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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
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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.