

WATERS OF THE UNITED STATES:  
STAKEHOLDER PERSPECTIVES ON THE IMPACTS OF EPA'S PROPOSED RULE

HEARING BEFORE THE

U.S. SENATE COMMITTEE ON  
AGRICULTURE, NUTRITION, AND FORESTRY

**The Clean Water Act and Mosquito Control in Idaho**

TESTIMONY  
OF  
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Mr. Chairman, and Members of the Committee, my name is Jason Kinley. I am the director of the Gem County Mosquito Abatement District (GCMAD), a special purpose district established in Emmett, Idaho to control mosquitoes. I welcome the opportunity to provide a public health perspective to the deliberations of this committee concerning impacts of the U.S. Environmental Protection Agency's (EPA) proposed rule regarding definitions of Waters of the U.S. within the Clean Water Act (CWA) and will limit my testimony to impacts the EPA proposed rule will have on public health protection.

Over one million people die worldwide each year from mosquito transmitted diseases. While fatalities in the U.S. are relatively rare due to a long history of successful mosquito control programs, the costs associated with the treatment of mosquito-borne illness run into the millions of dollars each year. The human costs are far greater.

Alarmingly, the future of public health protection through mosquito abatement itself is in jeopardy due to increasing costs associated with pesticide registration, the reduction of epidemiology and laboratory capacity grants, and burdensome requirements of the CWA's National Pollutant Discharge Elimination System (NPDES) permits. These costs and the reduction of grant funding divert already scarce taxpayer dollars to regulatory compliance instead of using those funds to meet mandated missions and objectives. Indeed, the end result compromises both the quality and extent of protection mosquito control offers to the public and may result in the loss of protection for those constituencies who cannot afford to pay these increased costs.

The GCMAD serves a rural agricultural constituency. The size of the district's jurisdiction is approximately 120 square miles and is composed of ranches and farms that rely on flood irrigation for crop and pasture production. The district has a lattice of irrigation conveyance canals, supply ditches, and drain ditches. All canals and ditches initiate and return to the Payette River. The program was originally established in 1960, the first of its type in the State of Idaho. The primary reason for establishing the district was economic in scope. Cattle raised in the Emmett valley were twenty percent lighter in weight when taken to market when compared to cattle weight from surrounding areas. The district's primary objective at the beginning was to suppress mosquitoes so that cattle could keep weight on and generate a better return on investment for ranchers and producers.

The GCMAD fully endorses the CWA's intent of reducing pollutant load in the Nation's clean water while allowing productive use of that resource. To that end, mosquito control professionals have devoted a substantial amount of their expertise to the development of numerous mosquito abatement strategies that reduce the reliance upon public health insecticides. Provision of a safe and healthy environment is a core mission of my profession. Mosquito control professionals are dedicated to providing leadership, information, and education leading to the enhancement of health and quality of life through the suppression of mosquito and other vector transmitted diseases and the reduction of annoyance levels caused by mosquitoes and other vectors and pests of public health importance. This is accomplished through the use of integrated mosquito management procedures, which includes the use of duly registered public health pesticides, when warranted.

If the proposed rule is finalized consistent with its current form, the number of waters protected by the CWA will increase. EPA has stated that this increase in jurisdiction will aid in protecting the Nation's public health and aquatic resources. I certainly support the protection of our Nation's waterways and wetlands. However, I am also concerned that the expansion of Waters of the U.S. under the proposed rule will increase regulatory burdens to conduct necessary and prudent integrated mosquito management initiatives, and thus inhibit such work.

It is important to note that the NPDES permitting system for mosquito control under the CWA does not reduce the amount of insecticides applied to Waters of the U.S. In fact, the NPDES permitting system allows insecticides to be applied to Waters of the U.S. In Gem County, the amount of insecticide applied to Waters of the U.S. has indeed increased over time as the district identifies more sites that produce mosquitoes that are also identified as Waters of the U.S. Simply put, the NPDES permit does not, in any way, limit or reduce insecticide applications to Waters of the U.S.

Unfortunately, by requiring mosquito control programs to hold a NPDES permit to make applications, mosquito control districts are now subject to the full weight of the CWA. As you may know, the CWA 3<sup>rd</sup> Party Citizen Suit Provision allows for any third party to sue a government entity for violations, but also for allegations of violations. Many allegations are based on individual and personal interpretation and opinion. The cost of litigating these 3<sup>rd</sup> party citizen suits is enough to make any mosquito control program question whether or not necessary mosquito control product applications are worth the effort.

Mosquito control products are labeled under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). Moreover, products used in mosquito control have specific labels that include application instructions and environmental considerations that must be adhered to. Product applications are governed by FIFRA and the processing of violations and enforcement is standardized and transparent. In contrast to the CWA, violations under FIFRA are based on sound science, EPA approved label language, and specific enforcement bench marks. Violations under FIFRA are not based on personal perceptions or personal opinion and only government agencies that have been empowered to process violations do so. Allegations of violations follow a clear and decisive process.

The GCMAD and Gem County, Idaho have real experience with 3<sup>rd</sup> party citizen suits filed under the auspices of the CWA. In 2002, before mosquito control applications were regulated under the CWA NPDES permitting system, the district was sued by a citizen for allegations of violations. The EPA, who has jurisdiction over Waters of the U.S. in Idaho, and the Idaho State Department of Agriculture found no violations whatsoever in the district's regular practices of mosquito abatement, and yet, the individual was able to file allegations and bring suit.

Over the subsequent 10 years, the GCMAD and Gem County were forced to defend themselves from the allegations and spent approximately \$450,000 to address the law suit. To put that cost into perspective, the average annual budget for the GCMAD is \$450,000.

