

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.