On February 8, the House Transportation and Infrastructure Subcommittee on Water Resources and Environment held a hearing on stakeholder perspectives of the 2023 Waters of the Unites States (WOTUS) rule. Witnesses included: Alicia Huey, National Association of Home Builders; Garrett Hawkins, Missouri Farm Bureau; Mark Williams, National Stone, Sand & Gravel Association; Susan Parker Bodine, Earth & Water Law; and Dave Owen, UC College of the Law, San Francisco.

Huey said: "For most of the last two decades, builders and developers have faced constantly changing regulatory definitions of WOTUS, making our decisions, including project financing, land acquisitions, project design, land development, and homebuilding activities exceedingly difficult." She noted that home building is a complex and highly regulated industry, that government regulations account for more than a quarter of the price of a new single-family home, and that uncertainty due to unclear regulations increases those costs. "A key component of effective regulation is ensuring that federal, state, and local agencies cooperate and coordinate to streamline permitting requirements and respect the constitutional roles of each level of government…. Home builders support removing redundancy, clarifying jurisdictional authority, and having the agencies facilitate compliance while protecting and improving the aquatic environment. Unfortunately, the final rule fails to provide the clarity and certainty the construction industry seeks. This rule will increase federal regulatory power over private property and lead to increased litigation, permit requirements, and lengthy delays for any business trying to comply. Equally important, these changes will not significantly improve water quality because much of the rule improperly encompasses water features already regulated at the state level." She pointed out the uncertainty raised by the ambiguous and undefined terms in the new rule, including, "tributary," "neighboring," and "similarly situated waters in the region," and the lack of clarity in the "significantly affects" test that will be applied to three of the five jurisdictional categories (tributaries, adjacent wetlands, and intrastate waters).

Hawkins said: "Perversely, the Agencies' broad assertion of jurisdiction can make it more difficult for farmers and ranchers to engage in soil conservation activities. Farmers and ranchers have more incentive than most to preserve topsoil on their land; as such, where land is at risk of erosion, they may want to engage in mitigation activities. Farmers and ranchers also often take on projects that provide stormwater management, wildlife habitat, flood control, and nutrient processing and improve overall water quality in uplands and ephemeral features. But, if they cannot do this without applying for a federal permit, it may be cost-prohibitive, resulting in environmental degradation, not protection…. This new rule will only create more confusion for landowners and will inevitably slow down many of the important economic drivers that benefit our communities. This unnecessary regulatory red-tape places a burden on our nation's farmers and ranchers while stripping the states of their historic regulatory role. Farmers and ranchers want clean water and clear rules, so they can remain focused on what they do best - providing food, fiber and renewable fuel for our nation and the world."

Hawkins continued: "The significant nexus test can be used to assert jurisdiction over tributaries, adjacent wetlands, and basically any 'other water' because the rule uses undefined, amorphous terms like 'similarly situated,' 'in the region' and 'material influence' that will leave farmers and ranchers guessing about whether waters on their lands are WOTUS. This suggests that regulators can manipulate the standard to reach whatever outcomes they please and that farmers and ranchers may not know the outcomes until they are already exposed to civil and criminal liability, including devastating penalties."

Williams said: "This is already the fifth rule change that the regulated community and regulators have experienced in the last 10 years, and the court decision could well require a sixth change. This adds to the time for all parties to understand a new rule that may only exist for a few months, which is an unnecessary drain on corporate and government resources."

Bodine said: "In 1972, Congress did not tell EPA and the Corps: 'do whatever you think is necessary to protect water.' Instead, the [Clean Water Act (CWA)] represents a legislative compromise that carefully prescribes the scope of federal authority. For example, Congress was well aware of the importance of groundwater, but deliberately excluded groundwater from the regulatory provisions of the CWA. Congress was well aware of the ecological importance of wetlands, but as recognized in the 1973 final report of the congressionally chartered National Water Commission, Congress left the regulation of isolated wetlands and waters to the states. Congress was well aware that nonpoint sources contributed to water pollution, but Congress deliberately excluded nonpoint sources from the regulatory authority of the Act. Congress was well aware of the importance of water supplies, but deliberately refrained from regulating water supply in the CWA." She called the 2023 rule "superficially familiar" and a "codification of the agencies' prior overreach and an attempt to get judicial deference for that overreach."

Bodine walked through a stepwise progression of jurisdictional expansion by EPA and the Corps every few years between 1973 and 2008, and pushback from the U.S. Supreme Court between 2001 and 2016. She called the new WOTUS rule's use of the presence of animals as a basis for jurisdiction another expansion. "Contrary to this novel interpretation of the CWA, there is no basis in the text or history of the CWA to support the idea that federal jurisdiction is based on the movement of animals. Water quality is the presence or absence of pollution that impacts the ability of a body of water to meet its designated uses." She referenced the Technical Support Document, indicating that the most common type of connection between navigable waters and wetlands, floodplains, open waters, and all stream types (including ephemeral channels) is a biological connection. For isolated waters, groundwater is the most common connection to navigable waters. "Dispersal of biota and groundwater are likely to become the primary ways EPA and the Corps claim control over private property, even though nothing in the CWA or its legislative history supports this outcome." She also detailed the erosion of exemptions for farmers over time, and the expansion of concepts of tributaries and adjacency.

