



STATE OF OKLAHOMA

November 14, 2014

Gina McCarthy
Administrator
U.S. Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, NW (1101A)
Washington, DC 20460

Jo Ellen Darcy
Assistant Secretary of the Army
(Civil Works)
108 Army Pentagon
Washington, DC 20310-0108

Re: Definition of "Waters of the United States" under the Clean Water Act
Proposed Rule: **Docket ID No. EPA-HQ-OW-2011-0880**

Dear Administrator McCarthy and Assistant Secretary Darcy:

As co-regulators under the Clean Water Act ("CWA") and State environmental agencies responsible for managing the water quantity and quality of Oklahoma's streams, lakes and aquifers, we urge you to suspend the current rulemaking process, engage the States in a more meaningful dialogue, and ultimately work with us to develop a rule that truly clarifies where the limited jurisdiction of the Federal government ends and where the more expansive jurisdiction of our agencies begins relative to waters of the United States ("WOTUS") as defined by the CWA. Discussed more thoroughly below, the current proposal undeniably creates more confusion and leaves the door open for unrestrained and unnecessary expansion of Federal jurisdiction, which in many ways will be more detrimental to our efforts to restore and protect Oklahoma's waterways.

Before highlighting our most significant concerns, please note that we have participated in the development of comment letters you will receive from a number of organizations in which we are members. Specifically, we wholeheartedly support the additional comments and input that you have received and/or will receive from the Western States Water Council, Association of Clean Water Administrators, Environmental Council of States, and Groundwater Protection Council, among others.

I. States are Central to Clean Water Success

It is noteworthy that the Federal Water Pollution Control Act has long recognized the importance of partnership between local, State and Federal governments going back to its inception in 1948 and continuing through the various amendments that have brought us to the CWA of today. The existence and need for a State-Federal partnership has been present

in the statutory basis for this rule for over sixty years. The CWA's cooperative federalism framework was solidified in the 1972 reauthorization process, whereby Congress gave explicit authority for the States to act as co-regulators when implementing the CWA. Sections 101(b) and 101(g) of the CWA state that it is the policy of Congress to protect the rights of States in their effort to eliminate pollution and that States have the authority to allocate quantities of water within their boundaries, as well as underscoring that Federal agencies *shall* cooperate with them when solutions are developed.

In addition to the cooperative federalism framework embodied in the CWA, the EPA and Corps of Engineers ("Agencies") surprisingly opted to forego the opportunity to engage in a meaningful, upfront consultation process with States as required by Executive Order ("E.O.") 13132. Specifically, E.O. 13132 requires a federalism summary impact statement that details the efforts made by the Agencies to involve and engage the States in promulgation of a draft rule prior to notice of the rule in the Federal Register. Instead of using E.O. 13132 as a legally mandated avenue to engage States in a thorough process of ensuring the greatest deference to State-led efforts, the Agencies rejected partnership and certified in the Federal Register notice that this rulemaking action "will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government." 79 Fed. Reg. at 22,220. How a rulemaking focused on defining the boundary between Federal and State jurisdiction over water pollution control can have no substantial impact or effect on States and the distribution of power between various levels of government is beyond rational.

Regardless of the legal ramifications, the practical result of choosing the path of rejecting federalism consultation requirements is mass confusion among the very State partners that have worked with your Agencies for decades to accomplish all the water quality gains made thus far. Just as we have been partners and allies in the overall effort to restore the fishable, swimmable goals of the CWA, the States and the Agencies could have been allies in the effort to clarify WOTUS jurisdiction to the benefit of all who implement the CWA's many facets. As it stands now, we've lost faith in the process and believe that the myriad flaws and points of confusion cannot be resolved satisfactorily through a series of public comment period extensions. The kind of input that our agencies and other State co-regulators seek, not to mention deserve as a matter of mutual respect and as required by law, can only be accomplished through halting the current effort, rolling up our sleeves, and developing regulatory language through a meaningful exchange of ideas and drafts. Such a process has been employed by your Agencies in the past through numerous Federal-State working groups and other arrangements.

Choosing to charge ahead with the current proposal in a rush to finalize the WOTUS rule will undoubtedly lead to increased litigation and burdensome resource constraints on our agencies that could ultimately thwart the great water quality successes we have documented in Oklahoma. We are proud to be listed on EPA's website as having the second

most water quality restoration success stories in the country, but we note that the overwhelming majority of those successes came through voluntary actions taken in partnership with our landowners and other watershed stakeholders. States, not the Federal government, are in the best position to coordinate with their local stakeholders to accomplish the goals of the CWA.

