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WILL EPA'S 'WATERS OF THE UNITED STATES' RULE DROWN SMALL BUSINESSES?

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COMMITTEE ON SMALL BUSINESS
UNITED STATES
HOUSE OF REPRESENTATIVES

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WILL EPA'S 'WATERS OF THE UNITED STATES' RULE DROWN SMALL BUSINESSES?

THURSDAY, MAY 29, 2014

HOUSE OF REPRESENTATIVES,
COMMITTEE ON SMALL BUSINESS,
Washington, DC.

The Committee met, pursuant to call, at 1:00 p.m., in Room 2360, Rayburn House Office Building. Hon. Sam Graves [chairman of the Committee] presiding.

Present: Representatives Graves, Chabot, King, Luetkemeyer, Tipton, Herrera Beutler, Huelskamp, Schweikert, Bentivolio, Collins, Rice, Velázquez, Schrader, Chu, and Payne.

Chairman GRAVES. Good afternoon, everyone. We will call the hearing to order. I want to thank our witnesses for being here.

In my four years as chairman, the Committee on Small Business has held more than 20 hearings examining the effects of regulations on small businesses and the economy. However, few regulations examined at these previous hearings are as expansive and potentially damaging to small businesses as the recently proposed "Waters of the United States" rule. This rule as currently drafted could extend the regulatory reach of the Clean Water Act to thousands of small streams, ditches, ponds, and other isolated waters, some of which have very little or no connection to traditionally navigable waterways.

The agency claims that the proposed rule will increase clarity as to which waters are subjected to the Clean Water Act jurisdiction. However, this proposed rule creates more confusion, not less. Terms like neighboring, floodplain, riparian an area, tributary, and significant nexus are vaguely defined and fail to clarify where the Clean Water jurisdiction will end.

Under this proposed rule, farmers, ranchers, home builders, and a variety of other small businesses could find their lands and livelihoods subject to the Clean Water Act jurisdiction for the very first time. And the burdens of this regulatory regime extend beyond the need to obtain federal permits and will also require costly and time-consuming mitigation activities and project modifications. While this proposed rule clearly has significant consequences for small businesses, the EPA and Army Corps of Engineers failed to assess those impacts. Had the agencies conducted research and gotten input from small businesses as required by the Regulatory Flexibility Act, perhaps they would have identified and fixed some of the problems with the rule before it was proposed. This rule threatens to drown small businesses in unnecessary regulatory requirements, and for that reason, I hope the EPA and the Corps will

withdraw the rule and conduct the required small business impact analysis and outreach before proceeding.

And again, I want to thank all of our witnesses for being here, each one of you. We look forward to your testimony, and I now yield to Ranking Member Velázquez for her opening statement.

Ms. VELAZQUEZ. Thank you, Mr. Chairman.

Since its establishment in 1970, the Environmental Protection Agency has been vital to protecting public health and safety. Over the last 40 years, a series of laws passed by Congress have placed greater responsibility on the agency for ensuring the water we drink and the air we breathe is safe and not a threat to human health. Most of us, including many on both sides of the aisle, likely agree that the goals of the EPA, protecting our health and environment, should be a priority. Reducing pollution and environmental risk is not only important to public health, but carries important economic benefits as well. However, as the EPA carries out its vital mission, it must always be mindful of how new rules and regulations impact our nation's small businesses.

One of the EPA's primary responsibilities is the enforcement of the Clean Water Act, whose implementation is shared in part with the Army Corps of Engineers. Through these steps and the implementation of the act, Americans are healthier, our waterways are being remediated, and as a result, many industries are seeing greater opportunities. In light of this, it is clear that no small business wants our water supply to be compromised. In fact, we have heard time and again in this committee, how entrepreneurs are pioneering many of the clean technologies that are reducing pollution. Still, when we talk about regulations, the truth of the matter is that such rules almost always impact small firms.

Today, we will examine one such regulation—the EPA and Army Corps' proposed rule redefining which waters are subject to the Clean Water Act. Under this proposal, new bodies of water will become subject to the act, while others will be excluded. Additionally, steps are taken to preserve further exemptions for normal farming and ranching activities, such as irrigation and the runoff of stormwater, activities that are often undertaken by small firms.

Regardless, these changes will result in winners and losers, and unfortunately, some small businesses, particularly those involved in construction and agriculture, will likely be subject to greater regulatory costs. It is important to note, however, that there are many sectors also dominated by small businesses which will benefit. This includes companies engaged in recreation, tourism, hunting, fishing, and boating. For those companies, their livelihood is often tied to clean water. This rule also brings with it water economic benefits, making our drinking water safer and providing farms with clean water to irrigate their crops. Unbalanced, it appears that there will be small businesses on both sides of this issue.

Regardless, small businesses need a rule that works for everyone, not just a few. With this in mind, it is concerning that no regulatory flexibility analysis was performed. While the agency certified this proposed rule would not have a significant economic impact on a substantial number of small entities, it provided no justification for this finding. Such agency indifference is something

that this committee is all too familiar with. Similarly, the EPA's analysis found that there was no need to conduct a small business advocacy review panel, a special requirement for the EPA.

During today's hearing, I am interested in witnesses' perspectives on the agency's rationale for not taking these steps. These issues are not new to this committee. It is critical that as new rules are developed, small business interests must be balanced against our desire to preserve the environment. Central to this is making sure small firms have the ability to provide input and make substantive comments throughout the regulatory process.

Today, I hope to hear very clearly how EPA concluded or did not conduct outreach to small firms. I want to know what is working and what is not, and most of all, how the process can be improved. Such steps are critical, especially as we continue to consider changes to the Regulatory Flexibility Act. As with most regulatory matters, there are small businesses on both sides of this issue, and given this, it is important that we hear from them. The reality is that small firms and their job creating potential are central to our economy as is a clean and healthy environment. Balancing these two goals has never been more important and more difficult, and I look forward to today's hearing to gain insight into these very matters.

With that, I thank our witnesses for their participation, and I yield back the balance of my time. Thank you, Mr. Chairman.

Chairman GRAVES. If any other Committee members have an opening statement prepared, I would ask that you submit it so we can include it in the record.

I would also like to take just a minute to explain the lights. There are five minutes for testimony, and when it comes down to one minute, the yellow light will come up. And we ask that you try to adhere to it, but if you go over, we are not going to stop you.

And with that, we will start with introductions. And our first witness is Jack Field. He is the owner of a small commercial cattle operation, the Lazy JF Cattle Company in Yakima, Washington. Mr. Field also serves as the executive vice president of the Washington Cattlemen's Association, and in that role he works with livestock producers and educates them about state and federal water quality regulations. Mr. Field is also a member of the National Cattlemen's Beef Association, and he is testifying today on behalf of both organizations. Thanks for being here and coming all this way. And we look forward to your testimony.

STATEMENTS OF JACK FIELD, OWNER, LAZY JF CATTLE COMPANY; ALAN PARKS, VICE PRESIDENT, MEMPHIS STONE AND GRAVEL COMPANY; TOM WOODS, PRESIDENT WOODS CUSTOM HOMES; WILLIAM BUZBEE, PROFESSOR, EMORY ENVIRONMENTAL AND NATURAL RESOURCES LAW PROGRAM, EMORY LAW SCHOOL

STATEMENT OF JACK FIELD

Mr. FIELD. Thank you, Mr. Chair.

Good afternoon. My name is Jack Field. I am a cattle rancher from Yakima, Washington, and the executive vice president of the

Washington Cattlemen's Association. WCA is an affiliate of the National Cattlemen's Beef Association of which I am also a member.

Thank you to the chairman and ranking member for allowing me to testify today on the impacts of the EPA and Army Corps' proposed expanded definitions of waters of the United States. I will also provide my concerns with the interpretive role that was promulgated alongside this proposal.

I own and manage 120 head of cattle, which is about the average number of cattle for a rancher in the U.S., which means the average producer falls under what the law considers a small business. My cattle drink from tanks which I pump from a stream so I can protect potential bull trout habitat. They also water from irrigation ditches, ponds, creeks, seeps, and puddles that they find. It is important to me and my operation to have clean water.

The cattle industry prides itself on being good stewards of our country's natural resources. We maintain open spaces, and provide wildlife habitat. We also provide the country with those juicy ribeyes we love to throw on the grill on summer days like today.

To provide these important functions, cattlemen must be able to operate without excessive federal burdens like the one we are discussing today. As a producer and the head of a state association, I can tell you after reading this proposal, it has the potential to negatively impact every aspect of my operation by dictating land use activities in Washington State from 2,600 miles away. After reading the proposal, I can say one thing is clear—this proposal is not clear.

There are undefined terms and phrases throughout the rule. The proposal would include ditches as waters of the U.S. if a regulator can distinguish a bed, a bank, and an ordinary high water mark. The proposal would also make everything within a floodplain and a riparian area a water by considering them adjacent waters. The result could be to eliminate the use of my entire summer pasture which is located wholly in a floodplain.

As you can see looking on the screen, I have a ditch running through my pasture. Cattle utilize this for drinking. In my judgment, this could easily qualify as a water of the U.S., opening me and my ranch up to significant liability. Not only could I be required to obtain a 404 permit for grazing cows in the pasture, but making it a federal water there are now considerations under the National Environmental Policy Act (NEPA) and the Endangered Species Act due to the federal decision-making in granting and denying a permit.

There also is a citizens' supervision under section 505 of the Clean Water Act that would keep me up at night. Instead of improving water quality, it is my belief, and the belief of both WCA and NCBA that this proposal will decrease water quality by discouraging conservation. I recently—next picture—completed a voluntary project which you can see here. I installed a fence that creates a riparian pasture so I can manage grazing that occurs within the riparian area, which also protects water quality. If this proposal and the interpretive rule I enforced when I started this project, I would not have completed it due to the significant legal liability the proposal created. If I implemented a conservation practice that is not on this prescriptive list of 56 practices outlined as

part of the interpretive rule, I could fall outside of the exemption and be subject to a 404 dredge and fill program. While this may not have been the intent, this was the result of the proposal.

The fence in the picture was cost-shared with local dollars from my conservation district, which does not meet the strenuous NRCS standards due to wider post spacing and reduced numbers of wires and stays. I would not go through the hassle of obtaining the 404 permit for such a small project like this. The total fence was roughly a quarter mile with an approximate cost of $1,400. My estimate in looking at this, with NRCS standards, it would cost me additionally another $300 per quarter mile. That may not sound like a lot, but when you expand that over several hundreds of acres and the fencing that goes with that, it adds up. And on a small operation like mine, every dollar counts.

Future conservation projects will not be implemented if this interpretive rule and the definitions are allowed to move forward. I could not afford to be at risk of being in violation of the Clean Water Act with violations and fines that could add up to $37,000 day and the risk of potential criminal sanctions. I want to do my part for the environment, but I cannot if it would jeopardize my entire operation.

This did not have to be the result. All the agencies had to do was to engage stakeholders early in the process, incorporate our suggestions, and we would be much further along in crafting a rule that actually clarifies the scope of the Clean Water Act jurisdiction. Despite what EPA is saying, they did not have a meaningful dialogue with the small business community. There was zero outreach to the agricultural community before the rule was proposed and before the interpretive rule went into effect. What we are left with now is a proposal that does not work for small businesses, does not work for cattle ranchers, and does not work for the environment.

I would ask that the agencies ditch the rule. I believe we can do a lot better than this. Thank you.

Chairman GRAVES. Thank you, Mr. Field.

I am trying to decide if we try to go through one more witness. We will go through one more witness. Unfortunately, we have had a series of votes called.

Our next witness is Alan Parks. He is the vice president of Memphis Stone and Gravel Company, which is a locally owned and operated aggregate supplier in Memphis, Tennessee and North Mississippi. As vice president, Mr. Parks is involved in all phases of the company's development of sand and gravel resources, including permitting and environmental compliance, and he has a degree in mining engineering. He previously worked for the Tennessee Department of Environment and Conservation. Mr. Parks is testifying on behalf of the National Stone, Sand, and Gravel Association. Thanks for being here.

STATEMENT OF ALAN PARKS

Mr. PARKS. Chairman Graves and members of the Committee, thank you for inviting me to testify on behalf of the National Stone, Sand, and Gravel Association.

My name is Alan Parks, and I am vice president of Memphis Stone and Gravel Company, which was started in 1910 and re-

mains a family-owned business. We have eight active mining facilities in Tennessee and Mississippi.

There are more than 10,000 construction aggregate operations nationwide. Of particular relevance to this hearing, 70 percent of our members are considered small business.

Aggregates are the chief ingredient in asphalt pavement and concrete, and used in nearly all building construction. As the industry that provides essential construction materials, we are deeply concerned by EPA's expansion of the Clean Water Act. This would cause further harm to an industry that has seen production drop by 39 percent since 2006.

The companies in our industry remove resources from the ground, then process them into usable construction products. We do not use or discharge any hazardous chemicals. After we recover these resources, we return the land to other productive uses, such as farm land and recreational lakes.

While stone, sand, and gravel resources may seem to be everywhere, these materials must meet strict technical guidelines to make our roads and infrastructure safe and durable. Unlike other businesses, we cannot simply choose where we operate. We are limited to where natural forces have deposited these materials. Because high quality aggregate deposits were often created by water, they are often located near water. Water management is a significant issue for any company in our industry.

EPA claims this rule is needed because so many waters are unprotected. We believe that is not the case. Before breaking ground on any project, we evaluate whether we are affecting jurisdictional water, which requires consultation with the Corps and state officials. There is an extensive review of all of our projects to ensure compliance with local, state, and federal rules governing how we can or cannot affect land and water resources.

While there are many inefficiencies in the current regulatory system, adding vague terms and undefined concepts to an already complicated program is not the way to improve the process. For example, EPA states groundwater is excluded from this rule, but the rule also says that shallow subsurface connections are included. Does this mean that water that fills our pits is jurisdictional?

From Memphis Stone and Gravel Company's point of view, it would be a rare event not to encounter shallow groundwater in sand and gravel deposits. Will a separate permit be required for reclaiming the pit and returning it to another beneficial use? These are just some of the many questions this rule poses but does not answer.

Having a clear jurisdictional determination for each site is critical to the aggregates industry. These decisions impact the planning, financing, construction, and operating of our facilities. Because the Clean Water Act dredge and fill permit and the corresponding states' 401 certification process is so long and costly for a small company like ours, we attempt to avoid jurisdictional areas.

Now under the proposed revisions, many previously nonjurisdictional areas could be considered jurisdictional. It will make nearly any area we try to access require additional permits.

The delay caused by multiple surveys, reports, and additional authorizations will add significant new costs during the permitting

process, which could lead to abandoning projects once considered viable. One NSSGA member calculated that to do the additional mitigation of a stream required under this rule would be more than $100,000. This is just one site and one project in our industry.

We make business decisions to buy or lease properties for 15 to 30 years in advance of our operations. A change in what is considered jurisdictional can have a significant impact on our material reserves, which will affect the life of our facilities and delay the start-up of new sites. If it is determined that development of a site will take too long or cost too much to acquire permits or perform mitigation, we will not move forward. That means a whole host of economic activity in a community will not occur.

Given that infrastructure investment is essential to economic recovery and growth, any change in the way land use is regulated places additional burden on the aggregates industry. This is a serious change in the rules that dictate how we can or cannot conduct business.

NSSGA appreciates this opportunity to speak on this matter. Thank you, Mr. Chairman. I will be happy to respond to any questions.

Chairman GRAVES. Thank you, Mr. Parks.

And with that, we will break. We have got a 15-minute vote and four five-minute votes at this point, so we should not be too terribly long. But I would ask everybody to stay and come back. But I apologize for this. The ranking member and I do not get to make the schedule on voting, unfortunately. But we will be back shortly.

So the Committee is in recess.

[Recess]

Chairman GRAVES. All right. We will go ahead and call the hearing back to order.

Our next witness is going to be Tom Woods, who is a home builder with more than 40 years experience in the home building industry. He is the president of Woods Custom Homes, a building company based in Blue Springs, Missouri, in my district. Tom serves as the 2014 first vice chairman of the Board of the National Association of Home Builders and is testifying on behalf of that association.

Tom, thanks for being here today. I look forward to your testimony.

STATEMENT OF TOM WOODS

Mr. WOODS. Chairman Graves and members of the Subcommittee, I appreciate this opportunity to testify today. My name is Tom Woods, and I am the president of Woods Custom Homes based in Blue Springs, Missouri, and NAHB's 2014 first vice chairman of the board.

Since its inception, the Clean Water Act has made significant strides in improving the quality of our water resources. Home builders have a vested interest in the protection of our water resources. Home building is one of the most regulated activities in this country, and as a small business owner, I can tell you that the key to a successful regulatory regime is consistency, predictability, timeliness, while focusing on protecting true aquatic resources. When it comes to the Clean Water Act, we get none of that.

For years, landowners and regulators alike have been frustrated with the confusion over what are "Waters of the United States." When the EPA and Army Corps proposed this most recent rule, we hoped it would finally provide clarity and certainty. Unfortunately, the rule falls well short of that goal.

The rule establishes broader definitions of existing regulatory categories, such as tributaries, and seeks to regulate new areas that are not currently federally regulated, such as adjacent non-wetlands, riparian areas, floodplains, and other waters.

The agencies intentionally created overly broad terms so they have the authority to interpret them. Under this rule, the federal government would regulate roadside ditches or water features that may flow, only after a heavy rainfall.

I am a businessman. I need to know the rules. I can't play a guessing game of "is it federally jurisdictional?" But that's just what this proposal would force me to do.

Builders would face new, costly delays just waiting for the agencies to determine if a road ditch is a "Water of the United States." The only winners are the lawyers, as this rule will certainly lead to increased litigation.

My business has already been a victim of permitting delays. For one of my building projects, I was entangled in the Army Corps permitting process for over two years.

These delays will only increase as the agencies work to extend federal protections to smaller waters.

While many aspects of the Clean Water Act are vague, it is clear that Congress intended to create a partnership between the federal agencies and the state governments to protect our nation's water resources. There is a point where federal authority ends and state authority begins. Unfortunately, defining that point has proven incredibly difficult.

States have adequately regulated their own waters and wetlands for years. As a former mayor, I have a firsthand understanding of the lengths that the states and local governments go in order to protect their waters. The agencies have bypassed the safeguards of the Regulatory Flexibility Act by failing to consider the true economic costs on small business. Since the agencies failed to hold a small business panel, it is clear that they are not interested in hearing from small businesses like mine. Unfortunately, all too often the EPA completely ignore the RFA requirements. The agency's economic analysis of the proposed rule failed to consider the economic impact on small businesses and is therefore fatally flawed.

According to economist Dr. David Sunding, "the errors and omissions in EPA's study are so severe as to render it virtually meaningless." That should give us all pause.

It is clear that the EPA should withdraw the economic analysis and prepare a more thorough and accurate analysis. Any final rule should provide understandable definitions and preserve the partnership between all levels of government, while also considering the impacts on small businesses. All are sorely lacking here. I request that the agency start over and develop a more meaningful and balanced rule that respects the spirit of the RFA.

Thank you for the opportunity to testify today.

Ms. VELÁZQUEZ. Mr. Chairman, it is my pleasure to introduce Professor William Buzbee. Professor Buzbee is a professor of law at Emory University School of Law, where he is also the director of the Environmental and Natural Resources law program. He will next be joining the faculty of Georgetown Law Center. Before becoming a professor, he counseled industry, municipalities, and governmental authorities about environment law, pollution control, and land use issues. Professor Buzbee has written extensively about related issues with a focus on regulatory federalism. Welcome.

STATEMENT OF WILLIAM BUZBEE

Mr. BUZBEE. Thank you very much. And thank you to all the members of the Committee.

I am pleased to accept the invitation to testify before the Committee. I think I was invited to testify due to my expertise, not as a partisan or representative of any organization, so what I will try to do is provide a little bit of context about what is going on with these proposed regulations and offer a few comments about the legality and logic of the regulations.

I should add that this is not my first involvement with the question of what is waters of the United States. Earlier, I represented a bipartisan group of former EPA administrators before the Supreme Court in the Rapanos case. They are aligned with the George W. Bush administration in trying to uphold the longstanding protections of the regulations about waters of the United States, and then subsequently, I testified at a few hearings about the very confusing ruling that emerged.

I will make five main points in my testimony. First, although people have focused on wetlands protections, it is important to understand that what is a water of the United States is a lynchpin of the whole Clean Water Act, including pollution discharges from industry, oil, and other sorts of spills and water concerns.

Second, there have been some comments about these regulations questioning if they are legal in response to what the Supreme Court has done in three major cases, and I will show that they are. In addition, there have been persistent claims, and we have heard some today, that the regulatory claims here are too broad. And I will show how these proposed regulations actually cut back on EPA and the Army Corps' jurisdiction. Very importantly, the regulations here are linked to a massive survey of peer reviewed science on wetlands. In an era when people think agencies should respect sound science and peer reviewed science, it is important to acknowledge that is the underpinning of this regulation. And then lastly, I will show how the regulations here reduce a commerce-linked rationale that long has been an underpinning of federal power.

So first, again, it is important to understand the Clean Water Act. Waters of the United States is the entire root of federal power here. So if you are concerned about industrial discharges into America's waters, industrial discharges into what might be a dry riverbed in the southwest and what would happen during a heavy rain flow, that is as much a concern as is wetlands filling. It is important to keep that in mind. And certainly given the importance

of fishing industries, the use of waters for drinking water, municipal uses and the like, protecting waters is of critical importance across the entire nation. Businesses are on all sides of this issue.

Second, this point about people's claim that this is an illegal grab of power beyond what the Supreme Court has allowed, this is clearly incorrect. Six Supreme Court justices in the Rapanos case agreed that EPA and the Army Corps, by regulation, could clarify what counts as a water of the United States. And then earlier in a case called Riverside Bayview Homes, a unanimous Supreme Court also talked about this being an area appropriate for rulemaking authority. There is no doubt this is something where authority exists. People may skirmish over what the appropriate bounds are, but is there room for rulemaking here? The answer is absolutely.

Point three. These people have failed to acknowledge that in these regulations for the first time the Army Corps and EPA have very explicitly carved out jurisdiction saying they will no longer assert jurisdiction in several areas. I will not list them off in depth because of the limited time, but it includes waste treatment systems, prior converted crop land, ditches that are upland and do not contribute flow to other waters, and really, if you look through these, several of them seem to be a direct answer to some previous testimony, which will have talked about efforts to regulate puddles and meaningless things like gutters and birdfeeders. They have clearly said that they are not reaching out to the outermost limits.

Point four has to do with the peer reviewed science. I am sure it is great reading for all of us, but there is a 300 some odd page science report that goes through all of the peer reviewed science on why you should protect waters, and the proposed regulations here tie in very directly. And so again that is an important change now in these regulations, really hinging federal jurisdiction to that science.

Now, point five, in my last few seconds, is there was a longstanding regulation 328.3(a) or (a)(3), I am sorry, that allowed the federal government to assert jurisdiction over disputed waters if they could show the harm or the use of waters was linked to commerce and industry. And EPA and the Army Corps have deleted that provision, and so they now are no longer asserting that. At this point, under these regulations, all jurisdictions are hinged to what the science shows about the need to protect waters.

So I will stop there. Thank you very much, members.

Chairman GRAVES. Thank you very much. We are going to start our questions with Mr. Tipton.

Is Jamie here?

Mr. Huelskamp?

Mr. HUELSKAMP. Thank you, Mr. Chairman. I appreciate moving to the front of the line here. That kind of surprised me a little bit.

