AUTHENTICATED
U.S. GOVERNMENT
INFORMATION
GPO

NAVIGATING THE CLEAN WATER ACT: IS WATER WET?

HEARING

BEFORE THE

COMMITTEE ON SCIENCE, SPACE, AND TECHNOLOGY
HOUSE OF REPRESENTATIVES

ONE HUNDRED THIRTEENTH CONGRESS

SECOND SESSION

JULY 9, 2014

Serial No. 113–84

Printed for the use of the Committee on Science, Space, and Technology

Available via the World Wide Web: http://science.house.gov

U.S. GOVERNMENT PUBLISHING OFFICE

89–413PDF WASHINGTON : 2015

For sale by the Superintendent of Documents, U.S. Government Publishing Office
Internet: bookstore.gpo.gov Phone: toll free (866) 512–1800; DC area (202) 512–1800
Fax: (202) 512–2104 Mail: Stop IDCC, Washington, DC 20402–0001

COMMITTEE ON SCIENCE, SPACE, AND TECHNOLOGY

HON. LAMAR S. SMITH, Texas, *Chair*

DANA ROHRABACHER, California
RALPH M. HALL, Texas
F. JAMES SENSENBRENNER, JR., Wisconsin
FRANK D. LUCAS, Oklahoma
RANDY NEUGEBAUER, Texas
MICHAEL T. McCAUL, Texas
PAUL C. BROUN, Georgia
STEVEN M. PALAZZO, Mississippi
MO BROOKS, Alabama
RANDY HULTGREN, Illinois
LARRY BUCSHON, Indiana
STEVE STOCKMAN, Texas
BILL POSEY, Florida
CYNTHIA LUMMIS, Wyoming
DAVID SCHWEIKERT, Arizona
THOMAS MASSIE, Kentucky
KEVIN CRAMER, North Dakota
JIM BRIDENSTINE, Oklahoma
RANDY WEBER, Texas
CHRIS COLLINS, New York
BILL JOHNSON, Ohio

EDDIE BERNICE JOHNSON, Texas
ZOE LOFGREN, California
DANIEL LIPINSKI, Illinois
DONNA F. EDWARDS, Maryland
FREDERICA S. WILSON, Florida
SUZANNE BONAMICI, Oregon
ERIC SWALWELL, California
DAN MAFFEI, New York
ALAN GRAYSON, Florida
JOSEPH KENNEDY III, Massachusetts
SCOTT PETERS, California
DEREK KILMER, Washington
AMI BERA, California
ELIZABETH ESTY, Connecticut
MARC VEASEY, Texas
JULIA BROWNLEY, California
ROBIN KELLY, Illinois
KATHERINE CLARK, Massachusetts

CONTENTS

July 9, 2014

	Page
Witness List	2
Hearing Charter	3

Opening Statements

Statement by Representative Lamar S. Smith, Chairman, Committee on Science, Space, and Technology, U.S. House of Representatives	14
Written Statement	15
Statement by Representative Suzanne Bonamici, Committee on Science, Space, and Technology, U.S. House of Representatives	16
Written Statement	17

Witnesses:

The Honorable Robert W. Perciasepe, Deputy Administrator, U.S. Environmental Protection Agency	
Oral Statement	18
Submitted Biography	21
Discussion	32

Appendix I: Answers to Post-Hearing Questions

The Honorable Robert W. Perciasepe, Deputy Administrator, U.S. Environmental Protection Agency	72

Appendix II: Additional Material for the Record

Written statement submitted by Representative Eddie Bernice Johnson, Ranking Member, Committee on Science, Space, and Technology, U.S. House of Representatives	110
Letters submitted by Representative Lamar S. Smith, Chairman, Committee on Science, Space, and Technology, U.S. House of Representatives	111
Letters submitted by Representative Kevin Cramer, Committee on Science, Space, and Technology, U.S. House of Representatives	118
Letters submitted by Representative Paul C. Broun, Committee on Science, Space, and Technology, U.S. House of Representatives	122
Letter submitted by Representative Ralph M. Hall, Committee on Science, Space, and Technology, U.S. House of Representatives	140
Letter submitted by Representative Randy Hultgren, Committee on Science, Space, and Technology, U.S. House of Representatives	142
Letters submitted by Representative Larry Bucshon, Committee on Science, Space, and Technology, U.S. House of Representatives	144
Letter submitted by Representative Mo Brooks, Committee on Science, Space, and Technology, U.S. House of Representatives	161
Letters submitted by Representative David Schweikert, Committee on Science, Space, and Technology, U.S. House of Representatives	163

NAVIGATING THE CLEAN WATER ACT: IS WATER WET?

WEDNESDAY, JULY 9, 2014

HOUSE OF REPRESENTATIVES,
COMMITTEE ON SCIENCE, SPACE, AND TECHNOLOGY,
Washington, D.C.

The Committee met, pursuant to call, at 10:02 a.m., in Room 2318 of the Rayburn House Office Building, Hon. Lamar Smith [Chairman of the Committee] presiding.

Chairman SMITH. The Committee on Science, Space, and Technology will come to order.

LAMAR S. SMITH, Texas
CHAIRMAN

EDDIE BERNICE JOHNSON, Texas
RANKING MEMBER

Congress of the United States
House of Representatives
COMMITTEE ON SCIENCE, SPACE, AND TECHNOLOGY
2321 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-6301
(202) 225-6371
www.science.house.gov

Navigating the Clean Water Act: Is Water Wet?

Wednesday, July 9, 2014
10:00 a.m.-12:00 p.m.
2318 Rayburn House Office Building

Witnesses

The Honorable Robert W. Perciasepe, Deputy Administrator, U.S. Environmental Protection Agency

U.S. HOUSE OF REPRESENTATIVES
COMMITTEE ON SCIENCE, SPACE, AND TECHNOLOGY
FULL COMMITTEE

HEARING CHARTER

Navigating the Clean Water Act: Is Water Wet?

Wednesday, July 9th, 2014
10:00 a.m. – 12:00 p.m.
2318 Rayburn House Office Building

PURPOSE

On Wednesday, July 9th at 10:00 a.m. in Room 2318 of the Rayburn House Office Building, the Committee on Science, Space, and Technology will hold a hearing entitled *Navigating the Clean Water Act: Is Water Wet?* The purpose of this hearing is to understand the scope and impact of the Environmental Protection Agency's (EPA) proposed rule entitled "Definition of the 'Waters of the United States' Under the Clean Water Act."[1]

WITNESS LIST

- **The Honorable Robert W. Perciasepe**, Deputy Administrator, U.S. Environmental Protection Agency

BACKGROUND

Waterways have long served as highways for commerce. In 1824, the landmark Supreme Court decision in Gibbons v. Ogden[2] held that the power to regulate interstate commerce and ensure navigability was granted to Congress by the Commerce Clause of the U.S. Constitution.[3] At a time when over-land roads were few and often poorly maintained, Congress sought to keep waterways free of obstacles to navigation. Consequently, the first Rivers and Harbors Act was passed in 1824 and appropriated funds to improve navigation on the Mississippi and Ohio rivers by removing sandbars, snags, and other obstacles.

In the original Rivers and Harbors Act and subsequent statutes of the same name, Congress charged the U.S. Army Corps of Engineers with implementation. The Rivers and Harbors Act of 1899[4] prohibited the dumping of solid waste into navigable rivers and harbors. Further, the rapidly expanding electric generation sector relied heavily on hydropower, so the

---

[1] U.S. ENVIRONMENTAL PROTECTION AGENCY. *Definition of "Waters of the United States" Under the Clean Water Act.* EPA-HQ-OW-2011-0880. Apr 21, 2014. *Available at* http://www.regulations.gov/#!docketDetail;D=EPA-HQ-OW-2011-0880.

[2] 22 US 1 (1824).

[3] *See also* CONGRESSIONAL RESEARCH SERVICE. *Federal Oversight and State Cooperation in the Chesapeake Bay.* May 29, 2013. *Available at* http://www.crs.gov/pdfloader/R43090.

[4] March 3, 1899, Ch. 425, Sec. 9, 30 Stat. 1151.

statute required a license from Congress to dam rivers. These early legislative precursors focused on protecting and improving the use of nation's waterways for interstate commerce.[5]

Building upon these early efforts, yet still decades before the EPA was created, the Federal Water Pollution Control Act of 1948 represented the first comprehensive federal clean water program. The law bestowed upon the Department of the Interior the authority to collaboratively develop and implement antipollution programs. The law also established programs to build sewage treatment plants and help state governments pay for water-pollution control programs.[6]

Despite numerous revisions, this Act produced slow progress; by the 1970s only about half of the states had water quality standards. With the creation of the EPA, Congress recognized that states and the federal government must work together more effectively to promote environmental stewardship. In 1972, after significant modifications and amendments, the "Clean Water Act" (CWA) became the common name of the law.[7] Table 1 lists public laws and major amendments that formed the CWA.

Table 1. Clean Water Act and Major Amendments[8]

Year	Act	Public Law
1948	Federal Water Pollution Control Act	P.L. 80-845
1956	Water Pollution Control Act of 1956	P.L. 84-660
1961	Federal Water Pollution Control Act Amendments	P.L. 87-88
1965	Water Quality Act of 1965	P.L. 89-234
1966	Clean Water Restoration Act	P.L. 89-753
1970	Water Quality Improvement Act of 1970	P.L. 91-224, Part I
1972	Federal Water Pollution Control Act Amendments	P.L. 92-500
1977	Clean Water Act of 1977	P.L. 95-217
1981	Municipal Wastewater Treatment Construction Grants Amendments	P.L. 97-117
1987	Water Quality Act of 1987	P.L. 100-4

The modern CWA established the basic structure for regulating the "waters of the United States." It made it unlawful to discharge any pollutant into navigable waters, unless a permit was obtained. The law has civil, criminal, and administrative enforcement provisions and also allows citizens to file suit against persons who violate standards, limitations, or permit requirements.[9]

Currently, more than 65,000 municipal, industrial, commercial, or other sources must obtain discharge permits from EPA or states under the Act's section 402 program and more than 150,000 sources must obtain permits for stormwater. Under section 404 of the CWA, a separate

[5] Percival, et al. "Statutory Authorities for Protecting Water Quality." ENVIRONMENTAL REGULATION LAW, SCIENCE, AND POLICY. 6th ed. 643.

[6] *Id at 643-44.*

[7] Percival, et al. "Statutory Authorities for Protecting Water Quality." ENVIRONMENTAL REGULATION LAW, SCIENCE, AND POLICY. 6th ed. 644-45.

[8] CONGRESSIONAL RESEARCH SERVICE. *Clean Water Act: A Summary of the Law*. Nov. 30, 2012. *Available at* http://www.crs.gov/pdfloader/RL30030.

