would be graduating from high school this year. With a proposed construction date starting in 2018, assuming no more delays, and a two year construction period that child will not be able drive on this new road or bridges when they graduate from college.

Definitions and Terminology

Many of the terms in the current Clean Water Act are unclear and the proposed rules would make the situation even worse. This problem has led to a wide variety of interpretations among the Corps of Engineers Districts and individuals within the same district in enforcing these rules . Failing to bring clarity to the existing rules and adding more rules and undefined terms will make the situation worse. Some examples:

Tributary needs to be differentiated from a drainage ditch. By using the words interchangeably it gives a false impression of a ditch that is normally dry as having a continuous flow of water. The generally accepted definition of a tributary is "a stream that flows to a larger stream or other body of water", and a stream "is a body of water with a current that flows within a bed between stream banks." A ditch is a long narrow trench or hole dug into the ground. There are times when a ditch carries water but is normally dry. (Using such a definition equating tributary and ditch in a law makes it legal, a classic example of newspeak.)

The initial definition given in the Clean Water Act says a tributary has a bed, bank and ordinary high water mark. It was then extended to lakes, ponds, ditches, canals and wetlands. The logic, as I understand it, is that Judge Kennedy's statements about wetlands also apply to tributaries. *"...the agencies conclude that tributaries as they propose to define them perform the requisite functions identified by Justice Kennedy for them to be considered, as a category, to be "Waters of the United States." Assertion of jurisdiction over tributaries with a bed and banks and OHWM is also consistent with Rapanos because five Justices did not reject the current regulations that assert jurisdiction over non-navigable tributaries of traditional navigable waters and interstate waters. "* The vote you will recall was 4-1-4. Judge Kennedy was the 1. *This logic is from* the Proposed New Rule.

In the EPA webinar introducing the proposed new rule, there was a lot of emphasis on why controlling "ditches" is so important to them. The proposed rule includes ditches as tributaries and covered by their jurisdiction unless the ditch is exempted. Ditches cut into Uplands are exempt from being considered Waters of the U.S. There is no definition included for the term

Upland. If the term Upland only means an area of higher ground- at what elevation does it begin? If Upland ditch is referring to streams and rivers carrying fast flowing clear water out of mountainous areas and possessing bedrock or coarse sediment beds then they are not truly ditches.

The current EPA/Corps argument for referring to ditches as tributaries can be extended to make house gutters tributaries contributing to the Waters of the U.S. (This could also be accomplished using "Landscape Jurisdiction," discussed below).

As a county we have many miles of normally dry ditches that we have created to protect our roads. Like most ditches, they are designed to drain runoff "downhill." If the current proposed regulation is enacted "as is"- many of our ditches could become "jurisdictional." It would be virtually impossible to maintain these ditches if every time we need to clean or widen a ditch we have to get a federal permit. Currently it takes months if not years to get permits from the Corps of Engineers. A result of the proposed rules will be more waters of the U.S. being declared and an even greater slowdown in the current process to get permits approved.

The concept of "Bed and Bank" and "Ordinary High Water Mark" (OHWM) needs to be further defined to show the difference between minor ruts at the bottom of a normally dry drainage ditch and the ditch itself. (Example: - Landscape Jurisdiction is a term used in the new rule that is undefined. The following are basic definitions. "Landscape comprises the visible features of an area of land, including the physical elements of landforms such as (ice-capped) mountains, hills, water bodies such as rivers, lakes, ponds and the sea, living elements of land cover including indigenous vegetation, human elements including different forms of land use, buildings and structures, and transitory elements such as lighting and weather conditions." Wikipedia

"Jurisdiction" is defined by the Merriam Webster Dictionary as, "the power or right to make judgments about the law, to arrest and punish criminals, etc.; the power or right to govern an area: an area within which a particular system of laws is used."

No one can determine how enforcement officials will want to interpret the term and how it can be changed over a period of time. The potential cost and control of land to developers, transportation improvements, farmers and ranchers is tremendous. The same authority could be extended to what could be used on lawns as runoff from these properties eventually go to a drainage way that eventually will go to an active stream or river. This term should be totally removed from the document.

If a rut at the bottom of a dry ditch can become a water of the U.S. (see above) and a normally dry ditch defined as a tributary – worst case authoritarian interpretations for Landscape Jurisdiction would seem probable.

The regulation's definition of "Floodplain" as areas with "moderate to high water flows" rather than the usual definitions established by FEMA could have multiple interpretations. But under the proposed rule it would seem reasonable to assume that any area that potentially could flood will be considered jurisdictional. These areas would be considered "water of the U.S." even without a significant nexus. As an example, the northwest portion of Douglas County lies between the Platte River and The Elkhorn River. It is primarily farmland that, when there is rain, drains to ditches that then drain to the river. The area can easily be seen as an area with potential "moderate to high water flows." Under the new rule water near a water of the U.S. can be considered jurisdictional IF it falls in a Flood Plain or Riparian Area even if there is no "significant nexus."

Combining the concepts of Landscape Jurisdiction and Floodplain offers the potential for the EPA and the Corps of Engineers to control considerably larger land areas than they do today. The concept of "Landscape Jurisdiction" should be totally eliminated from the document. Once the concept is in the regulations it is subject to expansion and a variety of interpretations.

Rep. Lamar Smith (R-Texas), chairman of the House Committee on Science, Space, and Technology, is among the members of Congress who have denounced the EPA's new water regulatory plans as "a massive power grab of private property across the U.S."

In a November 12, 2013 press statement, Rep. Smith declared:

"The EPA's draft water rule is a massive power grab of private property across the U.S. This could be the largest expansion of EPA regulatory authority ever. If the draft rule is approved, it would allow the EPA to regulate virtually every body of water in the United States, including private and public lakes, ponds and streams. "

Storm Clean Up is also a concern for those who deal with disasters such as flooding or wind storms. These types of storms impact many ditches, culverts and tributaries. Trying to get permits is already a problem. Expanding the areas regulated will only make things worse.

A recent report from the Gate's Foundations reported the mosquito to be the most dangerous creature on the planet based on the number of people who died from contact with them. Getting a permit to spray a wetland, tributary etc for mosquitoes or other pests should be looked at to ensure that work can be done in a timely manner when needed. The same may well be a problem with spraying for noxious weeds, which spread rapidly and are a problem to control.

Increased Litigation

Additionally, counties are liable for ensuring that our public safety ditches are maintained and in some cases counties have faced lawsuits over ditch maintenance. In 2002, *in Arreola v Monterey* (99 Cal. App. 4th 722), the Fourth District Court of Appeals held the County of Monterey (Calif.) liable for not maintaining a flood control channel that failed due to overgrowth of vegetation.

Counties are also facing high levels of litigation from outside groups on approved permits that have been signed off by both the state and the EPA. Even though the counties are following the state and federal permitting rules on water quality, these groups are asserting that the permits are not stringent enough. A number of counties in Washington and Maryland have been sued over the scope and sufficiency of their approved MS4 permits.

These are just a few examples of the real impact of the current federal permitting process. The new proposed rule creates even more confusion over what is under federal jurisdiction. If the approval process is not clarified and streamlined, more counties will experience delays in safeguarding and caring for these public safety and stormwater ditches. Our bottom line is that the proposed rule contains many terms that are not adequately defined and NACo believes that more roadside ditches, flood control channels and stormwater management conveyances and treatment approaches will be federally regulated under this proposal.

This is problematic because our members are ultimately liable for maintaining the integrity of these ditches, channels, conveyances and treatment approaches, even if federal permits are not issued by the federal agencies in a timely manner. Furthermore, the unknown impacts on other CWA programs are equally problematic.

What we are asking for

We ask that the proposed rule be withdrawn until further analysis has been completed and more in-depth consultation with state and local officials—especially practitioners—is undertaken. NACo and counties nationwide share the EPA's and Corps goal for a clear, concise and workable definition for "waters of the U.S." to reduce confusion—not to mention costs—within the federal permitting process. Unfortunately, we believe that this proposed rule falls short of that goal.

Counties stand ready to work with Congress and the agencies to craft a clear, concise and workable definition for "waters of the U.S." to reduce confusion within the federal CWA program. We look forward to working together with our federal partners, as our founding fathers intended, to protect our nation's water resources for generations to come. Counties stand ready to work with our counterparts in states and in the federal government to reach a resolution that makes sense. We can achieve our shared goal of protecting the environment without inhibiting public safety and economic vitality of our communities.

Thank you again for the opportunity to testify today on the proposed Waters of the U.S. rule. I would welcome the opportunity to address any questions.

Senator FISCHER. Thank you, Commissioner.

Next I would like to welcome Mrs. Barb Cooksley, the president-elect of the Nebraska Cattlemen. Barb and her family raise cattle on their ranch near Anselmo, Nebraska where they pride themselves on being good stewards of the land and water resources. I'm looking forward to Barb's testimony which will offer great insight on how the proposed "Waters of the U.S." rule will affect this very special Nebraska way of life. Barb, please begin your testimony.

STATEMENT OF BARBARA COOKSLEY, OWNER
COOKSLEY RANCH, ANSELMO, NE

Ms. COOKSLEY. Thank you, Senator.

Good morning. My name is Barb Cooksley. My family raises cattle on our ranch near Anselmo, Nebraska. I am president-elect of Nebraska Cattlemen, and thank you for allowing me to testify today on the impacts of the Environmental Protection Agency and the Army Corps of Engineers' proposed rule on the "waters of the United States." I'm here today representing Nebraska Cattlemen's 3,000 plus members but I'm also happy to lend my voice to nearly 50,000 ag producers in Nebraska. In addition to my service to Nebraska Cattlemen, I currently serve on several environmental boards and committees for the areas and State. Land stewardship has been my family's priority for generations.

First and foremost, I want to thank you for your interest in this issue and for continuing to be engaged, because EPA intends to finalize the WOTUS rule by sometime this year. I'm also thankful Congress included language in the omnibus package that led to the withdrawal of EPA's Interpretive Rule. That rule was problematic and did not provide clarity or certainty for agriculture.

Animal ag producers pride themselves on being good stewards of our country's natural resources. We maintain open spaces, healthy rangelands, provide wildlife habitat while working to feed the world. But to provide all these important functions, we must be able to operate without excessive Federal burdens like the one we're discussing today. As a beef producer, I can tell you after reading the proposed rule it has the potential to impact every aspect of our family's operation and others like it by regulating potentially every water feature on my land. What's worse is the ambiguity in the proposed rule that makes it difficult, if not impossible, to determine just how much our family ranch will be affected. This ambiguity places all landowners in a position of uncertainty and inequity. Because of this, I ask the EPA and Army Corp of Engineers to withdraw the proposed rule and sit down with farmers and ranchers to discuss our concerns and viable solutions before any additional action.

I would like to use my time here this morning to show you why this rule is problematic for operations like mine and show you some pictures to help color the issues.

Welcome to just outside Anselmo, Nebraska. In this picture you will see the home place for our ranching operation. There are several homes on this site since we operate the ranch alongside two additional generations of family members. Our ranch sits in the pristine Nebraska Sandhills. The Sandhills are a unique ecosystem of mixed-grass prairie that has grown on top of stabilized sand

dunes. We use cattle to manage this land to ensure this unique ecosystem is protected and maintained rather than deteriorating and literally blowing away.

This is an aerial photo that's been zoomed out slightly. What look like waves are actually the rolling hills of sand dunes, natural depressions, draws, and dry ruts that may have water in them seasonally. What you cannot see is the unique feature of the Sandhills which is its close connection to groundwater supplies. This close connection makes it possible for grass to be grown on top of the sand dunes. And at times ponds can literally spring up in these depressions of the Sandhills out of nowhere because of this connection. However, within a matter of months, and perhaps for several years, the water may be gone again. As you can see, currently there is no water here. But the question is, is that dried up natural depression a WOTUS? Are my seasonally flowing draws an ephemeral stream? There's no water in the draw, but the proposed rule suggests these features could be jurisdictional. If so, will I be required to obtain a permit to conduct daily activities across my entire property, such as building a fence or moving cattle from pasture to pasture?

Here's a pond with water in it and one without. This water occurs naturally. Cattle and wildlife utilize this water. And producers want to be able to allow cattle to use this naturally occurring water body. If this pond is jurisdictional under the WOTUS rule, would cattle or wildlife waste in the water constitute a discharge that I would need a permit for? It may sound silly to say that but in my interpretation, and many others' interpretations, it suggests just that.

Here's a photo of the same ponds where you can see they are near an eroded channel that runs to the Middle Loop River. At times, water does run off into this channel. Here's where it gets put all together and see how the proposed rule expands Federal jurisdiction. In the top right corner is the Middle Loop River. This river is an interState water and falls under Federal jurisdiction. That's uncontested. Now just to the left, the eroded channel, the beige squiggly line, now it's questionable whether this channel would have been considered Federal water prior to the WOTUS rule. But now will most likely be deemed a tributary that meets the definition of a WOTUS. And under the proposed rule, every water body adjacent to a tributary is a WOTUS too. It appears to me they would be Federal waters under the proposed rule. If they are indeed "Waters of the U.S.," I will need permits to conduct everyday account activities through those waters. Permits that will cost my family time and money. We will continue to do our part for the environment but this ambiguous and expansive proposed rule does not help us achieve that.

We look forward to working with the Environment and Public Works Committee to insure we have the ability to do what we do best, produce the world's safest, most nutritional, abundant and afford able protein, while giving the consumers the choice they deserve. Together we can sustain our country's excellence and prosperity and insure the viability of our way of life for future generations.

I appreciate the opportunity to visit with you today. Thank you.

[The prepared statement of Ms. Cooksley follows:]

Testimony of

Barb Cooksley, Owner Cooksley Ranch

Anselmo, Nebraska

with regards to

"Waters of the U.S. rulemaking and its impact on rural America"

submitted to the

United States Senate

Environment and Public Works Committee

Senator Jim Inhofe, Chairman

March 14, 2015

Lincoln, NE

Good morning, my name is Barb Cooksley. My family raises cattle on our ranch in Anselmo, Nebraska and I am a member of the Nebraska Cattlemen. Thank you for allowing me to testify today on the impacts of the Environmental Protection Agency and the Army Corps of Engineers' proposed rule on the definition of Waters of the United States. I am testifying before you representing livestock, dairy, and poultry producers across the state.

First and foremost, I want to thank you for your interest in this issue and for continuing to be engaged because EPA intends to finalize the WOTUS rule at some point this year. I am also thankful Congress included language in the omnibus package that led to the withdrawal of EPA's Interpretive Rule. That rule was problematic and did not provide clarity or certainty for agriculture.

Animal agriculture producers pride themselves on being good stewards of our country's natural resources. We maintain open spaces, healthy rangelands, provide wildlife habitat and feed the world. But to provide all these important functions, we must be able to operate without excessive federal burdens, like the one we are discussing today. I am extremely concerned about the devastating impact this proposed rule could have on me and other ranchers and farmers. As a livestock producer, I can tell you that after reading the proposed rule it has the potential to impact every aspect of my operation and others like it by regulating potentially every water feature on my land. What's worse is the ambiguity in the proposed rule that makes it difficult, if not impossible, to determine ***just how much*** my ranch will be affected. This ambiguity over key definitions will result in disparate interpretation by bureaucrats in different regions of the country and place all landowners in a position of uncertainty and inequity. Because of this, I ask that the EPA and the Army Corps of Engineers withdraw the proposed rule and sit down with farmers and ranchers to discuss our concerns and viable solutions, ***before*** any additional action.

Let's be clear - everyone wants clean water. Farmers and ranchers rely on clean water to be successful in businesses. But, expanding the federal regulatory reach of the EPA and Army Corps does ***not*** equal clean water. After reading the proposed rule, I can say that only one thing ***is*** clear, the proposed definitions are ambiguous. If the agencies' goal was actually to provide clarity they have missed the mark completely. Despite the agencies' assertion that a tributary is clearly defined by a bed, bank, and ordinary high water mark, confusion and ambiguity is introduced when the rule explains "[a] water that otherwise qualifies as a tributary under the proposed definition does not lose its status as a tributary if, for any length, there are one or more man-made breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as debris piles, boulder fields, or a stream segment that flows underground) so long as a bed and banks and an ordinary high water mark can be identified upstream of the break." How far will I have to look "upstream" to ensure I am not liable for applying fertilizer or pesticide into an area that may lack a bed and a bank and an ordinary high water mark yet is still considered a jurisdictional water?

Although the proposed rule provides exemptions for ditches, they are ambiguous and are of little or no value to agricultural operations. For example, the proposed rule excludes "ditches that are excavated wholly in uplands, drain only uplands and have less than the perennial flow." Unfortunately, the term, "uplands" was not explained or clarified in the proposed rule.

Similarly, the proposed rule also excludes "ditches that do not contribute flow either directly or through another water" to navigable waters or tributaries. To qualify for this exclusion a ditch must contribute zero flow

(even indirectly) to any navigable water or tributaries. Because most ditches convey at least small flow indirectly to minor tributaries, this exclusion provides no benefit to agricultural operations.

The proposal would also make everything within a floodplain and a riparian area a federal water by considering them "adjacent waters." While this alone is concerning, the extent of this authority is equally ambiguous. The proposed rule provides no clarification on how far a riparian area extends away from the water body nor does it delineate the flood frequency that would determine jurisdictional boundaries. Using "best professional judgment" to answer this on a case-by-case basis, as is suggested in the proposed rule, provides no meaningful guidance to agricultural operations and once again highlights the proposed rule's lack of clarity.

Our ranch sits in the pristine, Nebraska Sandhills. The Sandhills are a unique ecosystem of mixed-grass prairie that has grown on top of stabilized sand dunes. We use cattle to manage this land to ensure this unique ecosystem is protected and maintained rather than deteriorating and literally blowing away. I have seasonal draws and dry runs running through my pastures, as well as ponds and other natural depressions that at times contain water. It appears to me that many of these features could now become federal waters under this proposed rule. If they ***are*** 'waters of the U.S.' I will need a 404 or 402 permit to conduct everyday activities near those waters. Permits that will be costly and time-consuming.

Farmers, ranchers and poultry producers often rely on working and shaping the land to make it productive. This includes installing practices to control and utilize stormwater for the benefit of growing crops and forage and also sustaining and protecting agricultural livestock. Regardless of the agencies' claims to the contrary, the new jurisdictional framework crafted from the proposed rule would require me to obtain federal permits to plow certain fields, apply fertilizer, graze cattle in the pasture, build a fence, or operate a poultry and egg production operation.

Not only could I be required to obtain a 404 permit for grazing my cows in the pasture, but by making it a federal water there are now considerations under the National Environmental Policy Act and the Endangered Species Act due to the federal decision-making in granting or denying a permit. There is also the citizen suit provision under Section 505 of the Clean Water Act that would expose my operation and my family to frivolous legal action and unnecessary expense. For the price of a postage stamp someone who disagrees with eating red meat could throw me into court where I will have to spend time and money proving that I am not violating the Clean Water Act. This is not what anyone had in mind when Congress passed the Clean Water Act forty-three years ago.

I'm fearful the proposed rule, if finalized without substantial change, will result in cattle grazing becoming a discharge activity subject to legal liability under the Clean Water Act. To my knowledge, the federal government has not considered cattle, raised on pastures, to be a point source or require dredge and fill permits to operate. Unfortunately, the proposed rule seems to be the mechanism that will initiate these changes. This did not have to be the result; all the agencies had to do was engage agriculture early on in the process, incorporate our suggestions and we would be much farther along in crafting a rule that actually would clarify the scope of Clean Water Act jurisdiction.

We are particularly concerned with the lack of outreach with the small business community, contrary to the Regulatory Flexibility Act. As a family-owned business and knowing the detrimental impact this regulation will have on my operation, it is appalling the agencies could assert that it will not have a "significant economic impact on a substantial number of small entities." It is clear to me that the rule's primary impact will be on

small landowners across the country. The agencies should have conducted a robust and thorough analysis of the impact, but it is clear from the certification that they have not completed this important step in developing the regulation. There was also zero outreach to us in the agriculture community before the rule was proposed. Despite what the EPA and Army Corps are saying, they did not have a meaningful dialogue with the small business community as a whole. Even when cattle producers asked the head of EPA's Office of Water a year ago about the proposal, all we were told was to "wait and see what the proposal says." Well we were forced to wait instead of having input and what we got was a proposal that doesn't work for small businesses, doesn't work for animal agriculture, and doesn't work for the environment. Farmers respond to carrots not the stick. If you give us the tools to achieve improved water quality, we will be receptive to that and work together.

We want to continue to do our part for the environment, but this ambiguous and expansive proposed rule does not help us achieve that. This is why the animal agriculture community has joined with land owners across the country asking the EPA and Army Corps to withdraw the current WOTUS Proposed Rule. Then EPA and Army Corp must have serious and meaningful dialogue with the agricultural community to find the necessary solution that will provide the clarity and certainty we require. We look forward to working with the Agriculture Committee to ensure that we have the ability to do what we do best – produce the world's safest, most nutritious, abundant and affordable protein while giving consumers the choice they deserve. Together we can sustain our country's excellence and prosperity, ensuring the viability of our way of life for future generations. I appreciate the opportunity to visit with you today. Thank you for your time.

Biography

Barb Cooksley owns and operates Cooksley Ranch in Anselmo, Nebraska with her husband George, daughter Sara and two nephews and their families. Together they comprise the fourth, fifth and sixth generations to operate the ranch on this site. Barb is currently serving as President-Elect of Nebraska Cattlemen and also serves on several environmental boards and committees for the area and state. Land stewardship has been a family priority for generations.

Senator FISCHER. Thank you very much, Barb, for providing that perspective on the agricultural industry.

Next we have Mr. Donald Wisnieski. He is president of the Nebraska State Home Builders Association. A native of Norfolk, Don is the owner of Wisnieski Construction which has served the Norfolk community since 1986, primarily focusing on custom home building.

Don, you are to be commended for your community service and operating that successful small business for almost three decades. When you're ready, please begin your testimony.

STATEMENT OF DONALD WISNIESKI, OWNER, WIDNIESKI CONSTRUCTION INS.

Mr. WISNIESKI. Thank you.

Senator Fischer, thank you for the opportunity to testify today.

As stated, my name is Don Wisnieski. I'm the president of Wisnieski Construction located in Norfolk. I also serve as the 2015 President of the Nebraska State Home Builders Association. Home builders have been an advocate for the Clean Water Act since its inception. We have a responsibility to protect the environment. And it is a responsibility I know well because I must often obtain permits for building projects. When it comes to Federal regulatory requirements, what I desire as a small business owner is a permitting process that is consistent, timely, and focused on protecting true aquatic resources.

Landowners have been frustrated with the continued uncertainty over the scope of the Clean Water Act over waters of the United States. There is a need for additional clarity, and the administration recently proposed a rule intended to do just that. Unfortunately, that proposed rule falls short. There is no certainty under this proposal, just the expansion of Federal authority. These changes will not even improve water quality, as the rule improperly encompasses waters that are already regulated at the State level. The rule would establish broader definitions of existing regulatory categories such as tributaries and regulates new areas that are not currently federally regulated, such as an—adjacent nonwetlands, repairing areas, floodplains, and other water areas. And these changes are far reaching, affecting all Clean Water Act programs but no—but provides no additional protections for most of these areas already comfortably resting under the State and local authorities.

I'm also concerned that the terms are overly broad, giving the agencies broad authority to interpret them. I need to know the rules. I can't play a guessing game of, is it jurisdictional. We don't need a set of new vague and convoluted definitions. Under the Clean Water Act, Congress intended to create a partnership between Federal agencies and the State governments to protect our Nation's water resources. There is a point where Federal authority ends and the State authority begins. And the Supreme Court has twice affirmed that the Clean Water Act places limits on Federal authority over waters. And the states do regulate the waters under their jurisdiction. Nebraska takes its responsibilities to protect its natural resources seriously.

If you look around the country, you'll find that many of the states are protecting their natural resources more aggressively since the passage of the Clean Water Act in 1972.

The proposed rule will have significant impacts on my business. Construction projects rely on efficient, timely, and consistent permitting procedures and review processes under the Clean Water Act programs. An onerous permitting process could delay projects which leads to greater risk and higher costs. Also, more Federal permitting actions will trigger additional statutory reviews by outside agencies under laws including the Endangered Species Acts, the National Historic Prevention Act, the National Environmental Policy Act. It's doubtful that these agencies will have the equipment to handle these inflow of additional permitting requests.

I am uncertain of what the environmental benefits are gained by this paperwork. But I am certain of the massive delays of permittings that will result. The cost of obtaining Clean Water Act permits range from close to 29,000 all the way up to close to $272,000. Permitting delays will only increase these costs and prevent me from expanding my business and in hiring more employees.

The agencies have not considered the unintended consequences of this rule. Under this proposed rule, Low Impact Development stormwater controls could be federally jurisdictional. Many of our builders voluntarily select LID controls, such as rain gardens and swells for the general benefit of our communities. This rule would discourage these voluntary projects if they require Federal permits.

This proposed rule does not add new protections for our Nation's water resources, it just shifts the regulatory authority from the states to the Federal Government. The proposed rule is inconsistent with previous Supreme Court decision and expands the scope of waters to federally regulated beyond what Congress envisioned. Any final rule should be considered—or consistent with the Supreme Court's decisions, provide understandable definitions, and preserve the partnership between all levels of government. All are sorely lacking here.

I want to thank you for the opportunity to testify. And I do look forward to any questions you may have, Senator. Thank you.

[The prepared statement of Mr. Wisnieski follows:]

Testimony of Donald Wisnieski,
Owner,
Wisnieski Construction, Inc.

Before the Senate Committee on Environment and Public Works

Hearing on "Impacts of the Proposed Waters of the United States Rule on State and Local Governments and Stakeholders"

March 14, 2015

Chairman Inhofe, Ranking Member Boxer, Senator Fischer and distinguished members of the Committee, thank you for the opportunity to testify this morning.

My name is Don Wisnieski, and I am the owner of Wisnieski Construction Inc. located in Norfolk, Nebraska. I also serve as the 2015 President of the Nebraska Home Builders Association. Wisnieski Construction, Inc. has been serving customers in the greater Norfolk, NE area since 1986 when I founded the company. I am a proud small business owner and now have 15 full time employees. We focus primarily on custom home building.

My goal is to provide and expand opportunities for all consumers to have safe, decent and affordable housing and for my business to thrive. The Great Recession and its lingering impacts significantly reduced the production of housing over the past several years. Due to these declines, the industry is operating well below historic norms. In order to meet the housing needs of a growing population and replacement requirements of older housing stock, the industry needs to build about 1.4 million new single-family homes each year and more than 1.7 million total housing units. By comparison, in 2013, home builders constructed only 618,000 single family homes and 307,000 multifamily units.

While the recovery from the Great Recession has been slow, home building is beginning to experience growth. In fact, since the last quarter of 2011, advances in home building have been responsible for 13% of total economic expansion. And this growth creates jobs. According to the National Association of Home Builders (NAHB), 305 full-time equivalent (FTE) jobs, and $8.9 million in tax revenue are generated by the construction of 100 single family homes. Similarly, 100 new multifamily units results in 116 FTE jobs and $3.3 million in tax revenue. Further, the building and improvement of the housing stock of a local area provides a tax base for state and local governments. The taxes attributable to housing are substantial. According to Census data and NAHB calculations, property taxes attributable to housing totaled approximately $300 billion in 2012.

The rise and fall of housing activity has been the dominant economic factor of the last decade. Housing typically leads the economy out of recession, although in the period after the Great Recession, housing has not played that role. There are many reasons why the recovery has been slower than past history would suggest, including regulatory burdens, increased construction costs and the lack of available financing. I am pleased that the Committee is addressing this important issue and I appreciate the opportunity to give my perspective.

Home builders have been advocates of the Clean Water Act (CWA) since its inception and have a vested interest in preserving and protecting our nation's water resources. The CWA has helped our nation make significant strides in improving the quality of our water resources and improving the quality of life. As we build neighborhoods and help create thriving communities, we have a responsibility to protect the environment. Under the CWA, I must often obtain and comply with section 402 and 404 permits for building projects. As a small business navigating federal bureaucracies, what is most important to my compliance efforts is a permitting scheme that is consistent, predictable, timely, and focused on protecting true aquatic resources. The regulatory requirements we face as builders do not just come from the federal government. A key component to effective regulation is ensuring that local, state and federal agencies are cooperating, where possible, to streamline permitting requirements and respecting the appropriate responsibilities of each level of government.

I have an intimate understanding of how the federal government's regulatory process impacts small businesses in the real-world. Many of these regulations have made it significantly more difficult to do business and have hampered job creation. Housing serves as a great example of an industry that would benefit from smarter and more sensible regulation. According to a study completed by the NAHB, government regulations account for 25% of the price of single-family home. Nearly two-thirds of this impact is due to regulations that affect the developer of the lot, with the rest due to regulations that fall on the builder during construction.[1]

"Waters of the United States" Proposed Rule:

On April 21, 2014, the Environmental Protection Agency and U.S. Army Corps of Engineers ("the agencies") proposed a rule redefining the scope of waters protected under the CWA. For years, landowners and regulators alike have been frustrated with the continued uncertainty over the scope of federal jurisdiction over "Waters of the United States." By improving the CWA's implementation, removing redundancy, and further clarifying jurisdictional authority, it can do an even better job at facilitating compliance and protecting the aquatic environment.

[1] Survey conducted by Paul Emrath, National Association of Home Builders, "How Government Regulation Affects the Price of a New Home," 2011

Unfortunately, the proposed rule falls well short of providing the clarity and certainty the construction industry seeks. This rule will increase federal regulatory power over private property and will lead to increased litigation, permit requirements, and lengthy delays for any business trying to comply. These changes will not improve water quality, as much of the rule improperly encompasses water features that are already regulated at the state level.

The Proposed Rule Unnecessarily and Inappropriately Expands Federal Jurisdiction

The agencies assert that the scope of CWA jurisdiction is narrower under the proposed rule than under current practices and that it does not assert jurisdiction over any new types of waters. This is simply not accurate. In reality, the proposed rule establishes broader definitions of existing regulatory categories, such as tributaries, and regulates new areas that are not jurisdictional under current regulations, such as adjacent non-wetlands, riparian areas, floodplains, and other waters.

In addition, this change in jurisdictional authority does not only apply to section 404 of the CWA, but to all of its other programs. For home building activities, I am also concerned with the impacts this rule will have on section 402 storm water permitting requirements, the various mandates associated with effluent limitations, and water quality standards.

The proposed changes provide no additional protections for these newly jurisdictional areas as many already comfortably rest under state and/or local authority. I believe the agencies intentionally created overly broad terms so they have the authority to interpret them as they see fit. For any small business trying to comply with the law, the last thing it needs is a set of new, vague and convoluted definitions that only provide another layer of uncertainty. Let me discuss some of the problematic features in detail:

New Definition of Tributary:

The agencies have sought to expand their reach by adding, for the first time, a broad definition of "tributary." They define a tributary as a "[w]ater body physically characterized by a bed and bank and ordinary high water mark which contributes flow directly or through other water bodies to Traditional Navigable Waters (TNW)." They also state that a water body does not lose its tributary status if there are man-made breaks, as long as a bed and bank can be identified up or down stream. This new definition will include substantial additions, such as a first time inclusion of ditches, conveyances and other water features that may flow, if at all, only after a heavy rainfall. Unless proper mapping is provided by the agencies it may be impossible for a home builder to independently identify a tributary.

New Definition of Adjacent:

The concept of regulating "adjacent waters" is completely new. In the past, the notion of "adjacent" only applied to wetlands, yet through this rule, "adjacency" will now extend to water bodies. While widening this concept to include waters, the agencies also try to clarify what is

"adjacency" by redefining essential terms. The current definition of "adjacency" is "bordering, contiguous, or neighboring." However, much of the confusion rests within the meaning of "neighboring." The rule vaguely defines "neighboring" as "waters located within the riparian area or floodplain or waters with a surface or shallow subsurface connection."

The rule leaves the door completely open on the meaning of riparian and floodplain. It gives no indication as to what type of floodplain a water must be located in to be deemed jurisdictional and places no parameters on flood frequency. Intentionally leaving these terms loosely defined gives the agencies relatively unbounded jurisdiction and leaves land owners perplexed as to whether their land may be regulated.

"Other Waters:"

The rule also provides a catchall "other waters" category for areas that may not fit neatly into a specific water category but for which the agencies have retained complete discretion to find a significant nexus on a case-by-case basis. Significantly, this also includes the ability to make blanket jurisdictional determinations by considering all similarly situated waters located within the same region or watershed to determine if they, taken together, have a significant nexus to a TNW. The ability to aggregate waters further illustrates the notion that there is no limit to federal jurisdiction under this rule.

These definitions will leave home builders in a constant state of confusion. This unpredictability will make it difficult for my business to comply and grow. The agencies suggest that the rule provides clarity however; all it does is produce more questions. Unfortunately, we have to rely on the agencies for answers.

Rulemaking the Proposed Rule is Inconsistent with Supreme Court precedent:

The CWA was designed to strike a careful balance between federal and state authority. This has proven to be a difficult task, and to some extent, the efforts of the courts to provide clarity have only added to the uncertainty. The courts have been clear on one issue, which is that there is a limit to federal jurisdiction of waters. In fact, the Supreme Court has twice affirmed that both the U.S. Constitution and CWA place limits on federal authority over intrastate waters. While many were optimistic that this rule would finally translate the Court's directives to a workable framework, the proposed rule instead is a marked departure from past Supreme Court decisions and raises significant constitutional questions. In order to view the rule through this legal framework, it is necessary to look at the key cases:

Solid Waste Agency of Northern Cook County v. Army Corps of Engineers (SWANCC): In 2001, for the first time, the Supreme Court limited the federal government's jurisdictional authority under the CWA through the *SWANCC* decision. The case questioned whether the CWA conferred the Corps of Engineers with authority over isolated, seasonal ponds at an abandoned sand and gravel pit in suburban Chicago because they were susceptible to be use by

migratory birds. The Court rejected the Corps's assertion of jurisdiction because the agency's interpretation gave no effect to the word navigable in the term "navigable waters." In other words, the Corps could not assert jurisdiction over the area in question simply because a migratory bird might land there.

Rapanos v. United States and Carabell v. U.S. Army Corps of Engineering: Both *Rapanos*[2] and *Carabell*[3] cases followed the same fact-pattern: wetlands miles away from TNWs that drained through multiple ditches, culverts, and creeks, that eventually drain into a TNW. The question of this court case was over the jurisdictional theory that waters are jurisdictional as long as they have a "hydrological connection" to a TNW. *Rapanos* provided a significant clarification that CWA jurisdiction does not reach non-navigable features merely because they may be hydrologically connected to downstream navigable waters. In short, the "any hydrologic connection" theory was rejected— just as the migratory bird rule was disapproved in *SWANCC*.

However, two theories emerged from the majority's opinion in *Rapanos*. The first, written by Justice Scalia, claimed that CWA coverage extended to "...only those relatively **permanent, standing, or continuously flowing** [emphasis added] bodies of water 'forming geographic features' that are described in ordinary parlance as 'stream[s,] ... oceans, rivers, [and] lakes.'"[4] The plurality also developed a jurisdictional rule for wetlands in particular: "[O]nly those wetlands with a continuous surface connection to bodies that are 'waters of the United States' in their own right, so that there is no clear demarcation between 'waters' and 'wetlands,' are 'adjacent to' such waters and covered by the Act."[5]

The second test was authored by Justice Kennedy, who concurred in the judgment, but wrote separately for himself. He elevated the concept of "significant nexus," first used by the Court in *SWANCC,* to be the appropriate test for jurisdiction: "[W]etlands possess the requisite nexus, and thus come within the statutory phrase 'navigable waters,' if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'"[6] "Consistent with *SWANCC* and with the need to give the term 'navigable' some meaning, the Corps' jurisdiction over wetlands depends on a significant nexus between the wetlands in question and navigable waters in the traditional sense." [7]

The most significant clarification that *Rapanos* provided was that the five Justices agreed CWA jurisdiction does *not* reach non-navigable features merely because they are hydrologically connected to downstream navigable water. However, many have maligned *Rapanos* because the

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[2] Rapanos v. United States, 126 S.Ct 2208 (2006)
[3] Carabell v. United States, 126 S.Ct. 1295 (2006)
[4] Rapanos 126 S.Ct. at 2225
[5] *Id.* at 2226
[6] *Id.* at 2248
[7] *Id.* at 2249

Justices failed to reach a majority opinion that announced the "correct" test for CWA jurisdiction. In many cases, the existence of two tests only adds more confusion and disagreement regarding the scope of the CWA.

