Opening Statement

Ken Kopocis

Hearing before the Subcommittee on Environment

Committee on Science, Space, and Technology

U.S. House of Representatives

November 29, 2017

Chairman Biggs, Ranking Member Bonamici, and other members of the subcommittee, thank you for the request to appear today to discuss the future for protecting water quality of the "waters of the United States" under the Clean Water Act and the role of the States. 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 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, these roles are often referred to as a partnership or cooperative federalism. Today, most of the day-to-day activities for implementing the Clean Water Act are carried out by the States. Further reducing the scope of the Clean Water Act will only reduce State efforts to protect waters from pollution and destruction.

Clean water in adequate supply is essential to our existence. Whether illustrated by the recent drought 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 U.S. Environmental Protection Agency and Department of the Army issued the Clean Water Rule in 2015to 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 Supreme Court considered the scope of waters protected by the Clean Water Act from pollution and destruction three times – *U.S.* v. *Riverside Bayview Homes* in 1985, *Solid Waste Agency of Northern Cook County* v. *Army Corps of Engineers* in 2001, and *Rapanos* v. *U.S.* in 2006. In each of those cases, in every opinion written by the justices, whether it was 9 – 0 in *Riverside Bayview*, 5 – 4 in *SWANCC*, or 4 – 1 – 4 in *Rapanos*, <u>every</u> justice has supported that the Clean Water Act term "navigable waters" is broader than the traditional understanding of that term. The Clean Water Act applies to waters beyond those considered to be traditionally navigable. The Supreme Court has been completely consistent on this point.

The Clean Water Rule was developed to address the uncertainty and confusion following the U.S. Supreme Court decisions usually referred to simply as *SWANCC* and *Rapanos*.

In *SWANCC*, a majority of the Court invalidated the agencies' practice of using the presence of migratory birds as a sole basis for establishing Clean Water Act jurisdiction, and the agencies stopped that practice. The Court in *SWANCC* did not invalidate any aspect of the agencies' regulations.

In *Rapanos*, the Court considered two consolidated cases involving wetlands that did not immediately abut traditionally navigable waters. In *Rapanos*, no opinion could gather a majority, and the nine justices wrote five separate opinions. The confusion evident on the Court carried over into the regulatory responsibilities of the two agencies and resulted in the George W. Bush administration issuing guidance in 2003 and 2008 to reconcile the several opinions of the

Court with the existing regulations defining the scope of the Clean Water Act. Again in *Rapanos*, the agencies' regulations were left intact by the Court.

Following the confusion generated by *Rapanos*, interested parties demanded that the agencies take action to clarify which waters would have their quality and existence protected by the Clean Water Act, and equally important which would not. Every interest group that approached the agencies, and this includes the agriculture community, the property development and construction community, the environmental community, the resource extraction community, the hunting and fishing community, mayors, governors and Federal and State legislators on both sides of the aisle, and countless others recommended that the agencies take action to address the post-*Rapanos* confusion. No one argued for the agencies to do nothing and retain the status quo. Yet, that is the course the Trump administration is currently pursuing.

To respond to these requests, the agencies spent several years developing the Clean Water Rule. This development was subject to countless conversations with outside groups, including all of those I mentioned previously – State, local and Federal interests in the public and private sectors. When the agencies considered issuing additional guidance as an interim measure, that effort had both strong support and strong criticism. The agencies abandoned the idea of developing guidance and chose to pursue formal rule-making under the Administrative Procedure Act. While more time consuming, rule-making provides more certainty since guidance is not binding on the agencies.

The Clean Water Rule clarifies the jurisdiction of the Clean Water Act and would reduce the costly and time-consuming case-specific significant nexus analysis that resulted from the *Rapanos* decision. The Rule interprets the Clean Water Act, it does not expand it. In fact, because of the implementation of the Supreme Court decisions and the added exclusions, the Clean Water Rule narrows the coverage of the Clean Water Act compared to the 1986 Rule it replaces, and does so consistent with the Act's legislative history and the court cases interpreting it.

The Rule is supported by the best available peer-reviewed science on the relationship of waters, their connectivity, and the impacts of protecting water quality or not protecting water quality on downstream and adjacent waters. 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 used by the agencies to support the Clean Water Rule has not been seriously challenged. The agencies have 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, the agencies must stand behind the prior work.

Because of the Clean Water Rule's greater clarity and specificity compared to the rule it replaced, no longer would many waters, such as some tributaries, adjacent waters, ditches and wetlands, need a level of individual analysis to determine whether there was a significant nexus to a downstream water that *Rapanos* required and the old regulatory definition did not provide. Because of the new exclusions in the Clean Water Rule, people would for the first time be able to read the Rule and better know that a water body or feature was not subject to the Clean Water Act without the need for an individual analysis.

