

## TESTIMONY

### IMPACT OF PROPOSED CHANGES TO CLEAN WATER ACT JURISDICTION RULE ON THE U.S. DEPARTMENT OF AGRICULTURE'S PROGRAMS

Before the House Agriculture Committee  
Subcommittee on Conservation and Forestry

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Chairman Thompson, Ranking member Grisham, and members of the Committee, thank you for inviting me today to testify on how the United States Environmental Protection Agency's (EPA) and the United States Army Corp of Engineers' "Waters of the United States" (WOTUS) proposed rule will affect United States Department of Agriculture (USDA) programs, especially those in the jurisdiction of your Committee.

My testimony today stems from two experiences. First, I represent the Waters Advocacy Coalition (WAC), a large cross-section of the nation's construction real estate, mining, manufacturing, energy, public health and safety, agriculture and forestry sectors. The Coalition is deeply concerned with how this proposal could stymie growth and opportunity throughout our economy and especially in rural America. Second, I had the honor of serving as a career official in the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget (OMB). My responsibility in OIRA was to determine how EPA draft regulations and policies affect our national welfare and the budgets and the missions of other Federal agencies.

From these twin streams of experience, I am very concerned that EPA is rushing forward with a rulemaking without considering the full ramifications and without fully estimating the social benefits and costs. USDA's recent budget submission, performance plan, and other program analyses do not evaluate how the WOTUS rule will increase the cost and will reduce the performance of USDA programs. From my own analysis, the impacts on USDA programs will be significant and complex.

Based on the Administration's stated schedule for this rule, there isn't enough time for USDA understand the implication for USDA programs in the jurisdiction of this Committee. EPA's leadership has stated that they plan to issue the final rule this spring. Under the Executive order for regulatory review issued by this Administration, OIRA only has 60 days to 90 days to review the draft final WOTUS rule. To avoid the adverse effects of this rulemaking on USDA and rural America, EPA and the Corps should repropose other regulatory alternatives and reanalyze their social benefits, social costs, and Federal budget impacts.

## The WOTUS Rulemaking Will Increase Costs and Uncertainty for Farming and for Services in Rural America

While the Committee has heard these costs described from other witnesses this morning, let me summarize the major ones:

- Expanding jurisdiction under regulation to most ditches, ephemeral streams, and lands containing adjacent waters will increase the land available that can only be farmed under Federal permitting conditions.
- While much attention has been paid to the rule's expansive definitions of wetlands, the rulemaking has implications far beyond wetland permitting. The regulatory definition triggers many other expansive and expensive provisions of the CWA including the following:
  - Permitting for discharges in waters of the United States.
  - Spill Protection Requirements.
  - Water Quality Standards.
  - Anti-backsliding provisions.
  - Citizen suit provisions.

The last two deserve some mention. Under the Clean Water Act, once effluent permit limits are established, they cannot be made less stringent even if the initial environmental problem has been solved. Whatever the value of this "antibacksliding" provision is for industrial discharges, it certainly does not fit well for farming, grazing, and other active land uses. Farmers innovate constantly - new seeds, new crops, new pest control systems, new equipment. Under the CWA, if a farmer must seek a CWA permit for any runoff into a ditch, those limits become binding in the future. It may become very difficult to grow a new crop and remain in compliance with permit based on the previous crop.

The threat of citizen suits is not a false scare. It has been said that EPA and the Corps will not change their jurisdictional determinations, allowing current land uses to continue. This argument ignores the consequences of regulation. Under the CWA, authorized states must establish water quality standards for all waters of the United States and permit discharges into these waters. On behalf of EPA, citizens can sue potential dischargers and the States for failure to comply with permitted conditions or for failure to establish standards under the CWA. Once most ditches become waters of the United States, citizen groups can file suit against adjacent land owners for unpermitted discharges. Just last month, citizen groups in California gave notices to hundreds of businesses and property owners that they intend to sue these business if they are not in compliance with an upcoming CWA stormwater rule.

