



STATE OF WASHINGTON

REGIONAL DIRECTOR
DEPARTMENT OF ECOLOGY
JOSH BALDI

Chairman Roberts, Ranking Member Stabenow, members of the committee, thank you for inviting me to speak to this committee today. My name is Josh Baldi, and I am Regional Director of the Washington Department of Ecology's Northwest Office. Ecology's Northwest Region includes a large portion of Puget Sound and is home to Washington's tech and aerospace industry. It also is an important part of the State's \$49 billion agricultural sector. Notable commodities produced in the region are milk, nursery and potatoes, and we are the nation's leader in raspberry production. Washington State is also renowned for unique resources such as shellfish and salmon, which are important to our economy, way of life and tribal cultures.

Ecology is quite experienced in matters associated with United States Army Corps of Engineers (Corps) and the Environmental Protection Agency's (EPA) "waters-of-the-US" jurisdiction. As the water quality authority for Washington State, Ecology implements the state's water pollution control act (RCW 90.48) and is the state water pollution control agency responsible for implementing all federal water pollution control laws and regulations, including 401 water quality certifications for federal Clean Water Act section 404 permits.

The Department of Ecology was one of four Washington state agencies that signed a consensus comment letter on November 12, 2014 expressing support for the Corps and EPA to clarify the definition of waters-of-the-US. The other signatory agencies were the state departments of Transportation, Fish and Wildlife, and Agriculture. That comment letter has been submitted for the record.

We appreciate the Corps' and EPA's attempt to clarify jurisdiction for waters-of-the-US through the proposed rule. As the federal agencies worked through the public comment process last summer and fall, we have been appreciative of their interaction with the states. While work remains, we believe the EPA and the Corps have been responsive to many concerns raised.

Ecology believes the rule helps to clarify what types of waters would be considered jurisdictional under the Clean Water Act and specifically where proponents may need Section 404 permits from the Corps and related Section 401 water quality certifications from the State.

The increased clarity provided by the proposed rule should help increase predictability and streamlining where permits are justified.

The proposed rule does not resolve all the uncertainty over what ditches are jurisdictional, so case-by-case determinations will still be needed. However, the rule attempts to narrow the number of individual jurisdictional calls needed by identifying those ditches that are clearly non-jurisdictional, such as those excavated in and draining only uplands.

As a practical matter, the types of waters that the rule identifies as waters-of-the-US are consistent with the jurisdictional calls that we have seen in practice by the Corps in Washington State for many years. Consequently, the rule will not result in a regulatory change for permittees in our State.

At the federal level, we also do not believe the proposed rule affects the existing, broad exemption under the federal Clean Water Act for farming, ranching and silvicultural practices. That exemption is found under 40 Code of Federal Regulation part 122.3 (NPDES) and section 404(f)(1)(A).

Under the waters-of-the-US rule, some farm ditches may be jurisdictional tributaries but maintaining them in the course of normal agriculture does not require a section 404 permit. Washington State uses the same approach of allowing ongoing farming maintenance and uses without a permitting process.

The rule does acknowledge that some ditches are tributaries that should be protected. Some Washington ditches are actually channelized streams and as such, they are appropriately designated as tributaries. In our experience, the Corps has not exerted jurisdiction over ditches that are not streams or which only drain uplands. And again, farming activities involving ditches are still exempt from needing a Section 404 permit in the course of normal farming practices.

Ecology supports the definition of a tributary to include the criteria of having a bed and bank and ordinary high water mark. Regional manuals on determining Ordinary High Water Mark (OHWM) will be important to ensure clarity. Washington is fortunate to have an OHWM manual for streams in addition to a regional manual being developed by the Corps that will include non-perennial streams.

More specifically, Ecology supports the concepts of including waters that are located in the floodplain of a jurisdictional water as well as those located in riparian areas along waters and tributaries. Washington floodplains support many wetlands that are used by salmon for protection and rearing. These wetlands are often connected to rivers via shallow subsurface flows as well as by overbank flooding. Wetlands in these areas provide critical functions such as flow attenuation and habitat for invertebrates, amphibians and fish. They directly affect the physical, chemical and biological properties of downstream waters and are appropriately included as waters-of-the-US. However, while we support the inclusion of waters in these areas, the definitions for floodplain and riparian in the rule are quite broad.

The breadth of some definitions is a remaining concern. Given the variety of conditions across the country, it is understandable that the rule has such definitions. Ecology believes that these definitions can and should be further refined on a regional basis. We recommend the development of these regionally-appropriate definitions of floodplains and riparian areas so that the state and the federal agencies have a common understanding of those terms and how they are applied on the landscape.

In closing, Washington State supports the proposed waters-of-the-US rule because:

Efforts to date between federal agencies and the states have been interactive and positive. While additional work remains, we would like to build upon the interagency cooperation;

The proposed rule will clarify that a small but important number of streams and wetlands deserve coverage under waters-of-the-US; and,

The increased clarity sought in the rule will help create a more predictable and efficient permitting system.

Lastly, the approach embodied in the EPA and Corps' proposed rule adheres closely to the system Washington State has had in place for more than 25 years. It is an approach that has worked for people, farms and fish, and we believe Washington State's approach can be strengthened by the proposed rule.