In other words, **the district spent 10% of its annual budgets to defend itself from allegations of violations brought by a citizen** under the CWA's Citizen Suit Provision instead of spending

those funds on our mandated mission of protection of public health. To reiterate, the district was found to not be in any form of violation under FIFRA or the CWA whatsoever when making applications to Waters of the U.S.

In the interest of us or anyone else avoiding this type of legal jeopardy in the future, this committee has previously approved legislation to clarify that pesticide applications made in accordance with FIFRA shall not be doubly regulated under the CWA. EPA's Office of Pesticide Programs, in conducting its exhaustive review in deciding whether to register a product, adequately takes into account potential impacts to water and aquatic organisms. When it determines that additional requirements are necessary to provide protections, then supplementary restrictions are added to a product's label. Given this existing process, the CWA permit is redundant and provides no additional benefit.

We were hopeful that the Senate Agriculture, Nutrition and Forestry Committee would include that fix during the reauthorization of the most recent Farm Bill. Unfortunately, the necessary provision was dropped in conference and therefore the oversight costs and legal jeopardy still remain.

As more jurisdiction is added to the CWA under the EPA's proposed rule to expand definitions of Waters of the U.S., the burden to comply with local interpretation of what a Water of the U.S. is and its additional required permit considerations becomes greater than the need to protect public health. It is far more costly to be sued under the CWA than it is to ignore the treatment of a water source where potentially disease carrying mosquitoes are developing.

One example of problematic expansions of Waters of the U.S. in this proposed rule is the proposed definition of "tributary," in 40 CFR 230.3(u)(5). Although the district sincerely appreciates the attempt to define a "tributary," the proposed definition could easily be interpreted to mean that many drainage or irrigation conveyances will now be jurisdictional. The inclusion of roadside, irrigation, and storm water ditches could have profound impacts and consequences. The potential far-reaching effect of the definition of "tributaries" includes all waters and wetlands adjacent to tributaries. The proposed language here could easily create uncertainty regarding pesticide applications to Waters of the U.S., which could in turn have very costly ramifications, as discussed previously in regards to 3<sup>rd</sup> party citizen suits.

If this new definition of "tributary" is accepted, it will become unduly burdensome to Gem County's mosquito control program to evaluate all drainage ditches and/or apply for EPA consultation based on current watershed functions. Not only will this impede the program's ability to quickly control mosquitoes and protect public health based on current conditions, but could potentially take years to clarify for the long term. It is widely accepted that most surface water eventually flows into a traditionally navigable waterway; however by providing many exceptions under the Tributaries section, the true role of many drainage ditches or waterways will become very ambiguous.

In the case of drainage and road way ditches that could, under the rule, be included as tributaries to a Water of the U.S., the result of such designation would now classify drainage and road way ditches as a "Water of the U.S." and would potentially reduce or eliminate mosquito control

districts from conducting maintenance on drainage ditches, such as excavating material for better drainage. Districts would have to seek permission to alter that ditch since it is a tributary to a Water of the U.S., which takes time, money, and personnel resources.

It would also be beneficial to include specific and concrete benchmarks as a way to determine what constitutes a “significant nexus.” The proposed rule regarding “significant nexus” should include quantifiable standards and measures regarding what constitutes a “significant” effect that is “more than speculative or insubstantial” as laid out in proposed 40 CFR 230.3(u)(7).

Currently, due to the NPDES requirements our agency is subject to significant costs on a daily basis for compliance. The process of reporting activities conducted on Waters of the U.S. for a season takes time to process and tabulate. Currently, staff at the GCMAD spend approximately 15 business days per year tabulating and reporting activities for the season on Waters of the U.S. The district has had to invest in a geographic information system for accurate reporting of applications to Waters of the U.S. **The purchase of necessary hardware and software required an investment of 20% of the district’s annual operating budget.** The district was forced to make this hardware and software investment to comply with the NPDES reporting requirements solely, as it was not necessary for FIFRA compliance. The costs associated with reporting compliance diverts funding away from the mission of protecting public health in Gem County. These costs would only increase with the expansion of defined regulated waters as there would be a larger number of water bodies where compliance is required. Again, all of these regulatory requirements would either require increase taxation of our citizens, or a diversion of resources away from our public health mission. Either way, neither the environment nor the public would be well-served.

It is important to note that the GCMAD’s mosquito control season is only six months long. In other areas of the country where the mosquito control season is much longer or year round, the reporting component becomes never ending. Increase in defined waters would increase the work load for reporting compliance.

Regulated waters in my district must go through an evaluation to determine if they are compromised for any active ingredients that the district may use at any given time during the course of a mosquito control season. That requires water quality testing, and testing must be paid for by the agency seeking to determine whether or not the water body is compromised. Testing takes time and can be expensive. Since the irrigation season begins in April of every year, the opportunity to actually test water for compromise already puts mosquito control initiatives behind the mosquito production curve. Mosquito control is time sensitive, with the idea that controlling mosquitoes early in the season better establishes an initially low population that promotes a lower breeding population for the remainder of the season.

In conclusion, the public health community fears that a potential loss of mosquito and vector control capacity due to shrinking budgets, coupled with the costs attendant to unfunded NPDES compliance, mitigation measures, and compliance costs will have a demonstrably adverse impact on the citizenry and wildlife.

The current climate of mosquito control in the U.S. is dynamic. Recently, there has been an influx of invasive species of mosquitoes, such as *Aedes albopictus* and *Aedes japonicus*, in many parts of the country and new diseases like Chikungunya virus that are not endemic to North America. The costs associated with addressing influxes of invasive species and new diseases are exacerbated by redundant regulation and reporting requirements.

The increase in jurisdictional scope of the proposed rule compounds these costs, making a great many mosquito management programs potentially unsustainable. This will ultimately result in adverse impacts on communities, recreation, and both animal and human health.