

**Testimony of Robert Kerr,
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Before the House Committee on Science, Space, and Technology

Hearing on “EPA Regulatory Overreach: Impacts on American Competitiveness”

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Chairman Smith, Ranking Member Johnson, and distinguished members of the Committee, on behalf of the 140,000 members of the National Association of Home Builders, thank you for the opportunity to testify this morning.

My name is Bob Kerr, and I am the owner of Kerr Environmental Services Corporation located in Virginia Beach and Glen Allen, Virginia. Kerr Environmental Services provides services related to natural resources investigations, permitting, mitigation, environmental due diligence, and water resources engineering. My company has extensive experience in compliance with the Clean Water Act (CWA), having performed jurisdictional determinations on approximately 45,000 acres of wetlands and 343,000 linear feet of streams and other waters throughout Virginia and North Carolina over the past 13 years. Collectively, the company staff has over 75 years of experience in delineations of wetland and waters and jurisdictional determinations of “waters of the United States.”

Our clients include the United States Department of Defense; the Virginia Department of Transportation; multiple counties and cities throughout Virginia; public and private utility providers; commercial real estate developers; and home builders. I started conducting delineations and jurisdictional determinations in the summer of 1986 in the metropolitan New York area, just before promulgation of regulations on the definition of “waters of the United States” was published in November 1986.¹ It is with these experiences and perspective that I provide today’s testimony regarding the recently finalized rule to define the term “waters of the United States” under the Clean Water Act.

I am pleased that the Committee is addressing this important issue, and I appreciate the opportunity to give my perspective.

¹ 51 Federal Register at 41,206 (November 13, 1986).

Final Rule Defining “Waters of the United States” under the Clean Water Act:

On May 27, 2015, the U.S. Environmental Protection Agency and U.S. Army Corps of Engineers (“the agencies”) finalized a rule redefining the scope of waters protected under the CWA. For years, land owners and regulators alike have been frustrated with the ongoing uncertainty over the scope of federal jurisdiction over “waters of the United States.” By improving the CWA’s implementation, removing redundancy, and further clarifying jurisdictional authority, the agencies could have improved compliance while protecting and improving the aquatic environment.

Unfortunately, the rule falls well short of providing the clarity and certainty that the regulated community seeks. This rule will increase federal regulatory power over private property and will lead to increased litigation, permit requirements, and lengthy delays for any business trying to comply. Equally important, these changes will not significantly improve water quality because much of the rule improperly encompasses water features that are already regulated at the state level. The only thing that is certain is how difficult it will be for me to provide jurisdictional determinations and secure permits for my clients. This rule is so convoluted that even professional consultants with decades of experience will struggle to determine what is jurisdictional. Decisions among the profession will become more inconsistent. This alone is proof that this rule will not work.

The Rule is Inconsistent with Supreme Court Precedent

The Clean Water Act (CWA) was intended to strike a careful balance between federal and state authority. This has proven to be a difficult task, and to some extent, the efforts of the courts to provide clarity have only added to the uncertainty. The courts, however, have been clear on one issue: there is a limit to federal jurisdiction of waters. In fact, the Supreme Court has twice affirmed that both the U.S. Constitution and CWA place limits on federal authority over intrastate waters. While many were optimistic that this rule would finally translate the Court’s directives into a workable framework, the proposed rule instead is a marked departure from past Supreme Court decisions and raises significant constitutional questions. In order to view the rule through this legal framework, let us review the key cases:

Solid Waste Agency of Northern Cook County v. Army Corps of Engineers (SWANCC): In 2001, for the first time, the Supreme Court limited the federal government’s jurisdictional authority under the CWA through the *SWANCC* decision². The case questioned whether the CWA conferred the Corps of Engineers with authority over isolated seasonal ponds at an abandoned sand and gravel pit in suburban Chicago, Ill., because they were susceptible to being used by migratory birds. The Court rejected the Corps’ assertion of jurisdiction because the

² *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001).

agency's interpretation gave no effect to the word navigable in the term "navigable waters." In other words, the Corps could not assert jurisdiction over the area in question simply because a migratory bird might land there.

