THE ATTORNEY GENERAL
STATE OF ARKANSAS
LESLIE RUTLEDGE

Good Morning, Chairman Roberts, Ranking Member Stabenow, ladies and gentlemen of the Committee. My name is Leslie Rutledge, and I am the Attorney General of Arkansas. It is an honor to appear before this committee whose membership includes my own senator, Senator John Boozman.

On April 21, 2014, the United States Environmental Protection Agency ("EPA") and the United States Army Corps of Engineers ("Corps") (collectively, "the agencies") published a proposed rule to amend the definition of "waters of the United States" under the federal Clean Water Act ("CWA"). 79 Fed. Reg. 22188 (April 21, 2014). The proposed rule purports to "clarify" the agencies' regulatory jurisdiction under the CWA based on rulings of the United States Supreme Court in *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985), *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) ("SWANCC"), and *Rapanos v. United States*, 547 U.S. 715 (2006). The latest of these, *Rapanos*, was a plurality opinion and the agencies argue that the "significant nexus" test from Justice Kennedy's concurring opinion is the controlling interpretation of the law. Not only is this a questionable legal basis for the proposed rule, the rule, as proposed, does not follow Justice Kennedy's test and fails miserably at offering any clarity to the definition.

As the State's Chief Legal Officer, I must raise my concerns with the legality of this rule and the practical effects that unlawful expansion of federal jurisdiction under the CWA will have on

323 Center Street, Suite 200 • Little Rock, Arkansas 72201
Telephone (501) 682-2007 • Fax (501) 682-8118
WEBSITE • www.arkansasag.gov

our state. Despite the lengthy legal arguments cited in the proposed rule, it fails to meet the "significant nexus" standard articulated by Justice Anthony Kennedy in *Rapanos*. Likewise, the proposed rule is vague and ambiguous and violates the basic tenets of administrative law. And, perhaps most importantly, unlawful rules have consequences. This proposed rule threatens Arkansas's agricultural community, the largest sector of our economy.

The CWA achieves its regulatory goals through jurisdiction over "navigable waters." Navigable waters are defined as "waters of the United States, including the territorial seas." CWA § 502(7); 33 U.S.C. § 1362(7). The term "navigable waters" applies in several sections of the CWA, including the section 402 National Pollutant Discharge Elimination System ("NPDES") permit program for the discharge of pollutants from a point source, the section 404 permitting program for discharge of dredge and fill material, the section 303 water quality standards and total maximum daily load programs, and the section 401 state water quality certification process. The section 311 oil spill and prevention and response program uses the term, "navigable waters of the United States," which has been interpreted the same as "navigable waters."

The EPA and the Corps have interpreted the term "waters of the United States" through regulations found, *inter alia*, at 33 C.F.R. § 328.3 (Corps regulations for dredge and fill permits) and 40 C.F.R. § 122.2 (regulations for all CWA programs administered by the EPA). The proposed rule seeks to amend the regulations, which currently define "waters of the United States" as "traditional navigable waters, interstate waters, all other waters that could affect interstate or foreign commerce, impoundments of waters of the United States, tributaries, the territorial seas, and adjacent wetlands." *Id*.

In their attempt at "clarity," the agencies expand the definition of "waters of the United States" into three (3) parts, with multiple subparts, and add seven (7) new definitions. This certainly does not clarify the rule for the states and the regulated community. The proposed rule defines "waters of the United States" to mean:

> (1) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide; (2) All interstate waters, including interstate wetlands; (3) The territorial seas; (4) All impoundments of waters identified [as traditionally navigable waters and tributaries to those waters][1]; (5) All tributaries of waters identified [as traditionally navigable waters, their tributaries and impoundments of such waters]; (6) All waters, including wetlands, adjacent to a water identified [as traditionally navigable waters, their tributaries, and impoundments of such waters]; and (7) On a case-specific basis, other waters, including wetlands, provided that those waters alone, or in combination with other similarly situated waters, including wetlands, located in the same region, have a significant nexus to a water identified [as traditionally navigable waters]."

See Proposed Rule at 79 Fed. Reg. 22262-74 (the rule proposes to put this definition in several sections of the regulation). These proposed amendments would expand the authority of the agencies far beyond anything that Congress could have envisioned when enacting the CWA.

Over one million public comments were filed on the proposed rule, and extensive legal arguments have been made explaining how the rule is unlawful. I will not repeat those arguments at length but will focus on two of the most troubling aspects of the proposed language. One, the proposed definition of "tributary" does not comply with Justice Kennedy's "significant nexus" test in *Rapanos.* Two, the proposed "case-specific" determination of waters that possess a "significant nexus" to a traditionally navigable waterway is vague and ambiguous,

[1] Parts 1 through 3 of the proposed definition of "waters of the United States" covers those waters that would be considered to fall under the traditional definition of "navigable waters," that is they are "'navigable in fact' or readily susceptible of being rendered so." *Rapanos*, 547 U.S. at 723. For purposes of the narrative of this testimony, the term "traditionally navigable water" is substituted for references to Parts 1 through 3 of the definition.

not only violating basic tenets of administrative law but also causing confusion and expense for states and the regulated community.

