ENVIRONMENTAL PROTECTION AGENCY
AND
U.S. ARMY CORP OF ENGINEERS
WATERS OF THE UNITED STATES RULEMAKING REVISIONS
PUBLIC HEARING
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JACK REARDON CENTER
KANSAS CITY, KS

TESTIMONY
BY
MARK HAGUE
ENVIRONMENTAL PROTECTION NETWORK

Hello.

My name is Mark Hague. I come here today to offer comments about the proposal by the U.S. Environmental Protection Agency and the U.S. Army Corp of Engineers to revise the Waters of the United States, commonly referred to as the WOTUS Rule promulgated in 2015.

I am a member of the Environmental Protection Network (EPN). I served at the U.S. EPA for 37 years. From November 2015 until my retirement from EPA in January 2017, I was the Regional Administrator for EPA Region 7.

The mission of the Environmental Protection Network is to preserve and advance the nation's bipartisan legacy of progress towards clean air, water and land and climate protection for all Americans. EPN's principal focus is to assure the capacity of government agencies charged with public health and environmental protection to sustain that progress. We are committed to providing relevant facts and objective analysis to the public, policy-makers and the media.

I want to thank the EPA and the Corp of Engineers for convening this hearing to solicit public input on the proposed changes to the 2015 WOTUS rule.

Public input is a critical component to federal rulemaking. Public comments collected and considered carefully by regulatory agencies ensure that citizens' voices are heard and should guide sound rulemaking that serves the interest of all citizens. Complementary to hearing from citizens is the regulatory agencies seeking input on the science, legal and policy analyses used to frame its rulemaking or proposals to change existing rules.

SOUND SCIENCE SHOULD GUIDE EPA AND CORP OF ENGINEERS RULEMAKING.

The current proposal for changes to the 2015 WOTUS rule needs to carefully explain, using objective legal analysis and sound science, why changes are necessary and how proposed changes will ensure consistent water quality protections across political and ecological boundaries. Using sound science from many other federal, state and academic research institutions should provide the backbone of effective rulemaking.

The issues surrounding the current proposed and existing WOTUS rule are complex. That said, there are several basic points that I submit that need to be carefully considered by EPA and the U.S. Corp of Engineers as they contemplate revisions to the 2015 WOTUS rule.

The critical difference between the 2015 rule and this proposal is that the new definition of jurisdictional waters eliminates ephemeral waters, non-navigable interstate waters and many wetlands. Yet the agencies state in this proposal that there are no data available to identify where or how many of these excluded waters and wetlands exist. Public comments by senior agency officials, as reported by several media sources during the public announcement of the proposed rule, indicate that key elements of scientific data are either unknown, difficult to obtain or are unavailable.

In my years of work with EPA, the lack of data, no known science, or not available from EPA was little not sufficient for effective decision-making let alone rulemaking that fundamentally defines protections afforded by the Clean Water Act (CWA) to the nation's critical system of water bodies and wetlands. Too often, when sufficient data gaps were observed, additional research and data collection from across all federal and state agencies would be undertaken to fill information gaps and better inform critical decision-making. EPA and the Corp of Engineers should redouble their efforts to collect data from the USGS and other agencies to ensure sufficient information is considered to determine the inventory of waters that could be subject to protection under any version of the WOTUS rule. Where data gaps exist, the regulators should acknowledge those and explain to the public how it will answer fundamental questions being raised. To date it appears from agency leadership comments that not all the data has been collected or evaluated.

THE RULE CONTEMPLATES A FUNDAMENTAL CHANGE IN THE SUCCESSFUL IMPLEMENTATION OF THE CWA BY STATES AND EPA.

The current proposal requests public comment on giving states the authority to make jurisdictional determinations and to submit those to the agencies for approval. The current proposed rule appears to weigh heavily on a state's first approach to determining protections for waters and wetlands within the boundaries of a given state. States have taken substantial steps to develop, fund and implement programs under the CWA as well as other environmental laws. To suggest that EPA should cede basic responsibilities in light of state program maturation seems to not fully recognize the critical role EPA plays to ensure a level playing field across the country. EPA should fulfill its responsibility to develop the science and regulatory framework for implementing the CWA. Doing so ensures that each state has sufficient science and regulatory backing to fairly and consistently protect its own waters while

ensuring actions designed and implemented by one state protect critical waters that flow into other states.

