

**Testimony of
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On behalf of the National Association of State Departments of Agriculture**

**As submitted to the
House Committee on Agriculture, Subcommittee on Conservation and Forestry
To review the definition of “Waters of the United States” proposed rule and
its impact on rural America**

March 5, 2015

9: 15 a.m.

1300 Longworth House Office Building

Introduction

Chairman Thompson, Ranking Member Lujan Grisham, and members of the Subcommittee, good morning and thank you for inviting me to join you this morning. My name is Jeff Witte, and I am here to represent the National Association of State Departments of Agriculture - NASDA. Everyone agrees that clean water is an important part of our nation’s health. I know this because I grew up on a beef cattle ranch in my native state of New Mexico. I proudly serve as my state’s Secretary of Agriculture, President of the Western Association of State Departments of Agriculture, and Chairman of NASDA’s Natural Resources, Pesticide Management, and Environment Committee.

In my various roles, I promote agriculture and protect consumers and producers through a host of regulatory programs — including regulatory programs to ensure the protection of my state’s natural resources. I sit before you today to express my concerns with the significant negative impacts of the proposed Waters of the United States (WOTUS) Rule on farmers, ranchers, and people in other agricultural industries.

The stated intent of the proposed rule was to increase clarity and consistency. In fact, it has done the opposite: creating confusion and uncertainty for agricultural producers, rural communities, and state governments. The impacts of the rule are so potentially harmful, it should be withdrawn. We request that federal water regulators take a more collaborative approach in working with state and local stakeholders to draft a rule that works for everyone.

Impacts in New Mexico and Across the Country

In New Mexico, agriculture contributes approximately \$4 billion to the economy every year¹ and is the backbone of rural communities. New Mexico products our country treasures — such as cheese, pecans, and chile peppers — and the hardworking families that bring them to us, would be directly impacted by the proposed rule.

¹ National Agricultural Statistics Service. (2012). *2012 Census of Agriculture* - 2012 Census Volume 1, Chapter 1: State Level Data: New Mexico. Retrieved from USDA: http://agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_State_Level/New_Mexico/

New Mexico is an arid state with diverse landscapes; and, overall, we get much less precipitation than other states. This means irrigated farms are reliant upon ditches fed by spring runoff, which only flow ephemerally. The proposed definition of ditches have been a point of confusion since the publication of the proposed rule. It is unclear if the many ditches that feed from rivers will be considered “tributaries” under Section (s) (5) or will be excluded as “ditches” under Section (t) (3) or (t) (4).

Similarly, ranchers are often dependent on catching rainwater for livestock and to control erosion, which may be regulated under this rule. Of special concern in the southwest is the potential inclusion of ephemeral erosional features such as arroyos, which are similar to gullies. Again, it is unclear from the rule if arroyos will be jurisdictional as small “tributaries” under Section (s) (5) or excluded because of their status as an “erosional feature” as gullies are in Section (t) (vii).

Waters that have traditionally been available for agriculture without the need for permits will now be subject to permitting under the proposed rule — adding time and costs to the production of food on the 2.1 million farms throughout our country. The time sensitive nature of agricultural production may be at risk due to addition scrutiny and potential legal challenges associated with determining jurisdictional waters.

Among the many terms that are left undefined in the proposed rule, “prior converted croplands” is of specific concern to the agricultural community. This is not just an issue in arid states; across the nation agricultural producers and regulators have expressed concern for how the Clean Water Act (CWA) will apply this term. Although, the Environmental Protection Agency (EPA) does not define “prior converted croplands,” other agencies such as the Natural Resources Conservation Service only afford this status to wetlands that were cropped before 1985. This barrier could have profound impacts on rural economies in addition to the nation’s ability to provide enough food for a growing population.

Farmers and ranchers throughout the country — including those in wetter states — have also expressed concern with the rule. For instance, Florida Commissioner Adam Putnam recently testified on the consequences that this proposal would have for lands located near isolated wetlands with the expansion of federal jurisdiction.