Gentlemen, thanks for your testimony. I apologize for Mr. Field coming and winning the award for traveling the furthest distance, oftentimes coming from halfway across the country. I wish I were further away from the regulators in Washington, but I appreciate your description of what actually happens on a ranch and what you fear these proposed regulations might do for you. It certainly is a vast overreach and certainly being in agriculture myself, I am wor-

ried about what happens, whether it is dry stream beds, backyard ponds. You know, we wish we actually had road ditches with water in them, but my understanding of the rule would mean that they would have a regulatory nexus from Washington to interfere with those as well and creating that regulatory uncertainty in these vast overreaches is creating some problems.

I wish, for Mr. Field and Mr. Parks, if you would describe a little further what changes you believe you might have to make. And again, that is the difficulty, is the regulatory uncertainty, because this is not the first time there has been a proposal to strike the word "navigable" and say, hey, that does not count anymore, even though that is certainly the intention of Congress. So if you will describe a little bit more specifically what you think you might have to do and the cost of doing those in the future.

Mr. FIELD. Absolutely. Thank you very much, Congressman.

The biggest question, as you have highlighted, is being asked to explain hypothetically what will happen when I cannot clearly tell you what the rule means is very difficult, but I will do my very best.

The biggest challenge—and I reference this list—this is a list of the 56 preapproved practices that EPA has deemed are not going to create a discharge if an individual—and these are related to farming and agricultural activities—if an individual executes those as prescribed by NRCS.

So just for my example, and we talked a little bit earlier about fencing or prescribed grazing. Clearly, it would create additional expense and burden on my operation to have to go through and create NRCS approved grazing plans to ensure that in areas where I have a riparian pasture, if I have a fence that touches that riparian area, meaning if it floods at any time of the year and then that water drains back into a tributary, which the EPA may deem has connectivity under their broad definition of authority, I then, if I am not grazing, in accordance to my NRCS approved plan, could be found out of compliance. Thus, being required to obtain a 404 permit for cattle grazing in a riparian area.

Hearing the good gentleman to my right speak about the challenges they have in obtaining permits for constructing homes, I have no expectation whatsoever to do that. I am a small—extremely small business. I have got 55 momma cows. That is one truckload. I cannot afford an attorney or an environmental consultant. I would like to think I am a fairly intelligent individual being able to read the law, but I cannot honestly tell you what the expense would mean to my operation in terms of compliance with the environmental regulation.

I want clean water. I drink the same water that my neighbors down the stream do. I want good, clean groundwater. I want good, clean surface water. But in my opinion, the best way we get there is through local decisions, and that happens at the local level and the state and county.

Mr. HUELSKAMP. Thank you, Mr. Field.

Mr. Parks?

Mr. PARKS. If I can sum this up in three words, I would say cost, delay, and uncertainty. Those are going to be the big three things that come out of this.

I believe that increased regulated area is going to be significant. I think one concern that we have is we have developed a level of competency over the years understanding how to play this game, and now the rules are going to change significantly. So there is going to be a pretty significant learning curve for that, both for the regulated community, as well as those that are in charge of regulating. That causes delay, and there is a cost to that.

We make substantial investments on these natural resources. We lease those many years down the road, and we are concerned that because jurisdictional determinations are subject to review every five years, what is going to happen to deposits that we had banked on mining that are now going to be off limits? So there is a lot of uncertainty that exists with this, and it creates the potential for a much, much broader regulated area.

Mr. HUELSKAMP. Mr. Parks, one last quick follow-up as far as planning ahead. How many years out do you make purchases in order to secure those deposits? I mean, certainly more than five years?

Mr. PARKS. Absolutely. It is not uncommon typically in a 15 to 30 year range is what most of our leases' terms are.

Mr. HUELSKAMP. Thank you, Mr. Chairman. I yield back.

Chairman GRAVES. Ranking Member Velázquez.

Ms. VELÁZQUEZ. Thank you, Mr. Chairman.

Professor Buzbee, you indicated in your testimony that while some small businesses have come out against the proposed rule, there are business interests on both sides. Can you explain why the split?

Mr. BUZBEE. Yes. Based on past, if you kind of track who has supported changes, who has testified, and who has participated in some of the Supreme Court cases, there are very substantial interests linked to hunting and fishing as one area, and then there is also commercial fishing on a large scale, which is very much dependent on rivers and their tributaries. In addition, recreational interests are a huge business in the United States, and they very much depend on this.

While not first level small business, municipal uses of the waters that we are trying to protect through the Clean Water Act has a direct effect on many businesses who depend on safe and good water for their businesses. So if you have looked historically, the reason why there has been—there was for about 30 years—really bipartisan support across party lines was that people realized it was both environmentally and good business to have improved clean waters.

Ms. VELÁZQUEZ. It appears the main fear of many is that the proposed rule would broaden the scope of the Clean Water Act and that there would be limitless claims of federal power. Is this an accurate criticism of the proposed rule?

Mr. BUZBEE. No, it is not. It is not an accurate description. As I said, first, there is for the first time an explicit carve-out of a number of areas plus very importantly there is the explicit deletion of this longstanding commerce link grounds for jurisdiction. And then there are also several other grounds that have long been explicit in the Clean Water Act, and they remain.

Very importantly here is what the EPA and the Corps have done is they set three categories. They have some areas they call jurisdictional. Then they have others and they talk about them by category. And then they have others that still require case by case analysis for a significant nexus. And so while I do think there are concerns with delay, any time you have a case specific judgment it also gives people the chance, whether they are building houses or working on a cattle ranch, to argue about whether an area deserves protection.

Ms. VELÁZQUEZ. Thank you.

Mr. Field, you indicated that there was zero outreach to the agriculture community before the rule was proposed and that you were told to "wait and see." Why do you think there was this reluctance from EPA to have input from those stakeholders?

Mr. FIELD. Thank you.

I cannot answer why EPA failed to reach out. However, it is clear to see the result. We are experiencing it right now.

Just if I may answer a follow-up to the professor's comment regarding the section 505 of the Clean Water Act, I would argue adamantly that the citizen supervision is by far anything but clear. Having the opportunity as we drive down the road to simply pick up the phone and contact EPA and say, "I question an activity that is occurring. I think there is a discharge." Click. That is an anonymous call. We, as land owners, the target of the call, never have an opportunity to know who is making the call, who is making the claim, and I have seen this happen in Washington State where the citizens—the opportunity to make anonymous calls leads to countless inspections, follow-up, and does nothing in terms of protecting water quality, but causing a continuous do-loop.

But back to your point, in terms of outreach, it is beyond frustrating as to why EPA did not reach out. I know in February, at the National Cattlemen's Annual Meeting, EPA was asked that very question, and they were told to wait and see what the proposal looked like.

Ms. VELÁZQUEZ. So now that you have this forum, you have the opportunity to tell me and the committee what the number one concern or complaint is that you have regarding the proposed rule?

Mr. FIELD. The absolute vagueness. It is a dramatic overreach, in my opinion, of what the original intent was. And the idea that simply having again to show a bed, a bank, and an ordinary high water mark, then being able to make the deem that it is adjacent, that is limitless.

Ms. VELÁZQUEZ. Thank you.

Mr. Woods, in your testimony, you point to an economist who found that EPA's cost-benefit analysis was flawed because it used a time period in which there was low construction activity as its baseline. During the time, construction spending was 24 percent below that of the previous two years. Can you give us a sense of what the true cost would be if the analysis had used a period that was more reflective of the construction industry?

Mr. WOODS. I can only give you a guesstimate, I guess, I would say. If you look at 2009–2010, yes, they are 24 percent behind 2007–2008. However, remember, 2008 was the absolute cliff. Construction overall dropped by 80 percent. So if you take that as a

number, you can assume that there would be five times the permits if we were able to get back to normal construction. So if there were five times the permits, there would be at least a minimum of five times the cost, and I see very little benefit whatsoever. That is the other flaw in the thing. There will be cost, and in my estimation, no benefit.

And if I might, the other problem you have here when you say a cost benefit and the way I think their method is flawed, because your real cost, not only the physical cost of hiring the attorneys and the consultants to go through this process, but your real cost in the construction industry is in the time because houses have very short time periods. They have very short commitments on loans and appraisals and those kinds of things, and if you stretch it out, those commitments are usually only six months.

Ms. VELÁZQUEZ. Okay.

Mr. WOODS. If you stretch it out, you just lost those sales.

Ms. VELÁZQUEZ. Thank you. Thank you for your answer.

Professor Buzbee, one other concern that has been expressed is how the proposed rule will affect their businesses, and among those is the fear that the new rule will be subject to lawsuits. My question to you is what safeguards are there in the act that will prevent businesses being subject to a lawsuit?

Mr. BUZBEE. Well, first, the most important thing is first that you have an Army Corps of Engineers that making jurisdictional determinations does react with alacrity and reviews and gives people prompt feedback. That is essential. Citizen suits are actually very hard to bring, and that is actually only when people go into the courts. Whether phone tips or something like that would be a different issue. And so in the end they would have to basically show that there was a violation and convince a court and show that they were harmed by it, and that is difficult. And I think for that reason there are not as many—you do not hear about a lot of section 404 water-related—waters of the United States-related citizen-litigation suits.

Ms. VELÁZQUEZ. Thank you.

Thank you, Mr. Chairman. I yield back.

Chairman GRAVES. Mr. Tipton?

Mr. TIPTON. Thank you, Mr. Chairman. I would like to thank our panel for taking the time to be here.

I have to tell you, gentlemen, I think this is the greatest water grab that we have seen by the federal government in the history of the United States. The overreach of the EPA in terms of being able to control.

Mr. Field, you are out of the west?

Mr. FIELD. Yes, sir.

Mr. TIPTON. This is a private property right in the west?

Mr. FIELD. Absolutely correct.

Mr. TIPTON. You have state law in the west. We have priority-based systems, and we are now seeing the federal government trying to be able to step in to be able to regulate virtually all of the waters of the United States.

When you read through this, "Traditional navigable waters, interstate waters and wetlands, territorial seas, impoundments of the first three categories in tributaries, tributaries of the first four

categories, waters and wetlands adjacent to the first five categories and other waters."

Does that sound like everything to you, Mr. Field?

Mr. FIELD. It sounds to me, once that drop falls out of the sky, it is under EPA's jurisdiction.

Mr. TIPTON. It is going to be under the EPA's jurisdiction.

You were just talking about the ditch that you diverted off the stream to be able to get water to your cattle, to be able to irrigate, I assume, some of your fields so that you can actually grow hay, some feed for the cattle. How is this going to impact your business?

Mr. FIELD. I honestly cannot tell you that. That is why I am here, sir. The picture that we had is an irrigation ditch. There is about an acre foot of water that flows through that to a few of my neighbors right now, and the question I have and the sincere fear is the riparian pasture that is between that irrigation ditch and the tributary that flows to a water of the U.S. and the question of am I in violation of the Clean Water Act? I subject myself to more liability today by putting the pictures on the screen and talking than I can afford to pay.

Mr. TIPTON. Now, do you have ever sense if the EPA is allowed to be able to move forward with these rules, it is no longer your land, no longer your property, no longer your water; that it is now owned by the federal government and it will be controlled out of Washington?

Mr. FIELD. That is most certainly a concern I think that is shared by every private landowner. And an additional fear that I have, and in speaking with Mr. Parks that I think would be equitable on other natural resource industries, is the concern that this rule, if it goes forward unchanged and unamended, that it may have a chilling impact on landowners who may not be directly involved. I lease all of my property for grazing. This may have a chilling impact and a landowner might say, "Boy, Jack, I would love to help you out and lease some pasture, but I am afraid your activity brings too much liability under the Clean Water Act. Go maybe try the neighbor."

Mr. TIPTON. Yes, I think, you know, because I think we can agree, everybody in this room is an environmentalist. We all like clean air and we all like clean water. You were describing for us an effort that you had made in terms of being able to put in some conservation. Now, if these rules move forward, if the overreach of the federal government is put into place, you are not going to be able to afford, nor would you be willing to move into those conservation areas. Is that correct?

Mr. FIELD. Well, you are absolutely correct. I would certainly not partner with NRCS or my conservation district. I would try to do what I can at a much slower pace just on my own because—and do not get me wrong. The NRCS standards are excellent. They work perfectly. But I do not need to implement those practices exactly to the standard. I can get by with a three strand high tensile fence that I can build in a much faster time than a four or five strand barbed wire fence that delivers the exact same benefits at a much lower cost. And again, in my operation, I have got to try to spread the dollar just as everybody else on this panel as far as we can.

Mr. TIPTON. And, you know, just for the point of clarity, I happen to view our farm and ranch community as part of our national defense. We certainly need to be able to feed this country. Did you state, and did I write this down correctly, there was zero outreach by the EPA to the ag community. Is that correct?

Mr. FIELD. Yes, sir. Questions were made in February requesting for meaningful dialogue and input, and again, being told to wait and see. And that is, unfortunately, not a very productive means of promulgating rule, and especially something that will be this effective.

Mr. TIPTON. So an agency that says you will follow the rules does not follow its own rules when it comes to being able to reach out and find out what the business impacts are going to be.

Mr. Parks, would you like to comment on that?

Mr. PARKS. Yes, sir. I would.

Fortunately, our company is a member of a great trade association who made us aware of these developments and keeps us informed and in the loop. The Home Builders Association, National Cattlemen's Association, that is the type of—you know, that is why we are members of these associations. By and large, we do not have the management and the support staff to stay engaged with these types of issues. I would say for the most part the small business community has a cursory understanding of what is being proposed at best, and most folks have no idea the enormity that these changes could bring to the regulated community.

Mr. TIPTON. I see I am out of time. Gentlemen, I thank you for your comments, and I share your concerns over this overreach by the government and the EPA.

Chairman GRAVES. Mr. Schrader?

Mr. SCHRADER. Thank you, Mr. Chairman.

Well, I guess I find Professor Buzbee's testimony on his five points actually pretty incredulous. I respect his previous experience and expertise, but the idea that this is a simple definition of waters of the United States, we have heard from people that live, work, and try and build our great country and the economy that that is not the case. This is a vast expansion. As a matter of fact, it is not legally responsive even to the courts.

Let us go back to the Supreme Court decision, Professor Buzbee. That was supposed to be about navigable rivers or have some juxtaposition or nexus to navigable rivers. CWA does not include every bloody water in the United States of America. It is supposed to be dealing with those rivers that actually have some nexus to navigability. Otherwise, to the good gentleman from Colorado's point, it becomes a grab of private property throughout the United States of America. That is not what the CWA was all about.

I think the fact that this is actually not a broad interpretation is ludicrous. We have 56 different exceptions, and I bet Mr. Field, are you competent every single exception that they are going to come up with is listed right there? Are there going to be some others you are going to run up against?

Mr. FIELD. You are absolutely correct. This is, again, the list, if you follow the 56 preapproved NRCS practices by the letter you would be exempt. But if you, again, my fence. Not having a NRCS plan, it does not meet the standard, I do not fall under——

Mr. SCHRADER. Well, and I think that is unfortunately going to be the case for everybody. The commerce caused a deletion almost is a direct contravention from the plurality's decision of the Supreme Court. You are supposed to still take the navigability piece into consideration. Even Justice Kennedy talks about significant nexus in his decision. There is none of that. None of that with EPA. We are on primary, secondary, tertiary, quaternary, septuagenarian relationships to navigability here. This is ludicrous. I mean, I do not think anybody in a straight face can say that this is anything but a huge grab of jurisdictional power at the end of the day.

Let us talk about peer reviewed research here. I guess I am a little concerned about how committed the EPA was as they developed this rule to coming up with the accepted peer reviewed research when their own EPA draft study, "Connectivity of Streams to Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence," was sent to the EPA's Science Advisory Board to begin review on the same day they sent their final rule to OMB. If you are talking about peer reviewed science and actually watching science, they did not follow their own gosh darn science. That is an indictment that I think is beyond the pale here. All I know is that back in Oregon we have a lot of federal land, just like every western state legislator here. And we have a tough time dealing with all the federal rules on a regular basis. And what we are seeing here is unfortunately more rules, more regulations.

I think Mr. Parks summed it up nicely, "More cost, more delay, more uncertainty." Even if it does not go to a lawsuit—you know, Professor Buzbee, not every dang small businessman has a lawyer in their pocket that they have on retainer that they can fight these things. The threat of someone driving down the highway, seeing a practice and they are worried about it, all of a sudden you have got EPA or in my state DEQ coming in and investigating you, that costs a business money. This is an abomination.

Thank you, Mr. Chairman. I yield back.

Chairman GRAVES. Mr. Schweikert?

Mr. SCHWEIKERT. Thank you, Mr. Chairman.

We did a little workgroup about a month ago with a number of lawyers who basically work in this area, environmental law, and we set sort of a game theory. We read through the rule and basically turned to those who it was within their specialty and said, "Take it to an extreme. Take it to—maximize the language."

And so, Professor, I was going to ask for your help on a couple things that still echo in my mind. A river that only once every 100 years—let me back up. A wash that only on occasion contributes to a navigable stream. Does that wash fall under these rules?

Mr. BUZBEE. I think the way they have set them up, they are proposing to look by different regions to figure out, but if an area is a dry riverbed in an area that is, say, Arizona, an area that tends to be dry that has major rain torrents that come down and during those times water is carried on——

Mr. SCHWEIKERT. It would fall under?

Mr. BUZBEE. I believe that it would fall under for those instances.

Mr. SCHWEIKERT. Okay, so, because I remember sitting through a meeting on this, lordy, 15, 20 years ago, where the salt riverbed, which we damned up before statehood, so it has basically been dry for 100 years except for that 100-year flood that we had a few years—actually, back in the 1980s. And at that time, EPA wanted to designate that as a navigable river. So the wash that goes behind my property, my home, so I have a property, a big wash under it, when we get our 14 inches of rain a year, which comes on a Tuesday—no, it really does—and that would contribute to that dry salt riverbed, and that dry salt riverbed once every 100 years or so contributes down to the Colorado, would fall under the rule. Right?

Mr. BUZBEE. I do not know about if there is a time limit. I am not aware. I mean, you are saying once every 100 years. I do not know. My guess is that would be because they seem to be talking more about with periodic rainfalls that would be heavy that would flow.

Mr. SCHWEIKERT. So now we are into the definition of periodic, ultimately.

And my concern is also in this rule there is also some cleanup of the language of, we will call it, "citizen litigation." You know, the ability. And before speaking to one of the minority members you said, "Well, you do not think this happens often." I, literally, in Arizona, have multiple law firms that literally their sole practice is suing the Forest Service. And that is how they make their money.

Now, a lot of the suing is actually all about we will sue and get a settlement, and that is how we enforce policy. So under this, could I get sued for the dry wash behind my house that contributes to the dry salt riverbed that contributes eventually to the Colorado River once every 100 years?

Mr. BUZBEE. Under the Clean Water Act, you would have to show that you had discharged a pollutant into the river from a point source, which would mean either industrial discharges, or if you went in and, say, built a concrete pier blocking it, then there would be a possibility of liability if it was jurisdictional. But you can only sue if you have that and there is an advance notice requirement. So they would have to give you an advance notice, and the state, and the fed——

Mr. SCHWEIKERT. But in that same concept, so in my property, I go out and dig and plant some desert trees, and I use the appropriate fertilizers for my area. Haven't I just now walked over that line?

Mr. BUZBEE. As far as I know, I am not aware of that from what I read. I am not clear if there would be. I cannot see one in that.

Mr. SCHWEIKERT. Okay. When we modeled it and actually read it through line by line, and look, that may not be the intent, but my great fear is as we have seen over and over and over and over, when we end up—we create these—the government creates these rules and then over the next 10 years, 15 years, 20 years, litigation after litigation after litigation, expansion, expansion, expansion, all of a sudden I am not allowed to plant a desert tree in the back of my property because there is a wash. And I know that

sounds absurd, but I can model you through the language and show you how that reads in there.

And with that, I yield back, Mr. Chairman.

Chairman GRAVES. Ms. Chu?

Ms. CHU. Yes, Professor Buzbee, there has been a representation that nearly every drop of water that falls would be regulated by the federal government and that even if not every drop of water is regulated, any place that water collects will be including all manmade bodies of water, ponds, ditches, floodplains, and even standing water in potholes. And yet, from what I read, the actual increase of jurisdiction would be three percent, which does not sound like every body of water that is out there. So could you please clarify that?

Mr. BUZBEE. Yes. I agree. Your read is consistent with mine, that there is a clarification of the grounds for jurisdiction, but I do not see a substantial increase, and because of these explicit carveouts that are now part of the proposed regulations, areas that previously had been raised as a kind of parade of horribles of extensive regulation, I do not think you would find them. And so, for example, there was a mention earlier that just by having cattle grazing, that that would create a need for a section 404 permit. I am not aware of any basis for that.

Ms. CHU. Is three percent a correct number do you think?

Mr. BUZBEE. I have not looked at that. I have seen other people have estimated three percent, but I have not, myself, tried to figure out across the country the percentage.

Ms. CHU. From what I read, 117 million Americans who consume water from public systems that rely on seasonal or intermittent water sources would have greater protection of their drinking water. Is that true?

Mr. BUZBEE. Yes, it is. The science does show more and more that protecting rivers, riverbeds, and the buffers around them, especially, is critically important to maintaining water quality, both for human use, as well as fisheries and other purposes. And so especially for municipalities that depend on water from flowing rivers, maintaining the purity of that water is extremely important.

Ms. CHU. Now, it is my understanding that the EPA is, in proposing these regulations, is actually trying to limit the pollution in our drinking water and therefore, they have define which waters may be subject to these kinds of pollutants and also carry pollutants downstream. Could you elaborate on that point and help us understand how the definition of waters facilitates the main goal of protecting constituents from pollution?

Mr. BUZBEE. Sure. As you can read in the very extensive proposed regulation, a lot of the focus is trying to track, based on peer reviewed science, how pollutants move through waters from areas where the waters collect and then essentially move from tributaries into larger navigable-in -fact, waters, or traditionally navigable waters. And so basically, they found that both wetlands and tributaries do tremendous work, essentially functioning for free and reducing pollutants so what eventually goes into the larger water bodies is substantially cleansed by the process itself. And so in that respect it is critically important to maintain the purity of water.

Ms. CHU. And then in your testimony you said that several categories of waters are exempted from the rule. For example, waste water treatment systems, prior converted cropland, and several sorts of ditches. Could you tell us how and why these exemptions were made and why they are necessary?

Mr. BUZBEE. There has been, I think, in some cases these were kind of in actual enforcement practices were largely followed, but there have been a lot of claims of excessive claims of jurisdiction. So looking at their explanation, the view was it was time not to leave them open to debate but just to make crystal clear these would not be jurisdictional, and that would remove them from any debate and argument. People would not be able to later say, oh, there was a significant nexus. No, these are removed from federal power.

Mr. FIELD. Congresswoman, if I may, just to one question. You had done an excellent job of highlighting the problem with this rule when you asked Professor Buzbee if in his opinion this rule would only yield three percent of additional regulation. The problem is I can bring my attorney and they will argue the opposite saying, no, I do not think it is three percent; I think it is 10 percent. It is not clear to us what truly is going to be the regulated water under this rule.

And the other question, in terms of a carve-out on a waste treatment plant, they are regulated under the National Pollution Discharge Permit. That is NDPES. That is a point-source polluter. That is apples and oranges. In this discussion, we are talking about non-point.

Ms. CHU. Well, I still have another question, so if I could continue with Professor Buzbee.