### Implications of these Regulations for Rural America

The vast number of land owners who own, or are adjacent to, jurisdictional waters face a difficult choice. They can either cede control of the land to Federal jurisdiction or they can pay significant permitting costs to maintain the current use. Let's explore each choice. If they cede control of the land now deemed water of the US, they will lose production from that land. More significantly, they likely will also have lower yields on their remaining non-jurisdictional land. For example, to receive a discharge permit for pesticide application adjacent to a waters of the US, farmers will need buffer zones or engineering barriers to prevent discharge to these jurisdictional waters.

On the other hand, if they seek to maintain their current use, they must pay to obtain Federal permits. Obtaining these permits are not cheap - EPA estimates that they are at least \$57,000. The WAC has submitted data to EPA to show that these costs are much higher than EPA's estimates. In addition to the permitting cost, farmers will then have to pay to comply with the permit. These compliance costs include monitoring, reporting, wetland mitigation purchases, and other costs. As EPA states in its economic analyses for other rulemakings, these costs can easily exceed hundreds of thousands of dollars.

Whether a farm's revenue goes down or its costs go up, the bottom line is the same—the rulemaking will reduce the nation's net farm income.

But that isn't all. There is another cost that often doesn't receive as much attention, but is extremely important for farmers. Uncertainty. This rulemaking increases farming uncertainty both in terms of time and space. Permit applications and permit approval takes time. The Corps of Engineers' or EPA's permit approval process is not aligned to, or as predictable as, the growing season. There is also uncertainty in space, i.e., the extent of EPA's asserted jurisdiction. Since EPA's definitions are not clear, farmers face some uncertainty where they can plant without prior approval.

Uncertainty matters because of another vital ingredient in farming and in rural America, affordable and available financing. Our nation has a long tradition of loss mitigation and shared risk between the farmer, commercial financial institutions, and the Federal government. In the face of this rule's negative and uncertain effects on farm income, private lenders are likely to charge higher financing costs or may cut off loans to certain farmers until the jurisdictional issues are resolved.

EPA has not considered the costs of uncertainty in its rulemaking. More importantly, USDA has apparently not either.

### Effect of the WOTUS Proposed Rule on USDA Programs

EPA's rulemaking conflicts with USDA's mission to promote rural America's prosperity. Here are just some of the impacts on USDA programs:

- **Greater Demand for Crop Insurance.** As farmers' costs increase and income uncertainty increases due to this rule, they will sensibly pay to reduce their overall risk in other areas. Farmers then are likely to increase their coverage under Federal crop insurance programs. USDA has experienced increased demand for coverage over time as other revenue risks (e.g., trade restrictions) have increased.
- **Greater Demand for Farm Operating Loans.** USDA's farm loan programs serve as a safety net when farmers cannot obtain credit from commercial sources. This program offers a lifeline to a large number of farmers - with an average loan size of \$57,000, the \$1.25 billion in obligations goes a long way. As the WOTUS rule reduces net farm income for many farmers, their balance sheets will be stressed. More farmers will seek USDA's farm operating loans. Unfortunately, more farmers will be unable to keep current on their existing federal loans. When net income falls, delinquency rates and thus Federal budget costs.
- **Greater Demand for Other Rural Infrastructure Financing.** USDA supports investments in rural infrastructure for telecommunication, energy, and education. USDA has multiple grant, loan guarantee, and loan programs to share rural

development risk. This rulemaking increases infrastructure project cost and uncertainty and thus will increase USDA's infrastructure support costs.

