TESTIMONY
Presented to the
House Committee on Agriculture
Conservation and Forestry Subcommittee
U.S. House of Representatives
By
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On behalf of the
American Soybean Association, National Association of Wheat Growers, National Corn Growers Association, National Cotton Council, National Sorghum Producers, Southern Peanut Farmers Federation, USA Rice Federation, and Western Peanut Growers
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I would like to thank Chairman Thompson, Ranking Member Lujan Grisham, and Members of the Subcommittee for the opportunity to offer our views regarding the U.S. Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers (Corps) (together, "the Agencies") proposed rule to define "waters of the United States" under the Clean Water Act (CWA). My name is Sledge Taylor, and my family and I raise cotton, corn, soybeans, wheat, peanuts and cattle in Como, Mississippi and in addition to other duties I also serve this year as the Chairman of the National Cotton Council.

It is our belief that the proposed rule will result in federal permit requirements for many commonplace and essential farming practices. This will result in farmers like myself being forced to endure even more costly regulations and place many of us at risk for fines from the Agencies or facing a citizen suit for normal farming practices.

In both the proposed rule and the Agencies' marketing campaign aimed at selling the proposal to farmers, ranchers and the general public, the Agencies paint two misleading and contradictory pictures. First is the attempt by two federal agencies to make only minor tweaks to increase the "clarity" and "certainty" of a regulatory scheme long accepted by landowners and businesses. Under this scenario, the rule merely clarifies and provides certainty for a regulatory scheme needlessly muddled by the U.S. Supreme Court. So minor is the impact on landowners, the Agencies claim that the proposed rule would impact a mere 1,332 acres nationwide under the section 404 program. The second picture is more critical, where the proposed rule purports to protect roughly 60% of the nation's flowing rivers, lakes, wetlands, and drinking water sources, which have been left vulnerable by state inaction and the Supreme Court's confusing opinions.

The proposed rule provides none of the clarity and certainty it promises. Instead, it creates confusion and risk by providing the Agencies with almost unlimited authority to regulate, at their discretion, any low spot where rainwater collects, including common farm ditches, ephemeral drainages, agricultural ponds, and isolated wetlands found in and near farms and ranches across the nation. The proposed rule defines terms like "tributary" and "adjacent" in ways that make it impossible for a typical farmer or rancher to know whether the specific ditches or low areas at his or her farm will be deemed "waters of the U.S." These definitions are certainly broad enough, however, to give regulators (and citizen plaintiffs) plenty of room to assert that such areas are

subject to CWA jurisdiction. Moreover, no crisis exists. The Agencies do not argue that they need to regulate farming and ranching to protect navigable waters. Yet, the proposed rule gives them sweeping authority to do so, which they may exercise at will, or in response to a citizen plaintiff.

Farming and ranching are water-dependent enterprises. Whether they are growing plants or raising animals, farmers and ranchers depend upon water. For this reason, much of the farming and ranching tend to occur on lands where there is either plentiful rainfall or adequate water available for irrigation (some via ditches). There are many features on those lands that contain or carry water only when it rains and that may be miles from the nearest truly "navigable" water. Farmers and ranchers regard these landscape features as simply low spots in farm fields.

There are also features on farms and ranches that tend to be wet year round, but are not jurisdictional waters today. For example, many ponds are used on farms and ranches for purposes such as stock watering, providing irrigation water, or settling and filtering farm runoff. Additionally, irrigation ditches carry flowing water to fields throughout the growing season as farmers and ranchers open and close irrigation gates to allow the water to reach particular fields. These irrigation ditches are typically close to larger sources of water, irrigation canals, or actual navigable waters that are the source of irrigation water, and these ditches channel return flows back to those source waters. In short, America's farm and ranch lands are an intricate maze of ditches, ponds, wetlands, and ephemeral drainages.

Given the breadth of the definitions in the proposed rule, the vast majority of ephemeral drainage features and ditches on farmlands and pastures described above would be categorically regulated as jurisdictional tributaries under the proposed rule. The vast majority of small wetlands, ponds and pools (including, potentially, ephemeral ponds, which some might call "puddles") would be either categorically regulated as "adjacent" waters or could still be regulated as "other waters." Consequently, with the exception of very narrow section 404 exemptions, regulating drains, ditches, stock ponds, and other low spots within farm fields and pastures as "navigable waters" would mean that *any* discharge of a pollutant (e.g., soil, dust, pesticides, fertilizers and "biological material") into those ditches, drains, ponds, etc. will be unlawful without a CWA permit.