II. CWA Section 404 Implementation is the Problem

It is telling that the preeminent cases driving the Agencies' decision to revise the WOTUS rule involve improper application of CWA authority under Section 404, yet the agency charged with primary responsibility for implementing this Section has been noticeably in the background or completely absent from the discussions that have taken place since the proposed rule's release. Interestingly, it is the States that assign designated uses of regulated waters and the criteria to protect those uses under Section 303 of the CWA, as well as work with watershed stakeholders to reduce nonpoint source impacts to water quality under Section 319. Under Section 401 of the CWA, it is the States that review Federal actions and certify whether those actions will meet State water quality standards. Under Section 402 of the CWA, Oklahoma and forty-five other States implement the NPDES permitting program. Yet under Section 404 of the CWA, only two States implement the dredge and fill permitting program. Perhaps the Agencies' efforts would be better spent working with Corps of Engineers Divisions and Districts in order to avoid the misapplication of WOTUS protections that ultimately led to Supreme Court decisions in *Bayview Homes*, *SWANCC* and *Rapanos* that resulted in the confusion your Agencies are trying to address in this action.

Instead of focusing on a more effective, efficient way to address disparate decisions by the Corps of Engineers in implementing Section 404, we fear this rulemaking will create additional disorder in implementing Sections 303, 319, 401 and 402 where none exists currently. Despite the Agencies' stated intent to define more clearly the extent of WOTUS jurisdiction, the already fuzzy line of jurisdiction has been shifted without making the line any less fuzzy. We and most other States have learned to adapt, overcome confusion, and succeed in restoring water quality through our delegated authorities to implement Section 303, 319, 401 and 402 programs. However, this effort to fix problems that really only exist within Section 404 authorities will have repercussions in the other, more settled programs that States are largely responsible to implement. Rather, we suggest a national priority be placed on providing more clear guidance and training to Corps of Engineers Divisions and Districts on how to uniformly apply the provisions of Section 404. If coupled with deference to each State on WOTUS delineation that parallels the deference already shown to States on Section 401 certifications, we believe confusion and litigation can be dramatically reduced.

III. Exemptions Further Clarified or Removed Altogether

While the Agencies' efforts to exempt certain water features and activities from CWA jurisdiction are noble, in many cases it has arguably led to erosion of exemptions we believe were already well established prior to this proposal. Though embodied in a separate document outside this proposed rule to define WOTUS, the Agencies' proposed *Interpretive Rule Regarding the Applicability of Clean Water Act Section 404(f)(1)(A)* ("Interpretive Rule") provides an excellent example of such unintended consequences. The effect of the proposed Interpretive Rule is to narrow the scope of agricultural activities exempt from CWA jurisdiction despite the Agencies' stated intent otherwise. We reiterate our request to withdraw the proposed Interpretive Rule and suggest that the exemptions for ditches and some other features proposed within the WOTUS rule suffer from the same unintended consequences without significant clarification.

IV. Definitions Lacking in a Rule Meant to Define

Undefined or poorly defined terms like tributaries, adjacent waters, floodplains, riparian areas, rills, gullies, and uplands inject additional confusion in a proposed rule meant to clarify CWA jurisdiction. Because many of these features vary significantly from state-to-state and ecosystem-to-ecosystem, States are ultimately in the best position to understand the connection of these features to navigable waters and, thus, determine whether the connections are significant. Further efforts to craft definitions in a rule that is national in scope could be futile, which is why development of processes and procedures that defer critical decisions to States may have more merit.

V. "Other Waters" are the Category that Swallows the Rule

In sharp contrast to other efforts within the rule to define significant water features and those that might be exempt, the proposed "other waters" category essentially opens the door for any collection of water to be considered WOTUS. Inclusion of this category, at least as proposed, breeds significant regulatory uncertainty and undoubtedly will slow down projects due to the need for increased case-by-case determinations. When coupled with decreasing agency resources and increasing demands for other services, the prospect of getting timely jurisdictional determinations is dubious at best. A wholesale revision to this category that builds upon State knowledge and data on similar classes of waterbodies could help immensely. Furthermore, the burden that this current proposal places on landowners and potential developers must be shifted to the Agencies in order to make timely jurisdictional determinations (e.g., in 180-days or less).

