

Testimony of

**Jeff Metz, Owner/Operator
Metz Land and Cattle Co.
Angora, NE**

“Waters of the United States: Stakeholder Perspectives on the Impacts of EPA’s Proposed Rule.”

United States Senate

Committee on Agriculture, Nutrition and Forestry

March 24, 2015
Washington, DC

Good morning, my name is Jeff Metz. My family and I farm and ranch in the Western Nebraska Panhandle where we raise cattle, corn, wheat and other dry land crops. Thank you for allowing me to testify today to help provide a farmer, rancher and local government perspective on this proposed rule.

Let me begin by thanking the Chairman and Ranking Member of this Committee for holding a hearing on this tremendously important issue. The Environmental Protection Agency (EPA) and Army Corps of Engineers' (Corps) proposed Waters of the U.S. (WOTUS) rule represents a dramatic expansion of the federal government's reach into the everyday activities of farmers, ranchers, homebuilders, local county governments and virtually anyone who turns earth with a shovel.

Let me be very clear – everyone wants clean water. The proponents of this rule love to talk in very general terms about the importance of clean water for America's families. Farmers and ranchers rely on clean water not only for their operations, but also for their own families. However, this proposed rule isn't about clean water. This rule is clearly focused on expanding the role of federal regulatory agencies into the daily lives of people around the country.

In terms of the rule itself, trying to determine what water or even land feature was included within EPA and the Corps' jurisdiction was murky at best. Despite the agencies' assertion that jurisdictional water bodies are clearly defined by a bed, bank and ordinary high water mark, the rule explains "[a] water that otherwise qualifies as a tributary under the proposed definition does not lose its status as a tributary if, for any length, there are one or more man-made breaks (such as bridges, culverts, pipes or dams), or on or more natural breaks (such as debris piles, boulder fields, or a stream segment that flows underground) so long as a bed and banks and an ordinary high water mark can be identified upstream of the break." How far would I have to look "upstream" in order to ensure I am not liable for applying fertilizer or pesticides into an area that may lack a bed, bank and high water mark yet is still considered jurisdictional by the EPA and Corps?

Throughout my land I have seasonal draws, valleys and canyons as well as ponds and other natural depressions that at times fill or flow with water. In fact, there are many examples in Nebraska of waterways that have what the rule defines as jurisdictional, a bed and bank and a high water mark, but only during precipitation events. And, unless there is a significant amount of precipitation, many of those examples are waters that flow only a short distance before evaporating or seeping into the ground. Many rarely, if ever, have flow that actually reaches a flowing stream even though a topographic map may show that it does. Yet, it appears that I will now need a federal permit in order to plow, apply fertilizer or pesticides, graze cattle or even build a fence in these areas or even around them. A federal permit that will cost me time, money and that the federal government is under no obligation to even give me.

In Nebraska, the Nebraska Department of Environmental Quality (NDEQ) has administered many of the federal CWA permitting programs using its unique "waters of the state" definition for nearly forty years. During those forty years, the NDEQ's decisions have been overseen by the EPA and have been in accordance with the Clean Water Act (CWA). For agriculture in Nebraska, there is an understanding of what a "water of the state" is and is not based on four

decades of interpretation by NDEQ. In administering §311, the EPA advises producers to decide if a spill could "reasonably be expected" to reach water. However, the imposition of the proposed rule would create uncertainty, expansion of jurisdiction, and exposure to new liability for Nebraska producers. In addition, the federal encroachment of what is now a state delegated program runs counter to the concept of "cooperative federalism" which is a tenet of federal environmental programs.

Currently, the §402 program most impacts Nebraska agriculture in permit requirements for certain livestock operations and pesticide applications on or near water. For livestock producers, the NDEQ first started regulating discharges to "waters of the state" in 1974. Thousands, if not tens of thousands, of livestock producers have been visited by the NDEQ since that time. The NDEQ's program is to observe an operation to determine if waste or runoff has the potential to impact waters of the state. If there is a potential to impact water quality then the producer must either change the operation to avoid the potential impact or control the waste and runoff such that it will not impact water quality. Many producers, especially small producers, have been able to modify their operation or construct mitigating landscape features (water diverting berms or waterways, for example) to avoid impacting waters of the state. Likewise, producers have been constructing livestock waste control facilities under state permits. These are state construction standards for engineered facilities to handle all waste and it is common to use land application of waste as part of the operation.