[9] *See generally* "Summary of the Clean Water Act." ENVIRONMENTAL PROTECTION AGENCY. *Available at* http://www2.epa.gov/laws-regulations/summary-clean-water-act.

permitting regime further protects the nation's waters, including wetlands.[10] According to a Congressional Research Service report, *Clean Water Act: A Summary of the Law* (Nov. 30, 2012):

> *Some types of activities are exempt from permit requirements, including certain farming, ranching, and forestry practices which do not alter the use or character of the land; some construction and maintenance; and activities already regulated by states under other provisions of the act. EPA may delegate certain Section 404 permitting responsibility to qualified states and has done so twice (Michigan and New Jersey). For some time, the act's wetlands permit program has been one of the most controversial parts of the law. Some who wish to develop wetlands maintain that federal regulation intrudes on and impedes private land-use decisions, while environmentalists seek more protection for remaining wetlands and limits on activities that are authorized to take place in wetlands.*[11]

Penalties for violations can be as much as $25,000 per day. Criminal violations of the act for negligent or knowing violations are punishable by fines of $50,000 per day and three years imprisonment. Cases of "knowing endangerment" carry a fine of up to $250,000 and 15 years in prison.[12]

Although the CWA deals with water pollution, it does not specifically address drinking-water quality. A separate statute, the Safe Drinking Water Act of 1974 (P.L. 93-523), provides protection of public drinking water supplies.[13]

Jurisdictional Uncertainty

A series of Supreme Court decisions have rejected some attempts to expand control over previously unregulated areas and created ambiguity regarding the scope of CWA jurisdiction. According to a Congressional Research Service report, *Federal Oversight and State Cooperation in the Chesapeake Bay* (May 29, 2013):

> *The U.S. Supreme Court has long held that a state owns the navigable waters within its borders. In 1842, the Court explained that when the United States was formed, "the people of each state became themselves sovereign; and in that character hold the absolute right to all their navigable waters and the soils under them for their own common use, subject only to the rights since surrendered by the Constitution to the general government." Under the constitutional equal footing doctrine, states that later joined the union acquired the same rights granted to the original states, and therefore also acquired ownership of their state's navigable waters upon achieving statehood.*[14]

---

[10] CONGRESSIONAL RESEARCH SERVICE. *Clean Water Act: A Summary of the Law*. Nov. 30, 2012. *Available at* http://www.crs.gov/pdfloader/RL30030.
[11] *Id.*
[12] *Id.*
[13] The EPA is not proposing to modify the protections afforded by the Safe Drinking Water Act.
[14] Congressional Research Service. *Federal Oversight and State Cooperation in the Chesapeake Bay*, pages 2-3. May 29, 2013. *Available at* http://www.crs.gov/pdfloader/R43090 (internal citations omitted).

However, a state's authority over its waters is "subject to the power of Congress to control the waters for the purpose of commerce."[15]

The CWA regulates "navigable waters," which the Act defines as "waters of the United States."[16] Over the past 30 years, the Supreme Court has examined the meaning of this statutory language three times.

First, in *U.S. v. Riverside Bayview,* the Court upheld the regulation of wetlands "adjacent" to navigable waters because it found that the adjacent wetlands were "inseparably bound up" with the navigable waters.[17]

In 2001, *Solid Waste Agency of N. Cook Cnty v. U.S. Army Corps of Engineers* (commonly referred to as the *SWANCC case*), the Supreme Court rejected CWA jurisdiction over isolated ponds because they lacked a "significant nexus" to navigable waters.[18] After *SWANCC*, the agencies asserted that the decision only applied to isolated waters and that if a body of water connected to navigable waters, it was not an isolated water and was subject to CWA jurisdiction.[19]

The third case was *Rapanos v. U.S.* in 2006. In *Rapanos,* a majority of the Supreme Court rejected the "any connection" theory of jurisdiction, finding it was too broad a standard.[20] The plurality held that the plain language of the CWA "does not authorize this 'Land Is Waters' approach to federal jurisdiction" and that "[i]n applying the definition to ephemeral streams, wet meadows, storm sewers and culverts, directional sheet flow during storm events, drain tiles, manmade drainage ditches, and dry arroyos in the middle of the desert, the Corps has stretched the term 'waters of the United States' beyond parody."[21] Instead, the plurality held that the CWA "confers jurisdiction over only relatively *permanent* bodies of water."[22]

Justice Kennedy also criticized the Corps' standard as too broad because it "leave[s] wide room for regulation of drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water volumes…"[23] In his concurrence, Justice Kennedy established a "significant nexus" standard.

Noting that the reach of the CWA is notoriously unclear, the Supreme Court also called on the agencies to undertake a rulemaking and clarify key jurisdictional standards.[24] Specifically, Justice Kennedy noted that the presence of an ordinary high water mark is not a

---

[15] *Id.* (citing United States v. Appalachian Electric Power Co., 311 U.S. 377, 423 (1940)).
[16] 33 U.S.C. §§ 1344, 1362(7).
[17] 474 U.S. 121 (1985).
[18] 531 U.S. 159 (2001).
[19] *See, e.g.,* Brief for the United States at 31, *Rapanos v. United States*, 547 U.S. 715 (2006) (No. 04-1034); *Rapanos*, 547 U.S. at 780 (Kennedy, J., concurring) ("The Corps' theory of jurisdiction in these consolidated cases—adjacency to tributaries, however remote and insubstantial—raises concerns ....").
[20] 547 U.S. 715 (2006).
[21] *Id. at 734.*
[22] *Id.* (emphasis in original).
[23] *Id. at* 781 (Kennedy, J., concurring).
[24] *See, e.g., Rapanos*, 547 U.S. at 726 (plurality); *id.* at 782 (Kennedy, J., concurring); *id.* at 758 (Roberts, C.J., concurring); *Sackett v. EPA*, 132 S. Ct. 1367, 1375 (2012) (Alito, J., concurring).

reliable standard for determining whether a water is a jurisdictional tributary.[25] Further, some within the regulated public called for a rulemaking to clarify the reach of the CWA.[26]

In light of these concerns, the agencies proposed guidance in 2008, and 2011.[27]

Connectivity Report

On September 17, 2013, the EPA and Army Corps of Engineers announced that a proposed rule defining the scope of CWA jurisdiction had been sent to the Office of Management and Budget (OMB) for interagency review. On the same day, EPA submitted its Draft Science Synthesis Report on the Connectivity of Streams and Wetlands to Downstream Waters[28] to its Scientific Advisory Board (SAB) for peer review. Along with the Report, the EPA assigned technical charge questions to the SAB expert panel with instructions to begin review of the Report.

The draft "Connectivity Report" evaluates potential connections between isolated streams and wetlands with navigable waters. The agencies assert "[t]his draft rule takes into consideration the current state-of-the-art peer reviewed science reflected in the draft science report. Any final regulatory action related to the jurisdiction of the Clean Water Act in a rulemaking will be based on a final version of this scientific assessment."[29] However, EPA sent the rule to OMB before the SAB had begun reviewing the Report.

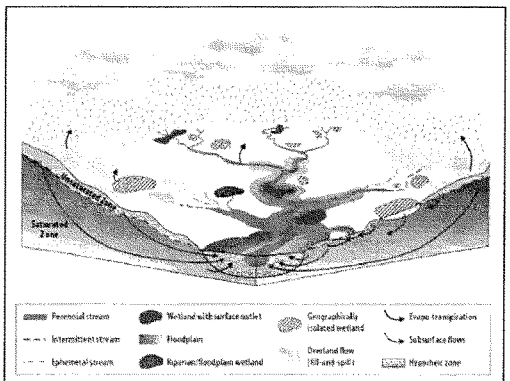


Figure 1-1. Overview of watershed elements discussed in this review. This is a simplified overview of the watershed elements and connection pathways discussed in this review. Blue lines represent stream and river channels, which include ephemeral, intermittent, and perennial tributaries to a river mainstem, shown at the center of the diagram. In addition to surface flows through stream channels, water and materials can move into streams and rivers through overland flow, shown here in yellow, and groundwater flows, shown here in red. Flowpath details (e.g., bidirectional exchanges between channels and hyporheic zones, confining layers, etc.) are omitted for clarity.

SOURCE: U.S. ENVIRONMENTAL PROTECTION AGENCY. Office of Research and Development. *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence, External Review* ***Draft***. EPA/600/R-11-098B. Sep. 2013.

[25] *Rapanos*, 547 U.S. at 781; *See also* Matthew K. Mersel, U.S. Army Corps of Engineers, The Ordinary High Water Mark: Concepts, Research, and Applications (Mar. 20, 2013) (acknowledging that Corps standard for identifying streams is "vague" and has been applied "inconsistently").

[26] Persons and Organizations Requesting Clarification of "Waters of the U.S." by Rulemaking. *Available at* http://www2.epa.gov/sites/production/files/2014-03/documents/wus_request_rulemaking.pdf (EPA notes that "Request for a rulemaking process does not imply support for the rule as proposed").

[27] CONGRESSIONAL RESEARCH SERVICE. EPA and the Army Corps' Proposed Rule to Define "Waters of the United States." June 24, 2014. *Available at* http://www.crs.gov/pdfloader/R43455.

[28] U.S. ENVIRONMENTAL PROTECTION AGENCY. Office of Research and Development. *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence, External Review Draft.* EPA/600/R-11-098B. Sep. 2013. *Available at* http://yosemite.epa.gov/sab/sabproduct.nsf/0/7724357376745F48852579E60043E88C/$File/WOUS_ERD2_Sep2013.pdf.

[29] EPA Press Release. Sep. 2013. *Available at* http://cfpub.epa.gov/ncea/cfm/recordisplay.cfm?deid=23834.

Under the Environmental Research, Development and Demonstration Authorization Act (ERDDAA), the "Administrator, at the time any proposed criteria document, standard, limitation, or regulation under the... [CWA]... is provided to any other Federal agency for formal review and comment, shall make available to the Board such proposed criteria document, standard, limitation, or regulation, together with relevant scientific and technical information in the possession of the Environmental Protection Agency on which the proposed action is based." [30] The law explains that this process provides the Board with a critical opportunity to share with the Administrator "its advice and comments on the adequacy of the scientific and technical basis of the proposed criteria document, standard, limitation, or regulation."[31]

The importance of the statutory peer review process is underscored by the fact that the Connectivity Report is classified as a "Highly Influential Scientific Assessment." In a June 27, 2012 letter to the Committee, EPA confirmed that the "Synthesis is a 'Highly Influential Scientific Assessment' as defined by OMB."[32] Specifically, the OMB's *Peer Review Bulletin*[33] states that "it is important to obtain peer review before the agency announces its regulatory options so that any technical corrections can be made before the agency becomes invested in a specific approach or the positions of interest groups have hardened." The Bulletin notes that if the review occurs too late in the process "it is unlikely to contribute to the course of a rulemaking."

The Committee has invited the EPA to reconcile the apparent divergence from the requirements of ERDDAA and OMB guidelines.[34]

Further, pursuant to authority under ERDDAA, the Committee on Science, Space, and Technology provided the SAB with charge questions related to the Report.[35]

Proposed Rule

On March 25, 2014, the EPA and the Corps jointly proposed a rule defining the scope of waters protected under the CWA. The proposal is open for comment until October 21, 2014. Some have raised concerns that the proposed rule could increase the reach of the CWA well beyond Congressional intent.[36] However, according to the agencies, the rule would only increase

---

[30] Environmental Research, Development and Demonstration Authorization Act of 1978, 42 USC § 4365.

