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Agriculture, Nutrition and Forestry

"Waters of the United States: Stakeholder Perspectives on the Impacts of EPA's Proposed Rule"

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Chairman Roberts, Ranking Member Stabenow and members of the Committee, thank you for inviting me to testify this morning. As secretary of the North Carolina Department of Environment and Natural Resources (DENR), I am grateful for the opportunity to testify today and share my views on the topic of the definition of "waters of the United States" contained in the Administration's proposed rules, particularly as it affects the agricultural industry in North Carolina. Governor Pat McCrory and Agriculture Commissioner Steve Troxler appreciate the opportunity to highlight this important issue and its impact on our state.

The agricultural industry contributes approximately $78 billion to our state economy annually and employs 16% of the work force. North Carolina's 52,400 farmers grow more than 80 different commodities and utilize more than a quarter of state land to furnish consumers a dependable and affordable supply of food and fiber. We are greatly concerned that the proposed rule will cause this important industry – and other significant segments of our state's economy and infrastructure – to fall victim to ever-expanding federal overreach that will unnecessarily stifle economic growth and prosperity with little, if any, environmental benefit.

My remarks today are consistent with the positions taken in the timely comments submitted in November, 2014, by DENR and the North Carolina Department of Agriculture and Consumer Services on the joint Environmental Protection Agency (EPA)/ U.S. Army Corps of Engineers (the Corps) proposal for the definition of "waters of the United States."

The definition of "waters of the United States" is of vital interest to DENR, as the department works in partnership with the EPA and the Corps on projects, permitting programs and standards designed to protect the quality of aquatic resources, aquatic habitat and the environment in the State of North Carolina. North Carolina law authorizes DENR to implement a program, much like that provided in the Clean Water Act (CWA) and other federal legislation concerning water quality, to protect and enhance the quality of "waters of the State."

"Waters of the State" differs in many important and fundamental respects from "waters of the United States," because the program of regulation for waters of the state stems from authority contained in the N.C. Constitution and implementing state legislation. The authority for the CWA regulatory program derives from the Commerce Clause of the United States Constitution and has a more limited scope. In fact, the term used in the CWA is "navigable waters," which is defined in the CWA as "waters of the United States." As the U.S. Supreme Court has recognized in a series of recent cases concerning CWA jurisdiction, the term "navigable waters" has meaning, otherwise Congress would not have used it. Most recently, Justice Kennedy noted in his concurring opinion in *Rapanos v. United States*, 547 U.S. 715 (2006), the most recent U.S. Supreme Court case on the breadth of CWA jurisdiction, that "the word 'navigable' [in the Clean Water Act] must be given some effect," in determining the meaning of "waters of the United States." Expansion of federal CWA jurisdiction by redefining the regulatory definitions of the

"waters of the United States" and "navigable waters" has significant implications for the joint federal-state framework under the CWA as well as for our federal system of government.

Indeed, states were not included in a meaningful way in crafting the new definitions. The EPA and the Corps seemed determined to forge ahead, scheduling meetings with state agencies, and issuing statements reiterating their claim that the rule represented merely a clarification, only after the publication of the proposed rule. The numerous effective state law programs which already address water quality issues associated with protection of riparian areas, and control of nonpoint sources of pollution, were evidently ignored.

As it stands, notwithstanding the EPA's claims to the contrary, the recently proposed definition of the phrase "waters of the United States," and the definitions of terms related to the determination of "waters of the United States," would profoundly expand federal jurisdiction over activities in the State of North Carolina and would result in greater uncertainty, higher costs, and risk for our state's farmers and foresters. The EPA has characterized the new definition as a "clarification," but the only thing made clear is the EPA's objective to expand federal jurisdiction in ways that strain the meaning of the language in the Supreme Court decisions as a means to bring a potentially enormous amount of land within federal jurisdiction. The proposed rule also expands CWA jurisdiction by potentially pulling within that jurisdiction ephemeral drainages, ditches, ponds, and isolated wetlands, any of which may be located within farms in North Carolina, as well as in urban and rural across the state, with the potential to seriously add to the regulatory burden on both the private and public sectors, including, for example, the construction industry and highway construction. None of these features have previously been subject to federal regulation, except in specific fact-driven instances.