VI. The Burden of Ambiguity on States and Local Stakeholders

Like others that have commented, including the organizations to which we belong, we believe that the Agencies have missed or ignored the greater expense and resource burden

this proposed rule will place on State co-regulators and watershed stakeholders. The ambiguity outlined above opens the door for your Agencies and the courts to greatly expand CWA jurisdiction to waters not meant to be regulated by the Federal government. Because States are in the lead or play a significant role in implementation of the various CWA programs, we anticipate greater demands on our already limited resources that go well beyond the estimates provided in the cost analysis accompanying this rulemaking. For example, an expanded number of Section 404 permits will result in an increased demand for 401 certifications by the State, and there are unquantifiable impacts on our stormwater general permits and MS4 permits. More significantly, it will be the landowners, developers and other watershed stakeholders that own and manage well over 90% of Oklahoma's landscape that will face the brunt of the burden despite the great strides they have made in working with us to restore water quality heretofore.

VII. Exempt Groundwater, Including Subsurface Hydrologic Connections

As noted particularly in the preamble to the draft WOTUS rule, groundwater is outside the reach and scope of the CWA. In fact, it's a great example of an equally important source of freshwater for our citizens and industries that is well protected and managed solely within the purview of States. We appreciate the proposed rule's exclusion of groundwater, both in the preamble and now in the regulatory text, including the exemption of "groundwater drained through subsurface drainage systems." Still, given the proposed rule's use of "shallow subsurface hydrologic connections" as a possible means to establish jurisdiction, we believe the regulatory exemption should be extended to cover such shallow subsurface water. In Oklahoma and a number of other states, any water under the surface, no matter how shallow, is groundwater and is a property right of the overlying landowner. While the discussion in the preamble states that subsurface hydrologic connections will not become jurisdictional themselves, we remain concerned about the fact that preamble language often becomes unplugged from the regulatory language upon final codification in the CFR. Accordingly, we propose that the groundwater exclusion in paragraph (t)(5)(vi) of the proposed rule be amended as follows:

"Groundwater, including but not limited to groundwater drained through subsurface drainage systems and shallow subsurface hydrologic connections used to establish jurisdiction between surface waters under this section."
(proposed changes underlined)

VIII. Conclusion

In order to make truly constructive recommendations for bringing clarity to the unsettled scope of CWA jurisdiction, which mostly exists within the Section 404 context, we believe the Agencies must stay this proceeding and engage in meaningful State consultation as facilitated by the cooperative federalism principles embedded in the CWA and required by E.O. 13132. Whether through a Federal-State working group or equivalent process, there

simply is no other way to correct the proposed rule's deficiencies through public comments submitted to your docket. States have worked too hard for too many years to restore and protect their citizens' waters to be relegated to a public participation process with rushed timelines that afford inadequate dialogue. In fact, Oklahoma began passing laws to curb water pollution beginning in the 1920's and even established its first standards for water quality in 1968, all well before your Agencies were given limited authority by Congress to ensure protection of the nation's navigable waters.

We look forward to your favorable consideration of our plea for mutual respect and genuine partnership, and we stand ready to work with you on this and any other proposed action aimed at protecting the resources of Oklahoma.

Sincerely,



Michael Teague
Secretary of Energy & Environment



J.D. Strong, Executive Director
Oklahoma Water Resources Board



Scott Thompson, Executive Director
Oklahoma Department of Environmental Quality



Jim Reese
Secretary of Agriculture



Lisa Knauf Owen, Interim Director
Oklahoma Conservation Commission

Enclosure

**United States House of Representatives
Committee on Transportation and Infrastructure
Subcommittee on Water Resources and Environment**

**Public Hearing
“Potential Impacts of Proposed Changes to the Clean Water Act Jurisdiction Rule”**

**Testimony of

J.D. Strong
Oklahoma Water Resources Board**

June 11, 2014

I. Introduction

In addition to my testimony on behalf of the Western Governors’ Association (WGA) and Western States Water Council (WSWC), which I wholeheartedly support and hereby incorporate by reference, I would also like to address the Committee in my capacity as the Executive Director of the Oklahoma Water Resources Board (OWRB). The OWRB’s mission is to enhance the quality of life for Oklahomans by managing, protecting, and improving the state’s water resources to ensure clean, safe, and reliable water supplies, a strong economy, and a healthy environment. Our primary duties and responsibilities include Oklahoma’s water use appropriation and permitting, water quality monitoring and standards, financial assistance for water/wastewater systems, dam safety, floodplain management, water supply planning, technical studies and research, and water resource mapping.