Rapanos v. United States and Carabell v. U.S. Army Corps of Engineers (collectively, Rapanos): Both the *Rapanos*³ and *Carabell*⁴ cases followed the same fact-pattern in *SWANCC*: questions of jurisdiction surrounding wetlands miles away from traditional navigable waters (TNWs) that drained through multiple ditches, culverts, and creeks, that eventually drain into a TNW. The question of this court case was over the premise that waters are jurisdictional as long as they have a "hydrological connection" to a TNW. *Rapanos* clarified that CWA jurisdiction does not reach non-navigable features merely because they may be hydrologically connected to downstream navigable waters. In short, the "any hydrologic connection" theory was rejected by the Supreme Court — just as the migratory bird rule was disapproved in *SWANCC*.

However, two theories emerged from the majority opinion in *Rapanos*. The first, written by Justice Scalia, claimed that CWA coverage extended to "...only those relatively **permanent, standing, or continuously flowing** [emphasis added] bodies of water 'forming geographic features' that are described in ordinary parlance as 'stream[s], ... oceans, rivers, [and] lakes.'"⁵ The plurality also developed a jurisdictional rule for wetlands in particular: "[O]nly those wetlands with a continuous surface connection to bodies that are 'waters of the United States' in their own right, so that there is no clear demarcation between 'waters' and 'wetlands,' are 'adjacent to' such waters and covered by the Act."⁶

The second test was authored by Justice Kennedy, who concurred in the judgment, but wrote separately for himself. He elevated the concept of "significant nexus," first used by the Court in *SWANCC*, to be the appropriate test for jurisdiction: "[W]etlands possess the requisite nexus, and thus come within the statutory phrase 'navigable waters,' if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" "Consistent with *SWANCC* and with the need to give the term 'navigable' some meaning, the Corps' jurisdiction over wetlands depends on a significant nexus between the wetlands in question and navigable waters in the traditional sense."

The most noteworthy clarification that *Rapanos* provided was that the five Justices agreed CWA jurisdiction does not reach non-navigable features merely because they are hydrologically connected to downstream navigable water. However, many have maligned *Rapanos* because the Justices failed to reach a majority opinion that announced the "correct" test for CWA

³ *Rapanos v. United States*, 126 S.Ct 2208 (2006)

⁴ *Carabell v. United States*, 126 S.Ct. 1295 (2006)

⁵ *Rapanos* 126 S.Ct. at 2225

⁶ *Id.* at 2226

jurisdiction. Often, the existence of two tests only generates more confusion and disagreement regarding the scope of the CWA.

While the agencies face a difficult task in resolving this conflict, the new rule defining “waters of the United States” is obviously inconsistent with these Supreme Court decisions and will expand the scope of waters that can be regulated by the agencies. The rule will extend coverage to many features that are remote and/or carry only minor volumes of water, and contrary to the Supreme Court’s findings, its provisions provide no meaningful limit to federal jurisdiction. The rule ignores the tests that were developed in *Rapanos* and reverts back to regulating any hydrologic connection. More specifically, the rule disregards Justice Kennedy’s “significant nexus” test by making all connections regulable. Such a broad overreach is unacceptable.

The Proposed Rule Unnecessarily and Inappropriately Expands Federal Jurisdiction

The agencies contend that the scope of CWA jurisdiction is narrower under the proposed rule than under current practices and that it does not assert jurisdiction over any new types of waters. This claim is simply not accurate. In reality, the rule establishes expansive definitions of new regulatory categories, including for the first time a regulatory tributary definition. It also regulates new areas that are not jurisdictional under current regulations, such as most ditches, adjacent non-wetlands (heretofore isolated waters) and all water features that are located within 100 feet of a jurisdictional water, even if that water is an ephemeral stream that only flows after it rains.

