Opening Statement

Ken Kopocis

Hearing before the Subcommittee on Water Resources and Environment

Committee on Transportation and Infrastructure

U.S. House of Representatives

September 18, 2019

Chairman Napolitano, Ranking Member Westerman, and other members of the subcommittee, thank you for the request to appear today to discuss the "The Administration's Priorities and Policy Initiatives under the Clean Water Act." I appear today in a personal capacity.

In 1972, Congress established the objective of the Clean Water Act, to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. Congress made clear that this objective would be best achieved by controlling pollutant discharges at their source, and reemphasized that objective through the substantial amendments of 1977 and 1987 that tightened controls on pollutant discharges. Congress made improving water quality the heart of the statutory and regulatory program.

Congress also created significant roles for the States in the implementation of the Clean Water Act, and today most of the day-to-day activities for implementing the Clean Water Act are carried out by the States with assistance and approval by EPA.

The President has frequently said that the United States has the cleanest air and water. While that characterization is rated mostly false by PolitiFact, the U.S. has made great strides since our environmental laws were enacted in the late 1960's and early 1970's. We have doubled the waters meeting state-established water quality standards, but we are only one-half the way to the goals Congress set for fishable, swimmable waters in 1972 – a goal Congress said should be reached by 1983.

With much work remaining to improve water quality, the Trump EPA appears determined to roll back water quality protection wherever possible. To date, EPA actions include –

Reducing the scope of waters protected from pollution and destruction under the Clean Water Act to levels not seen since the Clean Water Act was enacted.

Just last week, EPA finalized a rule to return the scope of waters protected to those established by the Reagan administration. This is directly contrary to the position of all interest

groups following the confusion generated by the Supreme Court in the *Rapanos v. U.S.* decision in 2006. I was on the staff of this committee at that time and no one argued to retain the status quo. Some argued for legislation and some for regulation, but no one wanted to retain the Reagan-era rule. Yet, that is the course the Trump EPA is pursuing.

Even more detrimental to protecting water quality, the EPA is finalizing a rule that as proposed would further weaken the Clean Water Act by eliminating protection for thousands of miles of streams and wetlands nationwide, including 55 million acres of farmland containing wetlands – an area the size of Nebraska.

EPA is reconsidering the steam electric effluent limitations guidelines. These are controls on coal-fired power plants that would eliminate annually 1.4 billion pounds of arsenic, lead, mercury, selenium, chromium, cadmium – 30% of all toxics discharge by all industrial categories under the Clean Water Act – and nutrients from our waters. EPA is doing so even as the Fifth Circuit Court of Appeals ordered EPA to consider stronger controls on discharges associated with power plants, not weaker.

The Trump EPA is looking to allow greater amounts of pollutants from treatment plants through dilution – a process called blending. Make no mistake, while plants sometimes use this blending concept during unusual flow events, this is a reduction in the secondary treatment requirements Congress wrote into the law in 1972. If a community has an infiltration/inflow problem or a lack of capacity for treatment that is what should be addressed, plants should not simply dilute untreated waste. These investments have been eligible uses of federal assistance since 1972.

EPA reversed its decades old position that prohibits disposing of waste without limit or treatment though unlined pits or underground where this disposal is so connected to nearby protected waters that the nearby waters become polluted. No public comment, just a reversal to allow greater pollution.

EPA wants to limit the ability of states to protect their waters to state standards by restricting the ability of states affect water quality in federal permits, even while EPA argues in restricting the scope of the Clean Water Act that states know best how to protect their waters.

EPA is placing resource extraction – mining, oil and gas, and logging – above environmental protection by limiting its own authority to protect drinking water and natural resources from unacceptable impacts.

The Trump EPA is systematically taking the cop off the beat by significantly reducing its ability to enforce environmental protection laws through budget cuts and reducing the actions EPA takes.

The Christian Science Monitor conducted a thorough analysis of EPA enforcement data and documented some disturbing results. The Monitor reported that fines against polluting lawbreakers, for fiscal year 2018, totaled about $69 million – the lowest, by a significant degree, since the EPA's enforcement office was created in 1994.

