



ASSOCIATION OF CLEAN WATER ADMINISTRATORS

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Testimony of

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On behalf of the
Association of Clean Water Administrators

U.S. House of Representatives
Committee on Agriculture
Subcommittee on Conservation & Forestry

Regarding

The impact of the *Waters of the U.S.* proposal on rural America

Chairman Thompson, Ranking Member Grisham, and members of the Committee, my name is Martha Clark Mettler and it is my pleasure to appear before you today to provide the Association of Clean Water Administrators (ACWA) perspectives on the proposed rule revising the *Definition of “Waters of the United States” Under the Clean Water Act*. I am here today representing the members of ACWA as the association’s President.

I am currently the Deputy Assistant Commissioner, Office of Water Quality, with the Indiana Department of Environmental Management (IDEM). IDEM is responsible for the daily implementation of the Clean Water Act (CWA) water quality programs in Indiana. I have been with IDEM since 1995, was named Deputy Assistant Commissioner in 2005 and have been a member of ACWA since that time.

ACWA is the national, non-partisan professional organization representing the State, Interstate and Territorial water quality control officials responsible for the implementation of surface water protection programs throughout the nation. ACWA’s members are on the front lines of Clean Water Act (CWA) monitoring, permitting, inspection, compliance and enforcement across the country and ACWA’s members are dedicated to Congress’ goal of restoring and maintaining the chemical, biological and physical integrity of our nation’s waters.

As the primary entities responsible for carrying out the CWA, States are uniquely positioned to provide input on how the proposed rule will impact their current activities under the various CWA programs and how the reach of jurisdiction may change, dependent on their current authority under state law. The proposed rule also raises implementation issues and questions that

vary from state to state; important considerations when developing a national rule of this breadth. ACWA's members reviewed and considered the proposed rule and were left with remaining comments, questions and concerns that were conveyed to the agencies in our comment letter. Due to the varied opinions of the states, ACWA is unable to support or oppose the proposed rule.

My statement today does not supersede or alter the perspective or input of any individual states and I encourage you to review individual state comments that are included in the docket so that you and the members of the Committee fully understand the breadth of diversity among the states on this proposal. According to an analysis done by one stakeholder group, eight (8) states support the rule as proposed; one (1) state supports the rule as proposed but suggests the agencies should revise the final rule based on specific comments; four (4) states expressed a neutral opinion on the proposal; ten (10) states oppose the proposal in current form and suggest revisions; 22 believe the rule should be withdrawn and, it is not clear how the remaining six (6) states view the proposal. A review of the rulemaking docket shows that there is a wide variety of opinions among the states on the proposed rule. Time spent reviewing individual state comments will provide the Committee with a clear understanding of how the proposed rule will affect state programs and highlight the concerns that these states have with the proposal.

Lack of Consultation with States

States have long supported early, meaningful and substantial state involvement in the development and implementation of the Clean Water Act. Following publication of the proposed rule, ACWA coordinated with EPA, the Corps and other state associations to hold a series of co-

regulator calls to discuss questions from the states and to gain further understanding of the proposal. These discussions were helpful and ACWA appreciates the time and effort that the agencies put into these discussions in order to explain what the rule is intended to do and not do, and to hear the viewpoints of the states. We believe, however, that EPA and the Corps must continue to engage states as their co-regulators and partners as the *Waters of the U.S.* rulemaking process comes to its culmination. Since the states are the primary entities for carrying out the CWA, we encourage the agencies to maintain regular forums and contact with ACWA and its members leading to any finalization of the proposed rule and associated implementation guidance. We look forward to continuing to work with EPA and the Corps on refining the proposal to add additional clarity and certainty to jurisdictional determinations. Writing such a fundamental rule that applies nationally is very difficult and state regulators can help the agencies as the states have an intimate knowledge of their own watersheds and delegated authorities and an understanding of the on-the-ground implementation of CWA programs.

Geographic Variability

Due to state-to-state differences in geohydrology and water-related legal authorities, as well as uncertainty as to the effects of the rule on the implementation of various sections of the CWA including the TMDL, NPDES, Non-point Source and Wetlands programs, ACWA finds it difficult to comment on whether the proposed rule is suitable for all states. For example, some states question the appropriateness of federal jurisdiction over all ephemeral tributaries since some rain-dependent streams flow so infrequently, their effect on downstream waters is inconsequential. However, some ACWA members support federal jurisdiction over all ephemeral tributaries, either because they have identified a strong connection between ephemeral streams and downstream protection in their state, or because relying on case-by-case

determinations of whether ephemeral streams have a significant nexus to downstream waters is too resource and time intensive.