The Clean Water Rule continues to apply the protections of the Clean Water Act to traditionally navigable waters, interstate waters, the territorial seas, impoundments of otherwise jurisdictional waters, tributaries, and adjacent wetlands. The Clean Water Rule deletes the

jurisdiction of the Clean Water Act over waters "the use, degradation or destruction of which could affect interstate or foreign commerce" and replaces it with the significant nexus analysis first established by the majority opinion in *SWANCC* and carried forward in *Rapanos* by Justice Kennedy. The Rule also establishes transparency in how the agencies will make significant nexus determinations by listing specific factors instead of leaving those decisions within the discretion of an agency employee.

The Clean Water Rule carries forward the jurisdictional exclusions for waste treatment systems and prior converted cropland. It also adds new regulatory exclusions such as for certain ditches, artificially irrigated areas, farm and stock water ponds, irrigation ponds, settling basins, fields flooded for rice growing, log cleaning ponds, cooling ponds, reflecting and swimming pools, ornamental waters, water-filled depressions incidental to mining or construction, erosional features and grassed waterways, groundwater including tile drains, stormwater features, wastewater recycling and groundwater recharge.

For greater detail on the inclusions and exclusions, the complete text of the Clean Water Rule is attached as an appendix to this statement.

The Clean Water Rule is a carefully considered rule that was developed with unprecedented public engagement and comment. The agencies received and considered over one million public comments over a period of 207 days. The agencies held over 400 public meetings all across the country. I personally attended about 70 of those meetings in my prior capacity, both in Washington and around the country, including multiple visits to farms. The Rule applies the law as written by Congress and interpreted by the Supreme Court; it relies upon the best available peer-reviewed science to support its scope; and it is the product of over 40 years of technical expertise of the U.S. EPA and the Department of the Army working with the Corps of Engineers in administering the Clean Water Act.

Unfortunately, the Rule's benefits of clarity, predictability and consistency have been put on hold by the courts, but that will ultimately be resolved. I personally am very aware of the controversy surrounding the scope of the Clean Water Act over these many years, but I also believe it is a disservice to the public that the Trump administration has indicated that it will undertake a new rule-making to retreat from the Clean Water Rule. Of even greater concern is the stated intent of the Trump administration to develop a new rule based upon the plurality opinion authored by Justice Scalia in *Rapanos*. This would be a retreat from the 1986 Rule adopted by the Reagan administration.

The plurality opinion in *Rapanos* was expressly rejected by five of the nine justices – rejected by a majority of the court. In addition to the four dissenting justices who rejected the plurality opinion, Justice Kennedy wrote that the plurality opinion "makes little practical sense" and was "unpersuasive." He concluded, "In sum, the plurality's opinion is inconsistent with the

Act's text, structure, and purpose." The current effort to develop a Scalia-based rule is guaranteed to continue the post-*Rapanos* confusion and litigation for many, many years to come, and is not likely to withstand judicial challenge.

The Trump EPA has put forward a false choice that providing protection against polluting and destroying waterbodies somehow is adverse 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-six of the fifty States already implement many day-to-day aspects of the Clean Water Act through state permitting programs. Plus, a significant number of States have not challenged the Clean Water Rule and their interests are undercut by the proposed rollback.

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 – as much as 60 percent nationally. In more arid areas of the country, this could be as high as 80 to 90 percent. 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 no evidence that any State has done so.

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 in need of reduced pollution and increased protection. Abandoning upstream waters and continuing the confusion on how to protect water quality does not advance these joint efforts at the State and Federal level. In my thirty-plus years in water law, I have never heard 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. The Clean Water Rule advances the cause of protecting human health and the environment. This is not a time for retreat.

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

APPENDIX to Statement of Ken Kopocis

The following definition was published on June 29, 2015 by EPA and the Department of the Army as the Clean Water Rule. On October 9, 2015, the 6th Circuit Court of Appeals stayed the use of the revised rule. The revised rule is reproduced below.

Code of Federal Regulations

(Revised 2015 by Clean Water Rule, currently stayed by 6th Circuit.)

Title 40 - Protection of Environment. CHAPTER I - ENVIRONMENTAL PROTECTION AGENCY (CONTINUED). SUBCHAPTER D - WATER PROGRAMS. PART 122 - EPA ADMINISTERED PERMIT PROGRAMS: THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM. Subpart A - Definitions and General Program Requirements.

Authority: The Clean Water Act, 33 U.S.C. 1251 *et seq*.

Source: 80 FR 37054, June 29, 2015

§ 122.2 Definitions.

The following definitions apply to parts 122, 123, and 124. Terms not defined in this section have the meaning given by CWA. When a defined term appears in a definition, the defined term is sometimes placed in quotation marks as an aid to readers.