The OWRB plays a crucial role in Oklahoma’s co-regulatory partnership with the federal government under the Clean Water Act (CWA), along with the Oklahoma Department of Environmental Quality (ODEQ); Oklahoma Department of Agriculture, Food and Forestry (ODAFF); Oklahoma Conservation Commission (OCC); Oklahoma Corporation Commission (OCC); and many other public and private stakeholders.

Before providing Oklahoma’s perspective on the proposed rule, please note that these comments will only describe the views of my particular state and not the views of the WGA, the WSWC, and their member states. The rule will affect every state differently given the considerable differences in the states’ hydrology, geography, and legal frameworks. In turn, each state has its own, unique perspective about the substance of the proposed rule, and the degree to which each state may support or oppose the rule and its specific provisions will vary. These differences further underscore the need for the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (the Corps) (collectively, the agencies) to conduct substantive consultation with each of the individual states in the development and implementation of this or any other proposed rule regarding CWA jurisdiction.

II. Oklahoma concerns with rulemaking process

a. Co-regulators are not just stakeholders

The State of Oklahoma plays a significant role in ensuring effective implementation of the CWA. Our co-regulator status elevates the State of Oklahoma, and every other state, above the multitude of other stakeholders now engaged in the public review process. It is imperative that with a rulemaking process of this magnitude, which directly impacts states' implementation of CWA programs, that significant input and review be provided to co-regulator entities on the substance of the proposed rule. With regard to the proposed rule regarding CWA jurisdiction, the WOTUS rulemaking process undeniably excluded Oklahoma's CWA co-regulating agencies.

As stated in my testimony on behalf of WGA and WSWC, EPA and the Corps failed to follow Federalism consultation requirements under Executive Order 13132. Oklahoma believes this failure is a direct violation not only of a Presidential directive designed to maintain the proper balance between federal and state regulation of our citizens, but also of a specific Congressional mandate that shared Federalism guide the ultimate implementation of the CWA. In the proposed rule's preamble, EPA and the Corps downplay the rule's substantial effects on the relationship between the national government and states. On the contrary, the very architecture of the CWA relies upon a strong, cooperative relationship between the federal and state agencies charged with its implementation. Thus, it stands to reason that any rule designed to implement this law must also be based upon substantial cooperation between the federal and state governments.

From a more practical standpoint, there was no reason for EPA and the Corps to avoid formal and meaningful consultation with the states over the many years that have transpired since the agencies embarked upon this process. Erring on the side of caution and demonstrating a genuine desire to cooperate with the very state agencies that have labored to make CWA implementation a success over the past forty-plus-years, EPA and the Corps just as easily could have engaged in the more formal consultation process outlined by Executive Order 13132. Oklahoma recognizes that this rule is one that EPA and the Corps must address at a national level; however, Section 3(b) of Executive Order 13132 *requires* federal agencies to "consult with State and local officials to determine whether Federal objectives can be attained by other means." This is critical in the current situation given the significant effect this rule could have on the ability of Oklahoma and many other drought-stricken states to manage and allocate scarce water resources, not to mention the absolute necessity to do so at the State, regional and local levels. By skipping this critical step in the process, Oklahoma and many other states are left confused, disenfranchised, and scrambling within a 90-day period allotted for public comment to figure out how we will carry out our respective responsibilities on a mostly final rule.

b. Cart before the horse

Further, it defies logic and scientific reason that EPA and the Corps would expedite submittal of the draft Connectivity Report¹ to the EPA Science Advisory Board (SAB) at the same time they

¹ U.S. Environmental Protection Agency, *Connectivity of Stream and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*, EPA/660R-11/098B (Sept. 2013), available at:

submitted the proposed rule to OMB. As a scientist, I am concerned by what can only be described as an effort to effectively cut off the ongoing scientific deliberation vital to the fundamental questions underlying this proposed rule. Such a rushed, uncollaborative process is foreign to state regulatory agencies like the OWRB that are often engaged in developing highly technical rules over extended periods of time with multiple opportunities for input, first by the scientist that help better inform the decision-making process, then by those burdened with implementing or complying with such rules.

c. Comparison to Oklahoma's rulemaking process

For example, as the state agency charged with developing Oklahoma's Water Quality Standards (WQS), the OWRB follows a comprehensive process for rulemaking that fosters regulatory collaboration and creates effective policy. Due to the fact that Oklahoma's WQS have a significant impact on several state agency partners and a vast network of agricultural, industrial, and municipal stakeholders, collaboration is critical to establishing standards that are clear and effective.