While the agencies face a difficult task in resolving this conflict, the proposed rule is obviously inconsistent with these Supreme Court decisions and will significantly expand the scope of waters to be regulated by the agencies. The rule would extend coverage to many features that are remote and/or carry only minor volumes of water, and contrary to the Supreme Court's findings its provisions provide no meaningful limit to federal jurisdiction. The rule ignores the tests that were developed in *Rapanos* and reverts back to regulating any hydrologic connection. More specifically, the rule disregards Justice Kennedy's "Significant Nexus" test by making all connections regulable. Such a broad overreach is unacceptable.

The Proposed Rule Ignores Federal/State Balance

While many aspects of the CWA are vague, it is clear that Congress intended to create a partnership between the federal agencies and state governments, to protect our nation's water resources. Congress states in section 101 of the CWA that "[f]ederal agencies shall co-operate with state and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resource." Under this notion, there is a point where federal authority ends and state authority begins.

The rule proposed by the agencies blatantly ignores this history of partnership and fails to recognize that there are limits on federal authority. If this rule is finalized, the federal government will severely cripple the state's role in protecting our nation's water resources, which would be a huge mistake as well as unconstitutional. Litigation is a likely result, and while it makes its way through the court system, regulators and businesses will be left in a lurch.

Potential Impacts on Construction:

Home building is a complex and highly regulated industry. Costs for certain regulatory actions are borne by these small businesses in the form of land, planning, and carrying costs, which ultimately arrive in the market as a combination of higher prices and lower output for the industry. As output declines and jobs are lost, other sectors that buy from or sell to the construction industry also contract and lose jobs. Builders and developers, already crippled by the economic downturn, cannot depend upon the future home-buying public to absorb costs for regulations.

Because compliance costs for regulations are often incurred prior to home sales, builders and developers have to pay these additional carrying costs. Carrying these additional costs only adds

more risk to an already risky business. This is one of the difficult realities that home builders face every day. This rule only adds to the headwinds that our industry faces.

Even moderate cost increases can have significant negative market impacts. This is of particular concern in the affordable housing sector where relatively small price increases can have an immediate impact on low to moderate income home buyers. Such buyers are more susceptible to being priced out of the market. As the price of the home increases, those who are on the verge of qualifying for a new home will no longer be able to afford this purchase. An analysis done by NAHB illustrates the number of households priced out of the market for a median priced new home due to a $1,000 price increase. Nationally, this price difference means that when a median new home price increases from $225,000 to $226,000, 232,447 households can no longer afford that home. We need to find a necessary balance between protecting our nation's water resources and allowing citizens to build and develop their land.

The costs of obtaining Corps section 404 permits are signifieant: averaging 788 days and $271,596 for an individual permit; 313 days and $28,915 for a nationwide permit. Over $1.7 billion is spent each year by the private and public sectors obtaining wetlands permits.[8] These ranges do not take into account the cost of mitigation, which can be exorbitant. On average, it takes 15 months between the time a developer applies for zoning/subdivision approval and the time they obtain preliminary approval to start site work.[9]

Increased Number of Federal Permits:

Construetion projects rely on efficient, timely, and consistent permitting procedures and review processes under CWA programs. Developers are generally ill-equipped to make their own jurisdictional determinations and must hire outside consultants to secure necessary permits and approvals under CWA programs. Delays often lead to greater risks and higher eosts, which many developers would rather avoid given tight budgets and time frames. If environmental liabilities, such as an onerous permitting process, exceed the purchase price of a real estate transaction, those liabilities could delay or eventually kill a deal-making process. If the rule is finalized in its current form, the ability to sell, build, expand, or retrofit real estate projects will suffer notable setbacks, including added cost and dclays for development and investment.

Specifically for the "other waters" category, builders will be at the mercy of the agencies. Builders will have to request a jurisdictional determination from the agencies to ensure they are not disturbing land near an aggregated water. Consequently, an increase in the number of jurisdictional determinations requests, across all industries, will result in greater permitting delays as the agencies are flooded with paperwork.

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[8] David Sunding and David Zilberman, "The Economics of Environmental Regulation by Licensing: An Assessment of Recent Changes to the Wetland Permitting Process," 2002

[9] Survey conducted by Paul Emrath, National Association of Home Builders, "How Government Regulation Affects the Price of a New Home", 2011

Increased Federal Consultations:

Many federal statues tie their approval/consultation requirements to those of the CWA i.e. if one has to obtain a CWA permit, he/she must also obtain others. If more areas are considered jurisdictional, more CWA permits will be required. More federal permitting actions will trigger additional statutory reviews – by agencies other than the permitting agency – under laws including the Endangered Species Act, National Historic Preservation Act, and National Environmental Policy Act. Project proponents do not have a seat at the table during these additional reviews, nor are consulting agencies bound by a specific time limit. Lengthened permitting times will include an increased number of meetings, formal and informal hearings, and appeals. These federal consultations are just another layer of red tape that the federal government has placed on small businesses and it is doubtful the agencies will be equipped to handle this inflow.

Unintended Consequences and Regulations Beyond Wetlands:

Discourages use of Low Impact Development:

Often times, localities will require or encourage builders and developers to use Low Impact Development (LID) or green infrastructure when managing stormwater runoff on their properties. These relatively new practices use or mimic natural processes to infiltrate or reuse stormwater runoff on the building site where it is generated. This is a highly encouraged practice that keeps rainwater out of the sewer system and reduces the amount of untreated runoff discharged into surface waters.

While the uses of LID methods are beneficial to communities throughout the country, there is no single source of federal funding dedicated to the design and implementation of LID solutions. Many builders voluntarily implement the use of LID Best Management Practices (BMPs) for the general benefit of their communities. Examples of LID BMPs are bioretention areas such as raingardens, swales, retention ponds and infiltration basins. Under this proposed rule, these BMPs could fall under the jurisdiction of the CWA. Over time, these areas could begin to function similarly to wetlands and be regulated. Engineers will have to reevaluate which BMPs will ultimately fall under CWA jurisdiction and builders will be less inclined to participate in these voluntary activities.

Impacts on Municipal Separate Storm Sewer Systems:

In addition, there are serious concerns on the impact this proposed rule will have on Municipal Separate Storm Sewer Systems (MS4s). MS4 systems are owned and operated by state and local governments and vary in size; however, their function is universal—to transport or convey a cities' stormwater through pipes, drains, gutters and open ditches. Many MS4 systems are

regulated as point sources and therefore are required to obtain a 402 National Pollutant Discharge Elimination System permit and develop a stormwater management program because exposed ditches and intermittent streams are often part of a MS4 system. I am concerned that the proposed rule does not prevent MS4s from being regulable as a "Water of United States." These features are already regulated as a point source. For this reason, I believe that the agencies should consider including an exemption for urban and suburban storm sewer systems, as they should not be jurisdictional under the CWA.

Conclusion:

This rule does not add new protections for our nation's water resources but rather, it considers which level of government has the jurisdictional authority to oversee those protections. The intent of the CWA and Supreme Court precedents say that there is a limit to federal authority and the responsibility of protecting our nation's water is shared across all levels of government. The rule fails to recognize this balance.

I have significant concerns with the proposed rule and I would encourage the agencies to rethink it. I believe the rule should be consistent with Supreme Court decisions, provide understandable definitions and preserve the partnership between local, state and federal governments. The housing industry cannot successfully face the forthcoming challenges while weighed down by additional regulatory burdens and requirements that provide little benefit.

I appreciate the opportunity to discuss these important issues.

Senator FISCHER. Thank you, Don. I would like to welcome Mr. John Crabtree. Mr. Crabtree is the Media Director for the Center of Rural Affairs which has accomplished commendable work on rural development opportunities throughout our State.

I would note that, as is customary for the Senate Environment and Public Works Committee hearings, we work in a bipartisan manner to select witnesses. And with ranking member Senator Barbara Boxer, our next two witnesses are Minority witnesses.

Mr. Crabtree, please begin your testimony when you are ready.

STATEMENT OF JOHN CRABTREE, CENTER FOR RURAL AFFAIRS, LYONS, NE

Mr. CRABTREE. Thank you, Senator Fischer, and good morning. And, yes, I thank the members of the Committee and the ranking members and the staff for working with me to—to invite me here. But I thank you for inviting me here, too. I really appreciate you bringing this hearing to Nebraska.

My name, as you said, is John Crabtree. I live and work in the Northeast Nebraska small town of Lyons, population 851. I'm testifying today on behalf of the Center for Rural Affairs where I work as Media Director and rural public policy advocate.

Since its founding in 1973, the Center's resisted the role of advocating for the interests of any particular group. Instead, we've chosen to advance a set of values, values that we believe reflect the best of rural and small town America. And we deeply believe that water quality is one of those—that clean water is one of those rural values.

The need for this rulemaking process arises out of the chaos, confusion and complexity surrounding Clean Water Act enforcement as a result of Supreme Court decisions in 2001 and 2006. The proposed rule focuses on reducing that confusion, and the Center for Rural Affairs is encouraged by the process so far. We encourage the EPA and the Army Corp of Engineers to continue moving this rulemaking process forward.

It's worth clarifying that the Center is supportive of the formal rulemaking process as it's provided the opportunity to craft a stronger and more suitable rule through increased citizen input and engagement. While no proposed rule is perfect, we believe the rulemaking process will improve this rule, which is why we provided detailed and substantive comments to the EPA and Corps during the public commentary period. And we believe that an improved rule can and should reduce confusion and provide clarity for regulated entities, including ranchers and farmers, and ultimately improve the quality of the Nation's waters for the hundreds of us who utilize and depend upon clean water from our rivers, lakes, and streams.

Clean water is vital to farming and ranching and small towns. Water for livestock, irrigation, and other purposes is crucial to the day-to-day operations of farms and ranches. And farmers and ranchers are the tip of the spear when it comes to preserving water quality in America because much of the surface water of the U.S. falls first on American farms and ranches.

Streams and wetlands create economic opportunity in small town America through hunting, fishing, birding, recreation, tourism,

farming, ranching and small manufacturing. Farmers, ranchers and America's small towns depend heavily on water and our neighbors downstream count on us to preserve the quality of that water for their use as well.

Now, despite the assertions that underState the economic benefit and vastly overState the cost of implementing this proposed rule, the true cost of implementation is estimated to range from 160 to 278 million. And according to multiple econometric models, the estimated economic benefits of implementing the proposed rule range from 390 to 510 million, or likely double the costs.

Clean water is crucial here in Nebraska too, of course. And vulnerable surface waters are prevalent in Nebraska. EPA estimates that 52 percent of Nebraska streams have no other streams flowing into them, and that 77 percent do not flow year-round. Under varying interpretations of the most recent Supreme Court decision, these smaller water bodies are among those for which the extent of Clean Water Act protections has been questioned.

EPA has also determined that 525,000 people in Nebraska receive some of their drinking water from areas containing these smaller streams and that at least 197 facilities located on such streams currently have permits under the Clean Water Act and other Federal statutes regulating pollution discharges. In addition, the Nebraska Game and Parks Commission has estimated that nearly 829,000 acres of wetlands in the State could be considered so-called isolated waters particularly vulnerable to losing those safeguards.

The "Waters of the U.S." rule is the product—excuse me, I'm sorry, I lost my place there.

Chief Justice Roberts has specifically said that rulemaking would most likely be required to provide necessary clarification of Clean Water Act jurisdiction. This has been a rigorous rulemaking process. EPA and the Army Corps has conducted extensive outreach to—as I said, conducted extensive outreach and received close to one million public comments on the proposed rule, including from the Center of Rural Affairs and thousands of other organizations and hundreds and thousands of individuals. An estimated 87 percent of those comments support the rule.

The "Waters of the U.S." rule goes to great lengths to ensure that farmers and ranchers benefit from preserving water quality but are not overly burdened with the rule's implementation. All the historical exclusions and exemptions for farming and ranching are preserved, including those for normal farming and ranching practices.

And that means that dramatic rhetoric such as statements that farmers and ranchers will need a permit to move cattle across a wet field or stream are absolutely false. Likewise, public statements that farm ponds would—by detractors is supported by the—despite public statements to the contrary, farm ponds would continue to fall under the longstanding exemption for farm ponds in the Clean Water Act.

In the final analysis, streams that only flow seasonally or after rain have been protected by the Clean Water Act since it was enacted in 1972. As well they should be, since more than 60 percent of streams nationwide do not flow year-round, and yet those very

same streams contribute to the drinking water for 117 million Americans.

Again, I want to thank you, Senator, for having this hearing and for inviting me here today.

Just my closing statement, my last comment, here in the west, we do understand that there's a lot of truth to the old joke, whiskey is for drinking and water is for fighting. Water is life, for people, crops, livestock, and wildlife as well as farms, ranches, business and industry. It's in all our interest to protect this most vital of our natural resources.

We believe the EPA and Army Corps of Engineers should continue to listen to concerns, make substantive improvements to the rule, and then move forward to finalization. Thank you.

[The prepared statement of Mr. Crabtree follows:]

Testimony of John Crabtree, Center for Rural Affairs, Lyons, Nebraska...

Madam Chair and members of the Committee, my name is John Crabtree. I live and work in the Northeast Nebraska small town of Lyons. I am testifying today on behalf of the Center for Rural Affairs, where I work as Media Director and rural public policy analyst advocate.

The U.S. Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers have proposed a joint rule to clarify the types of waters that are and are not covered by the Clean Water Act. This proposed rule, is, of course, the reason for this hearing and the Center for Rural Affairs thanks Senator Fischer for arranging to have this field hearing here in Nebraska. I thank you as well Senator.

The need for this rulemaking process arises out of the chaos, confusion and complexity surrounding Clean Water Act enforcement that resulted from Supreme Court decisions in 2001 and 2006. The proposed rule focuses on reducing that confusion and the Center for Rural Affairs is encouraged by the rulemaking process so far. We encourage the EPA and Army Corps of Engineers to move this rulemaking process forward.

Since its inception, the Center has resisted the role of advocating for the interests of any particular group. Instead, we have chosen to advance a set of values - values that we believe reflect the best of rural and small town America. Ultimately, we believe it is in the interest of all to create a future reflecting those values, and clean water is an essential part of rural values.

Conservation and environmental stewardship are also core values of the Center for Rural Affairs as we work to establish strong rural communities, social and economic justice, environmental stewardship, and genuine opportunity for all while engaging people in decisions that affect the quality of their lives and the future of their communities. We have a long history of advocating for federal conservation policies and programs that support farmers and ranchers in preserving our natural resources.

It is worth clarifying that the Center for Rural Affairs is supportive of the formal rulemaking process, as it has provided the opportunity to craft a stronger and more suitable rule through increased citizen input and engagement. While no proposed rule is perfect, we believe that the rulemaking process will improve the rule, which is why we provided detailed and substantive comments to EPA and the Army Corps of Engineers during the public comment period. And we believe that an improved rule can and should reduce confusion and provide clarity for regulated entities including farmers and ranchers, and ultimately improve the quality of the nation's waters for the hundreds of millions of us who utilize and depend upon clean water from our rivers, lakes and streams.

Why Clean Water is Vital

Clean water is vital to farming, ranching and small towns. Water for livestock, irrigation and other purposes is crucial to the day to day operations of farms and ranches. And farmers and ranchers are the tip of the spear for protecting water quality in America because much of the surface water of the U.S. falls first on American farms and ranches.

Streams and wetlands create economic opportunities in small town America through hunting, fishing, birding, recreation, tourism, farming, ranching and small manufacturing. Farmers, ranchers and America's small towns depend heavily on water and our neighbors downstream count on us to preserve the quality of that water for their use as well.

Moreover, despite assertions by some that understate the economic benefit and vastly overstate the cost of implementing the proposed rule, the true cost of implementation will range from $160 to $278 million. According to multiple econometric models, the estimated economic benefits of implementing the proposed rule range from $390 to $510 million, or likely double the costs.

Clean Water is crucial here in Nebraska too, of course. And vulnerable surface waters are prevalent in Nebraska as well. EPA estimates that 52 percent of Nebraska streams have no other streams flowing into them, and that 77 percent do not flow year-round. Under varying interpretations of the most recent Supreme Court decision, these smaller water bodies are among those for which the extent of Clean Water Act protections has been questioned.

EPA has also determined that 525,566 people in Nebraska receive some of their drinking water from areas containing these smaller streams and that at least 197 facilities located on such streams currently have permits under the Clean Water Act and other federal statues regulating their pollution discharges. In addition, the Nebraska Game and Parks Commission has estimated that nearly 829,000 acres of wetlands in the state could be considered so-called "isolated" waters – water bodies that are particularly vulnerable to losing Clean Water Act safeguards.

Clearing the Regulatory Waters

The Waters of the U.S. rule is the product of exhaustive scientific examination and years of conversations with farming, ranching, manufacturing, hunting, fishing, recreation and other economic interests. The Waters of the U.S. rule is also a response to repeated calls from Congress and the Supreme Court to clarify Clean Water Act regulations and enforcement.

Chief Justice Roberts has specifically said that rulemaking would most likely be required to provide necessary clarification of Clean Water Act jurisdiction. And this is a proposed rule, EPA and the Army Corps has already undergone the required public comment period on the proposed rule, during which the Center for Rural Affairs and thousands of other organizations and concerned individuals provided detailed, substantive comments. EPA and the Army Corps should undertake revisions to the proposed rule, based upon those comments, to improve the rule before it becomes final.

The Waters of the U.S. rule goes to great lengths to ensure that farmers and ranchers benefit from preserving water quality but are not overly burdened with the rule's implementation. All the historical exclusions and exemptions for farming and ranching are preserved. Moreover, the proposal retains the normal farming and ranching exemption. But it also adds 56 conservation practices to that exemption.

This means that dramatic rhetoric such as statements that farmers and ranchers will need a permit to move cattle across a wet field or stream is absolutely false. Likewise, despite public statements to the contrary by detractors, farm ponds would continue to fall under the long-standing exemption for farm ponds.

The new rule would, however, go one step further, and specifically exclude stock watering and irrigation ponds built in dry lands. Statements by detractors that the proposed rule will apply to wet areas or erosional features in fields and pastures are also unfounded and needlessly alarm farmers and ranchers. In truth, water-filled areas on crop lands are not within the jurisdiction of the Clean Water Act under the proposed rule and the new rule specifically excludes erosional land features.

The proposed rule actually reduces regulation of ditches because it would exclude ditches that are constructed through dry lands and do not have water year-round. This Section is helpful in alleviating concerns for farmers by excluding prior converted cropland and ditches that do not deliver water directly to jurisdictional waters from the definition of Waters of the United States.

While we welcome the clarity excluding ditches, certain key definitions are missing in this section. First and foremost, the rule fails to define "ditch." One of the most contentious points of this proposed rule has been a lack of clarity surrounding regulation of agricultural drainage ditches. While it may seem unnecessary to explicitly define something as basic as a ditch, given the concern surrounding the proposed rule it would be better for the EPA and Army Corps of Engineers to err on the side of clarity.

We have, therefore, recommended the following definition of ditch informed by multiple state--level wetland regulations: *Ditch. The term ditch means a water conveyance channel with bed and banks of human construction. This does not include channelized, redirected, or otherwise manipulated natural water courses.*

I have heard and read criticisms of the proposed Waters of the U.S. rule, claiming that it will regulate puddles. This is, of course, absurd. Puddles and other transient accumulations of water have never been under the jurisdiction of the Clean Water Act and would not be jurisdictional under the proposed rule.

In the final analysis, streams that only flow seasonally or after rain have been protected by the Clean Water Act since it was enacted in 1972. As well they should be, since more than 60 percent of streams nationwide do not flow year-round and yet, those very same streams contribute to the drinking water supply for 117 million Americans, many of whom reside in America's small towns and rural areas.

Here in the west, we understand that there is much truth in the old joke that whiskey is for drinking and water is for fighting. Water is life, for people, crops, livestock, and wildlife as well as farms, ranches, business and industry (both small and large). It is in all our interest to protect this most vital of our natural resources. The proposed Waters of the U.S. rule is a crucial step in clearing the regulatory waters and protecting the quality of America's surface waters.

We should all continue earnest dialogue over our hopes and concerns for this rulemaking process, such as the dialogue we are having here today. EPA and the Army Corps of Engineers should continue to listen to concerns and make substantive improvements to the rule, and then move it forward to finalization. Thank you.

Respectfully submitted,

John Crabtree
Center for Rural Affairs
Box 136
145 Main Street
Lyons, Nebraska 68038
johnc@cfra.org
402-687-2103 ext. 1010

Senator FISCHER. Thank you, Mr. Crabtree.

Next, Mr. Wesley Sheets will be a witness for the Minority as well. Wes is the Nebraska National Director and served on the National Executive Board of the Izaak Walton League of America. Mr. Sheets worked for 32 years for the Nebraska Game and Parks Commission, and I thank him for his service to Nebraska.

So welcome, Wes. And your testimony, please.

STATEMENT OF WESLEY F. SHEETS, EXECUTIVE BOARD MEMBER AND NEBRASKA NATIONAL DIRECTOR, IZAAK WALTON LEAGUE OF AMERICA

Mr. SHEETS . Thank you, Senator Fischer, and members and staff of the Committee on Environment and Public Works. I thank you for the opportunity to provide comments here today.

My name is Wes Sheets, and I do live here in Lincoln, Nebraska. I am testifying on behalf of the Izaak Walton League of America, which is one of the Nation's oldest recreational and conservation organizations. The Izaak Walton League was formed back in 1922 by a group of outdoor specialists that were concerned with the water pollution impacting the health of our fish and wildlife and other natural resources. The founders of our organization understood that clean water and healthy wetlands are essential to robust populations of fish, and ducks, and other wildlife and, in turn—aha—and, in turn, to enjoyable and successful days in the field pursuing them.

I am active in all levels of the Izaak Walton League, as the treasurer of the local chapter, as the—I'm the national director for Nebraska, and I recently became a member of the League's executive board. Today I'm representing our nearly 2,000 members here in Nebraska and our other 45,000 members across the Nation. Our members are all from outdoor enthusiasts who hunt, fish, and participate in recreational shooting, boating, and many other outdoor activities.

My working career that Senator Fischer alluded to, I spent 32 years with the Nebraska Game and Parks Commission as a fisheries biologist, aquatic scientist, and finally finishing the career as the Agency Assistant Director for fisheries, wildlife and law enforcement. I was very privileged back in the early 1970's and mid 1970's to participate as an agency representative as the State of Nebraska began the establishment of its first water quality criteria standards under the newly passed Nebraska Environmental Protection Act.

It was a treat to see Senator Smith here in the audience this morning, and I thank him for helping get that process started.

I do want to start by acknowledging the interests and concerns of all my colleagues who are testifying here in opposition to this rule. The Izaak Walton League has a long history of working with farmers and ranchers, as well as other industries, on solutions for the conservation issues and we pledge to continue to do so.

League members are members—are farmers and ranchers, or they are employed by other industries represented here. And many of us come from rural and agricultural communities. I myself grew up on a dairy farm down in our neighboring State to the south.

We recognize the importance of clean water, as I hope everyone in this room also does. Clean water is fundamentally essential to all life, from humans, to wildlife, to fish and plants. Congress has charged the Environmental Protection Agency with cleaning up America's waters and with keeping it clean. To State the obvious, water flows downstream and can carry sediment, nutrients, and other pollutants with it. There is no line in the watershed above which water and pollutants do not flow downstream, at least to my knowledge. If landowners and businesses below some arbitrary line in the watershed of connected waters would be required to contribute to clean waters, while those above the arbitrary line could send sediments, nutrients and other articles downstream without concern for those impacts, those living upstream would certainly have an unfair and unnecessary economic advantage, I would submit.

This highlights the current confusion, and that is also why so many groups have asked the agencies for a clarifying ruling. Science is irrefutable that watershed waters are considered in the rules that are connected. All waters are important, and that includes the ephemeral waters that do not flow all year long perhaps. The rule is important to Nebraskans for very many reasons, not the least of which is the maintenance of fisheries and wildlife habitat, flooding mitigation, water-based recreation, industrial need, and many more life needs. Drinking water tops the many lists. And John just recounted some of the statistics that I wanted to use about how many folks depend on our stream water supplies for their drinking water.

Clean water is exactly the type of issue where a Federal rulemakes particular sense. The vast majority of U.S. waters are part of an interState network that drains to one of the oceans. What we put into upstream Nebraska waters affects not only Nebraskans but it does affect the hunting and fishing opportunities of people all the way down to Louisiana and into the Gulf of Mexico.

The muddying and pollution of waters directly hurts hunting and fishing and all of the businesses that benefit from them. Approximately 47 million hunters and anglers in Nebraska generate over $200 billion in economic activity each year. The rule needs to seek to clarify which waters are covered in this endeavor, and making the process more efficient and effective, and it is a better way to address the concerns about how the Clean Water Act is applied.

Nebraskans care as much about clean water and their downstream neighbors as anyone else in the country, and we care just as much about our traditions of fishing and hunting and depend on clean water.

Please give the agencies a chance to present a final rule.

And I thank you for the opportunity, Senator, for being present here today.

[The prepared statement of Mr. Sheets follows:]

Testimony of Wes Sheets
Executive Board Member and Nebraska National Director,
Izaak Walton League of America

On the Proposed Rule:
Definition of "Waters of the United States" Under the Clean Water Act

Before The
United States Senate Committee on Environment and Public Works
In Lincoln, Nebraska
March 14, 2015

Senator Fischer and Members and staff of the U.S. Senate Committee on Environment and Public Works, greetings and thank you for the opportunity to testify.

My name is Wes Sheets. I live in Lincoln Nebraska. I am testifying on behalf of the Izaak Walton League of America, one of the nation's oldest outdoor recreation and conservation organizations. The Izaak Walton League was founded in 1922 by fishermen and hunters concerned about the impact of water pollution on fishing and the health of fish, wildlife and other natural resources. The founders of our organization understood that clean water and healthy wetlands are essential to robust populations of fish, ducks and other wildlife and, in turn, to enjoyable and successful days in the field.

I am active at all levels of the Izaak Walton League, as Treasurer of the Lincoln Chapter, Nebraska National Director, and member of the League's national Executive Board. Today I am representing our nearly 2000 members in Nebraska and our nearly 45,000 members nationwide. Our members are outdoor enthusiasts who hunt, fish, and participate in recreational shooting, boating, and many other outdoor activities.

I am currently a board member and former Chairman of the Nebraska Sportsmen's Foundation and a member of Ducks Unlimited, Rocky Mountain Elk foundation and Pheasants Forever.. I worked for 32 years for the Nebraska Game and Parks Commission as a fisheries biologist, aquatic scientist, and finally finishing the career as the Agency Assistant Director for fisheries, wildlife and law enforcement. During my assigned duties in 1972 thru 1976, I served as the agency liaison with the then newly formed Department of Environmental Control, created by the Nebraska Environmental Protection Act. The major duties were to establish initial water quality standards that would ensure the state's waters would be safe for all uses from drinking water supplies to fisheries protection and recreational activities such as swimming.

I want to start by acknowledging the interests and concerns of my colleagues who are testifying in opposition to this rule. The Izaak Walton League has a long history of working with farmers and ranchers, as well as other industries, on conservation, on private land recreation and on solutions to environmental problems that recognize and respect economic interests. Many

League members are farmers and ranchers, or employed by other industries represented here, and many of us come from rural and agricultural communities. I myself grew up on a dairy farm in our neighboring state to the south. And as the eldest son continue to have interest in the business of maintaining a viable agricultural operation in the great grasslands of the flinthills region of Kansas.

However, we also recognize the importance of clean water, as I hope everyone in this room also does. Clean water is fundamentally essential to all life, from humans to wildlife, fish, and plants. Congress has charged the Environmental Protection Agency (EPA) with cleaning up America's waters, and with keeping them clean. The EPA, and the Army Corps of Engineers which implements parts of the Clean Water Act such as dredge and fill permits, cannot do their job without looking at all waters that flow into one another. That is because, to state the obvious, water flows downstream, and carries sediment, nutrients, and pollutants with it. There is no line in a watershed above which water and pollutants do not flow downstream, and below which they do, with the exception of waters that do not have a significant nexus to other waters, which the rule deals with separately. That is the nature of a watershed. Therefore, anything short of applying the Clean Water Act to at least all waters that are connected would create an arbitrary and unfair system. Farmers, ranchers, landowners, and businesses below some arbitrary line in a watershed of connected waters would be required to contribute to the health of the nation's waters and habitats and abide by the Clean Water Act, while those above the arbitrary line could send sediments, nutrients, and other pollutants downstream without concern for the Act or impacts downstream. Likewise, those living further upstream could dredge, drain, and fill wetlands that are still connected to downstream waters, while their neighbor just down the road could not, at least not without a permit. This gives those living upstream an unfair and unnecessary economic advantage. Where would the line in the watershed be drawn? Who's in and who's out?

This highlights the current confusion over how the Clean Water Act is currently being implemented. Headwater streams and wetlands are often presumed exempted from the Clean Water Act even though they may have a significant nexus connecting them to downstream waters. Therefore, many landowners and businesses exist in a regulatory grey area. Many don't know whether waters running through or draining off their property are covered under the Clean Water Act or not. While some may benefit in the short term by assuming they do not have to comply with the Act and taking advantage of the lack of clarity, this creates a long term risk if they are found to be out of compliance on covered waters. It also creates unnecessary costs for the private sector and the agencies in identifying and delineating which waters are covered by the Act and which are not.

This is why so many groups have asked the agencies for a rule clarifying which waters the Clean Water Act applies to. Over the past 10 years, agriculture and industry groups, elected officials from the local to the national level, hunting and angling organizations, environmental groups,

and many others have been asking for a rule because the status quo does not work – for affected businesses or the environment.

The agencies have come up with the only answer that is clearly consistent with law, science, principles of fairness, and plain common sense, and that is for all connected waters with a significant nexus to downstream waters to be managed in accordance with the Clean Water Act. This approach has many benefits. It provides clarity to all potentially affected parties – if the water or wetland you are wondering about is clearly connected to downstream waters you need to apply for a permit before you dredge or fill it. This approach also cuts out a lot of the unnecessary costs of delineating which waters are covered by the Clean Water Act and which are not.

The Clean Water Act covered all U.S. waters for approximately 30 years, including the waters the proposed rule would cover again, from its passage in 1972 until some waters started to be carved out of the Act in 2001 due to lawsuits targeting the Act's protections. The Clean Water Act was applied to all U.S. waters throughout the Carter, Reagan, Bush I, and Clinton administrations. During these decades, agriculture, construction, real estate, and oil and gas industries went about their business without being unduly burdened by the Clean Water Act. This was a period of general economic growth and low unemployment. We do not need to fear the re-extension of the Clean Water Act to some of these waters now.

What we should be concerned about is the loss of protection from activities like dredging and filling from any waters that connected to downstream waters, as well as from less obviously connected waters. All waters are important, and that includes ephemeral waters that don't flow all year long. In Nebraska, EPA estimates that 52 percent of the streams have no other streams flowing into them, and that 77 percent do not flow year-round. EPA also says that 525,566 people in Nebraska receive some of their drinking water from areas containing these smaller streams and that at least 197 facilities located on such streams currently have permits under the federal law regulating their pollution discharges. In addition, the Nebraska Game and Parks Commission has estimated that nearly 829,000 acres of wetlands in the state could be considered so-called "isolated" waters – water bodies that are particularly vulnerable to losing Clean Water Act safeguards.

Even wetlands that are not obviously connected to downstream waters provide critical ecological functions. They are the breeding grounds for many of our waterfowl, particularly in the prairie pothole region of the northern Great Plains. They provide habitat to many other species, and recharge groundwater. The Army Corps of Engineers and EPA were right to include means of protecting these important wetlands in the proposed rule and should keep those protections in the final rule, or strengthen them.

Many of the concerns over the clean water rule appear to be about the federal government's role in regulating activities that affect water quality, and about the processes through which waters

and wetlands under the jurisdiction of the Clean Water Act are identified, and dredge and fill permit requests evaluated. Regarding the federal role in cleaning up our waters, water is exactly the type of issue where a federal role makes particular sense. The vast majority of waters are part of an interstate network that drains to one of the oceans. What we put into upstream Nebraska waters affects not only the drinking water of Nebraska communities, and the fishing and hunting opportunities of Nebraskans and Nebraska businesses that relies on hunting and fishing, but also affects people all the way down to Louisiana. Louisiana commercial fishermen have to get beyond a "dead zone" for fish and other aquatic life at the mouth of the Mississippi River in the Gulf of Mexico that was larger than Connecticut this year. The zone is the result of all the pollution that comes down from people living upstream.

The muddying and pollution of our waters, and elimination of headwaters wetlands and streams also directly hurt hunting, fishing, and all of the businesses and communities that benefit from them. The approximately 47 million hunters and anglers in America generate over $200 billion in economic activity each year, supporting 1.5 million jobs in rural communities in particular. Other forms of outdoor recreation rely on clean water as well. According to the Outdoor Industry Association, boating, including canoeing and kayaking, had a total economic impact of $206 billion in 2012, supporting 1.5 million jobs.

Regarding federal permitting of activities that contribute to water pollution, I can appreciate that landowners may not want to have to face timedelays, and costs associated with identifying which waters and wetlands on their property are part of our national network of connected waters. However, the solution is not to exempt some arbitrary group of landowners from the Clean Water Act because that is not fair to downstream neighbors and communities. A better alternative would be to focus on clarifying and improving the process by which waters and wetlands are determined to be connected. This rule seeks to clarify which waters are covered, although there will always be some gray areas. Improving the process by which dredge and fill permit requests are evaluated by making the process more efficient and effective is a better way to address concerns about how the Clean Water Act is applied.

An even longer term solution is for landowners and businesses to take the steps necessary to slow the flow of water off of their lands, and to eliminate the runoff of sediments, nutrients, and pollutants that can harm people and aquatic life. If individuals and companies take more responsibility for what comes off their land, the need for and impact of regulations is reduced.

Further, most agricultural activities are exempted from the Clean Water Act. Since 1977, the Clean Water Act has included an exemption from the section 404 dredge and fill permit process for normal farming, silviculture and ranching activities. Under this provision (section 404(f)(1)(A)), the discharge of dredge or fill material "from normal farming, silviculture, and ranching activities such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices" is exempt from permitting. Separate provisions exempt "construction or maintenance of farm or

stock ponds or irrigation ditches, or the maintenance of drainage ditches" (section 404(f)(1)(C)) and "construction or maintenance of farm roads or forest roads . . ." (Section 404(f)(1)(E)). These exemptions do not apply to activities that would bring waters of the United States into uses for which they had not previously been used or where the flow or circulation of such waters would be reduced. These statutory exemptions can only be modified by Congress – federal agencies cannot alter them and are bound by law to follow them. The "Interpretive Rule" which sought to further identify and clarify these exceptions and was the sources of much concern within the agricultural community has been eliminated.

Nebraskans care as much about clean water and their downstream neighbors as anyone else in this country, and as much about our clean water dependent traditions like fishing and hunting. We are also generally pretty sensible people, and the only sensible solution here is to include at least all connected waters under the Clean Water Act. I urge you to allow the U.S. Army Corps of Engineers and Environmental Protection Agency to finalize the rule. They considered extensive public comments before the proposed rule was drafted. They took extensive public comment specifically on the proposed rule – more than one million comments were submitted on the draft rule throughout a nearly seven month comment period during which anyone was allowed to provide as much input as they chose. The agencies carried out additional outreach and meetings, focusing on affected sectors of industry and society. The agencies have indicated that they will be making significant changes to the final rule to address input and feedback and criticism they received during the comment period.

Give the agencies a chance to present their final rule. Congress can intervene at any point after that to stop or modify the rule in any number of ways. Stopping the rule before it is finalized, however, mires us in the longstanding status quo of uncertainty that so many stakeholders from all sides of this issue complained about.

Senator FISCHER. Thank you, Wes. Good to see you. Finally, I'm pleased to welcome our last witness, Mr. Don Blankenau. Mr. Blankenau is a water and natural resources attorney whose impressive career has enabled him to become a nationally recognized water policy expert.

