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Jackie McClaskey, Secretary

Governor Sam Brownback

Mr. Chairman, my name is Susan Metzger and I serve as an Assistant Secretary for the Kansas Department of Agriculture. Thank you for the opportunity to appear today and share Kansas' perspective on the impacts of the Federal rulemaking on Waters of the United States on Kansas agriculture and water management.

According to the EPA website on the Clean Water Rule, the rule is purported to help states protect their waters and will not broaden the coverage of the Clean Water Act. I am here today to testify that presumption is incorrect when describing the rule's application in Kansas.

We contend that, while certain tributaries are Waters of the U.S. under the existing regulation, the proposed rule gives a regulatory definition of "tributary" that covers waters to include all streams, with or without flow. There will be no need to make a significant nexus determination for dry streams or their adjacent waters because the rule automatically considers them Waters of the U.S.

Applying this blanket definition of tributary in Kansas will result in in nearly a 460% increase in the number of stream miles classified as Waters of the U.S., subject to all programs and provisions of the Clean Water Act. A nationally defined, "one size fits all," definition for terms like tributaries is not appropriate given the scarcity of flow in Western States such as Kansas, and the inherent variability of those streams to impact downstream waters. Rainfall across Kansas ranges from a low of less than 15 inches along our western border with Colorado to more than 40 inches in southeast Kansas. Low rainfall in the west combined with deep depths to the High Plains Aquifer make all but the major streams in the west, ephemeral, with their channel beds permanently above the water table. These streams, now and forever, only flow in response to localized rainfall. Yet, under the proposed rule, any order stream with a bed, bank and ordinary high water mark will be deemed a tributary, and as such, considered jurisdictional under the Act.

In 2001 the Kansas legislature defined a "classified stream" for purposes of applying Clean Water Act water quality standards and implementing programs. The statute and associated regulations directs protection of water quality to the state's significant waters while logically excluding ephemeral streams, grass, vegetative or other waterways, culverts or ditches.

Kansas has demonstrated great success in managing our water resources. Through the implementation of locally-driven water quality plans, Kansas has produced improvements in water quality including the removal of several water bodies from the state's list of impaired waters. These improvements are the result of appropriate positive coordination of state agencies with local jurisdictions and individual landowners. The proposed rule, and the intervention of the Federal agencies into management of marginal waters will degrade those productive relationships.

The distraction and diversion brought forth by this rule will incur additional expenditures at the state level for marginal environmental benefit and diminished success in water quality improvement in Kansas. The inevitable slow-down in permit reviews and increase in bureaucratic paperwork will unnecessarily delay and deter economic growth and impede the adoption of soil and water conservation practices by the farmers and ranchers of Kansas. As shared during the public comment period by many of the agriculture-related organizations and state agencies in Kansas, as well as Governor Sam Brownback, we request the proposed rule be withdrawn and any future discussions begin anew with the full consultation and advice of the State.

Mr. Chairman, as we saw with the now-withdrawn interpretive rule, Federal rulemaking without proper consultation with States, leads to unintended consequences. I believe that today's panel discussion restores state-level discussion towards development of a better, meaningful rulemaking under the Act. We hope that the states, as primary implementers of the Act, begin to have a significant role in crafting future rules by the Federal agencies. Thank you for the opportunity to share Kansas' perspective.