Subcommittee on Fisheries, Water, and Wildlife of the Senate Committee on Environment and Public Works
Hearing on "Oversight of the Army Corps of Engineers' Participation in the Development of the New Regulatory Definition of 'Waters of the United States.'"
Wednesday, September 30, 2015

Statement of Senator Inhofe (for press release not delivery)

The Waters of the United States rule is not just another example of regulatory overreach by the Obama Administration. This rule is not only unlawful, it is completely unfounded.

For most of its rules the Administration puts together a factual record and argues that the facts support more federal control. This factual information can be reviewed and evaluated as part of the administrative record.

This did not happen in the waters of the United States rulemaking. According to the one court that has looked at the merits of this rule, EPA and the Army simply made up new tests for expanding federal control over land and water without any support in the record.

On August 27, Judge Erickson of the District of North Dakota, issued an injunction that prevented the WOTUS rule from going into effect in 13 states because the rulemaking record is "inexplicable, arbitrary, and devoid of a reasoned process."

In fact, Judge Erickson noted: "On the record before the court, it appears that the standard is the right standard because the Agencies say it is."

Judge Erickson is right. We have memoranda from the Army Corps of Engineers that document the fact that EPA believes it has authority to assert federal control wherever they want. In fact, EPA even told the Corps that it has blanket authority to take control over millions of acres of isolated wetlands and can justify that power grab by giving up jurisdiction in other areas – even though these kinds of policy choices are the purview of Congress, not the Executive Branch.

Even if EPA had that kind of legislative authority – which they do not -- the final rule does not make this trade-off. In areas where the Corps expressed concern that the draft rule gave up jurisdiction, EPA made changes. Where the Corps expressed

concern that the draft final rule went too far, EPA refused to address those concerns.

So what we have is a final rule that the Corps of Engineers career experts say is not "reflective of Corps experience or expertise." In fact, the Corps of Engineers asked that their name and logo be removed from the background documents that EPA developed to support the rule.

These facts alone are should have caused the EPA and the Army to withdraw the rule and start over. But, unfortunately, the situation is even worse.

Not only is the final WOTUS rule unsupported by the rulemaking record, EPA and the Army have tried to hide that fact by affirmatively stating that the rule is based on the Corps' expertise and experience, including case-specific jurisdictional determinations. Based on the memoranda developed by the career staff at the Corps, we know that these statements are false.

I find this deeply troubling. It is one thing to disagree on law and policy. But it is quite another to make false claims to the American people.

We know EPA was in the driver's seat for this rulemaking and I am very sorry that the Army is caught up in this mess. But, after the career experts at the Corps of Engineers used words like "not accurate," "unfounded," "not supported by science or law," "inconsistent with the Supreme Court's decisions in Rapanos and SWANC," and "regulatory over-reach," to describe this rule I wish the Army had withdrawn its support.

But they did not.

Now that these facts have come to light it is time for EPA and the Army to admit that the WOTUS rule is indefensible.

Rather put the American people through years of confusion while the rule challenges wend their way through the courts, the Administration should do the right thing – withdraw this arbitrary and capricious rule and start over.