

TESTIMONY OF BECKY W. KEOGH  
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TESTIMONY TO THE  
HOUSE TRANSPORTATION AND INFRASTRUCTURE  
SUBCOMMITTEE ON WATER RESOURCES AND ENVIRONMENT

SEPTEMBER 18, 2019

Chairman Grace Napolitano (CA) and ranking member Bruce Westerman (AR), I am Becky Keogh, Secretary of Arkansas's Department of Energy and Environment. I bring greetings from the Natural State and from my Governor (your former colleague) the Honorable Asa Hutchinson. It is an honor to be in Washington, D.C. today appearing before the Subcommittee on Water Resources and Environment. As our state slogan suggests, in Arkansas we are incredibly concerned with the health, beauty, and safety of the waters of the United States. In fact, our Governor has recently taken extraordinary steps (both financial and regulatory) to ensure the enduring beauty and quality of the Buffalo National River, America's first National River, which was designated as such by this very body several decades ago. Arkansas's own senior statesman, John Paul Hammerschmidt, lead the charge to preserve the Buffalo River as both a pristine resource and a majestic treasure. And Governor Hutchinson picked up where Congressman Hammerschmidt left off by successfully negotiating an agreement to further protect the Beautiful Buffalo River and to establish permanent protection through a conservation easement on land where a controversial 6500 plus hog farm was authorized and operating. His action was accompanied by a call for a permanent moratorium on similar facilities in the river's watershed. In the announcement, Governor Hutchinson noted that he "believes in farming," but that must be balanced with efforts to preserve [the Buffalo] as "a national treasure."

Finding the balance between progress and preservation is a constant struggle for environmental regulators, legislators, and increasingly more often, federal judges. That is one too many cooks in the kitchen, I think we all can agree. When judges are left to legislate, we have all failed. The recent repeal of the 2015 Clean Water Rule is the first step in making sure we are all using the same cookbook and the same recipe. Prior to the recent repeal, twenty-two states followed the 2015 Rule, while twenty-seven did not. (And, Arkansas's fellow Region 5 state, New Mexico was left unclear as to which cookbook to use or if it was able to cook at all). According to United States Court of Appeals for the Eighth Circuit, Arkansas was not subject to the 2015 Rule, but our bordering states of Tennessee and Oklahoma were. Yet, we share common ingredients: the Mississippi River with Tennessee (creating jurisdictional and adjacent-wetland issues); and with Oklahoma we share numerous interstate waters some tributaries of which may currently be jurisdictional in Oklahoma but not in Arkansas.

Without a consistent definition of what is and what is not a Water of the United States (WOTUS), states were left to whip something up, from scratch. Arkansas and Oklahoma, with our Cherokee National tribal partners, are—for the first time ever—working together on an Illinois River watershed improvement plan. The basin-wide effort seeks to restore and protect the Illinois River, which also runs through the Cherokee Nation. The plan engages stakeholders, cities, and industry to jointly address historical issues and to assure progress continues while realizing the growth of community and agricultural interests. While our multi-state and tribal partners share a sense of direction, we struggled with boiling down our different regulatory mandates into one pot containing seemingly the same, but (at least according to the 2015 rule) actually different quality water. Having a uniform understanding of the fundamental definitions of WOTUS will certainly enable more effective management of shared water bodies among the states. But, it is not only uniformity that we seek. (As they say, never trust a skinny cook.) We want also want a rule that is lucid not ludicrous in its application.

The 2015 Rule has diverse and widespread opposition because of its extraordinary, (in pot-stirrer terms) perhaps unconstitutional, reach. The rule would have made it possible to regulate “waters” that were in reality dry land, such as a depressions in land that hold water a few days a year after heavy precipitation. Under the rule, citizens were encumbered from engaging in routine activities, such as home construction, infrastructure investment, and farming. The 2015 rule was so extreme it even sought to regulate waters invisible to the naked eye. The American Farm Bureau Federation explained:

...distant regulators using “desktop tools” can conclusively establish the presence of a “tributary” on private lands, even where the human eye can’t see water or any physical channel or evidence of water flow. That’s right—invisible tributaries! The agencies even claim “tributaries” exist where remote sensing and other desktop tools indicate a prior existence of bed, banks, and [ordinary high-water marks], where these features are no longer present on the landscape today.