In preparing my testimony, DENR staff reviewed the comments submitted by stakeholders on the proposed definitions. Among those stakeholders was the N.C. Farm Bureau (the Farm Bureau). The comments of the Farm Bureau focused on the effect of the proposed definitions on farms in North Carolina. We independently assessed those comments to form our own opinion concerning such effects.

An example of how the EPA proposal will subject agricultural operations to more pervasive federal intrusion is the newly proposed definition of "adjacent," and the revision of the existing jurisdictional category of "adjacent wetlands" to become "adjacent waters." A new "adjacent waters" category would replace the "adjacent wetlands" category and include not only wetlands, but other "waterbodies" deemed to be "adjacent" or "neighboring." "Adjacent" is defined in the existing rules to mean "bordering, contiguous, or neighboring." However, the proposed rule addresses waters in addition to wetlands, and includes "waters" separated from other waters by man-made dikes, natural river berms and dunes. The proposed definition of the term "neighboring" expands adjacency to waters located in the "riparian area" or "floodplain" of an otherwise jurisdictional water, and waters with a surface or shallow subsurface hydrologic connection to such jurisdictional water. A "floodplain" is proposed to be defined as the area bordering inland or coastal waters formed by sediment deposition from those waters and inundated during periods of "moderate to high" water flows. A "riparian area" is proposed to mean an area "bordering a water where surface or subsurface hydrology directly influence the ecological processes and plant and animal community structure in that area." In fact, under

existing state law programs in North Carolina, many activities in riparian areas and floodplains are already regulated, and those programs provide significant controls on nonpoint sources of pollution. Federal intrusion into these areas in unnecessary and counterproductive.

What the proposed definitions do not provide is guidance regarding whether the floodplain reflects areas inundated in an isolated flood, a 10-year flood, or a 100- year flood. Similarly, there is no suggestion as to a limit on the distance extending from a jurisdictional water for determining a riparian area. The result is that a "water" could potentially be determined to be "adjacent" to a jurisdictional water, and, thus, also subject to CWA jurisdiction if it was inundated during any one of the hurricanes that struck North Carolina in the recent past or stemming from any other such isolated and similar occurrence. The area riparian to an otherwise jurisdictional water can extend for 30 feet to several hundred feet or more, depending on a regulator's judgment. In areas of sandy soil composing much of the coastal plain of North Carolina, an apparently isolated wetland or pond might be found to have a shallow subsurface hydrologic connection to a jurisdictional water. The interpretation of how shallow such a connection has to be to fit the EPA's definition is left to the subjective judgment of the individual regulator. The proposed rule does not command such outcomes, but it allows them.

Eastern North Carolina has experienced extreme flooding with a series of hurricanes since the 1990s, many of which were extensively reported in the national media. Are those "high water flows" indicative of a floodplain? Sandy soils and high water tables are characteristic in eastern North Carolina, potentially providing "subsurface hydrologic connection" to a tributary to a navigable stream. How shallow does the water table have to be to be eligible? What season of the year would be considered, as water tables are seasonal in nature? The proposed rule also leaves the answers to these questions to the subjective judgment of the individual regulator.

Under the proposed definitions, farmers in North Carolina, and particularly in eastern North Carolina, might now find significant portions of their farms to be within "waters of the United States." Agricultural operations are particularly at risk with the degree of definitional latitude and uncertainty for several reasons. Farms typically do not have a wide topographic range. Areas of farms may not drain particularly well, and yet fall short of being properly characterized as a wetland. Under these definitions, those low, flat areas might potentially become jurisdictional waters due to "adjacency," depending on the judgment of the individual regulator.

In addition to the issues and uncertainty created by the ramifications of the definitions for "adjacency," and related terms, the proposed rule also expands the meaning of the term "tributary," and creates yet another area of uncertainty about what is and what is not federally jurisdictional. A "tributary" is proposed to be defined as a water characterized by the presence of a bed and banks, and an ordinary high water mark, which contributes flow, directly or through another water, to an otherwise jurisdictional water. This ignores the reality that the bed and banks can be "very low or may even disappear at times." Wetlands, lakes and ponds are also pulled into the definition of tributary, even if they lack a bed or banks or ordinary high water mark, provided they contribute flow, directly or remotely.

