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Committee on the Judiciary

Examining the Federal Regulatory System to Improve Accountability, Transparency and Integrity

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Thank you, Chairman Grassley and Ranking Member Senator Leahy for the opportunity to testify today. I appear in my individual capacity and not as a representative of any particular interest group. My comments will focus on the development of the final rule titled "Clean Water Act: Definition of Waters of the United States" ("Waters of the US Rule") signed by EPA Administrator Gina McCarthy and Assistant Secretary for the Army (Civil Works) Jo-Ellen Darcy on May 27, 2015. The final rule will be published in the Federal Register in the near future.

By way of background I have been involved in various ways with the Clean Water Act for over forty years. A law review article I wrote in 1975 on the scope of the CWA was cited by the US Supreme Court in its seminal decision in *E.I. Du Pont de Nemours & Co. v. Train*, 430 U.S. 112 (1977) From 1975-1984, while with National Wildlife Federation in Washington, I participated in many of the legislative debates, judicial actions, rulemakings, and other administrative proceedings during the formative stages of the Act's programs. During the Reagan Administration in the mid 80's I served as Regional Counsel for EPA's New England regional office with responsibility for overseeing the implementation and enforcement of the CWA in major cases including the cleanup of Boston Harbor. Following that I served as Commissioner of the Vermont Department of Environmental Conservation with responsibility for implementing the CWA at the state level. From there I joined the Perkins Coie law firm in Portland Oregon where I provided advice and representation to business interests on permitting, compliance, enforcement and other regulatory matters. For the past 22 years I have been on the faculty of the Vermont Law School where I teach the CWA, conduct training programs for judges and practitioners, research and publish articles, write amicus briefs in cases before the Supreme

Court and other courts, and frequently give presentations on the latest developments under the Act. In short I have seen the CWA from a variety of perspectives and am very familiar with the subject matter of today's hearing.

My initial comment is that the Waters of the US Rule (WOUS) is a long overdue clarification of the muddled state of the law created by Supreme Court decisions in *SWANCC* and *Rapanos*. In critically examining the process by which the rule was developed I would urge the committee not to lose sight of the fact that this rule is of vital importance to the health and well-being of the American people. One in every three Americans gets their drinking water from seasonal and rain dependent streams protected by this rule. Protecting tributary systems is critical to the fishing industry that supports over a million jobs and generates over 48 billion in economic benefits to communities across the land. Water based recreation generates another $86 billion to the economy. One third of endangered species depend upon the wetlands protected by this rule. To have healthy waters downstream we must protect the tributary systems upstream. As the Science Advisory Board stated in its review of the proposed rule:

> *There is strong scientific evidence to support the EPA's proposal to include all tributaries within the jurisdiction of the Clean Water Act. Tributaries, as a group, exert strong influence on the physical, chemical, and biological integrity of downstream waters, even though the degree of connectivity is a function of variation in the frequency, duration, magnitude, predictability, and consequences of physical, chemical and biological processes.*
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> *The available science supports the EPA's proposal to include adjacent waters and wetlands as waters of the United States. This is because adjacent waters and wetlands have a strong influence on the physical, chemical, and biological integrity of navigable waters.*

The decade long process that led to this final rule reflects a high degree of "accountability, transparency and integrity." The process employed by EPA reflects an unprecedented degree of public outreach and responsiveness to concerns and suggestions of numerous stakeholders. The rule is based on the best available peer reviewed science and it reflects a very conservative exercise of the statutory authority granted by the CWA. It addresses the confusion and uncertainty that has plagued administration of the CWA since the *SWANCC* and *Rapanos* decisions and places new, measurable limits on the extent of federal jurisdiction that should put concerns about Federalism to rest.

I. The WOUS Rule is a Considered Response to Numerous Calls from the Courts, the Congress, the States, the Stakeholders and the Public to clarify what Waters are and are not covered by the Clean Water Act.