* * * * *

Waters of the United States or *waters of the U.S.* means:

(1) For purposes of the Clean Water Act, 33 U.S.C. 1251 et seq. and its implementing regulations, subject to the exclusions in paragraph (2) of this definition, the term "waters of the United States" means:

(i) 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;

(ii) All interstate waters, including interstate wetlands;

(iii) The territorial seas;

(iv) All impoundments of waters otherwise identified as waters of the United States under this section;

(v) All tributaries, as defined in paragraph (3)(iii) of this section, of waters identified in paragraphs (1)(i) through (iii) of this section;

(vi) All waters adjacent to a water identified in paragraphs (1)(i) through (v) of this definition, including wetlands, ponds, lakes, oxbows, impoundments, and similar waters;

(vii) All waters in paragraphs (1)(vii)(A) through (E) of this definition where they are determined, on a case-specific basis, to have a significant nexus to a water identified in paragraphs (1)(i) through (iii) of this definition. The waters identified in each of paragraphs (1)(vii)(A) through (E) of this definition are similarly situated and shall be combined, for purposes of a significant nexus analysis, in the watershed that drains to the nearest water identified in paragraphs (1)(i) through (iii) of this definition. Waters identified in this paragraph shall not be combined with waters identified in paragraph (1)(vi) of this definition when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (1)(vi), they are an adjacent water and no case-specific significant nexus analysis is required.

(A) Prairie potholes. Prairie potholes are a complex of glacially formed wetlands, usually occurring in depressions that lack permanent natural outlets, located in the upper Midwest.

(B) Carolina bays and Delmarva bays. Carolina bays and Delmarva bays are ponded, depressional wetlands that occur along the Atlantic coastal plain.

(C) Pocosins. Pocosins are evergreen shrub and tree dominated wetlands found predominantly along the Central Atlantic coastal plain.

(D) Western vernal pools. Western vernal pools are seasonal wetlands located in parts of California and associated with topographic depression, soils with poor drainage, mild, wet winters and hot, dry summers.

(E) Texas coastal prairie wetlands. Texas coastal prairie wetlands are freshwater wetlands that occur as a mosaic of depressions, ridges, intermound flats, and mima mound wetlands located along the Texas Gulf Coast.

(viii) All waters located within the 100-year floodplain of a water identified in paragraphs (1)(i) through (iii) of this definition and all waters located within 4,000 feet of the high tide line or ordinary high water mark of a water identified in paragraphs (1)(i) through (v) of this definition where they are determined on a case-specific basis to have a significant nexus to a water identified in paragraphs (1)(i) through (v) of this definition. For waters determined to have a significant nexus, the entire water is a water of the United States if a portion is located within the 100-year floodplain of a water identified in (1)(i) through (iii) of this definition or within 4,000 feet of the high tide line or ordinary high water mark. Waters identified in this paragraph shall not be combined with waters identified in paragraph (1)(vi) of this definition when

performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (1)(vi), they are an adjacent water and no case-specific significant nexus analysis is required.

(2) The following are not "waters of the United States" even where they otherwise meet the terms of paragraphs (1)(iv) through (viii) of this definition.

(i) Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the Clean Water Act. This exclusion applies only to manmade bodies of water which neither were originally created in waters of the United States (such as disposal area in wetlands) nor resulted from the impoundment of waters of the United States. [See Note 1 of this section.]

(ii) Prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

(iii) The following ditches:

(A) Ditches with ephemeral flow that are not a relocated tributary or excavated in a tributary.

(B) Ditches with intermittent flow that are not a relocated tributary, excavated in a tributary, or drain wetlands.

(C) Ditches that do not flow, either directly or through another water, into a water identified in paragraphs (1)(i) through (iii) of this definition.

(iv) The following features:

(A) Artificially irrigated areas that would revert to dry land should application of water to that area cease;

(B) Artificial, constructed lakes and ponds created in dry land such as farm and stock watering ponds, irrigation ponds, settling basins, fields flooded for rice growing, log cleaning ponds, or cooling ponds;

(C) Artificial reflecting pools or swimming pools created in dry land;

(D) Small ornamental waters created in dry land;

(E) Water-filled depressions created in dry land incidental to mining or construction activity, including pits excavated for obtaining fill, sand, or gravel that fill with water;

(F) Erosional features, including gullies, rills, and other ephemeral features that do not meet the definition of tributary, non-wetland swales, and lawfully constructed grassed waterways; and

(G) Puddles.

(v) Groundwater, including groundwater drained through subsurface drainage systems.

(vi) Stormwater control features constructed to convey, treat, or store stormwater that are created in dry land.

