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Joint Hearing of the Senate Committee on Environment and Public Works and House Committee on Transportation and Infrastructure

"Impacts of the Proposed Waters of the United States Rule on State and Local Government"

Chairmen Inhofe and Shuster, Ranking Members Boxer and DeFazio, Members of the Senate Committee on Environment and Public Works and House Committee on Transportation and Infrastructure, thank you for this opportunity to discuss the Environmental Protection Agency's proposed rule to redefine the "Waters of the United States" and the significant negative impact such a rule would inflict on states and the landowners within their borders.

Respect and protection of private property rights sets the United States apart from other nations and has fueled the greatest expansion of economic freedom the world has ever known. Indeed, private property rights are among the foundational rights of any functional democracy, not just ours.

President Obama's Environmental Protection Agency currently stands poised to strike a blow to private property rights, through a proposed rule that radically expands EPA jurisdiction by placing virtually all land and water under the heavy regulatory hand of the federal government.

The Proposed Rule aims to redefine what constitutes "navigable waters" or "waters of the United States" – a term that long been understood to include only significant bodies of water capable of serving as conduits for interstate commerce. The proposed rule redefines those terms to now include virtually every body of water in the nation, right down to the smallest of streams, farm ponds and ditches. This is a naked power grab by the EPA.

Messrs. Chairmen, the EPA should undoubtedly have a role in solving interstate water quality issues. That role should not, however, be so expansive so as to render virtually every property owner in the nation subject to often unpredictable, unsound, and Byzantine federal regulatory regimes. When the states are cut out of the loop in favor of federal regulators, landowners are left lobbying distant federal bureaucrats when the system wrongs them – and wrong them it will.

Simply put, the proposed rule is a classic case of overreach, and flatly contrary to the will of Congress, who, with the passing of the Clean Water Act, decided that it was the states who should plan the development and use of local land and water resources.

The EPA has been generally dismissive of these concerns brought by states, local governments and individual citizens, with their primary tactic being an ineffective public relations campaign

to sway opinions in rural America. EPA Administrator Gina McCarthy has been documented as dismissing many concerns wholesale — calling them "ludicrous" and "silly" — while also asserting that the proposed rule is all about "protecting waters" and providing clarification.

To Administrator McCarthy, who appeared before you today, I say: pardon my skepticism, but these reassurances are from the same administration that preyed on the "ignorance" (their words, not mine) of the American voters to sell them on a federal takeover of healthcare, with lies like "if you like your insurance, you can keep your insurance." So, just as President Reagan told us, "Trust, but verify," we would like to trust you, but something does not add up. This rule smells like far more than mere clarification; indeed, it reeks of federal expansion, overreach, and interference with local land use decisions.

Notably, there are several United States Supreme Court decisions illustrating that the intended regulatory jurisdiction of the EPA has been limited primarily to the "navigable waters" of the United States, with all other waters rightly left for the states to regulate.

At the time the Clean Water Act (CWA) was passed, the Supreme Court had previously defined the "navigable waters of the United States" as interstate waters that are navigable in fact or readily susceptible of being rendered so. [The Daniel Ball, 10 Wall. 557, 563 (1871)]. More recently, the Court decided *Solid Waste Agency of Northern Cook County v. Army Corps of Engineers* [531 U.S. 159 (2001)], known as SWANCC, and *Rapanos v. United States* [574 U.S. 715 (2006)]. These two cases more clearly specify the limits of federal jurisdiction under the CWA, placing two significant limitations on federal jurisdiction. First, the Court has made clear that any examination of federal jurisdiction must begin with the understanding that Congress intended the States to retain primacy over the development and use of local land and water resources. Second, the Court made clear that federal jurisdiction is only proper over water that has a continuous surface connection to a "core" water.

In *SWANCC*, the Court ruled that the Army Corps of Engineers exceeded its authority by attempting to regulate "non-navigable, isolated, intrastate waters," such as seasonal ponds. The Court explained that in enacting the CWA, Congress intended to preserve the States' historical primacy over the management and regulation of intrastate water and land management.

In *Rapanos*, the Court described two different tests for when a secondary water can be considered a "water of the United States." A four-Justice plurality thought the question turned on whether the water has a continuous surface connection to a core water, while Justice Kennedy's concurring opinion examined whether a water has a "significant nexus" to a core water.

With this Proposed Rule, the EPA has attempted to transform Justice Kennedy's concurring opinion in *Rapanos* into a regulatory blank check for themselves. But the Proposed Rule's *ad hoc* approach is certainly contrary to the test adopted by the *Rapanos* plurality and is broader than even Justice Kennedy would permit.

In addition, and critically, the proposed rule's inclusion of this vague, catch-all category defeats the EPA's claimed purpose of the rule of bringing "transparency, predictability and consistency" to the scope of CWA jurisdiction and land-use decisions. Instead, the EPA has simply redefined the meaning of "navigable waters" in an extraordinarily broad way, so that any land owner may

be subject to onerous permitting requirements or severe civil penalties if violated, even if unknowingly.

Oklahoma has seen firsthand how the federal government, specifically the EPA, abuses its regulatory power in states that have interests in energy, farming and ranching. The states are not, and should not be used as, a vessel to carry out the misguided visions of bureaucrats in Washington, who often seem to have little regard for how their actions negatively impact the economy and private property rights.

During the comment period for this rule, Oklahoma filed its objections to the rule. Additionally, as the chief law officer of the state of Oklahoma, I can say with confidence that if the EPA continues forward with this rule as proposed, the rule will be challenged in court.

If this rule is issued as proposed, we will all live in a regulatory state where farmers must go before the EPA to seek permission to build a farm pond to keep their livestock alive, where home builders must seek EPA approval before beginning construction on a housing development that contains a dry creek bed, and where energy producers are left waiting for months or even years to get permits from the EPA, costing the producers tens, if not hundreds, of thousands of dollars that inevitably will be passed on to consumers.

Messrs. Chairmen, the EPA's proposed rule is unlawful and must be withdrawn. We urge the EPA to meet with state-level officials who can help the agency understand the careful measures that states already have in place to protect and develop the lands and waters within their borders. We urge the EPA to listen to Congress regarding the intent of the law to limit the regulation of non-navigable waters. But most of all, we urge the EPA to take note of the harm that its rule will do to the property rights of the average American and their ability to make land use decisions.

Thank you for the opportunity to speak to your committees.