This jurisdictional expansion will be disastrous for farmers and ranchers. Farmers need to apply weed, insect, and disease control products to protect their crops. On much of our most productive farmlands (areas with plenty of rain), it would be extremely difficult to avoid entirely the small wetlands, ephemeral drainages, and ditches in and around farm fields when applying such products. If low spots in farm fields are defined as jurisdictional waters, a federal permit will be required for farmers to protect crops. Absent a permit, even accidental deposition of pesticides and herbicides into these "jurisdictional" features (even at times when the features are completely dry) would be unlawful discharges.

The same goes for the application of fertilizer—including organic fertilizer (manure)—another necessary and beneficial aspect of many farming operations. It is simply not feasible for farmers to avoid adding fertilizer to low spots within farm fields that may become jurisdictional. As a result, the proposed rule will impose on farmers the burden of obtaining a section 402 National

Pollutant Discharge Elimination System permit to fertilize their fields—and put EPA into the business of regulating whether, when, and how a farmer's crops may be fertilized. In fact, if low spots in fields and pastures become jurisdictional wetlands or tributaries, EPA or citizens groups could sue any time a farmer plows, plants, or builds a fence across small jurisdictional wetlands or ephemeral drains. Given the "very low" "threshold" the Agencies apply before "truly *de minimis* activities" turn into "adverse effects on any aquatic function," farmers and ranchers would even have to think about whether "walking or driving a vehicle through" a jurisdictional feature is prohibited. Federal permits would be required (again, subject to the very narrow exemption of certain activities from section 404 permits) if such activities cause fertilizer, pesticides, or dirt to fall into low spots on the field, even if they are dry at that time.

I farm in the Mississippi Delta, and in the Oless hills of Mississippi. Our area has alluvial soils that have very little internal drainage so water must drain across the land to adjacent wetlands and streams. During storm events, water runs to shallow valleys in the middle of fields and slowly runs off. As a standard agricultural practice, we use an implement called a water furrow plow to better define a small drain through these depressions deemed "working lands" by the USDA. This allows water from storm events to drain more quickly. These shallow valleys rarely flood, except during extreme storm events, so we plant through these areas and the approximately 6 inch deep depressions we create with the water furrow low. In addition, we apply crop protection products and fertilizer when needed on the plants growing across these drains. However, the proposed rule by its terms extends federal CWA requirements to ephemeral drainages, which would include such a field drain, or as we call them, water furrows. If these small drains become regulated, producers will not be able to apply crop protection products, fertilizer, or other needed inputs to raise a crop within a hundred feet or more of each of these drains.

I have served on my counties Natural Resources Conservation Service (NRCS) county committee for 25 years and appreciate the importance of USDA's voluntary conservation programs. These programs are incentivizing producers to implement conservation practices that reduce erosion and nutrient loss from cropland. On my farm, we have utilized the Environmental Quality Incentives Program as well as the Conservation Stewardship Program. Many farms have worked with the NRCS to implement land-leveling practices. Water quality data clearly shows these land-leveling practices significantly reduce non-point source pollutants. Yet, under this proposed rule, these practices will require permits, which will require mitigation, which will make these voluntary conservation measures too costly to implement, even with financial assistance.

These are just some of the examples of how disruptive the proposed rule would be to our members' livelihoods. The stakes could not be higher. The regulation of low areas on farmlands and pastures as jurisdictional "waters" means that *any* activity on those lands that moves dirt or applies any product is subject to regulation. Everyday farming activities such as plowing, planting, disking, fertilizing, insect and disease control, and fence building in or near ephemeral drainages, ditches, or low spots could be a violation of the CWA, triggering civil penalties of up to $37,500 per violation per day—or even higher criminal penalties—unless a permit is obtained. The tens of thousands of dollars of additional costs for federal permitting of ordinary farming activities, however, is beyond the means of most farmers and ranchers—the vast majority of

whom are family-owned small businesses. Even those farmers and ranchers who can afford it should not be forced to wait months, or even years, for a federal permit to plow, plant, fertilize, or protect their crops.