Reverting to a state lead on a critical regulation such as WOTUS returns to an era prior to the enactment of the CWA and its amendments. States indeed should and must have a voice in environmental regulation. States have developed years of expertise and have intimate knowledge of physical and environmental conditions in their respective states. That said, it is always a concern that inconsistent and at time conflicting standards from state to state can cause undue burdens on business and industry. In the case of water quality protections, there needs to be a clear acknowledgement that waters do not always follow political boundaries. Right here, in Kansas City, KS, there are numerous waters, major waterways like the Missouri River, that share state and tribal boundaries. It's easy to see that basic protections of streams, wetlands and intermittent and ephemeral waters that vary along the Missouri River basin, which differ by bordering states, could have the unintended consequence of negating efforts by other states to reduce pollutants in connected streams in their state, thus tilting economic advantage to a state with less protection of waters and connected waters. This could create an unnecessary "race to the bottom" on water quality.

Successful implementation of the CWA, achieved during Democratic and Republican administrations, has worked best when respectful and mutually supportive implementation of national environmental laws is carried out by states and EPA in cooperation.

MAJOR FUNDING BY FEDERAL AND STATE GOVERNMENTS HAS BEEN ALLOCATED TO NONPOINT SOURCE PROTECTIONS AND IS PRODUCING DEMONSTRABLE IMPROVEMENTS IN WATER QUALITY.

Growing concerns about nonpoint source pollution from land use, especially in the agriculture sector, have driven research, demonstration and implementation of effective land-use practices that control soil erosion, increase the productivity of soils, and prevent loss of critical nutrients to run-off. Suddenly exempting many waters within a state boundary would seem to undermine the investments by states, land grant universities and the federal government to promote improving agricultural practices. Why adopt those practices if the water on a given section of land is not afforded protections under the CWA? Those efforts should continue to be encouraged. Including those waters under jurisdiction for the CWA provides an incentive for voluntary adoption of sound nutrient management programs.

In an era when the effects of a changing climate are being realized, maintaining and promoting good land management practices should be encouraged. Short-duration, high-volume rainfalls, an element of a changing climate, will have profound impacts on lands in the Heartland. Protecting those valuable resources, like wetlands, should be a careful consideration in this proposed rulemaking. Too much effort has been made by numerous states in the central part of the country to protect waters from nonpoint source pollution. Efforts costing millions, if not billions, of dollars to protect and restore the Gulf of Mexico from algae blooms and the effects of nonpoint source pollution have been made. Rolling back on the amount of waters subject to CWA jurisdiction could remove an incentive to continue those practices and thus threaten gains to improve water quality in those waters connected to the Missouri and Mississippi Rivers, which feed into the Gulf of Mexico.

Eliminating CWA protections for streams and wetlands upstream of public drinking water facilities will increase nutrients, hazardous algal blooms and toxic pollutants in the source waters of these facilities, requiring them to increase treatment to make the water safe to drink. The increased costs of treatment will likely be passed on to consumers in the form of rate increases. Those rate increases can have a disproportionate impact on low-income communities here in the Midwest and across the country.

Municipal systems must also be part of the solution. It's not an either or when considering nonpoint sources and point sources. All sources need to share in the responsibility of protecting all waters included in the 2015 WOTUS Rule.

LEGAL CHALLENGES TO THIS RULE WILL INCREASE UNCERTAINTY AND CREATE A CONFUSING PATCH WORK OF REGULATORY DEFINITIONS.

This rule doesn't appear to provide legal clarity. A major thrust of the 2015 rule was to provide clarity and certainty as to which waters were under jurisdiction of the CWA. This rule does not clarify, but rather seems to muddy those waters. This continued ambiguity will likely lead to prolonged litigation. That litigation will add greatly to the uncertainty as to what waters deserve protection. In that, legal ambiguity enforcement of basic CWA act protections will be hampered. EPA and Corp of Engineers staff tasked with determining jurisdictional boundaries and enforcing basic protections will be hampered if not totally stymied by ongoing litigation resolution, which could take years.

This rule proposal seems to weaken basic science and understanding of how intermittent, ephemeral streams and wetlands impact bigger year-round flowing waters in states along an entire watershed. Think of a downspout form a neighbor's house. Does it flow with water every day, and does that flow impact your property? On a daily basis, it probably doesn't. When it rains, and when it rains heavily, that downspout and water flow have a very real probability of flooding and negatively impacting your property or damaging your home. Think of that scenario as the agency moves to eliminate jurisdiction of a significant percentage of these waters and wetlands.

I encourage the EPA and Corp of Engineers to bring sound science and legal rationale into its proposed rulemaking. A practice that has withstood the test of time through Republican and Democratic administrations is to follow the law, follow the science and promote transparency in decision-making.

I will submit my complete written statement for the record.

Thank you for the opportunity to participate in this public hearing.

For more information, please email EPN at info@environmentalprotectionnetwork.org or call 202-656-6229.