Mr. FIELD. Excuse me.

Ms. CHU. In your testimony, you explained that what appears to be a vague language of the law will actually allow regulators to provide case by case decisions following site-specific inspections. Can you explain how the law's reliance on case by case analysis will actually allow regulators to adhere more closely to the intent of the Clean Water Act?

Mr. BUZBEE. Sure, I would be happy to.

This is partly the outgrowth of Justice Kennedy's opinion in the Rapanos case when he called for a significant nexus analysis so you would not be regulating marginal, insignificant waters. And so the Army Corps and EPA, in proposing this regulation, have basically tried to figure out what by category does need to be regulated and then carve-out certain areas, these are ones that need case-by-case analysis. And so those ones, it is not clear until you look in particular context. They have sought comment. I assume the colleagues here at the table will provide comments that would analyze by different regions why certain areas might be more likely to be jurisdictional or not. That is something they sought.

Ms. CHU. Thank you. I yield back.

Chairman GRAVES. Mr. Collins?

Mr. COLLINS. Thank you, Mr. Chairman. And I want to start by thanking Mr. Schrader for his excellent summary of the issues that we are bringing. Mr. Schrader and I cosponsored a letter to the administrator of the EPA, as well as the secretary of the De-

partment of Army that was signed by 231 members of Congress. It is not easy to get members to sign such letters, let alone 231 letters on a bipartisan way, including the chairman of every committee in Congress.

So when Professor Buzbee speaks about the impact or what he would suggest is not, as I agree with Mr. Schrader, the greatest expansion land grab, power grab that has ever occurred in the history of the EPA. And certainly, I think our testimony from Mr. Field, Mr. Parks, and Mr. Woods confirms that.

So for the record, I would like to point out to Professor Buzbee, not to nitpick, but I think it is important, Professor, when you were questioned by Ms. Chu about certain issues, let me reiterate how you responded. "I am not aware. As far as I know. A possibility. I do not know. My guess is. I believe that."

Those were your words, Professor. So when we talk about uncertainty, and I hear our farmers, and Mr. Schrader and I were asked to lead this letter by the Farm Bureau, our farmers, which grow the food that feed Americans and actually feed many around the world, are scared to death of this overreach and what it might mean. And again, it goes back to uncertainty. It goes back to the fact that outreach was not made to small business, to the farming community and the like. Frankly, the rule needs to be returned. That is what Mr. Schrader and I and 229 other members of Congress have simply asked at this point. They got too far out ahead as has been pointed out. 2008, 2009, 2010. It is fundamentally flawed as a beginning data point. And the fact that we have not done a true economic analysis is, I think, a reasonable request that we have made. Simply return the rule. Let us take this off the fast track that it is on. Let us get back to regular order. Let us do what we should be doing with the Farm Bureau, the Home Builders, the construction trades. We are not making a mountain out of a mole hill.

And my other concern, and maybe I will just ask for a brief comment, are the economy and jobs. We have an economy that is sputtering, that has lost steam. Our kids are graduating. They do not have the jobs. We need to grow our way out of the deficits and debt problem that we have and just, you know, Mr. Field, the simple kind of question, does a rule like this—because I certainly believe it is another hindrance in growing our economy. Uncertainty brings lack of investment. Certainly, I would like your opinion.

Mr. FIELD. You have just hit the nail on the head, sir. The lack of clarity on this rule, regardless of the industry you are involved in, not knowing, not being able to tell your lender with certainty that the activity you are about to enter into is not going to carry the potential legal liability of a violation of the Clean Water Act or the ability to have the citizens suit provision of section 505, it is unthinkable.

Mr. COLLINS. Uncertainty means lack of investment.

Mr. Parks?

Mr. PARKS. Yes. Just to add to what Mr. Field indicated. Most of our holdings, I would say roughly 80 percent, are leased. These issues affect private landowners. It is not just Memphis Stone and Gravel Company. So the bottom line is if we are able—if the rules require more area subject to regulation, then that certainly can

limit the amount of resources that we can recover. And that translates into cost and value to the property owner, as well as us.

Mr. COLLINS. Mr. Woods?

Mr. WOODS. Yes. It is going to have a devastating effect. I will give you an example.

One of my subdivisions in Mr. Graves's district has over 800 units. If it were built out, it would be subject to this. It is, in fact, the one that I mentioned took two and a half years and several hundreds of thousands of dollars to get the permit in the first place under the old rule. I would not go forward with getting it under the new rule. But if you take that and just extrapolate it, every house or every unit by our standards means about 3.7 jobs. You know, if you look at the tax bills and burdens and what they generate, it is in the thousands of dollars to the municipality and the state and federal government, and that is just one subdivision. I am not the big developer in Kansas City. I am just one of the medium-size guys, but you would have to take that number and add it and then go across the country and say how many are there. You are talking millions of jobs that will be lost simply because we cannot get the permits.

Mr. COLLINS. Thank you all very much.

Real quick, Mr. Parks. Our time is expired.

Mr. PARKS. Congressman, if I could just add that our biggest customers are DOTs. Mississippi Department of Transportation, Tennessee Department of Transportation. They have to deal with the same issues that we as industry have to deal with in determining what is jurisdiction and getting permits to do what they do.

Mr. COLLINS. All right. Thank you.

Thank you all very much. I yield back, Mr. Chairman.

Chairman GRAVES. Mr. Payne?

Mr. PAYNE. Thank you, Mr. Chairman, and to the ranking member. I appreciate everyone's testimony today.

Mr. Field, in your testimony, you mentioned that for business and moral reasons you protect the quality of water around your ranch.

Mr. FIELD. Yes, sir.

Mr. PAYNE. That is very admirable. However, in my home district, which takes in Newark, New Jersey and surrounding communities, we have the Passaic River, which was a place where a lot of industry was created in the 1800s and 1900s, and really drove a lot of the industrial revolution around cities. Newark is the third oldest city in the country. But it became a dumping ground. Agent Orange was produced in Newark, New Jersey, and a lot of issues that we still have with the river come from the toxins and those type of different agents. So do you really think that we can rely on moral integrity of businesses to not pollute our nation's waters? I mean, everyone is, you know, and I commend you, and it is around your ranch and that is important to you because that is where you are, but do you think we can rely on businesses not to pollute or follow your example?

Mr. FIELD. Well, that is an excellent question, Congressman, and I certainly understand your concerns where you sit. And you also bring up an excellent point. Effectively, what I would recommend, I think the best decision for your problem is—the solution

will be found locally in New Jersey, not by me in Washington State saying, well, I think the best way to clean up your reach of river, the local decisions. Nobody on this panel is saying we do not think we need to be able to regulate and protect water quality. When I go out to the tap to get a drink of water, I want to make sure it is safe. I want to make sure you and your family have safe water. But I do not believe creating a rule that does not clearly define, and as one that will be covered under the regulation, I need to know clearly is this jurisdictional? Is this not? Just what it means.

But to your point, in terms of being able to address your water quality issues, I absolutely think that solutions can be found locally, watershed by watershed. The most effective way to address the issue on your river is to get the local—all the stakeholders together, whether it be a total maximum daily load, to be able to get everybody there that is on the water body, identify what the issue is, and collaboratively come up with a solution. If there is buy-in from everybody, you can certainly address the issue.

Mr. PAYNE. Yes, and that is a very good point. The key there is buy-in. But, you know, as I stated, you protect the water around your ranch. A lot of these larger industries, the people that are involved in that business, do not live in that community, so it does not matter very much to them what their water quality is in that area. So my concern, and what we are trying to do, is make sure that we can make sure that everyone has the same opportunity in their community to have safe drinking water.

Mr. FIELD. Are these all nonpoint facilities or are these point source facilities as well as nonpoint? Because I am a nonpoint. I am a nonpermitted facility right now. If you are talking about a chemical manufacturer, that is a point source. If they are permitted to discharge whatever their discharge is into a water body, they are regulated right now under EPA, and I am not sure if you are delegated, but you may have a state authority regulating that as well. But there is regulation, and if they violate the numbers in terms of their permit, that is most certainly something that can be penalized. But it is a little difficult if we are talking about the applicability of point source regulation to nonpoint operations as well.

Mr. PAYNE. Well, I mean, you know, and that is quite true, but what we find is people tend to like to cut corners, and even though they are regulated, there are situations where we find that they have not followed the rules. So that is the actual important piece of that.

According to the EPA, over 117 million people drink from water systems in areas that currently lack full and clear protection under the law. Do you think it would be fair to exempt the polluter from the Clean Water Act, which would force them—force the community to pay for the clean-up of its water supply? I would like to ask Professor Buzbee—the whole panel, please.

Mr. BUZBEE. I think that the need for clear prohibition, so people know what to do so they are not disadvantaged. Then business has been shown again and again. So having clear rules, I think everyone at the table here would agree, clear rules are important, but it is important not to rely on just self-policing, but that does tend to be a recipe for disaster.

Mr. PAYNE. Okay. And my time is up, but quickly, if you could each give a quick brief answer.

Mr. Woods?

Mr. WOODS. I am not sure that I have the expertise to address your problem directly. As an old mayor, I believe that the best people to deal with it in the community are those people in the local community. They have the best knowledge of it, and I think that they can come up with the best solution, quite frankly.

Mr. PAYNE. Thank you, sir.

Mr. PARKS. Congressman, if I may, all of our projects require extensive site review. We open it up at the local level. There are tremendous opportunities for public participation. Most of our projects are governed by site-specific conditional use permits where conditions can be imposed on that at the local level. Both of our states, Mississippi and Tennessee, are authorized to implement the federal NPDS programs.

And with regard to water pollution in general, our company—the companies in our industry, and I would suggest probably to most industries—you cannot just allow water to discharge off your site uncontrolled. There is an extensive framework that is there already. How you manage any waters that leave your site, whether it be processed water or stormwater, we have to develop a pretty extensive stormwater prevention plan for every one of our projects that details exactly how we will manage stormwater runoff before it can impact anything. And those sites are open for inspection. They are inspected by state and federal regulators.

Mr. PAYNE. All right. Thank you.

And Mr. Field, I have gone way over my time so I will yield back to the chair. Thank you.

Chairman GRAVES. Mr. Luetkemeyer?

Mr. LUETKEMEYER. Thank you, Mr. Chair.

It is interesting that we are discussing this rule today because I know the chairman and I fought this battle a couple, three years ago. Whenever the various powers that be and tried to do the same thing with—I am going to take the word "navigable" out of the Clean Water Act. And here we are again today back in the same situation.

And so I know Mr. Buzbee, with his comments, indicated that we have had the Clean Water Act basically in force, and with the EPA, the authority to make rules for over 30 years, and I think we have seen probably some good things come from out of that from the standpoint we have much better clean water today, but as we see over those few years, the last number of years, bureaucracy tends to expand its limits or expand its authority, and it seems that we are in this process now.

If you look at what is going on with the administration, this is the biggest fear why we are looking at this rule in this light is the tremendous fear of overreach. And I think that the gentleman from Oregon and the gentleman from New York behind me here, both were very articulate in explaining the concerns that they have, the amount of overreach here from the standpoint that there is this fear that it continues to be that this administration will overreach bureaucratically. Every time there is a rule or regulation, it goes

one step beyond what their intent is, and therefore, it impacts our business community in a very negative way.

And I appreciate all of you being here today. I think if this rule goes forward, I see no way that it does not wind up in the Supreme Court, because this is something that is going to impact all three of the business people before us today in a way that is going to drive you either to have an extreme amount of cost or drive you completely out of business.

And so I guess my question to each one of the three of you to begin with is Mr. Field, if this thing goes forward, are you going to be able to stay in business?

Mr. FIELD. I honestly do not know. It would depend on whether or not EPA would determine the parcels that I graze to be within their jurisdiction or not, and I cannot honestly answer that. I am sorry.

Mr. LUETKEMEYER. Mr. Parks?

Mr. PARKS. Well, the question may be at what cost will we stay in business? I mean, there are limits. I mean, assuming that the cost increases can be supported, perhaps. But, you know, who is to know? There is a limit on what we can absorb. What it will definitely do is reduce the amount of resources that we can recover and will make permitting a much more complicated endeavor. And as a small company, we try to manage as much of that in-house as possible. We try to avoid going to consultants because that is a cost that we cannot afford to bear because that is a tradeoff.

Mr. LUETKEMEYER. Mr. Woods, I think you kind of already answered that before, but do you want to get on the record one more time? Get one more hammer at this?

Mr. WOODS. I would, if you do not mind. Quite frankly——

Mr. LUETKEMEYER. Push your button, please.

Mr. WOODS. I am sorry.

Quite frankly, I doubt that we would stay in business, and I doubt that most builders and small developers would stay in business. You have to remember one thing. The costs that are incurred are before you can do anything, so there is not a return until you get the delineation of whether you are involved or not involved, and that does not mean that your plans are going to be accepted.

Mr. LUETKEMEYER. There is a huge capital outlay here before you ever get one cent of return on your investment, and it all has to be recovered at some point, hopefully from the sale of your property.

Mr. WOODS. And I think we do not understand small business. For the most part, small business is mom and pop, and it is mom and pop making a living for their family so that the kids can go to college. And if you have got a decision to make between spending $200,000 to see if you might be able to develop a small piece of ground and come up with a plan that might then, two, three, four, five years later get a permit, I can tell you the kids' college or the dental bill is going to win out.

Mr. LUETKEMEYER. One of the things that concerns me, it seems like this is a solution in search of a problem from the standpoint that what are we trying to solve here?

Professor Buzbee, can you tell me what we are trying to solve by the expansion of this rule to go as far as these gentlemen think it

is going to go? Where is the problem that we are solving when you impact jobs at this level that they are talking about today?

Mr. BUZBEE. I guess, first, it is important to remember the Clean Water Act is not limitless in its reach, and so you do have to show that something is a tributary wetland, adjacent wetland.

Mr. LUETKEMEYER. These gentlemen have all testified here today that they believe if they interpret this to the lengths at which you can go, at which attorneys will stretch the law, which has been the case time and time again, especially with this administration, this is where we are headed. So where is the problem that this is trying to solve?

Mr. BUZBEE. My sense here is that this is inaccurate; that people will be able to build, and people that can build will continue to have thriving cattle businesses. Not everything needs to be put in a tributary or a wash or a river or a wetland. There is plenty of land where businesses can thrive. The Clean Water Act is really about where you put these things and where you discharge pollutants.

Mr. LUETKEMEYER. Well, Professor, I appreciate you living in a utopian society. Unfortunately, these three gentlemen do not live there. They live in the real world, and they have explained how the impact of this is going to be in the real world on real people on real jobs and real livelihoods, and that is what this Committee is all about today.

Mr. Chairman, I yield back.

Chairman GRAVES. Mr. Bentivolio?

Mr. BENTIVOLIO. Thank you very much, Mr. Chairman.

I would like to thank the chairman for holding this important hearing, and I would also like to thank the witnesses for taking part today and helping to enlighten us about the new waters of the United States rule.

When I read your testimonies, it made me wonder if the EPA purposefully makes vague and controversial rules simply so that bureaucrats over there can see their office in newspaper headlines.

Just a few weeks ago, I held a hearing in my district about the impact of federal regulations on small businesses in Michigan. Mr. Woods, one of those who testified, was Richard Kligman of Superb Custom Homes out of Plymouth, Michigan. He, too, brought the waters of the United States rule and concluded it this way—these federal consultations related to the Clean Water Act are just another layer of red tape that the federal government has placed on small businesses, and it is doubtful the agencies will be equipped.

This nonsense has to stop, Mr. Chairman. Everyone here wants to protect the environment, but we also want to help people in our country succeed and prosper. I do not think that those are mutually exclusive so long as the EPA is proposing rules that are easily understood and make common sense. Unfortunately, this time it does not seem to.

But I would like to go one step further. Mr. Chairman, you know, I went to—my wife said we had to replace the water closet in our bathroom, and so I went to her favorite hardware store and tried to find a water closet, a toilet, that would just take enough water, you know, and they said, "No, I am sorry. The only toilets we can see now are regulated to how much water can be flushed down at

a time." And I asked the salesman why that is. He says, "Well, we have to conserve water." And I said, "Well, you know, I live on a farm. We have a well and a septic. I recycle all my water. You know, that is how it works."

The government has this "one size fits all." I also have a pond on my farm, and I have been recently notified after this hearing that the EPA is really concerned about the toxins in the pond. Well, you know, we live on a dirt road in the country, and all the ditches on the dirt road somehow, you know, there is about 60 acres, feeds my pond, which then drains about two miles further downstream into some—I think it is the Rouge River eventually. But why am I suddenly responsible for the toxins that run off the road into my pond? Right? So do I have to—is the EPA going to regulate ditches like that and how they run into ponds?

I understand some of these concerns, but I have made those arrangements on my own without the EPA. I built berms made of gravel. And that naturally cleans up. Sand and gravel naturally cleans up the toxins that were reaching my pond. So I am wondering, do I have to get EPA requirements and permits to do that? Or is that something I can do on my own because that is probably the wisest thing for me to do? Why do I have to have a government regulator telling me what I have to do for every single facet of my life?

Mr. Parks, should I ask a question now? Sorry, I do not like the EPA. As far as I am concerned, China needs the EPA. So if we can send 15,000 employees to China for five years, I think we would all be better off.

Mr. PARKS. Well, I would say ditto, but we do have to work with these folks, so I am not going to go there. But you do hit the nail on the head. As I read through the definitions, it is hard for us to see what would not be jurisdictional, or potentially could be interpreted that way. And that is really the problem. It opens a lot of things up to interpretations. Even exclusions are not clear. One part removes artificial ponds created by dyking dry land, yet a tributary can be a manmade pond or a ditch. So which is it? I mean, we create a lot of ditches. We create a lot of basins, a lot of ponds, that can sit there for 10, 20, 30 years before we are ready to close them down. And so it is a big question for us. Are we creating all this jurisdictional area through our business processes?

Mr. BENTIVOLIO. Thank you very much. I think I have done my ranting. Thank you very much, Mr. Chairman. I appreciate it. Thank you.

Chairman GRAVES. Mr. King?

Mr. KING. Thank you, Mr. Chairman. I thank the witnesses for your testimony.

I have a little bit of reminiscing I went through as I listened to some of this, too, but I wanted to turn to Professor Buzbee first and ask this question. We have got the issue out here of significant nexus, but there is another term that is back in the dusty reaches of my mind called "waters hydrologically connected to." And I would ask Professor Buzbee are you familiar with the term? And would you define that for this Committee, please?

Mr. BUZBEE. The exact term I am not sure, but I think what you are probably referring to is in the case Riverside Bayview

Homes. A unanimous Supreme Court upheld jurisdiction for waters that essentially were wetlands near other waters and part of the grounds for that was the importance of taking into account hydrologic connections and the importance that they serve.

Mr. KING. But what is a hydrologic connection?

Mr. BUZBEE. A hydrologic connection in that case and subsequent cases and the new regulations as I understand it has to do with essentially whether water is moving from one place into another which they look at through several different kind of functional analyses.

Mr. KING. Stagnant water would not be hydrologically connected?

Mr. BUZBEE. I am sorry; I missed it.

Mr. KING. Stagnant water would not be hydrologically connected?

Mr. BUZBEE. If the water is truly isolated so it is not flowing, no, it would not be.

Mr. KING. I see. So then it would not be necessarily the flows; it would be the connection. So if you had two ponds and a conduit between them, say a small—just a stagnant stream, but as long as you could say, float a small boat, that would be hydrologically connected?

Mr. BUZBEE. I do not believe so. I do not think that is correct. The way they walk about it, they look at different regions. I think what you would be describing would be what appears to be an isolated water and then the question is whether that, because of its——

Mr. KING. But if it is two ponds and there is a very small, nonflowing stream between the two of those, would those ponds be hydrologically connected?

Mr. BUZBEE. The way hydrologically connected worked is I think they were ultimately talking about ultimately connecting to navigable waters or navigable-in-fact waters.

Mr. KING. Yes. Yes. And I agree with that definition. And I bring this up in part of this discussion about significant nexus. I think I will do this. I will tell the narrative.

Back in about 1994—first, I would let the Committee know that I have spent my life in soil conservation, water quality. I built more terraces probably than anybody in Congress or waterways or any kind of retention ponds you want to describe. It has been my life. And I remember walking into my construction office one night in about 1994 and there sat a farmer. And he said, "Did you see this DNR rule that they have published for comment?" And I read the rule and it said, "These 115 streams are proposed to be protected streams. These streams, to their geographical boundaries and "waters hydrologically connected to them." And I went straight up in the air because I believe in property rights, and I oppose property takings by government or anybody else. At that time it was a Fifth Amendment property rights issue before Kelo and went straight to Cherokee, Iowa, for the public comment hearing. And I asked them the question, "Define it for me, hydrologically connected." They said, "Well, we cannot." Then I said, "Then take it out of the rule." "Well, we cannot." "How can you tell me you can-

not define it and you cannot take it out? Then if you cannot define it, you cannot tell me why it is there."

Then the next night the hearing was in Algona, Iowa, and that was two hours up there and they saw me coming and said only one question per customer. Well, you can imagine that I did not walk away from that microphone until I had asked a lot of them. Subsequent to that I ran for the Iowa Senate because I had been boxed out of a hearing as a witness. They would not really let me testify to the answer to this.

So this goes pretty deep to me. And when I see the language here that we are dealing with and the stretch of the rules—I know how rules get stretched, and I have lived it, and so have a lot of the members of this Committee. We are dealing with the traditional navigable waters of the United States. That goes back to 1948—or excuse me, 1848, when the Corps of Engineers was granted the authority to remove the debris from the navigable waters. Now we get added to that, the definition has been expanded through litigation and some statute, but it also now includes interstate waters and wetlands, the territorial seas, impoundments of the first three categories and tributaries, tributaries of the first four categories, and number six, waters and wetlands adjacent to the first five. But the language of "other waters," which is all these categories that I have described, including riparian areas, floodplain, tributaries, significant nexus. When I see that language that says "significant nexus," that is the 2014 term that substituted for "waters hydrologically connected to." And how will they define hydrologically connected to? It is real simple. It is whenever two water molecules touch each other you can make the argument that they are hydrologically connected. You can argue the case law that is out there and how it is being interpreted, but in the end, if two water molecules touch, it is hydrologically connected. If you take a piece of nice, good, well moistened, freshly rained upon Iowa black soil, it is about 25 percent moisture today. Water molecules touch. They go all the way up through streams that water your cattle and all the way up to these homes that you are developing, and all the way into everybody's property in the United States only by the stretch of the definitions that are put in these rules.

And I would just pose one final question quickly to Professor Buzbee, and that is do you believe that if the federal government regulates the complete usage of property away from our property owners—whether it is the ranchers, whether it is developers—if they regulate the utilization of that property away and render it without value to the owner, is that a takings under the constitution?

Mr. BUZBEE. I think if you are phrasing it like the Lucas case by the Supreme Court that a 100 percent taking of all use would be a taking under that precedent.

Mr. KING. Useless to the owner for the purposes of——

Mr. BUZBEE. I think it is rendering it without value actually was the way it talked about it. So, again, it is more complicated than the subsequent cases.

Mr. KING. We are close to a yes though, and I will settle for that. And I appreciate all your testimony, and I yield back to the Chairman. Thank you.

Chairman GRAVES. I have a question for Mr. Woods.

In your testimony, you stated that any waters or wetlands within a floodplain can be subject to the Clean Water Act. I was just curious—or Clean Water Act jurisdiction—how that is going to affect your industry, your business. What impact is that going to have?