In his concurring opinion in *Rapanos* Chief Justice Roberts said: "It is unfortunate that no opinion commands a majority of the Court on precisely how to read Congress limits on the reach of the Clean Water Act. Lower courts and regulated entities will now have to feel their way on a case-by-case basis." *Rapanos v. United States* 126 S.Ct. 2208 (2006). The Chief Justice admonished the Corps and EPA for not following through on an earlier attempt to initiate a rulemaking following the *SWANCC* decision and he underscored the considerable discretion the agencies have to shape a rule that meets the goals of the Act while placing reasonable limits on the reach of federal power:

> *Agencies delegated rulemaking authority under a statute such as the Clean Water Act are afforded generous leeway by the courts in interpreting the statute they are entrusted to administer [citations omitted]. Given the broad, somewhat ambiguous, but nonetheless clearly limiting terms Congress employed in the Clean Water Act, the Corps and the EPA would have enjoyed plenty of room to operate in developing some notion of an outer bound to the reach of their authority.* Id at 2236

In his dissenting opinion Justice Breyer similarly urged the agencies to conduct a rulemaking forthwith:

> *If one thing is clear, it is that Congress intended the Army Corps of Engineers to make the complex technical judgments that lie at the heart of the present cases (subject to deferential judicial review). In the absence of updated regulations, courts will have to make ad hoc determinations that run the risk of transforming scientific questions into matters of law. That is not the system Congress intended. Hence I believe that today's opinions, taken together, call for the Army Corps of Engineers to write new regulations, and speedily so.* Id at 2266

Subsequently in *Sackett v EPA*, 132 S. Ct. 1367 (2012), a case dealing with the rights of landowners to challenge administrative compliance orders under the CWA, Justice Alito criticized the agencies' reliance on informal guidance and stressed the importance of developing a rule that more clearly defined the reach of federal jurisdiction:

> *For 40 years, Congress has done nothing to resolve this critical ambiguity, and the EPA has not seen fit to promulgate a rule providing a clear and sufficiently limited definition of the phrase. Instead, the agency has relied on informal guidance. But far from providing clarity and predictability, the agency's latest informal guidance advises*

property owners that many jurisdictional determinations concerning wetlands can only be made on a case-by-case basis by EPA field staff. Id at 1375

Nearly everyone has recognized the need for a rulemaking to address these problems. For example the Water Advocacy Coalition comprised of over 40 trade associations representing agricultural, industrial and commercial business interests stated in a February 2013 letter to EPA:

We have long believed that there is an opportunity, through a rulemaking that balances the many interests that lie at the heart of the jurisdictional issues, to improve water quality without increasing burden and delay on activities that are at the core of a growing, vibrant economy.

Though there has been vigorous opposition from the agricultural community there has also been strong support for the rulemaking as this 2012 letter from the Colorado Farming Coalition illustrates:

To protect our cherished waters like the Colorado River, we urge you to finalize your guidelines and move forward with a rulemaking to restore critical protections to these waters under the Clean Water Act and reaffirm the broad scope of the Clean Water Act that existed for more than three decades. We believe, by restoring the Clean Water Act, that your administration can put us back on track to becoming a country where all farmers can depend on clean water for their crops and livestock, and all Americans will have access to water that is safe for swimming, fishing, and drinking.

EPA has complied and made available hundreds of such requests from every sector of the economy, from every level of government, from the regulated community as well as the conservation community, from the scientific community as well as the public health community. In my 40+ years of experience with the CWA I cannot recall any other rulemaking that has received more scientific review, public scrutiny, critical analysis, open debate, and responsive action by the agencies as the WOUS rule.

II. The WOUS Rule Has Been a Decade in the Making

The current rulemaking must be viewed in the context of a decade's long effort to address the jurisdictional quagmire created by the opaque *SWANCC* decision in 2001 followed by the even more confused *Rapanos* decision in 2006. There have been no less than four guidance documents and legal opinions issued over the past decade. Each time the agencies wrestled with the same basic questions about how to interpret the vague and conflicting opinions in *SWANCC* and *Rapanos.* The succession of guidance documents did more to confuse than clarify matters and led to inconsistent decisions in the field and frustration on the part of the

regulated community, the states and the public. In response to the virtually unilateral issuance of the 2008 guidance EPA received over 200,000 comments in 2011 calling for a more deliberate approach to the issues through an open rulemaking.