The agencies created overly broad terms allowing them the authority to interpret them as they see fit in the field. For example, the new definition of “neighboring” allows the agencies to regulate isolated ponds over a quarter-mile from a the Great Lakes or a tidal creek, and using the new a(7) and a(8) categories of waters, the agencies would consider other isolated features that could be miles from a traditional navigable water jurisdictional if they are found to possess a “significant nexus.” This is a far cry from what Congress intended to be covered by the CWA. For any business trying to comply with the law, the last thing it needs is a set of new, vague and convoluted definitions that only provide another layer of uncertainty. Let me discuss some of the problematic features in detail:

New Definition of Tributary:

The agencies have sought to expand their reach by adding, for the first time, a broad definition of “tributary.” They define a tributary as a “water that contributes flow, either directly or through another water, . . . to a [traditional navigable water] that is characterized by the presence of the physical indicators of a bed and banks and an ordinary high water mark.”⁷ The agencies believe

⁷ Prepublication version of the “Clean Water Rule: Definition of ‘Waters of the United States,’” at page 203 (May 26, 2015) (*hereinafter*, Final Clean Water Rule).

that the presence of these physical indicators demonstrates that sufficient flow exists and therefore qualifies the feature as a tributary. While in some cases that is accurate, there are many ditches and dry channels that also exhibit these characteristics. The agencies did not provide any guidance on what the indicators are. This allows the agencies to create and alter such a list at any time in the future, without the need for public comment. This new definition will include substantial additions, such as small conveyances in the arid southwest that may flow only after certain rain events.

The agencies claim that the rule does not expand jurisdiction; however, the 2008 guidance document which has been used to make jurisdictional determinations for nearly a decade states that “[t]he agencies generally will not assert jurisdiction over... small washes characterized by low volume, infrequent or short duration flow.”⁸ In other words, the federal government has generally *not* asserted jurisdiction over ephemeral streams. Under the new tributary definition, however, ephemeral streams will now be categorically jurisdictional if they can be shown to possess any shelving of sediment. Ephemeral features are pervasive on the landscape, particularly in the arid southwest. Deeming these typically dry land features “waters of the U.S.” will result in a significant increase in federal jurisdiction.

Ordinary High Water Mark (OHWM)

The OHWM is the linchpin concept of the rule’s tributary definition, but the meaning of this key term has been debated for many years. In March 2014, the Corps recognized that OHWM is a “vague definition,” leading to “inconsistent interpretation of [the] OHWM concept,” and “inconsistent field indicators and delineation practices.”⁹ In addition, the Corps’ Western Mountains OHWM Guidance states that “OHWM delineation in non-perennial (i.e., intermittent and ephemeral) streams can be especially challenging,” and notes that “it is often difficult to determine what constitutes ordinary high water and to interpret the physical and biological indicators established and maintained by ordinary high water flows.”¹⁰ There is a serious disconnect between the agencies’ statements that the OHWM is easy to determine and the Corps’ recent statements to the contrary.

In addition to the confusion surrounding the OHWM definition, in the landmark 2006 Supreme Court decision, *Rapanos v. United States*, Justice Kennedy criticized the Agencies’ use of OHWM to determine whether tributaries are jurisdictional. Justice Kennedy raised concerns that such a standard was overbroad and would leave room for the agencies to assert jurisdiction over

⁸⁸ 2008 Post-Rapanos Guidance.

⁹ Presentation by Matthew K. Mersel, U.S. Army Engineer Research and Development Center, Development of National OHWM Delineation Technical Guidance (March 4, 2014),

¹⁰ Matthew K. Mersel and Robert W. Lichvar, U.S. Army Engineer Research and Development Center (ERDC), A Guide to Ordinary High Water Mark (OHWM) Delineation for Non-Perennial Streams in the Western Mountains, Valley, and Coast Region of the United States at pages 1-2 (August 2014). Corps Western Mountains OHWM Guidance at 1-2.

waters that do not have a significant nexus to traditional navigable waters.¹¹ This raises additional questions of why the agencies would continue to rely on the OHWM.