(vii) Wastewater recycling structures constructed in dry land; detention and retention basins built for wastewater recycling; groundwater recharge basins; percolation ponds built for wastewater recycling; and water distributary structures built for wastewater recycling.

(3) In this definition, the following terms apply:

(i) Adjacent. The term adjacent means bordering, contiguous, or neighboring a water identified in paragraphs (1)(i) through (v) of this definition, including waters separated by constructed dikes or barriers, natural river berms, beach dunes, and the like. For purposes of adjacency, an open water such as a pond or lake includes any wetlands within or abutting its ordinary high water mark. Adjacency is not limited to waters located laterally to a water identified in paragraphs (1)(i) through (v) of this definition. Adjacent waters also include all waters that connect segments of a water identified in paragraphs (1)(i) through (v) or are located at the head of a water identified in paragraphs (1)(i) through (v) of this definition and are bordering, contiguous, or neighboring such water. Waters being used for established normal farming, ranching, and silviculture activities (33 U.S.C. 1344(f)) are not adjacent.

(ii) Neighboring. The term neighboring means:

(A) All waters located within 100 feet of the ordinary high water mark of a water identified in paragraphs (1)(i) through (v) of this definition. The entire water is neighboring if a portion is located within 100 feet of the ordinary high water mark;

(B) All waters located within the 100-year floodplain of a water identified in paragraphs (1)(i) through (v) of this definition and not more than 1,500 feet from the ordinary high water mark of such water. The entire water is neighboring if a portion is located within 1,500 feet of the ordinary high water mark and within the 100-year floodplain;

(C) All waters located within 1,500 feet of the high tide line of a water identified in paragraphs (1)(i) or (iii) of this definition, and all waters within 1,500 feet of the ordinary high water mark of the Great Lakes. The entire water is neighboring if a portion is

located within 1,500 feet of the high tide line or within 1,500 feet of the ordinary high water mark of the Great Lakes.

(iii) Tributary and tributaries. The terms tributary and tributaries each mean a water that contributes flow, either directly or through another water (including an impoundment identified in paragraph (1)(iv) of this definition), to a water identified in paragraphs (1)(i) through (iii) of this definition that is characterized by the presence of the physical indicators of a bed and banks and an ordinary high water mark. These physical indicators demonstrate there is volume, frequency, and duration of flow sufficient to create a bed and banks and an ordinary high water mark, and thus to qualify as a tributary. A tributary can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, canals, and ditches not excluded under paragraph (2) of this definition. 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 constructed breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as wetlands 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 water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if it contributes flow through a water of the United States that does not meet the definition of tributary or through a non-jurisdictional water to a water identified in paragraphs (1)(i) through (iii) of this definition.

(iv) Wetlands. The term wetlands means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

(v) Significant nexus. The term significant nexus means that a water, including wetlands, either alone or in combination with other similarly situated waters in the region, significantly affects the chemical, physical, or biological integrity of a water identified in paragraphs (1)(i) through (iii) of this definition. The term “in the region” means the watershed that drains to the nearest water identified in paragraphs (1)(i) through (iii) of this definition. For an effect to be significant, it must be more than speculative or insubstantial. Waters are similarly situated when they function alike and are sufficiently close to function together in affecting downstream waters. For purposes of determining whether or not a water has a significant nexus, the water's effect on downstream (1)(i) through (iii) waters shall be assessed by evaluating the aquatic functions identified in paragraphs (3)(v)(A) through (I) of this definition. A water has a significant nexus when any single function or combination of functions performed by the water, alone or together with similarly situated waters in the region, contributes significantly to the chemical, physical, or biological integrity of the nearest water identified in paragraphs (1)(i) through (iii) of this definition. Functions relevant to the significant nexus evaluation are the following:

(A) Sediment trapping,

(B) Nutrient recycling,

(C) Pollutant trapping, transformation, filtering, and transport,

(D) Retention and attenuation of flood waters,

(E) Runoff storage,

(F) Contribution of flow,

(G) Export of organic matter,

(H) Export of food resources, and

(I) Provision of life cycle dependent aquatic habitat (such as foraging, feeding, nesting, breeding, spawning, or use as a nursery area) for species located in a water identified in paragraphs (1)(i) through (iii) of this definition.

(vi) Ordinary high water mark. The term ordinary high water mark means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.

(vii) High tide line. The term high tide line means the line of intersection of the land with the water's surface at the maximum height reached by a rising tide. The high tide line may be determined, in the absence of actual data, by a line of oil or scum along shore objects, a more or less continuous deposit of fine shell or debris on the foreshore or berm, other physical markings or characteristics, vegetation lines, tidal gages, or other suitable means that delineate the general height reached by a rising tide. The line encompasses spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds such as those accompanying a hurricane or other intense storm.