[31] *Id.*

[32] Letter from Nancy Stoner, EPA Acting Assistant Administrator to House Committee on Science, Space, and Technology. June 27, 2012. *Available at* http://science.house.gov/sites/republicans.science.house.gov/files/documents/06-27-2012%20EPA%20to%20Harris%20re%20CWA.pdf.

[33] EXECUTIVE OFFICE OF THE PRESIDENT, OFFICE OF MANAGEMENT AND BUDGET. Final Information Quality Bulletin for Peer Review. Dec. 2004. *Available at* http://www.whitehouse.gov/sites/default/files/omb/assets/omb/memoranda/fy2005/m05-03.pdf.

[34] Letter from House Committee on Science Space and Technology to EPA Administrator Gina McCarthy. Oct. 18, 2013. *Available at* http://science.house.gov/sites/republicans.science.house.gov/files/documents/Letters/101813_letter.pdf.

[35] Charge Questions from the House Committee on Science, Space, and Technology to the Science Advisory Board and the Panel for the Review of the EPA Water Body Connectivity Report. Nov. 6 2013. *Available at* http://yosemite.epa.gov/sab/sabproduct.nsf/7FF38D8F9D02345485257C2300685787/$File/11-06-2013+Science+Committee+Letter+to+Dr++Rodewald+and+Dr++Allen.pdf.

[36] *See e.g.* Letter from 231 Congressmen to EPA and USACE. May 1, 2014. *Available at* http://chriscollins.house.gov/sites/ chriscollins.house.gov/files/Clean%20Water%20Act%20Letter%20FINAL.pdf. Letter from 46 Senators and Representatives to EPA. May 8, 2014. *Available at* http://www.lee.senate.gov/public/index.cfm/2014/5/western-caucuses-urge-epa-to-halt-waters-of-the-us-rule.

jurisdictional areas by 3 percent and is intended to clarify the protections for "upstream waters and wetlands that are absolutely vital to downstream communities" by "strengthening the consistency, predictability and transparency of jurisdictional determinations."[37]

Additional Reading:

Charles K. McFarland. *The Federal Government and Water Power, 1901-1913: A Legislative Study in the Nascence of Regulation.* LAND ECONOMICS Vol. 42, No. 4. Nov. 1966.

CONGRESSIONAL RESEARCH SERVICE. *Clean Water Act: A Summary of the Law.* Nov. 30, 2012. *Available at* http://www.crs.gov/pdfloader/RL30030.

CONGRESSIONAL RESEARCH SERVICE. *Controversies over Redefining "Fill Material" Under the Clean Water Act.* Jan. 23, 2014. *Available at* http://www.crs.gov/pdfloader/RL31411.

CONGRESSIONAL RESEARCH SERVICE. EPA and the Army Corps' Proposed Rule to Define "Waters of the United States." June 24, 2014. *Available at* http://www.crs.gov/pdfloader/R43455.

CONGRESSIONAL RESEARCH SERVICE. Federal Oversight and State Cooperation in the Chesapeake Bay. May 29, 2013. *Available at* http://www.crs.gov/pdfloader/R43090.

Herbert A. Johnson. *"Gibbons v. Ogden": John Marshall, Steamboats, and the Commerce Clause.* UNIVERSITY PRESS OF KANSAS. 2010.

U.S. ENVIRONMENTAL PROTECTION AGENCY. *Definition of "Waters of the United States" Under the Clean Water Act.* EPA-HQ-OW-2011-0880. Apr 21, 2014. *Available at* http://www.regulations.gov/#!docketDetail;D=EPA-HQ-OW-2011-0880.

U.S. ENVIRONMENTAL PROTECTION AGENCY. Office of Research and Development. *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence, External Review Draft.* EPA/600/R-11-098B. Sep. 2013. *Available at* http://yosemite.epa.gov/sab/sabproduct.nsf/0/7724357376745F48852579E60043E88C/$File/WOUS_ERD2_Sep2013.pdf.

U.S. ENVIRONMENTAL PROTECTION AGENCY AND U.S. ARMY CORPS OF ENGINEERS. *Economic Analysis of Proposed Revised Definition of Waters of the United States.* March 2014. *Available at* http://www2.epa.gov/uswaters/economic-analysis-proposed-revised-definition-waters-united-states.

[37] U.S. ENVIRONMENTAL PROTECTION AGENCY. *Definition of "Waters of the United States" Under the Clean Water Act.* EPA-HQ-OW-2011-0880. Apr 21, 2014. *Available at* http://www.regulations.gov/#!docketDetail;D=EPA-HQ-OW-2011-0880.

Appendix A

Excerpt of the definition from the proposed rule:

Navigable waters **means the waters of the United States, including the territorial seas.**

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

(i) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(ii) All interstate waters, including interstate wetlands;

(iii) The territorial seas;

(iv) All impoundments of waters identified in paragraphs (1)(i) through (iii) and (v) of this definition;

(v) All tributaries of waters identified in paragraphs (1)(i) through (iv) of this definition;

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

(vii) On a case-specific basis, other waters, including wetlands, provided that those waters alone, or in combination **[See Appendix B]** with other similarly situated waters, including wetlands, located in the same region, have a significant nexus to a water identified in paragraphs (1)(i) through (iii) of this definition.

(2) The following are not "waters of the United States" notwithstanding whether they meet the terms of paragraphs (1)(i) through (vii) of this definition—

(i) Waste treatment systems, including treatment ponds or lagoons, designed to meet the requirements of the Clean Water Act.

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

(iii) Ditches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow.

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

(v) The following features:

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

(B) Artificial lakes or ponds created by excavating and/or diking dry land and used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing;

(C) Artificial reflecting pools or swimming pools created by excavating and/or diking dry land;

(D) Small ornamental waters created by excavating and/or diking dry land for primarily aesthetic reasons;

(E) Water-filled depressions created incidental to construction activity;

(F) Groundwater, including groundwater drained through subsurface drainage systems; and

(G) Gullies and rills and non-wetland swales.

(3) Definitions—

(i) ***Adjacent.*** The term *adjacent* means bordering, contiguous or neighboring. Waters, including wetlands, separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are "adjacent waters."

(ii) ***Neighboring.*** The term *neighboring,* for purposes of the term "adjacent" in this section, includes waters located within the riparian area or floodplain of a water identified in paragraphs (1)(i) through (v) of this definition, or waters with a shallow subsurface hydrologic connection or confined surface hydrologic connection to such a jurisdictional water.

(iii) ***Riparian area.*** The term *riparian area* means an area bordering a water where surface or subsurface hydrology directly influence the ecological processes and plant and animal community structure in that area. Riparian areas are transitional areas between aquatic and terrestrial ecosystems that influence the exchange of energy and materials between those ecosystems.

(iv) ***Floodplain.*** The term *floodplain* means an area bordering inland or coastal waters that was formed by sediment deposition from such water under present climatic conditions and is inundated during periods of moderate to high water flows.

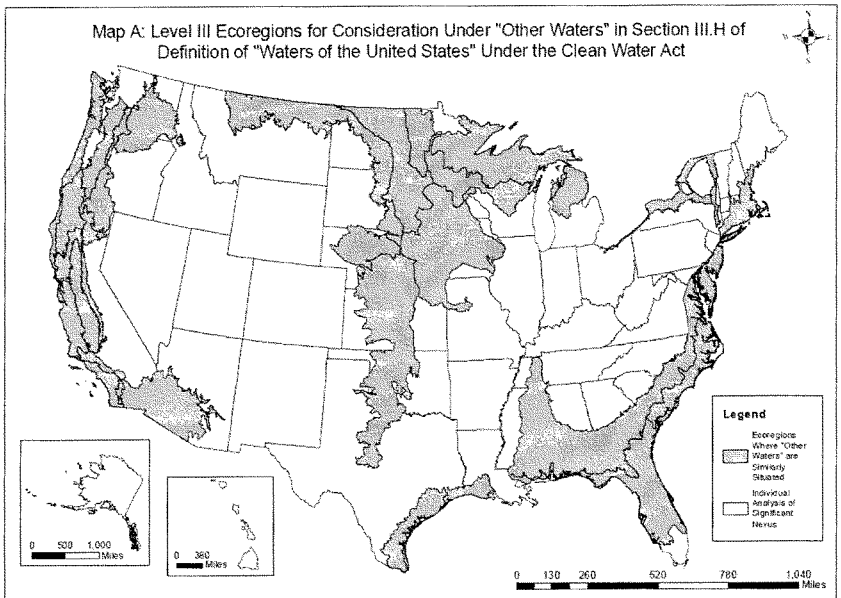
(v) ***Tributary.*** The term *tributary* means a water physically characterized by the presence of a bed and banks and ordinary high water mark, as defined at 33 CFR 328.3(e), which

contributes flow, either directly or through another water, to a water identified in paragraphs (1)(i) through (iv) of this definition. In addition, wetlands, lakes, and ponds are tributaries (even if they lack a bed and banks or ordinary high water mark) if they contribute flow, either directly or through another water to a water identified in paragraphs (1)(i) through (iii) of this definition. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if, for any length, there are one or more man-made breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as wetlands at the head of or along the run of a stream, debris piles, boulder fields, or a stream that flows underground) so long as a bed and banks and an ordinary high water mark can be identified upstream of the break. A tributary, including wetlands, can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, lakes, ponds, impoundments, canals, and ditches not excluded in paragraph (2)(iii) or (iv) of this definition.

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

(vii) ***Significant nexus.*** The term *significant nexus* means that a water, including wetlands, either alone or in combination with other similarly situated waters in the region (i.e., the watershed that drains to the nearest water identified in paragraphs (1)(i) through (iii) of this definition), significantly affects the chemical, physical, or biological integrity of a water identified in paragraphs (1)(i) through (iii) of this definition. For an effect to be significant, it must be more than speculative or insubstantial. Other waters, including wetlands, are similarly situated when they perform similar functions and are located sufficiently close together or sufficiently close to a "water of the United States" so that they can be evaluated as a single landscape unit with regard to their effect on the chemical, physical, or biological integrity of a water identified in paragraphs (1)(i) through (iii) of this definition.

Appendix B



Map A: Level III Ecoregions for Consideration Under "Other Waters" in Section III.H of Definition of "Waters of the United States" Under the Clean Water Act

Note: For display purposes, the borders for ecoregions are displayed only where "other waters" are similarly situated under Option 2 (the shaded areas). Otherwise, state boundaries are displayed.

Source: U.S. Environmental Protection Agency, "Level III Ecoregions of the Continental United States," map scale 1:7,500,000 (Corvallis, OR: U.S. EPA – National Health and Environmental Effects Research Laboratory, 2013), available at http://www.epa.gov/wed/pages/ecoregions/level_iii_iv.htm.