Perhaps the most problematic proposed modification for agriculture is the inclusion of ephemeral drainages and ditches within the proposed definitional scope of "tributary." An ephemeral

drainage conveys water only during and shortly after precipitation events. In past iterations of the rule, ephemeral drainages have not been characterized as "waters of the United States." Under the new definition, a regulator need only locate a bed and "very low" banks and a contribution of flow to another tributary regardless of how minimal that flow might be. Ditches that are not entirely constructed in uplands and exclusively draining uplands and that convey some amount of water to another tributary may now fall within the definition of "waters of the United States." In practical terms, for agricultural operations, virtually all ditches would be considered jurisdictional under this definition. This factor alone constitutes an enormous expansion of federal jurisdiction into water conveyances on farms. Ditches are commonly constructed in formerly ephemeral drainageways, owing to the nature and purpose of a ditch. Ephemeral drainages and the ditches associated with those drainages may now be subject to federal jurisdiction.

The consequence for farmers is that the proposed definitions not only significantly expand CWA jurisdiction, but also significantly expand uncertainty. Many more landscape features on a farm have the potential to become jurisdictional under the proposed rule. The presence of features on a farm that might result in a determination of jurisdiction reduces land values. Expanding federal jurisdiction and leaving federal regulators broad discretion exposes landowners to risk by reducing the amount of productive land, or increasing the cost of using of that land. A reduction in productive acreage will drive down farm values and make lenders less confident in their security, which will make them less likely to lend vital resources to our farmers.

The significance of the "nexus" between the features that confer jurisdiction under the proposed rule is debatable. The EPA and the Corps have essentially read the modifier "significant" out of the "significant nexus" test that Justice Kennedy set forth in his concurring opinion in *Rapanos*. His "significant nexus" test, with respect to the extent of the effect of a potential water of the United States on a downstream navigable-in-fact water, has become effectively the default test for determining CWA jurisdiction. In its November 2014 comments to the EPA and the Corps, DENR detailed how the rule's reliance on mere connectivity, surface or subsurface to establish a nexus between the subject feature and a navigable-in-fact water ignores the meaning of the modifying term "significant." As Justice Kennedy observed in *Rapanos*, "mere hydrologic connection should not suffice in all cases; the connection may be too insubstantial for the hydrologic linkage to establish the required nexus with navigable waters as traditionally understood." It is apparent that the EPA and the Corps did not find that aspect of Justice Kennedy's analysis particularly compelling.

From DENR's perspective, the effect of these proposed definitions will be akin to an unfunded mandate. Many more waters will be brought within CWA jurisdiction, and more permits under the CWA and under the North Carolina statutes will be required. The resulting increase in permit applications on the state level will further tax limited resources in the department, as will the increase in permit applications for federal permits, for which DENR is obligated, under Section 401 of the CWA, to issue certifications that water quality standards will not be compromised due to the issuance of the federal permit. Additionally, there are many other non-federal regulatory programs under North Carolina law for the protection of our surface and groundwater resources that will also be affected and consume significant amounts of additional staff time. These include riparian buffer programs, nonpoint source controls and post-construction stormwater programs.

The inclusion of many more features within the scope of waters of the United States will necessarily pull those features within the meaning of waters of the state, and trigger the applicability of these exclusively state law-based programs. DENR staff is already fully engaged. This additional burden will add significant costs and result in longer permit processing times. The expected increase in enforcement actions, third party challenges and citizen lawsuits will further exacerbate this burden.

Finally, there are legal concerns to consider. If the EPA, based on a claim of statutory ambiguity, moves forward with this new interpretation claiming that dry lands are navigable waters, it will constitute yet another example of the EPA abusing the public trust it was granted by the judiciary through Chevron. This raises the question of whether the EPA should be afforded any deference in interpreting statutory provisions.

The regulated community in North Carolina, and the agricultural sector in particular, would be significantly and adversely affected by the proposed rules redefining "waters of the United States." The proposed definitions go well beyond the authority initially intended and granted in the CWA, as described and limited in subsequent U.S. Supreme Court opinions.

Thank you for the opportunity to provide this testimony. I would be happy to answer any questions you may have.