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Delaying the EPA and Corps' Clean Water Rule Makes No Sense: Bad for Farmers, Bad for Developers, and Bad for the Environment

Dear Colleague:

For over a decade, numerous stakeholders, ranging from agricultural interests, development organizations, and conservation groups have called on the Corps and EPA to undertake a Federal rulemaking to simplify and improve the process for determining what waters (and wetlands) are, and are not, covered by the Clean Water Act, consistent with the decisions of the Supreme Court.

In March of 2014, the administration responded by releasing a proposed Clean Water rule to provide the clarity that so many organizations have asked for, and undertaking an "unprecedented" level of public outreach on the proposal. As is common with any rulemaking, the agencies received both praise for and concern about the impacts of this proposal. In testimony to our Committee, the Federal agencies identified several specific areas where the rulemaking may lack specificity and have committed to make changes to these areas before the rule is finalized later this spring.

For example, the American Farm Bureau Federation expressed concern about the distinction between "ephemeral" (rain-dependent) streams, which are currently subject to the Clean Water Act, and "erosional features" which are not. Recently, EPA testified that the agencies expect the final rule to clarify the distinction between ephemeral streams and erosional features to ensure that the final rule did not, inadvertently, bring erosional features under the scope of the Act.

Similarly, the Farm Bureau expressed concern that the proposed Clean Water rule would subject all activities, even land use activities, within a "floodplain" to the Clean Water Act permitting requirements. While EPA clarified that, unless an activity involved the discharge of a pollutant or the placement of dredge or fill material into a "navigable water," the Clean Water Act simply does not apply, it also recognized the inexact nature of the term "floodplain" in the proposed rule. EPA testified that it expected the final rule to provide more clarity and certainty on this issue.

Numerous groups, including the National Association of Counties, have expressed concern about the impact of the proposed rule on "ditches". In response, the agencies testified that the proposed rule not only codified the current exemption for ditches, but also "expanded the definition of ditches that would be exempt under the Clean Water rule to make it clearer, [including] ditches that basically drain dry land along public lands and highways." Further, the agencies committed to provide greater certainty, in the final rule, on what ditches are and are not protected by the Act.

Other groups questioned whether the proposed Clean Water rule would capture municipal separate sanitary stormwater sewer systems (MS4s) or water reuse or recycling projects. The EPA administrator testified that "EPA has not intended to capture features … that have already been captured in … MS4 permits, [and it] is our intent to continue to encourage and respect those decisions and to encourage water reuse and recycling, which very much is consistent with the Clean Water Act and our overall intent." Further, the administrator testified that EPA would make very clear that these exclusions are articulated in the final rule "so that people will see in writing what they have been asking us about."

Western water supply agencies have also received clarification from EPA that the rulemaking will not add jurisdictional scope to water supply canals, water transfers, or groundwater projects, which are important tools used in the West to address historic drought conditions. EPA testified that "the proposed rule would not expand jurisdiction over water delivery systems [, such as canals used for irrigation, industrial, and residential water deliveries]. If such features are not covered now under the tests established by the Supreme Court, they would not become jurisdictional under the proposed rule." The EPA also stated that "the proposed rule would not alter the status quo regarding water transfers". EPA has also testified, numerous times, on the jurisdictional status of groundwater by stating, "We explicitly make sure to mention that groundwater is not included."

Finally, several groups, such as the National Association of Home Builders, voiced concern over the proposed rule's retaining of the regulatory term "other waters". In many ways, the jurisdictional status of these waters, which can include "isolated waters" (e.g., prairie potholes), highlights the current legal confusion caused by split Supreme Court decisions. Existing regulations cover a broad category of "other waters" which, today, remain legally subject to the Act based on "interstate or foreign commerce" connections. The proposed rule attempts to narrow jurisdiction over these waters to only those where the agencies can demonstrate a significant connection (nexus) between the water and some other jurisdictional water. Yet, even this narrower scope remains very case-specific, and does not provide the predictability sought in this rulemaking. In response, the agencies are exploring a more "transparent system for people … to understand what constitutes a significant nexus to comply with the instructions that the Supreme Court gave us."

Again, the Corps and EPA have testified that they are close to finalizing their Clean Water rulemaking to provide more certainty to the current permitting process. Unfortunately, despite the calls for clarity and certainty, the Republican majority has made it a priority to halt the current Clean Water rulemaking, and to force the agencies to go back to the drawing board and start the process all over again, before the public will ever see the final product.

We have to ask why? Such an approach would perpetuate the regulatory confusion that exists today, adding additional costs and delay to the construction of vital projects across the nation. And, it would leave countless acres of wetlands and miles of streams – many of which serve as the primary source of drinking water for 117 million Americans – at risk. In short, as the EPA Deputy Administrator recently testified, "I do not know what value would be added [for delaying implementation of the Clean Water rule] other than the addition of time."

Blocking the agencies from releasing their final product simply makes no sense. It provides no certainty to the regulated community on where the rules apply, and it leaves many of our nation's waters unprotected. Let the agencies finish their work, and if Congress wants to revisit this issue afterward, it has ample authority to do so. If you have any questions, or would like to learn more about the Clean Water rule, please call the Subcommittee on Water Resources and Environment at 202-225-0060, or visit http://democrats.transportation.house.gov/legislation/waters-united-states.

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