Map available in rulemaking docket with supporting materials at http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OW-2011-0880-0002.

Chairman SMITH. Welcome to today's hearing titled "Navigating the Clean Water Act: Is Water Wet?" I will recognize myself for an opening statement and then the ranking member for hers.

A year ago, this Committee issued its first subpoena in over two decades because the Environmental Protection Agency refused to make public the data it claims justifies its costly air regulations. The EPA finally admitted that in many cases it never even had the data it uses to support its billion-dollar mandates. Now, once again, the EPA has avoided open debate in its rush to implement the President's radical agenda. The EPA wrote its new waters of the U.S. rule without even waiting for the expert advice of the Agency's own Science Advisory Board.

The Science Advisory Board exists to provide independent advice to the EPA and to Congress. It is the job of these experts to review the underlying science. Not only did the EPA publish its rule before the Board had an opportunity to review the report, but when this Committee sent official questions to the Board as its review began, the EPA stepped in to prevent the experts from responding. The Obama Administration continues to undermine scientific inquiry in order to fast-track its partisan agenda.

Even though Clean Water Act jurisdiction is ultimately a legal question, the Agency's refusal to wait for the science undercuts the opportunity for informed policy decisions. The EPA's rule is so vague that it does little more than extend an open invitation to trial lawyers and government drones. Meanwhile, the EPA has offered empty assurances. Last week the Agency released a fact sheet that ended with a disclaimer saying that its statements are not binding. The American people are tired of an Administration that makes promises with its fingers crossed behind its back.

The EPA does not provide real clarity about what is or isn't water. Instead, the Agency gives itself extraordinary power to pick and choose on a case-by-case basis. In fact, the proposed rule is 370 pages but it never actually defines "water." According to the EPA, 59 percent of the streams they may claim to regulate, aren't always wet. The EPA states that these places often only become wet after rain events and in some cases are so tiny or temporary that they don't even appear on maps. The Agency's Web site says, "They could be a drizzle of snowmelt that runs down a mountainside crease, a small spring-fed pond, or a depression in the ground that fills with water after every rain and overflows into the creek below."

The practical implications of this new rule are troubling for private property owners. How do we even know when and where these tiny drizzles of water might appear? Americans deserve to know what is punishable so they can live without fear of arbitrary persecutions.

Take a look at a map from the EPA's draft report, and this is on the screen to either side of us. The image shows tributaries in red and larger streams in blue that the EPA could consider claiming in the western part of the United States. Before the EPA invades the back yards of Americans, they should tell them what they are really doing.

When Congress enacted the Clean Water Act, it was about water, not land. But the EPA's rewriting of the law is a terrifying expan-

sion of federal control over the lands owned by the American people.

The EPA is on a regulation rampage, and this new water rule proves it.

[The prepared statement of Mr. Smith follows:]

PREPARED STATEMENT OF CHAIRMAN LAMAR S. SMITH

A year ago, this Committee issued its first subpoena in over two-decades because the Environmental Protection Agency (EPA) refused to make public the data it claims justifies its costly air regulations. The EPA finally admitted that in many cases it never even had the data it uses to support its billion-dollar mandates.

Now, once again, the EPA has avoided open debate in its rush to implement the President's radical agenda. The EPA wrote its new "waters of the U.S." rule without even waiting for the expert advice of the Agency's own Science Advisory Board.

The Science Advisory Board exists to provide independent advice to the EPA and to Congress. It is the job of these experts to review the underlying science. Not only did the EPA publish its rule before the Board had an opportunity to review the report, but when this Committee sent official questions to the Board as its review began, the EPA stepped in to prevent the experts from responding. The Obama administration continues to undermine scientific inquiry in order to fast-track its partisan agenda.

Even though Clean Water Act jurisdiction is ultimately a legal question, the Agency's refusal to wait for the science undercuts the opportunity for informed policy decisions.

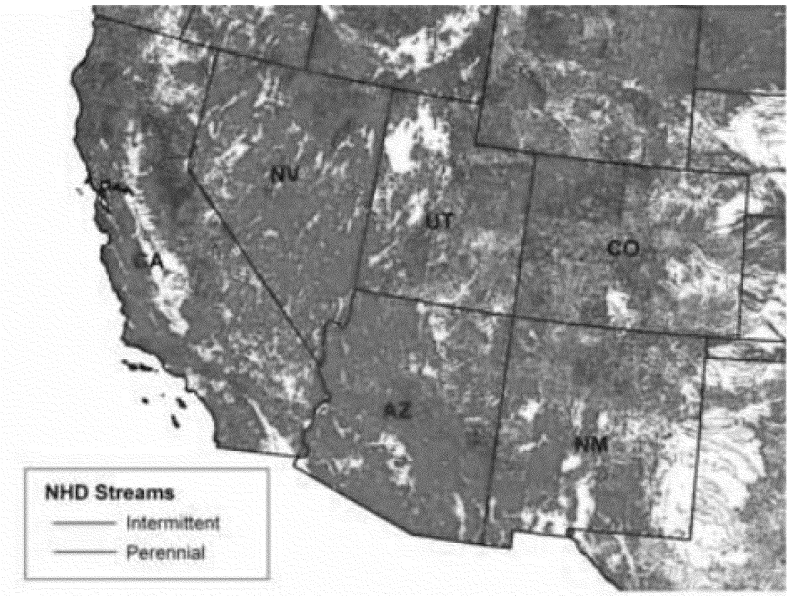
The EPA's rule is so vague that it does little more than extend an open invitation to trial lawyers and government drones. Meanwhile, the EPA has offered empty assurances. Last week the Agency released a fact-sheet that ended with a disclaimer saying that its statements are not binding. The American people are tired of an Administration that makes promises with its fingers crossed behind its back. The EPA does not provide real clarity about what is or isn't "water." Instead, the Agency gives itself extraordinary power to pick and choose on a case-by-case basis. In fact, the proposed rule is 370 pages but it never actually defines "water."

According to the EPA, 59% of the "streams" they may claim to regulate aren't always wet. The EPA states that these places often only become wet after rain events and in some cases are so tiny or temporary that they don't even appear on maps.

The Agency's website says, "They could be a drizzle of snowmelt that runs down a mountainside crease, a small spring-fed pond, or a depression in the ground that fills with water after every rain and overflows into the creek below."

The practical implications of this new rule are troubling for private property owners. How do we even know when and where these tiny "drizzles" of water might appear? Americans deserve to know what is punishable so they can live without fear of arbitrary prosecutions.

Take a look at a map from the EPA's draft report. The image shows tributaries in red and larger streams in blue that the EPA could consider claiming in the western part of the U.S.



[For a better image of the map please visit *http://science.house.gov/sites/republicans.science.house.gov/files/documents/HHRG-113-%20SY-WState-S000244-20140709.pdf*]

Before the EPA invades the back yards of Americans, they should tell them what they are really doing. When Congress enacted the Clean Water Act, it was about water, not land. But the EPA's re-writing of the law is a terrifying expansion of federal control over the lands owned by the American people. The EPA is on a regulation rampage, and this new water rule proves it.

Chairman SMITH. That concludes my remarks, and the gentlewoman from Oregon, Ms. Bonamici, is recognized for her opening statement.

Ms. BONAMICI. Thank you very much, Chairman Smith, for holding this morning's hearing to discuss the rule proposed by the Army Corps and the EPA to define the term "waters of the United States" in the Clean Water Act. I would also like to welcome Deputy Administrator Mr. Perciasepe and thank him for appearing before us this morning.

Access to clean water is essential to economic growth. A study by the World Health Organization found that every dollar invested in water and sanitation yields economic benefits of between $7 and $12. Most Americans are lucky enough to be able to simply turn on a tap and have water that is safe to drink. Unfortunately, this is not the case everywhere.

Although it is difficult to put a specific figure on the value of water to the United States economy, studies have shown that clean water is a prerequisite for nearly every industry from agriculture to manufacturing to commercial fisheries to tourism. With 3.5 million miles of rivers and streams, more than 100 million acres of wetlands, and 39.9 million acres of lakes and reservoirs in the United States, managing the availability and quality of this finite

resource can be a challenge. And though it may be a challenge, it is one that we must accept.

As we will no doubt hear today, these streams, lakes, and wetlands offer a wide variety of benefits to our constituents. For example, wetlands can reduce the possibility of flooding by storing excess water after a heavy rain. They can also be a source of water during times of drought. Wetlands and streams improve water quality by trapping sediments and filtering out pollutants and they serve as a critical habitat for fish and other aquatic life, increasing biological diversity.

According to the EPA, more than 100 stakeholders, from state and local governments to industry and agricultural associations to environmental groups, have all asked the EPA and the Army Corps to provide clarity about what waters are and are not within the jurisdiction of the Clean Water Act. And that, Mr. Chairman, is why I am glad we are having this hearing today to discuss the need for that clarity. And although I know that not all of these organizations are supportive of the proposed rule, the goal of the agencies is to provide all interested parties with the clarity that they need and deserve.

Mr. Chairman, some of my constituents have expressed concern about the potential impact of the proposed rule, while others have expressed strong support for the rule. I welcome the opportunity provided by today's hearing to learn more about the details of the proposed rule. I know that the comment period is going on until October, and this gives us an opportunity to clarify some of the misinformation that has been circulating about the proposal and also to provide an opportunity to let the public know about the intent of clarifying what clean waters are within the Clean Water Act.

So I thank you very much, Mr. Chairman. I look forward to the Deputy Administrator's testimony, and I yield back the balance of my time.

[The prepared statement of Ms. Bonamici follows:]

PREPARED STATEMENT OF REPRESENATIVE SUZANNE BONAMICI

Thank you, Chairman Smith for holding this morning's hearing to discuss the rule proposed by the Army Corps and EPA to define the term "waters of the United States" in the Clean Water Act. I'd also like to welcome Mr. Perciasepe and thank him for appearing before us this morning.

Access to clean water is essential to economic growth. A study by the World Health Organization found that every $1 invested in water and sanitation yields economic benefits of between $7 and $12. Most Americans are lucky enough to be able to simply turn on the tap and have water that is safe to drink. Unfortunately, this is not the case everywhere. Although it is difficult to put a specific figure on the value of water to the U.S. economy, studies have shown that clean water is a prerequisite for nearly every industry from agriculture and manufacturing to commercial fisheries to tourism. With 3.5 million miles of rivers and streams, more than 100 million acres of wetlands, and 39.9 million acres of lakes and reservoirs in the United States, managing the availability and quality of this finite resource can be a challenge.

Though it may be a challenge, it is one that we must accept. As we will no doubt hear today, these streams, lakes, and wetlands offer a wide variety of benefits to our constituents. For example, wetlands can reduce the possibility of flooding by storing excess water after a heavy rain; they can also be a source of water during times of drought. Wetlands and streams improve water quality by trapping sediments and filtering out pollutants and they serve as critical habitat for fish and other aquatic life, increasing biological diversity.

