

Mr. Chairman, Members of the Committee, on behalf of myself and my boss Congressman Kevin Cramer, thank you for the opportunity to present an update on the Waters of the U.S. (otherwise known as WOTUS) rulemaking undertaken by the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps). It is my understanding this Committee has received a presentation on WOTUS from the North Dakota Attorney General in August of last year so I will try to limit my comments to updating from there.

However, I would like to start with a high level background going back to the earliest days of our country. Typically the debate surrounding the federal government's role in regulating waters was for the purpose of vessels navigating waterways engaged in commerce. The overriding priority was ensuring the waterways were adequate and free of obstructions to keep economic activity flowing and the wellbeing of its citizens prospering. The right to do so is from the commerce clause in the U.S. Constitution which gives the federal government significant powers over these waters. After much time had passed the definition of "navigable" was greatly expanded through the Federal Water Pollution Control Act Amendments of 1972 which introduced the term "waters of the United States" and with the clarification of a 1975 court case, federal jurisdiction was no longer limited to the traditional tests of navigability. After amendments in 1977 – where amendments to narrow the Corps' jurisdiction were rejected – the law became referred to as the Clean Water Act. The federal government's jurisdiction expanded, but to what extent is still debated today.

A 1985 Supreme Court case upheld the federal government's "adjacent wetlands" jurisdiction, a 2001 Supreme Court decision denied the federal government's jurisdiction over "isolated waters," and a 2006 Supreme Court case said the federal government overreached in its "adjacent wetland" rulings. However, while agreeing the Corps went too far, a lone Justice Anthony Kennedy offered his own opinion on what constitutes a "waters of the U.S." causing lawyers, judges, policymakers, and others to take their favorite pieces of his opinion to strengthen their own opinions.

While I would certainly agree with the EPA and the Corps that there is much uncertainty and confusion about these rules, it is without a doubt that their new definition expands federal jurisdiction and still leaves some permit seekers with

uncertainty through case-specific evaluations. When the EPA cites the rule will only result in an approximately two percent increase in jurisdiction for streams and wetlands, they fail to mention this is an increase from their historical 98 percent positive jurisdiction to 100 percent. For "other waters," they estimate an increase from their historical zero percent to 17 percent being jurisdictional.

A few problem areas related to the development of the rule include: (1) the U.S. Small Business Administration Office of Advocacy determining the "EPA and the Corps have improperly certified the proposed rule under the Regulatory Flexibility Act because it would have direct, significant effects on small businesses" and "recommends that the agencies withdraw the rule and that the EPA conduct a Small Business Advocacy Review panel before proceeding any further with this rulemaking;" (2) through Congressional oversight, memos were discovered from the Corps to the EPA, arguing the economic analysis and technical support documents prepared by the EPA "are flawed in multiple respects," including applying Corps data out of context and mixing terminology and data. "In the Corps' judgment, the documents contain numerous inappropriate assumptions with no connection to the data provided, misapplied data, analytical deficiencies and logical inconsistencies;" and (3) the U.S. Government Accountability Office has issued a legal opinion that the EPA violated publicity or propaganda and anti-lobbying laws in its social media campaigns related to WOTUS.

As soon as the rule was finalized on May 27, 2015, legal challenges were filed in multiple federal courts by industry groups, more than half the states, and environmental groups. On August 28, 2015, the same day the rule was scheduled to go into effect, North Dakota Federal District Judge Erickson blocked the rule from going into effect for the 13 states in the case before him. He stated the challengers have a "substantial likelihood of success," the development of the rule was "inexplicable, arbitrary and devoid of a reasoned process", and "the rule allows EPA regulation of waters that do not bear any effect on the chemical, physical, and biological integrity of any navigable-in-fact water."

On October 9, 2015, the U.S. Court of Appeals for the Sixth Circuit placed a nationwide stay on the rule, meaning the challengers had a good chance of prevailing in their view.

For someone like me who isn't a lawyer the way forward in court is just as confusing as the rule. Circuit court petitions were consolidated in the Sixth Circuit by the Judicial Panel on Multidistrict Litigation (the Panel), but the Panel denied a request by the EPA and the Corps to centralize the various district court challenges in the district court in Washington, D.C. On February 22, 2016, the Sixth Circuit ruled it had jurisdiction to hear consolidated challenges to a final rule, but there is also a pending case in the Eleventh Circuit in which Florida and 10 other states are seeking to overturn a Georgia district judge's finding that an appeals court is the proper venue for their challenge to the Clean Water Rule.

Arguably one of the most significant changes facing WOTUS is the passing of Supreme Court Justice Scalia on February 13, 2016. As the author of the majority opinion in the 2006 case rejecting the federal government's overreach, the state and business group challengers have lost their most significant ally. Given the current makeup, chances are circuit court splits will be left unresolved for some time and there's no other way to say it other than elections matter for presidential appointment of Scalia's replacement and Senate confirmation.

Congress has weighed in on the rule. The Senate and the House passed a Joint Resolution (S.J.Res 22) to prevent the rule from taking effect and not allowing the agencies to reissue any substantially similar rule. However, it was vetoed by President Obama on January 19, 2016. The House passed appropriations bills for fiscal years 2015 and 2016 preventing the development, adoption, implementation, or enforcement of the rule, but they were never considered by the full Senate and not included in the enacted fiscal year 2015 or 2016 spending bills. Speaker Ryan consistently speaks to halting WOTUS as one of the House's priorities in the 2017 spending bill. In the 113th and 114th Congresses, the House passed similar bills (H.R. 5078 and H.R. 1732) requiring the agencies to develop a new rule, taking into consideration public comments and consult with state and local governments. The Senate didn't take up the bill in the 113th Congress and in the 114th Congress (S.1140) fell short of the 60 votes needed to overcome a filibuster on the motion to proceed. Other legislation to amend the Clean Water Act has been introduced to either reduce or expand the federal jurisdiction over water bodies, but remain just as difficult to pass given the political makeup in Washington, D.C.