III. The Agencies Outreach Efforts Were Unprecedented

Long before the current rulemaking was initiated EPA and the Corps were reaching out to affected interests. In 2011, the agencies conducted an outreach meeting designed to exchange information with small entities that may be interested in this action. The outreach effort was led by representatives from EPA's Office of Wetlands, Oceans, and Watersheds within EPA's Office of Water; the Army Corps of Engineers Regulatory Program; the Office of Information and Regulatory Affairs within the Office of Management and Budget (OMB), and the Office of Advocacy of the Small Business Administration (SBA).

During the formal rulemaking process EPA and the Corps conducted over 400 public meetings around the country. Hearing the concerns of some sectors of the agricultural community EPA made a special effort to reach out to them. EPA officials including Administrator McCarthy visited farms in Arizona, Colorado, Maryland, Mississippi, Missouri, New York, Pennsylvania, Texas, and Vermont.

EPA also met with small business representatives to hear their concerns. EPA has received considerable support from major sectors of the small business community. A survey by the American Sustainable Business Council found that 80 percent of small business owners favor including small streams and headwaters in federal clean water protections. More than 300 small businesses across the country wrote a letter to the President supporting protections for critical waterways across the country. The 800,000 Latino-owned businesses that make up the Latin Business Association voiced their support for the rule.

EPA and the Corps also met with hundreds of local officials and worked closely with key intergovernmental associations to understand local issues. Administrator McCarthy asked EPA's Local Government Advisory Committee to host a series of meetings with local officials around the country and report to her on findings and recommendations. While critical of the proposed rule in many respects the LGAC also acknowledged the lengths to which EPA was going to solicit unvarnished feedback: In a November 14 2014 letter to Administrator MCarthy LGAC stated: "We are especially appreciative that you have engaged the Local Government Advisory Committee's (LGAC) Protecting America's Waters Workgroup to facilitate outreach to local, state and tribal agencies in the spirit of collaborative partnership."

EPA also granted requests to extend the public comment period to allow ample time for people to digest the information and fully air their views. The normal time for public comment on a proposed rule is 60 days. EPA twice extended the comment period, giving the public over

200 days to provide input and suggest refinements. EPA received over one million comments, the vast majority of which were supportive of the rule.

It also is instructive to compare the process used to develop this rule with the process used to adopt the *2008 Rapanos Guidance* which was initially issued in 2007 without any prior opportunity for public review or comment. Nor was there any consultation with states and stakeholders. Nor was there a scientific assessment to understand the implications of the jurisdictional lines being drawn. While EPA solicited comments on the 2007 guidance after the fact, the 2008 revised guidance reflects very little substantive change from the 2007 version. The WOUS rulemaking stands in stark contrast to what has been done before. As former EPA Administrators Christine Todd Whitman, Carol M. Browner and William Reilly said in a recent release:

> *Administrator Gina McCarthy has engaged an unprecedented number of Americans and industry, environmental, public health, elected and public official stakeholders from across the country. The EPA's use of all available communications tools has been the foundation of that outreach and engagement*.

IV. The Final Rule Reflects Significant Changes in Response to Comments and Criticisms

The proof that EPA and the Corps listened carefully to all points of view expressed during the long rulemaking process is found in the text of the final rule and the detailed explanations comprising almost 300 pages. The final rule clarifies definitions of key terms such as ditches and tributaries, and what adjacency means. For the first time EPA has drawn bright lines on what waters are not subject to federal jurisdiction. It has spelled out in specific detail how the rule does not protect any waters that have not historically been covered by the CWA; how it does not add any new regulatory requirements for agriculture; how it does not impinge on private property rights; how it does not regulate land use; how it does not cover erosional features such as gullies, rills and non-wetland swales; and how it does not include groundwater, shallow subsurface flow and tile drains. In addition to existing exclusions for waste treatment systems and prior converted cropland, the rule codifies for the first time exclusions for a number of types of waters such as certain ditches, artificially irrigated areas that would revert to dryland, and other artificial and constructed waters. These numerous deletions and exclusions represent a major change in CWA regulations and practice.