According to the EPA, more than 100 stakeholders, from state and local governments to industry and agriculture associations to environmental groups, have asked the EPA and the Army Corps to provide clarity about what waters are and are not within the jurisdiction of the Clean Water Act. And although I know that not all of these organizations are supportive of the proposed rule, the goal of the agencies is to provide all interested parties the clarity that they need and deserve.

Mr. Chairman, some of my constituents have expressed concern about the potential impact the proposed rule may have, while others have expressed strong support for the proposed rule. I welcome the opportunity provided by today's hearing to learn more about the details of the proposed rule as well as the opportunity to clarify some of the misinformation that has been circulating about the proposal.

Thank you, Mr. Chairman and I yield back the balance of my time.

Chairman SMITH. Thank you, Ms. Bonamici.

Without objection, let me put in the record several letters that we received, and they are from the Texas and Southwest Cattle Raisers Association, the Texas Winery, the Texas Association of Business and the Texas Farm Bureau.

[The appears in Appendix II]

Chairman SMITH. Let me now introduce our only witness today, and he is Mr. Bob Perciasepe, Deputy Administrator for the Environmental Protection Agency. He was appointed to this position by President Obama in 2009. Mr. Perciasepe previously served as a top EPA official in the Administration of President Bill Clinton, who appointed him to serve as the nation's top water official and then as the senior official responsible for air quality across the United States. Prior to being named to his current position, he was Chief Operating Officer at the National Audubon Society, one of the world's leading environmental organizations. He has also held top positions at the state and municipal government level including Secretary of the Environment for the State of Maryland. Mr. Perciasepe received his bachelor's degree in natural resources from Cornell University and his master's degree in planning and public administration from Syracuse University.

We welcome you today and appreciate your testimony and look forward to your comments, and please proceed.

TESTIMONY OF HON. ROBERT W. PERCIASEPE, DEPUTY ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

Mr. PERCIASEPE. Thank you, Mr. Chairman and Madam Ranking Member. I really appreciate the introductions and appreciate the opportunity to be here today.

Now, I believe, as I think everyone else does, that Americans want clean and safe waters for ourselves, for our economy, for our environment and for the future uses that we will need, and as we are talking about today, EPA and the U.S. Army Corps of Engineers are undertaking a process to clarify the geographic scope of the Clean Water Act and to improve regulations that have been in place for 30 years. The existing regulations on the books have been in place for 30 years, and the proposed rule will provide families, manufacturers, farmers, outdoor recreation, energy producers with clean water.

The written testimony that I submitted will provide more details about the proposed rule including the Agency's goals to respond to

requests of stakeholders across the country and to make the process of identifying waters protected under the Clean Water Act easier to understand, more predictable and more consistent with the law and recent Supreme Court decisions. We believe this rulemaking will minimize delays and costs and improve predictability, clarity, consistency for everyone who may or may not need a Clean Water Act permit. It is important to note that this is identifying of where we will regulate the discharge of pollutants, not what we regulate what is going on on the land.

I will focus my opening remarks here on trying to address some of the disinformation regarding potential effects of this rulemaking, and I am concerned that that information that is incorrect is having the effect of distracting a real public and national debate and discussion that needs to take place on the legal policy and scientific underpinnings of how we run the Clean Water Act and the protections for clean water in the country. The agencies are continuing to meet with Americans across the country including farmers—the Administrator, Gina McCarthy, is in Missouri today meeting with farmers—energy companies, small businesses, local governments, sportsmen, developers and others to get their comments—remember, this is a proposal—to answer their questions about this rule. We are hearing from the public directly, personally on how to improve the rule.

But some of the misinformation is something that we have to cut through, and I am hoping we will have some chance to do that today. I have heard personally, for example, and when we are out talking to folks that this regulation will require farmers to get permits to have their cows cross a stream; this regulation will make dry washes that carry water only once a thousand years protected under the Clean Water Act; and this rule would make land or floodplains subject to Clean Water Act jurisdiction. I can say categorically that none of those statements are true.

In contrast, there are some key examples of what the proposed rule does and does not do. In adherence with the Supreme Court, it would reduce the scope of waters protected under the Clean Water Act compared to the existing regulations that it replaces. It would not assert jurisdiction over any type of waters not previously protected over the last 40 years. The rule does not apply to lands, whole floodplains, backyards, wet spots or puddles. It will increase transparency, consistency and predictability in making jurisdictional determinations and reduce existing costs and confusion and delays. It represents the best peer-reviewed science about the functions and values of the Nation's waters. And the Agency—and this is important to your opening comments, Mr. Chairman. The Agency will not finalize this rule until our Science Advisory Board is complete with its review of both the rule itself and the science documents that support it.

It will reduce Clean Water Act jurisdiction over ditches compared to the previous 2008 guidance. The rule would maintain all existing Clean Water Act exemptions and exclusions. In addition, we are trying to clarify agricultural conservation practices which we do not want to inhibit that are conducted in waters that do not require a permit under the Clean Water Act. So we have published a proposed rule, not a final rule. We are currently taking comment

on the proposal and we expect tremendous and are getting tremendous public response from a broad range of interests. We are working actively to meet with a wide range of stakeholders. This outreach has already been tremendously helpful and it is helping us understand the concerns and discussing effective solutions that will lead to improvements in the final regulation. We are going to continue working hard, listening more effectively and to understand the issues better.

Additionally, in preparation for the proposed rule, EPA was able to review and consider more than 1,000 peer-reviewed scientific papers and other data, and the EPA's Office of Research and Development prepared a draft peer-reviewed synthesis of these published peer-reviewed scientific documents and the nature of connectivity and the effects of tributaries and wetlands on downstream waters. This draft report informed the agencies' development of the proposed rule, and following earlier external peer review, the report is currently undergoing peer review led by the EPA's Science Advisory Board. We expect that the SAB will complete its review later in this calendar year but again, we will not finalize this rule until they complete their review of that document and that we have their comments available to us to finalize the rule.

So let me conclude by emphasizing my strong belief that what is good for the environment and clean water is good for farmers, ranchers, foresters, manufacturers, homebuilders and small businesses. We look forward to working with all stakeholders and the public to reflect this important goal in the final rulemaking when we get to that point.

So thank you for this opportunity to comment. I apologize for running over, though. I just looked at the clock.

[The prepared statement of Mr. Perciasepe follows:]

TESTIMONY OF BOB PERCIASEPE
DEPUTY ADMINISTRATOR
U.S. ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE COMMITTEE ON SCIENCE, SPACE, AND TECHNOLOGY
UNITED STATES HOUSE OF REPRESENTATIVES

July 9, 2014

Good afternoon Chairman Smith, Ranking Member Johnson, and members of the Committee. I am Bob Perciasepe, the Deputy Administrator of the U.S. Environmental Protection Agency. I am pleased to be here today to discuss the EPA's and the U.S. Army Corps of Engineers' recently proposed rule which would clarify the jurisdictional scope of the Clean Water Act (CWA), simplifying and improving the process for determining waters that are, and are not, covered by the Act. The agencies' proposed rule was published in the Federal Register on April 21, 2014, and is available to the public now for their review and comment.

I want to begin by emphasizing that we are discussing a proposed rule that we anticipate will receive tens of thousands of public comments. We look forward to addressing these comments when we finalize revisions that further clarify our regulations and make them more effective in implementing the statute, consistent with the law and sound science. Our goal in revising the rule is straightforward: to respond to requests from stakeholders across the country to make the process of identifying waters protected under the CWA easier to understand, more predictable, and more consistent with the law and peer-reviewed science. We believe the result of this rulemaking will be to improve the process for making jurisdictional determinations for the CWA by minimizing delays and costs and to improve predictability and consistency for landowners.

The proposed rule preserves all existing agricultural exemptions under the CWA and in addition, we

worked closely with our partners at the U.S. Department of Agriculture to promote additional conservation practices that enhance farming and protect water quality through a companion Interpretive Rule that clarifies which practices are exempt from CWA permitting requirements. We are also working with our partners in the states and tribes to assure their voices are effectively represented as we proceed through this rulemaking. The proposed rule continues to respect states' well-defined and long-standing relationships with federal agencies in implementing CWA programs.

We are working closely with our partners at the U.S. Department of Agriculture to reduce regulatory burdens for the nation's farmers, ranchers, and foresters by promoting practices that enhance farming and protect water quality, and by clarifying that these practices are exempt from CWA permitting requirements. We are also working with our partners in the states and tribes to assure their voices are effectively represented as we proceed through this rulemaking. The proposed rule continues to respect states' well-defined and long-standing relationships with federal agencies in implementing CWA programs.

In my testimony today, I plan to highlight the uncertainty and confusion that prompted stakeholders to ask the agencies to develop a proposed rule. I will then describe the primary elements of the proposed rule and how the rule will provide additional clarity regarding waters that are and are not "waters of the United States." I will discuss our agencies' efforts to improve clarity and preserve existing CWA exemptions and exclusions for agriculture, and the agencies' recently released interpretive rule, which clarifies that certain agricultural conservation practices that protect or improve water quality are exempt from CWA Section 404 permitting requirements. Finally, I will describe our work to improve the scientific basis for our decision-making and to gather public input on the proposed rule.

The Importance of Clean Water

The foundation of the agencies' rulemaking efforts to clarify protection under the CWA is the goal of providing clean and safe water to all Americans. Clean water is vital to every single American – from families who rely on affordable, safe, clean waters for their public drinking water supply, and on safe places to swim and healthy fish to eat, to farmers who need abundant and reliable sources of water to grow their crops, to hunters and anglers who depend on healthy waters for recreation and their work, to businesses that need a steady supply of clean water to make their products. The range of local and large-scale businesses that we depend on—and who, in turn, depend on a reliable supply of clean water—include tourism, health care, farming, fishing, food and beverage production, manufacturing, transportation and energy generation.

In addition to providing habitat, rivers, lakes, ponds and wetlands supply and cleanse our drinking water, ameliorate storm surges, provide invaluable storage capacity for some flood waters, and enhance our quality of life by providing myriad recreational opportunities, as well as important water supply and power generation benefits. Consider these facts about the value of clean water to Americans:

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

- Approximately 117 million people – one in three Americans – get their drinking water from public systems that rely on seasonal, rain-dependent, and headwater streams.[1]

Legal Background and Recent Confusion Regarding CWA Jurisdiction

In recent years, several Supreme Court decisions have raised questions regarding the geographic scope of the Act. In *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001), the Supreme Court in a 5-4 opinion held that the use of "isolated" non-navigable intrastate ponds by migratory birds was not by itself a sufficient basis for the exercise of Federal regulatory authority under the CWA . Five years after this case, the Court again addressed the Clean Water Act term "waters of the United States" in *Rapanos v. United States*, 547 U.S. 715 (2006), which involved two consolidated cases in which the CWA had been applied to wetlands adjacent to non-navigable tributaries of traditional navigable waters. While all Members of the Court agreed that the term ''waters of the United States'' encompasses waters, including wetlands, beyond those that are navigable in the traditional sense, the case yielded no majority opinion. Neither the plurality nor the concurring opinion in *Rapanos* invalidated any of the agencies' existing regulations defining "waters of the United States," but these opinions did raise questions concerning how to determine which waters were jurisdictional pursuant to their regulations.[2]

Following these decisions, there has been a lack of clarity regarding CWA jurisdiction over some streams and wetlands. For nearly a decade, members of Congress, state and local officials, industry, agriculture, environmental groups, and the public have asked our agencies for a rulemaking to provide

[1] A county-level map depicting the percent of the population receiving drinking water directly or indirectly from streams that are seasonal, rain-dependent or headwaters is available at http://water.epa.gov/type/rsl/drinkingwatermap.cfm.
[2] Additional background information on these cases is included in the preamble to the agencies' proposed rule, as well as a legal appendix to the proposed rule, which are available at http://www2.epa.gov/sites/production/files/2014-04/documents/fr-2014-07142.pdf.

clarity.[3] This complexity has made enforcement of the law difficult in many cases, and has increased the amount of time it takes to make jurisdictional determinations under the CWA.