The proposed rule defines "tributary" as:

> [A] water physically characterized by the presence of a bed and banks and ordinary high water mark…which contributes flow, either directly or through another water, to a water identified as a [traditionally navigable waters, their tributaries, and impoundments of such waters]. In addition, wetlands, lakes, and ponds are tributaries (even if they lack a bed and banks or ordinary high water mark) if they contribute flow, either directly or through another water to a water identified as a [traditionally navigable water, their tributaries, and impoundments of such waters]. A water that otherwise qualifies as a tributary under this 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 one or more natural breaks (such as wetlands at the head of or along the run of a stream, debris piles, boulder fields, or a stream that flows underground) so long as a bed and banks and an ordinary high water mark can be identified upstream of the break. A tributary, including wetlands, can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, lakes, ponds, impoundments, canals, and ditches not excluded [under the proposed definition].

See Proposed Rule at 79 Fed. Reg. 22262-74 (the rule proposes to put this definition in several sections of the regulation). While the agencies claim to follow Justice Kennedy's "significant nexus" test, in actuality, they ignore important passages of his opinion.

Justice Kennedy specifically analyzed the breadth of the Corps' standard for tributaries. The Corps deems a water a tributary if it "feeds into a traditional navigable water (or tributary thereof) and possesses an ordinary high-water mark, defined as a 'line on the shore established by the fluctuations of water and indicated by [certain] physical characteristics." *Rapanos*, 547 U.S. 715, 781. Justice Kennedy noted that this standard, if it were consistently applied, might "provide a rough measure of the volume and regularity of flow…and a reasonable measure of whether specific minor tributaries bear a sufficient nexus with other regulated waters to constitute 'navigable waters' under the Act." *Id.* However, he went on to state:

> Yet the breadth of this standard – which seems to leave wide room for regulation of drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water volumes toward it – precludes its adoption as the determinative measure of whether adjacent wetlands are likely to play an important role in the integrity of an aquatic system compromising navigable waters as traditionally understood. Indeed, in many cases wetlands adjacent to tributaries covered by this standard might appear little more related to navigable-in-fact waters than were the isolated ponds held to fall beyond the Act's scope in *SWANCC*. *Id.*

Not only does the proposed rule ignore Justice Kennedy's assessment of using evidence of an ordinary high water mark as a standard of delineating a tributary, the agencies expand the definition to include waters without such evidence if they "contribute *flow, either directly or through another* water to a water identified as a [traditionally navigable water, their tributaries, and impoundments of such waters]." See Proposed Rule at 79 Fed. Reg. 22262-74 (the rule proposes to put this definition in several sections of the regulation). Even a trickle is flowing water. Every stream, no matter how small, would meet this standard. Justice Kennedy clearly drew a distinction between waters carrying "only minor water volumes" toward a navigable-in-fact water from waters that were under the jurisdiction of the CWA. The proposed rule fails to address such distinctions and as such, does not comport with Justice Kennedy's concurring opinion.

The proposed definition of "waters of the United States" also provides that, on a case-by-case basis, waters, including wetlands, either alone, or in combination with other similarly situated waters, that have a significant nexus to traditionally navigable waters will be considered under the jurisdiction of the CWA. See Proposed Rule at 79 Fed. Reg. 22262-74 (the rule proposes to put this definition in several sections of the regulation). The proposed rule goes on to define "significant nexus" as:

> [A] water, including wetlands, either alone or in combination with other similarly situated waters in the region (i.e., the watershed that drains to the nearest water identified [as a traditionally navigable water]), significantly affects the chemical, physical, or biological integrity of a water identified [as a traditionally navigable water]. For an effect to be significant, it must be more than speculative or insubstantial. Other waters, including wetlands, are similarly situated when they perform similar functions and are located sufficiently close together or sufficiently close to a "water of the United States" so that they can be evaluated as a single landscape unit with regard to their effect on the chemical, physical, or biological integrity of [a traditionally navigable water].

See Proposed Rule at 79 Fed. Reg. 22262-74. The rule uses the term "significant nexus," but provides no clarity to the "significant nexus" test. The rule's inherent vagueness violates the basic tenets of administrative law and for that reason alone, the agencies should withdraw the proposal and find a solution that offers certainty to the states and the regulated community.

The standards for evaluating vagueness were enunciated in *Grayned v. City of Rockford*, 408 U.S. 104, 108–109 (1972):

> Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory applications.