Mr. WOODS. I will speak to it relative to the Midwest and the Plains States, wherever you want to put us. As you well, now, if you are in Independence, Missouri, Blue Springs, Missouri, you are close to the Missouri River. You are close to the Little Blue and the Big Blue and the Caw. And we have got tons of what has been called for years "bottom ground." Your first problem is you cannot get yourself too far away from a floodplain or a wetlands.

The second problem that you have in that definition, and that is the one that probably bothers me more, in too many cases the maps that are used and have been used to delineate these nexus are erroneous. We have seen situations, one specific situation in Riverside, Missouri, where the floodplain was halfway up the hill. It is not where the creek is. Now, I defy you to put a floodplain halfway up a hill and not in the creek. And it took us almost two and a half years to get a determination and a change in the flood map. We had to go in and prove that the water did not usually run across the hill halfway up; it usually ran at the creek.

So those are the kinds of problems you are going to run into, is it is not that it is truly a floodplain or it is not that it is truly a wetlands.

The case that I pointed out here, the very first thing we did in the subdivision that I am talking about in Independence, Missouri, just to put it into perspective, is we had consultants come in and walk our site. It is almost 500 acres. It is a bottom land field, but it is not a floodplain. And actually it had been prior converted, which I just find out now may have changed. But it had been farmed for 150 years. There were none there. There were none found. And yet we still ended up subject to because we were close enough; we were adjacent to some things. We felt it best that we move forward, try to move forward in a very positive way. I thought we were being wise. We brought everybody out, let them tour the site and tried to put in place the very best practices and show off, and as I was told by the city engineer in Independence, we were justly rewarded for our good deeds. Two and a half years and $250,000 later we got a permit. That is what concerns me the most.

Chairman GRAVES. Well, and you mention, too, and there are some carve-outs as has been pointed out by Professor Buzbee. However, it also states "adjacent to jurisdictional waters." And that is what concerns me as much as anything else.

And in closing, I want to kind of build on what Mr. Luetkemeyer said as well. We fought this before. Removing the term "navigable" out of the Clean Water Act. And we fought it under two different majorities. And it failed Congress. This failed the people's house by folks that are voted on by constituents. And now here we are fighting it coming at it from the regulatory standpoint by individuals who are not elected, who are not responsible to anyone, and that is the most frustrating part. The will of the people was done, and

this was defeated. And now here we are going through this process under agency proposed rulemaking, and it is frustrating.

But all of this testimony has showed us that the waters of the United States or this proposed rule is going to have a significant impact on small businesses. And the EPA and the Corps failed to do the assessments that they were supposed to do under the Regulatory Flexibility Act. And that is another thing that bothers me as much as anything else because when agencies fail to comply with the RFA, the result is always poorly crafted regulations, and it is going to impose a lot of unnecessary and costly burdens on small business, and this is going to be the case. We are going to be closely monitoring this and the development of this rule, and we are going to be engaging all of the agencies until they come in full compliance with the RFA.

And with that, I would ask unanimous consent that all members have five legislative days to submit statements and supporting materials for the record. Without objection that is so ordered.

And with that, I appreciate all of you coming in and your testimony. The hearing is adjourned.

[Whereupon, at 3:41 p.m., the Committee was adjourned.]

APPENDIX

Opening Statement: Congressman Blain Luetkemeyer (R-MO-3)

I appreciate the opportunity today to examine the impacts of the proposed "Waters of the US" rule on our nation's small businesses. This proposed rule will vastly expand federal jurisdiction over our nation's waters and represents one of the most expansive federal land grabs in history. It will extend federal regulations to a whole host of waters that the CWA was never intended to apply to including ditches, ponds, and seasonally wet puddles.

If finalized, this rule will stall development, cost jobs, and put a plethora of activities and decision-making under the heavy hand of federal regulation. With the stroke of a pen bureaucrats in Washington can do immense damage to our economy and, unfortunately, this appears to be just another example of this overreaching administration putting the federal regulatory train into overdrive while disregarding the impact their actions have on the lives of hard working Americans.

Similar proposals have been defeated numerous times in Congress but their failure seems to only embolden this administration to expand its power through rulemaking. As with any policy of such vast impact, the American people deserve to have their voices heard through their elected representatives. Moreover, entities that will be affected have a right to be at the table to have their concerns addressed.

Despite claims to the contrary, this proposed rule will establish broader, convoluted definitions of regulatory categories that will create even more uncertainty for our nation's small businesses. Under the definition regulators will be given far-reaching authority to subjectively apply jurisdiction over all types of waters. This gives little confidence to small businesses trying to stay within the law.

One thing is clear from the proposal; this rule will drastically increase the number and types of activities that are subject to CWA permitting. Obtaining such permits often require expertise, time, and resource that many small businesses simply don't have. Permitting will in turn trigger additional review requirements under laws including the National Environmental Policy Act (NEPA) and the Endangered Species Act (ESA). Faced with these onerous and prohibitive costs small businesses will be forced to decide whether to spend massive amounts of money on permitting, drastically alter their activities, or close-up shop.

As our economy struggles to regain its footing, small businesses will provide the engine that drive job creation and economic growth. It is frustrating that proposals like these threaten the very growth that our nation needs. Industries such as home building, farming, and energy exploration have been bright spots in our economic recovery and the proposed rule puts them directly in the cross hairs of the federal regulatory regime.

I look forward to receiving testimony from our witnesses to illustrate the potential impact this proposed rule will have on their respective businesses and industries.

Testimony

Jack Field

Owner, Lazy JF Cattle Co.

with regards to

Will EPA's 'Waters of the United States' Rule Drown Small Businesses?

submitted to the

United States House of Representatives

Committee on Small Business

Representative Sam Graves, Chairman

submitted by

Mr. Jack Field

Washington Cattlemen's Association

National Cattlemen's Beef Association

May 29, 2014

Washington, DC

Good afternoon, my name is Jack Field. I am a cattle rancher from Yakima, Washington and the Executive Vice President of the Washington Cattlemen's Association. WCA is an affiliate of the National Cattlemen's Beef Association of which I am also a member. Thank you to the Chairman and Ranking Member for allowing me to testify today on the impacts of the Environmental Protection Agency and the U.S. Army Corps of Engineers' proposed expanded definition of "waters of the United States." I will also provide my concerns with the USDA-Natural Resources Conservation Service (NRCS) interpretive rule that was promulgated alongside this proposal.

First and foremost, the cattle industry prides itself on being good stewards of our country's natural resources. We maintain open spaces, healthy rangelands, provide wildlife habitat and provide the country with those juicy ribeyes we all love to throw on the grill on summer days like today. But to provide all these important functions, cattlemen must be able to operate without excessive federal burdens, like the one we are discussing today. I don't think the negative impacts of this definition can be overstated. As a producer and the head of a state association, I can tell you that after reading the proposal rule it has the potential to impact every aspect of my operation and others like it by dictating land use activities in Washington state from 2,687 miles away. I would also feel confident in saying that I believe it will actually have a detrimental impact on water quality.

After reading the proposal I can say that one thing is clear, the proposed definition is not clear. If the agencies' goal was actually to provide clarity than they have missed the mark completely, making the status quo worse, not better. The proposal would include ditches as Water of the U.S. if a regulator can distinguish a bed, bank, and ordinary high water mark. The proposal also would make everything within a floodplain and a riparian area a federal water by considering them "adjacent waters." The result could be to eliminate the use of my summer pasture, which is located wholly in a floodplain. I will show you what I think it could mean for my ranch and other small businesses like it.

In total I own and manage 55 cow/calf pairs and 10 replacements, or 120 total head of cattle, which is the average number of head for a cattle rancher in the U.S. There are some bigger and some smaller, but I'm about your average size, which means the average cattle producer in the U.S. falls well under what the law considers a "small business." We clearly manage the landscape and must utilize it to raise our animals. My cattle drink from tanks which I pump from a stream so I can protect potential bull trout habitat, they also water from irrigation ditches, ponds, creeks, seeps and puddles that they find. Therefore it is important to me and my operation to have clean water. Protecting the quality of the water I need for my cows does not require the federal government's oversight. Myself, for profitability and moral reasons, and the state of Washington do a pretty darn good job.

You can see in the first attached picture I have a small stream running through my pasture that my cattle utilize for drinking

water. It is my judgment, based on the language of the proposal that this could easily qualify as a water of the U.S., opening me and my ranch up to significant liability. Not only could I be required to get a 404 permit for grazing my cows in the pasture, but by making it a federal water there are now considerations under the National Environmental Policy Act, or NEPA, and the Endangered Species Act due to the federal decision-making in granting or denying a permit. There is also the citizen suit provision under Sec. 505 of the Clean Water Act that would keep me up at night. For the price of a postage stamp someone who disagrees with eating red meat could throw me into court where I will have to spend time and money proving that I am not violating the Clean Water Act. I don't think this is what anyone had in mind when Congress passed the Clean Water Act.

Instead of improving water quality, it is my belief, the belief of the Washington Cattlemen's Association, and the belief of the National Cattlemen's Beef Association that this proposal will decrease the quality of our water because it would discourage ranchers like myself from implementing conservation practices that are designed to protect water quality. As an example, I recently completed a project that you can see in the second attached picture that creates a riparian pasture so I can manage the grazing that occurs within the riparian area. The fence has allowed me to better manage my forage and to protect water quality. I voluntarily installed the fence, not because I had to, but because I thought it would be good for the environment. If this proposal and the NRCS-EPA-Corps Interpretive Rule were in force when I started this project I would not have completed it due to the significant legal liability they have created.

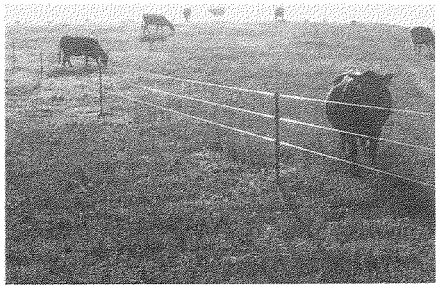
The Washington Cattlemen's Association and the National Cattlemen's Beef Association believe some presumptions have been created by the NRCS interpretive rule. First, that cattle grazing is a discharge activity subjecting me to legal liability if it occurs in a water of the U.S. I have never heard of the federal government declaring cattle to be either a point source or to create a fill activity under the Clean Water Act, but that' exactly what they've done. Second, if I implement a conservation practice that is not on the prescriptive list of 56 NRCS practices, or not done to the NRCS standard, it could now fall outside the statutory exemption for normal farming and ranching. The result is that if I do not follow the exact specifications for NRCS' prescribed grazing standard on my operation, I am no longer exempted from the 404 dredge and fill program. While this might not have been the agencies' intent, it was the result. The fence that I put up in the attached picture was done with cost-shared dollars from the local conservation district. It was not required to meet the more strenuous NRCS standard for fencing and I would not have engaged in the project had it been a requirement. You can see in this picture that the posts are spaced further apart than NRCS specs require, and do not have the required number of wires. Both those requirements add costs. The entire project cost approximately $1,400. Had I been required to install a fence meeting the NRCS standard and specifications it would have cost me an additional $300, for a quarter mile fence.

While that may not seem like a lot, if you expand that over hundreds of acres it can really add up to a lot of money. And for small business like mine, $300 does matter. Future conservation projects will not be implemented if this interpretive rule and proposed definition are allowed to move forward. I could not afford to risk being in violation of the Clean Water Act with fines of $37,500 per day and possible criminal sanctions to put in a project. I also would not go through the hassle and high cost of getting a 404 permit to complete this small project. I want to do my part for the environment, but I can't if it would jeopardize my entire operation. This is why the National Cattlemen's Beef Association and the Washington Cattlemen's Association are asking the agencies to withdraw the Interpretive Rule.

This didn't have to be the result; all the agencies had to do was engage stakeholders early on in the process, incorporate our suggestions and we would be much farther along in crafting a rule that actually would clarify the scope of Clean Water Act jurisdiction. We are particularly concerned with the lack of outreach with the small business community, contrary to the Regulatory Flexibility Act. Being the owner of a small business myself in the cattle industry and knowing the detrimental impact this regulation will have on my operation, it is appalling the agencies could assert that this regulation will not have a "significant economic impact on a substantial number of small entities." It is clear to me that the rule's primary impact will be on small landowners across the country. The agencies should have conducted a robust and thorough analysis of the impact, but is clear from the certification that they have not completed this important step in developing the regulation.

There was also zero outreach to the agriculture community before the rule was proposed and before the interpretive rule went into effect. Despite what the EPA is saying, they did not have a meaningful dialogue with the small business community as a whole. Even when cattle producers asked the head of the office of water at our February meeting in Nashville about the proposal, all we were told was to "wait and see what the proposal says." Well we were forced to wait instead of having input and this is what we got, a proposal that doesn't work for small businesses, doesn't work for cattle ranchers, and doesn't work for the environment.

Picture #1



Picture #2

STATEMENT OF

ALAN PARKS
VICE PRESIDENT
MEMPHIS STONE AND GRAVEL COMPANY

ON BEHALF OF

THE NATIONAL STONE, SAND, & GRAVEL ASSOCIATION

BEFORE THE HOUSE
COMMITTEE ON SMALL BUSINESS

HEARING ON

WILL EPA'S 'WATERS OF THE UNITED STATES' RULE DROWN SMALL BUSINESSES?

WASHINGTON, D.C.

May 29, 2014

Chairman Graves and members of the Committee, thank you for inviting me to testify on behalf of the National Stone, Sand & Gravel Association (NSSGA) at this hearing: "Will EPA's 'Waters of the United States Rule' Drown Small Businesses?"

My name is Alan Parks and I am Vice President of Memphis Stone and Gravel Company, of Memphis, Tennessee, where I have worked for almost 15 years on permitting and environmental compliance. Additionally, I direct the company's exploration drilling activity, long range mining, and reclamation work. I am a registered professional geologist in the State of Tennessee and have degree in mining engineering. My prior occupation was working as a geologist for the Tennessee Department of Environment and Conservation.

NSSGA is the world's largest mining association by product volume. NSSGA member companies represent more than 90% of the crushed stone and 70% of the sand and gravel consumed annually in the U.S., and there are more than 10,000 aggregates operations in the U.S. Of particular relevance to this hearing, 70% of NSSGA members are considered small businesses, and many are located in rural areas.

Memphis Stone and Gravel Company was started in 1910 and remains a family-owned business. We have eight active mining facilities in Tennessee and Mississippi. Memphis Stone and Gravel Company has a long history of providing aggregates for the betterment of the nation. To assist with the war effort in 1942, Memphis Stone and Gravel Company was the prime contractor for Halls Air Force Base and Murfreesboro artillery ranges. We have won national and local awards for conservation, community service, and safety.

Like all aggregates operations, Memphis Stone and Gravel Company is regulated by numerous entities including the city, county, and state governments, and federal agencies including the EPA, the Mine Safety and Health Administration, and the U.S. Army Corps of Engineers. Before we begin operations we must obtain permits to construct and operate our facilities. After we start operations, our facilities are routinely monitored to ensure we are operating in a safe and environmentally responsible manner. A safe and healthy environment in which to work is good business, and in the best interest of the employees. We work hard to make sure this happens.

Aggregates are the chief ingredient in asphalt pavement and concrete, and are used in nearly all residential, commercial, and industrial building construction and in most public works projects, including roads, highways, bridges, dams, and airports. Aggregates are used for many environmental purposes including: treating drinking water and in sewage treatment plants, for erosion control and in cleaning air emissions from power plants. While Americans take for granted this essential natural material, they are imperative for construction. Unlike other businesses, we cannot simply choose where we operate. We are limited to where natural forces have deposited the materials we mine. There are also competing land uses that can affect the feasibility of any project.

Through its economic, social and environmental contributions, aggregates production helps to create sustainable communities and is essential to the quality of life Americans enjoy. Aggregates are a high-volume, low-cost product. Due to high product transportation costs, proximity to market is critical; thus 70% of our nation's counties are home to an aggregates operation. Generally, once aggregates are transported outside a 25-mile limit, the cost of the material can increase 30% to 100%, in addition to creating environmental and transportation concerns. Because so much of our material is used in public projects, any cost increases are ultimately borne by the taxpayer.

As the industry that provides that basic material for everything from the roads on which we drive to purifying the water we drink. NSSGA members are deeply concerned that EPA's proposed rule will stifle our industry at a time when we are just now recovering from the economic downturn. The aggregates industry removes materials from the ground, then crushes and processes them. Hazardous chemicals are not used or discharged during removal or processing of aggregates. When aggregates producers are finished using the stone, sand or gravel in an area, they pay to return the land to other productive uses, such as residential and business communities, farm land, parks, or nature preserves.

Over the past eight years, the aggregates industry has experienced the most severe recession in its history. This expansion of jurisdiction will have a severe impact on industry by increasing the costs and delays of the regulatory process, causing further harm to an industry that has been production drop by 39% since 2006. While stone, sand and gravel resources may seem to be ubiquitous, construction materials must meet strict technical guidelines to make durable roads and other public works projects. Because many aggregate deposits were created by water, they are often located near water. The availability of future sources of high quality aggregates is a significant problem in many areas of the country and permitting issues has made the problem worse.

NSSGA members pride themselves on meeting or exceeding compliance with all pertinent environmental laws and regulations, and emphasize sustainable practices. Memphis Stone and Gravel Company pays very close attention to our resources, particularly water. Careful design of our plants ensures we maximize the recycling of precipitation and reuse of all of our water supplies. Additionally, we operate most of our facilities as a no-discharge system, keeping all process water on-site and requiring no hazardous chemicals in our production process.

EPA claims this rule change is needed because so many waters are unprotected, but that is not true: states and local governments have rules that effectively manage these resources. For example, states and many municipalities regulate any potential negative impacts to storm water run-off and require detailed storm water pollution prevention plans. These plans are required for every project, both during construction and operations. States and local governments are best-suited to make land use decisions and balance economic and environmental benefits, which is what Congress in-

tended. While EPA states groundwater is excluded from this rule, the rule also says that "shallow subsurface connections" are included. Does this mean the water that fills our pits is jurisdiction? It would be a rare event to NOT encounter shallow, unconfined or perched groundwater in sand and gravel deposits that we typically mine. Will a separate permit be required for reclaiming the it and returning it to another, beneficial use? These are just some of the many questions this rule poses, but does not answer. And, that in many ways underscores the problem with the proposed rule, the uncertainty of the scope of jurisdiction.

EPA contends the purpose of the proposed rule is to eliminate the time and resources allocated to make site-specific review of determinations. Before breaking ground, we always evaluate whether we are affecting jurisdictional water, which requires consultation with the Corps and sometimes hiring a consultant. Yet EPA doesn't provide any set criteria on what a "significant nexus" is, so the inclusion "other waters" will require additional time for determinations to be made. The delay caused by multiple consultations, surveys, reports, and individual watershed permits processed will add significant new costs during the permitting process, which could lead to abandoning projects once considered viable.

The aggregates industry requires large land areas to process and remove the extensive quantities of material needed for public works projects. Memphis Stone and Gravel Company can use up to 25 acres a year per site. This proposed rule could effectively place many areas "off limits" due to cost of new permits and/or the mitigation required to off-set losses to now regulated streams.

Having a clear jurisdictional determination for each site is critical to the aggregates industry. These decisions impact the planning, financing, constructing and operating aggregates facilities. Because the Clean Water Act 404 "dredge and fill" permitting process and the corresponding states' 401 Certification process is so long and costly for a small company like Memphis Stone and Gravel Company, we attempt to avoid jurisdictional areas. Now, under the proposed revisions, many previously non-jurisdictional areas like floodplains, wet weather conveyances, upland headwaters, ephemeral streams or any riparian area could be considered jurisdictional. It will make nearly any area we try to access regulated and in need of additional permits.

Even obtaining a jurisdictional determination can be a significant undertaking for a small company like ours. As a small company we attempt to do many of the jurisdictional determinations and other permitting in-house. However, Memphis Stone and Gravel Company will from time to time seek a consultant to help us obtain the required information for submission, because of time constraints. While jurisdictional determinations are good for five years, as an industry we make business decisions to buy or lease properties to extract aggregates for very long terms, 15 to 30 years is not uncommon for Memphis Stone and Gravel Company. The companies in our industry are very concerned that past understandings of what would be jurisdictional will now be subject to view. A change in what is considered jurisdictional can have sig-

nificant impacts on our material reserves, which will affect the life of our facilities and delay the start-up of new sites. Ultimately this change will disrupt the supply of aggregates to our biggest customers, government agencies; thus affecting highway programs, airports, and municipal projects.

There is much inefficiency in the current regulatory system; however, adding vague terms and undefined concepts to an already complicated program is not the way to fix the problem. In some cases this rule could have a negative effect on the environment and safety. Ditches without maintenance can degrade and lead to increased erosion and sediment problems.

EPA should undertake a full evaluation of the effects this rule will have on small businesses via a Small Business Advocacy Review (SBRFA) Panel. The proposed rule will put small businesses at risk of fines of up to $37,500 per day if a permit is required and not obtained, which could wipe out a small business that does not realize a permit is needed for work far from "navigable" water. We agree wholeheartedly with Chairman Graves that EPA is required to comply with the Regulatory Flexibility Act and get input from affected small businesses before proposing a rule. EPA claims this rule is based on sound science, but the Science Advisory Board, the group of independent scientists reviewing it, are still not near completion; in fact they have raised serious questions EPA has not answered.

EPA's economic analysis of this rule does not accurately show what businesses like ours will end up paying if this rule is finalized. It is not even close. One NSSGA member calculated that to do the additional mitigation of a stream required under this rule would be more than $100,000; this is just for one site in our industry. This is more than EPA has estimated the stream mitigation costs are for entire states in its economic analysis. For our business, time is money. Any new requirements lead to a long learning curve for both the regulators and the regulated. Just getting a jurisdictional determination can take momths—permits can take years; how much longer will it take to break ground with so many vague and undefined terms in this rule?

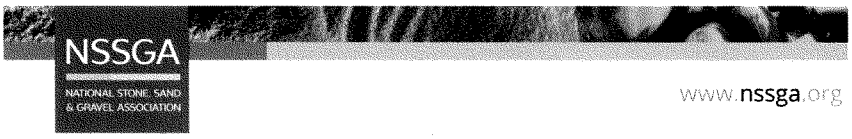
The proposed rule has no clear line on what is "in" and what is "out," making it very difficult for our industry and other businesses to plan new projects and make hiring decisions. If it is determined development of a site will take too long or cost too much in permitting or mitigation, we won't move forward. That means a whole host of economic activity in a community will not occur—all of this in the name of protecting a ditch or farm pond.

Taken further, a significant cut in aggregates production could lead to a shortage of construction aggregate, raising the costs of concrete and hot mix asphalt products for state and federal road building and repair, and commercial and residential construction. NSSGA estimates that material prices could escalate from 80% up to 180%. As material costs increase, supply becomes limited, which will further reduce growth and employment opportunities in our industry. Increases in costs of our materials for public works would be borne by taxpayers, and delay road repairs and other crucial

projects. Given that infrastructure investment is essential to economic recovery and growth, any change in the way land use is regulated places additional burden on the aggregates industry that is unwarranted and would adversely impact aggregates supply and vitally important American jobs.

NSSGA appreciates this opportunity to speak on the devastating effects of a broad expansion of Clean Water Act jurisdiction on the aggregates industry. Thank you, Mr. Chairman, and I will be happy to respond to any questions.