In response to these implementation challenges and significant stakeholder requests for rulemaking, the agencies began developing a proposed rule. To help inform the proposed rule, the agencies began reviewing available peer-reviewed science regarding the connectivity or isolation of aquatic resources and effects on downstream waters, a topic I will discuss in more detail later. Consistent with EPA and U.S. Army Corps of Engineers ("the Corps") policy to promote communications among the agencies, states and local governments, and in recognition of the vital role states play in implementation of the CWA, the EPA undertook federalism consultation for this effort. The EPA held a series of meetings and outreach calls with state and local governments and their representatives soliciting input on a potential rule. During this process, state and local governments identified a number of issues, which the agencies have considered in developing the proposed rule.

Key Elements of the Proposed Rule

The agencies' proposed rule helps to protect the nation's waters, consistent with the law and currently available scientific and technical expertise. The rule provides continuity with the existing regulations, where possible, which will reduce confusion and will reduce transaction costs for the regulated community and the agencies. Toward that same end, the agencies also proposed, where consistent with the law and their scientific and technical expertise, categories of waters that are and are not jurisdictional, as well as categories of waters and wetlands that require a case-specific evaluation to determine whether they are protected by the CWA.

[3] A list of individuals and organizations who requested clarification of Clean Water "Waters of the United States" by rulemaking is available at http://www2.epa.gov/sites/production/files/2014-03/documents/wus_request_rulemaking.pdf.

Specifically, the proposed rule clarifies that, under the CWA:

- All tributaries to the nation's traditional navigable waters, interstate waters, the territorial seas, or impoundments of these waters would be protected because they are critical to the chemical, physical, and biological integrity of these waters.
- Waters, including wetlands, that are adjacent to traditional navigable waters, interstate waters, the territorial seas, jurisdictional tributaries, or impoundments of these waters would be protected because such waters possess a significant nexus to traditional navigable waters, interstate waters, or the territorial seas.
- Some waters would remain subject to a case-specific evaluation of whether or not such waters meet the legal standards for federal jurisdiction established by the Supreme Court.
- Certain waters are excluded, as described below.

The proposed rule also discusses several regulatory alternatives that would reduce or eliminate the need for case-specific evaluations, to provide even greater clarity for the public. The proposed rule retains the agencies' longstanding exclusions for waste treatment systems and prior converted cropland, from the definition of "waters of the United States." Moreover, the agencies also propose to clarify for the first time, by rule, that certain features and types of waters are not considered "waters of the United States." These include features such as certain intermittent and ephemeral ditches; artificially irrigated areas that would revert to uplands if irrigation were to cease; artificial lakes and ponds used for purposes such as stock watering, irrigation, settling basins, or rice growing; and groundwater, including groundwater drained through subsurface drainage systems.

The agencies' proposed rule continues to reflect the states' primary and exclusive authority over water allocation and water rights administration, as well as state and federal co-regulation of water quality. The agencies worked hard to assure that the proposed rule reflects these fundamental CWA principles,

which we share with our state partners. Now that the agencies have released a proposed rule, we look forward to additional opportunities for close collaboration with state and local governments to review the comments we received during our voluntary federalism consultation and to discuss how the proposed rule addresses those comments. The agencies will continue to take input from state and local governments as the rulemaking process continues.

Concurrent with the release of the proposed rule, the agencies published an economic analysis of the benefits and costs of the proposed rule based on implementation of all parts of the CWA. We concluded that the proposed rule would provide an estimated $388 million to $514 million annually of benefits to the public, including reducing flooding, filtering pollution, providing wildlife habitat, supporting hunting and fishing, and recharging groundwater. The public benefits significantly outweigh the costs of about $162 million to $278 million per year for mitigating impacts to streams and wetlands, and taking steps to reduce pollution to waterways.[4]

Benefits of the Proposed Rule for Agriculture

For the past several years, the EPA and the Corps have listened to input from the agriculture community while developing the proposed rule. Using the input from those discussions, the EPA and the Corps then worked with the U.S. Department of Agriculture to ensure that concerns raised by farmers and the agricultural industry were addressed in the proposed rule. The proposed rule does not change, in any way, existing CWA exemptions from permitting for discharges of dredged and/or fill material into waters of the U.S. associated with agriculture, ranching, and forestry activities, including the exemptions for:

[4] This analysis is available at http://www2.epa.gov/sites/production/files/2014-03/documents/wus_proposed_rule_economic_analysis.pdf.

- Normal farming, silviculture, and ranching practices, which include plowing, seeding, cultivating, minor drainage, and harvesting for production of food, fiber, and forest products;
- Upland soil and water conservation practices;
- Agricultural stormwater discharges;
- Return flows from irrigated agriculture;
- Construction and maintenance of farm or stock ponds or irrigation ditches;
- Maintenance of drainage ditches; and
- Construction or maintenance of farm, forest, and temporary mining roads, where constructed and maintained in accordance with best management practices.

I want to emphasize that farmers, ranchers, and foresters who are conducting these activities covered by the exemptions (activities such as plowing, tilling, planting, harvesting, building and maintaining roads, ponds and ditches, and many other activities in waters on their lands), can continue these practices after the new rule without the need for approval from the Federal government. Additionally, the proposed rule expressly excludes groundwater from jurisdiction, including groundwater in subsurface tile drains. It reduces jurisdiction over ditches, and maintains the existing exclusions for prior converted cropland and waste treatment systems, including treatment ponds or lagoons.

In addition, in coordination with USDA's Natural Resources Conservation Service (NRCS), the EPA and the Corps clarified that certain additional NRCS conservation practices occurring in "Waters of the U.S", identified by the USDA, the EPA, and the Corps, and implemented in accordance with published USDA conservation practice standards, are exempted from CWA Section 404 permitting as normal farming activities. The agencies did so through an interpretive rule that was published at the same time as the proposed rule and that went into effect on April 3, 2014. Moreover, through a memorandum of understanding, EPA, the Corps, and USDA now have a collaborative process for working together to

implement these exemptions. It will facilitate the periodical identification, review, and update of the list of NRCS conservation practice standards and activities that would qualify under the exemption.[5]

Science and Public Input in the Agencies' Rulemaking Efforts

The agencies' rulemaking efforts have been informed by the latest peer-reviewed science regarding the connections between aquatic resources and effects on downstream waters. In preparation for the proposed rule, the EPA reviewed and considered more than 1,000 peer-reviewed scientific papers and other data, and the EPA's Office of Research and Development prepared a draft peer-reviewed synthesis of published peer-reviewed scientific literature discussing the nature of connectivity and effects of tributaries and wetlands on downstream waters. This draft report, "*Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*," informed the agencies' development of the proposed rule.[6] Following an earlier external peer review, the Report is currently undergoing peer review led by EPA's Science Advisory Board (SAB). We expect the SAB review to be completed later in 2014. The rule will not be finalized until the EPA develops a final scientific report that considers the results of the SAB review, which will help inform the final rule.

Next Steps

The agencies published the proposed rule in the Federal Register on April 21, and the public comment period on the proposed rule will be open for 182 days, closing on October 20. During this period, the agencies are launching a robust outreach effort, holding discussions around the country and gathering input from states, local governments, and other stakeholders needed to shape a final rule. We welcome comments from all stakeholders on the agencies' proposed rule. At the conclusion of the rulemaking

[5] The agencies' interpretive rule and memorandum of understanding are available at http://water.epa.gov/lawsregs/guidance/wetlands/CWAwaters.cfm.
[6] The draft report is available at http://yosemite.epa.gov/sab/sabproduct.nsf/fedrgstr_activites/Watershed%20Connectivity%20Report.

process, the agencies will review the entirety of the completed administrative record, including public comments and the EPA's final science synthesis report. The comments will be summarized and made publicly available. The agencies will make appropriate revisions to the rule in response to public comments and to recommendations from the Science Advisory Board's review of the scientific report.

Conclusion

Thank you Chairman Smith, Ranking Member Johnson, and members of the Committee, for this opportunity to discuss the agencies' efforts to provide additional clarity regarding the geographic scope of the Clean Water Act. I look forward to robust public input on the agencies' proposed rule to ensure that it achieves the goal of providing greater predictability, consistency, and clarity in the process of identifying waters that are, and are not, covered by the CWA.

Thank you again, and I will be happy to answer your questions.

Deputy Administrator Bob Perciasepe

Bob Perciasepe

Appointed by President Obama in 2009 as the U.S. Environmental Protection Agency's Deputy Administrator, Bob Perciasepe continues a career spanning nearly four decades as one of the nation's leading environmental and public policy figures. An expert on environmental stewardship, advocacy, public policy, and national resource and organizational management, Perciasepe is widely respected within both the environmental and U.S. business communities.

His extensive experience includes service both inside and outside of government. He served as a top EPA official in the administration of President Bill Clinton, who appointed him, first, to serve as the nation's top water official and later as the senior official responsible for air quality across the U.S. Prior to being named to his current position, he was chief operating officer at the National Audubon Society, one of the world's leading environmental organizations. He has also held top positions within state and municipal government, including as Secretary of the Environment for the State of Maryland and as a senior official for the City of Baltimore.

Perciasepe holds a Bachelor of Science degree in Natural Resources from Cornell University and a master's degree in planning and public administration from the Maxwell School of Syracuse University. He and his wife have two adult daughters.

Chairman SMITH. We weren't going to hold you to the 5 minutes, but thank you for your comments, Mr. Perciasepe.

Let me go back to the map that I showed on the screens a few minutes ago and direct my first question to you in regard to that map, because it looks to me like what the EPA proposes is to regulate about 99 percent of these western states whether those areas in some cases are wet or dry. This is a map from your preliminary report? Do you agree with what the map says in that it would cover about 99 percent of those western states?

Mr. PERCIASEPE. There are two things, like I said. First, this is a similar map to what the current regulations would be covering, and what that map is showing is the full drainage areas, not the actual waters.

Chairman SMITH. That is my point, but your regulations could cover those areas that are the drainage areas, not just the actual water, and that is why so much of that map is either red or blue.