The Agencies have downplayed the significant impact this regulatory expansion will have on the business of farming and ranching. Telling farmers and ranchers to just "get a permit" is unhelpful when getting a permit means far more than filling out a form and paying a permit fee. The costs associated with obtaining a permit often include fees of both lawyers and technical consultants whose expertise is necessary to ensure an accurate application and to develop the plans that must be submitted with the application. There are also ongoing compliance costs related to management practices, recordkeeping, reporting and monitoring.

For section 404 permits in particular, the costs can be extremely burdensome. There are two types of permits available depending on the farming activity and the amount of "navigable waters" that will be impacted. If a farming activity will impact less than half an acre of "navigable waters" (or less than 300 linear feet), a farmer can seek a Nationwide Permit (NWP), such as NWP 40 for certain agricultural activities, under CWA section 404(e). Studies show that the average cost to secure an NWP is almost $36,000. With more ephemeral streams and ditches deemed "navigable waters," fewer activities will qualify for NWPs and more farmers will need to seek individual section 404 permits, which have a staggering average cost of $337,577.

Some of the most substantial costs associated with section 404 permitting include "mitigation" requirements and other "conditions" attached to any permit that a farmer must accept to be able to conduct the permitted activity. Moreover, obtaining these permits takes time (assuming a permit is granted at all). While an NWP may take "only" ten months to obtain, an individual permit often takes more than two years. In the meantime, permit applicants cannot move forward with their operations. Clearly, such timelines are not consistent or feasible relative to the production of annual crops that have an average growing season of five to eight months.

Few studies have quantified the costs of seeking and complying with section 402 permits, perhaps because of the great variability among industries and the wide range of costs associated with individual permits versus "general" permits. For pesticide applications, a section 402 "general" permit may or may not be available, as many pesticide National Pollutant Discharge Elimination System NPDES general permits have been drafted for specific types of applications that would not include row crop production. Several EPA public statements during the comment period have indicated that general permits are available for pesticide use, but EPA has provided no specific information on how many states actually offer general permit coverage for pesticide applications to row crops. Meanwhile, EPA has been completely silent on the absence of any general permits (to our knowledge) for fertilizer application (outside the CAFO context).

Unless and until EPA and the states that administer the section 402 permitting program issue general permits for fertilizing crops, farmers may have no choice but to pursue individual permits simply to fertilize their crops grown within or near the countless newly jurisdictional low spots on farm fields. Whether general or individual permits are involved, perhaps the largest likely cost of NPDES permitting requirements for essential farming practices is the cost of not being allowed to apply products or nutrients in or around newly jurisdictional features that are

ubiquitous across our nation's most productive farming regions. This cost is in the form of diminished productivity, reduced efficiency and increased risk of disease—not to mention the risk of enforcement (imagine a farmer being forced to prove in court that he turned the spray nozzle off before passing over a dry ephemeral drainage). EPA's failure to even consider implications such as these further undermines the credibility of its already fatally flawed economic impact analysis of the proposed rule.

The Agencies have done a tremendous amount of outreach to the agricultural community. Unfortunately this was only after the release of the proposed rule, and while appreciated, it would have been much more beneficial for that outreach to have occurred prior to the release of the rule. The agriculture community has hosted the Region IV EPA Administrator as well as other EPA officials on operations in Mississippi to help show the "on the ground" impacts of their proposed rule. During this process, the Agencies have made promises to make significant changes to the rule, and this is a positive step. My concern is that once these significant changes are made, in all likelihood, the public will not have an opportunity to review and offer comments to the Agencies. Given the amount of public interest in this rule, we strongly encourage the Agencies to release the revised rule again for public comment. The CWA involves an extremely complex set of rules and regulations, and it is important for rural America to have ample input into any final rule that the Agencies promulgate.

It is clear that this rule will have a significant impact on rural America and production agriculture. I thank this Committee for its diligence in defending agriculture and appreciate the opportunity to testify on this important issue.