Before we hear from Mr. Blankenau, I would tell you that I'm entering into today's hearing record comments he filed on behalf of the Nebraska Association of Resource Districts, Nebraska League of Municipalities, and the Nebraska Groundwater Management Coalition.

Mr. Blankenau, thank you for testifying. You may begin when ready.

STATEMENT OF DON BLANKENAU, ATTORNEY FOR NEBRASKA ASSOCIATION OF RESOURCES DISTRICTS AND THE LEAGUE OF NEBRASKA MUNICIPALITIES

Mr. BLANKENAU. Thank you, Senator.

Members of the Committee and staff, we appreciate the opportunity to testify this morning.

Again, my name is Don Blankenau, and I am an attorney based in Lincoln, Nebraska specializing in water and natural resources law. My practice has allowed me to engage in water cases in the states of Nebraska, Arizona, North Dakota, South Dakota, Missouri, Georgia, Florida and Alabama. I appear here today to offer my thoughts regarding the proposed rule. My colleague, Vanessa Silke, and I have previously filed formal comments on behalf of this rule regarding compliance to include the Nebraska Groundwater Management Coalition, the Nebraska Association of Resources Districts, the League of Nebraska Municipalities, and the Tri-Basin Natural Resources District and the Lyman-Richey Corporation with the sand and gravel mining operation. As you've noted, Senator, those comments are included in the record today, but I'll offer some additional comments.

I'd like to begin with a brief anecdote that I think highlights the philosophical perspective of the Federal proponents of this rule. Some 4 years ago I was at a meeting with the—with an employee of the Army Corps of Engineers when we began a discussion concerning groundwater management. To my surprise, this employee stated that it was time for the Federal Government to assert more control over groundwater. I responded to that statement with the observation that the U.S. Supreme Court in a Nebraska case, Sporhase versus Nebraska, ex rel. Douglas, in 1982, had determined that groundwater was an article of interState commerce within the meaning of the Constitution. And I went on to explain that as an article of interState commerce, any increased Federal control was the sole purview of Congress and could not be undertaken by an agency absent expressed congressional authorization. The Corps employee simply responded, we can do a lot with our rules, and if Congress won't act, we will. The proposed rule I think is the product of that kind of thinking.

Whether a rule is good policy is one question. Whether it's legal is another. And in my view, this proposed rule is neither. Article 1, Section 8, Clause 3 of the Constitution of the United States contains the "commerce clause" that authorizes Congress alone to

make laws governing interState commerce. Historically, it was the interState trafficking of goods and services on the Nation's interState waters that served as the legal lynchpin to congressional control over those waters. In other words, Congress only had the authority over navigable waters to the extent those waters served as conduits of commerce. It is in this context and under this authority that Congress adopted the Clean Water Act and expressly limited its reach to navigable waters. In the decades that have passed since its passage, the reach of the EPA and the Corps has broadened as those two agencies extended the definition of the term "navigable waters." Contrary to the assertions of its proponents, the proposed rule does not merely codify existing judicial interpretations of navigable waters, it affirmatively extends and expands the meaning to create Federal controls that go far beyond what Congress intended when it adopted the Clean Water Act.

The proposed rule defines water as navigable if it has a hydrologic groundwater connection to a navigable stream. So while molecules of water in an excavation or pothole may be miles from a stream or decades from ever impacting that stream, the proposed rule defines them as navigable in place today. In Nebraska, the groundwater is commonly hydrologically connected to stream flow and can extend out many miles from the stream. The proposed rule would therefore impact many thousands of people more than the existing rule.

Existing permit requirements under the Clean Water Act already add a layer of Federal regulatory oversight on top of the state-based regulatory scheme, and result in significant cost increases and overall delay in the development process. For example, due to limited staff support at the Corps' Omaha District Office, individual permits under Section 404 currently take up to 18 months to process. Permit costs typically range between $25,000 and $100,000, accounting for legal, technical and logistical costs. Engaging the Corps in the permit application process is no guarantee that a permit will be granted. In those instances where a permit is denied, development of a property at its highest and best use is effectively precluded. These costs, along with the uncertainty of the permit approval process, will only increase under the proposed rule's expansion of the scope of Federal jurisdiction and will directly impinge upon land-use decisions at the State and local level.

Ultimately, the proposed rule stretches the definition of navigable waters beyond credibility. Which is evidenced by the nearly 1,000,000 negative comments that have been submitted. The truth is, and this is important, there is no water quality necessity that requires this kind of Federal intervention. None at this time. There simply is no real problem this rule will solve. Instead, the rule is just another example of the ever-growing Federal erosion of State authority and ever-expanding regulatory net.

I urge the Committee to take all necessary action to ensure the proposed rule does not become law. Thank you.

[The prepared statement of Mr. Blankenau follows:]

TESTIMONY OF
DON BLANKENAU,
ATTORNEY FOR NEBRASKA ASSOICATION OF RESOURCES DISTRICTS AND
THE LEAGUE OF NEBRASKA MUNICIPALITIES
BEFORE THE
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS
UNITED STATES SENATE
March 14, 2015

Good morning Senator and members of the Committee.

My name is Don Blankenau. I am an attorney based in Lincoln, Nebraska specializing in water and natural resources law. My practice has allowed me to engage in water cases in the states of Nebraska, Arizona, North Dakota, South Dakota, Missouri, Georgia, Florida and Alabama. I appear here today to offer my thoughts regarding the proposed rule concerning the Waters of the United States. Vanessa Silke, an attorney in my office, and I have previously filed formal comments to this rule on behalf of our clients which include the Nebraska Groundwater Management Coalition, the Nebraska Association of Resources Districts, the League of Nebraska Municipalities, and the Tri-Basin Natural Resources District. I've brought with me a sample of those comments and offer them into the record of this hearing. In addition to those comments, I offer some additional considerations today.

I'd like to begin with a brief anecdote that I believe highlights the philosophical perspective of the federal proponents of this rule: Four years ago I was at a meeting with an employee of the U.S. Army Corps of Engineers when we began a discussion regarding ground water management. To my surprise, this employee stated that it was time for the federal government to assert more control over ground water. I responded to that statement with the observation that the United States Supreme Court in a Nebraska case, *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941 (1982), determined that ground water was an article of commerce within the meaning of the Constitution. I went on to explain that as an article of commerce, any increased federal control

was the sole purview of Congress and could not be undertaken by an agency absent Congressional authorization. The Corps employee simply responded, "We can do a lot with our rules and if Congress won't act, we will." The proposed rule is the product of that kind of thinking.

Whether a rule is good policy is one question. Whether it is legal is another. In my view, the proposed rule is neither. Article 1, Section 8, clause 3 of the Constitution of the United States contains the "commerce clause" that authorizes Congress to make laws governing interstate commerce. Historically, the interstate trafficking in goods and services on our nation's interstate rivers served as the legal lynchpin to Congressional control over navigable waters. It is in this context and under this authority that Congress adopted the Clean Water Act and expressly limited its reach to "navigable waters." In the decades that have passed, the reach of the EPA and Corps has broadened, as the term "navigable waters" has been extended by those two agencies. Contrary to the assertions of its proponents, the proposed rule does not merely codify existing judicial interpretations of navigable waters; it affirmatively expands the meaning to create federal controls that go far beyond what Congress intended when it adopted the Clean Water Act.

The proposed rule defines water as "navigable" if it has a hydrologic – ground water – connection to a navigable stream. So while molecules of water in an excavation may be miles from a stream and decades from ever impacting that stream, today they are defined as navigable. In Nebraska, the ground water commonly is hydrologically connected to streamflow and can extend out many miles from the stream. The proposed rule would therefore impact many thousands of people and acres than the present requirements.

Existing permit requirements under the CWA already add a layer of federal regulatory oversight on top of the state-based regulatory scheme, and result in significant cost increases and overall delay in the development process. For example, due to limited staff support at the Corps' Omaha District Office, individual permits under section 404 of the CWA (hereafter "404 Permits")

currently take up to eighteen (18) months to process. Permitting costs typically range between $25,000 and $100,000, accounting for legal, technical and logistical (e.g., mitigation) costs. Engaging the Corps in the permit application process is no guarantee a permit will be granted; in those instances where a permit is denied, development of a property at its highest and best use is effectively precluded. These costs, along with the uncertainty of the permit approval process, will only increase under the Proposed Rule's expansion of the scope of federal jurisdiction, and will directly impinge on land-use decisions at the state and local level.

Furthermore, changes to the federal definition of WOTUS will impact the administration of CWA permit programs administered by NDEQ (section 402 NPDES permits, sections 303 and 305 Water Quality Standards and TMDLs, and section 401 State Certification). The Proposed Rule's broad expansion of jurisdiction will not only require an in-depth review of NDEQ's rules, regulations, and CWA permitting procedures, but will also result in significant cost increases for the regulated community and overall delay in the development process. Ultimately the proposed rule stretches the definition of "navigable waters" beyond credibility, which is evidenced by the nearly 1,000,000 negative comments that have been submitted. The truth is, there is no water quality necessity that requires this kind of federal intervention. In other words, there is no real problem the rule will solve. Instead, the rule is simply another example of the ever growing federal erosion of state authority. I urge the committee to take all necessary action to ensure this proposed rule does not become law.

Thank you. I will answer any questions.

Docket ID No. EPA–HQ–OW–2011–0880

Comments to the

Definition of "Waters of the United States"

Under the Clean Water Act,

79 Fed. Reg. 22188 (April 21, 2014)

Submitted on behalf of the League of Nebraska Municipalities by:

Donald G. Blankenau
Vanessa Silke
BLANKENAU WILMOTH JARECKE LLP
1023 Lincoln Mall, Suite 201
Lincoln, NE 68508-2817
don@aqualawyers.com
vanessa@aqualawyers.com

PREFACE

Since 1909, the League of Nebraska Municipalities (the "League") has served as a voice for Nebraska municipalities in proceedings before state and federal agencies, tribunals, courts, and legislative and executive branches of government. The mission of the League and its member cities and villages is to preserve local control and empower municipal officials to provide effective leadership and improve the quality of life for their citizens.

The League appreciates the opportunity to submit these comments on the proposed *Definition of "Waters of the United States"* (hereafter "WOTUS") *Under the Clean Water Act*,[1] ("CWA") (collectively, the "Proposed Rule") issued by the U.S. Army Corps of Engineers ("Corps") and the U.S. Environmental Protection Agency ("EPA") (collectively, the "Agencies").

INTRODUCTION

The League's members face the ongoing challenge of planning, managing and financing the necessary infrastructure to handle wastewater, stormwater, and flood control systems, as well as provide drinking water, electricity, and natural gas[2] to 98% of Nebraskans living in municipalities. Each of these systems and utilities is subject to layers of state-based permitting programs and regulatory measures administered by the Nebraska Department of Environmental Quality ("NDEQ")[3], the Nebraska Department of Natural Resources ("DNR")[4], and Natural Resources Districts ("NRDs")[5], in addition to federal CWA permitting requirements under section 404 (administered by the Corps), and sections 303, 305, 311, 401, and 402 (administered by NDEQ with oversight from EPA).

Land values and access to water are two major components which dictate decisions by agricultural producers and private industry to locate facilities and engage in development activities.[6] These decisions are not only critical to creating and retaining jobs within Nebraska's 530 municipalities, but also bolster the local tax base upon which the League's members must rely in order to carry out statutory duties and responsibilities, which include the construction and maintenance of roads and wastewater, stormwater, and flood control systems, through the levy of

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[1] 79 Fed. Reg. 22188 (April 21, 2014)

[2] The League's members not only provide general governmental services, but also operate and manage publicly-owned utility systems. Of 530 municipalities in Nebraska, 463 own and operate water distribution systems, 122 own and operate electric distribution systems, 13 own and operate natural gas distribution systems, and over 400 own and operate wastewater collection and treatment systems.

[3] Nebraska Environmental Protection Act, NEB. REV. STAT. 81-1501, *et seq.*

[4] Nebraska Groundwater Management and Protection Act, NEB. REV. STAT. §§ 46-701 *et seq.*, NEB. REV. STAT. § 2-32,115, NEB. REV. STAT. § 25-1064; NEB. REV. STAT. § 25-2159; NEB. REV. STAT. § 25-2160; NEB. REV. STAT. § 37-807; NEB. REV. STAT. § 28-106.

[5] NEB. REV. STAT. §§ 2-3201 *et seq.* Each NRD is charged by statute with the regulation and administration of groundwater quantity and quality within their respective territory.

[6] Agricultural production and groundwater-dependent development form the backbone of Nebraska's economy. *See, e.g.*, Spencer Parkinson, Decision Innovation Solutions, "Economic Impact of the Ability of Nebraska Agriculture to Irrigate - The Case of 2012." November 26, 2012. http://www.nefb.org/resources/handlers/StorageContainer.ashx?path=b9f7ee3f-8bd1-42b7-91a8-f735dc64668e.

taxes, the issuance of bonds, and receipt of matching funds through partnerships with state and federal agencies.

Permit requirements under the CWA already add an additional layer of federal regulatory oversight on top of the state-based regulatory scheme, and result in significant cost increases and overall delay in the development process. For example, due to limited staff support at the Corps' Omaha District Office, individual permits under section 404 of the CWA (hereafter "404 Permits") currently take up to eighteen (18) months to process. Permitting costs typically range between $25,000 and $100,000, accounting for legal, technical and logistical (e.g., mitigation) costs. Engaging the Corps in the permit application process is no guarantee a permit will be granted; in those instances where a permit is denied, development of a property at its highest and best use is effectively precluded. These costs, along with the uncertainty of the permit approval process, will only increase under the Proposed Rule's expansion of the scope of federal jurisdiction, and will directly impinge on land-use decisions at the state and local level.

Furthermore, changes to the federal definition of WOTUS will impact the administration of CWA permit programs administered by NDEQ (section 402 NPDES permits, section 303 and 305 Water Quality Standards and TMDLs, and section 401 State Certification). The Proposed Rule's broad expansion of jurisdiction will not only require an in-depth review of NDEQ's rules, regulations, and CWA permitting procedures, but will also result in significant cost increases for the regulated community and overall delay in the development process.

The League supports the Agencies' goals of improving predictability and clarifying the scope of WOTUS under the CWA.[7] However, the Agencies seek to accomplish these goals through an unprecedented reliance on undefined groundwater connections, and non-hydrologic connections previously rejected by the Supreme Court, as the basis for the assertion of federal jurisdiction over any isolated intrastate body of water. The Agencies' flawed assumptions effectively shift the burden of proving liability under the CWA to the regulated community and ignore the impacts to numerous permit programs which incorporate the WOTUS definition. Within the Proposed Rule, the Agencies have also left open the question of whether or how current exemptions from the CWA will be retained. Furthermore, the Agencies have failed to comply with the Regulatory Flexibility Act, as amended by the Small Business Regulatory Enforcement Fairness Act (collectively, the "RFA")[8], which sets forth procedural steps designed to safeguard small governmental jurisdictions, which include all but two of Nebraska's 530 municipalities.

For these reasons, the Proposed Rule should be withdrawn. Below are detailed comments addressing the Agencies' impermissible expansion of federal jurisdiction, omission of current exemptions from the CWA, and failure to comply with the RFA.

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[7] 79 Fed. Reg. 22188

[8] 5 U.S.C. §§ 601 *et seq.*

I. The Proposed Rule impermissibly expands the scope of CWA jurisdiction and effectively shifts the Agencies' burden of proof to the regulated community.

Under the CWA, the Agencies carry the burden of proving a person discharged a pollutant from a point source into a WOTUS without a permit. Under the current rule, jurisdiction is not always assumed, and a case-by-case, site-specific determination is often made by the Corps and NDEQ to determine whether jurisdiction will be asserted under the CWA.[9] Therefore, many of the projects and development activities undertaken by the League's members, as well as private landowners, irrigation districts, drainage districts, and small businesses located within the jurisdictional territories of the League's members are unpermitted by the Corps, or NDEQ, pursuant to the CWA.

Rather than respect constitutional constraints on the authority granted under the CWA, and set forth in *Solid Waste Agency of No. Cook Cty v. Corps of Engineers* ("SWANCC")[10] and *Rapanos v. U.S.,*[11] and their lineage, the Agencies have relied on overly broad scientific justifications (many tenuous at best) to convert the "significant nexus" concept (a legal term of art) into a sweeping regulatory tool under which *any* chemical, physical, or biological connection, alone or in the aggregate, legitimizes the Agencies' exercise of jurisdictional authority under the Proposed Rule.

Specifically, the Proposed Rule's expansive definitions of "neighboring," "riparian," and "tributary" expand the scope of presumed federal jurisdiction upon any showing by the Agencies that a chemical, physical, or biological connection between an isolated intrastate body or conveyance of water and a traditionally navigable body of water is not insignificant.

A. The new definitions of "neighboring" and "riparian area"

The Proposed Rule alters a current category of jurisdictional waters to include "**all waters** (not just wetlands) **adjacent**" to waters susceptible to use in interstate or foreign commerce, waters subject to the ebb and flow of the tide, impoundments and tributaries of such waters, and the territorial seas ("Proposed 1-5 Waters").[12] For these waters, jurisdiction is assumed by rule, and no case-by-case determination will be made by the Agencies to justify federal regulation.

Within the definition of the term "adjacency" is the term "neighboring" which is newly defined as all waters located within a riparian area or floodplain, as well as waters with a "shallow subsurface hydrologic connection" to Proposed 1-5 Waters. Also included within the term "neighboring" is the term "riparian area," which includes any area "bordering where surface or subsurface hydrology directly influence ... the animal community."

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[9] *See, e.g.* Revised Guidance on Clean Water Act Jurisdiction Following the Supreme Court Decision in *Rapanos v. U.S.* and *Carabell v. U.S.*, dated December 2 , 2008 (http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/juris_images.pdf); Title 119, NDEQ's Rules and Regulations Pertaining to the Issuance of Permits under the National Pollutant Discharge Elimination System (http://deq.ne.gov/RuleAndR.nsf/Title_119.xsp).

[10] 121 S. Ct. 675 (2001)

[11] 126 S. Ct. 2208 (2006)

[12] 40 C.F.R. 230.3(s)(6)

No definition is provided for the scope of "shallow subsurface hydrologic connection" or "subsurface hydrology." Much of Nebraska has a relatively high groundwater table,[13] and the interconnection between groundwater sources and local river systems makes it unlikely that the League's member municipalities, or landowners within their respective jurisdictions, could engage in development activities or construct and maintain wastewater, stormwater, and flood control systems without creating some form of open water that would fall within the category of "adjacent waters."

In support of these sweeping definitions, the Agencies have also cited to overland migration patterns of plant and animal species, which ironically require **the absence of a surface hydrologic connection**. Remarkably, the Proposed Rule explicitly states that hydrologic connections are **not** necessary to establish jurisdiction where it can be shown that overland migration patterns of plants and animals establish links between and among water bodies.[14] Regardless of the number of species of plants or animals cited by the Agencies, this approach is no different than the previously-rejected Migratory Bird Rule,[15] which similarly failed to require any surface water connection between an isolated water and a traditionally navigable water.

B. The new definition of "tributary"

Under the Proposed Rule, a "tributary" is categorically jurisdictional, and includes wetlands, lakes, ponds, impoundments, canals, and ditches, whether natural, man-altered, or man-made, if they contribute flow either directly **or through another water** to an interstate water, interstate wetlands, or territorial sea.[16] No meaningful exemption from this definition is provided,[17] and no case-by-case determination as to the jurisdictional status of the water will be made. Under the plain language of the Proposed Rule, this means **any** hydrologic connection to a traditionally navigable water, interstate water, or interstate wetland, will result in the characterization of an isolated intrastate body or conveyance of water as a "tributary."

In Nebraska's large river valleys, it is impossible to engage in development or construction activities without creating some form of open water with some remote hydrologic connection to a traditionally navigable water, or other interstate water or interstate wetland.[18] Moreover, decades of development have also resulted in an extensive network of ditches throughout communities and along roads and agricultural properties, which terminate, at some point, in a

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[13] *See* Exhibit A, image depicting depth to groundwater in Nebraska

[14] 79 FR 22240, 22242, 22249 (discussing how overland movements of plants and animals establish the jurisdictional links between waters).

[15] *SWANCC. v. U.S. Army Corps of Engineers*, 531 U.S. 159, 166-67, 121 S. Ct. 675, 680 (2001), (The Agencies have interpreted the CWA "to cover the abandoned gravel pit at issue here because it is used as habitat for migratory birds. We conclude that the 'Migratory Bird Rule' is not fairly supported by the CWA."

[16] 40 CFR 230.3(u)(5) (emphasis supplied).

[17] *Id.* Exempt from the definition of "tributary" are ditches that "drain only uplands" and "do not contribute flow either directly or through another water" to any traditionally navigable water, interstate water, interstate wetland, or territorial sea.

[18] *See* Exhibit B, image depicting drainage basins of major rivers within Nebraska; *see also* Exbibit C, image depicting wetlands identified by EPA Region 7.

conveyance to a traditionally navigable water, interstate water, interstate wetland, or territorial sea. Under the Proposed Rule, every segment of these conveyances would qualify as a "tributary" and federal jurisdiction under the CWA would be presumed.

The images attached hereto as Exhibits A, B, and C drive home the magnitude of the proposed expansion of federal CWA jurisdiction due to the Agencies' expansive definitions of "neighboring," "riparian," and "tributary." As plainly illustrated in the attachments, no portion of Nebraska is outside of a floodplain, or lacking some form of a subsurface or remote hydrologic connection either directly, or through another water, to an interstate water. Thus, for all practical purposes, any ditch, wastewater, stormwater, or flood control system, or development activities undertaken by private individuals, entities, and other governmental units within the municipalities' jurisdictions would be immediately subjected to federal CWA jurisdiction, absent any showing by the Agencies that site-specific connections to interstate surface waters are in fact significant.

The maps illustrate the sweeping impact of the Proposed Rule's expansive definitions of categorically jurisdictional waters: by presuming all open intrastate bodies or conveyances of water have some chemical, physical, or biological connection to a traditionally navigable water that is not insignificant, every member of the regulated community will be saddled with the expensive, time-consuming burden of proving such connections are not significant.

Prior attempts to assert jurisdiction over isolated intrastate bodies or conveyances of water, whether through broad definitions of statutory terms or through identifying isolated waters as habitat for migratory birds, have been rejected as an overreach of the authority granted by the Clean Water Act.[19] The Proposed Rule is yet another attempt to expand federal jurisdiction over conceivably all waters through exactly the same means.

II. The Proposed Rule Indirectly Asserts Federal Control Over Groundwater and Local Land-Use Decisions.

By relying on shallow subsurface groundwater connections to justify categorical jurisdiction over otherwise isolated intrastate bodies or conveyances of water, the Agencies are indirectly regulating groundwater, over which the States alone have jurisdiction. The Court has established limits on the scope of the Agencies' authority under the Clean Water Act, holding in *Rapanos*:

> [C]lean water is not the *only* purpose of the [CWA]. **So is the preservation of primary state responsibility for ordinary land-use decisions**. ... It would have been an easy matter for Congress to give the Corps jurisdiction over all wetlands (or, for that matter, all dry lands) that 'significantly affect the chemical, physical, and biological integrity of 'waters of the United States.' **It did not do that**[.]"

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[19] *SWANCC. v. U.S. Army Corps of Engineers*, 531 U.S. 159, 166-67, 121 S. Ct. 675, 680 (2001), (The Agencies have interpreted the CWA "to cover the abandoned gravel pit at issue here because it is used as habitat for migratory birds. We conclude that the 'Migratory Bird Rule' is not fairly supported by the CWA." *See also United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133, 106 S.Ct. 455 (1985) (the concept of adjacency is defined as wetlands that actually abutted on a navigable waterway).

Rapanos v. United States, 547 U.S. 715, 755-56, 126 S. Ct. 2208, 2234 (2006) (emphasis supplied). [20] The structure of the CWA indicates that Congress did not intend groundwater and navigable waters to be synonymous. As explained by the District Court in *Washington Wilderness Coal. v. Hecla Min. Co.*:

> If the terms were synonymous, it would not be necessary for Congress to make distinct references to groundwater and navigable water. ...The legislative history of the [CWA] also demonstrates that Congress did not intend that discharges to isolated ground water be subject to permit requirements. ... 'Because the jurisdiction regarding groundwater is so complex and varied from State to State, the committee did not adopt this recommendation.'

870 F. Supp. 983, 990 (E.D. Wash. 1994), citing S. Rep. No. 414, 92nd Cong., 1st Sess. 73 (1971), U.S. Code Cong. & Admin. News 1972, pp. 3668, 3739. Moreover, a number of courts have concluded that the possibility of a hydrological connection between ground and surface waters is insufficient to justify CWA regulation.[21]

Despite the Agencies' statements to the contrary,[22] the Proposed Rule **does** include groundwater, because without groundwater, there is **no** hydrologic link between many isolated waters and traditionally navigable waters.[23] Any past practice or proposed standard under which the Agencies establish jurisdiction over isolated waters by virtue of groundwater, exempt waters, or any other undefined connections, must be rejected.[24] Simply put, the Agencies should not attempt to assert jurisdiction over an otherwise isolated water by piggybacking on non-jurisdictional waters. The Agencies are required to establish jurisdiction over each link from traditionally navigable water to isolated intrastate waters.

Equally troubling is the Agencies' disregard for all existing layers of state and local regulatory measures, which provide protection for groundwater and intrastate surface water.[25] These meaningful regulatory measures will only be hampered by another layer of federal interference,

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[20] *See also Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Engineers*, 531 U.S. 159, 166-67, 121 S. Ct. 675, 680 (2001); *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council*, 485 U.S. 568, 575, 108 S.Ct. 1392, 99 (1988); *FERC v. Mississippi*, 456 U.S. 742, 767–768, n. 30, 102 S.Ct. 2126 (1982); *Hess v. Port Authority Trans–Hudson Corporation*, 513 U.S. 30, 44, 115 S.Ct. 394, 130 L.Ed.2d 245 (1994); and S.Rep. No. 414, 92nd Cong., 1st Sess. 73 (1971), U.S.Code Cong. & Admin.News 1972, pp. 3668, 3739.

[21] *See Oconomowoc Lake v. Dayton Hudson Corp.*, 24 F.3d 962 (7th Cir.1994); *Kelley v. United States*, 618 F.Supp. 1103 (W.D.Mich.1985).

[22] "The agencies have never interpreted 'waters of the United States' to include groundwater and the Proposed Rule explicitly excludes groundwater, including groundwater drained through subsurface drainage systems." 79 Fed. Reg. 22218.

[23] Comments to the SAB Report indicate that in some cases, the *only* connection between water bodies is groundwater. *See* Science Advisory Board (SAB) Draft Report (4/23/14).

[24] 79 FR 22219; GAO Report – "Waters and Wetlands" (page 23) February, 2004.

[25] NEB. REV. STAT. §§ 2-3201 *et seq.*; Nebraska Groundwater Management and Protection Act, NEB. REV. STAT. §§ 46-701 *et seq.*, NEB. REV. STAT. § 2-32,115, NEB. REV. STAT. § 25-1064; NEB. REV. STAT. § 25-2159; NEB. REV. STAT. § 25-2160; NEB. REV. STAT. § 37-807; NEB. REV. STAT. § 28-106; Nebraska Environmental Protection Act, NEB. REV. STAT. §§ 81-1501, *et seq.*

and will directly impact land use decisions made by state and local governmental entities, such as the League's member municipalities, and private entities, which must account for the cost and timeframe for the permitting process and the impacts of permit denials on land values and potential development. The negative impacts to the local tax base for Nebraska's municipalities, and the stifling effect on development activities under the Proposed Rule cannot be discounted.

Asserting blanket jurisdiction over any and all waters will result in federal control over the regulation of land use – a primary responsibility of the States.[26] This infringement on State and local responsibilities to control the development of localized natural resources and land uses is not supported by the language or history of the CWA.[27] As written, the Proposed Rule is not based upon a permissible construction of the CWA and will not withstand a challenge.[28]

III. The Agencies Should Provide Greater Certainty to the Regulated Community by Amending the Proposed Rule to Explicitly Include All Existing Exemptions.

Formal regulatory exemptions from the CWA provide the greatest certainty for the regulated community. Agency representatives have repeatedly stated to Congress, the media, and the regulated community, that **all** existing exemptions will be maintained,[29] and a specific list of waters that will not be deemed WOTUS is included in the Proposed Rule.[30] However, the Agencies have failed to include the current language of all existing exemptions in the Proposed Rule. Instead, new qualifying language effectively negates the exemption for ditches, and the interpretive exemption for pits excavated in dry land for the purpose of obtaining fill, sand and gravel has been omitted from the list delineated within the Proposed Rule.

The Proposed Rule's exemption for ditches is particularly troubling, as it does not cover any ditches that contribute flow, either directly or through another water, to a traditionally navigable water, interstate water, interstate wetland, or impoundments of such waters or tributaries.[31] The Agencies' overbroad assumptions regarding the impacts an isolated intrastate conveyance, such as a ditch, must have if it indirectly contributes flow to a traditionally navigable water effectively negates the exemption. Absent a meaningful exemption, most ditches will be swept into the

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[26] *Hess v. Port Authority Trans-Hudson Corporation*, 513 U.S. 30, 44, 115 S.Ct. 394, 130 L.Ed.2d 245 (1994) ("[R]egulation of land use [is] a function traditionally performed by local governments"); *FERC v. Mississippi*, 456 U.S. 742, 767–768, n. 30, 102 S.Ct. 2126, 72 L.Ed.2d 532 (1982) (Regulation of land use, as through the issuance of the development permits, is a quintessential state and local power.)

[27] *SWANCC. v. U.S. Army Corps of Engineers*, 531 U.S. 159, 174, 121 S. Ct. 675, 683-84, 148 L. Ed. 2d 576 (2001) ("Rather than expressing a desire to readjust the federal-state balance in this manner, Congress chose to recognize, preserve, and protect the primary responsibilities and rights of States ... to plan the development and use ... of land and water resources[.]")

[28] *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843, 104 S.Ct. 2778 (1984); *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Engineers*, 531 U.S. 159, 174, 121 S. Ct. 675, 684, 148 L. Ed. 2d 576 (2001).

[29] *See* http://www2.epa.gov/uswaters: ("All agricultural exemptions and exclusions from Clean Water Act requirements that have existed for nearly 40 years have been retained with clarification.")

[30] 79 Fed. Reg. 22218.

[31] Proposed definition at 40 C.F.R. 230.3(t)(4)

Proposed Rule's broad definition of "tributary" and countless activities, which are currently unpermitted, will become subject to federal jurisdiction.

Furthermore, the exemption for waste treatment systems is limited to those systems "designed to meet the requirements of the Clean Water Act." This exemption will be meaningless for any waste treatment system that does not account for impacts to the increased number of bodies and conveyances of water falling within the scope of the proposed WOTUS definition.

Failure to explicitly affirm all existing exemptions, including current EPA-approved state-specific exemptions from NPDES permitting requirements, within the Proposed Rule will create confusion within the regulated community as to whether the existing exemptions remain in effect, which is further complicated by the increase in federal jurisdiction discussed above. Clarifying the exemptions will allow members of the regulated community to avoid a burdensome permit application process, the cost and timeframe for which will directly translate into higher costs for development activities, or avoidance of development altogether.

IV. The Agencies have failed to account for the impacts of the expansion of the definition of WOTUS on existing CWA permits administered by the States.

Despite the Agencies' inexplicable assertions, the Proposed Rule will expand the scope of federal jurisdiction under the CWA. By refusing to recognize the obvious, the Agencies have also neglected to analyze the impact of a new federal definition of WOTUS, and its limitation and omission of exemptions, on State-administered CWA permit programs.

NPDES permits for municipal, commercial, industrial wastewater, industrial discharges to public wastewater treatment systems, industrial and municipal storm water, municipal combined sanitary and storm sewer overflows and discharges, and livestock waste control, Water Quality Standards, and stormwater management plans for Municipal Separate Storm Sewer Systems (MS4), among others, are all tied to the requirements of the CWA, which include the federal definition of WOTUS. Changes to the federal rule will impact the time and resources required to ensure State-based statutes, procedures, and rules and regulations meet federal requirements under the CWA. The costs associated with the administration of increased jurisdiction, and the additional time and resources which must be committed to ensure CWA duties are met, translate into an unfunded mandate on State agencies.The League's members will also be required to commit considerable time and resources to review current permits, obtain new permits, and adjust current infrastructure to adapt to changes which may be required for currently-permitted activities. These efforts will also translate into tax and rate increases to support the ongoing management of wastewater, stormwater, and flood control systems, as well as for the delivery of drinking water, electricity, and natural gas services.

Changes to fundamental definitions of CWA terms should not be proposed unless and until the Agencies have taken into account the administrative and financial implications of expanding the scope of federal jurisdiction.

V. The Agencies have violated the RFA, which was enacted and amended specifically to protect small entities, such as the League's member municipalities.

The RFA requires the Agencies to review the Proposed Rule to determine if it will have a "significant economic impact on a substantial number of small entities."[32] All but two of Nebraska's 530 municipalities qualify as "small entities" under the RFA. The Proposed Rule's expansion of the scope of waters deemed jurisdictional under the CWA will place additional, unnecessary burdens on those who rely on water for their personal and economic survival. Such burdens will negatively affect or otherwise prevent[33] development activities, production capacities, and land values, all of which are factors that directly impact the tax base of the League's member municipalities. The cost and timeframe for municipalities to construct and maintain wastewater, stormwater, and flood control systems, and to provide utility services will also be affected if the Proposed Rule is adopted.

Due to its extraordinary potential to adversely impact the regulated community, it is especially important that the Proposed Rule be subjected to all procedural steps designed to safeguard small governmental jurisdictions, such as Nebraska's municipalities, and other small entities, from overzealous regulation.[34]

In part because so many proposed rules were subjected to meaningless "rubber stamp" certifications, Congress amended the RFA by enacting the Small Business Regulatory Enforcement Fairness Act of 1996 ("SBREFA"). The SBREFA amended section 611 of the RFA to allow small entities, such as the League's member municipalities, to obtain judicial review of agency noncompliance with the RFA and tightened the requirement for certifications so the Agencies must provide the factual basis that supports their certification statement.[35] The SBREFA also requires EPA to convene small business review panels whenever its planned rules are likely to have a significant economic impact on a substantial number of small entities. The SBREFA panels include small entity representatives who will be affected by the rule, who advise representatives from the Small Business Administration's Office of Advocacy, the Office of Management and Budget's Office of Information and Regulatory Affairs, and the Agencies on probable real-world impacts and potential regulatory alternatives. The panel must then prepare a report containing recommended alternatives to the Agencies and the panel's recommendations could be incorporated into the Proposed Rule.[36]

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[32] 5 U.S.C. §§ 601 *et seq.*; 5 U.S.C. § 601(6), "the term 'small entity' shall have the same meaning as the terms 'small business', 'small organization' and 'small governmental jurisdiction[.]'"

[33] *Review of 2014 EPA Economic Analysis of Proposed Revised Definition of Waters of the United States*, David Sunding, Ph.D., May 15, 2014 (at page 15-19).

[34] 5 U.S.C. § 602(a)(1). *See also* 5 USC § 601(5), "the term 'small governmental jurisdiction' means governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand[.]"

[35] 5 U.S.C. § 611

[36] The RFA was further strengthened on August 13, 2002, when President Bush signed Executive Order 13,272. This Executive Order requires the Agencies to consider the Small Business Administration's Office of Advocacy's written comments on proposed rules and include a response to those comments in the final rule.

These laws and policies were put in place specifically to protect small entities such as the League's member municipalities. However, the Agencies have violated these laws and policies by disingenuously certifying the Proposed Rule will have no substantial impact on protected entities. Specifically, the Administrator concludes:

> The scope of regulatory jurisdiction in this proposed rule is narrower than that under the existing regulations. *See* 40 CFR 122.2 (defining "waters of the United States"). Because *fewer* waters will be subject to the CWA under the proposed rule than are subject to regulation under the existing regulations, this action will not affect small entities to a greater degree than the existing regulations. As a consequence, this action if promulgated will not have a significant adverse economic impact on a substantial number of small entities, and therefore no regulatory flexibility analysis is required.