On another key measure, injunctive relief – the cost of complying with an EPA order – the $3.95 billion figure reported by the EPA is the lowest in 15 years. The Monitor found that 40 percent of the total is from cases that were settled by the EPA under President Obama. The average annual cost of compliance is $7.74 billion, nearly double EPA's most recent figures.

Other disturbing findings of the Monitor include: inspections in 2018 were the lowest since records began in 1994; the number of civil cases initiated was the lowest of any year since 1982; judicial referrals for both 2017 and 2018 were 110 – the lowest number since 1976 and less than half the average annual number of 239.

While numbers may vary from year-to-year, these precipitous declines are not a mere variance or outlier. These reductions in environmental enforcement reflect a conscious decision to create more avenues to ignore our bedrock environmental laws without fear of being caught or held responsible.

Clean water in adequate supply is essential to our existence. Whether illustrated by the recent droughts in California or the lead contamination in Flint, Michigan, we have daily reminders that water is essential to life. Waters are also important to the environment in which we live. Rivers, lakes, ponds and wetlands supply and cleanse our drinking water, ameliorate storm surges, provide invaluable storage capacity for flood waters, and enhance our quality of life by providing essential habitat, myriad recreational opportunities, as well as important water supply and power generation benefits.

Consider these facts about the value of clean water to Americans:

- Manufacturing companies use nine trillion gallons of fresh water every year.
- 31 percent of all water withdrawals in the U.S. are for irrigation, highlighting the extent to which the nation's farmers depend on clean water.
- About 40 million anglers spend $45 billion annually to fish in U.S. waters.
- The beverage industry uses more than 12 billion gallons of water annually to produce products valued at $58 billion.
- About 60 percent of stream miles in the U.S. only flow seasonally or after rain, but are critically important to the health of downstream waters.

- Approximately 117 million people – one in three Americans – get their drinking water from public systems that rely on seasonal, rain-dependent, and headwater streams.

The EPA and Department of the Army issued the Clean Water Rule in 2015 to ensure that the Nation's waters could continue to provide these essential benefits, making waters better protected from pollution and destruction by having the scope of the Clean Water Act easier to understand, more predictable, and more consistent with the law and peer-reviewed science.

The EPA has repealed the 2015 Clean Water Rule. But its proposed replacement is a retreat from Congress' clearly stated objective of protecting the Nation's waters.

The proposal was clearly based upon Justice Scalia's plurality opinion in *Rapanos*. The proposal rejects the "significant nexus" test that informed a unanimous court in *U.S.* v. *Riverside Bayview Homes* in 1985 and that was clearly stated by the majority in *Solid Waste Agency of Northern Cook County* v. *Army Corps of Engineers* in 2001. Rather than adhere to Supreme Court precedent, EPA appears to be challenging the Supreme Court by establishing yet another test, supported by only four of the nine justices in *Rapanos*, for determining which waters will be protected from pollution and destruction by the CWA. Such a path is inconsistent with the CWA, judicial and administrative precedent, and the concurring opinion of Chief Justice Roberts in *Rapanos* wherein he cited Supreme Court precedent on how to interpret a decision when no opinion commands a majority of the Court.

A majority of the Court, five of nine justices, expressly rejected Justice Scalia's plurality opinion in *Rapanos*. In addition to the four dissenting justices who rejected the plurality opinion, Justice Kennedy, while concurring in the judgment to vacate and remand the cases, wrote that Justice Scalia's plurality opinion finding that the CWA did not cover intermittent or ephemeral streams or wetlands "makes little practical sense in a statute concerned with downstream water quality" and was "unpersuasive." He concluded his assessment of the plurality opinion in particularly direct terms, "In sum, the plurality's opinion is inconsistent with the Act's text, structure, and purpose."