- **Greater Costs to Manage US Forests.** USDA manages our nation's forest resources for their multiple uses. The Forest Service must comply with NEPA in its use decisions. As with farmers, the Forest Service will must comply with the rule and evaluate the new extent of jurisdictional waters on or adjacent to its land. Past jurisdiction decisions under NEPA will likely be need to be revised due the rule. For example, the Forest Service has submitted 14 draft EIS for public and EPA comment since the beginning of October. Conducting new evaluations for these EIS documents will increase Federal spending and potentially delay using our forest resources.
- **Greater Demand for NRCS Decisions.** The USDA's Natural Resources Conservation Service (NRCS) plays two important roles in this rule. First, the 2014 Farm Bill make eligibility for all Federal assistance dependent upon complying with NRCS's wetland determinations. The stakes are incredibly high for this compliance. Violations on one field disqualifies farmers from Federal assistance on all of their fields. Therefore, farmers have strong incentives to seek NRCS determinations for their fields and to follow them.

It is worth noting that the proposed WOTUS rule adopts a different definition of wetland than NRCS regulation. Last month, NRCS called for comment on State Offsite Methods for several states that outline procedures for NRCS staff to make remote wetland determinations. These NRCS proposals make no mention of EPA's proposed rule, even though they are both wetland delineations. As a result, we are heading to a future where farmers must farm based on two sets of maps - one determining their eligibility for Federal farm programs and the other determining their legal compliance with the waters of the United States rulemaking.

Second, it is not only NRCS' responsibilities for its wetland determinations, but the responsibility EPA gave it for EPA's determinations. In its interpretive rule published with the proposed rule, EPA and USDA put forth limited exemptions from compliance with section 404 of the Clean Water Act for normal farming operations provided farmers follow approved NRCS management plans. Given the substantial fines possible under the CWA, farmers will move to ensure that NRCS staff explicitly approve their plans. Commercial lenders are in turn likely to insist on NRCS approved plans prior to approving financing.

For these reasons, NRCS staff will face significantly greater demands for their time. Since their decisions will have greater consequences, NRCS staff will have less time to pursue their other responsibilities that are of great interest to this Committee.

### **Little Evidence That USDA is Considering These Impacts**

USDA has given little public indication that they are planning for these consequences. However, we do know that USDA's recent public documents do not anticipate or quantify the rule's impacts on USDA programs. For example:

- There is no mention of this rule's effect in USDA's FY2016 budget request. In fact, the Administration proposes to reduce NRCS's budget authority in 2016 at the time when farmers will need their services more.
- There is no mention of this rule's effect in USDA's Performance Plan. The broad breadth of the rulemaking's effect on USDA programs receives no mention.
- There is no mention of this rule's effect in OMB's Federal Credit Supplement to the FY16 Budget Submission. Since OMB projects the default rate to increase by 50 percent in FY2015 as compared to FY2014, accounting for the effect of the additional financial burden of this rule in FY16 would be prudent financial planning.

## Recommendations

In addition to its public planning documents, USDA has opportunities within the interagency regulatory review process to raise the WOTUS rulemaking's effect on its programs. For more than 30 years, each President has required federal agencies to submit draft regulation to OMB for review. OMB coordinates interagency review of each regulation, allowing other agencies to review the impact on their programs and mission. Policy officials and the public can then see the trade-offs. For it is not a choice of environmental protection or rural development, but rather how can we use America's limited resources as efficiently as possible to achieve a mix of both policy goals.

However, policy officials can only make these trade-offs if they have information. And the timeframe is limited - the Executive order only give OMB 60 to 90 days to review even regulations with profound economic impacts. USDA must be ready and active advocate for rural America during this review.

This Committee can ensure USDA participates actively in the Executive branch interagency review by asking senior officials these questions:

- What are the budget impacts of the rulemaking on USDA programs and loan guarantees in FY16?
- What are the additional demands on USDA personnel from EPA's rulemaking?
- Has USDA offered alternatives to EPA and OMB to lessen the impact of EPA's proposal on farmers, the rural American economy, and USDA?

If USDA officials are not prepared to answer these questions, then the rulemaking is not ready to have the force and effect of law. The Administration then should reconsider the proposal, fully analyze its potential economic effects as required by law and Executive orders, and ask for additional public comment.

Members of the Committee, thank you for the opportunity to speak to you today on this important topic. I would be happy to answer any questions you may have.