The first step in the OWRB's WQS rulemaking process is to bring all agency co-regulators and scientists to the table for discussion and input regarding what rules are needed and the scientific basis for such rules. In fact, we often ask that our agency co-regulators provide draft language for provisions they deem to be important to include in the rulemaking process. This is what genuine consultation between co-regulators looks like. Further stakeholder discussion is accomplished through at least two informal open meetings, all before embarking on an extended series of formal notices, reviews, and hearings. Essentially, the goal of this process is for stakeholders to have reached a solid understanding, if not consensus, on the general terms and language of the proposed rule prior to launching into the formal rulemaking process provided under Oklahoma's Administrative Procedures Act. Time and again, we have witnessed the success of this process in fostering clear and effective water quality policy for the citizens of Oklahoma.

If the OWRB had followed the process used by EPA and the Corps to develop its proposed WOTUS rule, I have no doubt that the Oklahomans to which we are accountable would have secured legislative and/or gubernatorial sanctions preventing any further action to finalize such rules. Recognizing the State of Oklahoma as a co-regulator, and thus affording us the opportunity for comprehensive input similar to the rulemaking process used in Oklahoma, could have avoided altogether many of the concerns I will now outline regarding the proposed WOTUS rule.

III. Oklahoma concerns with the draft rule

EPA and the Corps have arduously emphasized that the goal for this proposed rulemaking is to provide a measure of definition, clarity and objectivity to the determination of WOTUS jurisdiction. I wholeheartedly agree that clarity and less subjectivity in making CWA

[http://yosemite.epa.gov/sab/sabproduct.nsf/fedrgstr_activites/7724357376745F48852579E60043E88C/\\$File/WOUS_ERD2_Sep2013.pdf](http://yosemite.epa.gov/sab/sabproduct.nsf/fedrgstr_activites/7724357376745F48852579E60043E88C/$File/WOUS_ERD2_Sep2013.pdf).

jurisdictional determinations are the key reason for pursuing this rulemaking in the first place. Falling short of this goal would render the rulemaking process futile for all involved.

Unfortunately from Oklahoma's perspective, the proposed rule does not make it any more clear or precise which waters fall under CWA jurisdiction unless we are to assume that nearly all waters fall under such jurisdiction. Having not been involved in the deliberations prior to drafting the rule, and given the expedited review timeline that we now face, we are concerned that EPA and the Corps have made a policy decision that all connections between waters are "significant" regardless of how much or how often they actually contain water or influence truly navigable waters. ***Essentially, EPA and the Corps have taken an already fuzzy line and moved it from one place to another without making the line any less fuzzy.***

Critical portions of the proposed rule include key concepts that are newly created, yet are left unclear, undefined or subject to agency discretion. In other words, the rule fosters continued and additional subjectivity – a result diametrically opposed to the authoring agencies' intent. While the proposed rule does not change the primary categories of water that historically have been regulated as "navigable waters" (e.g. tidal water bodies, interstate waters, territorial seas, and impoundments of these waters), the proposal seemingly expands the CWA's regulatory coverage of tributaries and includes broad new categories of waters, such as ditches, adjacent waters, riparian areas and floodplains.

Because I and other Oklahoma co-regulators were not invited to participate in the decision-making process, we are left wondering whether our myriad ditches, dry ephemeral streams, playa lakes and other features that sometimes carry water will fall under federal jurisdiction. Current regulations do not even refer to ditches as jurisdictional waters, so why have they been added? The mere mention of ditches evokes an entirely new dispute for most arid western states like Oklahoma, as entire communities and economies have been built upon vast networks of ditches. Under the proposed rule, it seems at least possible that EPA and the Corps want to regulate our ditches, except for a few rare cases in which some farm ditches may fall into either of the two exempt categories narrowly crafted by the agencies.