Attachments: NSSGA Clean Water Act Expansion



www.nssga.org

EPA'S EXPANSION OF CLEAN WATER ACT JURISDICTION WILL HARM THE AGGREGATES INDUSTRY

EPA's proposed rule will greatly increase the scope of what is considered "waters of the U.S.," including generally dry areas. This goes far beyond sensible limits established by Congress and the U.S. Supreme Court, and usurps congressional authority by effectively removing "navigable" from the Clean Water Act. Furthermore it will impose significant costs that far exceed the environmental benefits. We ask that Congress deny EPA the ability to broaden its jurisdictional determination beyond the 2008 Guidance.

Changes in Scope:

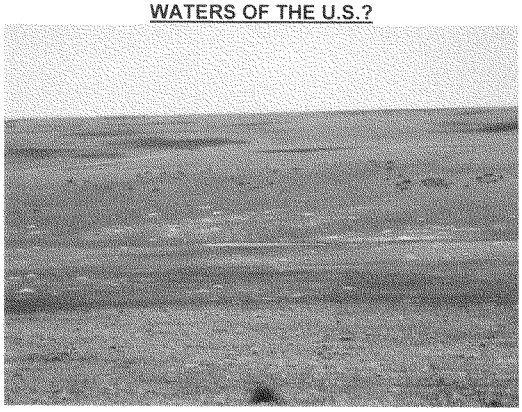
- Determination of jurisdiction is critical to the aggregates industry, impacting the costs of planning, financing, constructing and operating aggregates facilities.
- This expansion of CWA jurisdiction will have a severe impact on industry by increasing the costs and delays of the regulatory process, causing further harm to an industry that has seen production drop by 39% since 2006.
- EPA insists this broad expansion of powers is merely a change in "definition," and does not require full regulatory evaluation, such as the effects on small businesses.
- Many marginal aquatic areas that only have a remote and insubstantial impact to traditionally navigable waters will now be under federal jurisdiction, which imposes costs that far exceed any benefit to the aquatic ecosystem.

Overwhelming Burden to Business:

- EPA's economic analysis and adherence to proper rulemaking procedure are fatally flawed and should be completely redone.
- This draft rule will complicate and slow an already ponderous permitting process.
- It will put businesses at risk of fines of up to $37,500 per day if a permit is required and not obtained.
- Costs for mitigation under this new rule could run **$100,000 and up PER SITE**, while EPA's flawed economic analysis finds costs PER STATE of far less than that.

The rule will make it even more difficult for aggregates operators to ensure a timely supply of aggregates for public works projects essential to economic recovery, and will increase costs with no discernable environmental benefit.

WATERS OF THE U.S.?



Testimony of Tom Woods

First Vice Chairman of the Board

National Association of Home Builders

Before the

United States House of Representatives

Small Business Committee

Hearing on "Will EPA's 'Waters of the United States' Rule Drown Small Businesses"

May 29, 2014

Chairman Graves, Ranking Member Velazquez, members of the subcommittee, on behalf of the more than 140,000 members of the National Association of Home Builders (NAHB), I appreciate the opportunity to testify today. My name is Tom Woods and I am the president of Woods Custom Homes, a building company based in Blue Springs, Missouri, and NAHB's 2014 First Vice Chairman of the Board.

NAHB members are involved in the home building, remodeling, multifamily construction, land development, property management, and light commercial construction industries. Our industry is largely dominated by small businesses, with our average builder member employing 11 employees. Since the Association's inception in 1942, NAHB's primary goal has been to ensure that housing is a national priority and that all Americans have access to safe, decent and affordable housing, whether they choose to buy or rent a home.

Recognizing the need for a clean environment and the benefits that it brings to communities, residents, and potential home buyers, NAHB members have a vested interest in preserving and protecting our nation's land and water resources. Since its inception in 1972, the Clean Water Act (CWA) has helped to make significant strides in improving the quality of our water resources and our lives. As environmental stewards, the nation's home builders construct neighborhoods and help create thriving communities while maintaining, protecting, and enhancing our natural resources. Under the CWA, home builders must often obtain and comply with section 402 and 404 permits to complete their projects. For businesses navigating federal bureaucracies, what is most important to our compliance efforts is a regulatory scheme that is consistent, predictable, timely, and focused on protecting true aquatic resources. Unfortunately, this is becoming a more elusive goal.

As a leader of my industry, I have a unique understanding of how the federal government's regulatory process impacts businesses in the real-world. Additional regulations make it more difficult for me to provide homes at a price point that is affordable to working families—a reality that affects both renters and prospective buyers.

The home building industry would benefit from smarter and more sensible regulation. According to a study completed by NAHB, government regulations accounts for up to 25% of the price of a single-family home. Nearly two-thirds of this impact is due to regulations that affect the developer of the lot, with the rest due to regulations that are imposed on the builder during construction.[1] The regulatory requirements we face as builders do not just come from the federal government. As the former Mayor of Blue Springs, Missouri, I believe a key component of effective regulation is ensuring that local, state and federal agencies are cooperating, where possible, to streamline permitting requirements and are respecting the appropriate responsibilities of each level of government. Importantly, more sensible regulation will translate into job growth in the construction industry.

"Waters of the United States" Proposed Rule:

On April 21, 2014, the Environmental Protection Agency and U.S. Army Corps of Engineers ("the agencies") proposed a rule redefining the scope of waters protected under the CWA. For years, landowners and regulators alike have been frustrated with the continued uncertainty over the scope of federal jurisdiction over "Waters of the United States." By improving the CWA's implementation, removing redundancy, and further clarifying jurisdictional authority, the agencies are hoping they can do an even better job at facilitating compliance while protecting and improving the aquatic environment.

Unfortunately, the proposed rule falls well short of providing the clarity and certainty the construction industry seeks. This rule will increase federal regulatory power over private property and will lead to increased litigation, permit requirements, and 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 that are already regulated at the state level.

Addressing the Impacts on Small Entities

The agencies completely ignore the impact this proposed rule will have on small entities. They claim "...(t)hat fewer waters will be subject to the CWA under the proposed rule than are subject to regulation under the existing regulations; this action will not affect small entities to a greater degree than the existing regulations."

This is not accurate. In reality, the proposed rule establishes broader definitions of existing regulatory categories, such as tributaries, and regulates new areas that are not jurisdictional under current regulations, such as adjacent non-wetlands, riparian areas, floodplains, and other waters.

The agencies intentionally created overly broad terms so they have the authority to interpret them as they see fit in the field, including stepping in where they may think a state has not gone far

[1] Survey conducted by Paul Emrath, National Association of Home Builders, "How Government Regulation Affects the Price of a New Home," 2011

enough. These new definitions will include substantial additions, such as a first time inclusion of ditches, conveyances and other water features that may flow, if at all, only after a heavy rainfall. Unless proper mapping is provided by the agencies it may be impossible for a home builder to independently identify what is jurisdictional.

In addition, the proposal suggests that "neighboring" could include any wet feature within a "floodplain." As I am sure you are aware, floodplains can extend for miles from traditional navigable waters, yet the agencies can now claim that those features, miles away, can be considered neighboring. This is a far cry from what Congress intended to be covered by the CWA. For any small business trying to comply with the law, the last thing it needs is a set of new, vague and convoluted definitions that only provide another layer of uncertainty.

These definitions will leave home builders in a constant state of confusion. As a small business owner, this unpredictability will make it difficult for my business to comply and grow. The agencies suggest that the rule provides clarity; however all it does is produce more questions. Unfortunately, we have to rely on the agencies and costly consultants for answers.

Regulatory Flexibility Act

These changes have far reaching implications and will alter the way we conduct business. Recognizing that small businesses are frequently disproportionately impacted by federal regulations, Congress enacted, more than 30 years ago, the Regulatory Flexibility Act (RFA). The agencies are legally required to assess the true impacts this rule will have on small businesses under the RFA.

The RFA requires federal agencies to consider the effect of their actions on small entities, including small businesses, small nonprofit enterprises, and small local governments.[2] When an agency issues a rulemaking proposal, the RFA requires the agency to "prepare and make available for public comment an initial regulatory flexibility analysis. Such analysis shall describe the impact of the proposed rule on small entities."[3]

The RFA states that an initial regulatory flexibility analysis (IRFA) shall address the reasons that an agency is considering the action; the objectives and legal basis of the rule; the type and number of small entities to which the rule will apply; the projected reporting, recordkeeping, and other compliance requirements of the proposed rule; and all federal rules that may duplicate, overlap, or conflict with the proposed rule. The agency must also provide a description of any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes which minimize any significant economic impact of the proposed rule on small entities.[4]

[2] 5 U.S.C. 601–612.
[3] 5 U.S.C. 603(a).
[4] 5 U.S.C. 603(c).

Section 605 of the RFA allows an agency, in lieu of preparing an IRFA, to certify that a rule is not expected to have a significant economic impact on a substantial number of small entities. If the head of the agency makes such a certification, the agency must publish the certification in the Federal Register along with a statement providing the factual basis for the certification.[5]

While the original Congressional intent and subsequent additions and enhancements to the RFA are to be lauded, the reality is that far too often agencies either view compliance with the Act as little more than a procedural "check-the-box" exercise or they artfully avoid compliance by other means.

In this instance, the agencies have bypassed the safeguards of the RFA by certifying the proposed rule. NAHB believes that the agencies should have conducted an IRFA to truly assess the impact this rule will have on small business entities. A more thorough analysis of the proposed requirements would have revealed the disproportionate burdens that this rule places on small residential home builders. I take issue with the fact that the agencies have not considered these consequences.

Small Businesses Regulatory Enforcement Fairness Act Requirements

Under the 1996 amendments to the RFA, known as the Small Businesses Regulatory Enforcement Fairness Act (SBREFA),[6] if the Occupational Safety and Health Administration (OSHA) or Environmental Protection Agency (EPA) prepares an IRFA, they must first notify the Chief Counsel for Advocacy of the Small Business Administration ("Advocacy") and provide Advocacy with information on the potential impacts of the proposed regulation on small entities. Advocacy must then identify individual representatives of affected small entities for the purpose of obtaining advice and recommendations about the potential impacts of the proposed rule. The agency must convene a review panel made up of representatives from the agency, Advocacy, and the Office of Management and Budget to review the materials the agency has prepared, collect advice and recommendations from the small entity representatives (SERs), and issue a report of the panel's findings. Following this process, the agency shall modify the proposed rule, the IRFA, or the decision on whether an IRFA is required if the panel report warrants any changes.[7]

In the 18 years since the RFA was amended by SBREFA to include the panel requirement, EPA has convened approximately 43 panels. According to a report issues by the Congressional Research Service (CRS), EPA issued nearly the same number of significant regulations during the first Obama Administration.[8] It defies belief

[5] 5 U.S.C. 605.
[6] 5 U.S.C. 609.
[7] 5 U.S.C. 609(b) (1) through (6).
[8] The Congressional Research Service examined 45 regulations it characterized as satisfying OMB's "significance" threshold of $100 million annual effect on the U.S. economy in a report addressing the rate of issuing regulations during the first Obama Administration. *Regulations: Too Much, Too Little, or On Track?,* http://www.fas.org/sgp/crs/misc/R41561.pdf (last visited Mar. 5, 2013).

that so few EPA regulations have met the threshold under SBREFA and these numbers illustrate how reluctant some agencies are to comply with the law.

It was very surprising to me that the agencies decided to certify the rule, thereby completely bypassing the RFA process. The agencies are not interested in hearing from the regulated community. Their only objective is to move this regulation closer to the finish line. For a rule of this magnitude, the small business voice must be heard and the agencies have failed to provide that platform.

Ensuring Compliance with Small Entity Feedback Requirements

While section 611 of the RFA provides for judicial review of some of the act's provisions, it does not permit judicial review of section 609(b), which contains the panel requirement.[9] NAHB believes that the RFA should be amended to include judicial review of the panel requirement to ensure the agencies adhere to the law. If the RFA allowed judicial review of section 609(b), agencies would feel more pressure to comply by convening a meaningful panel of SERs that can thoughtfully and substantively advise the agency, as Congress intended. Knowing that its decision whether to convene a panel could result in a judicial remand of a regulation presents a strong incentive to agencies to conduct a panel at the early stages in rule development. Without a judicial backstop or other enforcement mechanism, there is no way to compel the agency to implement a clear congressional directive. When agencies evade their responsibility to convene review panels, they remove small business input entirely from the equation.

Acknowledging the True Costs to Small Entities

Not only did the agencies fail to perform the required RFA analysis to determine the proposal's economic impacts on small businesses, the agencies' economic analysis of the proposal is fatally flawed.

The Agencies' Flawed Cost-Benefit Analysis

The Environmental Protection Agency's (EPA *Economic Analysis of Proposed Revised Definition of Waters of the United States* (analysis) fails to provide a reasonable assessment of costs and benefits as required by Executive Order 12866. Economist Dr. David Sunding, the Thomas J. Graff Professor at the University of California-Berkeley's College of Natural Resources, has identified several major flaws with the analysis.

According to Dr. Sunding, the analysis relies on a flawed methodology for estimating the extent of newly jurisdictional waters and thereby underestimating the incremental wetland acreage that will be impacted, excludes several important types of costs, and uses a flawed benefits methodology. In fact, he stated that "the errors and

[9] Section 611(a)(1) states: "For any rule subject to this chapter, a small entity that is adversely affected or aggrieved by final agency action is entitled to judicial review of agency compliance with the requirements of sections 601, 604, 605(b), 608(b), and 610 in accordance with chapter 7. Agency compliance with sections 607 and 609(a) shall be judicially reviewable in connection with judicial review of section 604."

omissions in EPA's study are so severe as to render it virtually meaningless." For example, one of the many problems that he acknowledged was the unreliable data sample the EPA used in the analysis:

> *"The analysis uses FY 2009/2010 as the baseline year to estimate impacts. FY 2009/2010 was a period of significant contraction in the housing market due to the financial crisis. Construction spending during these two fiscal years was 24% below that of the previous two-year period. In statistical terms, this is an issue of sample selection, where due to exogenous events the sample selected for the analysis is not representative of the overall population. The report bases its finding on a period of extremely low construction activity, which will result in artificially-low number of applications and affected acreage. Even if the percent increase in added permits is correct, using the number or permits issued in 2010 as a baseline is very likely a significant underestimation of the affected acreage in years not subject to a crisis in the building sector."*[10]

In addition, EPA's calculation of incremental costs is deficient. EPA's analysis excludes several important types of costs, such as costs associated with permitting delays, impact avoidance and minimization. Also, EPA's analysis of Section 404 costs relies on permitting cost data that are nearly 20 years old and are not adjusted for inflation.

Finally, EPA uses a flawed methodology for its calculation of benefits. EPA's analysis adopts an all or nothing approach to assessing benefits by assuming that all wetlands affected by the rule's definitional change would be filled. On the flip side, they make the assumption that the rule would preserve or mitigate land if federal jurisdiction is extended by the rule. These unrealistic assumptions contribute to an inflated benefits calculation.

It is clear that the EPA should withdraw the economic analysis and prepare an adequate study of this major change to the CWA. Yet again, the agencies are painting an inaccurate picture of how this regulation will impact small businesses.

Costs to the Home Building Industry

Home building is a complex and highly regulated industry. As costs, regulatory burdens, and delays increase, the small businesses that make up a majority of the industry must adapt. This can include paying higher prices for land or purchasing smaller parcels, redrawing development or house plans, and/or completing mitigation. All of these adaptations must be financed by the builder and ultimately arrive in the market as a combination of higher prices for the consumers and lower output for the industry. As output declines and jobs are lost, other sectors that buy from or sell to the construction industry also contract and lose jobs. Builders and developers, already crippled by the economic downturn, cannot

[10] David Sunding, "Review of 2014 EPA Economic Analysis of Proposed Revised Definition of Waters of the United States," 2014

depend upon the future home buying public to absorb the multitude of costs associated with overregulation.

Because compliance costs for regulations are often incurred prior to home sales, builders and developers have to essentially finance these additional carrying costs until the property is sold. Because of the increased price, it may take longer for the home to be sold. Carrying these additional costs only adds more risk to an already risky business, yet is one of the difficult realities that home builders face very day. This proposed rule only adds to the headwinds that our industry faces.

Even moderate cost increases can have significant negative market impacts. This is of particular concern in the affordable housing sector where relatively small price increases can have an immediate impact on low to moderate income home buyers. Such buyers are more susceptible to being priced out of the market. As the price of the home increases, those who are on the verge of qualifying for a new home will no longer be able to afford this purchase. An analysis done by NAHB illustrates the number of households priced out of the market for a median priced new home due to a $1,000 price increase. Nationally, this price difference means that when a median new home price increases from $225,000 to $226,000, 232,447 households can no longer afford that home.

The picture becomes more stark when you consider the time and cost to obtain a CWA section 404 permit. A 2002 study found that it takes an average of 788 days and $271,596 to obtain an individual permit and 313 days and $28,915 for a "streamlined" nationwide permit. Over $1.7 billion is spent each year by the private and public sectors obtaining wetlands permits.[11] Importantly, these ranges do not take into account the cost of mitigation, which can be exorbitant. When considering these excesses, it becomes clear that we need to fine a necessary balance between protecting our nation's water resources and allowing citizens to build and develop their land.

Construction projects rely on efficient, timely, and consistent permitting procedures and review processes under CWA programs. Builders and developers are generally ill-equipped to make their own jurisdictional determinations and must hire outside consultants to secure necessary permits and approval. This takes time and money. Delays often lead to greater risks and higher costs, which many developers would rather avoid given tight budgets and timeframes. Onerous permitting liabilities could delay or eventually kill a real estate deal. If the rule is finalized in its current form, the ability to sell, build, expand, or retrofit structures or properties will suffer notable setbacks, including added cost and delays for development and investment.

Oftentimes, home builders will be at the mercy of the agencies. Builders will have to request a jurisdictional determination from the agencies to ensure they are not disturbing land near an aggregated water. Consequently, an increase in the number of jurisdic-

[11] David Sunding and David Zilberman, "The Economics of Environmental Regulation by Licensing: An Assessment of Recent Changes to the Wetland Permitting Process," 2002

tional determination requests, across all industries, will result in greater permitting delays as the agencies are flooded with paperwork. My business has already been the victim of permitting delay. For one of my building projects, I was entangled in the Army Corps permitting process for over two years. These delays will only increase as the agencies work to extend federal protections to smaller waters.

In addition, many federal statutes tie their approval/consultation requirements to those of the CWA, i.e. if one has to obtain a CWA permit, he/she must also obtain other permits. If more areas are considered jurisdictional, more CWA permits will be required. More federal permitting actions will trigger additional statutory reviews—by agencies other than the permitting agency—under laws including the Endangered Species Act, National Historic Preservation Act, and National Environmental Policy Act. Project proponents do not have a seat at the table during these additional reviews, nor are consulting agencies bound by a specific time limit. Lengthened permitting times will include an increased number of meetings, formal and informal hearings, and appeals. These federal consultations are just another layer of red tape that the federal government has placed on small businesses and it is doubtful the agencies will be equipped to handle this inflow.

While my industry is complex and multifaceted, it is not beyond the agencies' ability to adequately study and estimate realistic costs and burdens resulting from this proposal.

Impacts on State and Local Governments

While many aspects of the CWA are vague, it is clear that Congress intended to create a partnership between the federal agencies and state governments to protect our nation's water resources. Congress states in section 101 of the CWA that "[f]ederal agencies shall cooperate with state and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resource." Under this notion, there is a point where federal authority ends and state authority begins. The rule proposed by the agencies blatantly ignores this history of partnership and fails to recognize that there are limits on federal authority.

States have adequately regulated their own waters and wetlands for years. States take their responsibilities to protect its natural resources seriously and do not need the federal government to assert jurisdiction. In fact, every state has the authority to exceed federal law, so long as there is a compelling reason. If you looked around the country you would find that many states are protecting their natural resources more aggressively than when the CWA was enacted. As a former Mayor, I am aware of this impact. I have a firsthand understanding of the lengths that state and local governments go to in order to protect their waters.

In addition, if this rule is finalized it will slow down housing production which will have an adverse affect on state and local economies. Buyers of new homes and investors in rental properties add to the local tax base through business, income and real estate

taxes, and new residents buy goods and services in the community. NAHB estimates the first-year economic impacts of building 100 typical single family homes to include $28 million in wage and business profits, $11.1 million in federal, state and local taxes, and 297 jobs. In the multifamily sector, the impacts of building 100 typical rental apartments include $10.8 million in wages and business profits, $4.2 million in federal, state and local taxes and 113 jobs.

Conclusion:

Congress, in crafting the RFA, clearly intended for federal agencies to carefully consider the proportional impacts of federal regulations on small businesses.

It is the purpose of this Act to establish as a principle of regulatory issuance that agencies shall endeavor, consistent with the objectives of the rule and applicable statutes, to fit regulatory and informational requirements to the scale of the businesses, organizations, and governmental jurisdictions subject to regulations. To achieve this principal, agencies are required to solicit and consider flexible regulatory proposals and to explain the rationale for their actions to assure that such proposals are given serious consideration.

Unfortunately, all too often the EPA has completely skirted these requirements. They clearly view RFA compliance as an optional step in the rulemaking process. This proposed rule will have a significant impact on small businesses nationwide, an important notion that the agencies choose to ignore. I am at a loss as to why the agencies refuse to give small businesses a seat at the table to discuss these impacts. I request that the agencies start over and develop a more meaningful and balanced rule that respects the spirit of the RFA.

Thank you again for the opportunity to testify today.

Testimony of William W. Buzbee

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Before the United States House of Representatives

Committee on Small Business

May 29, 2014

Hearing on United States Environmental Protection Agency and Army Corps of Engineers "Waters of the United States" Proposed Regulations as Published in the Federal Register on April 21, 2014

My name is William Buzbee. I am a Professor of Law at Emory University School of Law, where I am director of Emory's Environmental and Natural Resources Law Program. I am about to move to Washington where this summer I will be joining the faculty at the Georgetown University Law Center. I am also a member-scholar of the not-for-profit regulatory policy think-tank the Center for Progressive Reform.

I am pleased to accept this Committee's invitation to testify regarding the new proposed "waters of the United States" regulations published in the Federal Register by the Army Corps of Engineers (the Army Corps) and the United States Environmental Protection Agency (EPA) on April 21, 2014. As a professor asked to testify due to my expertise, not as a partisan, representative of any organization, I will seek to provide context leading to these proposed regulations, comment on the choices made by EPA and the Army Corps, and assess the legality and logic of the proposed regulations.

My background and past involvement with the "waters of the United States" question:

This is not my first involvement with the question of what is protected as a "water of the United States" under the CWA. As a result of my work on environmental law and federalism, I served as co-counsel for an unusual bipartisan amicus brief filed in *United States v. Rapanos,* 547 U.S. 715 (2006) (*Rapanos*). This brief was filed on behalf of a bipartisan group of four former Administrators of the United States Environmental Protection Agency (EPA). Those former US EPA Administrators included Russell Train, who served under Presidents Nixon and Ford, Douglas Costle, who served under President Carter, William Reilly, who served under the first President Bush, and Carol Browner, who served under President Clinton. Despite their different party backgrounds and years of service, all four shared the same views about the importance of retaining longstanding protections of America's waters. This bipartisan EPA Administrators' brief was aligned in *Rapanos* with George W. Bush Administration's arguments before the Supreme Court, several dozen states, many local governments, and an array of environmental groups as well as hunting and fishing interests. All asked the Supreme Court to uphold longstanding regulatory and statutory interpretations regarding what is protected as a "water of the United States," emphasizing the centrality of the "waters" determination to all of the Clean Water Act. After all, although this question of what are protected "waters" is often discussed with a focus on wetlands and tributaries and especially dredging and filling restrictions long set by Section 404 of the Clean Water Act, the "waters" issue is the key jurisdictional hook for virtually all of the Clean Water Act. This includes, among other things, direct pollution industrial discharges under Section 402 of the Clean Water Act and its National Pollutant Discharge Elimination System (NPDES) program, as well as oil spill and water quality components of the Act.