Mr. PERCIASEPE. No, the regulations—keep in mind, this is just where the jurisdiction is.

Chairman SMITH. Right.

Mr. PERCIASEPE. You would be affected if you wanted to discharge pollution into the waters that might be in those red areas.

Chairman SMITH. But the EPA could if it wanted to regulate the area that is colored red and blue in this map?

Mr. PERCIASEPE. We would not regulate the land in those areas. The water that is in those areas that has stream banks, that has a bed, normal high-water marks, those would be the places that would be covered, not the land.

Chairman SMITH. To the extent that the water traversed the land, then that land itself would be impacted by the regulations, would they not?

Mr. PERCIASEPE. The water, the water tributaries, the bodies of water that are in those areas would be subject to regulation if you discharge pollution into them. It would not be the farm fields, it would not be the backyards, it would not be the areas, the land areas. It would be the discharge of pollutants into the waters in those areas.

Chairman SMITH. Let me give a quick example. To the extent that there was a runoff from a stream or from even one of those rain puddles that I referred to, then you would be able to regulate that area, would you not?

Mr. PERCIASEPE. We are proposing in this rule that tributaries to traditionally navigable waters, and this is included in many of the science documents and also in the Supreme Court decision, that have a significant effect on the downstream navigable waters. If you wanted to discharge pollutants into those or fill them in, you would have to have a permit under the Clean Water Act.

Chairman SMITH. Suppose we are not talking about pollutants. Suppose we are just talking about rain runoff or that drizzle that is in your report or in the report where you might have literally areas that are only wet after it rains. Those areas would be covered whether or not there are pollutants involved or not.

Mr. PERCIASEPE. The stream would be covered, not the land area. The stream. You wouldn't be able to discharge into the stream. And including streams that are intermittent.

Chairman SMITH. Correct, that might be dry today.

Mr. PERCIASEPE. They might be dry some parts of the year.

Chairman SMITH. And in my opinion, at least, what gets into the land and goes beyond the water, as you just said, if you are talking about dry stream beds, that is land, that is not water, and I think that that concerns a lot of farmers and ranchers and landowners.

Mr. PERCIASEPE. I understand that, and we are certainly talking to a lot of them about those concerns but we have tried to define which of those would be covered or that you would have to get a permit if you filled them or discharged pollution into them if they have the characteristics, that is, water flows in it enough times that it creates a bed and a bank and an ordinary high-water mark, and that is a hydrologic science kind of determination.

Chairman SMITH. Going back to my main point, once again, you all had the authority to regulate in many cases dry land, in many cases intermittent streams, that would cover most of that area covered by the red and blue, which again I think is about 99 percent of the western states.

But let me go to the states. I understand you have maps of each individual state but in greater detail than the map that is on the board and that was in your preliminary report. Can we get access to those state maps that are more detailed?

Mr. PERCIASEPE. If we—I am not aware of how detailed the maps we have but again, I want to be really clear here. We—all that red area is not going to be regulated by the Clean Water Act. It would only be the water bodies or the tributaries that are in those areas. I don't know how many times—I don't know what else to say about that, Mr. Chairman, because I really do understand the concern but I want you to understand that——

Chairman SMITH. Is this map accurate, though? Those red areas——

Mr. PERCIASEPE. Those areas are regulated under the current regulations.

Chairman SMITH. But you have the authority to regulate under current law. It just hasn't been regulated before, and I think you are getting ready to expand your authority in a far greater way that has been done in the past.

Mr. PERCIASEPE. No, we are not.

Chairman SMITH. So nothing beyond the current regulations. Are you sure about that?

Mr. PERCIASEPE. I am.

Chairman SMITH. Okay. We will hold you to that.

And I understand that the EPA does have these state maps in more detail, so if you have them, you will get them——

Mr. PERCIASEPE. I will.

Chairman SMITH. I appreciate that. My last question goes to the Science Advisory Board. You heard me mention that in my opening statement, that they by law provide advice to the EPA and provide advice to Congress. We submitted several questions to the Science Advisory Board that were intercepted by the EPA and the Science Advisory Board was not allowed to answer our questions. That is not the way I read the law. We don't have to get the EPA's permission for the Science Advisory Board to give us answers to our ques-

tions. Why did the EPA intercept our questions and why was the Science Advisory Board prevented from answering our questions?

Mr. PERCIASEPE. Well, let me sway a couple of things about that. First of all, our intent is to make sure— we want this Committee and other committees of jurisdiction to benefit from the advice of that body.

Chairman SMITH. The law doesn't allow you to screen the Science Advisory Board's answers or to intercept our questions, the way I read the law.

Mr. PERCIASEPE. The members of the Science Advisory Board are volunteers, and they volunteer to provide their scientific advice and expertise to the American public through the government, and in volunteering, they become special what is called in the HR system, special federal employees, and so they are actually employees in that regard, although they are volunteers, and we feel that there needs to be a process——

Chairman SMITH. Do you disagree with the law that says that we can get answers directly from the Science Advisory Board? Do you think the law says that you can intercept our questions and prevent them from giving us answers?

Mr. PERCIASEPE. We have given all your questions to—they have those. Whatever you have——

Chairman SMITH. But you haven't allowed them to answer our questions.

Mr. PERCIASEPE. Well, what we are trying to work out, and I think we are making really good progress on this, is how you take federal employees and have a defined—so they understand what the process is on how they would go about doing this work.

Chairman SMITH. I think that is a pretty paternalistic almost more so added to say that you have got to tell these employees what to do or educate them. They are experts in their own right.

We have a complete and fundamental disagreement on that. I think it was totally inappropriate for the EPA to intercept the questions and the Science Advisory Board from answering our questions. You apparently disagree with that, but to me, that is the law.

That concludes my questions, and the gentlewoman from Oregon is recognized for hers.

Ms. BONAMICI. Thank you very much, Mr. Chairman, and thank you again, Deputy Administrator, for being here and for your abilities, bringing your expertise to discuss this important issue. So I have several questions. First, I wanted to just confirm something that you said in your testimony. You said under the proposed rule, the current exemptions are maintained. Is that correct?

Mr. PERCIASEPE. Yes, that is correct.

Ms. BONAMICI. Thank you. So I want to start by discussing the issue of green infrastructure. City and county governments in my district have been replacing so-called gray infrastructure with green infrastructure including some daylighting stormwater pipes to create swales, vegetated swales, and by constructing wetlands, ponds and other natural facilities to manage and treat storm water. So many of these features have characteristics that the proposed rule could classify as tributaries and thus define them as waters of the United States. So assuming that the EPA wants to avoid

the unintended consequence of discouraging green infrastructure, how can the proposed rule be clarified to support the continued development of green infrastructure such as these swales?

Mr. PERCIASEPE. Well, our intent is certainly not to discourage green infrastructure. EPA is a great advocate of green infrastructure. We think it is a bona fide solution to some of the urban runoff and pollution issues we have.

You know, if you have a storm drain somewhere in your municipality or county or town and you discharge pollution into it and it goes downstream, you can't—you would have to—the discharge of pollutants into that would have to be regulated. But we are not going to regulate in any different way a daylighted storm drain or diversions of gutters into a tree pit, which has vegetation in it that we want percolation of the groundwater to take place there. These things that are not jurisdictional now would not be jurisdictional under this proposed rule.

Ms. BONAMICI. Thank you for clarifying that, and I happen to represent a district that is very diverse, so I don't just have urban areas; I also have a lot of rural and agricultural areas. So one concern that I have heard about from my constituents in the agriculture industry is that the proposed rule may lead to the regulation of any activity on a farm that simply has the appearance of affecting a water of the United States, even if that activity does not include a discharge or involve a potential pollutant. So for some groups, they are very concerned and they want to express a concern about how ditches will be regulated under the proposal. A number of groups oppose the inclusion of ditches under the definition of tributaries. So could you please discuss how the EPA might clarify this question for stakeholders who are concerned about the proposed rule leading to an increase in amount of activities for which farmers must seek permits?

Mr. PERCIASEPE. So there is two parts to that. One is, is the water jurisdictional, and the second is, does the activity itself regardless of whether it is jurisdictional require any action under the Clean Water Act. And so the farmers of this country who are working very hard to produce the food that we all need, they have to think about both of those because if you can plant, plow—I think the sequence would be plow, plant or no till, and harvest crops today on your land, this will not change any of that. Those activities are exempt from Clean Water Act permitting under the Clean Water Act, under the law itself.

One of the things that we are trying to expand on and be clear about are the conservation practices that many farmers also do during different times of the year and they do this with hunting organizations like the Ducks Unlimited and others, and we want to make sure that those activities are also best management practices that you would do to do conservation on your land because farmers are primary stewards of the land and we want to make sure that we can understand the plowing, planting and harvesting but we also want to make sure that those conservation practices are not inhibited. So yes——

Ms. BONAMICI. Sorry to interrupt but I want to follow up and I am running out of time. So I want to talk a little bit more about ditches and how they may be treated differently under the pro-

posed rule compared to current practice. So ditches is a big issue in the district. So can you talk about whether they are exempt under the proposed rule? Will farmers be able to maintain drainage and irrigation ditches without getting a Clean Water Act permit and will local governments need additional permits to maintain roadside sides? So if you could clarify that, please?

Mr. PERCIASEPE. Roadside ditches, ditches that are on upland areas that are designed to drain that water off of an upland area, all of those we try to be really clear, they are not included in this jurisdiction—as a jurisdictional water or feature even, and when we talk about ditches, we are probably talking about constructed activity. Now, if you channelize a stream and make it look like a ditch but it is a channelized stream that is running all year long, that would require, but the ditches that people are using to drain their farm fields or make sure water runs off more efficiently off an industrial property or at the side of a road, those are not jurisdictional and they would not be jurisdictional under this proposal, and we have tried to clarify that. Now, if we didn't get that right—I am telling you what our intent is, but if we didn't get that right, that is what we are hoping to get some comment on because——

Ms. BONAMICI. Thank you very much. I see my time is expired. That was very helpful. I yield back.

Chairman SMITH. Thank you, Ms. Bonamici. We will go to the gentleman from North Carolina, Mr. Cramer, for his questions.

Mr. CRAMER. I am from North Dakota, but it is very close to North Carolina.

Chairman SMITH. Did I say—pardon me.

Mr. PERCIASEPE. They are both north. Thank you, Mr. Chairman.

First of all, before I almost certainly will forget, I have received four letters this morning from four different county Farm Bureaus in North Dakota that I would like to admit to the record if that is okay.

Chairman SMITH. Without objection, they will be made a part of the record.

[The information appears in Appendix II]

Mr. CRAMER. I need to get very clear something that I heard—I think I heard anyway—during the chairman's questioning, and let me ask you the question this way. Do you believe that the law allows the EPA to intercept this Committee's questions to the advisory board and/or somehow regulate their answers back to us? Do you believe that the law allows that?