A Scalia-based rule also has many adverse practical effects for protecting State waters from pollution and destruction. For example, eliminating the protection for intermittent and ephemeral streams will remove Clean Water Act protection for a significant number of waters. In more arid areas of the country, this could be as high as 80 to 90 percent of waters no longer protected. These waters would no longer be protected by water quality standards, no Clean Water Act permits would be required for discharges of pollutants, funding to address municipal wastewater, stormwater, and nonpoint source pollution would be less available, and Federal authority to respond to oil spills would be curtailed. While some argue that States can and will fill this void, since the scope of the Clean Water Act was first limited in 2001 and further limited in 2006, there is little evidence that the States have done so.

In developing the Clean Water Rule, EPA's Office of Research and Development prepared an exhaustive synthesis of peer-reviewed science on how waters are connected to each other and how they impact downstream waters. This Science Report was also peer-reviewed by EPA's independent Science Advisory Board and subjected to public comment. The Science Report informed the agencies' actions in response to the policy guidance provided by the Supreme Court in both the *SWANCC* and *Rapanos* decisions – how best to consider the significant nexus between upstream and downstream waters when determining the jurisdiction of the Clean Water Act.

The final Science Report provides several key conclusions based on review of the peer-reviewed scientific literature:

> 1. All tributary streams, including perennial, intermittent, and ephemeral streams, are physically, biologically, and chemically connected to downstream rivers and this connection influences the integrity of downstream rivers.
>
> 2. Wetlands and open waters in floodplains and riparian areas are physically, chemically and biologically connected with downstream rivers and influence the ecological integrity of such rivers.
>
> 3. Non-floodplain wetlands and open waters (i.e., isolated waters) provide many functions that benefit downstream water quality and ecological integrity.
>
> 4. The connectivity of streams, wetlands and other surface waters, taken as a whole, to downstream waters occurs along a continuum from highly connected to highly isolated – but these variations in the degree of connectivity are critical to the ecological integrity and sustainability of downstream waters.
>
> 5. The critical contribution of upstream waters to the chemical, physical, and biological integrity of downstream waters results from the accumulative contribution of similar waters in the same watershed and in the context of their function considered over time.

Continuing even to today, the validity and credibility of the science developed by the EPA to support the Clean Water Rule has not been seriously challenged. EPA has not denied or refuted the science. The various litigants challenging the Rule have not put forward newer or better science to dispute the conclusions of the Science Report. If there is better science, those challenging the conclusions, whether public or private, have an obligation to bring such science to the attention of the public and the agencies for their consideration. Without such new information, EPA must stand behind the prior work. Instead, EPA is choosing to ignore it.

EPA ignoring science is like the CIA ignoring intelligence or NOAA ignoring weather forecasts.

The Trump EPA has put forward a false choice that providing protection against polluting and destroying waterbodies somehow is averse to States' interests. Under the Clean Water Act, States decide how clean their waters will be by establishing the designated use for waters within the State. States are also able to establish water quality criteria that support those uses. Forty-seven of the fifty States already implement many day-to-day aspects of the Clean Water Act through state permitting programs. The federal-state partnership has worked will to improve and protect water quality since 1972. This is no time to dissolve the partnership.

The Clean Water Act is often referred to as our most effective environmental law, and it has resulted in great improvements in water quality. However, the work is far from finished – State generated water quality reports indicate hundreds of impaired waters need reduced pollution and increased protection. Abandoning upstream waters and continuing the confusion on how to protect water quality, eliminating or reducing regulatory requirements to eliminate toxic discharges, taking the cops of the beat, restricting the rights of states to protect their waters, and other steps of the Trump EPA do not advance these joint efforts at the State and Federal level.

Candidate Trump promised to get rid of the Environmental Protection Agency "in almost every form," leaving only "little tidbits" intact. This may be in the interest of developers, oil and gas, agribusiness and significant polluters such as coal-fired power plants, but not in the interests of the public or the environment. In my thirty-four years in water law, I have never heard the public say that the water in our rivers, lakes, streams and ponds is too clean, that there are too many healthy fish to catch and eat, that our drinking water is too clean and abundant, or that we need more beach closures due to pollution. EPA needs to do its job in protecting human health and the environment under the Clean Water Act. This is not a time for retreat.

Thank you again, I am pleased to answer any questions you may have.