All decisions in these programs have relied on the state definition of regulated water bodies for forty years. In addition, many producers have gone through the NPDES permitting process and are currently operating under a General Permit or an Individual Permit. This regulatory structure has evolved at the state level in tandem with the federally delegated NPDES program since its inception. All determinations have been made under the state definition of regulated waters. If the proposed rule is adopted, the Nebraska regulatory scheme suddenly leaves the producer wondering if his or her operation is effectively permitted or exempted. This is because, with the broad categorical definition of tributaries and neighboring waters, it is possible that currently exempted operations may now be subject to federal CWA jurisdiction. What's worse is that a producer may have, in good faith, constructed a landscape feature to divert flow away from livestock operations and now those very features may themselves be a "tributary" or an "adjacent" water. This will cause confusion, increase costs and will expose producers to new liability to enforcement from the federal or state government or to citizen suits under the CWA. This federalization of a current state program also infringes states' rights and runs counter to the concept of "cooperative federalism".

As many of you know, the state of Nebraska sits on top of one of America's greatest natural resources, the Ogallala Aquifer. This vast underground water resource has helped Nebraska become one of the nation's most agriculturally productive states even though it was once labeled as part of the "Great American Desert." It is the importance of this resource that leads many of us to be concerned with potential for groundwater sources to be treated as "waters of the United States". EPA has said that this isn't so and the proposed rule itself contains an exclusion for groundwater. However, the definition of a number of terms within the proposed rule would include "waters with a shallow subsurface hydrologic connection or confined surface hydrologic connection" to jurisdictional water. There are many areas in Nebraska where there is a

hydrologic connection of surface and ground water. In fact, there are entire river basins where this occurs. Are all riparian and floodplain areas with a hydrologic connection of ground and surface water now going to be subject to CWA jurisdiction? What are the limits of this language? The CWA and the federal government as a whole has never had regulatory control over groundwater and any efforts to change that should be stopped.

Nebraska is also home to a unique ecosystem known as the Sandhills – the center of Nebraska’s critical cow-calf industry. The Sandhills are a mixed-grass prairie that has grown on top of stabilized sand dunes. Cattle are used to manage this land to ensure it is protected and maintained rather than deteriorating and literally blowing away. This area is also home to low lying meadows that sit on top of a very shallow water table. These wet meadows will fill with water during the spring, but will dry out during the summer allowing ranchers to mow the grass for hay. Given the broad reach of this rule, would ranchers now be required to obtain a federal permit in order to utilize this precious resource? As the mowing of these areas are extremely time sensitive, a delay of a few days to obtain a federal permit could mean the loss of an entire year’s worth of cattle feed. It is critical to the future of Nebraska’s overall economy that this regulation be stopped to avoid the loss of this vital feed source.

As I said earlier, this rule’s impact will reach much farther than just agriculture. As a County Commissioner in Morrill County Nebraska, we are charged with maintaining 900 miles of gravel and other minimal maintenance roads all of which have ditches that run along each side. The process of maintaining these roads is expensive and time consuming, yet it remains as one of the most important tasks of county government. We simply cannot afford to be required to obtain a federal permit each time we go out to maintain these roads because of the ditches that run alongside them.

Douglas County Nebraska, a mostly urban county which contains the city of Omaha, is home to a road ditch intended to protect of the adjacent roads from runoff from adjacent fields. The ditch is several feet deep and wide and is full of dryland weeds. If you dig through those weeds, you will see a rut approximately 6” to 8” wide and less than an inch deep. Presumably, this rut developed before any vegetation began to grow. There is no Ordinary High Water Mark associated with this “bed and bank” because when it rains; it is completely underwater. The Corps recently declared this rut to be a “water of the U.S.” The redesign of this ditch is costing the county hundreds of thousands of dollars and has held up the project for another two years. This is merely an example of what we can expect if this proposed rule is finalized.

I also think it is important to discuss the process in which the EPA and Corps have proposed this rule. Following the release of the rule last year, EPA conducted a public relations campaign to try and sell this rule to the American public. They held meetings with farm groups and other industry stakeholders, a few farmers and even some of you I am sure. The problem however, is that EPA did a very poor job of talking to farmers and ranchers before this rule was ever proposed. Moving forward to today and we are being told that the EPA and Corps will be introducing a final rule in late spring or early summer. Rather than giving folks the opportunity to comment on an interim rule, they will be moving quickly to issue a final rule that will not offer the opportunity for comment. Even though roughly two-thirds of the 20,000 substantive

comments on the proposed rule were in opposition, it seems that the attitude of EPA is to ignore a clear outpouring of opposition and move ahead anyway.

This massive expansion of the federal CWA is being undertaken by the EPA and Corps because of what they describe as “confusion” surrounding a few U.S. Supreme Court cases. As I made a rough reading of the proposed rule as well as portions of the CWA, it has become very clear to me that the only ones who seemed to be confused as to where their regulatory limits lie is the EPA and Corps not farmers and ranchers. Congress clearly laid out exactly the extent of their regulatory authority by using the word “navigable” over and over again throughout the CWA. No one is advocating for the elimination of all federal water regulations. What we need is something far more focused on common sense rather than a document which grants the federal government blanket authority over all bodies of water everywhere.

Thanks you for your time today and I am more than happy to answer any questions you may have.