Another example is in Iowa. My colleagues have estimated that wetland mitigation costs associated with upgrading that state’s century-old tile drainage system could increase under the proposed rule from \$1.8 billion to more than \$57 billion in coming decades.²

Further, we have significant concerns that farmers and ranchers will face uncertain permitting requirements and legal liabilities under Section 402 of the CWA, which requires National Pollutant Discharge Elimination System permits for point source discharges near a jurisdictional water.

Jurisdictional Issues

My team has worked with our own environmental permitting agency, Soil and Water Conservation Districts, and other stakeholders. We have concluded this rulemaking represents a federal overreach into state affairs, specifically states’ authority to manage and allocate water.

² Personal Communication between NASDA staff and staff of Division of Soil Conservation, Iowa Department of Agriculture and Land Stewardship

States have been provided with the authority to manage water quality under the CWA. The New Mexico Environment Department specifically stated in their comments that they are “most significantly concerned that the proposed rule’s definition of ‘tributary’ will unconstitutionally increase federal authority over traditionally held intrastate intermittent and ephemeral waters...”³ These concerns, which have yet to be addressed, make managing water quality and conservation practices at the state level burdensome.

Since the proposed rule was published in April 2014, EPA and the Army Corps have not been consistent. The agencies have variously said that jurisdiction will increase,⁴ decrease,⁵ and will not change.⁷ There is a significant lack of clarity in the proposed definitions. Furthermore, interpretation of the rule would be left to the discretion of the district offices of the Army Corps across the nation, which adds ambiguity and inconsistency to the process. The “other waters” category in Section (s) (7) leaves many waters in question to the discretion of individuals — creating an unreliable and uncertain business environment.

These issues create both regulatory uncertainty and untold economic consequences for farmers and ranchers. Farmers and ranchers who have historically utilized waters that were not jurisdictional will have to commit valuable time and resources in learning the permitting process and pursuing a permit if needed, causing delays in production.

Additionally, the industries that support our nation’s food system—and public health—would be affected by this rule. Pesticide labeling, which informs users and regulators of where pesticides are allowed and appropriate, will change due to expanded jurisdictional areas in which they are prohibited. For example, a pesticide that is labeled inappropriate for use near water may no longer be allowed for use on arroyos or dry ditches to control noxious weeds and invasive species. Pesticides are not only used for crops but are also used for vector control to reduce infectious diseases and algae control to reduce harmful toxins in drinking water downstream. The expanded jurisdiction this rule calls for could negatively impact public health.

Effect on Business

The Small Business Administration (SBA) has expressed concern that EPA and Army Corps inappropriately used a nearly thirty-year-old baseline to certify small business impacts. Further, the SBA said the rule does indeed impose costs directly on small businesses.⁸ The bottom line is the rule would have significant economic consequences on small businesses including farmers and ranchers because they would have to pay for permits when they have not been required to in the past.

³ New Mexico Environment Department. (2014, November 14). New Mexico Environment Department's Comments Regarding Proposed Regulatory Changes to the Definition of "Waters of the United States" Under the Clean Water Act.

⁴ U.S. Environmental Protection Agency and U.S. Army Corps of Engineers. “Economic Analysis of Proposed Revised Definition of *Waters of the U.S.*,” March 2014. http://www2.epa.gov/sites/production/files/2014-03/documents/wus_proposed_rule_economic_analysis.pdf.

⁵ The Brattle Group. “Review of 2014 EPA Economic Analysis of Proposed Revised Definition of *Waters of the U.S.*” May 15, 2014. Available at: <http://www.brattle.com/news-and-knowledge/publications/archive/2014>.

⁶ Stoner, Nancy. “Setting the Record Straight on Waters of the U.S.” EPA Connect, July 7, 2014. <http://blog.epa.gov/epaconnect/author/nancystoner/>.

⁷ U.S. Environmental Protection Agency. “Clean Water Act Exclusions and Exemptions Continue for Agriculture,” http://www2.epa.gov/sites/production/files/2014-03/documents/cwa_ag_exclusions_exemptions.pdf.

⁸ The Office of Advocacy. (2014, October 21). *Definition of “Waters of the United States” Under the Clean Water Act*. Retrieved from U.S. Small Business Administration: <https://www.sba.gov/advocacy/1012014-definition-waters-united-states-under-clean-water-act>

Restoration Initiatives

The changes and uncertainty resulting from this rule not only affect agriculture but can also hamper environmental restoration conducted by several federal agencies and soil and water conservation districts in my state.