Bodine noted that, despite repeated claims of extensive experience, the agencies themselves have admitted that they have no experience asserting jurisdiction over intrastate, non-navigable waters based on the significant nexus test. She said: "To support expanded jurisdiction under the 2023 WOTUS Rule, the agencies also claim that an isolated water can affect the integrity of a navigable water by either preventing or contributing water flows. These flows include overland sheet flow spilling from a wetland and contributions to groundwater that later recharges to surface water. They make this claim even though claiming jurisdiction based on water supply functions contravenes section 101(g) of the CWA."

Owen compared the failings of the 2020 Navigable Waters Protection Rule with the statutory consistency of the 2023 WOTUS Rule, which he referred to as the 2022 rule. (The Corps and EPA signed the final rule at the end of 2022, and it was published in the Federal Register at the beginning of 2023.) He said: "The rule is necessary to protect water quality. It is consistent with the Clean Water Act's text and with decades of nearly uninterrupted agency interpretations and practice. It makes economic sense. And it is also necessary because the regulation it replaces — a rule promulgated in 2020 under the previous administration — was at odds with statutory text, water quality protection, rational economics, and its own stated justifications." He talked about how water is defined in everyday language, regardless of the seasonality; how the presence of waters in the nation makes them "of the United States"; and how the central purpose of the CWA is to protect water quality. He provided a brief history of the long-established standards under the CWA and the extensive studies on water quality science. "The 2022 rule, with its emphasis on water quality connections, appropriately respects the importance of science. This time around, the agencies have quantified the areas that would retain protection. Likewise, they have explained, at length, how scientific research informs their choices about the geographic scope of Clean Water Act protection. They have respected, rather than ignored, their mandate from Congress."

Owen discussed the economic value of the new rule. "The 2022 rule recognizes the obvious: water quality is economically valuable. Improved water quality raises home values. Many economic activities directly depend on clean water and on protection of the physical integrity of streams and wetlands. Hunting, fishing, and boating are all large industries — as well as activities that bring many Americans the difficult-to-quantify happiness that comes from recreating outside. Many other businesses depend on quality water as an industrial input…. Dirty water also poses huge financial burdens on public water suppliers and the customers they serve. Water treatment is expensive, and it becomes more expensive if the water source has more contaminants. Preventing pollution is usually much cheaper than cleaning it up, but if the Clean Water Act does not apply, and pollution prevention does not occur, the public can get stuck with big bills…. On the other side of the ledger, the costs of protecting wetlands and streams tend to be greatly overstated. The subset of businesses that objects to Clean Water Act regulations typically argues that the law shuts down productive activities and that perceived ambiguities in the scope of Clean Water Act coverage create crippling uncertainty." He noted that property owners have flexibility through permitting processes, allowing them to develop in a way that avoids wetlands or streams, or to use compensatory mitigation to proceed with their project. He also pointed out the property owners can find out about the scope of the CWA coverage by reading the Corps' detailed manual explaining how to identify jurisdictional waters, by seeking a free jurisdictional determination from the Corps, or by reaching out to an extensive environmental consulting industry.

Owen concluded his testimony with a discussion about protecting state authority. "The Clean Water Act is designed to empower states by helping them work with the federal government to protect their water quality. It was not designed to let states turn polluters loose. The act, in other words, seeks to empower states — and in fact does so — but it empowers them to clean up waterways, not to leave them dirty…. The Clean Water Act is built on cooperative federalism. In this system, states are crucially important as partners in working toward the shared national goal of water quality protection." He referenced CWA section 101(b) about protecting the primary responsibilities and rights of States to prevent pollution, then said: "This language clearly emphasizes the importance of states. But it expresses Congress's desire for the states to be heavily involved in protecting waters that are subject to Clean Water Act jurisdiction. It says

nothing about excluding a class of aquatic features from that protection or about turning states loose to authorize pollution. Other language of section 101 also indicates that the purpose of state involvement was to restrain water pollution, not protect polluters…. The text therefore makes the goal of section 101(b) crystal clear. Congress was enlisting the states in pursuit of the crucial national goal of protecting water quality. It was not trying to limit the scope of the Clean Water Act's coverage."

Owen explored other sections of the CWA and the role of states in implementing much of the statute, and noted that state implementation is dependent on federal funds and contingent on waters falling within CWA jurisdiction. But he noted that there are other ways that the CWA leaves state authority intact. "Even if a waterway is subject to federal jurisdiction, states still retain primary responsibility for allocating water rights in that waterway. If the waterway is navigable-in-fact — and thus unquestionably subject to Clean Water Act jurisdiction — the state in which it is located still owns its streambed. Similarly, so long as streams or wetlands are not on federally owned land, states and local governments retain their land use authority over those streams and wetlands and surrounding uplands. Nor is there *de facto* preemption of that authority. If states or local governments want to authorize development in areas with jurisdictional aquatic features, they generally can, and they routinely do so; the Corps issues tens of thousands of fill permits every year, and permit denials are exceedingly rare."