After the Court's splintered and confusing ruling in *Rapanos,* I testified during the summer of 2006 before the Fisheries, Wildlife, and Water subcommittee of the United States Senate Committee

on Environment and Public Works about the implications of the *Rapanos* decision. Shortly thereafter, I testified at a December 2007 hearing of the Senate Committee on Environment and Public Works, also discussing the implications of these cases and regulatory and judicial developments since *Rapanos*. I also testified in 2008 at a House hearing held by the Committee on Transportation and Infrastructure regarding a proposed bill referred to as the Clean Water Restoration Act.

Earlier in my legal career, I counseled industry, municipalities and governmental authorities, states and environmental groups about environmental law, pollution control, and land use issues under all of the major federal environmental laws, as well as state and local laws. As a scholar, I have written extensively about related issues, with a special focus in recent years on regulatory federalism, especially environmental laws and their frequent reliance on overlapping federal, state and local environmental roles. I have published books with Cornell and Cambridge University Presses, and Wolters Kluwer/Aspen. My publications have appeared in *Stanford Law Review, Cornell Law Review, NYU Law Review, Michigan Law Review, University of Pennsylvania Law Review,* and in an array of other journals and books. I have taught at Emory since 1993, but also visited at Columbia, Cornell, Georgetown and Illinois Law Schools. As mentioned above, I will be leaving Emory for Georgetown University Law Center in a few months.

The purpose and logic of the new "waters" proposed regulations, in brief:

These proposed regulations and a massive accompanying science report referenced and summarized in the Federal Register notice are an attempt to reduce uncertainties created by three Supreme Court decisions bearing on what sorts of "waters" can be federally protected under the Clean Water Act. The two most important recent cases are the Supreme Court's decisions in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers,* 531 U.S. 159 (2001) *(SWANCC)* and *United States v. Rapanos,* 547 U.S. 715 (2006) *(Rapanos).* Judicial and regulatory treatments of these cases and the earlier related decision in *United States v. Riverside Bayview Homes,* 474 U.S. 121 (1985), have resulted in an increasingly confused body of law, creating both regulatory uncertainty and occasionally bold new assertions about reduced protections for previously jurisdictional "waters of the United States." These cases, and resulting confusion, have increased regulatory transaction costs for everyone and reduced the protections afforded to America's waters. The proposed 2014 "waters" regulations are a logical and legally well justified means to bring clarity to the law and, to the extent permissible under the Supreme Court's recent decisions, restore protections long provided to America's waters during three decades of bipartisan agreement about when and why various sorts of waters should be protected. If finalized, they should greatly reduce legal uncertainty, regulatory skirmishing, and attendant litigation resulting from the uncertain intersection of these three important cases.

I will make five main points in this testimony:

First, I will explain very briefly how the question of what "waters" are protected matters not just for wetlands and tributary protections, but for industrial discharges of pollution. Furthermore, the various types of waters protected perform many functions of importance to businesses and governments at all levels. Business, health, recreational, and environmental interests are all at stake here. Surely this Committee will hear from some business interests arguing against the proposal of the Army Corps and EPA, but business interests are undoubtedly on both sides of this issue, with hunting, fishing, boating, recreation, and tourism linked businesses especially dependent on protection of America's waters. And because pollution and filling of America's waters threaten low cost but high value wetlands functions and water used for agricultural purposes and for drinking water, and also water quality in drought prone areas, the despoiling or filling of America's waters would be immensely costly.

Second, I will show how the regulatory choices reflected in these regulations are responsive to Supreme Court law and also the views of a majority of the Supreme Court, at least when it last addressed related questions.

Third, these proposed regulations reveal that EPA and Army Corps have responded to criticisms of supposed limitless claims of federal power by retaining and solidifying exemptions.

Fourth, and perhaps most importantly, the regulations link a massive survey of peer reviewed science of waters' functions with a tiered and nuanced approach. This approach answers criticism that the federal government is going too far and protecting areas of no value relevant to the Clean Water act. If critics can find flaws in the science or proposed regulatory categories, they can and should produce their own contrary support and call for correction in the now ongoing notice and comment regulatory process.

Lastly, in the initial heated attacks on these proposed regulations, critics failed to note and credit a major change that removes the most expansive and least water-linked historic grounds for federal claims of jurisdiction. For decades, federal jurisdiction has existed for "other waters" of various sorts merely upon several sorts of showing that the harming activity or uses of the waters were linked to industry or commerce. This was, in effect, a commerce-linked sweep up provision. The new proposed regulations delete these longstanding grounds for protection, and if finalized would now link Clean Water Act jurisdiction to what the best peer reviewed science indicates deserves protection.

Point I: *The extent of federally protected waters matters to far more than just wetlands regulation and explains the longstanding federal bipartisan consensus*

The question of what "waters" are federally protected is not a matter that only concerns allegedly marginal waters that, as often presented by critics of the longstanding protective consensus, look more like land or involve the outermost reaches of wetlands protection. The question of what are protected "waters of the United States" concerns the very linchpin of federal Clean Water Act jurisdiction. It does indeed supply the hook for Section 404 "dredge and

fill" coverage, but also provides the jurisdictional prerequisite for Section 402's requirements of permits for industrial pollution discharges under the National Pollution Discharge Elimination System (or NPDES). It also underpins efforts to protect water quality, protect drinking water, provide habitat, and buffer against storm surges and flooding. Furthermore, since the 1970s and still today on the Supreme Court, the longstanding consensus has been to protect far more than just waters used in the literal sense for shipping-linked navigation. The Clean Water Act has been one of America's great success stories, helping to restore many of America's rivers from highly polluted conditions to water that often now is clean enough for fishing, recreation, and even drinking water. The Act also greatly reduced the pre-Clean Water Act tendency to see wetlands as worthless and appropriate for filling. Nevertheless, many parts of the country still suffer from degraded water quality, and threats to wetlands and tributaries still arise. Everyone may share a common interest in protecting water quality and wetlands' hugely valuable functioning. Nevertheless, the ability to pollute with impunity or convert for private gain a tributary or wetland into land for development or other commercial use can generate private wealth, even if others downstream are economic losers. Hence, despite a broad consensus that America's rivers, tributaries and wetlands should be protected, clashes over particular applications of the law are a near constant.

Until the 2001 Supreme Court *SWANCC* case, the law and underlying regulations reflected a stable bipartisan consensus of almost thirty years that protection of America's waters through stable Part 328 regulations was good policy. However, *SWANCC* and the 2006 *Rapanos* case unsettled that longstanding bipartisan consensus, breeding legal uncertainty that the new Army Corps and EPA regulations seek to address. As suggested by a majority of Supreme Court justices in *Rapanos,* new regulations responding to these two cases and linking what are protected "waters" to sound science could reduce such uncertainty, both protecting waters that matter and reducing regulatory uncertainty that benefits no one.

Point II: *The new proposed "waters of the United States" regulations are an appropriate response to the Supreme Court's recent cases:*

Although both *SWANCC* and *Rapanos* unsettled the longstanding protective and bipartisan consensus about what "waters" were federally protected, both cases created considerable legal uncertainty that has led now to over a decade of disagreement and skirmishing before Congress, agencies, and the courts. However, a six justice majority in *Rapanos* embraced the role of expert regulation to clarify the appropriate line between land and water. This included Chief Justice Roberts, who bemoaned the lack of responsive clarifying regulations post-*SWANCC,* and Justice Kennedy, who penned a swing vote opinion that is widely viewed as the most authoritative *Rapanos* opinion. Justice Kennedy fleshed out how a "significant nexus" needs to be shown to federally protect some waters whose linkages to navigable waters and functioning makes them of possibly marginal importance; "alone or in combination," the relationship with navigable waters much be more than "specu-

lative or insubstantial." *Rapanos,* 547 U.S. at 780. Justice Kennedy explicitly recognized that many questions about what sorts of waters deserve protection could be addressed via categories set forth by regulation, although he also appeared to call for case-by-case determinations in other settings. The four dissenters, all of whom joined an opinion by Justice Stevens, would have affirmed the regulators' judgments attacked in *Rapanos;* they emphasized the importance of judicial deference to expert regulatory judgments about what waters should be protected. Thus, along with Chief Justice Roberts and Justice Kennedy, six justices embraced an ongoing role for regulation to bring clarity to the law. In addition, an earlier unanimous Supreme Court in *Riverside Bayview Homes* embraced deference to regulatory judgments about where to draw the line between land and water. There undoubtedly remains legitimate room for regulations to bring greater clarity to this body of law.

The proposed regulations at issue in today's hearing respond directly and reasonably to these Supreme Court calls. They protect some waters by category, basing that judgment on a comprehensive review of peer reviewed science about the linkages, value and functions of such categories of waters. Some other types of waters are identified as possibly falling under federal jurisdiction, but the jurisdictional determination has to follow a water site-specific review to see if a "significant nexus" exists adequate to justify federal protection. Furthermore, the proposed regulations offer additional guidance about what "significant nexus" analysis should consider, building on Justice Kennedy's *Rapanos* language and providing additional guidance for what regulators and those seeking a jurisdictional determination should consider.

Hence, by protecting some waters by category and others on a case-by-case basis if satisfying "significant nexus" analysis, and in all instances hinging such regulatory judgments to a comprehensive survey of peer reviewed science, the Army Corps and EPA have respected Supreme Court edicts and signals. Furthermore, these proposed regulations also show fealty to the Clean Water Act's explicit goal of protecting the "chemical, physical, and biological integrity" of America's waters by reducing pollution discharges and requiring permits before discharging any pollutants into such waters, whether in the form of industrial pollution or fill.

Point III: *The proposed regulations make explicit several categories of activities or waters not subject to federal jurisdiction*

A persistent refrain in recent years and regarding the proposed regulations under discussion today is that the jurisdiction being claimed borders on the limitless. This is most evidently erroneous in the proposal's creation of both categorically protected waters and others that must be assessed on a case-by-case basis. However, the proposed regulations go further, in new Section 328.3(b) making explicit that several types of otherwise potentially debatable waters are not "waters of the United States." These include (with additional more precise language): waste treatment systems; prior converted cropland; several sorts of ditches that are upland or do not contribute flow to otherwise regulated waters; and several types of "features" such as artificially irrigated areas that would revert to

upland without irrigation water, artificial lakes, ponds, pools and ornamental waters, construction-linked water-filled depressions, groundwater, and gullies, rills and non-wetland swales. Several of these exemptions appear to be in direct answer to criticisms in court briefs and congressional testimony that federal jurisdiction has bordered on the limitless.

Point IV: *The proposed regulations' link to a massive survey of peer-reviewed science about waters' connectivity, values and function answers responds to the most prevalent criticism of "waters" federal jurisdiction and puts all on notice*

Over the past decade, a common claim of critics of federal jurisdiction has been that waters—or sometimes lands—can and are claimed to be protected for no reason relevant to the Clean Water Act's purposes. And on this issue and in other battles over regulation, critics have called for "sound science" and "peer reviewed" science to underpin regulatory judgments. The Army Corps and EPA have taken this to heart, for the first time pulling together a massive survey of peer reviewed publications about the connectivity, values, and functions of various types of waters. This report is, I believe, under review by the Science Advisory Board, and also has been made public for review and comment. In addition, the Corps and EPA in their proposed regulation's Federal Register notice explain how they interpret this report and the science in deciding what types of waters are categorically protected, subject case-by-case to "significant nexus" analysis, or not protected.

I am unclear what action, if any, this Committee might choose to take about these proposed regulations, but this pending notice and comment process and public vetting of the accompanying science report are providing a value open, transparent, and judicially challengeable process. If critics can point to flaws and identify better peer reviewed published science, they now have such an opportunity.

Point V: *The Army Corps and EPA in the proposed regulations have deleted the longstanding "other waters" commerce-linked sweep-up provision, thereby linking protections to science and limiting federal power*

In the proposed regulations, a longstanding additional grounds for federal jurisdiction has been deleted. This provision, the former Section 328.3(3) "other waters" paragraphs, provided federal jurisdiction to protect over a dozen sorts of waters upon a showing that their "use, degradation or destruction . . . could affect interstate or foreign commerce" or be used by "interstate or foreign travelers" for "recreational or other purposes," for fishing-linked commerce, or for "industrial purposes by industries in interstate commerce." This provision basically identified types of waters but made them protectable based on their commerce-linked uses or values. This regulation was consistent with longstanding understandings of the 1972 Clean Water Act amendments and the congressionally intended reach of federal power. However, both the *SWANCC* and *Rapanos* decisions raised questions about whether Clean Water Act jurisdiction could focus on a water's commercial or industrial uses

or the impacts of a water's degradation without regard to the water's functions or links to navigable waters.

I will not here opine on whether this section's deletion was legally necessary or prudent. I will, however, note that the Corps and EPA have decided to answer critics and eliminate uncertainty by deleting this section in favor of now linking *all* jurisdictional "waters of the United States" determinations to what the science shows. Since most pollution and filling activity is undoubtedly commercial and industrial in nature, and little today is not linked to interstate commerce, this regulatory deletion is a potentially significant concession. Again, the proposed regulations choose to link regulation to peer reviewed science and cut back on the broadest possible grounds for jurisdiction.

Conclusion

The legal uncertainty of recent years has benefitted no one. For those concerned about protection of America's waters, regulatory uncertainty has led to regulatory forbearance and some problematic or erroneous regulatory and judicial decisions leaving important waters unprotected. For those needing to make business decisions, regulatory uncertainty has also raised costs. By linking the "waters of the United States" question to peer reviewed science and clarifying which waters are subject to categorical or case-by-case protection and revealing the reasons for such judgments, the Corps and EPA have moved the law in the direction of certainty and clarity. Undoubtedly some will not like where they have chosen to draw their lines, but this is an area calling for difficult, expert regulatory judgments. There was a reason for the thirty years of bipartisan consensus in favor of broadly protecting America's waters. These proposed regulations, if finalized in a similar form, could perhaps once again bring clarity and stability to the law, while also respecting the protective mandates of the Clean Water Act.

Submitted Testimony of the American Public Gas Association to the House Small Business Committee Hearing, "Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) proposed rule defining the scope of waters protected under the Clean Water Act"

A Consumer Perspective

On behalf of the American Public Gas Association (APGA), we appreciate this opportunity to submit testimony on the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) proposed rule defining the scope of waters protected under the Clean Water Act (CWA) (Docket ID No. EPA–HQ–OW–2011–0880)

APGA is the national association for publicly owned natural gas distribution systems. There are approximately 1,000 public gas systems in 37 states, and over 700 of these systems are APGA members. Publicly-owned gas systems are not-for-profit, retail distribution entities owned by, and accountable to, the citizens they serve. They include municipal gas distribution systems, public utility districts, county districts, and other public agencies that own and operate natural gas distribution facilities in their communities. Public gas systems' primary focus is on providing safe, reliable, and affordable service to their customers.

At the most basic level, APGA represents the views of American natural gas consumers. Our members serve homeowners and small businesses, which rely on affordable natural gas to heat their homes, cook their meals, power their restaurants, schools and hospitals, and service businesses of all types.

On March 25, 2014, the EPA and Corps (hereafter collectively, the Agencies) published a Notice of Proposed Rulemaking (NOPR) to clarify the scope of CWA regulation over America's streams and wetlands. APGA acknowledges that the CWA is fairly characterized as "watershed" legislation that is responsible for addressing successfully pollution in the waters of the United States,[1] and applauds the Agencies for their work in that area. Our concern is that this proposed rule, while arguably well-intentioned, has been inadequately studied and, by appearing to broaden the Agencies' reach under the CWA, will increase, rather than diminish, regulatory uncertainty, to the detriment of APGA's members' operations. Of course, at the end of the day, if the NOPR is adopted as a final rule, its validity will be determined by the judicial system, unless Congress intervenes to make clear that it did not intend for the scope of CWA to reach to the limits to which the Agencies now want to take it.

APGA's stake in this debate is that the effort of the Agencies to extend their CWA jurisdiction, if implemented, would raise safety concerns as related to the ongoing operation and maintenance of natural gas distribution systems and inflict an unnecessary and

[1] *Solid Waste Agency of Northern Cook County v. U.S. Corps of Engineers,* 531 U.S. 169, 175 (2001) (dissent) ("*SWANCC*").

unwarranted financial burden on APGA's members and their customers.[2] In other words, the extension of federal jurisdiction to matters heretofore considered to be within the parameters of the States frequently has unintended consequences, and this is no exception. In addition, the downsides of enhanced jurisdictional reach are greatly heightened, if not accompanied by, sufficient increased funding to ensure timely action by the Agencies as it relates to CWA matters over which they exercise jurisdiction.

Prejudges the Science

There are certain aspects of the NOPR that APGA finds very troubling from the standpoint of fundamental administrative law principles. The need to broaden the scope under the proposed rule is based on EPA's draft scientific study on the connectivity of waters *"Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence."* The EPA's Science Advisory Board panel is still in the process of peer-reviewing the draft connectivity report. At its December 2013 meeting, the panel identified significant deficiencies with the report. In addition, the Agencies base their analysis of "significant nexus"—a key phrase in the judicial history of the reach of CWA jurisdiction[3]—on a yet-to-be finished literature review which fails to examine what connections are "significant." The final report will be released during the comment period, which will not allow the affected parties adequate time to review and comment. Moreover, it does not appear that the Agencies intend to give the public an opportunity to review the final connectivity report as part of the WOTUS rulemaking. There are numerous places throughout the preamble to the proposed rule wherein the Agencies have asked the public to provide specific information regarding the proposed rule's scientific justifications. The purpose of the Science Advisory Board (SAB) review of the draft connectivity study was to evaluate the "evolving scientific literature on connectivity of waters," and the public deserves the opportunity to comment on the conclusions of that review process.

Expanding the Scope

The EPA and the Corps both assert that the scope of CWA jurisdiction is narrower under the proposed rule than under existing regulations, and that the proposed rule does not extend jurisdiction over any new types of waters. However, under the manner in which the proposed rule is constructed, there is essentially no limit to CWA federal jurisdiction. The proposed rule establishes broader definitions of existing regulatory categories, such as tributaries, and regulates new areas that are not jurisdictional under current regulations, such as adjacent non-wetlands. The Congressional Research Service found that the proposed rule expands the agencies' authority by proposing new definitions such as "tributary" and new categories of waters such as "adjacent waters." Authority will be expanded over many new isolated waters through its "significant

[2] The time and cost burden of the federal permitting process was noted in *Rapanos*, 547 U.S. at 721.
[3] *E.g., SWANCC,* 531 U.S. *at 167–68.*

nexus" definition, which relies on a yet-to-be completed "Connectivity of Streams and Wetlands to Downstream Waters" report that fails to address the "significance" of such connections.

Impacts on APGA Members

Due to the expansiveness of the proposed rule, the potential impact on public gas systems would be significant. The proposed rule increases the number of water features that would be subjected to federal permitting standards. These water features have been traditionally regulated at the local level. This system of shared responsibility, consistent with basic principles of federalism,[4] has resulted in effective environmental protection without imposing unnecessary federal controls (or expanding federal dollars) where they are not needed. APGA believes that the Agencies should focus on maintaining a proper balance between Federal and State oversight of non-navigable waters wholly within State boundaries that do not affect interstate commerce.

In 2013 the Chambersburg municipal gas system in Chambersburg, PA had to cross the Conococheague Creek with a gas main. To minimize impact to the creek, it directionally bored six feet under the stream bed. Notwithstanding taking such steps to avoid any impact to the creek, Chambersburg was required to complete a CWA Section 404 stream crossing permit, which took seven months to obtain (and could have taken much longer). What this illustrates is that permitting on CWA waters is slow now, and if the Agencies are successful in extending their jurisdictional reach, acquiring such permits will be even slower and more widespread in the future. This will be especially so, if as appears to be the case, the Agencies are not seeking any, much less adequate, additional funding to support their widened authority. Bottom line, this will make operating safe and efficient natural gas distribution systems more difficult and more expensive, without any offsetting benefit.

With the potential increase in the number of geographical features that would have to undergo a review and likely additional permitting. APGA's members are concerned with the impact the increased workload would have on the Agencies with respect to both the quickness of the review process and the quality of the review. Due to the nature of our business, timely review and issuance of permits are not only critical to maintain safety, but are also critical for maintaining a reliable and resilient system.

APGA's members spend a significant amount of time and resources replacing and servicing their systems, such as updating cast iron gas mains and older steel gas mains and services. This work is for the safety of their residents, as well as to satisfy Federal and State regulations whose goal is public safety. They regularly cross ditches and dry creek beds and properties in flood plains and/or properties that may drain into storm water ditches. Delaying pipe replacements for months or years would negatively impact

[4] The CWA recognizes the "primary responsibilities and rights of States to prevent, reduce and eliminate pollution,..." *Rapanos* at 722–23.

the safety of natural gas system consumers, with any offsetting benefits to the environment being either negligible or non-existent.

Adversely Affects Jobs and Economic Growth:

The Agencies state that the proposed rule will benefit businesses by increasing efficiency in determining coverage of the CWA. The reality, APGA believes, is that the proposed rule will subject far more activities to both federal and state CWA permitting requirements, NEPA analyses, mitigation requirements, and citizen lawsuits challenging the applications of new terms and provisions. The impact will be felt by our members and our member's customers, especially small businesses that are likely to be least able to absorb the costs. The potential adverse effect on economic activity and job creation in many sectors of the economy has been largely dismissed by the Agencies and certainly is not reflected in EPA's flawed economic analysis for the proposed rule. [CITES] Neither do the Agencies adequately address the effect on state and federal resources for permitting, oversight, and enforcement.

The Economic Analysis suggests that the proposed rule will increase overall jurisdiction under the CWA by only 2.7 percent federalism.[5] But the EPA arrives at this percentage using a flawed methodology that only accounts for the Section 404 program, relies on figures extrapolated from statistics from 2009–2010, and fails to consider waters and features that were not historically subjected to the CWA permitting process. Relying on these outdated data, the Agencies systematically and substantially underestimate the impact of the proposed rule's new definition.

Conclusion

APGA has the utmost respect for the CWA and the Agencies' actions thereunder to clean our nation's waters. We are expressing our reservations about the NOPR because of our concerns regarding regulatory uncertainty and the adverse impacts of such uncertainty as it relates to the hundreds of communities in this country that will be adversely impacted by expanding the scope of the CWA beyond what we believe Congress intended or the courts have sanctioned. Neither agency has outlined a clear path to implementing this rule so as to prevent unnecessary permit backlog on an already overtaxed review staff. The unintended consequences of such expanded jurisdiction will make operating a safe and efficient local natural gas distribution system less likely and more expensive, to the detriment of the millions of consumers served by such systems. For these reasons, we urge Congress to look very carefully at the NOPR that is the subject of this hearing.

APGA appreciates the opportunity to submit testimony before the House Committee on Small Business on this critical natural gas and public interest issue. We stand ready to work with the Committee on these and all other natural gas issues.

[5] EPA and the Corps of Engineers prepared economic analysis "Economic Analysis of Proposed Revised Definition of Waters of the United States."