In 2005 the Bureau of Land Management began the Restore New Mexico initiative. This program brings together federal, state, and private partners — including farmers and ranchers — to restore landscapes across the state. So far, these partners have successfully restored more than 3 million acres by thinning overgrown forests, restoring native grasses, removing thirsty nonnative species, reclaiming abandoned oil fields, and more.⁹ Over the last ten years, at least \$100 million — 40 percent from farmers and ranchers — has been used for on-the-ground conservation programs.¹⁰

There are still 4 million acres identified for restoration and conservation. This rule puts that work in jeopardy due to increases in time and money required for permitting, which would otherwise be spent on important conservation projects and on maintaining the important work that has already been completed.

Watershed restoration and conservation projects also address wildfire concerns. The rule could impede land management agencies from conducting timely restoration projects. Preventative watershed conservation projects are much less costly than the mitigation and rehabilitation activities that must occur after catastrophic fires — which are becoming more common in western states. It is our hope that these imperative, preventative measures do not face increased costs or delays from permitting now that jurisdictional waters would increase.

Over \$19 million was spent on fighting the Little Bear fire in southern New Mexico in 2012.¹¹ This does not include the restoration work that continues in this region. We are concerned that fire suppression and rehabilitation activities may be delayed or impeded by additional permitting requirements. It is unclear where the funds to complete permitting will come from — from the private entities that are severely affected or from the state and federal agencies that are working so hard to suppress fires and restore these landscapes.

Conclusion

Our nation's food security rests on the shoulders of our farmers and ranchers. The confusion and uncertainty from this proposed rule may adversely affect them. The rule would cause negative consequences without any clear benefit beyond existing CWA regulations.

Farming and ranching is already a risky business, and adding this level of uncertainty would make many young farmers and ranchers think twice about entering the profession. Since the average age of

⁹ BLM. (2014, October 7). *Accomplishments: Restore New Mexico*. Retrieved from U.S. Department of the Interior: http://www.blm.gov/nm/st/en/prog/restore_new_mexico/restore_new_mexico.html

¹⁰ Mr. Ken Leiting, New Mexico Association of Conservation Districts.

¹¹ Kalvelage, Jim. (July 26, 2012). "Cost of Little Bear Fire suppression tops \$19 million." *Ruidoso News*. http://www.ruidosonews.com/ci_21163264/cost-little-bear-fire-suppression-tops-19-million.

agricultural producers in the United States is 58 years old,¹² implementing unclear regulations may prevent future innovation in the agricultural economy. Without the opportunity for these young agriculturalists to succeed, our reliable and superior food supply could be undermined.

EPA has stated that we can expect extensive revisions in the final rule. We do hope for extensive revisions, but we are concerned that the revisions may not catch all issues that have caused individuals, organizations, and local and state governments to submit over 1 million comments on this rule. In addition, the EPA and the Army Corps have not posted all public comments or responded to them, yet the agencies have indicated they intend to send the rule to be finalized to the Office of Management and Budget in the very near future. Given the magnitude of comments received and the clear requirement to respond prior to finalization, the agencies are neglecting their duty to provide good faith effort to address public concerns.

If finalized in its current form, the federal agencies may not have the resources to implement the rule. Monitoring and assessing water quality on newly jurisdictional water bodies in a very large state such as New Mexico would necessarily require additional resources and, therefore, cannot possibly come without new costs — potentially creating an unfunded mandate to states.

My request of the committee is that you support and encourage the complete withdrawal of this rule. Late last year in the “Consolidated and Further Continuing Appropriations Act of 2015,” Congress directed the agencies to withdraw the flawed Agricultural Interpretive Rule. Our hope is that the same can be done for the proposed rule itself. State and local governments have expressed dissatisfaction with the very low level of collaboration in this process. We request more robust involvement opportunities to help revise this rule to benefit all interested parties.

I appreciate the opportunity to testify before you today, and I welcome any questions you may have.

¹² U.S. Department of Agriculture. “2012 Census of Agriculture.”
http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_US/