Equally confusing in the proposed rule are its somewhat incoherent list of exemptions, including the aforementioned narrow ditch exemption. These exemptions apply to a limited set of features excavated wholly on uplands, which is yet another critical term left undefined in the proposed rule. It is also noteworthy that in the rule's preamble, EPA and the Corps acknowledge the difficulty of distinguishing excluded "gullies and rills" from potentially regulated "ephemeral streams."

Essentially, the proposed rule can be interpreted to open the door for most water features, and even dry land, to become WOTUS—a broad expansion of the areas across the landscape where no "dredge or fill" material or other "pollutant" can be "discharged" without a federal permit. It begs the question whether anything within a watershed will ever be deemed so insignificant that the federal government leaves regulatory discretion to Oklahoma and the other states.

IV. Oklahoma concerns with jurisdictional expansion

By establishing broader definitions of existing regulatory categories, such as “tributaries,” and regulating new areas that are not jurisdictional under current regulations, the proposed rule basically provides no clear limit to federal jurisdiction. Location of a water in a riparian area or a floodplain, a connection through shallow subsurface water or directly or indirectly through other waters, and aggregation of similarly situated waters, are some of the ways that the proposed rule could capture waters that historically would be non-jurisdictional.

a. Jurisdiction over subsurface flows, a.k.a. “groundwater”

Of great significance to Oklahoma, the proposed rule does not go far enough to ensure that Oklahoma’s groundwater is off limits. While I appreciate that EPA and the Corps have added a specific statement in the proposed rule that excludes groundwater, they continue to say that shallow subsurface flows could be used to establish jurisdictional nexus. In Oklahoma, any subsurface water, no matter how shallow, is considered groundwater and thus belongs to private property owners subject only to reasonable regulation by the state. As a practical matter, it’s hard to fathom how CWA regulations can be effectively applied to distinct surface waters connected only through subsurface waters without ultimately expanding jurisdiction over the property owner’s groundwater resource. Any regulation of subsurface flows, or other water under the surface, would be a severe encroachment on the private property rights of Oklahoma landowners.

b. Local and state management is key to success

While not stated explicitly in the proposed rule, expansion of EPA and Corps jurisdiction over any waters not previously considered WOTUS must be predicated on a belief that states are incapable of protecting and managing such waters – an assertion that simply is not supported by science or facts. The OWRB and other state agencies in Oklahoma have been responsible and effective stewards of water quality and quantity management both before and since enactment of the CWA. In fact, many of Oklahoma’s success stories are highlighted in EPA’s own publications and webpages and are due to state and local voluntary conservation programs, effective water management strategies, and superior water quality monitoring networks.

c. Inadequate economic impact analysis

EPA and the Corps also claim that the rule would have minimal economic impact and would not affect many acres—only about 1,300 acres nationwide—which seems grossly inaccurate given that the proposed rule could be read to affect this number of acres within one Oklahoma county alone. Furthermore, in order for EPA and the Corps to substantiate such claims that the rule will only impact a defined number of acres or defined percentage of waters requires that they delineate the newly impacted areas. ***So show us the map!*** Such a map would go a long way to helping states and the regulated community understand exactly where each jurisdictional water is located. Unfortunately, up to this point there has been no map delineating the proposed scope of CWA jurisdiction, even in the abstract, which seems like a very reasonable and helpful visual aid to accompany a geographically-based rule. When we contacted our Corps District Office to help

identify which waters would be covered by the new rule, we were told that case-by-case determinations would continue to be made, which begs the question whether anything has been clarified by the proposed rule.

Largely avoiding the true costs, EPA and the Corps have instead emphasized that the proposed rule will *benefit* businesses by making it easier to determine if a body of water is covered by the CWA. Based upon our aforementioned confusion regarding definitions and new undefined terms, this is only true if we assume that nearly *everything* is covered. This, of course, does not save anyone from the cost and burdens of increased regulation. As highlighted in a recent report prepared for The Waters Advocacy Coalition, “The inclusion of these (expanded categories of) waters will broaden the scope of the CWA and will increase the costs associated with each program. Unfortunately, the EPA analysis relies on a flawed methodology for estimating the extent of newly jurisdictional waters that systematically underestimates the impact of the definitional changes.”² Thus, the proposed rule creates a situation where continued litigation will likely cause a greater expenditure of time and resources to subjectively apply the definitions contained within the proposed rule. This impact will be felt by the entire regulated community and all Oklahomans, including small landowners and businesses least able to absorb such costs. Of grave concern to the OWRB and our sister agencies, the analysis also does not address the burden on state resources for required for permitting, oversight and enforcement.