ARTBA - AMERICAN ROAD & TRANSPORTATION BUILDERS ASSOCIATION

Will EPA's 'Waters of the United States' Rule Drown Small Businesses?

Statement of the

American Road and Transportation Builders Association

Submitted to the

United States House of Representatives

Committee on Small Business

May 29, 2014

On behalf of the American Road and Transportation Builders Association (ARTBA) and its more than 6,000 member firms and public agencies nationwide, the association would like to thank Chairman Graves and Ranking Member Velázquez for holding today's hearing, "Will EPA's 'Waters of the United States' Rule Drown Small Businesses?"

ARTBA's membership includes public agencies and private firms and organizations that own, plan, design, supply and construct transportation projects throughout the country. ARTBA's largest membership division is our contractors division—a significant number of which are small businesses.

Transportation construction is directly tied to the economic health and development of this country. According to Federal Highway Administration data, every $1 billion spent on highway and bridge improvements supports almost 28,000 jobs, many of which are in small businesses. Given these broad direct and indirect economic contributions, the impact on transportation development should be taken into account when analyzing new federal regulations.

ARTBA members are directly involved with the federal wetlands permitting program and undertake a variety of construction-related activities under the Clean Water Act (CWA). ARTBA actively works to combine the complementary interests of improving our nation's transportation infrastructure with protecting essential water resources.

One of the main reasons for the success of the CWA is the Act's clear recognition of a partnership between the federal and state levels of government in the area of protecting water resources. The

lines of federal and state responsibility are set forth in Section 101(b) of the CWA:

> "It is the policy of Congress to recognize, preserve, and protect the primary responsibilities of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation and enhancement) of land and water resources..." [1]

This structure of shared responsibility between federal and state governments allows states the essential flexibility they need to protect truly ecologically important and environmentally sensitive areas within their borders while, at the same time, making necessary improvements to their transportation infrastructure. The success of the federal-state partnership is backed by dramatic results. Prior to the inception of the CWA, from the 1950s to the 1970s, an average of 458,000 acres of wetlands were lost each year. Subsequent to the CWA's passage, from 1986–1997, the loss rate declined to 58,600 acres per year and between 1998–2004 overall wetland areas increased at a rate of 32,000 acres per year.[2]

ARTBA supports the reasonable protection of environmentally sensitive wetlands with policies balancing preservation, economic realities, and public mobility requirements. Much of the current debate over federal jurisdiction, however, involves overly broad and ambiguous definitions of "wetlands." Many states define wetlands as well other types of water resources and prescribe regulatory regimes that are appropriate to each body of water. However, the federal government often uses a one-size fits all approach essentially requiring water resources viewed by states as not being wetlands to be regulated as if they were wetlands under federal law.

In its recently proposed rule regarding federal jurisdiction under the CWA, the U.S. Environmental Protection Agency (EPA) seeks to expand federal jurisdiction by stating, essentially, that all waters in the U.S. are "connected," and therefore subject to federal regulation. Such a view of federal jurisdiction will increase the amount of instances in which permits would be required—regardless of ecological value or demonstrated need—for transportation improvements. While the benefit of additional wetlands permits in the transportation arena are in doubt, it is clear the new requirements would contribute to already lengthy delays in the project review and approval process. Further, in instances where the federal government declines to require a permit, the door would still be left open to unnecessary, time-consuming litigation initiated by project opponents.

Over-inclusive views as to what constitutes a wetland are frequently used by anti-growth groups to stop desperately needed transportation improvements. For this reason, ARTBA has, and continues to, work towards a definition of "wetlands" that would be easily recognizable to both landowners and transportation planners and is consistent with the original scope of the CWA's jurisdiction. As an example of this, official ARTBA policy recommends defining

[1] CWA § 101(b).

[2] *Draft 2007 Report on the Environment: Science,* USEPA, May 2007, available at http://cfpub.epa.gov/ncea/cfm/recordisplay.cfm?deid=140917

a "wetland" as follows: "If a land area is saturated with water at the surface during the normal growing season, has hydric soil and supports aquatic-type vegetation, it is a functioning wetland."

ARTBA is particularly concerned with the treatment of ditches under EPA's proposed rule. Roadside ditches are an essential part of the nation's transportation network and contribute to the public health and safety of the nation by dispersing water from roadways. While current regulations say nothing about ditches, EPA's expansive view of connectivity could be used to regulate all roadside ditches that have common characteristics, such as a channel or an ordinary high water mark. The purpose of roadside ditches is unique and distinct from the waters EPA seeks to connect. As such, ditches should not be regulated as traditional wetlands.

In addition, the EPA proposal utilizes the concept of allowing for "aggregation" of the contributions of all similar waters *"within an entire watershed,"* making it far easier to establish a significant nexus between these small intrastate waters and newly expanded roster of traditional navigable waters. This novel concept results in a blanket jurisdictional determination for an entire class of waters within an entire watershed.

Such an interpretation of jurisdiction will literally leave no transportation project untouched from federal wetlands jurisdiction regardless of its location, as there is no area in the United States not linked to at least one watershed. Further, "connecting" all waters in order to establish federal jurisdiction is exactly what the Supreme Court has, on multiple occasions, told the EPA it cannot do. Rather, EPA may assert jurisdiction over only those water bodies with a "significant" connection to a traditionally navigable water. Instead of attempting to discern where there are truly "significant" connections between water bodies, EPA "connects" all of the waters of the United States and asserts essentially limitless jurisdiction. This completely eviscerates the federal/state partnership the CWA was founded on and leaves no wet area untouched by the possibility of federal regulation.

It should also be noted that there has been recent bipartisan progress in the area of streamlining the project review and approval process for transportation projects. Members of both parties agree that transportation improvements can be built more quickly without sacrificing necessary environmental protections. The current surface transportation reauthorization law, the "Moving Ahead for Progress in the 21st Century" (MAP–21) Act contained significant reforms to the project delivery process aimed at reducing delay. Recently, the Obama Administration released the "Generating Renewal, Opportunity, and Work with Accelerated Mobility, Efficiency, and Rebuilding of Infrastructure and Communities throughout America" (GROW AMERICA) reauthorization proposal which continues MAP–21's efforts at improving project delivery.

If EPA's rule is finalized, the progress of MAP–21 and the potential progress of the project delivery reforms in GROW AMERICA would be jeopardized. Any reduction in delay gained from improvements to the project delivery process would likely be negated by the

increased permitting requirements and opportunities for litigation caused by the rule's expansion of federal jurisdiction.

ARTBA instead, has urged EPA on multiple occasions to establish clarity in CWA regulation by developing a classification system for wetlands based on their ecological value. This would allow increased protection for the most valuable wetlands while also creating flexibility for projects impacting wetlands that are considered to have little or no value. Also, there should be a "de minimis" level of impacts defined which would not require any permitting process to encompass instances where impacts to wetlands are so minor that they do not have any ecological effect. A "de-minimis" standard for impacts would be particularly helpful for transportation projects, as it could reduce needless paperwork, delay and regulatory requirements where a project's impacts do not rise to the level of having a significant effect on the environment.

This committee should also note that there have been multiple legislative attempts in recent years to expand the jurisdiction of the CWA to include all "waters of the United States." Each of these efforts have met with broad bipartisan opposition and none have resulted in new law or even a successful committee mark-up. It is clear that consensus among policymakers and affected stakeholders has not yet been reached regarding appropriate federal wetlands jurisdiction. This committee should direct EPA to take note of these developments and instead of seeking to "connect" all waters, work with the regulated community to identify those specific types of water bodies which are currently not being covered and craft more appropriate, targeted measures to protect them.

Finally, ARTBA is disheartened that EPA's proposed rule was published prior to the conclusion of efforts by the agency's own Science Advisory Board (SAB) to determine what constitutes a "significant" connection between water bodies. As ARTBA understood the process, the SAB's work should have been finalized before any regulatory efforts began. Given that EPA's rule has already been released, ARTBA is highly skeptical that any findings by the SAB will change a rule that has already been drafted. EPA should suspend its rulemaking efforts and start anew after the SAB findings have been finalized, allowing all members of the regulated community to have proper input into this conversation about where CWA jurisdiction begins and ends.

ARTBA looks forward to continuing to work with the committee in order to continue continuing to protect the small businesses which improve and sustain our nation's infrastructure while addressing the future challenges of the CWA.

May 29, 2014

Chairman Graves and Ranking Member Velazquez
Small Business Committee
U.S. House of Representatives
2361 Rayburn House Office Building
Washington, DC 20515

Re: Impacts of "Waters of the U.S." Proposed Rule on Aerial Application of Pest Controls

Dear Chairman Graves and Ranking Member Velazquez:

The National Agricultural Aviation Association (NAAA) is pleased that today's Small Business Committee hearing is receiving testimony on likely impacts on small businesses of the rulemaking to redefine "waters of the U.S." proposed by the U.S. Environmental Protection Agency and Army Corps of Engineers (agencies). We submit this letter for the record to provide additional information for you and your Committee members for this important hearing.

NAAA consists of more than 1,700 members in 46 states, and represents the interests of small business owners and pilots licensed as commercial applicators to use aircraft to enhance the production of food, fiber and bio-fuel; protect forestry; protect waterways and ranchland from invasive species; and control mosquitoes and other health-threatening pests. Aerial application of pesticides is a mature, expert industry made up of many small businesses using sophisticated aircraft and application technologies. The average pilot is 50 years old, with nearly 25 years and 10,000 hours of agricultural aerial application experience, according to a 2012 industry survey. The average aerial application company is comprised of five employees and two aircraft that can cost up to $1.4 million each. These aircraft are ruggedly built to handle 30 to 100 takeoffs and landings every day from rough landing strips, and utilize sophisticated precision application equipment such as GPS (Global Positioning Systems), GIS (geographical information systems), flow controls, real time meteorological systems and precisely calibrated spray equipment. During the spray season, work days are long as pilots treat thousands of acres for many different clients, often across more than one state. Mistakes are rare, as are spray drift incidents. This success is a combination of gained experience, proper planning and execution, modern equipment, and dogged pursuit of best practices and safety within the industry.

National Agricultural Aviation Association 1440 Duke Street, Alexandria, Va. 22314 Telephone: 202-546-5722 Fax: 202-546-5726 www.agaviation.org

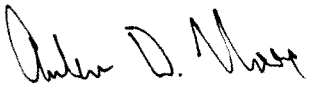
We believe the economic analysis conducted by the agencies for their proposed rulemaking did not adequately consider the economic impacts on small businesses like aerial applicators that are required under the Regulatory Flexibility Act. Had they conducted such an analysis, the agencies would have determined the proposed rule would impose significant costs, legal jeopardy and compliance burdens on the aerial application industry, and that it will interfere with the health and welfare services NAAA members provide society. Both direct and indirect economic risks would result. Aerial applicators are subject to state and federal regulations for pesticide use, including enforceable FIFRA label requirements for terrestrial pesticides, many of which clearly state "do not apply to water." Despite the most sophisticated equipment, pilots applying pesticides at 120 to 150 mph will find it difficult to correctly determine if a shadow on the ground happens to be an ephemeral ditch, dry "tributary," or neighboring "adjacent water." Especially troubling would be features that are dry at the time, overgrown with vegetation, and unbeknownst to them may only occasionally and indirectly provide snowmelt or stormwater flow to some remote "waters of the US." For any applications of pesticides intended to be sprayed "into, over or near" water (e.g., mosquito control, forest canopy insect control, aquatic weed control, etc.), NAAA members are subject also to the requirements of NPDES general permits issued by EPA and 45 delegated states. The NPDES permit requirements vary widely from state to state, and aerial applicators serving clients in several states must maintain compliance with several different sets of permit requirements. Alleged noncompliance could result in Clean Water Act (CWA) penalties or citizen suits, which likely would put individual NAAA members out of business.

We are concerned that the proposed rule would create more confusion, costs and legal burdens as aerial applicators and their clients (farmers, ranchers, forest owners, public and private pest managers, and natural resource managers) struggle to map the thousands of newly-defined "waters of the US" and adjust their work accordingly. Legal jeopardy and economic risks likely will discourage many aerial application contracts and could adversely affect access to financing for expensive aircraft.

From a policy perspective, NAAA and its members are concerned that rather than clarify current law and Supreme Court decisions, the proposed rule would instead create confusion and result in endless litigation. The new "waters of the US" definition includes a number of vague and broadly-defined terms such as "adjacent," "riparian area" and "floodplain" that do not clearly delineate which waters are covered. "Uplands" are mentioned throughout the proposed rule but not defined in either the rule or preamble. For the first time, "tributary" is defined and includes bodies of water such as manmade and natural ditches. "Adjacent *wetlands*" is expanded to include all "adjacent *waters*." "Other waters" also may be subject to the jurisdiction of the CWA on a case-by-case basis if there is a "significant nexus" to traditionally navigable waters. The expanded jurisdiction and the imprecision of the terms used by the agencies may result in significant added legal and regulatory costs for small businesses.

Thank you for the opportunity to submit this testimony for the record. We hope the EPA and Corps of Engineers will withdraw the rule and comply fully with their obligations under the Regulatory Flexibility Act before proceeding with the rulemaking.

Sincerely,



Andrew D. Moore
Executive Director

TESTIMONY BEFORE THE UNITED STATES CONGRESS
ON BEHALF OF THE

NATIONAL FEDERATION OF INDEPENDENT BUSINESS

NFIB
The Voice of Small Business.

Statement for the Record for the

House Committee on Small Business

Will EPA's 'Waters of the United States' Rule Drown Small Businesses?

May 29, 2014

National Federation of Independent Business (NFIB)
1201 F Street, NW Suite 200
Washington, DC 20004

The National Federation of Independent Business (NFIB) appreciates the opportunity to submit this statement for the record to the Committee on Small Business for the hearing entitled "Will EPA's 'Waters of the United States' Rule Drown Small Businesses?" NFIB is the nation's leading small business advocacy organization representing over 350,000 small business owners across the country, and we appreciate the opportunity to provide our perspective on this issue. NFIB represents small businesses in every region and every industry in the country. Accordingly, NFIB has a unique insight into the concerns of the small business community, and can speak with authority on these concerns.

NFIB applauds the Committee for having this hearing today. We note at the outset that the proposed rule to define "waters of the United States" under the Clean Water Act (CWA) was jointly submitted, by the Environmental Protection Agency and the U.S. Army Corps of Engineers (the Agencies), for publication in the *Federal Register* on April 21, 2014. In that publication, the Agencies certified that the proposed rule will not have a significant adverse impact on the small business community. But as explained in this statement, this certification is patently false. Moreover, it is contravened by the Agencies' administrative rulemaking record.

Contrary to the Agencies' assertions, the proposed rule will have a tremendous, direct, and immediate effect on many small businesses across all sectors of the economy. NFIB is concerned that the proposed rule represents an unprecedented jurisdictional landgrab, which will affect the rights of private landowners—including many small businesses. As such, NFIB believes that the Agencies have, thus far, ignored their statutory obligations—under the Regulatory Flexibility Act (RFA) and the Small Business Regulatory Enforcement Fairness Act (SBREFA)—requiring the Agencies to seriously consider the economic impact of the proposed rule on the small business community.

The Agencies Have Failed to Comply with the Regulatory Flexibility Act

NFIB believes the Agencies have failed to meet their statutory obligations under the RFA and SBREFA. Accordingly, NFIB believes the Agencies should (1) acknowledge that the proposed rule will have a significant adverse impact on a substantial number of small businesses; (2) withdraw the proposed rule; and (3) wait to propose a new rule until the Agencies have considered less burdensome alternative interpretations of the pertinent CWA jurisdictional provisions. As such, we applaud the Committee for its recent letter asking the Agencies to withdraw the proposed rule on these grounds.

The RFA and SBREFA Require the Agencies to Seriously Consider Economic Impacts

The RFA and SBREFA were enacted to address an unfortunate reality: regulations usually impose disproportionate costs on small businesses. Accordingly, the RFA and SBREFA require that federal agencies must seriously consider whether a proposed regulation

will have a significant adverse impact on a substantial number of small businesses before finalizing the rule. If an agency should determine that there will likely be significant adverse impacts, the agency is then required to consider less burdensome alternatives consistent with the language of the statute the agency has been charged with enforcing. Alternatively the agency might certify that there will be no significant adverse impact on the small business community, and forgo any further analysis.

Unfortunately, we note that federal agencies are all too quick to certify that regulatory proposals will not impact small business, or that the impacts will not be significant. This is a serious problem and unfortunately courts typically rubberstamp these certifications so long as they are not "arbitrary or capricious." This is an extraordinary low bar for the certifying agency may explain why federal agencies all too often include conclusive language—with little or no analysis—certifying that proposed rules will not have significant adverse impacts.

For this reason, NFIB submits that Congress should consider measures to put more teeth in the RFA and SBREFA. We note that the House of Representatives has already passed the Regulatory Flexibility Improvements Act (H.R. 2542). We believe the provisions in this legislation would have presented the Agencies from ignoring their requirements under the RFA.

In any event, NFIB maintains that the current forms of the RFA and SBREFA should be understood as imposing an affirmative requirement to seriously consider the economic impact of the proposed regulation. Unfortunately, the Agencies appear to have given short-shrift to this requirement in the present case. In this instance, the Agencies have proposed a rule that will have clear significant economic impacts on many small businesses throughout the country, but the Agencies have certified that there will be no adverse impact. The Agencies base this certification on the errant assertion that the proposed rule will actually narrow the CWA's jurisdiction—an assertion that is plainly contradicted by the record.

The proposed regulations will plainly expand the CWA's jurisdictional reach as a matter of law. And as a matter of fact, the Agencies acknowledge elsewhere in the record that the proposed regulation will result in at least a three percent increase in jurisdictional wetlands. NFIB believes the three percent estimate is far too conservative; however, in any event, it patently contradicts the Agencies' RFA certification that the rule will not hurt small business.

The proposed rule will have direct adverse impacts on many small businesses

The Agencies are pursuing a significant expansion of federal CWA jurisdiction, which will necessarily exert more government control over private properties—including many owned by small businesses. As a result, the proposed rule will have severe practical and financial implications for many. This is because a business owner cannot make economically beneficial uses of his or her land once it is considered a jurisdictional wetland. And if an owner proceeds with a project on a portion of land that might be considered

a wetland, the owner faces the prospect of devastating fines—up to $37,500 per day.

Consequently, most landowners—especially small businesses—will be forced into keeping their properties undeveloped. If the purported jurisdictional wetland covers the entire property, the owner may well be dined the opportunity to make any productive or economically beneficial use of the property. In some cases, it may be possible for the owner to obtain a permit to allow for development; however, there is no guarantee a permit will be issued. Moreover, for small business owners and individuals of modest means, such a permit is usually cost prohibitive. Indeed, the Supreme Court noted, in *Rapanos v. United States,* that the average CWA permit costs more than $270,000.

While multinational corporations with tremendous capital resources might be able to afford such costs, most small businesses are without recourse. Usually, their only option is to swallow their losses and forgo any development plans. Unfortunately, these small businesses suffer greatly because they have usually tied up much of their assets into their real estate investments and can neither afford necessary permits, nor legal representation to challenge improper jurisdictional assertions—lawsuits challenge these assertions are fact intensive and extremely costly to litigate.

The proposed rule will also have indirect adverse impacts on many small businesses

Even in the absence of an affirmative assertion of CWA jurisdiction, landowners will be more hesitant to engage in development projects or to make other economically beneficial uses of their properties if the proposed rule is approved. Landowners are already aware that federal agencies have taken an aggressive posture in making jurisdictional assertions in recent years. And now that the Agencies have proposed this rule, it is apparent that they are taking an even more aggressive approach to jurisdictional issues—a signal that landowners can expect greater enforcement actions in the future.

NFIB already receives questions and concerns from small business owners who are worried about whether the Agencies have jurisdiction over their properties. And we expect to hear from many more concerned individuals if the proposed rule is finalized. Indeed, under the proposed rule a landowner may have legitimate cause for concern if—at any point during the year—any amount of water rests or flows over a property.

And contrary to the Agencies' assertions, the proposed rule will do little or nothing to make CWA jurisdiction clearer for most properties. The reality is that landowners will have to seek out experts and legal counsel—which gets costly quickly—before developing on any segment of land that occasionally has water overflow. And, the only way to have definitive clarity is to seek a formal jurisdictional determination from the Agencies, which costs more money and further delays development plans.

Of course, in the absence of a formal jurisdictional assessment, property owners proceed at their own risk if they wish to use portions of their property that might be viewed as jurisdictional. Indeed, they face ruinous fines of up to $37,500 per day if they errantly begin filling in—or dredging—land that the Agencies believe is a jurisdictional wetland. And for this reason any property that might be viewed as containing a jurisdictional wetland will be greatly devalued. In addition, even if the property owner is found to be in the right, he or she may use all their assets fighting to prove this fact.

The Proposed Regulation Radically Expands CWA Jurisdictions

NFIB views the proposed rule as a jurisdictional land-grab. It should be remembered that the Agencies are not writing on a blank slate here. The Supreme Court has made clear that there are constitutional limits on the jurisdictional reach of the Clean Water Act. The Agencies have been repudiated for overreaching in the past, and will be again if the proposed regulation is understood as reaching beyond the constitutional limitations recognized in *Rapanos.*

There are undoubtedly grounds for disputing how far CWA jurisdiction reaches on a case-by-case basis; however, there is no question that *Rapanos* set the outer-limits. The Agencies cannot exceed those limits any more than Congress could. And for several reasons, NFIB believes the proposed regulation go beyond what the *Rapanos* tests allow. NFIB views the proposed rule as a jurisdictional land grab. For the reasons set forth below, we maintain the proposed regulation are inconsistent *Rapanos* and should therefore be amended or abandoned entirely.

This is not an exhaustive list of our legal concerns over the jurisdiction the Agencies propose to assert. NFIB will provide a more detailed explanation of these concerns in our formal comments to the Agencies. We will be sure to provide the Committee with those comments once they are filed.

(1) The Proposed Regulation Lowers the Threshold for Proving Navigability

The proposed regulation defines "traditional navigable waters" as any waters that are used for commerce or that could be used for commerce in the future. But the proposed regulation would effectively expand CWA jurisdiction by lowering the threshold for demonstrating the potential for navigable use in commerce. Specifically, the proposed regulation provides that the potential for commercial navigation "can be demonstrated by current boating or canoe trips for recreation or other purposes." While the proposed regulation suggests that the Agencies' assessment must take into account physical characteristics of the waterway, it ultimately provides that the water will be viewed as "traditional navigable waters" if there is any evidence that a watercraft can navigate the waterway. This would seemingly justify the Agencies treating any waterway as "traditional navigable water" if any party can succeed

in a single downstream trip—an approach that we think is far too easy to satisfy.

(2) The Proposed Regulation Disregards Whether Interstate Waters are Navigable

The proposed regulation inappropriately treats all interstate waters as "waters of the United States," regardless of whether they are in fact navigable, or even "connect[ed] to such waters." But, the Supreme Court has made clear that jurisdiction may not be assumed in this manner. To assert jurisdiction, an agency must demonstrate that there is a connection to traditional interstate navigable waters. And the potential for commercial navigation must be proven in fact.