Ditches

For the first time, ditches will be categorically jurisdictional under the expanded definition of tributary. The rule does contain several exemptions:

- Ditches with ephemeral flow that are not a relocated tributary or excavated in a tributary.
- Ditches with intermittent flow that are not a relocated tributary, excavated in a tributary, or drain wetlands.
- Ditches that do not flow, either directly or through another water, into a [traditional navigable water].¹²

While the agencies believe that they have provided sufficient ditch exemptions, the third exclusion is so narrow in scope that it functions as a re-capture provision of features excluded by the first two exclusions.

Very few ditches will fall into these exemption categories, and it will be onerous for applicants to prove that their ditch meets the exclusion criteria. For example, the rule excludes ditches that do not flow either directly or through another water into a downstream water. But because ditches are excavated for the sole purpose of moving water off the land to a downstream water, this exemption is virtually meaningless. In other words, all ditches lead somewhere. I cannot in my entire career think of a ditch that did not connect to other ditches, and then ultimately to a navigable water.

And the agencies would only exempt a ditch if it is not found in a relocated tributary or excavated in a tributary. While topographic maps and historical photographs might help me to determine if a ditch was once a historic tributary and therefore not exempt from the tributary definition, some of the ditches I analyze are located on Virginia croplands that have been farmed for over 200 years. Obviously, I do not have access to maps dating back that far.

The ditch exclusions are so limited and potentially hard to prove, that even I – a professional consultant with 30 years of experience performing jurisdictional determinations - would have difficulty saying with certainty that a ditch is excluded. And, to further complicate the inclusion of ditches as “waters of the U.S.,” the preamble of the rule states that a ditch can be considered both a point source and a “water of the U.S.” This is nonsensical and will lead to duplicative regulation of the same features under Clean Water Act Section 402 and Section 404 permitting programs.

¹¹ *Rapanos v. United States*, 547 U.S. 715, 781-82 (2006) (Kennedy, J., concurring).

¹² Final Clean Water Rule at page 201.

New Concept of Adjacent Waters

In addition to the expansive “tributary” definition, the concept of regulating “adjacent waters” is completely new. In the past, the notion of “adjacent” applied only to wetlands that physically abut a jurisdictional water.

The current definition of “adjacency” is “bordering, contiguous, or neighboring.” However, this has led to confusion over what is neighboring as this is a vague term. The new rule attempts to end this confusion by defining “neighboring” as either “all waters located within 100 feet of the OHWM of a jurisdictional water;” or “all waters located within the 100 year floodplain of a jurisdictional water and not more than 1,500 feet from the OHWM of such water;” or “all waters located within 1,500 feet of the high tide line of (a)(1) through (a)(3) water and all waters within 1,500 feet of the OHWM of the Great Lakes.” While providing clarity on neighboring is helpful, this definition would encompass isolated waters located more than a quarter of a mile—1,500 feet—from a jurisdictional water. It is also important to keep in mind that if only a small fraction of a water is located within this quarter-mile zone, then the entire water, regardless of how far it extends, will be branded as an adjacent water and, in turn, categorically jurisdictional. This will lead to a significant increase in federal jurisdiction by-rule over isolated waters that are already regulated by the states and these waters should be subjected to a significant nexus test before being considered jurisdictional by the federal government. In another significant expansion of jurisdiction, “adjacency” will now also extend to water bodies—not just wetlands, as had been the case. In doing so, the agencies have unnecessarily redefined a term that has stood since 1986.

While the agencies claim they have provided bright lines that put limits on the “adjacent waters” definition, in actuality, it is now more likely that an isolated water feature will be captured under the “neighboring” definition. Many isolated waters are regulated by the states and should not be pulled into federal jurisdiction through a new definition that was not mandated by legislation or legal precedent.

Moreover, this definition is confusing and will be extremely difficult to apply. If I were to try to identify an adjacent water under this new definition I would have to:

- Determine whether the 100-year floodplain is present and assess what features are located within the floodplain of a jurisdictional water.
- For any water located within the 100-year floodplain, I would then have to determine if any part of the feature is within 1,500 feet of the OHWM of the nearest jurisdictional water.
- If any are found, then the entire feature will be jurisdictional
- If no 100-year floodplain is present, determine the location of the nearest jurisdictional water’s OHWM or the high tide line of the nearest tidally influenced water.