V. Recommendations

The issues outlined above are of great concern to the State of Oklahoma for a number of reasons, not least of which is that a significant amount of time and resources have been expended on a proposed rule that is confounding. Instead, this proposed rule breeds the continued broad interpretations that have lead to repeated subjectivity and uncertainty in years past. While it is my sincere hope that my comments today will be accepted as constructive criticism, I recognize that they would not be fully constructive without identifying some recommendations for a path forward.

a. Time-out

First and foremost, I encourage EPA and the Corps to recognize that this flawed process cannot continue without genuine consultation with state co-regulators like Oklahoma, as doing so would continue to violate Executive and Congressional mandates, not to mention the very trust and cooperation upon which we co-regulators depend. Stepping back and following a collaborative rulemaking process similar to Oklahoma’s or any number of other states, or the process outlined in Executive Order 13132 in the alternative, would resolve difficult and protracted complications that undoubtedly will flow from continuing down the current path. My agency and our CWA co-regulatory partners in Oklahoma stand ready to assist both EPA and the Corps with initiating this process in our own state.

² David Sunding, Ph.D., *Review of 2014 EPA Economic Analysis of Proposed Revised Definition of Waters of the United States*, The Brattle Group (May 2014), available at: <http://news.agc.org/wp-content/uploads/2014/05/WOTUS-Economic-Report-FINAL.pdf>

As noted previously, Section 3(b) of Executive Order 13132 requires consideration of whether federal objectives can be met through other means. It also provides the following additional remedies to state co-regulators that have so far been excluded from this rulemaking process:

Section 2(i): “The national government should be deferential to the States when taking action that affects the policymaking discretion of the States and should act only with the greatest caution where State or local governments have identified uncertainties regarding the constitutional or statutory authority of the national government.” (emphasis added)

Section 3(c): “With respect to Federal statutes and regulations administered by the States, the national government shall grant the States the maximum administrative discretion possible. Intrusive Federal oversight of State administration is neither necessary nor desirable.” (emphasis added)

Section 6(b): Requiring federal agencies to consult with state and local officials “early in the process of developing the proposed regulation” where the regulation will impose “substantial direct compliance costs on State and local governments and that is not required by statute.” (emphasis added)

Pausing the WOTUS rulemaking process at this stage would allow EPA and the Corps to step back and engage states in this meaningful, if not mandatory, process. In addition to clarifying for states what is meant by the new definitions and undefined terms found in the draft rule, an extended pause would allow federal and state partners to consider more effective alternatives that have not been fully vetted and likely will not be fully vetted within the 90-day timeframe to which we are currently confined.

For example, states like Oklahoma are considering highly conceptual solutions such as a ***rebuttable presumption approach***, which essentially shifts the burden off of landowners and others in the regulated community and instead requires EPA and the Corps to prove that certain marginal waters are in fact jurisdictional under the rule. Furthermore, waiting for the Connectivity Report to be fully vetted and finalized could result in a more solid scientific basis to establish a ***gradient approach*** in which more clear delineations of jurisdictional versus non-jurisdictional waters could be derived. Ongoing deliberations between the members of the SAB suggest that such gradients could be more clearly defined in the Connectivity Report. Such scientific advancements could go a long way to illuminating a more clear path forward for jurisdictional decision-making.

b. Statutory amendments

While amending the CWA is a difficult prospect that has alluded many a Congress, a narrow amendment designed to articulate a more collaborative and mandatory rulemaking process seems reasonable given the unsatisfactory experience that most states have had with this and numerous other CWA rulemakings of late. Avoiding an intractable debate on wholesale amendments or reauthorization of the CWA, Congress could craft an amendment designed for the singular purpose of prohibiting promulgation of any rule that fails to include meaningful, robust consultation with the states, tribes, and others charged with implementation.

VI. Conclusion

The foregoing comments and recommenations are offered in a spirit of cooperation and utmost respect for the daunting task faced by Congress and the many agencies charged with implementing its significant laws. I know that I and my sister Oklahoma agencies stand ready to assist the Committee, the EPA, and the Corps in this process.

Thank you for the opportunity to share Oklahoma's views with you today, and thank you for your leadership in addressing this important issue.