Exclusions

ACWA agrees that specific exclusions listed in the proposed rule provide increased clarity for regulators and the regulated community and we encourage the agencies to expand the list of clear exclusions in any final rule. This, in turn, may help to streamline permitting by reducing the number of individual jurisdictional determinations that will have to be made. However, some exclusions need clarification. ACWA encourages the agencies to clarify in the final rule that such ditches that drain upland, but eventually discharge to waters of the United States are not jurisdictional throughout the portion of the ditch that was excavated in uplands. The agencies should also include detail in the final rule or subsequent guidance on how to parse out exactly where the line is between non-jurisdictional and jurisdictional stretches of ditches, as well as how to affirm that a ditch does not contribute flow to a downstream, navigable water. Clarity is also needed on whether, when, or what parts of stormwater collection and treatment systems fall within the exclusion of “waste treatment systems” and therefore, a definition of these systems is warranted.

Additional Clarity Is Needed

ACWA agrees with EPA and the Corps that recent Supreme Court decisions created an environment of uncertainty and that clarity in CWA jurisdictional determinations is needed. However, to achieve that clarity, ACWA believes the agencies need to provide clearer definitions in the final rule. For example, the proposed rule failed to provide clear bounds on the spatial extent of floodplains and riparian areas. Similarly, additional detail is needed on the scope of a “shallow subsurface hydrologic connection. While ACWA’s members agree that

shallow subsurface flow can connect adjacent waters to proposed jurisdictional waters, the significance of the connection is a critical factor. The definition of “shallow subsurface hydrologic connection” should establish a clear limit beyond which a case-by-case significant nexus analysis is needed to assert jurisdiction. Additionally, the final rule should clearly state that the shallow subsurface aquifer is, itself, not jurisdictional. Terms like rills, gullies and uplands are not defined, but should be to add needed clarity to the final rule. Finally, ACWA believes that the final rule must make clear that the ability of states to assume the 404 program is not affected.

Other Waters and Significant Nexus Analysis

ACWA agrees and supports the agencies’ efforts to specifically exclude certain hydrologic features from CWA jurisdiction. These exclusions will provide greater clarity and streamline the certification review process. However, for features not specifically excluded, a case-by-case significant nexus analysis will be needed to assert jurisdiction which could slow down projects. The agencies should strive to limit the categories of waters that will require a case-by-case analysis. Moreover, the proposed rule failed to clarify whether the 2008 joint guidance issued by EPA and the Corps after the *Rappanos* decision will still be relied upon to make such determinations. If not, there needs to be enough flexibility in the final rule allowing the agencies to work with the states to develop a process for determining a significant nexus. ACWA also strongly encourages the agencies to work with states on a regional basis to jointly identify policies that consistently implement the significant nexus analysis allowing for grouping of geomorphically similar waterbodies. For waters that do not easily fit into such groups, the burden should be on EPA and the Corps to timely determine jurisdiction after requests for jurisdictional determinations are made. Importantly, greater transparency from the Corps and

better agreement and consistency between Corps districts and EPA is needed to afford successful implementation of the final rule.

Additional Guidance is Necessary

ACWA feels strongly that the agencies develop a set of regional, ecologically delineated guidance for both significant nexus determinations and the any of the desired clarifications described above not captured in the final rule itself. However, for this guidance to be useful, states must be involved in its development. States need greater detail on how to identify beds, banks and ordinary high water marks for the purpose of recognizing tributaries. States need greater detail on how to determine if a wetland “contributes flow, either directly or through another water” to one of the proposed jurisdictional waters set forth in the proposed rule. As was done for identification of regional hydric soils under the § 404 program, ACWA encourages the agencies to form regional committees made up of EPA, Corps and state partners, to develop any further definitions and guidance that may be needed to ensure consistent implementation of any final rule. In addition, the agencies should develop guidance on water quality standards applicable to ephemeral streams. This is important because many of these streams are dry a great majority of the time and do not generally support the CWA goals of fishable and swimmable, unlike streams and rivers that run for sustained periods (intermittent) or continuously (perennial) throughout the year. Without clear terms and guidance, states will be left to interpret this rule on their own, which will undermine national consistency, increase litigation and perpetuate uncertainty.

Mr. Chairman, Ranking Member Grisham and Members of the Subcommittee, I thank you for this opportunity to share ACWA’s perspectives on the *Water of the U.S.* proposed rule. We remain committed to the goals of the CWA and look forward to working with our partners at

EPA and the Corps as they finalize the proposal. We remain ready to answer any questions or concerns the agencies may have in follow-up to our comments, and would be pleased to facilitate further dialogue with our state member agencies. I am happy to answer any questions that you may have.