79 Fed. Reg. at 22220. This conclusion, and the factual basis on which it is predicted, is patently false. As set forth above, the *categorical* inclusion of *all* waters within so-called "neighboring" and "riparian areas" as "adjacent" based upon undefined groundwater connections and overland migration patterns of plant and animal species necessarily results in the assertion of federal jurisdiction over additional waters. Barring an obvious surface connection, these waters would have been subjected to case-by-case analysis, but will be automatically captured as jurisdictional.[37] In addition, the proposed aggregation of otherwise isolated waters to determine their cumulative impact on navigable waters will inherently sweep these otherwise non-jurisdictional waters into the regulatory network.[38] The same results from the inclusion of strictly ephemeral waterways located higher in stream systems.

The Agencies previously recognized their existing policy, as set forth in *Draft Guidance on Identifying Waters Protected by the Clean Water Act*,[39] would expand the number of waters over which they assert jurisdiction. They said of that guidance:

> The agencies expect, based on relevant science and recent field experience, that under the understandings stated in this draft guidance, the extent of waters over which the agencies assert jurisdiction under the CWA will increase compared to the extent of waters over which jurisdiction has been asserted under existing guidance, though certainly not to the full extent that it was typically asserted prior to the Supreme Court decisions in *SWANCC* and *Rapanos*.

The Proposed Rule, which codifies some elements of the Guidance, and expands on others, is clearly even broader in scope. Similarly, proponents of the Proposed Rule tout it for "restoring" protection to waters over which the Agencies do not presently assert jurisdiction, which is, of course, the basis of their support.[40]

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[37] 79 Fed. Reg. at 22219.

[38] *See* e.g., 79 Fed. Reg. at 22214.

[39] *See* http://water.epa.gov/lawsregs/guidance/wetlands/upload/wous_guidance_4-2011.pdf.

[40] *See, e.g., Advancing America's Clean Water Legacy: Proposed Clean Water Protection Rule Will Better Protect Streams and Wetlands* available at http://www.nrdc.org/water/files/clean-water-legacy-FS.pdf.; *The Clean Water*

Most importantly, the fact that more waters will be regulated under the Proposed Rule was confirmed by the Agencies in their written analysis of the potential costs and benefits associated with this action, titled "*Economic Analysis of Proposed Revised Definition of Waters of the United States*," which states that more waters will be regulated under the Proposed Rule.

The Agencies have failed to prepare an initial regulatory flexibility analysis ("IRFA") as required by the RFA, and make it available for public review and comment simultaneously with the Agencies' publication of general notice of proposed rulemaking for the rule.[41] The IRFA must describe the anticipated economic impacts of the Proposed Rule on small entities, and evaluate whether alternative actions that would minimize the rule's impact on small entities would achieve the regulatory purpose.[42] The Agencies must also prepare a final regulatory flexibility analysis ("FRFA").[43] The FRFA must summarize any issues raised by public commenters, describe the steps taken by the Agencies to minimize burdens on small entities, and explain why the Agencies selected the final regulatory action they did, and why other alternatives were rejected.[44]

As President Clinton made clear in Executive Order 12,866, "The American people deserve a regulatory system that works for them, not against them[.]" The Order also demands: "Each agency shall tailor its regulations to impose the least burden on society, including individuals, businesses of differing sizes, and other entities (including small communities and governmental entities), consistent with obtaining the regulatory objectives[.]"[45]

The Agencies have improperly circumvented their duties under the RFA, and have impermissibly shifted their burden of proof to the regulated community. The very real costs imposed on small entities under the Proposed Rule cannot be ignored. The Agencies must perform a proper RFA analysis or the Proposed Rule will remain legally and factually deficient.

CONCLUSION

The Proposed Rule should be withdrawn, as the jarring increase in the scope of federal jurisdiction under the Proposed Rule only amplifies existing uncertainty and inconsistency in the application of the CWA, and further upsets the balance between state and federal control over land use decisions and the management of groundwater. The Agencies' goals are better served through an explicit affirmation of current exemptions; furthermore, the Agencies should abandon their efforts to regulate groundwater and assert jurisdiction over isolated intrastate waters under theories rejected by the Supreme Court, and must ascertain the real costs of this (or any subsequent) Proposed Rule in conformance with RFA requirements.

Rule: Protecting America's Waters available at http://www.nwf.org/~/media/PDFs/Water/WOTUS%20Proposed%20rule%20fact%20sheet%203252014.pdf.

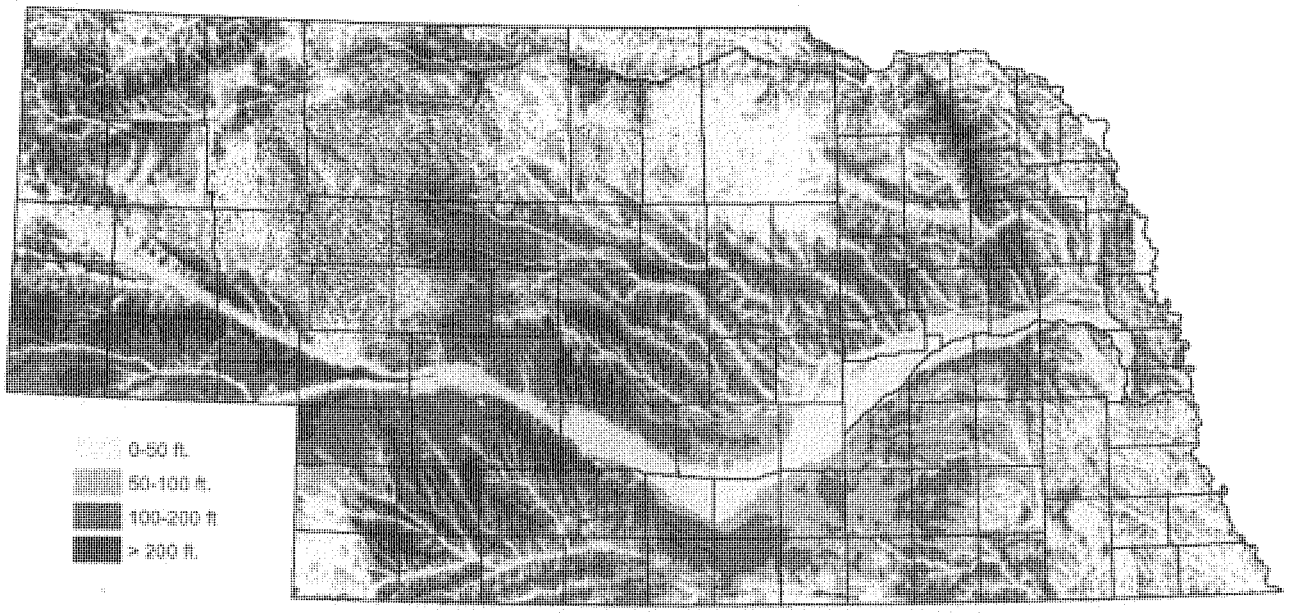
[41] 5 U.S.C. § 603(a)

[42] 5 U.S.C. § 603(b-c)

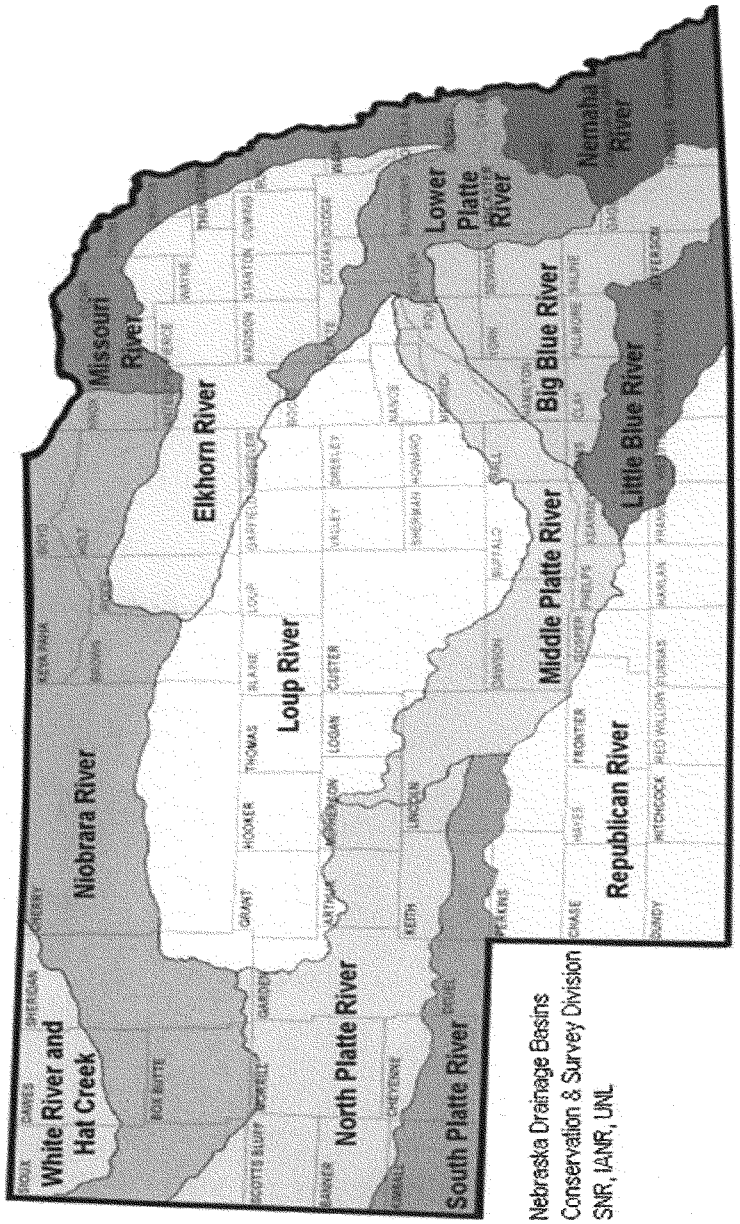
[43] 5 U.S.C. § 604(a)

[44] 5 U.S.C. § 604(a)

[45] *Id.*, Section 1(b)(11)



Generalized depth to groundwater. (Source: University of Nebraska, Conservation and Survey Division, 1998)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Niobrara River
Missouri River
Elkhorn River
Loup River
North Platte River
South Platte River
Middle Platte River
Big Blue River
Little Blue River
Republican River
Lower Platte River
Nemaha River
Nebraska Drainage Basins
Conservation & Survey Division
SNR, IANR, UNL
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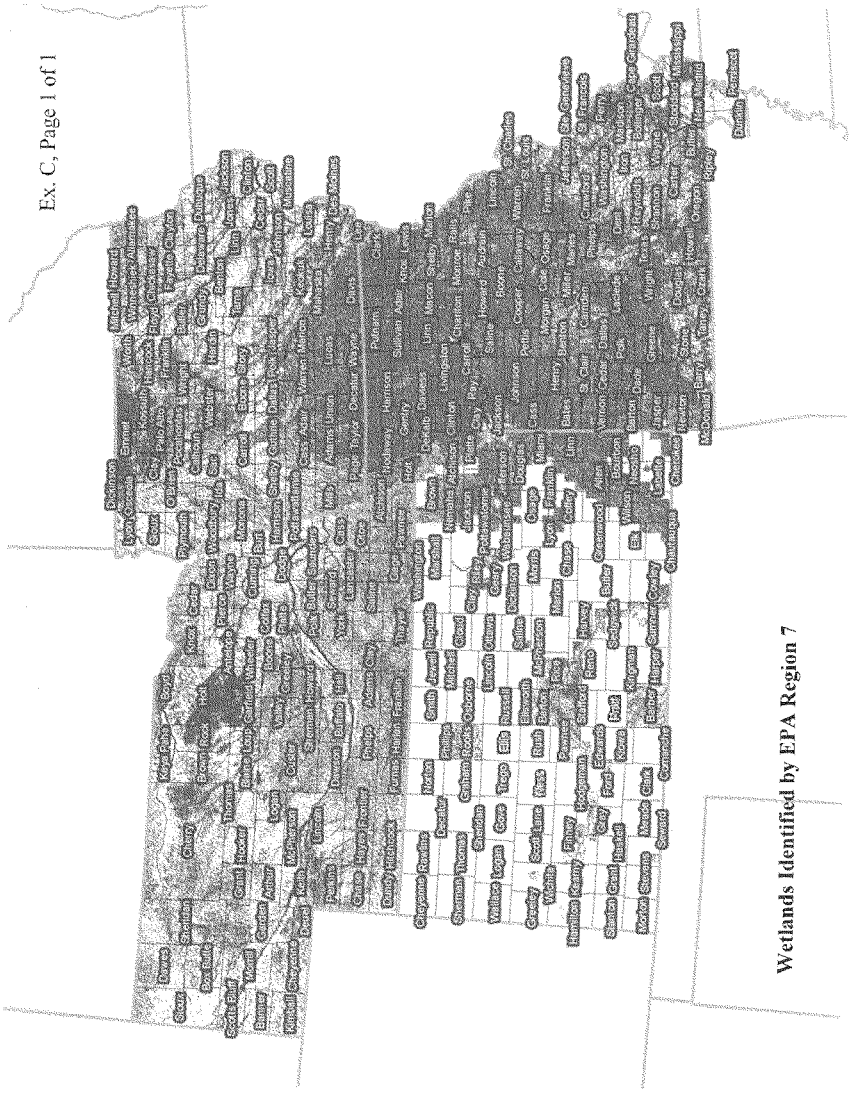

Wetlands Identified by EPA Region 7

United States Senate
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS
WASHINGTON, DC 20510–6175

April 9, 2014

The Honorable Barack Obama
President of the United States
The White House
1600 Pennsylvania Avenue, NW
Washington, DC 20500

Dear President Obama,

As members of the Senate Environment and Public Works Committee, we write in response to the U.S. Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers' (Corps) release of their proposed rule which would expand federal jurisdiction under the Clean Water Act (CWA). After an initial review of the proposed rule, we are deeply concerned that the agencies are attempting to obtain *de facto* land use authority over the property of families, neighborhoods and communities throughout the United States. Several provisions within the proposed rule demonstrate that EPA and the Corps are unwilling to accept the meaningful limits Congress placed on the agencies' authority under the CWA, limits the Supreme Court has repeatedly recognized. These include the proposed rule's categorical regulation of irrigation and stormwater ditches, unlimited aggregation approach, and broad adjacency definition. The proposed rule would also have EPA and the Corps making case-by-case jurisdictional determinations based on the "significant nexus" test, even as they ominously assert that a "hydrologic connection is not necessary to establish a significant nexus."[1]

Equally important, we believe EPA and the Corps should immediately cease in their proclamations that the agencies' proposal is a justified response to various calls for a CWA rulemaking.[2] In fact, EPA and the Corps are using rulemaking requests as an excuse to pursue a rushed, predetermined agenda, as opposed to engaging in a deliberative, fair, and transparent regulatory process. EPA and the Corps chose to release their proposed rule despite failing to 1) sufficiently consult with affected states; 2) allow for completion of the Science Advisory Board review of the so-called "Connectivity Report"; and 3) conduct a statutorily-required small business analysis and outreach pursuant to the Regulatory Flexibility Act (RFA), among other

[1] *See* U.S.E.P.A. and Army Corps of Engineers, Proposed Rule Regarding Definition of "Waters of the U.S." Under the Clean Water Act at 100 (March 25, 2014), http://www2.epa.gov/sites/production/files/2014-03/documents/wus_proposed_rule_20140325_prepublication.pdf.

[2] *See* Nancy Stoner, *Input Critical to Rule on Waters of the U.S.*, EPA Connect (March 25, 2014) ("In large part, it was public input that led us to propose a rule. Since 2008, EPA and the Corps have received numerous requests for a rulemaking to provide clarity on protections under the Clean Water Act from members of Congress, state and local officials, industry, agriculture, environmental groups, scientists, and the public."), http://blog.epa.gov/epaconnect/2014/03/input-critical-to-rule-on-waters-of-the-u-s/.

mandatory procedures. EPA and the Corps' decision to proceed despite the numerous concerns identified by lawmakers and stakeholders is incredibly disappointing.

The scope of CWA jurisdiction is one of the most important regulatory issues facing landowners, businesses, and municipalities today. Although EPA and the Corps may have a role in clarifying and limiting CWA jurisdiction, unfortunately the agencies' rule proposal was a significant step in the wrong direction. The decision to move forward with this proposal is a clear breach of your promise to cut through red tape.[1] In light of other recent CWA permitting decisions that have occurred during your administration, moving forward with the proposed rule will exponentially frustrate economic activity and further undermine notions of certainty in the federal permitting process.

Sincerely,

David Vitter
U.S. Senator

John Barrasso
U.S. Senator

James M. Inhofe
U.S. Senator

Jeff Sessions
U.S. Senator

Mike Crapo
U.S. Senator

Roger Wicker
U.S. Senator

John Boozman
U.S. Senator

Deb Fischer
U.S. Senator

[1] Exec. Order No. 13563, 76 Fed. Reg. 3,821 (Jan. 18, 2011).

Docket ID No. EPA–HQ–OW–2011–0880

Comments to the

Definition of "Waters of the United States"

Under the Clean Water Act,

79 Fed. Reg. 22188 (April 21, 2014)

Submitted on behalf of the Nebraska Groundwater Management Coalition by:

Donald G. Blankenau
Vanessa Silke
BLANKENAU WILMOTH JARECKE LLP
1023 Lincoln Mall, Suite 201
Lincoln, NE 68508-2817
don@aqualawyers.com
vanessa@aqualawyers.com

PREFACE

The purpose of the Nebraska Groundwater Management Coalition ("Coalition") is to provide the authority, resources, services, studies, and facilities needed for the representation of the interests of its members in proceedings before all agencies, tribunals, courts and any administrative, legislative, executive, or judicial bodies concerning or affecting Nebraska's groundwater, its use, its regulation, and its relationship to surface water, and to inform and educate the public concerning groundwater and the affects and impacts of any proposed regulatory changes on the people and resources of the State of Nebraska.

The Coalition appreciates the opportunity to submit these comments on the proposed *Definition of "Waters of the United States"* (hereafter "WOTUS") *Under the Clean Water Act,*[1] ("CWA") (collectively, the "Proposed Rule") issued by the U.S. Army Corps of Engineers ("Corps") and the U.S. Environmental Protection Agency ("EPA") (collectively, the "Agencies").

INTRODUCTION

The Coalition is comprised of seventeen Natural Resources Districts ("NRDs"), all political subdivisions from across the State of Nebraska,[2] as well as the Nebraska Association of Resources Districts. Each NRD is charged by statute with the regulation and administration of groundwater quantity and quality within their respective territory.[3] The Nebraska Legislature also empowered the NRDs, along with Nebraska Department of Natural Resources ("DNR"), to apply each entity's expertise to bring about an orderly administration and regulation of hydrologically connected surface and ground waters.[4] NRDs also coordinate regulatory efforts with the Nebraska Department of Environmental Quality ("NDEQ"), which administers the NPDES permit program with oversight from EPA, as well as a number of state-based permits and programs to protect ground and surface water quality.[5] Through the implementation of statutory duties and responsibilities, nearly every use of groundwater and surface water in the State of Nebraska is regulated in some way by the NRDs. Furthermore, NRDs directly

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[1] 79 Fed. Reg. 22188 (April 21, 2014)

[2] The Coalition Members include: Upper Republican NRD, Upper Niobrara White NRD, Upper Elkhorn NRD, Upper Big Blue NRD, Twin Platte NRD, Tri-Basin NRD, South Platte NRD, Middle Republican NRD, Middle Niobrara NRD, Lower Platte North NRD, Lower Niobrara NRD, Lower Loup NRD, Lower Elkhorn NRD, Lower Big Blue NRD, Little Blue NRD, Lewis & Clark NRD, and Central Platte NRD.

[3] NEB. REV. STAT. §§ 2-3201 *et seq.*; *See also* NEB. REV. STAT. §§ 2-3229, such purposes include: (1) erosion prevention and control, (2) prevention of damages from flood water and sediment, (3) flood prevention and control, (4) soil conservation, (5) water supply for any beneficial uses, (6) development, management, utilization, and conservation of ground water and surface water, (7) pollution control, (8) solid waste disposal and sanitary drainage, (9) drainage improvement and channel rectification, (10) development and management of fish and wildlife habitat, (11) development and management of recreational and park facilities, and (12) forestry and range management.

[4] Nebraska Groundwater Management and Protection Act, NEB. REV. STAT. §§ 46-701 *et seq.*, NEB. REV. STAT. § 2-32,115, NEB. REV. STAT. § 25-1064; NEB. REV. STAT. § 25-2159; NEB. REV. STAT. § 25-2160; NEB. REV. STAT. § 37-807; NEB. REV. STAT. § 28-106

[5] *See* Nebraska's Environmental Protection Act, NEB. REV. STAT. § 81-1501, *et seq.*

implement and manage a number flood control, drainage, and irrigation projects for which a CWA permit must be obtained if the Agencies assert federal jurisdiction.

Agricultural production and groundwater-dependent development form the backbone of Nebraska's economy.[6] Land values and access to water are the two major components which dictate producers' decisions to locate facilities and engage in development activities. These decisions are critical to the local tax base upon which the NRDs must rely in order to carry out statutory duties and responsibilities, including the implementation and ongoing management of flood control, drainage, and irrigation projects, through the levy of taxes, special occupation taxes, the issuance of bonds, and receipt of matching funds through partnerships with state and federal agencies.[7]

Permit requirements under the CWA already add an additional layer of federal regulatory oversight on top of the state-based regulatory scheme, and result in significant cost increases and overall delay in the development process. For example, due to limited staff support at the Corps' Omaha District Office, individual permits under section 404 of the CWA (hereafter "404 Permits") currently take up to eighteen (18) months to process. Permitting costs typically range between $25,000 and $100,000, accounting for legal, technical and logistical (e.g., mitigation) costs. Engaging the Agencies in the permit application process is no guarantee a permit will be granted; in those instances where a permit is denied, development of a property at its highest and best use is effectively precluded. These costs, along with the uncertainty of the permit approval process, will only increase under the Proposed Rule's expansion of the scope of federal jurisdiction, and will directly impinge on land-use decisions at the state and local level.

Furthermore, changes to the federal definition of WOTUS will impact the administration of CWA permit programs administered by NDEQ (section 402 NPDES permits, sections 303 and 305 Water Quality Standards and TMDLs, and section 401 State Certification). The Proposed Rule's broad expansion of jurisdiction will not only require an in-depth review of NDEQ's rules, regulations, and CWA permitting procedures, but will also result in significant cost increases for the regulated community and overall delay in the development process.

The Coalition supports the Agencies' goals of improving predictability and clarifying the scope of WOTUS under the CWA.[8] However, the Agencies seek to accomplish these goals through an unprecedented reliance on undefined groundwater connections, and non-hydrologic connections previously rejected by the Supreme Court, as the basis for the assertion of federal jurisdiction over any isolated intrastate body of water. The Agencies' flawed assumptions effectively shift the burden of proving liability under the CWA to the regulated community. Within the Proposed Rule, the Agencies have also left open the question of whether or how current exemptions from the CWA will be retained. Furthermore, the Agencies have failed to comply with the Regulatory Flexibility Act, as amended by the Small Business Regulatory Enforcement Fairness Act

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[6] See, eg. Spencer Parkinson, Decision Innovation Solutions, "Economic Impact of the Ability of Nebraska Agriculture to Irrigate - The Case of 2012." November 26, 2012. http://www.nefb.org/resources/handlers/StorageContainer.ashx?path=b9f7ee3f-8bd1-42b7-91a8-f735dc64668e.

[7] See, *e.g.* NEB. REV. STAT. §§ 2-3225, 2-3226.01-.04 through .05, 61-218.

[8] 79 Fed. Reg. 22188

(collectively, the "RFA")[9], which sets forth procedural steps designed to safeguard small governmental jurisdictions, such as the Coalition's members. For these reasons, the Proposed Rule should be withdrawn, because it will impermissibly impact water users and state and local entities responsible for the management of ground and surface water resources. Below are detailed comments addressing the Agencies' impermissible expansion of federal jurisdiction, omission of current exemptions from the CWA, and failure to comply with the RFA.

The Agencies cannot shift the burden of proof to the regulated community by relying on undefined groundwater and non-hydrologic connections as the basis for asserting federal jurisdiction.

Under the CWA, the Agencies carry the burden of proving a person discharged a pollutant from a point source into a WOTUS without a permit. Under the current rule, jurisdiction is not always assumed, and a case-by-case, site-specific determination is often made to determine whether jurisdiction will be asserted under the CWA.[10] Today, many of the Coalition's member NRDs manage water projects that are currently unpermitted by the Corps, or NDEQ pursuant to the CWA; the same is true for many of the projects and development activities undertaken by private landowners, irrigation districts, drainage districts, and small businesses located within the jurisdictional territory of each of the Coalition's member NRDs.

Rather than respect constitutional constraints on the authority granted under the CWA, and set forth in *Solid Waste Agency of No. Cook Cty v. Corps of Engineers* ("SWANCC")[11] and *Rapanos v. U.S.,*[12] and their lineage, the Agencies have relied on overly broad scientific justifications (many tenuous at best) to convert the "significant nexus" concept (a legal term of art) into a sweeping regulatory tool under which *any* chemical, physical, or biological connection, alone or in the aggregate, legitimizes the Agencies' exercise of jurisdictional authority under the Proposed Rule.

Specifically, the Proposed Rule's expansive definitions of "neighboring," "riparian," and "tributary," expand the scope of presumed federal jurisdiction upon any showing by the Agencies that a chemical, physical, or biological connection between an isolated intrastate body or conveyance of water and a traditionally navigable body of water is *not insignificant.*

The uew definitions of "Neighboring" and "Riparian Area"

The Proposed Rule alters a current category of jurisdictional waters to include "all waters (not just wetlands) **adjacent**" to waters susceptible to use in interstate or foreign commerce, waters

[9] 5 U.S.C. § 601 *et seq.*

[10] See, e.g, Revised Guidance on Clean Water Act Jurisdiction Following the Supreme Court Decision in *Rapanos v. U.S.* and *Carabell v. U.S.* – December2 , 2008 (http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/juris_images.pdf); Title 119, NDEQ's Rules and Regulations Pertaining to the Issuance of Permits under the National Pollutant Discharge Elimination System (http://deq.ne.gov/RuleAndR.nsf/Title_119.xsp).

[11] 121 S. Ct. 675 (2001)

[12] 126 S. Ct. 2208 (2006)

subject to the ebb and flow of the tide, impoundments and tributaries of such waters, and the territorial seas ("Proposed 1-5 Waters").[13] For these waters, jurisdiction is assumed by rule, and no case-by-case determination will be made by the Agencies to justify federal regulation.

Within the definition of the term "adjacency" is the term "neighboring" which is newly defined as all waters located within a riparian area or floodplain, as well as waters with a "shallow subsurface hydrologic connection" to Proposed 1-5 Waters. Also included within the term "neighboring" is the term "riparian area," which includes any area "bordering where surface or subsurface hydrology directly influence ... the animal community."

No definition is provided for the scope of "shallow subsurface hydrologic connection" or "subsurface hydrology." The State of Nebraska has a relatively high groundwater table throughout most of the State,[14] and the interconnection between groundwater sources and local river systems makes it unlikely that the Coalition's member NRDs, or landowners within their respective jurisdictions, could engage in development activities or implement and manage flood control, drainage, and irrigation projects without creating some form of open water that would fall within the category of "adjacent waters."

In support of these sweeping definitions, the Agencies have also cited to overland migration patterns of plant and animal species, which ironically require the *absence of a surface hydrologic connection*. Remarkably, the Proposed Rule explicitly states that hydrologic connections are *not* necessary to establish jurisdiction where it can be shown that overland migration patterns of plants and animals establish links between and among water bodies.[15] Regardless of the number of species of plants or animals cited by the Agencies, this approach is no different than the previously-rejected Migratory Bird Rule[16], which similarly failed to require any surface water connection between an isolated water and a traditionally navigable water.

The new definition of "Tributary"

Under the Proposed Rule, a "tributary" is categorically jurisdictional, and includes wetlands, lakes, ponds, impoundments, canals, and ditches, whether natural, man-altered, or man-made, if they contribute flow either directly **or through another water** to an interstate water, interstate wetlands, or territorial sea.[17] No meaningful exemption from this definition is provided,[18] and no

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[13] 40 C.F.R. 230.3(s)(6)

[14] See Exhibit A, image depicting depth to groundwater in Nebraska.

[15] 79 FR 22240, 22242, 22249 (discussing how overland movements of plants and animals establish the jurisdictional links between waters).

[16] *SWANCC, v. U.S. Army Corps of Engineers*, 531 U.S. 159, 166-67, 121 S. Ct. 675, 680 (2001), (The Agencies have interpreted the CWA "to cover the abandoned gravel pit at issue here because it is used as habitat for migratory birds. We conclude that the 'Migratory Bird Rule' is not fairly supported by the CWA."

[17] 40 CFR 230.3(u)(5) (emphasis supplied).

[18] Id. Exempt from the definition of "tributary" are ditches that "drain only uplands" and "do not contribute flow either directly or through another water" to any TNW, interstate water, interstate wetland, or territorial sea.

case-by-case determination as to the status of the water will be made. Under the plain language of the Proposed Rule, this means *any* hydrologic connection to a traditionally navigable water, interstate water, or interstate wetland, will result in the characterization of an isolated intrastate body or conveyance of water as a "tributary."

In Nebraska's large river valleys, it is impossible to develop commercially-viable land, or implement flood control, irrigation, or drainage projects without creating some form of open water with some remote hydrologic connection to a traditionally navigable water, or other interstate water or interstate wetland.[19]

The images attached hereto as Exhibits A, B, and C drive home the magnitude of the proposed expansion of federal CWA jurisdiction due to the Agencies' expansive definitions of "neighboring," "riparian," and "tributary." As plainly illustrated in the attachments, no portion of the State of Nebraska is outside of a floodplain, or lacking some form of a subsurface hydrologic connection either directly, or through another water, to an interstate water. Thus, for all practical purposes, the NRDs' flood control, drainage, and irrigation projects (and development activities undertaken by private individuals, entities, and other governmental units within the NRDs' territories) would be immediately subjected to federal CWA jurisdiction, absent any showing by the Agencies that site-specific connections to interstate surface waters are in fact significant.

The maps illustrate the sweeping impact of the Proposed Rule's expansive definitions of categorically jurisdictional water: by presuming all open intrastate bodies or conveyances of water have some chemical, physical, or biological connection to a traditionally navigable water that is not insignificant, every member of the regulated community will be saddled with the expensive, time-consuming burden of proving such connections are not significant.

Prior attempts to assert jurisdiction over isolated intrastate bodies or conveyances of water, whether through broad definitions of statutory terms or through identifying isolated waters as habitat for migratory birds, have been rejected as an overreach of the authority granted by the Clean Water Act.[20] The Proposed Rule is yet another attempt to expand federal jurisdiction over conceivably all waters through exactly the same means.

The Proposed Rule Indirectly Asserts Federal Control Over Groundwater and Local Land-Use Decisions.

By relying on shallow subsurface groundwater connections to justify categorical jurisdiction over otherwise isolated intrastate bodies or conveyances of water, the Agencies are indirectly regulating groundwater, over which the States alone have jurisdiction. The Court has established limits on the scope of the Agencies' authority under the Clean Water Act, holding in *Rapanos*:

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[19] See Exhibit B, image depicting drainage basins of major rivers within Nebraska; see also Exhibit C, image depicting wetlands identified by EPA Region 7.

[20] *SWANCC. v. U.S. Army Corps of Engineers*, 531 U.S. 159, 166-67, 121 S. Ct. 675, 680 (2001), (The Agencies have interpreted the CWA "to cover the abandoned gravel pit at issue here because it is used as habitat for migratory birds. We conclude that the 'Migratory Bird Rule' is not fairly supported by the CWA." *See also United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133, 106 S.Ct. 455 (1985) (the concept of adjacency is defined as wetlands that actually abutted on a navigable waterway).

> [C]lean water is not the *only* purpose of the [CWA]. **So is the preservation of primary state responsibility for ordinary land-use decisions**. ... It would have been an easy matter for Congress to give the Corps jurisdiction over all wetlands (or, for that matter, all dry lands) that 'significantly affect the chemical, physical, and biological integrity of 'waters of the United States.' **It did not do that**[.]"

Rapanos v. United States, 547 U.S. 715, 755-56, 126 S. Ct. 2208, 2234 (2006) (emphasis supplied). [21] The structure of the CWA indicates that Congress did not intend groundwater and navigable waters to be synonymous. As explained by the District Court in *Washington Wilderness Coal. v. Hecla Min. Co.*:

> If the terms were synonymous, it would not be necessary for Congress to make distinct references to groundwater and navigable water. ...The legislative history of the [CWA] also demonstrates that Congress did not intend that discharges to isolated ground water be subject to permit requirements. ... 'Because the jurisdiction regarding groundwater is so complex and varied from State to State, the committee did not adopt this recommendation.'

870 F. Supp. 983, 990 (E.D. Wash. 1994), citing S. Rep. No. 414, 92nd Cong., 1st Sess. 73 (1971), U.S. Code Cong. & Admin. News 1972, pp. 3668, 3739. Moreover, a number of courts have concluded that the possibility of a hydrological connection between ground and surface waters is insufficient to justify CWA regulation.[22]

Despite the Agencies' statements to the contrary,[23] the Proposed Rule *does* include groundwater, because without groundwater, there is *no* hydrologic link between many isolated waters and traditionally navigable waters.[24] Any past practice or proposed standard under which the Agencies establish jurisdiction over isolated waters by virtue of groundwater, exempt waters, or any other undefined connections, must be rejected.[25] Simply put, the Agencies should not attempt to assert jurisdiction over an otherwise isolated water by piggybacking on non-jurisdictional waters. The Agencies are required to establish jurisdiction over each link from traditionally navigable water to isolated intrastate waters.

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[21] *See also Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Engineers*, 531 U.S. 159, 166-67, 121 S. Ct. 675, 680 (2001); *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council*, 485 U.S. 568, 575, 108 S.Ct. 1392, 99 (1988); *FERC v. Mississippi*, 456 U.S. 742, 767–768, n. 30, 102 S.Ct. 2126 (1982); *Hess v. Port Authority Trans–Hudson Corporation*, 513 U.S. 30, 44, 115 S.Ct. 394, 130 L.Ed.2d 245 (1994); and S.Rep. No. 414, 92nd Cong., 1st Sess. 73 (1971), U.S.Code Cong. & Admin.News 1972, pp. 3668, 3739.

[22] See *Oconomowoc Lake v. Dayton Hudson Corp.*, 24 F.3d 962 (7th Cir.1994); *Kelley v. United States*, 618 F.Supp. 1103 (W.D.Mich.1985).

[23] "The agencies have never interpreted 'waters of the United States' to include groundwater and the Proposed Rule explicitly excludes groundwater, including groundwater drained through subsurface drainage systems." 79 Fed. Reg. 22218

[24] Comments to the SAB Report indicate that in some cases, the *only* connection between water bodies is groundwater. See Science Advisory Board (SAB) Draft Report (4/23/14). *See also* SAB letter to EPA regarding the scientific and technical basis of the Proposed Rule regarding "waters of the U.S." (9/30/14).

[25] 79 FR 22219; GAO Report – "Waters and Wetlands" (page 23) February, 2004.

Equally troubling is the Agencies' disregard for all existing layers of state and local regulatory measures, which provide protection for groundwater and intrastate surface water.[26] These meaningful regulatory measures will only be hampered by another layer of federal interference, and will directly impact land use decisions made by state and local governmental entities, such as the Coalition's member NRDs, and private entities, who must account for the cost and timeframe for the permitting process and the impacts of permit denials on land values and potential development. The negative impacts to the local tax base for governmental entities such as the NRDs, and the stifling effect on development activities under the Proposed Rule cannot be discounted.

Asserting blanket jurisdiction over any and all waters will result in federal control over the regulation of land use – a primary responsibility of the States.[27] This infringement on State and local responsibilities to control the development of localized natural resources and land uses is not supported by the language or history of the CWA.[28] As written, the Proposed Rule is not based upon a permissible construction of the CWA and will not withstand a challenge.[29]

The Agencies Should Provide Greater Certainty to the Regulated Community by Amending the Proposed Rule to Explicitly Include All Existing Exemptions.