(3) The Proposed Regulation Distorts Justice Kennedy's 'Nexus Test'

The proposed regulation expands CWA jurisdiction by distorting Justice Kennedy's "significant nexus test," such that it will liberally justify jurisdictional assertions beyond what the test would allow for if properly applied. The result is an expansion of CWA jurisdiction. It does so in three ways. One way is that the proposed regulation misstates the significant nexus test by replacing the conjunctive word "and" with the disjunctive word "or," when listing the different factors to be considered in determining whether the subject wetland has a sufficient nexus to traditional navigable waters. The proposed regulation also seeks to lower the threshold for satisfying the significant nexus test by stating that the test will be satisfied if it can be demonstrated that the chemical, physical or biological effect on jurisdictional waters is more than "speculative or insubstantial." Finally, the proposed regulation changes the significant nexus test by expanding the definition of "region."

(4) The Proposed Regulation Asserts Jurisdiction Over Anything with a High Water Mark

The proposed regulation provides that any "natural, man-altered, or man-made water body" with an ordinary high water mark will be considered a tributary. This requires the Agencies to assert jurisdiction over practically any land over which water occasionally flows. But, both *Rapanos* tests rejects such an expansive interpretation of CWA jurisdiction.

(5) The Proposed Regulation Places the Burden on the Landowner to Disprove Jurisdiction

The most fundamental problem is that the proposed regulation operates so as to create a presumption of jurisdiction—a presumption that may not bear out in practice. This is highly problematic because the burden should not be on the landowner to disprove CWA jurisdiction. The burden should rest on the Agencies to prove the existence of a "significant nexus" in any given case.

The small business community needs more time to comment on the proposed rule

NFIB believes that because of the substantial increase in jurisdiction under the proposed rule and its technical nature, the small business community needs an additional 90 days to adequately comment on the proposed rule.

Specifically, NFIB is attempting to reach out to its membership to understand the full impact of this rule. In order to do that, we have to first educate our membership on its scope. This will take substantial time to do satisfactorily. In addition, NFIB's Small Business Legal Center has filed a Freedom of Information Act request with the Agencies seeking information about how the Agencies determined they could certify the rule as not having a significant impact. We believe the NFIB Legal Center needs additional time to receive and review these materials, in order to properly comment on the certification.

Only Congress can fix the CWA's jurisdictional pitfalls

As Justice Alito noted in the *Sackett v. EPA,* the "reach of the Clean Water Act is notoriously unclear." This is undoubtedly true. The Supreme Court has addressed CWA jurisdictional questions on three different occasions. But, the exact reach of the CWA remains a murky question—so much sot hat some legal scholars contend that the CWA is unconstitutionally vague because the regulated community cannot readily determine whether a given property is, or is not, a jurisdictional wetland.

While it is commendable that the Agencies apparently seek to resolve some of the confusion over the jurisdictional reach of the CWA in the proposed regulation, our view is that only Congress can fix this problem. The proposed regulation would resolve the vast majority of jurisdictional disputes by applying categorical rules, which will result in expansive assertions of jurisdiction. But *Rapanos* makes clear that categorical assertions of jurisdiction must be rejected. It is simply beyond the authority of the Agencies to expand CWA jurisdiction through the rulemaking process in a manner that conflicts with the jurisdictional tests set forth in *Rapanos* and her progeny.

Therefore, NFIB believes action by Congress is necessary to ultimately provide the type of clarification that would allow small business owners to operate without fear of unknowingly violating the CWA.

Conclusion

NFIB greatly appreciates the efforts of the Committee to hold the Agencies to account on its requirements under the RFA. The Committee has demonstrated great leadership in expressing to the Agencies the tremendous impact this rule will have on small businesses across America.

Thank you again for the opportunity to provide this statement for the record. NFIB remains eager to work with members of the Committee to ensure that the Agencies operate within the bounds Congress clearly intended. We also look forward to working with the Committee to help ensure that the Agencies adhere to their re-

sponsibilities under the RFA in all of its current and future rulemakings.

May 28, 2014

The Honorable Sam Graves
Chairman
Committee on Small Business
U.S. House of Representatives
2361 Rayburn House Office Building
Washington, DC 20515-6315

The Honorable Nydia M. Velazquez
Ranking Member
Committee on Small Business
U.S. House of Representatives
2361 Rayburn House Office Building
Washington, DC 20515-6315

Re: National Wildlife Federation Statement on the "Waters of the United States" Rule

The National Wildlife Federation (NWF) is writing today in support of the proposed "Waters of the US" rule. Following the Supreme Court Cases *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers* (SWANCC") and *Rapanos v. United States* ("Rapanos"), the definition of what constituted a protected body of water under the Clean Water Act was left unresolved. This murky legal status has forced agencies to resolve the fundamental question of Clean Water Act jurisdiction on a case by case basis, which leaves businesses operating in a climate of uncertainty that can hinder their ability to plan and grow. This proposed rule seeks to redress this uncertainty, and was sought by interests such as the American Farm Bureau Federation, and the National Association of Manufacturers, as well as by Supreme Court justices. Once finalized, this rule will benefit the nation, clarify the permitting process, and help many small businesses that depend on clean water to survive.

The proposed rule clarifies which waters are – and are not – covered by the Clean Water Act. The proposed simply clarifies and affirms protections for historically protected streams and wetlands. This coverage extends to tributaries and adjacent wetlands, recognizing their significant influence on downstream waters. This regulatory coverage is consistent with *SWANCC* and *Rapanos* and constitutes an area smaller than historic Clean Water Act coverage under the administration of President Reagan.

The proposed rule and preamble also reiterate all existing exemptions from Clean Water Act jurisdiction, including many farming, ranching, and forestry activities. These exemptions include activities associated with irrigation and drainage ditches, as well as sediment basins on construction sites. Moreover, for the first time, the proposed rule actually codifies specific exempted waters, including many upland drainage ditches, artificial lakes and stock watering ponds, and water filled areas created by construction activity. These additional clarifications regarding waters that are not covered by the Act provide added certainty to businesses large and small.

In addition to actually extending exemptions over certain ditches, this rule offers a major economic benefit to the public that directly supports the industries that rely on clean water. In their economic analysis, the EPA estimated that this rule would ultimately provide $388-$514 million in benefits by reducing flooding, filtering pollution, supporting hunting and fishing, and recharging groundwater. Specifically, the streams and wetlands that benefit from this clearer status constitute a major source of drinking water for 117 million Americans.

In addition, clean waters support the nation's 40 million anglers, whose annual expenditure of $45 billion is a bulwark to our nation's economy. All told, America's hunting and fishing economy -- accounts for over $200 billion in economic activity each year and 1.5 million jobs. These economic benefits are felt by rural communities in particular. Wetlands and streams also help supply the vital ingredient that our nation's brewers rely on, as beer is roughly 90 percent water.

This proposed rule is designed to clarify the scope of the Clean Water Act, adding clarity, certainty, and consistency in implementation. It does not expand the historic scope of jurisdiction and it does not subject any businesses of any size to any specific regulatory burden. Consequently, we agree that EPA has met its responsibilities under the Regulatory Flexibility Act. EPA and the Corps have voluntarily sought input from small business stakeholders, in alignment with the President's January 18, 2011 Memorandum on Regulatory Flexibility, Small Business, and Job Creation. Their input, especially from the agricultural community over the past 3 years, is clearly reflected in the proposed rule as well as the related interpretive rule regarding exemptions for conservation practices on agricultural lands.

Ultimately, his proposed rule supports American small business interests by clarifying Clean Water Act jurisdiction, streamlining, jurisdictional determinations, and protecting water supplies, outdoor recreation and tourism, and flood protection on which businesses and communities depend. We urge the Committee respect this much-needed "Waters of the United States" rulemaking process.

Sincerely,

Jan Goldman-Carter
Senior Manager, Wetlands and Water Resources
Daniel Hubbell, Water Resources and Restoration
National Wildlife Federation

Cc: Members, Committee on Small Business

May 29, 2014
House Small Business Committee Hearing on EPA & Corps' proposed rule expanding Clean Water Act jurisdiction

Written Testimony from RISE (Responsible Industry for a Sound Environment)

Thank you for the opportunity to submit our written testimony on the Environmental Protection Agency's and the Army Corps of Engineers' proposed rule defining "waters of the U.S." under the Clean Water Act. RISE is the national association representing the manufacturers, formulators, distributors and other industry leaders in the specialty pesticide and fertilizer industry. We are also a member of the Waters Advocacy Coalition. Many of our members and their customers are small, local businesses providing pest, turf and lawn control solutions around the United States.

Due to the proposed rule's complexity and unintended economic burdens on small businesses, we recommend the House Small Business Committee requests "navigable" remains as the defining term of "waters of the U.S." under the Clean Water Act.

EPA's and the Army Corps of Engineers' proposed rule expanding the definition of waters of the United States under the Clean Water Act will have a profound and significant negative impact on small businesses including turf and landscaping, vector control services, sports turf management, vegetation management, and structural pest control. The costs of pesticide application permits near waters that would be defined as a "water of the U.S." will create additional burdens for small green industry and pest control businesses, and some business owners may not be able to afford these additional fees. The cost of permitting fees will also be reflected in customers' fees as businesses will have to increase prices to cover the new costs of their services.

Currently, all professionals in vector control must acquire NPDES permits to apply larvicides in water covered by the CWA. These applications are vital to helping protect the public from vector-borne diseases like West Nile Virus, Dengue Fever and more recently, Chikungunya. West Nile Virus claimed some 286 lives in 2013 and the proposed rule would make it more difficult for professional applicators to obtain permits and treat high risk areas.

The cost of NPDES permits already has effect on small businesses and cities. Cities like Brewerton, Alabama, Orchard City, Colorado, and Cedaredge, Colorado could not spray for mosquitoes due to the high costs and liability associated with NPDES permits. Western Slope and Delta County, Colorado, have expressed concerns about citizen lawsuits along with issues finding aerial spraying companies to perform vector control due to liability and costs. The city of Laramie, Wyoming, struggled with increased costs of mosquito control due to the increase its applicators had to charge due to NPDES permits. Oregon's Department of Environmental

Quality had to halt invasive species treatments for the same reason as Brewerton and other jurisdictions. We are concerned EPA and the Corps' proposed rule will cause even more small businesses applying pesticides to struggle with high permit costs.

One lawncare professional we know believes EPA's proposed rule will have a serious impact on his Baltimore county-based business. Most of the work done by his company, Pro-Lawn-Plus Inc., consists of pesticide and fertilizer applications in residential areas, and most customers live near ditches, swales, and creeks that would now be considered a "water of the U.S." The proposed rule would cause this company to significantly increase its service fees in order to keep his business operating with the new permitting costs.

Small businesses will also be at risk for costly citizen lawsuits that could significantly impact the way these companies operate and service customers. For example, a small landscaping company may no longer want to apply a perimeter treatment for ticks around a customer's property if they have a ditch or water nearby, due to the potential of being brought into a citizen lawsuit by a neighbor or activist group that believes the application is unlawful. These companies could no longer be able to provide routine services to customers, therefore affecting revenue and the businesses' ability to operate and grow.

Well-maintained lawns are important for the environment. Properly-cared for lawns reduce run-off of sediment and other materials into nearby waters. We believe one of the unintended consequences of EPA's proposed rule would be more soil erosion and run-off into many connected water bodies. Spot-pesticide treatments on properties made by small businesses like Pro-Lawn-Plus Inc., help protect the public from harmful pests like ticks, which cause dangerous diseases like Lyme disease. These companies also protect the environment with targeted herbicide applications to invasive and noxious weeds like poison ivy, oak and sumac. Many states have laws requiring land owners to control invasive plants on their property. Applications to meet state law requirements by lawn and landscape companies or landowners near any vaguely-defined "waters" would now be subject to CWA jurisdiction, fines, and lawsuits.

The turf and landscape industry is already highly regulated under the Federal Insecticide Fungicide Rodenticide Act. Professional applicators currently pay annual recertification and training fees and additional permitting fees due to the proposed rule would be costly and have an enormous economic impact on small businesses that apply pesticides and fertilizers. Currently, many businesses are not required to obtain 402 permits for the work they do. Under expanded CWA jurisdiction, these small businesses would now have to obtain 402 permits for any pesticide treatment near waters not originally regulated.

The label language on all pesticide products today instructs applicators which products can be used near different types of waters. If the definition of water is changed to be more expansive, then these products' labels may become more confusing or contradictory due to the proposed rule. For example, if a certain pesticide label says the product can be used near water, but the proposed rule expands CWA jurisdiction and contradicts this label statement, then professional applicators will not be able to use products in the manner they were intended for before the rule. Congress never intended for pesticide applications to be regulated under the CWA. However, a court decision resulted in the regulation of pesticides as "point sources," requiring NPDES

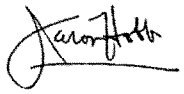
permits. The court decision did not reflect Congressional or EPA's intent. FIFRA requires all pesticides to undergo rigorous risk assessments for use on or near water before registrations can be approved. We believe EPA and the Corps' proposed rule is an overreach for this reason.

RISE recommends the House Small Business Committee requests "navigable" remains as the defining term of "waters of the U.S." under the Clean Water Act. Expanding CWA jurisdiction will cause significant economic burdens to small businesses applying pesticides and fertilizers due to costly pesticide permitting, and make it more difficult to treat harmful pests on private and public property if any water is nearby. Small businesses, public health and the environment will all be impacted.

The 90-day comment period ending July 21, 2014, is simply not enough time for review, analysis, and providing additional science addressing the proposed rule. We recommend the House Small Business Committee requests an extension of the public comment period for an additional 90 days until October 20, 2014 due to the rule's complexity and broad definitions. The extension will allow stakeholders and the public to provide meaningful and fully developed comments.

Thank you for the opportunity to submit our testimony and please contact us if you have any questions or need additional information.

Sincerely,



Aaron Hobbs
President
RISE (Responsible Industry for a Sound Environment)
1156 15th St. N.W.
Suite 400
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May 29, 2014

The Honorable Sam Graves
Chairman
Small Business Committee
U.S. House of Representatives
Washington, DC 20515

The Honorable Nydia M. Velazquez
Ranking Member
Small Business Committee
U.S. House of Representatives
Washington, DC 20515

Dear Chairman Graves and Ranking Member Velazquez:

On behalf of Trout Unlimited's (TU) 153,000 members nationwide, I am writing to provide testimony for your hearing today titled: "Will EPA's Waters of the United States Rule Drown Small Business"? I ask that you please include our letter in the hearing record.

The premise of the hearing appears to be that the recent Army Corps of Engineers and EPA proposal on defining the waters of the U.S. would, if finalized, be harmful to small businesses. TU strongly supports the proposed rule because it will clarify and strengthen the very foundation of the Clean Water Act's protections for important fish and wildlife habitat. Based on our long experience and the detailed economic analysis completed by the agencies and Office of Management and Budget for the proposal, we believe that many small businesses will benefit from the rule. We urge Committee to take a closer look at the proposal and discuss it with the many small businesses around the nation which rely upon health of the waters of the U.S. We urge the Committee to approach this topic with an eye towards making suggestions that will improve the rule. When you do, we believe you will find this proposal to be worthy of your support.

The Clean Water Act is very valuable to TU. Our mission is to conserve, protect and restore North America's trout and salmon fisheries and their watersheds. Our volunteers and staff work with industry, farmers, and local, state and federal agencies around the nation to achieve this mission. On average, each TU volunteer chapter annually donates more than 1,000 hours of volunteer time to stream and river restoration and youth education. The Act, and its splendid goal to "restore and maintain the chemical, physical, and biological integrity of the nation's waters" serves as the foundation to all of this work. Whether TU is working with farmers to restore small headwater streams in the Mississippi River watershed in Wisconsin, removing acidic pollution cause4d by abandoned mines in Colorado, or protecting the world famous salmon-producing watershed of Bristol Bay, Alaska—and its 14,000 jobs—the Clean Water Act is the safety net on which we rely.

Unfortunately, the nation's clean water safety net is broken, and if you appreciate clean water and the Clean Water Act, then you will appreciate the agencies' efforts to resolve the law's most funda-

mental question: which waters are—and are not—covered by the Clean Water Act.

Over the last decade, a series of Supreme Court decisions have weakened and confused these protections. The Army Corps and EPA proposal takes important steps to clarify and restore protections to intermittent and ephemeral streams that may only flow part of the year, as well as isolated wetlands. These intermittent and ephmeral streams provide habitat for spawning and juvenile trout, salmon, and other species, and protecting these streams means protecting the water quality of larger rivers downstream. Thus, sportsmen strongly support the reasonable efforts embodied in the proposed rule to clarify and restore the protection of the Clean Water Act to these bodies of water where we spend much of our time hunting and fishing.

I hope that the Committee recognizes the fact that, because of the uncertainties caused by the Supreme Court cases, a rulemaking was sought by many business interests, as well as by Supreme Court Justice Roberts who presided over the *Rapanos* decision which necessitated clarity over the Clean Water Act's jurisdiction.

I also urge the Committee to recognize that the proposal works to clarify what waters are **not** jurisdictional. The proposed rule and preamble reiterates all existing exemptions from Clean Water Act jurisdiction, including many farming, ranching, and forestry activities. These exemptions include activities associated with irrigation and drainage ditches, as well as sediment basins on construction sites. Moreover, for the first time, the proposed rule codifies specific exempted waters, including many upland drainage ditches, artificial lakes and stock watering ponds, and water filled areas created by construction activity.

Small businesses lose when the water that communities rely on is polluted, or is at risk of being polluted. The very unfortunate chemical spill in the Elk River in West Virginia earlier this year makes this point crystal clear. During that event, thousands of West Virginians could not drink or utilize their waters. They could not fish in or recreate in their home waters.

Conversely, small businesses win with clean water and healthy fish habitat. Hunting and fishing collectively represent a $200 billion a year economy, supporting 1.5 million jobs. These economic benefits are especially pronounced in rural areas, where money brought in during the hunting and fishing seasons can be enough to keep small businesses operational for the whole year. Through licenses, fees and excise taxes on sporting equipment, sportsmen also pay hundreds of millions of dollars each year for fish and wildlife management, habitat conservation, and public access. This economic engine runs on clean water.

The prosperous connection between clean water and small business occurs across the nation many times over, but the guiding and outfitting business owned and operated by my friend Tim Linehan and his wife Joanne in Libby, Montana is a great example. Tim and his partners guide hundreds of anglers from around the U.S. who come to fish the beautiful Kootenai and Yaak rivers. Tim's

business employs people in Libby directly, and the purchases he makes to keep the businesses running are made throughout Montana and across the nation in terms of fishing equipment and boats that he uses to run the business. Tim knows the value of clean water to his business and he is a passionate conservationist because of it. He is part of sport fishing business that yields an estimated $340 million dollars in Montana each year. It is the same story in many parts of U.S. Whether it is the sport fishing businesses associated with the outstanding fisheries of Missouri, the exciting steelhead fisheries of the rivers in northeastern Ohio, or the gold medal trout streams of Colorado, clean water and great fishing mean strong business opportunities.

In January of 1991, I testified before this committee on a very similar issue, a proposal to revise and improve the Clean Water Act wetlands delineation manual used by these same agencies to define what were—and what were not—jurisdictional wetlands. I defended the Bush Administration's efforts to improve the manual so that it would be a better tool for scientifically defining wetlands and providing more certainty for regulated businesses. Many of the Small Business committee members who participated in the 1991 hearing complained about the agencies' proposal. They said that it was a federal land grab, and that it would lead to regulation of mud puddles and bird baths. Sound familiar? The agencies proposal that is before us today **is not about**—as it was not in 1991—a federal land grab, nor an effort to regulate bird baths. It is about a worthy effort to make a great law, the Clean Water Act, work better to protect the waters of the U.S.

Now 40 years old, the Clean Water Act has come to a major crossroads. The agencies which Congress authorized to implement the Act, spurred by the Supreme Court itself and a wide range of stakeholders, have put forth a proposal that will help strengthen the very foundation of the law for years to come. As you scrutinize the proposal, we urge you and the Committee to strongly consider the views of sportsmen and women, and the many small businesses that they sustain with their purchases, and support the reasonable and science-based efforts of the Corps and EPA to clarify and restore the Act's jurisdictional coverage.

Thank you for considering our views,

Steve Moyer
Vice President for Government Affairs
Trout Unlimited

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June 4, 2014

The Honorable Sam Graves
Chairman
Small Business Committee
U.S. House of Representatives
Washington, DC 20515

The Honorable Nydia M. Velázquez
Ranking Member
Small Business Committee
U.S. House of Representatives
Washington, DC 20515

Statement of United Ag re: EPA's "Waters of the U.S." Proposed Rule

Dear Chairman Graves and Ranking Member Velázquez:

On behalf of its 16,000 employers and their 100,000 employees, United Ag thanks you and your Committee for holding a hearing on May 29, 2014 regarding the EPA's "Waters of the U.S." proposed rule, and asks that this letter be included in the record for that hearing.

United Ag was founded in 1980 to unite agribusiness by providing solutions, benefits, and services to its members on critical issues such as health care, immigration reform, and water supply concerns. We represent a wide range of agribusiness interests, primarily in California, from family farms to produce wholesalers to agribusiness support companies.

The proposed EPA rule would have a serious potential impact on all of these members, either directly or indirectly, by imposing significant additional costs, delays, and uncertainty on agriculture by restricting the use of private lands.

As discussed by the witnesses at the May 29th hearing, the proposed EPA rule would dramatically expand the scope of "navigable waters" subject to the Clean Water Act by regulating small and remote waters never before regulated by the Act. The proposed rule includes a number of vague or undefined terms: "riparian area," "floodplain," "tributary" and "significant nexus." Ditches and other areas that are dry most of the year – now more than ever, given the ongoing drought disaster in California – would suddenly fall under the Clean Water Act, requiring our farmers to obtain permits from the EPA and making it more difficult and costly to use their farms and grow America's food. Our farmers' land is their livelihood.

This significant expansion of the existing definition of "waters of the U.S." comes with no EPA outreach to the agricultural community that would bear a disproportionate impact of the rule. Nor has EPA conducted the required Regulatory Flexibility Act analysis in order to issue this rule. If EPA had reached out to groups like ours, we would have explained that the proposed rule does not offer the clarity or certainty that EPA intended but, rather, does the exact opposite, creating ambiguity and doubt.

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The delays and expense involved in new EPA permitting if this rule takes effect could cripple our members' ability to respond quickly to water preservation needs, to apply fertilizer or pesticides, or even to do something as simple as building a fence or clearing a ditch. Water is already at a premium for our California members, and no one takes water conservation more seriously than the growers that rely on it every day. This proposed rule would not solve any problems with the current application of the Clean Water Act, but would add substantial burdens to our members.

In addition to the tens or hundreds of thousands of dollars required to obtain a Section 404 permit from EPA, the proposed rule also points the way to unforeseen future liability under Section 311 (oil and hazardous substance liability) and Section 505 (citizen suits). Many of our members are small businesses and these additional costs and litigation exposure could drive them out of business.

The proposed rule is fatally flawed, due to the imprecise language, broad definitions, and absolute lack of outreach or analysis regarding the projected impact on small businesses, generally, and family farms, in particular. If EPA is intent on moving forward with a rule like this, we support your Committee's request that the Agency conduct this outreach and analysis and issue a new proposed rule that better reflects the needs of agriculture and small businesses.

Thank you again for your Committee's leadership on this issue and for all your hard work in protecting small businesses like our members. Please consider UnitedAg a resource that you can call upon at any time to assist on this issue or any other issues that affect the California agriculture industry. Thank you for your consideration of our comments.

Sincerely,

Brian Edmonds
Chairman, Board of Directors

Kirti Mutatkar
Interim CEO & CFO, UnitedAg

Mike Stoker
VP Government Relations, UnitedAg

○