And, as Heritage Foundation Senior Research Fellow Daren Bakst aptly stated: “If waters didn’t fall under specific categories as listed in the rule, then the . . . rule created a backup plan” to extend its reach by including a “we will know a regulated water when we see it aspect of the rule.” And as a means to this end, the EPA and the Corps were functioning more as local-zoning boards than federal regulators.

A broad range of states, citizens, tribal nations, cities, and industries started turning up the heat on the EPA and Corps of Engineers, demanding relief from the ambiguity and overreach of the 2015 rule. From our view, a dramatic change was critical to the continued vitality of our farmers, counties, and industries. We asked the EPA and the Corps to remove wasteful regulatory duplication (we don’t always need a second serving of regulation) and to respect the integrity of our state programs. We asked them

to serve up a solution that abandoned (or at least simmered down) their helicopter-mom mentalities that occurred in regulatory authorization and decision making. In Arkansas specifically, we needed a rule that would allow critical investments to advance and expand broadband and highway infrastructure.

Supreme Court Justice Scalia set out a recipe for success when he argued that the Clean Water Act applied only to waterways with “relatively permanent” surface water connections to navigable waters in the *Rapanos v. United States* 4-1-4-decision. And just last week, all this pot stirring has come to a head, as EPA Administrator Andrew Wheeler and Assistant Secretary of the Army for Civil Works R.D. James E finalized their efforts to repeal the 2015 regulation, and in so doing clarified which wetlands and waterways are subject to the Clean Water Act. (Who says a watched pot never boils?) As noted by our United States Senator, Tom Cotton, we now have a workable rule that is:

more sensibly balanced between conservation, on the one hand, and development. We want to protect our waterways, which is the source of so much enjoyment and satisfaction and commerce in our state and all across the country, but at the same time we want to protect private property rights and development as well," he said. "Rivers like the Buffalo National River or the Arkansas River [or] the White River are waterways of the United States, clearly, under what our founders meant in the Constitution. Puddles in backyards? Not so much.

By sorting out the required and limited ingredients of the Clean Water Act and spelling out each step of the proper recipe, these revisions curtail states who set out to misapply Section 401 of the Clean Water Act in ways that negatively impact the economies of other states, perhaps (more pot stirring) in violation of the Commerce Clause. The new rule allows states the flexibility of “seasoning” the solution, but prevents states from shutting out neighboring states from entire markets. And while we do not face the same waterway challenges of some states, Arkansas is a net exporter of

natural gas and is thereby supportive of a protective permitting program that reduces environmental risk while at the same time meets market-response and critical-use needs.

And, in Arkansas we further reduce environmental risk by employing a variety of best management practices. Of particular concern to you, Congressman Westerman, Arkansas's Secretary of Agriculture, Wes Ward, reports a high adoption rate of forestry best management practices, including water-quality protection as well as unique agriculture engagement to manage and prevent wildfires. As you know, these Arkansas forestry-led initiatives (from how to build temporary logging roads: where to put dips and turnout ditches, how to do stream crossings with skidders when logging, to stream-side management zones that require at least thirty-five feet of trees to remain on both sides of the stream, for seventy-feet total, along with prescribed-burns and prescribed-burn education as well as an un-paved road initiative modeled after a successful Pennsylvania program) have proven effective in preventing wildfires, increasing shade, and reducing sediment. In 2018, Arkansas statistically monitored 200 recent logging jobs for best management practices and found there was an 92% implementation rate. Such action underscores Arkansas's commitment to conservation, it could be said that we are cooking up a storm with state-led environmental solutions.

In closing, I I will echo the words of the ranking member of this committee, your friend and a friend to Arkansas, the Honorable Bruce Westerman. In his support of the new WOTUS rule (in his support of a common cookbook, with a workable recipe), he noted that the rollback of the 2015 rule ends "years of uncertainty over where federal jurisdiction begins and ends. For the first time, we are clearly delineating the difference between federally protected wetlands and state-protected wetlands." Thank you for your time and consideration.