Formal regulatory exemptions from the CWA provide the greatest certainty for the regulated community. Agency representatives have repeatedly stated to Congress, the media, and the regulated community, that *all* existing exemptions will be maintained,[30] and a specific list of waters that will not be deemed WOTUS is included in the Proposed Rule.[31] However, the Agencies have failed to include the current language of all existing exemptions in the Proposed Rule.[32] Instead, new qualifying language replaces the exemption for ditches, and the interpretive

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[26] NEB. REV. STAT. §§ 2-3201 *et seq.*; Nebraska Groundwater Management and Protection Act, NEB. REV. STAT. §§ 46-701 *et seq.*, NEB. REV. STAT. § 2-32,115, NEB. REV. STAT. § 25-1064; NEB. REV. STAT. § 25-2159; NEB. REV. STAT. § 25-2160; NEB. REV. STAT. § 37-807; NEB. REV. STAT. § 28-106; Nebraska Environmental Protection Act, Neb. Rev. Stat. § 81-1501, *et seq.*

[27] *Hess v. Port Authority Trans–Hudson Corporation,* 513 U.S. 30, 44, 115 S.Ct. 394, 130 L.Ed.2d 245 (1994) ("[R]egulation of land use [is] a function traditionally performed by local governments"); *FERC v. Mississippi,* 456 U.S. 742, 767–768, n. 30, 102 S.Ct. 2126, 72 L.Ed.2d 532 (1982) (Regulation of land use, as through the issuance of the development permits, is a quintessential state and local power.)

[28] *SWANCC. v. U.S. Army Corps of Engineers*, 531 U.S. 159, 174, 121 S. Ct. 675, 683-84, 148 L. Ed. 2d 576 (2001) ("Rather than expressing a desire to readjust the federal-state balance in this manner, Congress chose to recognize, preserve, and protect the primary responsibilities and rights of States ... to plan the development and use ... of land and water resources[.]")

[29] *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843, 104 S.Ct. 2778 (1984); *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Engineers*, 531 U.S. 159, 174, 121 S. Ct. 675, 684, 148 L. Ed. 2d 576 (2001).

[30] See http://www2.epa.gov/uswaters: ("All agricultural exemptions and exclusions from Clean Water Act requirements that have existed for nearly 40 years have been retained with clarification.")

[31] 79 Fed. Reg. 22218.

[32] The Agencies have also recently adopted an interpretive rule imposing mandatory compliance with Natural Resources Conservation Service (NRCS) standards as the basis for qualifying for a number of agricultural

exemption for pits excavated in dry land for the purpose of obtaining fill, sand and gravel has been omitted from the list delineated within the Proposed Rule.

The Proposed Rule's exemption for ditches is particularly troubling, as it does not cover any ditches that contribute flow, either directly or through another water, to a traditionally navigable water, interstate water, interstate wetland, or impoundments of such waters or tributaries.[33] The Agencies' overbroad assumptions regarding the impacts an isolated intrastate conveyance, such as a ditch, must have if it indirectly contributes flow to a traditionally navigable water effectively negates the exemption. Absent a meaningful exemption, federal jurisdiction will be asserted over many ditches under the broad definition of "tributary."

Failure to explicitly affirm all existing exemptions within the Proposed Rule will create confusion within the regulated community as to whether the existing exemptions remain in effect, which is further complicated by the increase in federal jurisdiction discussed above. Clarifying the exemptions will allow members of the regulated community to avoid a burdensome permit application process, the cost and timeframe for which will directly translate into higher costs for development activities, or avoidance of development altogether.

The Agencies have violated the RFA, which was enacted and amended specifically to protect small entities, such as the Coalition's member NRDs.

The Proposed Rule's expansion of the scope of waters deemed jurisdictional under the CWA will place additional, unnecessary burdens on those who rely on water for their personal and economic survival. Such burdens will negatively affect or otherwise prevent[34] development activities, production capacities, and land values, all of which are factors that directly impact the tax base of the Coalition's member NRDs, as well as the ability of the NRDs to implement and manage flood control, drainage, and irrigation projects.

The RFA[35] requires the Agencies to review the Proposed Rule to determine if it will have a "significant economic impact on a substantial number of small entities."[36] Due to its extraordinary potential to adversely impact the regulated community, it is especially important that the Proposed Rule be subjected to all procedural steps designed to safeguard small

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exemptions. The Coalition opposes the Agencies' efforts to limit the exemptions for agricultural activities through the interpretive rule.

[33] Proposed definition at 40 C.F.R. 230.3(t)(4)

[34] *Review of 2014 EPA Economic Analysis of Proposed Revised Definition of Waters of the United States*, David Sunding, Ph.D., May 15, 2014 (at page 15-19)..

[35] 5 U.S.C. § 601 *et seq.*

[36] 5 U.S.C. § 601(6), "the term 'small entity' shall have the same meaning as the terms 'small business', 'small organization' and 'small governmental jurisdiction[.]'"

governmental jurisdictions, such as NRDs, and other small entities, from overzealous regulation.[37]

In part because so many proposed rules were subjected to meaningless "rubber stamp" certifications, Congress amended the RFA by enacting the Small Business Regulatory Enforcement Fairness Act of 1996 ("SBREFA"). The SBREFA amended section 611 of the RFA to allow small entities, such as the Coalition's member NRDs, to obtain judicial review of agency noncompliance with the RFA and tightened the requirement for certifications so the Agencies must provide the factual basis that supports their certification statement.[38] The SBREFA also requires EPA to convene small business review panels whenever its planned rules are likely to have a significant economic impact on a substantial number of small entities. The SBREFA panels include small entity representatives who will be affected by the rule, who advise representatives from the Small Business Administration's Office of Advocacy, the Office of Management and Budget's Office of Information and Regulatory Affairs, and the Agencies on probable real-world impacts and potential regulatory alternatives. The panel must then prepare a report containing recommended alternatives to the Agencies and the panel's recommendations could be incorporated into the Proposed Rule.[39]

These laws and policies were put in place specifically to protect small entities such as the Coalition's member NRDs. However, the Agencies have violated these laws and policies by disingenuously certifying the Proposed Rule will have no substantial impact on protected entities. Specifically, the Administrator concludes:

> The scope of regulatory jurisdiction in this proposed rule is narrower than that under the existing regulations. See 40 CFR 122.2 (defining ''waters of the United States''). Because *fewer* waters will be subject to the CWA under the proposed rule than are subject to regulation under the existing regulations, this action will not affect small entities to a greater degree than the existing regulations. As a consequence, this action if promulgated will not have a significant adverse economic impact on a substantial number of small entities, and therefore no regulatory flexibility analysis is required.

79 Fed. Reg. at 22220. This conclusion, and the factual basis on which it is predicted, is patently false. As set forth above, the *categorical* inclusion of *all* waters within so-called "neighboring" and "riparian areas" as "adjacent" based upon undefined groundwater connections and overland migration patterns of plant and animal species necessarily results in the assertion of federal

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[37] 5 U.S.C. § 602(a)(1). *See also* 5 USC § 601(5), "the term 'small governmental jurisdiction' means governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand[.]" According to 2000 US Census data, at least 15 of Nebraska's 23 NRDs qualify as small governmental jurisdictions. See http://www.dnr.ne.gov/population-estimates-and-census-data; http://www.dnr.ne.gov/census-2000-population-compared-to-1990-by-nrds.

[38] 5 U.S.C. § 611

[39] The RFA was further strengthened on August 13, 2002, when President Bush signed Executive Order 13,272. This Executive Order requires the Agencies to consider the Small Business Administration's Office of Advocacy's written comments on proposed rules and include a response to those comments in the final rule.

jurisdiction over additional waters. Barring an obvious surface connection, these waters would have been subjected to case-by-case analysis, but will be automatically captured as jurisdictional.[40] In addition, the proposed aggregation of otherwise isolated waters to determine their cumulative impact on navigable waters will inherently sweep these otherwise non-jurisdictional waters into the regulatory network.[41] The same results from the inclusion of strictly ephemeral waterways located higher in stream systems.

The Agencies previously recognized their existing policy, as set forth in *Draft Guidance on Identifying Waters Protected by the Clean Water Act*,[42] would expand the number of waters over which they assert jurisdiction. They said of that guidance:

> The agencies expect, based on relevant science and recent field experience, that under the understandings stated in this draft guidance, the extent of waters over which the agencies assert jurisdiction under the CWA will increase compared to the extent of waters over which jurisdiction has been asserted under existing guidance, though certainly not to the full extent that it was typically asserted prior to the Supreme Court decisions in *SWANCC* and *Rapanos*.

The Proposed Rule, which codifies some elements of the Guidance, and expands on others, is clearly even broader in scope. Similarly, proponents of the Proposed Rule tout it for "restoring" protection to waters over which the Agencies do not presently assert jurisdiction, which is, of course, the basis of their support.[43]

Most importantly, the fact that more waters will be regulated under the Proposed Rule was confirmed by the Agencies in their written analysis of the potential costs and benefits associated with this action, titled "*Economic Analysis of Proposed Revised Definition of Waters of the United States*," which states that more waters will be regulated under the Proposed Rule.

The Agencies have failed to prepare an initial regulatory flexibility analysis ("IRFA") as required by the RFA, and make it available for public review and comment simultaneously with the Agencies' publication of general notice of proposed rulemaking for the rule.[44] The IRFA must describe the anticipated economic impacts of the Proposed Rule on small entities, and evaluate whether alternative actions that would minimize the rule's impact on small entities would achieve the regulatory purpose.[45] The Agencies must also prepare a final regulatory

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[40] 79 Fed. Reg. at 22219.

[41] *See* e.g., 79 Fed. Reg. at 22214.

[42] See http://water.epa.gov/lawsregs/guidance/wetlands/upload/wous_guidance_4-2011.pdf.

[43] See, e.g., *Advancing America's Clean Water Legacy: Proposed Clean Water Protection Rule Will Better Protect Streams and Wetlands* available at http://www.nrdc.org/water/files/clean-water-legacy-FS.pdf; *The Clean Water Rule: Protecting America's Waters* available at http://www.nwf.org/~/media/PDFs/Water/WOTUS%20Proposed%20rule%20fact%20sheet%203252014.pdf.

[44] 5 U.S.C. § 603(a)

[45] 5 U.S.C. § 603(b-c)

flexibility analysis ("FRFA").[46] The FRFA must summarize any issues raised by public commenters, describe the steps taken by the Agencies to minimize burdens on small entities, and explain why the Agencies selected the final regulatory action they did, and why other alternatives were rejected.[47]

As President Clinton made clear in Executive Order 12,866, "The American people deserve a regulatory system that works for them, not against them[.]" The Order also demands: "Each agency shall tailor its regulations to impose the least burden on society, including individuals, businesses of differing sizes, and other entities (including small communities and governmental entities), consistent with obtaining the regulatory objectives[.]"[48]

The Agencies have improperly circumvented their duties under the RFA, and have impermissibly shifted their burden of proof to the regulated community. The very real costs imposed on small entities under the Proposed Rule cannot be ignored. The Agencies must perform a proper RFA analysis or the Proposed Rule will remain legally and factually deficient.[49]

CONCLUSION

The Proposed Rule should be withdrawn, as the jarring increase in the scope of federal jurisdiction under the Proposed Rule only amplifies existing uncertainty and inconsistency in the application of the CWA, and further upsets the balance between state and federal control over land use decisions and the management of groundwater. The Agencies' goals are better served through an explicit affirmation of current exemptions; furthermore, the Agencies should abandon their effort to regulate groundwater and assert jurisdiction over isolated intrastate waters under theories rejected by the Supreme Court, and must ascertain the real costs of this (or any subsequent) Proposed Rule in conformance with RFA requirements.

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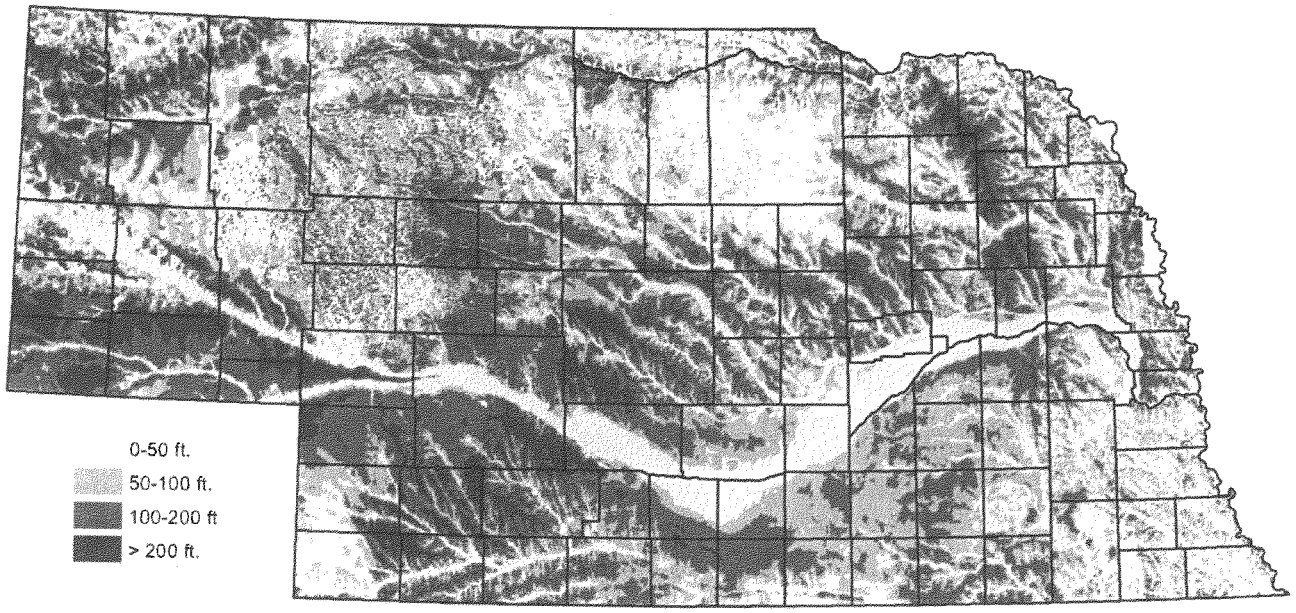
[46] 5 U.S.C. § 604(a)

[47] 5 U.S.C. § 604(a)

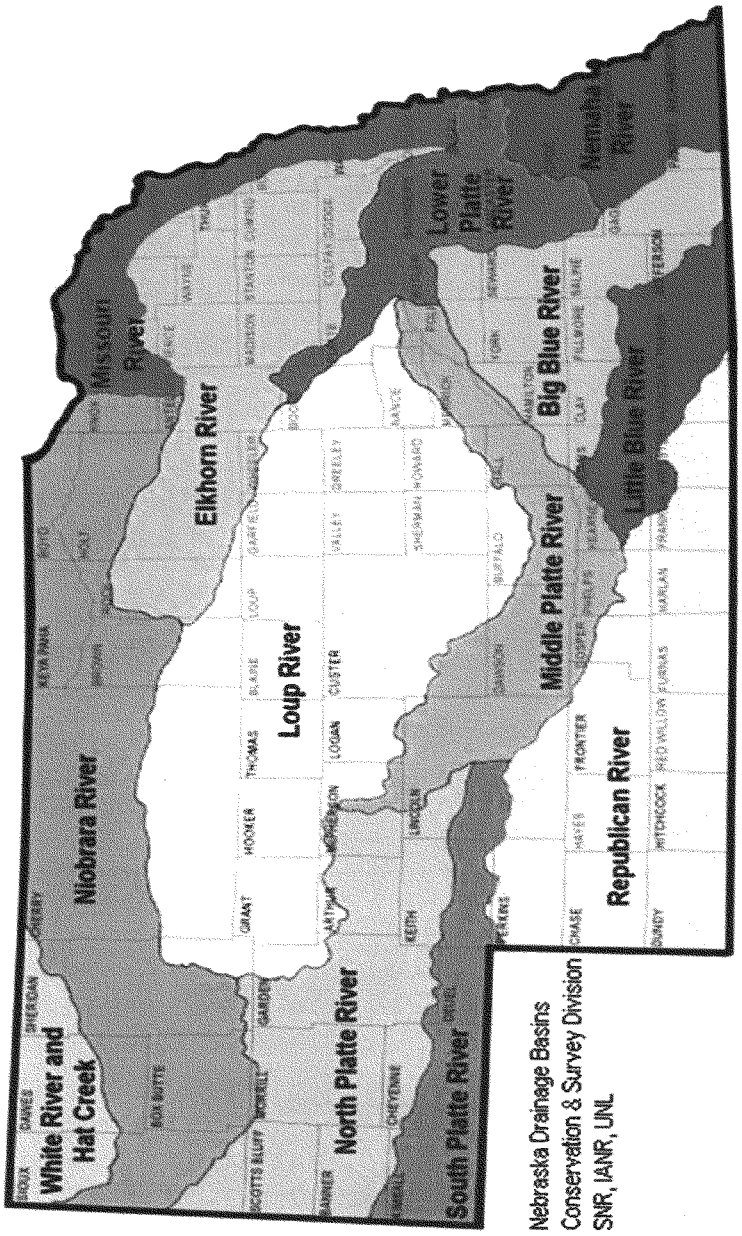
[48] *Id.*, Section 1(b)(11)

[49] *Compare* April 9, 2014 letter from members of the Senate Committee on Environment and Public Works, urging the agencies to conduct a proper RFA analysis (see Exhibit D).

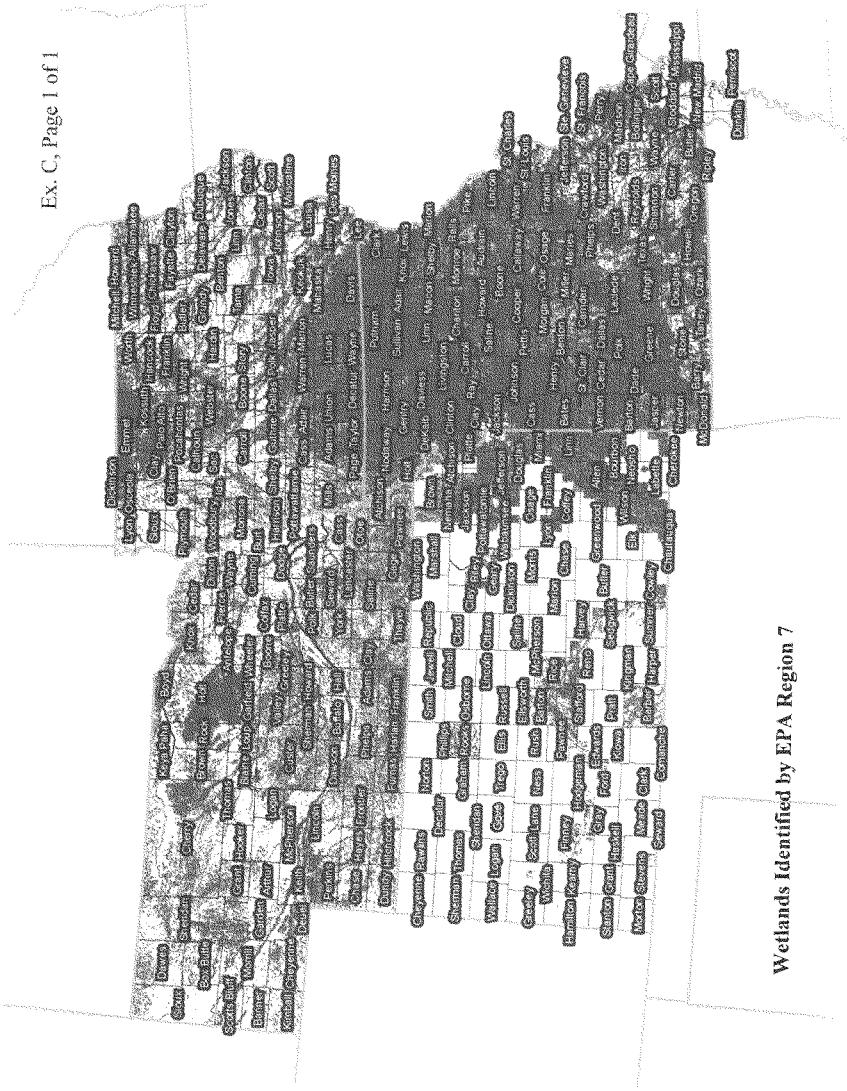


Generalized depth to groundwater. (Source: University of Nebraska, Conservation and Survey Division, 1998)

Ex. B, Page 1 of 1



Nebraska Drainage Basins
Conservation & Survey Division
SNR, IANR, UNL



Wetlands Identified by EPA Region 7

Docket ID No. EPA–HQ–OW–2011–0880

Comments to the

Definition of "Waters of the United States"

Under the Clean Water Act,

79 Fed. Reg. 22188 (April 21, 2014)

Submitted on behalf of the Nebraska Association of Resources Districts by:

Donald G. Blankenau
Vanessa Silke
BLANKENAU WILMOTH JARECKE LLP
1023 Lincoln Mall, Suite 201
Lincoln, NE 68508-2817
don@aqualawyers.com
vanessa@aqualawyers.com

PREFACE

The Nebraska Association of Resources Districts ("NARD") is an interlocal entity comprised of Nebraska's twenty-three Natural Resources Districts ("NRDs"), which conserve, protect, develop, and manage the natural resources of the State of Nebraska.[1] NARD coordinates efforts among NRDs and provides resources, services, studies, and facilities needed for NRD representation before agencies, tribunals, courts and any administrative, legislative, executive, or judicial bodies. NARD also informs and educates the public concerning the NRDs' efforts to conserve, sustain, and improve Nebraska's natural resources and environment.

NARD appreciates the opportunity to submit these comments on the proposed *Definition of "Waters of the United States"* (hereafter "WOTUS") *Under the Clean Water Act*,[2] ("CWA") (collectively, the "Proposed Rule") issued by the U.S. Army Corps of Engineers ("Corps") and the U.S. Environmental Protection Agency ("EPA") (collectively, the "Agencies").

INTRODUCTION

NARD is comprised of all twenty-three of Nebraska's NRDs, each of which is a political subdivision of the State of Nebraska.[3] Each NRD is charged by statute with the regulation and administration of groundwater quantity and quality within their respective territory.[4] The Nebraska Legislature also empowered the NRDs, along with Nebraska Department of Natural Resources ("DNR"), to apply each entity's expertise to bring about an orderly administration and regulation of hydrologically connected surface and ground waters.[5] Furthermore, NRDs coordinate regulatory efforts with the Nebraska Department of Environmental Quality ("NDEQ"), which administers the NPDES permit program with oversight from EPA, as well as a number of state-based permits and programs to protect ground and surface water quality under Nebraska's Environmental Protection Act.[6] NARD's members also obtain and provide,

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[1] NEB. REV. STAT. §§ 2-3201 *et seq.* The jurisdictions of NARD's member NRDs encompass the entirety of the State of Nebraska.

[2] 79 Fed. Reg. 22188 (April 21, 2014)

[3] NARD Members include: Upper Republican NRD, Upper Niobrara White NRD, Upper Loup NRD, Upper Elkhorn NRD, Upper Big Blue NRD, Twin Platte NRD, Tri-Basin NRD, South Platte NRD, Papio-Missouri River NRD, North Platte NRD, Nemaha NRD, Middle Republican NRD, Middle Niobrara NRD, Lower Republican NRD, Lower Platte South NRD, Lower Platte North NRD, Lower Niobrara NRD, Lower Loup NRD, Lower Elkhorn NRD, Lower Big Blue NRD, Little Blue NRD, Lewis & Clark NRD, and Central Platte NRD.

[4] NEB. REV. STAT. §§ 2-3201 *et seq.*; *See also* NEB. REV. STAT. §§ 2-3229, such purposes include: (1) erosion prevention and control, (2) prevention of damages from flood water and sediment, (3) flood prevention and control, (4) soil conservation, (5) water supply for any beneficial uses, (6) development, management, utilization, and conservation of ground water and surface water, (7) pollution control, (8) solid waste disposal and sanitary drainage, (9) drainage improvement and channel rectification, (10) development and management of fish and wildlife habitat, (11) development and management of recreational and park facilities, and (12) forestry and range management.

[5] Nebraska Groundwater Management and Protection Act, NEB. REV. STAT. §§ 46-701 *et seq.*, NEB. REV. STAT. § 2-32,115, NEB. REV. STAT. § 25-1064; NEB. REV. STAT. § 25-2159; NEB. REV. STAT. § 25-2160; NEB. REV. STAT. § 37-807; NEB. REV. STAT. § 28-106

[6] *See* NEB. REV. STAT. § 81-1501, *et seq.*

individually and by partnering with other state and local entities, funding for projects which are vital to the proper management of Nebraska's natural resources.[7] Through the implementation of statutory duties and responsibilities, nearly every use of groundwater and surface water in the State of Nebraska is regulated in some way by the NRDs. Furthermore, NRDs directly implement and manage a number flood control, drainage, and irrigation projects for which a CWA permit must be obtained if the Agencies assert federal jurisdiction.

Agricultural production and groundwater-dependent development form the backbone of Nebraska's economy.[8] Land values and access to water are the two major components which dictate producers' decisions to locate facilities and engage in development activities. These decisions are critical to the local tax base upon which the NRDs must rely in order to carry out statutory duties and responsibilities, including the implementation and ongoing management of flood control, drainage, and irrigation projects, through the levy of taxes, special occupation taxes, the issuance of bonds, and receipt of matching funds through partnerships with state and federal agencies.[9]

Permit requirements under the CWA already add an additional layer of federal regulatory oversight on top of the state-based regulatory scheme, and result in significant cost increases and overall delay in the development process. For example, due to limited staff support at the Corps' Omaha District Office, individual permits under section 404 of the CWA (hereafter "404 Permits") currently take up to eighteen (18) months to process. Permitting costs typically range between $25,000 and $100,000, accounting for legal, technical and logistical (e.g., mitigation) costs. Engaging the Corps in the permit application process is no guarantee a permit will be granted; in those instances where a permit is denied, development of a property at its highest and best use is effectively precluded. These costs, along with the uncertainty of the permit approval process, will only increase under the Proposed Rule's expansion of the scope of federal jurisdiction, and will directly impinge on land-use decisions at the state and local level.

Furthermore, changes to the federal definition of WOTUS will impact the administration of CWA permit programs administered by NDEQ (section 402 NPDES permits, sections 303 and 305 Water Quality Standards and TMDLs, and section 401 State Certification). The Proposed Rule's broad expansion of jurisdiction will not only require an in-depth review of NDEQ's rules, regulations, and CWA permitting procedures, but will also result in significant cost increases for the regulated community and overall delay in the development process.

NARD supports the Agencies' goals of improving predictability and clarifying the scope of WOTUS under the CWA.[10] However, the Agencies seek to accomplish these goals through an

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[7] See, e.g., NEB. REV. STAT. §§ 2-1501 *et seq.*; NEB. REV. STAT. §§ 2-15,122 *et seq;* NEB. REV. STAT. §§ 2-4201 *et seq.*

[8] See, eg. Spencer Parkinson, Decision Innovation Solutions, "Economic Impact of the Ability of Nebraska Agriculture to Irrigate - The Case of 2012." November 26, 2012. http://www.nefb.org/resources/handlers/StorageContainer.ashx?path=b9f7ee3f-8bd1-42b7-91a8-f735dc64668e.

[9] See, *e.g.* NEB. REV. STAT. §§ 2-3225, 2-3226.01-.04 through .05, 61-218.

[10] 79 Fed. Reg. 22188

unprecedented reliance on undefined groundwater connections, and non-hydrologic connections previously rejected by the Supreme Court, as the basis for the assertion of federal jurisdiction over any isolated intrastate body of water. The Agencies' flawed assumptions effectively shift the burden of proving liability under the CWA to the regulated community. Within the Proposed Rule, the Agencies have also left open the question of whether or how current exemptions from the CWA will be retained. Furthermore, the Agencies have failed to comply with the Regulatory Flexibility Act, as amended by the Small Business Regulatory Enforcement Fairness Act (collectively, the "RFA")[11], which sets forth procedural steps designed to safeguard small governmental jurisdictions, such as NARD's members.

For these reasons, the Proposed Rule should be withdrawn, because it will impermissibly impact water users and state-based entities responsible for the management of ground and surface water resources. Below are detailed comments addressing the Agencies' impermissible expansion of federal jurisdiction, omission of current exemptions from the CWA, and failure to comply with the RFA.

The Agencies cannot shift the burden of proof to the regulated community by relying on undefined groundwater and non-hydrologic connections as the basis for asserting federal jurisdiction.

Under the CWA, the Agencies carry the burden of proving a person discharged a pollutant from a point source into a WOTUS without a permit. Under the current rule, jurisdiction is not always assumed, and a case-by-case, site-specific determination is often made by the Corps and NDEQ to determine whether jurisdiction will be asserted under the CWA.[12] Today, many of NARD's member NRDs manage water projects that are currently unpermitted by the Corps, or NDEQ pursuant to the CWA; the same is true for many of the projects and development activities undertaken by private landowners, irrigation districts, drainage districts, and small businesses located within the jurisdictional territory of each of NARD's member NRDs. The Agencies assert that the Proposed Rule will not require additional permits to be obtained. However, the plain language of the Proposed Rule and the Science Advisory Board's ("SAB") draft comments and letter to the EPA contradict the Agencies' claims that the Proposed Rule does not expand jurisdiction or include groundwater.

Rather than respect constitutional constraints on the authority granted under the CWA, and set forth in *Solid Waste Agency of No. Cook Cty v. Corps of Engineers* ("SWANCC")[13] and *Rapanos v. U.S.*,[14] and their lineage, the Agencies have relied on overly broad scientific

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[11] 5 U.S.C. § 601 *et seq.*

[12] See, e.g, Revised Guidance on Clean Water Act Jurisdiction Following the Supreme Court Decision in *Rapanos v. U.S.* and *Carabell v. U.S.*, dated December 2, 2008 (http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/juris_images.pdf); Title 119, NDEQ's Rules and Regulations Pertaining to the Issuance of Permits under the National Pollutant Discharge Elimination System (http://deq.ne.gov/RuleAndR.nsf/Title_119.xsp).

[13] 121 S. Ct. 675 (2001)

[14] 126 S. Ct. 2208 (2006)

justifications (many tenuous at best) to convert the "significant nexus" concept (a legal term of art) into a sweeping regulatory tool under which *any* chemical, physical, or biological connection, alone or in the aggregate, legitimizes the Agencies' exercise of jurisdictional authority under the Proposed Rule.

Specifically, the Proposed Rule's expansive definitions of "neighboring," "riparian," and "tributary," expand the scope of presumed federal jurisdiction upon any showing by the Agencies that a chemical, physical, or biological connection between an isolated intrastate body or conveyance of water and a traditionally navigable body of water is *not insignificant*.

The new definitions of "Neighboring" and "Riparian Area"

The Proposed Rule alters a current category of jurisdictional waters to include "all waters (not just wetlands) **adjacent**" to waters susceptible to use in interstate or foreign commerce, waters subject to the ebb and flow of the tide, impoundments and tributaries of such waters, and the territorial seas ("Proposed 1-5 Waters").[15] For these waters, jurisdiction is assumed by rule, and no case-by-case determination will be made by the Agencies to justify federal regulation.

Within the definition of the term "adjacency" is the term "neighboring" which is newly defined as all waters located within a riparian area or floodplain, as well as waters with a "shallow subsurface hydrologic connection" to Proposed 1-5 Waters. Also included within the term "neighboring" is the term "riparian area," which includes any area "bordering where surface or subsurface hydrology directly influence ... the animal community."

No definition is provided for the scope of "shallow subsurface hydrologic connection" or "subsurface hydrology." The State of Nebraska has a relatively high groundwater table throughout most of the State,[16] and the interconnection between groundwater sources and local river systems makes it unlikely that NARD's member NRDs, or landowners within their respective jurisdictions, could engage in development activities or implement and manage flood control, drainage, and irrigation projects without creating some form of open water that would fall within the category of "adjacent waters."

In support of these sweeping definitions, the Agencies have also cited to overland migration patterns of plant and animal species, which ironically require **the absence of a surface hydrologic connection**. Remarkably, the Proposed Rule explicitly states that hydrologic connections are **not** necessary to establish jurisdiction where it can be shown that overland migration patterns of plants and animals establish links between and among water bodies.[17] Regardless of the number of species of plants or animals cited by the Agencies, this approach is

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[15] 40 C.F.R. 230.3(s)(6)

[16] *See* Exhibit A, image depicting depth to groundwater in Nebraska

[17] 79 FR 22240, 22242, 22249 (discussing how overland movements of plants and animals establish the jurisdictional links between waters).

no different than the previously-rejected Migratory Bird Rule,[18] which similarly failed to require any surface water connection between an isolated water and a traditionally navigable water.

The new definition of "Tributary"

Under the Proposed Rule, a "tributary" is categorically jurisdictional, and includes wetlands, lakes, ponds, impoundments, canals, and ditches, whether natural, man-altered, or man-made, if they contribute flow either directly **or through another water** to an interstate water, interstate wetlands, or territorial sea.[19] No meaningful exemption from this definition is provided,[20] and no case-by-case determination as to the status of the water will be made. Under the plain language of the Proposed Rule, this means *any* hydrologic connection to a traditionally navigable water, interstate water, or interstate wetland, will result in the characterization of an isolated intrastate body or conveyance of water as a "tributary."

In Nebraska's large river valleys, it is impossible to develop commercially-viable land, or implement flood control, irrigation, or drainage projects without creating some form of open water with some remote hydrologic connection to a traditionally navigable water, or other interstate water or interstate wetland.[21]

The images attached hereto as Exhibits A, B, and C drive home the magnitude of the proposed expansion of federal CWA jurisdiction due to the Agencies' expansive definitions of "neighboring," "riparian," and "tributary." As plainly illustrated in the attachments, no portion of the State of Nebraska is outside of a floodplain, or lacking some form of a subsurface hydrologic connection either directly, or through another water, to an interstate water. Thus, for all practical purposes, the NRDs' flood control, drainage, and irrigation projects (and development activities undertaken by private individuals, entities, and other governmental units within the NRDs' territories) would be immediately subjected to federal CWA jurisdiction, absent any showing by the Agencies that site-specific connections to interstate surface waters are in fact significant.

The maps illustrate the sweeping impact of the Proposed Rule's expansive definitions of categorically jurisdictional water: by presuming all open intrastate bodies or conveyances of water have some chemical, physical, or biological connection to a traditionally navigable water that is not insignificant, every member of the regulated community will be saddled with the expensive, time-consuming burden of proving such connections are not significant.

Prior attempts to assert jurisdiction over isolated intrastate bodies or conveyances of water, whether through broad definitions of statutory terms or through identifying isolated waters as

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[18] *SWANCC. v. U.S. Army Corps of Engineers*, 531 U.S. 159, 166-67, 121 S. Ct. 675, 680 (2001), (The Agencies have interpreted the CWA "to cover the abandoned gravel pit at issue here because it is used as habitat for migratory birds. We conclude that the 'Migratory Bird Rule' is not fairly supported by the CWA."

[19] 40 CFR 230.3(u)(5) (emphasis supplied).

[20] Id. Exempt from the definition of "tributary" are ditches that "drain only uplands" and "do not contribute flow either directly or through another water" to any TNW, interstate water, interstate wetland, or territorial sea.

[21] See Exhibit B, image depicting drainage basins of major rivers within Nebraska; see also Exhibit C, image depicting wetlands identified by EPA Region 7.

habitat for migratory birds, have been rejected as an overreach of the authority granted by the Clean Water Act.[22] The Proposed Rule is yet another attempt to expand federal jurisdiction over conceivably all waters through exactly the same means.

The Proposed Rule Indirectly Asserts Federal Control Over Groundwater and Local Land-Use Decisions.

By relying on shallow subsurface groundwater connections to justify categorical jurisdiction over otherwise isolated intrastate bodies or conveyances of water, the Agencies are indirectly regulating groundwater, over which the States alone have jurisdiction. The Court has established limits on the scope of the Agencies' authority under the Clean Water Act, holding in *Rapanos*:

> [C]lean water is not the *only* purpose of the [CWA]. **So is the preservation of primary state responsibility for ordinary land-use decisions.** ... It would have been an easy matter for Congress to give the Corps jurisdiction over all wetlands (or, for that matter, all dry lands) that 'significantly affect the chemieal, physical, and biological integrity of 'waters of the United States.' **It did not do that**[.]"