A statute which is so vague that a "reasonable man" or "man of common intelligence" must guess at its meaning, and may differ as to its application, violates due process. *Connally v. General Construction Co.*, 269 U.S. 385, 391(1926). A statute can also be impermissibly vague if it fails to provide people a reasonable opportunity to understand what conduct it prohibits or authorizes. *Hill v. Colorado*, 530 U.S. 703 (2000). These rules also apply to administrative regulations. *Boyce Motor Lines, Inc. v. United States*, 342 U.S. 337 (1952).

The agencies' definition of "significant nexus" contains so many vague terms that a reasonable person would be left guessing at its meaning. For example, someone reading the proposed rule would not be able to identify "speculative" or "insubstantial" effects, or how far is "sufficiently close." The regulated community should not have to wait until an enforcement action is initiated against it to know that the stream or wetland on their property has a "significant nexus" to a navigable water.

The vagueness and uncertainty surrounding the rule may be further exacerbated by the use of "interpretive rules." For example, simultaneously with the proposed change to the definition of "waters of the United States," the agencies released an "interpretive rule" that sought to "clarify" agricultural exemptions under the CWA by identifying 56 Natural Resources Conservation Service ("NRCS") Conservation Practice Standards ("CPSs") as "normal farming practices." The 56 CPSs listed did not include the entire list of CPSs established by NRCS, nor did they accurately reflect "normal" farming practices across the entire United States.

In my home state of Arkansas, the Delta Region is home to advanced row-crop agricultural practices. Many of these practices are considered cutting-edge technologies and would not be considered "normal" in other parts of the country. Arkansas farming practices such as precision land leveling, zero-grade leveling, grid soil sampling, variable rate fertilizer application, tailwater recovery, and the use of cover crops significantly improve water use efficiencies and optimize nutrient application. Such practices not only provide economic benefits for our farmers, they provide environmental benefits as well. These practices were not included in the list of 56 CPSs; thus, farmers in Arkansas are concerned that what is "normal" here would no longer be exempted from CWA permitting requirements.

After receiving comments from farmers across the country on this interpretive rule, the EPA has withdrawn the rule. However, a recent U.S. Supreme Court ruling held that administrative agencies do not have to submit interpretive rules to public notice and comment. *Perez v. Mortgage Bankers Ass'n*., No. 13-1041, 2015 WL 998535 (U.S. Mar. 9, 2015). What is to prevent the agencies from issuing interpretive rules that claim to offer further clarity on "speculative" or "insubstantial" effects but do not afford the public a chance to comment or challenge the rule? The vague nature of the proposed rule makes it ripe for a myriad of interpretive rules dictating the ways the states and the regulated community must comply with the Clean Water Act but offering little recourse to challenge the agencies.

Beyond the legal arguments against the proposed rule, its scope will have significant, practical impacts on Arkansas. In 2012, agriculture added $20.1 billion to the Arkansas economy. See *Economic Contribution of Arkansas Agriculture*, University of Arkansas Division of Agriculture, Research and Extension (2014). Arkansas's agricultural industry's contribution accounts for almost eighteen (18) cents of every dollar of Value Added to the economy. *Id*. Agriculture also provides approximately one in every six jobs in Arkansas. *Id*. The State is first in rice production, third in cotton production, fifth in timber production and tenth in soybeans and grain. See *Arkansas Agricultural Profile, A Summary of Arkansas and County Agricultural Data*, Arkansas Farm Bureau (2014). A thriving agricultural community is essential to the State of Arkansas and overreaching administrative rules put that sector of our economy in jeopardy.

Given the overbreadth of the proposed definition of "tributaries," every activity on a farm would likely need a permit from the agencies. This does not just apply to row crops; the definition would apply to activities that the agencies consider "discharges" from animal production facilities. See *Alt v. EPA*, United States District Court for the Northern

District West Virginia, No. 2:12-cv-00042. Obtaining a permit is very costly and may be beyond the means of most farmers and ranchers. However, the alternative is even more costly – civil penalties for violation of the CWA can reach up to $37,500 per violation per day, with even higher criminal penalties.

Farmers and ranchers want to follow the law, and they are concerned about protecting the land and water. But more restrictive and confusing administrative rules will not achieve that goal. It will only drive the younger generation away from agriculture and, ultimately, impact the food supply of all Americans.

As I have stated many times, I am proud to come from the Natural State. Clean water is not only important to our state economy but to our state identity. As I saw for myself growing up on a cattle farm near Batesville, Arkansas, it is in our best interest to protect this precious resource. The rivers and streams near my home have been protected for years by the cooperative relationship of state and federal law. The proposed rule turns this relationship on its head and ignores the role that states play in protecting clean water. My office has urged the agencies to withdraw the rule and will pursue all legal challenges necessary to prevent an unlawful rule from impacting the State of Arkansas.

Thank you again, Mr. Chairman and Ranking Member, for the opportunity to appear before you today. This concludes my testimony, and I am happy to answer any questions you or the other members of the Committee may have.