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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.