Rapanos v. United States, 547 U.S. 715, 755-56, 126 S. Ct. 2208, 2234 (2006) (emphasis supplied). [23] The structure of the CWA indicates that Congress did not intend groundwater and navigable waters to be synonymous. As explained by the District Court in *Washington Wilderness Coal. v. Hecla Min. Co.*:

> If the terms were synonymous, it would not be necessary for Congress to make distinct references to groundwater and navigable water. ...The legislative history of the [CWA] also demonstrates that Congress did not intend that discharges to isolated ground water be subject to permit requirements. ... 'Because the jurisdiction regarding groundwater is so complex and varied from State to State, the committee did not adopt this recommendation.'

870 F. Supp. 983, 990 (E.D. Wash. 1994), citing S. Rep. No. 414, 92nd Cong., 1st Sess. 73 (1971), U.S. Code Cong. & Admin. News 1972, pp. 3668, 3739. Moreover, a number of courts have concluded that the possibility of a hydrological connection between ground and surface waters is insufficient to justify CWA regulation.[24]

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[22] *SWANCC. v. U.S. Army Corps of Engineers*, 531 U.S. 159, 166-67, 121 S. Ct. 675, 680 (2001), (The Agencies have interpreted the CWA "to cover the abandoned gravel pit at issue here because it is used as habitat for migratory birds. We conclude that the 'Migratory Bird Rule' is not fairly supported by the CWA." *See also United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133, 106 S.Ct. 455 (1985) (the concept of adjacency is defined as wetlands that actually abutted on a navigable waterway).

[23] *See also Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Engineers*, 531 U.S. 159, 166-67, 121 S. Ct. 675, 680 (2001); *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council*, 485 U.S. 568, 575, 108 S.Ct. 1392, 99 (1988); *FERC v. Mississippi*, 456 U.S. 742, 767–768, n. 30, 102 S.Ct. 2126 (1982); *Hess v. Port Authority Trans-Hudson Corporation*, 513 U.S. 30, 44, 115 S.Ct. 394, 130 L.Ed.2d 245 (1994); and S.Rep. No. 414, 92nd Cong., 1st Sess. 73 (1971), U.S.Code Cong. & Admin.News 1972, pp. 3668, 3739.

[24] See *Oconomowoc Lake v. Dayton Hudson Corp.*, 24 F.3d 962 (7th Cir.1994); *Kelley v. United States*, 618 F.Supp. 1103 (W.D.Mich.1985).

Despite the Agencies' statements to the contrary,[25] the Proposed Rule **does** include groundwater, because without groundwater, there is **no** hydrologic link between many isolated waters and traditionally navigable waters.[26] Any past practice or proposed standard under which the Agencies establish jurisdiction over isolated waters by virtue of groundwater, exempt waters, or any other undefined connections, must be rejected.[27] Simply put, the Agencies should not attempt to assert jurisdiction over an otherwise isolated water by piggybacking on non-jurisdictional waters. The Agencies are required to establish jurisdiction over each link from traditionally navigable water to isolated intrastate waters.

Equally troubling is the Agencies' disregard for all existing layers of state and local regulatory measures, which provide protection for groundwater and intrastate surface water.[28] These meaningful regulatory measures will only be hampered by another layer of federal interference, and will directly impact land use decisions made by state and local governmental entities, such as NARD's member NRDs, and private entities, who must account for the cost and timeframe for the permitting process and the impacts of permit denials on land values and potential development. The negative impacts to the local tax base for governmental entities such as the NRDs, and the stifling effect on development activities under the Proposed Rule cannot be discounted.

Asserting blanket jurisdiction over any and all waters will result in federal control over the regulation of land use – a primary responsibility of the States.[29] This infringement on State and local responsibilities to control the development of localized natural resources and land uses is

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[25] "The agencies have never interpreted 'waters of the United States' to include groundwater and the Proposed Rule explicitly excludes groundwater, including groundwater drained through subsurface drainage systems." 79 Fed. Reg. 22218

[26] Comments to the SAB Report indicate that in some cases, the *only* connection between water bodies is groundwater. See Science Advisory Board (SAB) Draft Report (4/23/14). *See also* SAB letter to EPA regarding the scientific and technical basis of the Proposed Rule regarding "waters of the U.S." (9/30/14).

[27] 79 FR 22219; GAO Report – "Waters and Wetlands" (page 23) February, 2004.

[28] NEB. REV. STAT. §§ 2-3201 *et seq.*; Nebraska Groundwater Management and Protection Act, NEB. REV. STAT. §§ 46-701 *et seq.*, NEB. REV. STAT. § 2-32,115, NEB. REV. STAT. § 25-1064; NEB. REV. STAT. § 25-2159; NEB. REV. STAT. § 25-2160; NEB. REV. STAT. § 37-807; NEB. REV. STAT. § 28-106; Nebraska Environmental Protection Act, Neb. Rev. Stat. § 81-1501, *et seq.*

[29] *Hess v. Port Authority Trans-Hudson Corporation*, 513 U.S. 30, 44, 115 S.Ct. 394, 130 L.Ed.2d 245 (1994) ("[R]egulation of land use [is] a function traditionally performed by local governments"); *FERC v. Mississippi*, 456 U.S. 742, 767–768, n. 30, 102 S.Ct. 2126, 72 L.Ed.2d 532 (1982) (Regulation of land use, as through the issuance of the development permits, is a quintessential state and local power.)

not supported by the language or history of the CWA.[30] As written, the Proposed Rule is not based upon a permissible construction of the CWA and will not withstand a challenge.[31]

The Agencies Should Provide Greater Certainty to the Regulated Community by Amending the Proposed Rule to Explicitly Include All Existing Exemptions.

Formal regulatory exemptions from the CWA provide the greatest certainty for the regulated community. Agency representatives have repeatedly stated to Congress, the media, and the regulated community, that **all** existing exemptions will be maintained,[32] and a specific list of waters that will not be deemed WOTUS is included in the Proposed Rule.[33] However, the Agencies have failed to include the current language of all existing exemptions in the Proposed Rule.[34] Instead, new qualifying language replaces the exemption for ditches, and the interpretive exemption for pits excavated in dry land for the purpose of obtaining fill, sand and gravel has been omitted from the list delineated within the Proposed Rule.

The Proposed Rule's exemption for ditches is particularly troubling, as it does not cover any ditches that contribute flow, either directly or through another water, to a traditionally navigable water, interstate water, interstate wetland, or impoundments of such waters or tributaries.[35] The Agencies' overbroad assumptions regarding the impacts an isolated intrastate conveyance, such as a ditch, must have if it indirectly contributes flow to a traditionally navigable water effectively negates the exemption. Absent a meaningful exemption, federal jurisdiction will be asserted over many ditches under the broad definition of "tributary."

Failure to explicitly affirm all existing exemptions within the Proposed Rule will create confusion within the regulated community as to whether the existing exemptions remain in effect, which is further complicated by the increase in federal jurisdiction discussed above. Clarifying the exemptions will allow members of the regulated community to avoid a burdensome permit application process, the cost and timeframe for which will directly translate into higher costs for development activities, or avoidance of development altogether.

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[30] *SWANCC. v. U.S. Army Corps of Engineers*, 531 U.S. 159, 174, 121 S. Ct. 675, 683-84, 148 L. Ed. 2d 576 (2001) ("Rather than expressing a desire to readjust the federal-state balance in this manner, Congress chose to recognize, preserve, and protect the primary responsibilities and rights of States ... to plan the development and use ... of land and water resources[.]")

[31] *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843, 104 S.Ct. 2778 (1984); *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Engineers*, 531 U.S. 159, 174, 121 S. Ct. 675, 684, 148 L. Ed. 2d 576 (2001).

[32] See http://www2.epa.gov/uswaters: ("All agricultural exemptions and exclusions from Clean Water Act requirements that have existed for nearly 40 years have been retained with clarification.")

[33] 79 Fed. Reg. 22218.

[34] The Agencies have also recently adopted an interpretive rule imposing mandatory compliance with Natural Resources Conservation Service (NRCS) standards as the basis for qualifying for a number of agricultural exemptions. NARD opposes the Agencies' efforts to limit the exemptions for agricultural activities through the interpretive rule.

[35] Proposed definition at 40 C.F.R. 230.3(t)(4)

The Agencies have violated the RFA, which was enacted and amended specifically to protect small entities, such as NARD's member NRDs.

The Proposed Rule's expansion of the scope of waters deemed jurisdictional under the CWA will place additional, unnecessary burdens on those who rely on water for their personal and economic survival. Such burdens will negatively affect or otherwise prevent[36] development activities, production capacities, and land values, all of which are factors that directly impact the tax base of NARD's member NRDs, as well as the ability of the NRDs to implement and manage flood control, drainage, and irrigation projects.

The RFA[37] requires the Agencies to review the Proposed Rule to determine if it will have a "significant economic impact on a substantial number of small entities."[38] Due to its extraordinary potential to adversely impact the regulated community, it is especially important that the Proposed Rule be subjected to all procedural steps designed to safeguard small governmental jurisdictions, such as NRDs, and other small entities, from overzealous regulation.[39]

In part because so many proposed rules were subjected to meaningless "rubber stamp" certifications, Congress amended the RFA by enacting the Small Business Regulatory Enforcement Fairness Act of 1996 ("SBREFA"). The SBREFA amended section 611 of the RFA to allow small entities, such as NARD's member NRDs, to obtain judicial review of agency noncompliance with the RFA and tightened the requirement for certifications so the Agencies must provide the factual basis that supports their certification statement.[40] The SBREFA also requires EPA to convene small business review panels whenever its planned rules are likely to have a significant economic impact on a substantial number of small entities. The SBREFA panels include small entity representatives who will be affected by the rule, who advise representatives from the Small Business Administration's Office of Advocacy, the Office of Management and Budget's Office of Information and Regulatory Affairs, and the Agencies on probable real-world impacts and potential regulatory alternatives. The panel must then prepare a

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[36] *Review of 2014 EPA Economic Analysis of Proposed Revised Definition of Waters of the United States*, David Sunding, Ph.D., May 15, 2014 (at page 15-19).

[37] 5 U.S.C. § 601 *et seq.*

[38] 5 U.S.C. § 601(6), "the term 'small entity' shall have the same meaning as the terms 'small business', 'small organization' and 'small governmental jurisdiction[.]'"

[39] 5 U.S.C. § 602(a)(1). *See also* 5 USC § 601(5), "the term 'small governmental jurisdiction' means governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand[.]" According to 2000 US Census data, at least 15 of Nebraska's 23 NRDs qualify as small governmental jurisdictions. See http://www.dnr.ne.gov/population-estimates-and-census-data; http://www.dnr.ne.gov/census-2000-population-compared-to-1990-by-nrds.

[40] 5 U.S.C. § 611

report containing recommended alternatives to the Agencies and the panel's recommendations could be incorporated into the Proposed Rule.[41]

These laws and policies were put in place specifically to protect small entities such as NARD's member NRDs. However, the Agencies have violated these laws and policies by disingenuously certifying the Proposed Rule will have no substantial impact on protected entities. Specifically, the Administrator concludes:

> The scope of regulatory jurisdiction in this proposed rule is narrower than that under the existing regulations. See 40 CFR 122.2 (defining "waters of the United States"). Because *fewer* waters will be subject to the CWA under the proposed rule than are subject to regulation under the existing regulations, this action will not affect small entities to a greater degree than the existing regulations. As a consequence, this action if promulgated will not have a significant adverse economic impact on a substantial number of small entities, and therefore no regulatory flexibility analysis is required.

79 Fed. Reg. at 22220. This conclusion, and the factual basis on which it is predicted, is patently false. As set forth above, the *categorical* inclusion of *all* waters within so-called "neighboring" and "riparian areas" as "adjacent" based upon undefined groundwater connections and overland migration patterns of plant and animal species necessarily results in the assertion of federal jurisdiction over additional waters. Barring an obvious surface connection, these waters would have been subjected to case-by-case analysis, but will be automatically captured as jurisdictional.[42] In addition, the proposed aggregation of otherwise isolated waters to determine their cumulative impact on navigable waters will inherently sweep these otherwise non-jurisdictional waters into the regulatory network.[43] The same results from the inclusion of strictly ephemeral waterways located higher in stream systems.

The Agencies previously recognized their existing policy, as set forth in *Draft Guidance on Identifying Waters Protected by the Clean Water Act*,[44] would expand the number of waters over which they assert jurisdiction. They said of that guidance:

> The agencies expect, based on relevant science and recent field experience, that under the understandings stated in this draft guidance, the extent of waters over which the agencies assert jurisdiction under the CWA will increase compared to the extent of

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[41] The RFA was further strengthened on August 13, 2002, when President Bush signed Executive Order 13,272. This Executive Order requires the Agencies to consider the Small Business Administration's Office of Advocacy's written comments on proposed rules and include a response to those comments in the final rule.

[42] 79 Fed. Reg. at 22219.

[43] *See* e.g., 79 Fed. Reg. at 22214.

[44] See http://water.epa.gov/lawsregs/guidance/wetlands/upload/wous_guidance_4-2011.pdf.

United States Senate

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS
WASHINGTON, DC 20510–6175

April 9, 2014

The Honorable Barack Obama
President of the United States
The White House
1600 Pennsylvania Avenue, NW
Washington, DC 20500

Dear President Obama,

As members of the Senate Environment and Public Works Committee, we write in response to the U.S. Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers' (Corps) release of their proposed rule which would expand federal jurisdiction under the Clean Water Act (CWA). After an initial review of the proposed rule, we are deeply concerned that the agencies are attempting to obtain *de facto* land use authority over the property of families, neighborhoods and communities throughout the United States. Several provisions within the proposed rule demonstrate that EPA and the Corps are unwilling to accept the meaningful limits Congress placed on the agencies' authority under the CWA, limits the Supreme Court has repeatedly recognized. These include the proposed rule's categorical regulation of irrigation and stormwater ditches, unlimited aggregation approach, and broad adjacency definition. The proposed rule would also have EPA and the Corps making case-by-case jurisdictional determinations based on the "significant nexus" test, even as they ominously assert that a "hydrologic connection is not necessary to establish a significant nexus."[1]

Equally important, we believe EPA and the Corps should immediately cease in their proclamations that the agencies' proposal is a justified response to various calls for a CWA rulemaking.[2] In fact, EPA and the Corps are using rulemaking requests as an excuse to pursue a rushed, predetermined agenda, as opposed to engaging in a deliberative, fair, and transparent regulatory process. EPA and the Corps chose to release their proposed rule despite failing to 1) sufficiently consult with affected states; 2) allow for completion of the Science Advisory Board review of the so-called "Connectivity Report"; and 3) conduct a statutorily-required small business analysis and outreach pursuant to the Regulatory Flexibility Act (RFA), among other

[1] *See* U.S.E.P.A. and Army Corps of Engineers, Proposed Rule Regarding Definition of "Waters of the U.S." Under the Clean Water Act at 100 (March 25, 2014), http://www2.epa.gov/sites/production/files/2014-03/documents/wus_proposed_rule_20140325_prepublication.pdf.

[2] *See* Nancy Stoner, *Input Critical to Rule on Waters of the U.S.*, EPA Connect (March 25, 2014) ("In large part, it was public input that led us to propose a rule. Since 2008, EPA and the Corps have received numerous requests for a rulemaking to provide clarity on protections under the Clean Water Act from members of Congress, state and local officials, industry, agriculture, environmental groups, scientists, and the public."), http://blog.epa.gov/epaconnect/2014/03/input-critical-to-rule-on-waters-of-the-u-s/.

mandatory procedures. EPA and the Corps' decision to proceed despite the numerous concerns identified by lawmakers and stakeholders is incredibly disappointing.

The scope of CWA jurisdiction is one of the most important regulatory issues facing landowners, businesses, and municipalities today. Although EPA and the Corps may have a role in clarifying and limiting CWA jurisdiction, unfortunately the agencies' rule proposal was a significant step in the wrong direction. The decision to move forward with this proposal is a clear breach of your promise to cut through red tape.[1] In light of other recent CWA permitting decisions that have occurred during your administration, moving forward with the proposed rule will exponentially frustrate economic activity and further undermine notions of certainty in the federal permitting process.

Sincerely,

David Vitter
U.S. Senator

John Barrasso
U.S. Senator

James M. Inhofe
U.S. Senator

Jeff Sessions
U.S. Senator

Mike Crapo
U.S. Senator

Roger Wicker
U.S. Senator

John Boozman
U.S. Senator

Deb Fischer
U.S. Senator

[1] Exec. Order No. 13563, 76 Fed. Reg. 3,821 (Jan. 18, 2011).

Senator FISCHER. Thank you,

Mr. BLANKENAU.

At the request of the Minority, I am entering the comments from the Sierra Club Nebraska Chapter into our hearing record. And at the request of my partner in the U.S. Senate, I am entering into the record a statement from Senator Ben Sasse.

I would like to thank all of the panel for your thoughtful testimony. It's clear that you and the groups that you represent all have a very strong appreciation for the importance of clean water, and strong, healthy communities here in State of Nebraska.

There are clearly some major issues with the proposed rule that would impact every corner of our State, and so I'd like to open up the first question to the entire panel.

In your view, how do we as Nebraskans best take care of our precious water resources and how will this proposed rule impact these important efforts? Is it a top down bureaucratic Federal scheme? Is that—is that a help or is that a hindrance? And we'll start with Commissioner, please.

Ms. BORGESON. Thank you, Senator.

We protect our water resources by using the best construction practices and as—as we develop our communities. And we use real water professional—resource professionals to help us do that. The EPA and the Corps of Engineers have done a great deal of good to improve the water quality. In general, having an organization that can coordinate the clean-up of our waters and work together to establish this goal would seem to be a reasonable solution. But in speaking with our engineer staff, they believe that the original concept, when properly implemented, can—can be of help. But, unfortunately, they believe that because of the inconsistencies in enforcement, and the lack of clear definition of what is expected, has become quite a hindrance. The problem that's developed is that many of the individuals within the program seem to have forgotten that this is a combined effort of all those involved to improve and protect one of our most valuable resources. And so there has to be consistency in the way the rule is administered, and that it has to start with the clear and accurate definitions that are interpreted by the regulators in a consistent manner.

A top down bureaucratic Federal scheme would work best if the rule—or regulation is written in a way to incentivize communities rather than punish them. And then we—you know, if we're spending all of our resources on process, we're spending less on—and directly, on things that would impact and improving the water quality.

Senator FISCHER. Thank you.

Ms. Cooksley, your thoughts, please?

Ms. COOKSLEY. Thank you. I'd like to answer that last question first, would it be a help or a hindrance. In my view, it would a hindrance to have a Federal top down. And the reason being, as a private landowner, I am on the land every day. I depend on that land to be managed properly to sustain the—the grass on the sand dunes which provides wildlife habitat and food for the cattle. Our family has been on that ranch for over a hundred years. Having local management makes more sense. We see impacts more immediately and we can address those. And we would like to see going

forward that we develop relationships with our agencies and that they provide incentives, not regulations, and that they provide information, not burdens. And so I would like to keep local management.

Senator FISCHER. Thank you.

Mr. Wisnieski.

Mr. WISNIESKI. There's essentially a system in place at this point with the Clean Water Act and, as developers and builders, we're mostly voluntarily working on the State and local levels with what that system is in place. So time and money is not always of the essence on projects and stuff like that. To raise costs and have more regulations upon us is just such detriment. Twenty percent of a new home to date is literally regulatory costs. So we can't allow that to be increased with more regulations. So it's simply, leave the system in place as is.

Senator FISCHER. Thank you.

Mr. CRABTREE.

Mr. CRABTREE. Well, thank you, Senator.

I guess the first part of your question is—I'll take that first. Just about everybody up here has mentioned the concern about the uncertainty about jurisdiction in Clean Water Act under the rule but, of course, there's much uncertainty that exists in Clean Water Act enforcement today that was created by the Supreme Court decisions that sort of put the system in find kind of a—in a bit of flux. That uncertainty really does detract from our ability to effectively enforce the Act and protect the "Waters of the U.S." So, you know, my testimony I mentioned, just to reiterate, the Supreme Court, including Chief Justice, have said we're probably going to need rulemaking to clear up these jurisdictional definitions. I, and I must say, continuing to have dialogs like this on what's vitally important because I don't believe that any one person or any one agency is going to absolutely get this right. We don't believe the rule is perfect in its drafting. We had critical comments and supportive comments. But we are in a situation of great uncertainty today in enforcing the Clean Water Act. And so rulemaking that clears up those jurisdictional questions is necessary. It's not simply a matter of the status quo, because that was—the status quo that existed for 20 or 30 years has largely been absent for the last ten because of those Supreme Court decisions. And as far as, you know, how do we best do this, I think we draw on the things that we do best. We talk to each other, even when we disagree. The Center for Rural Affairs has had a long history of working with farmers and ranchers and conservation programs, Federal and State conservation programs, to help people—to help provide incentives for people to do things that improve water quality without a regulatory process. But, again, through conservation and stewardship. That's what we do I think best, and that's why the rule, I think, is supportable in that it creates all the—it reenforces all the exemptions that exist for farming in the Act previously.

Senator FISCHER. Thank you.

Mr. SHEETS.

Mr. SHEETS. Thank you, Senator. Obviously, the folks that I represent are basically users of water, and water quality is very important. We've all talked about the confusion of the existing situa-

tion and I think that's the nemesis of what we face. The best solution to me is not to border on a top down or a bottom up answer to this dilemma. I think it really borders on working together in a compromise to find an immediate solution where probably everybody is a bit upset but we all win in the final analysis. So, you know, I think organizations need the opportunity to voice their opinions. I think the regulators need to develop pertinent and intelligent responses to those comments, and in final analysis maybe will come to a better understanding of what it is we want to accomplish and how we're going to get there. The process needs to continue on and—no question in my mind.

Senator FISCHER. Thank you.

And Mr. Blankenau.

Mr. BLANKENAU. Thank you, Senator.

You know, frankly, my testimony in opposition to this rule here today is against my personal interests because as a lawyer I can guarantee you I will make money if this rule passes.

I think it's always bad policy if a State or Federal agency by rule usurps the role of the legislature. That's what's occurring here. The legislature specified that the waters that are to be impacted are those that are, in fact, navigable. The geographic extent that this rule will reach out is so significant that only the legislature should step in and deal with that kind of expansion. So I do think it is bad policy in this instance, and I do think it's illegal, and clearly against the Constitution.

And I would go back to some previous statements. I'm sure everyone in this rooms believes that it's important that we maintain clean water. That's not really what's at issue with this rule. There are no present water quality concerns that this rule will address. This is rather about control of the individuals and development. And I would urge the Committee to do what they can to quell this rule.

Senator FISCHER. Thank you,

Mr. BLANKENAU.

Commissioner Borgeson, I have a few questions for you, please.

In your testimony you spoke about the efforts in Omaha to address the combined sewer overflows to improve the water quality of the Missouri River. And that is going to be a very expensive undertaking. I think it's estimated to cost the citizens approximately $2 billion. Omaha is going to—increasing their rates. I've heard about that, as I'm sure you have as well. And that's a, really a burden on families and especially some of the poorest communities within the city of Omaha. I understand that green solutions are being proposed as part of that solution to the challenge, but this proposed rule that we're talking about right now, it's really a potential threat, I think, to the government's ability to maintain those facilities in the future without having to go through this permitting program that we're talking about. Do you agree with that? Can you kind of speak to that problem that Omaha may be facing when it looks at green solutions to such a costly problem that they're facing and their citizens are being—are having to pay for?

Ms. BORGESON. Yes. The one project in Douglas County, Omaha is the example of one of our combined elementary schools. The name is Saddlebrook, and it's an elementary school, it's a library,

and it's a community center, and it has a green roof. And it catches all of the rain and it keeps it from getting diverted onto the parking lots and then into the storm sewers. And then it adds a great deal of insulation to the building as well. Pretty—pretty neat project. But no one knows for certain what the possible consequences are of the new rules and how that—they will affect projects such as these. The Board could claim jurisdiction over these green solutions. So the concern of the new regulations is if these special permits are required for some of these things, what will it cost, what will the length be between the time that, you know, were intended to do the construction and actually getting the permit, and what other controls on the surrounding project will the permit want to exert. So, you know, again, it's essential that the proposed WOTUS rule does not negatively impact the use of green infrastructure, both from the installation and the ongoing maintenance on a standpoint of the project.

Senator FISCHER. You know, I hear from citizens, I hear from business people, I hear from government, local government, State government, about frustrations with regulations that the Federal Government mandates and is passed down and that we all then have to deal with. But I can tell you, the example you gave about 180th Street in your testimony, that has to be at the top of my list on really frustration that's out there and the time involved and the cost that's involved. How exactly do you think this proposed rule is going to further exacerbate that problem?

Ms. BORGESON. Well, first of all, the—I want to compliment you on the Build Nebraska Act, the LB 84, because it's been an absolute tremendous help to both the State and the local and funding projects to improve the transportation needs. And we are very, very appreciative of that.

But the major problem is the rules are not applied consistently. Primarily the lack of insufficient definition, use of terminology and, of course, you run into different personalities. The term that—terms that are already a problem are still not clearly defined in the new rules. Plus, the new terms are being added that obviously extend the control of EPA and the Corps of Engineers over both government right-of-way but farther and farther into private land. And so the 80th Street—180th Street project is a great example, you know, of both ends of the cooperation spectrum. The—our engineer's office met informally with the Corps of Engineers, the primary enforcers of the Clean Water Act, to discuss the project. And at that meaning the Corps would not give any formal opinion but did take suggestions about the bridge design and the location of the two major bridges that would be acceptable so that we could avoid some problems with an active stream. Well, these suggestions were incorporated into our original design, but as the design work continued we suddenly started to have problems with that rut at the bottom of the ditch that, again, was eight inches long and an inch deep. And so the latest construction date that we have is 2018, or Fiscal Year 2019, and the original start date, again, was 2010, and it was at a cost of about $20 million. So just to put it in perspective, assuming that a 3-percent increase in construction costs per year, and a 30 percent cost increase due to required changes, that have nothing to do with the primary "Waters of the U.S.," or the

historical highway that's—that it's going over, the project and the time value money on the increased cost is now estimated to be a minimum of $36 million. And that's—and a large of it is paid for by—a large percentage is paid for by the Federal highway. But it's all taxpayer money. And so, of course, you know, we're—we're affected by it, so . . .

Senator FISCHER. You know, when you talk about the regulations that counties are under, cities are under, you spoke in your testimony about once that a project is deemed to be under Federal jurisdiction then other Federal requirements kick in as well with NEPA, the National Environmental Policy Act, with, of course, endangered species, has an affect on that as well. I would assume then that adds additional time, additional cost to taxpayers, is that—is that correct?

Ms. BORGESON. Yes, it does. I mean, it means, again, a lot more time and a lot more additional paperwork and expense. And a good example, again, is the 180th Street project because that——

Senator FISCHER. That's like the poster child.

Ms. BORGESON. Yes. Because the state—well, the State Historical Society insisted that our initial plan for the two 900-foot bridges that span the Old Lincoln Highway—and, again, that's a piece of the national historic highway, and we're very proud of that, but that—and we have spent hundreds and thousands of dollars to maintain that because of its historical value, but—and the West Papio Creek and the railroad tracks, they insisted that those be changed to include a historical consistent design to go along the Old Lincoln Highway. So, in simple terms, for a county this means additional time, additional expense, is added to each one of these projects and—and more so just even in—a big concern is even in our routine maintenance that may fall under these Federal jurisdictions just because the water may drain through county ditches into waterways. So we're very, very concerned about that.

Senator FISCHER. As I think all counties are. I don't remember my exact numbers on this, but we look at the State highway system and the thousands of miles of road, well, here in Nebraska we have about ten times, I think, the county roads that have to be maintained as well. So I can appreciate the cost to citizens in this State to maintain the production and the problems they're going to be facing now in the future.

Ms. BORGESON. Absolutely.

Senator FISCHER. And so thank you very much.

Ms. Cooksley, I wanted to ask you a question, and if you could kind of clear something up. You know, a lot of times what we hear the most about this proposed rule and the idea that EPA and the Corps now would be regulating ditches under that proposed rule. And some agencies are saying, well, that's not true, ditches are going to be exempted. But I continue to hear, really, uncertainty and some certainty that those ditches are going to be included under the rule. Can you address that for us?

Ms. COOKSLEY. I will try.

The rule does say that ditches are exempt. But it's very vague to us that read it. It excludes ditches that are excavated wholly on uplands, drain only uplands, and have less than perennial flow. When I go up on an upland, to me that's higher than lower ground.

That ditch also had to occur through water, a perennial flow. The term "upland" was not defined further, so we're still in a fog on what does that mean. It does not exempt ditches that do not contribute flow either directly or through another water to navigable waters or tributaries. And to qualify for an exclusion a ditch must contribute zero flow to navigable water tributaries. And since most ditches that I know of convey water somewhere indirectly or directly to minor tributaries, it has no benefit. It muddies the water, so to speak, to us trying to understand and work within this rule.

Senator FISCHER. What about floodplains and regulation of floodplains, do you have thoughts on how this proposed rule would affect that?

Ms. COOKSLEY. The proposal would make everything within the floodplain and a repairing area a Federal water by considering that adjacent waters. And it fails to define how far a repairing area goes, which is the area around the water body. It doesn't distinguish flood intervals. And perhaps the most concerning to me is the rule says, best professional judgment by regulators to be used on a case-by-case basis. That allows me no flexibility to plan. How can I get ready for this? How do I manage this? So, again, we're back to the uncertainty.

Senator FISCHER. And I know that you and your family have a wonderful history of conservation and in taking care of your land and using those best management practices. How do you think—how do you think you're going to be affected when you try to follow the state-approved best management practices that truly affect the environment that you live in if this rule takes effect as it's proposing?

Ms. COOKSLEY. If it takes away the certainty from the State in managing the waters, and I have used their guidelines, then that puts me, as a private landowner, as a land manager, at risk. Such as Mr. Blankenau had said, if their—if the State authority is taken away, then, again, I am uncertain as to what I can and cannot do. And I am out there trying to do the right thing every day.

Senator FISCHER. You know, you keep mentioning uncertainty. And I guess I would ask you, how do you define that? What do you mean by uncertainty with this rule, and what kind of impact does this uncertainty that you talk about, what impact does that have on your planning and on your management? I guess I want to dive down a little deeper there into what you're saying.

Ms. COOKSLEY. In ranching, a short-term goal may be 5 years. A long-term goal may be the next generation. So we're looking a long ways down. We do need certainty. We need to know, is this depression, pond, a wetland that appears, disappears? Is that going to be regulated by the Federal Government; will it not be? Will it be regulated by the state; will it not be? I have to be able to plan management of that native Sandhills grass for the long term, which is into the next generation. So we need clear definitions and clear guidelines. And it gets back to certainty.

Senator FISCHER. Thank you. Don, I've got a couple questions for you as a home builder. You know, that's an American dream for people to be able to own their own home. I've—I truly was shocked to hear when you said that 25 percent of the cost of a home is be-

cause of regulation. That just delays, I think, the American dream for our citizens.

When you look at those permitting delays, how does that affect you as a builder?

Mr. WISNIESKI. Well, as the saying goes, time is money. Things have to move along pretty good. You know, if you go—if you're working with a bank for loans, those are typically going to start happening within a 6-month period. If you have a Clean Water Act wetland permit or something like that is proposed it's supposed to be in a timely manner. So you—we rely on that to be on a timely manner. And too many times this takes months or even years for that to be processed and get done. There was a 2002 study that was cited by the EPA in its economic analysis that the proposed rule found that an individual Clean Water Act wetland permit takes an average, now this is an average, of 788 days. That years. That's a long time. And a so-called stream wide, nationwide permit can take an average 313 days. Very close to a year. And without proper—as a developer or builder, without the proper permits in place, or not knowing if you have those all—those permits all in place, it's a great risk of running of fines, that we're aware of, up to $37,500 in a day, so . . . And keeping in mind, the bank's continually knocking. So that has to—that has to keep going.

The big fear is, in a lot of communities across the State, with shortage of housing, shortage of builders, work force, developers, the big fear is too many of those individuals are going to throw their hands up in the air and say, I don't need to deal with it. It compounds the problem that we're already facing. We can't go that direction. It needs to be streamlined. It needs to be timely. It needs to be consistent. So hopefully that answers that.

Senator FISCHER. It did.

And home builders, I know that sometimes you have to obtain those permits, Section 402 and 404, for you to complete your projects. What exactly are those and what do you have to follow in order to have those permits included?

Mr. WISNIESKI. The matrix behind each one of those is very difficult in its own way. In essence, the 402 is basically storm water related; the 404 is going to be your wetland related. Keep in mind, I'm a small businessman, I like to grab a hammer and build a house. I have to rely on the lawyers in the community to help with these type of issues.

Mr. BLANKENAU. God bless you.

Senator FISCHER. Too——

Mr. WISNIESKI. It's a money-making issue. But some of those things that are, you know, involved with these are the pre-application consultant—consultation consulting with these folks. There's individual permit applications that have to be submitted; there's public notifications; there's 15, 30-day public notice comments, and so on and so forth, that have to be done; opportunity for public hearings; there's Corps reviews; the public comments and evaluations for the permit applications; and finally the Corps' decision to make the permit, or issue it or deny it. So there's—the answer to that is actually pretty long if we want to get into it. I would rather get you information on that.

Senator FISCHER. OK.

Mr. WISNIESKI. And provide that at a later date because we could go on literally for an hour on this. So if I could be allowed.

Senator FISCHER. OK.

Mr. WISNIESKI. I have a lot of information that I'd love to get to you.

Senator FISCHER. Thank you. I look forward to receiving that.

Can you tell me, in your testimony you were talking about any waters or wetlands within a floodplain, that they could be subject to the Clean Water Act, their jurisdiction there. How does that affect home builders? I've—I heard from people all across the State, mostly in the eastern part of the State though, that have really deep concerns about being in a floodplain and what's all involved in that. Can you give us a little information on that, please?

Mr. WISNIESKI. Yes. Floodplain is vaguely defined and will result in unpredictable and inconsistent applications as far as the Act.

Do I need to get closer? Just holler at me next time.

A landowner's not able to look at a map and objectively know exactly the extent of those floodplains. That's probably the biggest problem. If you look at his property, at his or her property, and it's—you've got to decide whether you want to even purchase that property because you don't know how far those extensions actually reach out. It's just difficult to know where those boundaries are. And it makes it difficult. Is that my responsibility; is it the homeowner's responsibility; the developer's responsibility? So on and so forth. Or we have to wait for a field inspector to come out in the—and walk the property and subjectively determine this is where it's going to or not going to go. So it's a big issue that way.

Senator FISCHER. OK. And we heard the Commissioner talk about green projects and, you know, that's—that's so important that we—that we look at what's available and how we can move to more green projects. And I know there's some—there's some states and localities that require or encourage home builders to start building more of the low-impact development, these green projects that are out there. You heard the Commissioner's answer on some of the issues that counties, cities, deal with. What about home builders and, you know, people who want to move in that direction and then when they're building a home and what—what are you faced with on that?

Mr. WISNIESKI. Well, as I said earlier——

Senator FISCHER. Or what do you think you're going to be faced with?

Mr. WISNIESKI. Well, it's more of a fear than anything. As I stated in the testimony, a lot of the developers or builders are voluntarily doing those type of deals, whether we put swales in, whether we put water gardens, or whatever you want to call them, in. But if a rain garden develops wetland plants or vegetation and soils and happens to fall within a floodplain or a nearby river or stream, and a landowner, he wants to do something with it, if he has to dredge those out or maintain them—now, typically that's the backyards of a lot people—you know, a lot of folks' homes—not knowing what he can or can't do to that, and if you start to remove soils from there to maintain that, or pesticides for any kind of controls for whatever that might be, there's going to be a lot of fines or uncertainty what you can and can't do to those areas. We'll stop put-

ting them in, and that's not what we want to do. We do want to control that. They serve a great purpose. And on a voluntary basis, or on a local level that or we work with State or local levels to do that, that's a great option and we want to keep doing those. We don't want to eliminate folks from doing those because they're going to have a hard time maintaining them. Or the length of time to get a permit to do that, now they're over-silted or whatever the case might be. So it's an issue.

Senator FISCHER. Right. Thank you. Thank you very much.