- Determine what features are located within 100 feet of the OHWM or within 1,500 feet of the high tide line.
- If any are found, the entire feature will be jurisdictional.

I have no doubt that this standard will lead to confusion and inconsistency in the field. Intentionally leaving these terms so broadly defined gives the agencies relatively unbounded jurisdiction and leaves land owners perplexed as to whether their land may be federally regulated. For example, as 100-year floodplain maps are revised, so will federal CWA jurisdiction.

Case Specific Waters

The rule also provides two catchall “case specific waters” categories for areas that may not fit neatly into a specific water category but for which the agencies have retained complete discretion to find a significant nexus on a case-by-case basis. Significantly, this also includes the ability to make blanket jurisdictional determinations by considering all similarly situated waters located within the same region or watershed to determine if they, when considered collectively, have a significant nexus to a traditional navigable water. The ability to aggregate waters further illustrates the notion that there is no limit to federal jurisdiction under this rule. And, because waters can be aggregated to meet the significant nexus test, the so-called “case specific” analysis touted by the Agencies for (a)(7) and (a)(8) is not really a case specific analysis.

The cornerstone of the “case specific waters” categories is the use of the significant nexus test. The rule states that a water has a significant nexus “when any single function or combination of functions performed by the water, alone or together with similarly situated waters in the region, contributes significantly to the chemical, physical, or biological integrity of the nearest [traditional navigable water].” The functions that can be used to determine if a water has a significant nexus include: sediment trapping; nutrient recycling; pollutant trapping, transformation, filtering, or transport; retention and attenuation of flood waters; runoff storage; contribution of flow; export of organic matter; export of food resources; and provision of life cycle dependent aquatic habitat for species. Since a water need only be found to perform one of these functions in order to meet the criteria of the standard, the vast majority of waters would be determined to have a significant nexus. In fact, it is difficult to imagine that there are many waters that would fail the agencies’ significant nexus test. The significant nexus standard as defined in the rule is far too low of a threshold for making a positive jurisdictional determination.

Additionally, under the “provision of lifecycle dependent aquatic habitat” criterion, it is easy to argue that the agencies have reinstated the migratory bird test and can assert jurisdiction anywhere a bird may land. If true, this runs contrary to the Supreme Court ruling in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC)*.

As written I will need to aggregate to the nearest navigable or interstate water, including evaluating waters and wetlands on properties I have no legal access to, and that are not

accurately mapped, throughout a region that is enormous, and contrary to the guidance issued by the agencies after Rapanos.

The Proposed Rule Ignores Federal/State Balance

While many aspects of the CWA are vague, it is clear that Congress intended to create a partnership between the federal agencies and state governments to protect our nation's water resources. Congress states in Section 101 of the CWA that “[f]ederal agencies shall co-operate with state and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resource.” Under this notion, there is a point where federal authority ends and state authority begins. The Supreme Court's decisions have also reinforced this notion.

Despite this history, the rule ignores the state partnership and fails to acknowledge that there are limits to federal authority. This rule will severely diminish the states' role in protecting its unique water resources in a manner that is clear and consistent for that climate and geology, which would be a huge mistake, not to mention unconstitutional. Litigation is a likely result, and while it makes its way through the court system, regulators and businesses will be left in a lurch.

In addition, because the proposed change in jurisdictional authority does not only apply to Section 404 of the CWA, but to all of its programs, the states will be required to conduct more monitoring and develop water quality standards for these newly-jurisdictional waters in addition to those that are already covered. States will also be required to develop pollution diets known as total maximum daily loads if these waters do not meet their water quality goals. This unfunded mandate will be overly burdensome for the states, costing them valuable time and resources.

Moreover, many states have adequately regulated their own waters and wetlands for decades. States take their responsibilities to protect their natural resources seriously. In fact, every state has the authority to exceed federal law. If you look around the country, you will find that many states are protecting their aquatic resources more aggressively than when the CWA was enacted – a testament to their desire and willingness to do so.