It also recognizes the scientific fact that certain types of wetlands such as prairie potholes, pocosins, Carolina bays, Texas coastal wetlands and California vernal pools share similar ecological functions and provide a host of water quality, flood control, wildlife habitat and other ecosystem services that in the aggregate have a significant impact on the chemical

physical and biological integrity of downstream waters. These important wetlands are not automatically classified as jurisdictional but must still be evaluated on a case by case basis to establish their significance in relation to other waters of the US.

V. The Final Rule Represents a Conservative Exercise of Agency Authority under the CWA.

Prior to the *SWANCC* and *Rapanos* decision the courts had overwhelmingly upheld the coverage of the CWA to "the entire tributary system" (including adjacent wetlands) of the navigable waters. As the Fourth Circuit said in *United States v Deaton* 332 F.3d 698, 708 (4th Cir. 2003):

> *In sum, the Corps's regulatory interpretation of the term "waters of the United States" as encompassing nonnavigable tributaries of navigable waters does not invoke the outer limits of Congress's power or alter the federal-state framework. The agency's interpretation of the statute therefore does not present a serious constitutional question that would cause us to assume that Congress did not intend to authorize the regulation. Indeed, as our discussion of Congress's Commerce Clause authority makes clear, the federal assertion of jurisdiction over nonnavigable tributaries of navigable waters is constitutional.*

For three decades before *SWANCC*, the courts consistently upheld the assertion of federal jurisdiction over intermittent, ephemeral, and artificial tributaries (including ditches and arroyos) and adjacent wetlands that were many miles from traditionally navigable waterways. Yet despite the expansive view of federal control commerce flourished, the GDP more than doubled and agricultural productivity grew at an average rate of 1.59% per year. In short federal regulation did not have the draconian consequences that some have attributed to the current proposal.

Indeed, the final WOUS rule stops well short of this historic "high water" mark of federal jurisdiction. It does not go as far as the SAB recommended in protecting types of waters that provide significant water quality and other benefits to society. Contrary to the advice of the SAB the rule excludes many "other waters" (such as playa lakes) that in the aggregate could have significant impacts on water quality in major rivers. It excludes ditches that may perform functions similar to natural tributaries and that courts in the past have said are jurisdictional. Clearly EPA could have gone much further than it did.

This will of course make the rule much more defensible in court. The rule easily satisfies the different tests set forth in *Rapanos*. EPA could have opted to include waters that met either the plurality opinion by Justice Scalia or the concurring opinion by Justice Kennedy, as several lower courts have ruled. EPA chose to take the more conservative approach by fashioning the rule on Justice Kennedy's "significant nexus" test. Every Circuit Court that has interpreted *Rapanos* has

adopted the significant nexus test as either the controlling or the exclusive test to be applied in jurisdictional determinations. Hence EPA is on solid footing to defend the rule from the inevitable legal challenges.

VI. Conclusion

Considerable progress has been made over the past forty five years cleaning up polluted waters due to a strong federal-state partnership that features significant public investment in wastewater treatment systems and a comprehensive regulatory program that protects the interests of downstream states. Yet over forty percent of the nation's waters still do not meet water quality standards that protect human health and aquatic ecosystems. The reason is clear: where sources of pollution are regulated under the Act's comprehensive NPDES permit program administered by the states with active EPA oversight compliance rates are high and harmful pollutants have been reduced dramatically. By contrast where sources of pollution are not subject to regulation—so-called nonpoint sources—voluntary control measures (BMPs) administered by the states with little or no EPA oversight have largely failed to prevent significant impairment of water quality (Chesapeake Bay, Gulf Dead Zone, Lake Erie, Lake Champlain…). The key to success, as Congress recognized in 1972, is to control pollution at the source rather than wait for it to reach major water bodies, by which time it is too late to prevent damage to water quality that can prove difficult if not impossible to undo. As a point of emphasis over 40% of the sources, nearly 15,000 facilities, currently regulated under the Act discharge into small or intermittent tributaries located in the headwaters of navigable rivers. It is clear that reducing the scope of the Act reduces protection of water quality across the nation.

The time has come to end the acrimony and misinformation that has unfortunately characterized much of the debate over this rule. I would urge the committee to give it a chance to work.

Thank you.