Mr. Crabtree, you stated that 80—I think I heard you correctly, that 87 percent of the total comments support the proposed rule. However, it's my understanding that the bulk of these comments were not substantive and they did not evaluate the content of the rule. In fact, as Secretary Darcy stated publicly, out of the comments that the agencies classify as substantive, 58 percent of those oppose the rule. Were you aware of Secretary Darcy's statements?

Mr. CRABTREE. Yes, Senator. Actually, I think I had that in the written testimony that I submitted to the Committee. And I apologize for not emphasizing it.

Yes, I think you're right, I think that that's probably the case. And, I mean, I think we should also be careful because, for example, the substantive comments that the Center for Rural Affairs provided, which I was involved in drafting, had multiple criticisms. But they were detailed and specific. And the overarching, you know, I don't know, tenor of it was that we—we think that we're moving in the right direction. That they should continue. Now, I don't know how we would count that. I don't know if we're in 58 percent or the 42 percent. So I would assume that we're, you know, what they thought was appropriate. But, honestly, I can't tell you. So that—I'm not—I'm not dis—I don't find that matter too disconcerting but it is worthy of wondering about. But I still believe, even though that—because the difference between a substantive comment, a comment which they call substantive, which, you know, actually comments on a specific element of the rule, versus a statement by an individual citizen who says something that's not specifically detailed but says, I support this rule, I mean, I think there's still value in that too. So I think that 87 percent number is still pretty remarkable. Involves a lot of people in this country, said, we think doing this to protect water quality is important.

Senator FISCHER. I think it's also important that we base public policy that will affect the citizens of our State and the citizens of this country on fact and based on science. I always appreciate comments from constituents, but policy has to be based on fact.

So I am going to put Secretary Darcy, her letter that she sent to the House with those numbers in it into today's hearing record. So thank you.

Mr. Blankenau, in your comments you State that Section 404 permits can take up to 18 months to process by the Corps' Omaha District Office and the costs can range from 25,000 to a hundred thousand dollars. You know, this is a serious delay, and it's expensive. So we kind of brought it up earlier about what kind of activities are required under that permit. I'd like to know, too, what's going to be required under the proposed rule that you think. And that wait time then, is it going to be more than 18 months? You

know, I—we always hear the horror stories about the permitting process and how long it takes. So what, I guess, what do you see for the future here?

Mr. BLANKENAU. Well, if the proposed rule does become law, I think it extends the geographic regulatory reach of those agencies. And, as a result, I think it will require more and more permits to be issued. If the Corps' office is already stretched by personnel, and I think they are, I think many of them are hard-working, diligent Federal employees, but if they're already stretched, if their workload increases, I don't see how it can do anything but increase these delays and the costs.

Senator FISCHER. The Regulatory Flexibility Act, it requires agencies to examine the impacts of the proposed regulation on small governmental entities and on small businesses. The EPA and the Corps have certified that this proposed rule will not have significant economic impacts on a substantial number of small entities. But the chief counsel for the Small Business Administration Office of Advocacy, and that is a unit of the Federal Government, determined that this certification was in error and that it was improper. Can you talk about the EPA and the Corps' actions that I believe undermine the safeguards we have for our Nebraska municipalities and for the protection of our citizens?

Mr. BLANKENAU. Yes. I think their certification was the product of the narrative that it doesn't change existing law. And I think the Small Business Administration recognized that it, in fact, does change existing law. And further extends that geographic reach. Now, all but two of Nebraska's 530 municipalities and all of its Natural Resources Districts would qualify as small entities. Those municipalities and NRDs are among the most frequently recipients of 404 permits because of how much earth they move and all the activities that are involved. I think what you'll see is direct impacts to taxpayers as a result of those activities being delayed and additional processing costs.

Senator FISCHER. And I would like you to speak to the proposed rule's justification to regulate all the water that has a hydraulic connection. I think you have a very unique perspective because of your profession, because of your positions that you've held in a previous life, so I think you have a really good perspective to share with us how the water here in Nebraska, and specifically that connection that we have, how is that going to be affected?

Mr. BLANKENAU. Well, it's interesting because both the Corps and the EPA have previously disavowed any control over groundwater. But what they've done by adding the hydrologic connection component, is effectively used groundwater to claim jurisdiction over discreet bodies of water that might be many miles away. So, for instance, you know, I'll use the area that you were from, Senator, as an example. You might have a golf course developer who wishes to create a water feature and excavates a pond which exposes groundwater that might be hydrologically connected to the Dismal River some five miles away by that act of exposing and creating that exposure to groundwater, there's that hydrologic connection which makes that newly excavated pond now jurisdictional. So while it's technically correct that the proposed rule doesn't regulate

groundwater, they use that hydrologic connection of groundwater as the lynchpin to jurisdiction.

Senator FISCHER. And the Clean Water Act's purpose is to protect the quality of our navigable water; is that correct?

Mr. BLANKENAU. That's correct.

Senator FISCHER. And do you see this proposed rulemaking as expanding agencies' jurisdiction then, do you think? You alluded to it, but I know attorneys don't ever come right out and say it, but . . .

Mr. BLANKENAU. I don't want to beat around the bush of it.

Senator FISCHER. But, you know, the—I'm very concerned about the regulatory authority that we may see coming because of this proposed rule.

Mr. BLANKENAU. Well, again, and I really am concerned about what this does to the fabric of the Constitution. The authority of Congress is actually limited in what it can regulate. And it has historically been limited to actual navigation on waters. That was the whole purpose of the commerce clause being inserted in the Constitution to begin with. What we've done here is allowed an agency to define what "navigable" is and extend it to molecules of water that are very distant in time and in place. And I think that stretches the credibility beyond the breaking point.

Senator FISCHER. You know, this time of year we see the Sandhill crane coming to Nebraska and we have the opportunity as Nebraskans to really enjoy that phenomenon that's out there. But we also have a number of people from around the United States, around the world, that come to view the cranes this time of year. Can you explain how this rule, I think, is attempting to use these birds——

Mr. BLANKENAU. Yes.

Senator FISCHER. —to expand that Federal control over isolated water?

Mr. BLANKENAU. You've put your finger on one of the really odd things about the proposed rule, and it's the resurrection, if you will, of the Migratory Bird Rule, which I thought the Supreme Court had placed a stake through the heart of in its SWANCC decision. This rule effectively resurrects that concept where if a migratory bird, such as the Sandhill crane, stops at a pond or pothole along the way for a visit, that pond or pothole becomes jurisdictional, all the way from Texas to North Dakota.

Senator FISCHER. Or Anselmo, Nebraska.

Mr. BLANKENAU. Or in Anselmo.

So, yes, it's one of the real stretches, if you will, of a definition of what navigable waters are.

Senator FISCHER. OK. Thank you.

I have some questions for all of the witnesses. So I welcome any of you that would like to address these.

We'll begin with, do you believe that this proposed rule will clear up confusion regarding the jurisdiction of the Clean Water Act or do you think it will add to the confusion? You know, we've heard, I think, all of you bring that up in your testimony and in your comments.

Commissioner, would you like to address that?

Ms. BORGESON. Well, we believe it will, and does, add confusion and it's not defined properly. You know, in terms of counties, we do two basic routine maintenance tasks that all counties do. We—the cleaning and repairing of roadside ditches and the ongoing maintenance of unimproved roads. And so it's imperative and, again, it's just not clear, as to whether or not that routine maintenance of those right-of-ways and those ditches are included in the needs of these permits. We believe that the new rule does say that we would be, as counties, required to get permits for those ditches. In fact in the EPA's video it says in it several times about how important it is for them to have control of the ditches. And so we're very concerned, again, of the length Mr. Crabtree talked about of already overworked workers in the agencies, this just exacerbates it. And, again, it's just very unfair.

Senator FISCHER. OK. Thank you.

Ms. COOKSLEY.

Ms. COOKSLEY. I too feel it would be burdensome. It does not clarify. Every day I have to go out on the land, I need to be able to know what it is that I can do, because I am going out there to manage the land for the long-term viability of the land, keep the hills covered in grass, protect the wildlife, that I enjoy every day, and still maintain a sustainable business.

Senator FISCHER. Thank you.

Don.

Mr. WISNIESKI. I don't have a whole lot to add to that. I'll pass it on and let somebody else have the time.

Senator FISCHER. John.

Mr. CRABTREE. Senator, I actually really appreciate this question because I think this is one of the heart—sort of the heart of our discussion here. I absolutely respect that people have concerns about what the rule is going to—what the rule would do to—what jurisdiction of Clean Water Act would exist after the finalization rule. And Don and Wes and I, indeed, all of us on the panel probably all have six different viewpoints on what exactly that jurisdiction should end up being finally. The question about uncertainty though is a different question. Whether or not it—some opponents of the rule have said, well, the rule's unclear, it's—causes all these uncertainties, we don't know what it means. But they also say that it expands jurisdiction. It seems like, you know, a fairly precise examination of it. I am the most troubled by the fact that the uncertainty that we worry about exists today, currently. As Miss Cooksley has very adequately described, ranchers and farmers need certainty to make long-range plans. Ranching in the Sandhills is a long-term venture. It's not something you do this year and stop next year. I mean, it's a life commitment and it requires that kind of certainty. But that doesn't exist today. And from the Supreme Court Justice all the way down to little old me, people have said that we're going to have to define what's jurisdiction in order to provide that certainty.

Now, we all—many of us want to quibble, and reasonably so, about, well, what should it be. And that's one question that we should have that argument. But we also need to recognize the uncertainty that people say they hear in the rule exists today, and so they should hear it today too. We should also be talking about, we

need to do rulemaking like this, as the Chief Justice said. Because if we don't, Barbara will still have that uncertainty, and every other rancher out there will. It still exists, what's jurisdictional, what can I do, what can't I. And short of hiring an attorney, and potentially going to court and all that to resolve those questions, they won't have an answer.

And so that's what's important, in our minds, the Center for Rural Affairs, in my mind, that's what's most important about this rulemaking, is providing a definition that's clear and certain. And, again, we're reasonable people, we're more than happy to debate with the people about what exactly that definition should look like, and I think we should continue to debate that. But we have to get that question about would the rule provide certainty? Yes, it would. It absolutely would. It would provide certainty. That doesn't exist today.

Senator FISCHER. Thank you.

Wes.

Mr. SHEETS. Thank you. I'll try and be very succinct and say, yes, I do believe this rule would provide some certainty. But I'd also qualify that by suggesting that my good friend and counter-opponent on my panel here to my left, has expertise, and I would hope that in the final analysis that the rule would be promulgated or at least exposed or written in some final form and then subjected to whatever analysis that is appropriate to make the decision, whether it would work or not and what the ultimate determinations would be. And at that point then I would urge you, Senator, as a policymaker, to consider whether that's good policy for our country or not. But I'd like to see what has been typed down on paper before I would want to commit to making it into the law.

Senator FISCHER. Thank you.

And, Mr. Blankenau, you'll have the last word today.

Mr. BLANKENAU. Oh, good.

This past October, Justin Lavene and I had a case before the U.S. Supreme Court, and while we were engaged in argument, Justice Breyer made the observation that you could hardly find nine people less qualified to decide a water case than the Court. Which got a good laugh in the courtroom. But he, frankly, makes a point. I mean, these are people that are not schooled in hydrology, and making these kinds of decisions is difficult. I think the way the proposed rule is presently written it creates even more uncertainty than exists today. John's absolutely right, there is uncertainty today and clarity is necessary. But this rule, I think, pumps steroids into that uncertainty rather than bring about some resolution. So I would prefer, and I think what I'm hearing many of these panelists say, is that the Corps and EPA go back to the drafting room table and rework this and to try to do exactly what they set out to do, and that's to provide that certainty.

Senator FISCHER. Thank you.

As we wrap up the hearing this—today, this afternoon, I want to again express my gratitude to each of the witnesses for testifying today. We were privileged to hear a wide variety of different Nebraska stakeholders who provided details on the challenges families, businesses, communities will face if and when the administration finalizes the proposed Waters of the United States rule.

We are blessed to have great water resources in this State, and it is clear that this rule would only undermine the strong work of our State, Natural Resource Districts, local communities, and landowners in managing and protecting this precious natural resource.

I have serious concerns about the process that EPA and the Corps used to draft this rule, and its disregard for states, small businesses, and local authorities. It is clear that imposing additional rules and permitting requirements on farmers, small businesses, and local governments will only create uncertainty, cause litigation and liability exposure, and drive up the time and costs of important projects.

I have and will continue to support every legislative opportunity to force EPA and the Corps to withdraw this dangerous proposal. We should not be in the business of creating unnecessary regulations that generate more red tape. Instead, we need to explore policy options that promote growth and enable our job creators, communities, and especially our families to prosper. In doing so, I look forward to utilizing the insights provided by all the stakeholders at this meeting.

And, again, I thank all of you for being here today. Thank you.

And, with that, the hearing is now adjourned.

[Whereupon, at 12:12 p.m., the hearing was adjourned.]

[Additional material submitted for the record follows.]

STATEMENT OF HON. BENJAMIN E. SASSE, U.S. SENATOR FROM THE STATE OF NEBRASKA

Senator Fischer, thank you for convening a hearing on this topic in our great State and thank you for your leadership on this important issue in Congress. Issues concerning the expansion EPA's jurisdiction over additional waters in the United States are absolutely critical to Nebraskans. To my fellow Nebraskans, I would note that our State and the country are very fortunate to have Senator Fischer serving on the Environment and Public Works Committee in the U.S. Senate.

She understands these issues as well as anyone in Washington and is a relentless advocate for common sense in a city that doesn't understand the challenges our farmers and ranchers face. This Committee has jurisdiction over many agencies that implement areas of Federal law that touch industries throughout our state. The EPA is just one prominent example of such an agency. The country will be the beneficiary of Senator Fischer's leadership on this Committee because of her deep experience in transportation, commerce, and agriculture issues. I firmly believe my work on the Senate Agriculture, Nutrition, and Forestry Committee will be informed by her experience and counsel.

Senator Fischer, thank you also for inviting these Nebraskans here today to present testimony. I cannot think of a better way for our State to contribute to a discussion of an expansion of EPA's jurisdiction. To the witnesses, thank you in advance for you preparation and contributions to this important topic. Thank you also for your care for our State and national waters. Federal law cannot hope to adequately protect our waters without citizens who accept the responsibility of being committed caretakers. Nebraskans are committed stewards of our state's waters and those that wind their way through our great country. They are also deeply committed to restoring control to Nebraskans of environmental issues that are properly addressed through State and local jurisdictions.

As importantly, Nebraskans accept the responsibility and embrace the challenges of directing our own affairs. As I traveled Nebraska's 93 counties, I heard time and time again from many expressing the view that good ideas and proper policy is not the exclusive domain of Washington D.C. and the Federal regulations that spring from the power unwisely concentrated there. I look forward to reviewing the testimony submitted at today's hearing and learning from it better ways to improve our environment and ensure that we pass freedom and prosperity to those in our State and beyond that will inherit our land, water, and economic freedoms.

DEPARTMENT OF THE ARMY
OFFICE OF THE ASSISTANT SECRETARY
CIVIL WORKS
108 ARMY PENTAGON
WASHINGTON DC 20310-0108

27 FEB 2015

The Honorable Harold Rogers
Chairman
Committee on Appropriations
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Chairman,

On February 11, 2015, I testified before the Committee on Appropriations, Subcommittee on Energy and Water Development, and Related Agencies, during a budget hearing on the Civil Works program of the U.S. Army Corps of Engineers. During the hearing I fielded a specific question regarding the public comments the Army and the Environmental Protection Agency has received in response to the Clean Water Rule published in the Federal Register on April 21, 2014. In response to the question, I expressed my understanding that about 58% of the public comments were in opposition to the proposed rule. Unfortunately, I did not offer any additional context with regard to my answer. The number I referenced was for a specific subset of the total number of public comments received. As you know, the proposed rule has generated over one million comments.

To clarify the record and provide the appropriate context to my response, I wish to call to your attention, by way of emphasis, that of the 1,051,296 comments received on the proposed Clean Water Rule, 87% are in support, 1% is neutral, and 12% are in opposition.

I apologize for any misunderstanding or inconvenience that my initial response might have caused. Should you or any other Committee or Subcommittee member have any concerns or questions, I will gladly and promptly address them.

Very truly yours,

Jo-Ellen Darcy
Assistant Secretary of the Army
(Civil Works)

KOLEY JESSEN PC, LLO
1125 SOUTH 103RD STREET
SUITE 800
OMAHA, NE 68124
PHONE 402 390 9500
FAX 402 390 9005
koleyjessen.com

KOLEY JESSEN

ATTORNEYS

September 23, 2014

Jay Rempe
Nebraska Farm Bureau Federation
5225 S. 16th Street
Lincoln, NE 68512

Re: Docket ID No. EPA-HQ-OW-2011-0880, Definition of "Waters of the United States" Under the Clean Water Act
Our File No. 16479-0000

Dear Jay:

As agreed, I have prepared an analysis of the proposed definition of "waters of the United States" with a focus on impacts to Nebraska agricultural producers. This analysis is based on my experience with the Nebraska Environmental Protection Act and administering water quality programs in the State, including delegated federal programs. A major element of administering delegated Clean Water Act programs is interacting with the United States Environmental Protection Agency. If enacted as proposed, the rule would expand federal jurisdiction over wetlands and other ancillary waters. The impact on Nebraska agriculture would be significant and would cause cost increases, confusion, and uncertainty to agricultural producers. The expansion of authority would not only affect jurisdiction over permits to dredge and fill wetlands and other waters under §404 of the Act but also §402 discharges of pollutants to surface water and other sections of the Act.

PROPOSED RULE

The proposed rule represents the United States Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) interpretation of the current jurisdictional reach of the federal Clean Water Act (CWA or Act). The proposed rule will supersede a 2003 Joint Memorandum which provided clarifying guidance on the Supreme Court's *Solid Waste Agency of Northern Cook County v. US Army Corps of Engineers* (SWANCC) and a 2008 Joint Guidance memo issued after another Supreme Court case of *Rapanos v.* Army Corps of Engineers(Rapanos), (collectively "Existing Guidance"). Both of those cases involved wetlands issues with the Corps under §404. The proposed rule relies on a draft scientific report, *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence* that the EPA's Science Advisory Board released for public comment in

MICHAEL J. LINDER
DIRECT. 402.343.3755
MICHAEL.LINDER@KOLEYJESSEN.COM

September 2013. The agencies are using the draft Report as the scientific basis for the policy decisions expressed in the jurisdictional rule.

DRAFT CONNECTIVITY REPORT

The draft Connectivity Report was prepared to provide a basis for determining which wetlands and water bodies are categorically within EPA and Corps jurisdiction. The "categorical" determination as opposed to the current case-by-case basis for jurisdiction decisions was reportedly an attempt to make decisions more efficiently and to provide clarity. The scientific approach in the Report was the agencies' view on physical, chemical, and biological connections between upland streams and wetlands and water bodies recognized as "traditional navigable waters".

The Connectivity Report's conclusions have the effect of establishing categorical federal jurisdiction over the following waters based on the Report's conclusions:

- A *tributary system*, including perennial, intermittent, and ephemeral streams because they are physically, chemically, and biologically connected to downstream rivers.
- Wetlands and open waters in *riparian areas and floodplains* because they are physically, chemically, and biologically connected with downstream rivers.
- The Report also concluded that the current literature is insufficient to generalize about the connectivity or downstream effects of isolated wetlands.

As a result, the Report's conclusions (which carry over to the proposed rule) have the effect of establishing categorical federal jurisdiction over tributary systems, riparian areas, and floodplains allowing the agencies to establish jurisdiction over such waters without conducting a case-by-case analysis on anything other than isolated wetlands. As discussed below, this creates a blanket jurisdictional determination without the ability to interject judgment or common sense where needed. In Nebraska, where there are large areas of agricultural land with various types of water bodies and surface features, this will have a tremendous negative impact.

PROPOSED RULE AND SECTION 404

As noted earlier, the proposed rule addresses the definition of "waters of the United States" for all CWA purposes. And yet, the model for the regulatory approach here is the Existing Guidance which was limited on its face to §404 determinations. With backing of the Connectivity Report, the proposed rule would significantly expand the scope of categorical federal agency jurisdiction under the CWA. The proposal makes an aggressive interpretation of Justice Kennedy's "significant nexus" test for determining CWA jurisdiction under *Rapanos*. Justice Kennedy intended that in order to meet the significant nexus test, there needed to be some significance or importance to the individual water body's impact on navigable waters. It is not in

keeping with that case-by-case need to determine the importance of the specific facts of potential impact to think that an entire area could be categorically lumped into jurisdiction.

One stated purpose of the proposed rule is to reduce the use of the Corps' Wetlands Delineation Manual of 1987 and its supplements. The Manual is the tool the agencies use to determine whether water bodies are subject to CWA jurisdiction on a case-by-case basis. Case-by-case determinations using the Manual are frequently difficult, time consuming, and bureaucratic. The more difficult determinations are those waters described as "other waters" in the EPA and Corps' regulations. The proposed rule attempts to solve this difficulty by determining, for the first time, that the following will always be jurisdictional:

- All "tributaries", including any water (wetlands, lakes, and ponds) that contribute flow, either directly or through another water, to downstream traditional navigable waters, interstate waters, or territorial waters.

- All waters "adjacent" to such tributaries. "Adjacent" is broadly defined to include all waters located within the "riparian area" or "floodplain" of otherwise jurisdictional waters, including waters with shallow subsurface hydrologic connection or confined surface hydrologic connection to jurisdictional water.

The proposed rule does codify existing policies and categorically exempt areas from federal CWA jurisdiction in a specific listing of the policies and areas. However, the net effect of the proposed rule is that smaller and more remote upstream bodies of water will fall with certainty within federal CWA jurisdiction.

Nebraska is comprised of over 77,000 square miles of area with over 92 percent of that area used for agricultural purposes. From west to east, the State moves from low precipitation high plains to higher precipitation grasslands in the east. There are an infinite number of scenarios that call for good judgment in determining whether or not a particular water body is or should be subject to federal CWA jurisdiction. This rule would impose a blanket jurisdictional determination over thousands of acres of private property. The effect would be to impose unnecessary property restrictions and uncertainty as to what that actually means to a farmer or rancher.

It is widely agreed that the current §404 permitting process needs to be reformed. Time delays and regulatory uncertainty do exist. However, there is at least a current level of *predictability* with jurisdictional determinations. And, there is at least an ability for Corps field staff to apply common sense and flexibility when there may be a close call. However, the proposed rule will take that away and, instead, create many new areas that are subject to jurisdiction categorically.

Much of the cause for expansion of jurisdiction is due to the broad scope of definitions contained in the proposed rule. The definition of "tributary" is too broad and needs some element of permanent or consistent flow. As proposed, the definition is a land feature which has two banks, a bed and a high water mark. The land feature does not lose its tributary status if

there are man-made breaks (bridges, culverts, etc.) so long as the bed and bank can be identified upstream and downstream of the break. And, a tributary can be natural, man-altered, or man-made and includes rivers, streams, lakes, impoundments, canals, and ditches (unless excluded).

There are many examples in Nebraska of waterways that have a bed and bank and a high water mark but only run during precipitation events. And, unless there is a significant amount of precipitation, many of those examples are waters that flow only a short distance before evaporating or seeping into the ground. Many rarely, if ever, have flow that actually reaches a flowing stream even though a topographic map may indicate that it does. This is especially true in the more arid western part of the state. Also, there are thousands of miles of "ditches" in Nebraska constructed either as part of public and private roadways or are on the land for various reasons to help direct water flow during storms or wet periods. To include these features as being subject to federal jurisdiction is unnecessary and will have little or no positive impact on water quality.

Not only would "tributaries" be categorically subject to federal CWA jurisdiction but also any "adjoining" waters will be included. Adjoining waters include "neighboring" waters to tributaries. Neighboring waters are those that are located within a "riparian area" or "floodplains" or waters with a surface or shallow subsurface connection. In Nebraska, there are many areas that are flat and the state has many miles of rivers and streams creating expansive flood prone areas. Therefore, many of Nebraska's rivers and streams have extensive riparian and floodplain areas. Looking at the plain meaning of these definitions, Nebraska agricultural producers should have deep concerns that many areas of the state will be categorically defined as jurisdictional waters. If enacted as proposed, the interpretation of these definitions will be immensely important. In my opinion, these definitions should be narrowed to require that there is water flow present in a tributary for a significant amount of time to trigger jurisdiction. Or, provide some test that allows for the field personnel to exclude tributaries that only rarely contribute to the water quality of the identified traditionally navigable water. Nebraska can provide many examples of tributaries that, even at their glory, do not contribute to water quality impacts of any navigable water.

The literal interpretation of the proposed rule would be that a tributary (which is merely a discernible bed, bank and high water mark) and all of the adjoining riparian areas and floodplains would be under CWA jurisdiction. Read this way, which is the most direct reading, much of Nebraska would be categorically under federal jurisdiction with much of the rest left wondering if its "other waters" would pass the significant nexus test. This is because the proposed rule creates an additional determinant of jurisdiction. The term, "other water" refers to waters that cannot be considered "adjacent" to downstream jurisdictional waters and that are not tributaries of such waters. "Other waters" are found outside the riparian area and the floodplain, since waters within those areas are considered to be adjacent. As such, wetlands that are other waters typically would have "unidirectional flow". Fed Reg at 22246. Those isolated wetlands or land features would be viewed individually or collectively in a watershed to determine if they have "significant nexus" to traditional navigable waters. So, there would still be a Corps field determination of these features of the land to determine CWA jurisdiction. The Federal Register discussion of the "significant nexus" test relies almost exclusively on science in its evaluation.

The Supreme Court significant nexus test went beyond pure science and also would ask, "so what?". In other words, science alone may show a connection but common sense should prevail when there is no likely impact on water quality. The recent §404(f)(1)(A) normal farming activity exemption interpretive rule did not help clear up uncertainty and, in fact, leads to more questions. "Normal farming" as an exemption to the CWA has always been interpreted broadly and the interpretive rule narrows this historical treatment and applies a prescriptive method of "normal farming" as defined by certain NRCS Standards. This prescriptive, intrusive approach to narrowing the CWA exemption is aligned with the attempt to categorically classify certain areas as jurisdictional. The cumulative effect is dictation by the agencies of land practices which exceeds authority granted to the agencies by Congress in the CWA.

The cumulative impact of the changed process and determinations under §404 will be to expand the federal CWA jurisdiction. Land use features such as ditches, waterways, and dry creek beds which rarely carry water will now categorically be under federal jurisdiction. Isolated wetlands and other waters outside of these areas may still be subject to CWA jurisdiction after a Corps determination of significant nexus. The EPA states that the purpose and intent of this proposed rule is to provide clarity and certainty to the current analysis and decision-making under §404. In my opinion, there will continue to be uncertainty in the §404 jurisdictional determination process caused by the new definitions.

Instead of the proposed rule, EPA and the Corps should either fix the current bureaucratic nightmare of §404 permitting or propose a rule that truly narrows down water bodies that should be protected by the CWA. In either case, the current proposal should be withdrawn.

OTHER CWA SECTIONS AFFECTED

An equally important area of impact on Nebraska agricultural producers is a concern that the attempt to fix the §404 problem creates many more problems under other sections of the CWA. If enacted as proposed, the definition of "waters of the United States" would affect the scope of all provisions of the CWA that use the term. This would include the §402 National Pollutant Discharge Elimination System (NPDES) permit program; the §303 water quality standards and total maximum daily load programs; the §401 state water quality certification process; and the §311 oil spill program. As noted earlier, the Existing Guidance (the model for this rule) was limited on its face to §404 determinations and had no practical impact on the other sections listed above. By essentially overlaying the Existing Guidance (as modified by the proposed rule) on these other sections, EPA will create significant cost and confusion, increase unnecessary bureaucracy, infringe on state programs, and expose agricultural producers to new liability.

There is currently a difference in use and application of the definition in the CWA of "waters of the United States" as it is utilized in various sections of the Act. The reason for this is easily explained. Other than the §404 program and the §311 oil spill program, the CWA is essentially administered by the states with delegated programs. All but a handful of states have CWA programs delegated to them. In Nebraska, the Nebraska Department of Environmental Quality (NDEQ) has been delegated all CWA programs other than §404 and §311 since the mid-

1970s. In order to have an approved program, EPA must determine that the state's laws are consistent with the CWA. That would include an evaluation of the state equivalent definition of water bodies covered. In Nebraska, the definition of "waters of the state" is found in Neb.Rev.Stat. §81-1502(21) which was reviewed and approved by EPA. The wording of that definition is not identical to the wording of the definition of "waters of the United States" in the CWA. In fact, the wording is quite different. Wisely, Congress allowed states to craft their programs to be the most fitting to the state so long as the provisions were at least as stringent as the federal counterpart. The concept was one of "cooperative federalism" in which the federal government sets the broad goals and individual states reach the goals in a manner most appropriate for its citizens and based on its physical characteristics.

As a result, the NDEQ has administered the §401, §402 and §303 programs using its unique "waters of the state" definition for nearly forty years. The NDEQ has applied that definition to literally thousands of permitting decisions without ever once referring to the Existing Guidance. During those forty years, the NDEQ's decisions have been overseen by the EPA and have been in accordance with the CWA. For agriculture in Nebraska, there is an understanding of what a "water of the state" is and is not based on four decades of interpretation by NDEQ. Also, to my knowledge, the EPA in administering §311 does not utilize the Existing Guidance document itself but advises producers to decide if a spill could "reasonably be expected" to reach water (EPA *SPCC Fact Sheet: Information for Farmers*, January 2014). However, the imposition of the proposed rule would create uncertainty, expansion of jurisdiction, and exposure to new liability for Nebraska producers. In addition, the federal encroachment of what is now a state delegated program runs counter to the concept of "cooperative federalism" which is a tenet of federal environmental programs.

Currently, the §402 program most impacts Nebraska agriculture in permit requirements for certain livestock operations and pesticide applications on or near water. For livestock producers, the NDEQ first started regulating discharges to "waters of the state" in 1974. Thousands, if not tens of thousands, of livestock producers have been visited by the NDEQ since that time. The NDEQ's program is to observe an operation to determine if waste or runoff has the potential to impact waters of the state. If there is a potential to impact water quality then the producer must either change the operation to avoid the potential impact or control the waste and runoff such that it will not impact water quality. Many producers, especially small producers, have been able to modify their operation or construct mitigating landscape features (water diverting berms or waterways, for example) to avoid impacting waters of the state. Likewise, producers have been constructing livestock waste control facilities under state permits. These are state construction standards for engineered facilities to handle all waste and it is common to use land application of waste as part of the operation.

All decisions in these programs have relied on the state definition of regulated water bodies for forty years. In addition, many producers have gone through the NPDES permitting process and are currently operating under a General Permit or an Individual Permit. This regulatory structure has evolved at the state level in tandem with the federally delegated NPDES program since its inception. All determinations have been made under the state definition of regulated waters. If the proposed rule is adopted, the Nebraska regulatory scheme suddenly

leaves the producer wondering if his or her operation is effectively permitted or exempted. This is because, with the broad categorical definition of tributaries and neighboring waters, it is possible that currently exempted operations may now be subject to federal CWA jurisdiction. What's worse is that a producer may have, in good faith, constructed a landscape feature to divert flow away from livestock operations and now those very features may themselves be a "tributary" or an "adjacent" water.

This will cause confusion, increase costs and will expose producers to new liability to enforcement from the federal or state government or to citizen suits under the CWA. This federalization of a current state program also infringes states rights and runs counter to the concept of "cooperative federalism".

In Nebraska, farmers and ranchers have rarely been subject to NPDES permits other than the livestock program (and the recent pesticide permits which will be discussed later). The expansion of the definition to categorically include tributaries and waters adjoining tributaries takes in many new types of waters and land features. It is an additional concern that the Interpretive Rule treatment of "normal farming" activities does not apply to sections other than §404. That creates a question mark and added confusion over what differences there would be between §404 and the rest of the Act as it relates to the farming exemptions. Many of the questions that have long ago been answered or understood will now be at issue again. For example, if a farmer or rancher incidentally deposits fertilizer into a ditch or water way we know that most likely we are not dealing with a "point source discharge to waters of the United States" (the test for a permit under §402) because the area has not been deemed jurisdictional and this incidental activity would be exempt under the current application of the Act. With the proposed change, this same incident could occur in a categorically determined jurisdictional area and not be considered "normal farming" activity under NRCS Standards. Does that mean that a §402 permit is required? This increased confusion and uncertainty is not necessary. Again, the Nebraska definition of waters of the state is in place and has been implemented for forty years in a rational fashion. There is no problem that needs to be fixed in Nebraska.

The recent need to establish a process to obtain coverage for pesticide applications "on or near" water creates another point of potential turmoil if the proposed rule is adopted. The *National Cotton Council of America v. EPA* decision caused much confusion on how states would issue permits for application of pesticides on or near water bodies. The NDEQ developed and issued a General Permit with cooperation from Region VII. The General Permit is appropriate for Nebraska's varying conditions. It may not, however, cover all of the expansion of categorical federal jurisdiction and "other waters" as contemplated in the proposed rule. Nebraska agricultural producers are directly impacted by this issue and any change is unnecessary because the State has adequately addressed any concern here.

In summary, an expansion of CWA jurisdiction and an overlay of §404 decision-making process to §402 does not make sense. The State of Nebraska has developed a surface water discharge permitting system that is now built on forty years of implementation. EPA should not try to fix what is not broken. The proposed rule will expose producers to liability and uncertainty by drastically changing the NPDES program with an expanded federal definition.

The NDEQ has also administered the §401 and §303 programs since delegation in the 1970s. The impact on §401 will be an increase in the number of certifications that the State will need to issue because there will be more federal actions to trigger certification needs. This may add more bureaucracy, time, and red tape to the existing process. This will increase resource needs of state government and will potentially raise the NDEQ's budget.

The §303 program will be impacted by the increased number of water bodies subject to water quality standards. The NDEQ has been monitoring and assessing water bodies for forty years based on its interpretation of the state definition of waters of the state. EPA has approved the state program and, thus, has approved the definition. The addition of more water bodies will add to the state burden without additional resources which will lead to the need for more state resources. In addition, the water bodies that are subject to state assessment will also need to be evaluated to determine if they meet an assigned beneficial use. If the beneficial use is not being met, the water body may be impaired and need to be listed on the §303(d) list of impaired water bodies. That would trigger the requirement that a total maximum daily load (TMDL) be prepared which lays out "reasonable assurances" to bring the water body out of impaired status.

Additional TMDLs will put added burdens on producers. If EPA's expanded jurisdictional reach is realized under the propose rule, TMDLs may be written that include reasonable assurances that incorporate regulatory controls over newly defined CWA waters. Under the "other waters" definition, there could be entire watersheds that are subject to TMDLs with mandatory requirements to bring the isolated wetlands within it back into attainment with water quality standards. Nebraska agriculture should be concerned that this is an unwarranted reach of regulatory authority beyond the intent of the CWA or the holdings of the Supreme Court.

The federal encroachment into the §303 process is another illustration of the erosion of cooperative federalism. The NDEQ has developed a successful model of a voluntary process whereby priority watersheds can be protected using state, local, and federal resources to leverage private investment. There have been very successful efforts in Nebraska and around the country that are collaborative watershed projects using state, local, federal, and private (agricultural producers and land owner) resources. If these same efforts had been under a mandatory regulatory program, the results would have been much less successful. In fact, an unintended consequence of this proposed rule would be to create a disincentive for producers to install conservation measures at their operations. Why install conservation terraces if there is a question as to how that land feature will be viewed under the new rule? Why would a producer voluntarily try new conservation practices if they would raise the jurisdictional issue and potentially require a permit?

Another significant concern of Nebraska agriculture should be the affect of the proposed rule on the §311 oil spill program. Due to the expanded jurisdiction to include tributaries and water adjoining tributaries and other waters, there will be more instances of the need to prepare a Spill Prevention, Control, and Countermeasures Plan (SPCC) plan. Currently, the EPA Fact Sheet advises producers to determine if a spill would "reasonably" reach water to decide if the operation needs a plan. With the blanket categories of jurisdictional waters that would be subject

to CWA jurisdiction, that rule of thumb would surely change. Many producers would have to assume that they would need a SPCC plan since the jurisdictional question would be so far reaching and unpredictable. This change will place an additional burden on producers and create an additional liability exposure without additional benefits to water quality.