In these times of austere budgets and competing priorities, the agencies should heed the CWA's directive and allow the states to maintain their prerogatives to regulate their lands and waters within their boundaries as they see fit.

The Real World Implications of the Final Rule

From a practical perspective, this rule will fundamentally change the way I do business. Since the rule provides the agencies with a number of ways to assert jurisdiction, I will now have to

conduct multiple tests to determine whether something qualifies as a “water of the U.S.” under the new definition. These additional tests will require more time to complete and will cost my clients more money. In the end, many more features will be found to be jurisdictional. Consequently clients will need permits to fill agricultural ditches and moist portions of farm fields. This leads then to both added permitting costs, and the added mitigation costs for impacts to these newly regulated federal waters.

Many people believe that this rule will benefit my business. If more projects fall under federal jurisdiction, then more land owners will require a consultant to perform jurisdictional determinations. This sentiment, however, is not entirely accurate. While more jurisdictional determinations will need to be completed, the additional layers of red tape will only increase the complexity of my job, adding more time and money to any project I take on. I will also not be sure if the feature is regulated, and will no longer be able to provide the clarity I was able to provide clients. It is worth noting that I can no longer offer a fixed rate to my clients who are obtaining the expedited Section 404 Nationwide Permit because it is simply too difficult to secure in a predictable length of time under the current guidance. Let me repeat that: the process of obtaining the supposedly simpler, expedited Nationwide Permits has already become unpredictable and complex such that I can no longer determine how much they will cost. For my clients, not knowing their permitting costs in advance increases their financial risk. I believe that in some cases, clients will decide not pursue projects as a result. And that is not good for my business.

To prove my point further, a portion of my clients are small business home builders. No industry has suffered more through the Great Recession. Home building has recently showed signs of recovery, and the industry is putting Americans back to work. Unfortunately, under the expanded “waters of the U.S.” definition, many of these builders will no longer be able to afford my work and will walk away from projects. And the ones that are able to pay will be tied up in the process of validating jurisdiction for extended periods of time or be forced to “assume” CWA jurisdiction as a cost-saving measure through the “Preliminary Jurisdictional Determination” process. I anticipate losing work and clients to the cost of expensive software, analysis, and the time it will take me to conduct jurisdictional determinations.

The rule provides a mechanism for people to sue my clients if they feel the determination is in error or not performed properly. The only winners will be the lawyers because litigation will most certainly increase.

Conclusion

The agencies faced a very difficult task in setting a clear and consistent definition of a waters of the United States. Congress placed this burden on the agencies by failing to define clearly the limits of traditional navigable waters in the Clean Water Act. Past efforts by the agencies have

been overruled by the Supreme Court, which in turn provided multiple tests that are themselves subject to interpretation. Rather than thread the needle between the Constitution and the Clean Water Act, the agencies took the broad brush approach in many instances of finalizing a rule that sweeps almost all ditches, and waters under federal authority. I have significant concerns with this rule because I believe the consequences will be extremely onerous, confusing, complex and likely dire for certain properties and thus sellers and buyers of property.

Fortunately, there are solutions. The House of Representatives has passed legislation that will force the agencies to withdraw this rule, go back and consult with state and local governments, conduct meaningful discussions with small business stakeholders, and produce an accurate cost-benefit analysis.

The agencies could then re-propose an updated rule. And in the Senate, recently introduced legislation (S. 1140) by Senators John Barrasso (R-Wyo.), Joe Donnelly (D-Ind.), Jim Inhofe (R-Okla.), Heidi Heitkamp (D-N.D.), Pat Roberts (R-Kan.) and Joe Manchin (D-W.Va.) accomplishes this same goal while also providing the agencies with some guidance on how to identify a jurisdictional water.

I strongly urge the Senate to act quickly to reverse this flawed rule. Enacting the Senate bill gets us back on track to where we need to be, which is establishing a workable and sound definition of ‘waters of the United States.’

Thank you again for the opportunity to testify today.