Nebraska agriculture should also be concerned about the potential for groundwater sources to be treated as "waters of the United States". EPA has commented that this isn't so and the proposed rule itself contains an exclusion for groundwater. However, the definition of "adjacent" and "neighboring" would include "waters with a shallow subsurface hydrologic connection or confined surface hydrologic connection" to jurisdictional water. There are many areas in Nebraska where there is a hydrologic connection of surface and ground water. In fact, there are entire river basins where this phenomenon exists. Are all riparian and floodplain areas with a hydrologic connection of ground and surface water now going to be subject to CWA jurisdiction? What are the limits of this language? The impact of this interpretation is critical for Nebraska agriculture. If the answers to the questions above are in the affirmative, then a whole new layer of types of water and types of CWA permits needed come into play. The proposed rule needs to be more explicit as to what subsurface connections are covered, if any. . The CWA was not meant to cover groundwater and it should be excluded from jurisdictional coverage.

Any change to the interpretation of "waters of the United States" should focus only on §404 where many problems currently exist. The other sections of the Act are largely administered by the states and no business case has been made for a need to change this area of the Act.

SUMMARY OF COMMENTS AND PROPOSED ACTION

In my opinion, enactment of the proposed rule would cause negative impact on Nebraska's farmers and ranchers. The new definition would apply to all sections of the CWA and yet the only identified problem that the agencies are trying to solve is the unwieldy jurisdictional decision-making process under §404. The agencies believe that this inefficient and uncertain process is caused by the definition of "waters of the United States". There has been no business case made for a need to change the definition as it is implemented under the other sections of the Act.

As a proposed path forward, the agencies should immediately withdraw the rulemaking. The agencies should focus on the identified problem – the §404 program. Possible solutions may include reformation of the current decision-making process to include re-writing the Existing Guidance. It may even require amending the regulatory definition of "waters of the United States" specifically for the §404 program. Any effort at future rulemaking or reform efforts should include extensive outreach to affected entities. In addition, future rulemaking or reform efforts should not include other sections of the CWA. There has been no business case made for changing the definition as it applies to other sections and such a change would cause unnecessary cost, confusion and loss of states' rights without addressing any known problem.

Thank you for the opportunity to provide this analysis. I hope it is helpful in your deliberations over the impact of this proposed rule.

Sincerely yours,

Michael J. Linder

MJL

KOLEYJESSEN.COM

KOLEY JESSEN P.C., L.L.O.
ATTORNEYS AT LAW
ONE PACIFIC PLACE, SUITE 800
1125 SOUTH 103RD STREET
OMAHA, NE 68124
PHONE. 402.390.9500
FAX. 402.390.9005

KOLEY JESSEN

March 10, 2015

Deb Fischer
United States Senator
11819 Miracle Hills Drive
Suite 205
Omaha, NE 68154

Re: Field Hearing on the proposed Waters of the U.S. rule (WOTUS)
Senate Committee on Environment and Public Works
March 14, 2015
Lincoln, Nebraska

Dear Senator Fischer:

This letter and the attachment are meant for your information and use at the Senate Committee on Environment and Public Works Field Hearing in Lincoln on March 14, 2015. I would present this in person but, regretfully, I will be out of town and unavailable.

An analysis of the proposed definition of "waters of the United States" (WOTUS) that I prepared in September 2014 is attached. That analysis focuses on impacts of the proposed WOTUS definition on agriculture and, in particular, agriculture in Nebraska. As such, other impacts in the state are not discussed but that does not mean that other impacts will not be experienced.

The analysis spends a significant amount of time discussing the impact of a broad definitional change under the Clean Water Act. My opinion is that this broad approach does not need to be taken to deal with the problem that was been identified. The problem is in one of the main permitting programs of the CWA, the Section 404 program. For better or worse, the two primary permitting programs under the CWA have taken different paths in Nebraska (and nationally) over the last 40 years. Section 402 permits are for point source discharges to waters of the United States. Nebraska was delegated the authority to administer that program in the mid 1970s. The Nebraska Department of Environmental Quality has been issuing permits under Section 402 since that time using an approved definition of "waters of the state". Many other states took a similar approach and, as a result, there is a long history of decisions that have been made under various state definitions of protected waters. Interestingly, there are no widely recognized problems in the Section 402 program with determining jurisdictional waters.

MICHAEL J. LINDER
DIRECT. 402.343.3755
MICHAEL.LINDER@KOLEYJESSEN.COM

On the other hand, the Section 404 program has been handled by the Federal government through the Corps of Engineers and EPA. There is widespread recognition that jurisdictional determinations of WOTUS in the Section 404 program have become unwieldy. The Section 404 permitting process is lengthy, expensive, and confusing. The fix that has been proposed is to codify the existing federal guidance on jurisdictional determinations (that doesn't work well) into regulation. In order to remedy some of the current guidance problems, the regulatory proposal "clarifies" some areas of the guidance. This is primarily done in the form of new definitions which may clarify some of the problems but, in the process, expand the coverage of the Act.

When states agreed to administer programs such as the 402 permit program, they did so with the understanding that their relationship with the federal government would be one of "cooperative federalism". That is, the federal government would set out the parameters and goals of the program but the state would have flexibility to accomplish those goals in a manner most appropriate for that state. The proposed WOTUS definition encroaches on and impacts Nebraska's delegated Section 402 program. It will not only cause increased confusion and uncertainty in the State but it runs counter to the "cooperative federalism" promise.

The federal government does need to fix Section 404 but should not do so in a manner that causes problems in other areas. I would suggest withdrawing the proposed definition and, instead, focus on fixing the Section 404 program. The fix may include an intense examination of the Corps' process or a renewed effort to more easily delegate the 404 program to the states along with adequate funding.

Good luck with the Field Hearing process and please contact me with any questions.

Sincerely yours,

Michael J. Linder

MJL/jw

Attachment

NATIONAL ASSOCIATION OF COUNTIES

POLICY BRIEF

NACo 2014

County Action Needed

New "Waters of the United States" Definition Released

Counties are strongly encouraged to submit written comments on potential impacts of the proposed regulation to the Federal Register

On April 21, the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) jointly released a new proposed rule – *Definition of Waters of the U.S. Under the Clean Water Act* – that would amend the definition of "waters of the U.S." and expand the range of waters that fall under federal jurisdiction. The proposed rule, published in the Federal Register, is open for public comment until November 14, 2014.

The proposed rule uses U.S. Environmental Protection Agency's (EPA) draft report on *Connectivity of Stream and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*, which is currently undergoing review by EPA's Science Advisory Board, as a scientific basis for the new definition. The report focuses on over 1,000 scientific reports that demonstrate the interconnectedness of tributaries, wetlands, and other waters to downstream waters and the impact these connections have on the biological, chemical and physical relationship to downstream waters.

Why "Waters of the U.S." Regulation Matters to Counties

The proposed "waters of the U.S." regulation from EPA and the Corps could have a significant impact on counties across the country, in the following ways:

- **Seeks to define waters under federal jurisdiction:** The proposed rule would modify existing regulations, which have been in place for over 25 years, regarding which waters fall under federal jurisdiction through the Clean Water Act (CWA). The proposed modification aims to clarify issues raised in recent Supreme Court decisions that have created uncertainty over the scope of CWA jurisdiction and focuses on the interconnectivity of waters when determining which waters fall under federal jurisdiction. **Because the proposed rule could expand the scope of CWA jurisdiction, counties could feel a major impact as more waters become federally protected and subject to new rules or standards.**

- **Potentially increases the number of county-owned ditches under federal jurisdiction:** The proposed rule would define some ditches as "waters of the U.S." if they meet certain conditions. This means that more county-owned ditches would likely fall under federal oversight. In recent years, Section 404 permits have been required for ditch maintenance activities such as cleaning out vegetation and debris. **Once a ditch is under federal jurisdiction, the Section 404 permit process can be extremely cumbersome, time-consuming and expensive, leaving counties vulnerable to citizen suits if the federal permit process is not streamlined.**

- **Applies to all Clean Water Act programs, not just Section 404 program:** The proposed rule would apply not just to Section 404 permits, but also to other Clean Water Act programs. Among these programs—which would become subject to increasingly complex and costly federal regulatory requirements under the proposed rule—are the following:
    - **Section 402 National Pollution Discharge Elimination System (NPDES) program,** which includes municipal separate storm sewer systems (MS4s) and pesticide applications permits (EPA Program)
    - **Section 303 Water Quality Standards (WQS) program**, which is overseen by states and based on EPA's "waters of the U.S." designations
    - Other programs including **stormwater, green infrastructure, pesticide permits** and **total maxiumum daily load (TMDL) standards**

Background Information

The Clean Water Act (CWA) was enacted in 1972 to restore and maintain the chemical, physical and biological integrity of our nation's waters and is used to oversee federal water quality programs for areas that have a "water of the U.S." The term navigable "waters of the U.S." was derived from the Rivers and Harbors Act of 1899 to identify waters that were involved in interstate commerce and were designated as federally protected waters. Since then, a number of court cases have further defined navigable "waters of the U.S." to include waters that are not traditionally navigable.

More recently, in 2001 and 2006, Supreme Court cases have raised questions about which waters fall under federal jurisdiction, creating uncertainty both within the regulating agencies and the regulated community over the definition of "waters of the U.S." In 2001, in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers* (531 U.S.159, 2001), the Corps had used the "Migratory Bird Rule"—wherever a migratory bird could land—to claim federal jurisdiction over an isolated wetland. The Court ruled that the Corps exceeded their authority and infringed on states' water and land rights.

In 2006, in *Roponos v. United States*, (547 U.S. 715, 2006), the Corps were challenged over their intent to regulate isolated wetlands under the CWA Section 404 permit program. In a 4-1-4 split decision, the Court ruled that the Corps exceeded their authority to regulate these isolated wetlands. The plurality opinion states that only waters with a relatively permanent flow should be federally regulated. The concurrent opinion stated that waters should be jurisdictional if the water has a "significant nexus" with a navigable water, either alone or with other similarly situated sites. Since neither opinion was a majority opinion, it is unclear which opinion should be used in the field to assert jurisdiction, leading to further confusion over what waters are federally regulated under CWA.

The newly proposed rule attempts to resolve this confusion by broadening the geographic scope of CWA jurisdiction. The proposal states that "waters of the U.S" under federal jurisdiction include navigable waters, interstate waters, territorial waters, tributaries (ditches), wetlands, and "other waters." It also redefines or includes new definitions for key terms—adjacency, riparian area, and flood plain—that could be used by EPA and the Corps to claim additional waters as jurisdictional.

States and local governments play an important role in CWA implementation. As the range of waters that are considered "waters of the U.S." increase, states are required to expand their current water quality designations to protect those waters. This increases reporting and attainment standards at the state level. Counties, in the role of regulator, have their own watershed/stormwater management plans that would have to be modified based on the federal and state changes. Changes at the state level would impact comprehensive land use plans, floodplain regulations, building and/or special codes, watershed and stormwater plans.

Examples of Potential Impact on Counties

County-Owned Public Infrastructure Ditches

The proposed rule would broaden the number of county maintained ditches—roadside, flood channels and potentially others—that would require CWA Section 404 federal permits. Counties use public infrastructure ditches to funnel water away from low-lying roads, properties and businesses to prevent accidents and flooding incidences.

- The proposed rule states that man-made conveyances, including ditches, are considered jurisdictional tributaries if they have a bed, bank and ordinary high water mark (OHWM) and flow directly or indirectly into a "water of the U.S.," regardless of perennial, intermittent or ephemeral flow.

- The proposed rule excludes certain types of upland ditches with less than perennial flow or those ditches that do not contribute flow to a "water of the U.S." However, under the proposed rule, key terms like 'uplands' and 'contribute flow' are undefined. It is unclear how currently exempt ditches will be distinguished from jurisdictional ditches, especially if they are near a "water of the U.S."

Ultimately, a county is liable for maintaining the integrity of their ditches, even if federal permits are not approved by the federal agencies in a timely manner. For example, in 2002, in *Arreola v Monterey* (99 Cal. App. 4th 722), the Fourth District Court of Appeals held the County of Monterey (Calif.) liable for not maintaining a levee that failed due to overgrowth of vegetation, even though the County argued that the Corps permit process did not allow for timely approvals.

The National Association of Counties' policy calls on the federal government to clarify that local streets, gutters, and human-made ditches are excluded from the definition of "waters of the U.S."

Stormwater and Green Infrastructure

Since stormwater activities are not explicitly exempt under the proposed rule, concerns have been raised that Municipal Separate Storm Sewer System (MS4) ditches could now be classified as a "water of the U.S." Some counties and cities own MS4 infrastructure including ditches, channels, pipes and gutters that flow into a "water of the U.S." and are therefore regulated under the CWA Section 402 stormwater permit program.

This is a significant potential threat for counties that own MS4 infrastructure because they would be subject to additional water quality standards (including total maximum daily loads) if their stormwater ditches are considered a "water of the U.S." Not only would the discharge leaving the system be regulated, but all flows entering the MS4 would be regulated as well. Even if the agencies do not initially plan to regulate an MS4 as a

"water of the U.S.," they may be forced to do so through CWA citizen suits, unless MS4s are explicitly exempted from the requirements.

In addition, green infrastructure is not explicitly exempt under the proposed rule. A number of local governments are using green infrastructure as a stormwater management tool to lessen flooding and protect water quality by using vegetation, soils and natural processes. The proposed rule could inadvertently impact a number of these county maintained sites by requiring Section 404 permits for non-MS4 and MS4 green infrastructure construction projects. Additionally, it is unclear under the proposed rule whether a Section 404 permit will be required for maintenance activities on green infrastructure areas once the area is established. In stakeholder meetings, EPA has suggested local governments need to include in their comments whether an exemption is needed, and if so, under what circumstances, along with the reasoning behind the request.

Potential Impact on Other CWA Programs

It is unclear how the proposed definitional changes may impact the pesticide general permit program, which is used to control weeds and vegetation around ditches, water transfer, reuse and reclamation efforts and drinking and other water delivery systems. According to a joint document released by EPA and the Corps, *Economic Analysis of Proposed Revised Definition of Waters of the United States* (March 2014), the agencies have performed cost-benefit analysis across CWA programs, but acknowledge that "readers should be cautious is examining these results in light of the many data and methodological limitations, as well as the inherent assumptions in each component of the analysis."

Submitting Written Comments

NACo has prepared draft comments for counties. Go to NACo's "Waters of the U.S." hub for more information, www.naco.org/wous.

Written comments to EPA and Corps are due no later than November 14, 2014. *If you submit comments, please share a copy with NACo's Julie Ufner at jufner@naco.org or 202.942.4269.*

Submit your comments, identified by ***Docket ID No. EPA–HQ– OW–2011–0880*** by one of the following methods:

- Federal eRulemaking Portal: http://www.regulations.gov. Follow the instructions for submitting comments
- E-mail: ow-docket@epa.gov. Include EPA–HQ–OW–2011–0880 in the subject line of the message
- Mail: Send the original and three copies of your comments to: Water Docket, Environmental Protection Agency, Mail Code 2822T, 1200 Pennsylvania Avenue, NW, Washington, DC 20460, Attention: Docket ID No. EPA–HQ–OW–2011–0880.

For further information, contact: Julie Ufner at 202.942.4269 or jufner@naco.org

Definition of "Waters of the United States" Under the Clean Water Act
Summary of Draft Regulation As Proposed by EPA and Corps

Key Terms	Current EPA/Corps Regulations	Proposed Regulatory Language	Analysis of Potential County Impact
"Waters of the U.S."[1] Definition	40 CFR 230.3(s) The term "Waters of the United States" means: (1) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, all waters which are subject to the ebb and flow of the tide;	Define "Waters of the United States" for all sections (including sections 301, 311, 401, 402, 404) of the CWA to mean: (1) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;	**No change from current rules** These waters are referred to as traditionally navigable waters of the U.S. For the purposes of CWA jurisdiction, waters are considered traditional navigable waters if: • They are subject to section 9 or 10 of the 1899 Rivers and Harbors Appropriations Act • A federal court has determined the water body is navigable-in-fact under law • Waters currently used (or historically used) for commercial navigation, including commercial waterborne recreation (boat rentals, guided fishing trips, etc.)
	(2) All interstate waters[2], including interstate "wetlands";	(2) All interstate waters, including interstate wetlands;	**No change from current rules** Under the proposed rule, waters (lakes, streams, tributaries, etc.) would be considered "interstate waters" if they flow across state boundaries, even if they

[1] There is only one Clean Water Act definition of "waters of the U.S." This definition is used for all CWA programs (including sections 301, 311, 401, 402, and 404)
[2] All interstate waters are "waters of the U.S.", even if they are non-navigable (under the current "waters of the U.S." definition)

Definition of "Waters of the United States" Under the Clean Water Act
Summary of Draft Regulation As Proposed by EPA and Corps

Key Terms	Current EPA/Corps Regulations	Proposed Regulatory Language	Analysis of Potential County Impact
			are not considered "navigable" and do not connect to a "water of the U.S."
"Waters of the U.S." Definition (continued)	(3) All other waters such as interstate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce including any such waters:	(7) And on a case-specific basis, other waters, including wetlands, provided that those waters alone, or in combination with other similarly situated waters, including wetlands[3], located in the same region, have a significant nexus to a traditional navigable water, interstate water or the territorial sea	Under the proposed rule, "other waters" would not automatically be considered jurisdictional, instead, they would be assessed on a case-by-case basis, either alone or with other waters in the region to assess the biological, physical, chemical impacts to the closest jurisdictional waters Under the proposed rule, "other waters," such as isolated wetlands, must meet the significant nexus test to be considered jurisdictional. ***This is a major change over current practice.***
	(i) Which are or could be used by interstate or foreign travelers for recreation or other purposes; (ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or	(i) through (iii) eliminated	The agencies consider (i) through (iii) duplicative language

[3] The term wetlands means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support a prevalence of vegetation typical of wet soil conditions The term generally includes swamps, marshes, bogs and other similar areas

Definition of "Waters of the United States" Under the Clean Water Act
Summary of Draft Regulation As Proposed by EPA and Corps

NACO National Association of Counties

Key Terms	Current EPA/Corps Regulations	Proposed Regulatory Language	Analysis of Potential County Impact
"Waters of the U.S." Definition (continued)	(iii) Which are used or could be used for industrial purposes by industries in interstate commerce;		
	(4) All impoundments of waters otherwise defined as waters of the U.S. under this definition;	(4) All impoundments of a traditional navigable water, interstate water, the territorial seas or a tributary;	**No change from current rules – County owned dams and reservoirs are under federal jurisdiction**
	(5) Tributaries of waters identified in paragraphs (a) through (d) of this definition;	(5) All tributaries of a traditional navigable water, interstate water, the territorial seas or impoundment;	**Proposed rule more broadly defines the definition of tributary to include manmade and natural ditches** **Proposed rule would potentially increase the number of county-owned ditches under federal jurisdiction** All manmade and natural ditches that meet the definition of a tributary would be considered a "water of the U.S." regardless of perennial, intermittent or ephemeral flow – *Refer to "Tributary" definition for further explanation*
	(6) The territorial seas; and	(3) The territorial seas;	**No change from current rules** Territorial seas are defined as *"the belt of the seas measured from the line of the ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters, and*

Definition of "Waters of the United States" Under the Clean Water Act
Summary of Draft Regulation As Proposed by EPA and Corps

NACO National Association of Counties

Key Terms	Current EPA/Corps Regulations	Proposed Regulatory Language	Analysis of Potential County Impact
			extending seaward a distance of three miles"
"Waters of the U.S." Definition (continued)	(7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a) through (f) of this definition.	(6) All waters, including wetlands, adjacent to a traditional navigable water, interstate water, the territorial seas, impoundment or tributary;	**Proposed rule would broaden what types of waters next to a "waters of the U.S." are considered jurisdictional** Under the proposed regulation, wetlands, lakes, ponds, etc. that are adjacent to "waters of the U.S." would be jurisdictional if they can meet the significant nexus test – meaning the adjacent waters must show a significant connect to a "water of the U.S." **The proposed rule change would be relevant for non-jurisdictional county-owned ditches near a "water of the U.S." that have a significant connection (hydrologic water connection is not necessary) to a "water of the U.S."**
	(8): Waters of the United States do no not included prior converted cropland or waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the CWA (other than cooling points as defined in 40 CFR 423.11(m) which also meet the criteria of this definition) are not waters of the U.S.	Waters excluded from the definition of "waters of the U.S." include:	**The proposed rule excludes certain types of waters from being classified as a "water of the U.S."** The proposed rule codifies 1986 and 1988 guidance preamble language – meaning the proposed rule makes official a number of exemptions that have been in place since the 1980's

Definition of "Waters of the United States" Under the Clean Water Act
Summary of Draft Regulation As Proposed by EPA and Corps

Key Terms	Current EPA/Corps Regulations	Proposed Regulatory Language	Analysis of Potential County Impact
"Waters of the U.S." Definition (continued)			**Over the years, some exemptions, such as for waste treatment systems, have been challenged in the courts. The exemptions may be interpreted very narrowly**
		• Waste treatment systems, including treatment points or lagoons, **designed to meet CWA requirements**	Under the proposed rule, only those waste treatment systems, designed to meet CWA requirements, would be exempt. For waste treatment systems that were built to address non-CWA compliance issues, it is uncertain whether the system would also be exempt
		• Prior converted cropland	
		• Ditches that are excavated wholly in uplands, drain only in uplands, and have less than perennial flow	**The proposed rule exempts a certain type of uplands ditch – there is little consensus on how this language would (or would not) impact roadside ditches. EPA and Corps need to answer whether ditches will be considered in parts or in whole** Under the new rule, other ditches, not strictly in uplands, would be regulated or potentially those ditches adjacent to a "water of the U.S."
		• Ditches that do not contribute to flow, either directly or indirectly to a "water of the U.S.	**The proposed rule would exempt ditches that show they do not contribute to the flow of a "water of the U.S."**

Definition of "Waters of the United States" Under the Clean Water Act
Summary of Draft Regulation As Proposed by EPA and Corps

NACO National Association of Counties

Key Terms	Current EPA/Corps Regulations	Proposed Regulatory Language	Analysis of Potential County Impact
"Waters of the U.S." Definition (continued)		Additionally, the following features are exempted (from the "waters of the U.S." definition): 1. Would exclude artificial areas that revert to uplands if application of irrigation water ceases; 2. Artificial lakes and ponds used solely for stock watering, irrigation, settling basins, rice growing; 3. Artificial reflecting pools or swimming pools created by excavating and/or diking in dry land 4. Small ornamental waters created by excavating and/or diking dry land for primarily aesthetic reasons; 5. Water-filled depressions created incidental to construction activity; 6. Groundwater, including groundwater drained through subsurface drainage systems; and 7. Gullies and rills and non-wetland swales[4]	**Question: Are there county maintained ditches that do not contribute to flow of a "water of the U.S."?** **However, ditches can be a point source and regulated under the CWA Section 402 permit program** **Under the proposed rule, ditches that do contribute to the flow of a "water of the U.S." regardless of perennial, intermittent or ephemeral flows, would be jurisdictional**

[4] While non-jurisdictional geographic features such as non-wetland swales, ephemeral upland ditches may not be jurisdictional under the CWA section 404 permit program, the "point source" water discharges from these features may be regulated through other CWA programs, such as section 402

Definition of "Waters of the United States" Under the Clean Water Act
Summary of Draft Regulation As Proposed by EPA and Corps

NACo National Association of Counties

Key Terms	Current EPA/Corps Regulations	Proposed Regulatory Language	Analysis of Potential County Impact
"Waters of the U.S." Definition (continued)			**Under the proposed rule, stormwater and green infrastructure are not explicitly exempt. Clarification is needed to ensure this type of infrastructure is not classified as a "water of the U.S." through regional staff determinations or CWA citizen lawsuits** If more waters are designated "waters of the U.S.," those waters would then have to meet water quality standards (WQS), which are set by the state based on federally designated "waters of the U.S." State standards for these waters must include a highest beneficial use based on scientific analysis—fishable, swimmable, water supply—these standards are often challenged in the courts. Under CWA statute, states must treat all "waters of the U.S." equally, regardless of size or flow, when determining WQS In parts of California, stormwater channels are considered "waters of the U.S." However, the designation is not currently enforced

Definition of "Waters of the United States" Under the Clean Water Act
Summary of Draft Regulation As Proposed by EPA and Corps

Key Terms	Current EPA/Corps Regulations	Proposed Regulatory Language	Analysis of Potential County Impact
Ditches (aka "Tributaries")	Tributaries are considered a "waters of the U.S." under existing regulation.[5] Agencies have stated they *generally* would not assert jurisdiction over ditches (including roadside ditches) excavated wholly in and draining only in uplands and do not carry a relatively permanent flow of water.	Tributaries include, natural and manmade waters, including wetlands, rivers, streams, lakes, ponds, impoundments, canals and ditches if they: • Have a bed, bank, and ordinary high water mark (OHWM)[6] • Contribute to flow, either directly or indirectly, to a "water of the U.S."[7]	Proposed rule includes *for the first time* a regulatory definition of a tributary, which specifically defines **ditches** as jurisdictional tributaries unless exempted The proposed rule states that manmade and natural ditches are considered jurisdiction if they have a bed, bank and evidence of, and contribute to, flow, directly or indirectly, to a "water of the U.S." **Proposed rule would potentially increase the number of county-owned ditches under federal jurisdiction** All manmade and natural ditches that meet the definition of a tributary would be considered a "water of the U.S." regardless of perennial, intermittent or ephemeral flow
		Would excludes ditches that are excavated wholly in uplands, drain only in uplands, and have less than perennial flow[8]	Under the proposed rule, ditches are "exempt" if they are strictly uplands ditches with a less than a relatively permanent flow. There is uncertainty

[5] The term "tributary" is not defined under current regulations

[6] Bed, bank and OHWM are features generally associated with flow. OHWM usually defines the lateral limits of the ditch by showing evidence of flow. The bed is the part of the ditch, below the OHWM, and the banks may be above the OHWM

[7] The flow in the tributary may be ephemeral, intermittent or perennial, and the tributary must drain, or be a part of a network of tributaries that drain, into a "water of the U.S."

[8] Perennial flow means that water is present in a tributary year round when rainfall is normal or above normal

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Key Terms	Current EPA/Corps Regulations	Proposed Regulatory Language	Analysis of Potential County Impact
			whether this designation would protect all roadside ditches in uplands since many ditches run through both uplands and wetlands through the length of the ditch
Ditches (aka "Tributaries") (continued)		Would exclude ditches that do not contribute flow, either directly or through another water, to a traditional navigable water, interstate water, the territorial seas or an impoundment of a jurisdictional water	Under the proposed rule, ditches that do not contribute to flow of a "waters of the U.S." would be exempt. Since the majority of public infrastructure ditches are ultimately connected to a "water of the U.S." it is uncertain how this would be documented
		Jurisdictional ditches include, but are not limited to, natural streams that have been altered (i.e. channelized, straightened, relocated); ditches that have been excavated in "waters of the U.S." including jurisdictional wetlands; ditches that have perennial flow; and ditches that connect two or more "waters of the U.S."	EPA officials indicate the intent of the rule to regulate ditches that remain "wet" most of the year and have a mostly permanent flow –pooled or standing water is not jurisdictional. Question: if all perennial, intermittent and ephemeral ditches are jurisdictional, how can they be differentiated from exempt ditches?
		Tributaries that have been channelized in concrete or otherwise human altered, may also be jurisdictional if they meet the definitional conditions	
		All tributaries in a watershed will be considered in combination to assess whether they have a significant nexus to a "water of the U.S."	

Definition of "Waters of the United States" Under the Clean Water Act
Summary of Draft Regulation As Proposed by EPA and Corps

NACo National Association of Counties

Key Terms	Current EPA/Corps Regulations	Proposed Regulatory Language	Analysis of Potential County Impact
Ditches (aka "Tributaries") (continued)		A water, that is considered a jurisdictional tributary, does not lose its status if there are manmade breaks – bridges, culverts, pipes, or dams – or natural breaks – wetlands, debris piles, boulder fields, streams underground –as long as there is a bed, bank, and OHWM identified upstream of the break. This is relevant for arid and semi-arid areas where banks of the tributary may disappear at times.	The proposed rule notes that manmade and natural breaks in ditches – pipes, bridges, culverts, wetlands, streams underground, dams, etc. – are not jurisdictional. However, the ditch considered a "water of the U.S." above the break is also a jurisdictional water after the break The term uplands is not defined under the current or the proposed regulation. Question: how can the term uplands be defined to lessen impact on county operations? The proposed rule states that tributary connection may be traced by using direct observation or U.S. Geological Survey maps, aerial photography or other reliable remote sensing information, and other appropriated information in order to claim federal jurisdiction over the ditch Question: how can the agencies delineate how seasonal ditches will be regulated under the proposal?

Definition of "Waters of the United States" Under the Clean Water Act
Summary of Draft Regulation As Proposed by EPA and Corps

NACO National Association of Counties

Key Terms	Current EPA/Corps Regulations	Proposed Regulatory Language	Analysis of Potential County Impact
"Other Waters"	All other waters such as interstate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds that would impact interstate or foreign commerce	"Other waters" are jurisdictional if, "either alone or in combination with similarly situated "other waters" in the region[9], they have a "significant nexus" to a traditional navigable water, interstate water, or the territorial seas." "Other waters" would be evaluated either individually, or as a group of waters, where they are determined to be similarly situations in the region Waters would be considered "similarly situated" when they perform similar functions and are located sufficiently close together or when they are sufficiently close to a jurisdictional water	**Under the proposed rule, "other waters" are not automatically considered jurisdictional, instead, they must be assessed on a case-by-case basis, either alone or with other waters in the region to assess the biological, physical, chemical impacts to the closest jurisdictional waters** Under the proposed rule, "other waters" will be under federal jurisdiction if they have a significant connection to "waters of the U.S." Question: In the proposed rule, how can agencies clearly distinguish between landscape features that are not waters or wetlands and those that are jurisdictional Question: The agencies request, in the proposed rule, comments on alternative methods to determine "other waters." For example, should determinations be made on ecological or hydrologic landscape regions? If so, why and how? How would the various definitions impact counties?

[9] "In the region," means the watershed that drains to the nearest traditional navigable water, interstate water, or the territorial seas through a single point of entry

Definition of "Waters of the United States" Under the Clean Water Act
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Key Terms	Current EPA/Corps Regulations	Proposed Regulatory Language	Analysis of Potential County Impact
"Adjacent Waters"	Under existing regulation for "adjacent wetlands," only wetlands adjacent to a "water of the U.S." are considered jurisdictional Adjacent means bordering, ordering, contiguous or neighboring	Adjacent waters are defined as wetlands, ponds, lakes and similar water bodies that provide similar functions which have a significant nexus to "waters of the U.S." Waters, including wetlands, separated from other waters of the U.S. by man-made dikes or barriers, natural river berms, beach dunes, etc. are "adjacent waters" are jurisdictional	**The proposed rule replaces the term "adjacent wetlands" with "adjacent waters"** – this definition would include adjacent wetlands and ponds **Under the proposed rule, adjacent waters to a "water of the U.S." are those waters (and tributaries) that are highly dependent on each other, which must be shown through the significant nexus test** The proposed rule uses other key terms in definition–riparian area and flood plains–to claim jurisdiction over adjacent waters
"Significant Nexus"	n/a	The term "significant nexus" means that a water, including wetlands, either alone or in combination with other similarly situated waters in the region (i.e. the watershed that drains to the nearest "water of the U.S.") and significant affect the chemical, physical or biological integrity of the water to which they drain For an effect to be significant, it must be more than speculative or insubstantial Other waters, including wetlands, are similarly situated when they perform similar functions and are located sufficiently close together or sufficiently close to a "water of the U.S." so they can be evaluated as a single landscape unit regarding their chemical, physical, or biological impact on a "water of the U.S."[10]	**Newly defined term** – The proposed rule definition is based on Supreme Court Justice Kennedy's "similarly situated waters" test. A significant nexus test can be based on a specific water or on a combination of nearby waters The proposed rule states waters would be considered jurisdictional, the waters either alone or in conjunction, with another water must perform similar functions such as sediment trapping, storing and cleansing of water, movement of organisms, or hydrologic connections.

[10] Note: The term "single landscape unit is not defined in the proposed regulation.

Definition of "Waters of the United States" Under the Clean Water Act
Summary of Draft Regulation As Proposed by EPA and Corps

Key Terms	Current EPA/Corps Regulations	Proposed Regulatory Language	Analysis of Potential County Impact
"Riparian Area"	n/a	The term riparian area means an area bordering a water where the surface or subsurface hydrology directly influence the ecological processes and plant and animal community structure in that area. Riparian areas are transition areas between aquatic and terrestrial ecosystems that influence the exchange of energy and materials between those ecosystems[11] No uplands located in "riparian areas" can ever be "waters of the United States."	**Newly defined term** **The proposed rule broadly defines "riparian area" to include aquatic, plant or animal life that depend on above or below ground waters to exist** Under the proposed rule, a riparian area would not be jurisdiction in itself, however, it could be used as a mechanism to claim federal jurisdiction Under the proposed rule, there is no limiting scope to the size of a riparian area or a definition of the types of animal, plant and aquatic life that may trigger this definition The proposed rule states that no uplands in a riparian area can ever be "waters of the U.S."

[11] Note: Under the new term "riparian area," terms used in the definition – area, ecological processes, plant and animal community structure, exchange of energy and materials are not defined.

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Key Terms	Current EPA/Corps Regulations	Proposed Regulatory Language	Analysis of Potential County Impact
"Flood Plain"	n/a	Flood plain, under this definition, means an area bordering inland or coastal waters that was formed by sediment preposition from such water under present climatic conditions and is inundated during periods of moderate to high water flows **Absolutely no uplands located in riparian areas and flood plains can ever be "waters of the U.S."** There may be circumstances where a water located outside a flood plain or riparian area is considered adjacent if there is a confined surface or shallow subsurface hydrology connection Determination of jurisdiction using the terms "riparian area," "flood plain," and "hydrologic connection" will be based on best profession judgment and experience applied to the definitions proposed in this rule	**Newly defined term** The proposed rule uses the term "flood plain" to identify waters and wetlands that would be near (adjacent) to a "waters of the U.S." in order to establish federal jurisdiction The proposed rule definition relies heavily on "moderate to high water flows" rather than the Federal Emergency Management Agency's (FEMA) flood plain definitional terms such as 100 year or 500 year floodplains **The proposed rule states waters near to a "water of the U.S." could be jurisdiction *without a significant nexus* if they are in a flood plain or riparian area**

Definition of "Waters of the United States" Under the Clean Water Act
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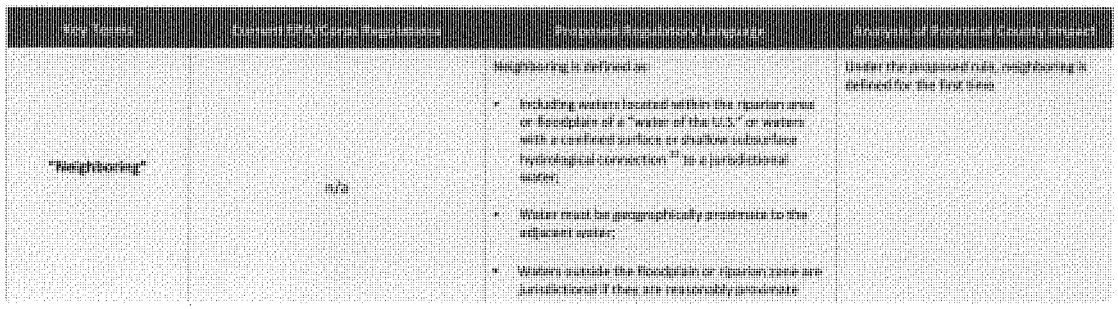

"Neighboring"	n/a	Neighboring is defined as: • Including waters located within the riparian area or floodplain of a "water of the U.S." or waters with a confined surface or shallow subsurface hydrological connection [12] to a jurisdictional water; • Water must be geographically proximate to the adjacent water; • Waters outside the floodplain or riparian zone are jurisdictional if they are reasonably proximate	Under the proposed rule, neighboring is defined for the first time

[12] While shallow subsurface flows are not considered a "water of the U.S." under the proposal, they may provide the connection establishing jurisdiction

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