Mr. PERCIASEPE. What I believe is that the Committee's processes and the SAB's processes need to both be protected in a way that there is a structured approach to how we interact, and we are working—we want to do that, and we want to have these employees of the Federal Government to have a knowledge on how they would go about, what process they would go through. So I am comfortable with just saying let us get that worked out. We are working hard to do that, and I have high confidence we will.

Mr. CRAMER. Okay. I can appreciate what you want, and as you said, the chairman, how you feel, that is all fine stuff for a social scientist but we are talking about hard science and the law, the letter of the law. Do you believe the law allows you to intercept the

questions from this Committee to the Science Advisory Board? I believe it does not but——

Mr. PERCIASEPE. We provided all the correspondence that you have given us to the Science Advisory Board.

Mr. CRAMER. I think the correspondence was to the Science Advisory Board, and that is the point, is that you have it, not the Science Advisory Board, or——

Mr. PERCIASEPE. Well, they are employees——

Mr. CRAMER. —screening before it gives to them. All right. We are not going to get anywhere on that one.

The EPA and the court keep talking about the need for clarity, and quite frankly, from my perspective, the clarity you seek is more permission, not clarify. I think to me it is every bit as clear today as it has ever been what your jurisdiction is and, more importantly, what it is not. It seems to me you are seeking permission, not clarity, because as I read the rule, I don't see—or the proposed rule, I don't see it being clear at all. And one of the areas that concerns me most is this reference to other waters and the definition of other waters. "Other waters" is so open-ended as to create ambiguity, not clarity, in my view. Can you explain why there needs to be a category called "other waters"?

Mr. PERCIASEPE. The existing regulations that are on the books use a very general test that is oriented toward whether there is an effect on interstate commerce or a potential effect on interstate commerce, which is not a science-based test, and it is not in adherence with what the Supreme Court laid out in their decisions in the last decade. And so what we are trying to do—and again, I am totally open to the fact that we may not be achieving what we are setting out to do here, is take what the Supreme Court says, you got to move away from this sort of general thing, because under the existing regulation, it is much more open-ended as to what a field technician could decide might have an effect on interstate commerce, not that a biologist is an expert in that matter, as you might agree with me on.

Mr. CRAMER. Sure.

Mr. PERCIASEPE. So what we are trying to do is get it back to sort of a science-based, science of hydrology. So we have in most cases, and I promise to get to the other in a minute, we have tried to define normal hydrologic features that a good, normal science-oriented field technician can figure out. There are other places that have those characteristics that have this other issue that has to be dealt with, which is whether they are connected or not, and this is the other issue that the Supreme Court asked us to try to deal with. And so what we do in under the current regulation, they are all case by case. Under this one, we are trying to define an approach that we would take, whether it is a watershed approach or an ecological approach, and we ask for comment on that, and we have to work—get to the point where we really understand how anything that has characteristics of being water like standing water or a wetland, and how we go about dealing with that as opposed to case by case. So I am with you that we need to define that better, and we think we got to most of the stuff in this rule but that one we are still asking questions on.

Mr. CRAMER. Okay. I guess this will be my final question, at least for now. The EPA has stated that it has consulted with the states. How is that coming along? Are a lot of states jumping on board with this rule? How many of them support it? Have you heard from any that have concerns about it? What is the status of the support of the states?

Mr. PERCIASEPE. So a couple of things on that. First of all, in our own Supreme Court filings back in the middle of the last decade, 35 states were amicus with us in the Supreme Court specifically. Currently, about—and I can provide this for the record——

Mr. CRAMER. That would be good.

Mr. PERCIASEPE. —probably a number of individual states and a number—most of the state organizations including the State Association of Ag Directors and what have asked us to do a rulemaking. So we have a lot of states saying do a rulemaking, a lot of states supporting us in front of the Supreme Court, and now what we have is a proposal out there and we have a process going on with a number of those state organizations including the Environmental Council of the States, the State Environmental Commissioners. Just last week, I was in Denver. I met with the ag directors including from North Dakota and the State Environmental Commissioners getting their input. Very informative to me, according to the things just mentioned, where I know we need to do more work. So we will not get this rule finalized without having a defined process with our co-regulators, the states, between now and then, and we have ample evidence beforehand of them asking us to do a rulemaking.

Mr. CRAMER. Yeah, doing a rulemaking and the outcome of the rulemaking are two very different things. My time is expired.

Chairman SMITH. I thank the gentleman from North Dakota. The gentleman from California, Mr. Peters, is recognized for his questions.

Mr. PETERS. Thank you, Mr. Chairman. Thank you, Mr. Secretary, for being here. I want to cover two topics.

The first was, in general, we know that the proposed rule is estimated to cost between $162 million to $278 million for additional mitigation pollution reduction facilities while it lists benefits including reducing flooding, filtering pollution, providing wildlife habitat, supporting hunting and fishing, and recharging groundwater with estimated benefits at $388 to $514 million annually. I wanted you to give us some sense of how those benefit numbers were calculated.

Mr. PERCIASEPE. Well, we use a variety of methods and economic analysis to do that, and one of the things that we did for this economic analysis, and we have been getting a lot of comment on this as well, is we looked at actual determinations or jurisdictional determinations that were being made by the Corps of Engineers in the field following the 2008 guidance and how they were making those determinations and would they be different under this proposal, and then we looked at that and we looked at studies that are available and that are out there related to the values of different flood control approaches and wildlife habitat benefits, the benefits of hunting and fishing in the United States, and we did the economic analysis around that. The cost numbers are related

to mitigation that might be required from permits for discharging fill or for the permitting processes themselves.

Mr. PETERS. We hear about the costs. We just want to get a sense of how you think the benefits are. Obviously we are sensitive that the balance sheets from which the costs are paid aren't always the balance sheets to which the benefits accrue.

The other thing is, I wanted to follow up on Ms. Bonamici. I did practice law for some time and worked on the Clean Water Act, and I think I am still the only former EPA employee in Congress, I suspect, so I may just have a little bit too much dangerous knowledge. But, I am sensitive to the need to encourage kind of the right kind of drainage as a matter of infrastructure, and so just maybe to phrase what her question was a little bit differently, is there any jurisdictional distinction between a concrete drainage ditch which conveys to an undisputably navigable water of the United States, on one hand, and a swale that has its own filtering, natural filtering elements in it that might also lead to the same water?

Mr. PERCIASEPE. Well, if it is a channelized stream with concrete or gabions or riprap, and it runs with the proper perennial or intermittent characteristics, then it would be jurisdictional under this, and if you wanted to discharge pollutant into it, you would have to get a permit.

Mr. PETERS. Right.

Mr. PERCIASEPE. On the swale, it becomes a different matter. I mean, there are swales in farm fields that are not jurisdictional. There are drainage off of a commercial property that has to move the water efficiently. Those are not going to be jurisdictional. It is hard to say specific here.

Mr. PETERS. What I am trying to get at is, is the fact that there is sort of a filtering built into it.

Mr. PERCIASEPE. Yes.

Mr. PETERS. Does that make a difference in having to comply with the law?

Mr. PERCIASEPE. Again, I am going to say as a general manner, swales are not going to be—drainage swales are not going to be jurisdictional but that doesn't mean you can't consider whether you are going to be discharging pollution into them.

Mr. PETERS. But that is exactly the point, that there might be—one of the things that we are talking about in theory, in planning theory, is now building drainage that has in itself, that incorporates——

Mr. PERCIASEPE. Absolutely.

Mr. PETERS. —filtering, and what I think Ms. Bonamici's question was that if we don't draw a distinction or provide any incentive, we are not going to encourage that at the local level, which is——

Mr. PERCIASEPE. We do not want to create disincentives for green infrastructure or other drainage systems that are built to help stormwater management and particularly from a pollution-control perspective. I mean, city—in many respects, you have this both in your district in both ways, cities are beginning to learn from what farmers have been already doing, and I think this is really kind of an interesting time for that kind of stormwater management work. But we do not want to create impediments to that.

Mr. PETERS. And I would invite any of your lawyers who wanted to follow up with two pages on that to me to feel free to do so.

Mr. PERCIASEPE. Okay.

Mr. PETERS. Thank you.

Mr. PERCIASEPE. We will follow up.

Mr. SCHWEIKERT. [Presiding] Thank you. Mr. Neugebauer.

Mr. NEUGEBAUER. Thank you, Mr. Chairman.

Thank you, Administrator, for being here this morning. Obviously this rule has caused quite a bit of controversy, and particularly a lot of uncertainty with my farmers and ranchers. I have received letters from both the Farm Bureau and the local Chamber of Commerce in my district very concerned about the mixed signals that they are hearing both from when they read the rule and what the Administration is saying, and I want to read this part, but the proposed rule states that all waters in a floodplain are regulated unless specifically excluded. Now, there are a limited number of exclusions for ponds that are used only for stock watering, irrigation, settling basins or rice growing, but there aren't any exclusions, for example, of standing water in a field, rainwater, puddles, backyards, wet spots or ponds that have other uses. Now, I know that Administrator Stoner has in her blog indicated that water in fields, ponds, rainwater are excluded from the regulation under this rule, and I think that is also repeated on the EPA Web site. But I think what we keep hearing is when people hear what you are saying and then they go back and see what is written in that rule, they think that there is a conflict there. Can you show me in the rule where these areas that Ms. Stoner and others are saying they are excluded? Because we are not finding them.

Mr. PERCIASEPE. We have heard this ourselves from a number of people. Again, I was mentioning just previously that I had been personally talking to some ag commissioners and what they hearing on the ground from both farmers and the associations. I am speaking to the soybean Association this afternoon after I complete work with you all this morning, and here is how it works and here is how we need to work on making it clearer. The floodplain concept is to help identify whether or not it is adjacent to a navigable water, so you have got a floodplain from a traditionally navigable water and you have water—I will come back to this—in that floodplain area, then we are saying that that should be considered adjacent. The trick here is, it is not any water in that floodplain. Obviously the floodplain is going to be flooded in the spring, let us say, if it is a typical floodplain. That doesn't make the floodplain itself jurisdictional. What it makes—what we are proposing in the rule is that if there is a water as is otherwise defined, a stream with a bed, bank and normal high-water mark or a wetland that has hydric soils and hydrophitic vegetation, puddle is not going to have that. A wet field isn't going to—is not jurisdictional under any circumstances. So and for those that actually need that like a rice field, we specifically exclude them.

So I think our intent here is to use the concept of floodplain, which is a solid hydrologic science concept of adjacency, but only be regulating waters that are otherwise defined in those floodplain areas to be jurisdictional. So that doesn't mean everything in the floodplain is jurisdictional or that there is any restrictions on farm-

ing or any other excluded activities. So we need to do a better job of figuring how to explain that, but that is the best I can do right here.

Mr. NEUGEBAUER. For example, in my district, we have a lot of playa lakes, and while those playa lakes sometimes have water, sometimes they don't, but they are not adjacent to other bodies of water that would meet I think the original intent of Congress, and that would be a navigable waterway. So I think one of the things I want to—hopefully during this comment period that you are hearing from these people but I think it is going to be important that the EPA take the necessary steps to make sure we clarify what is covered and what is not because I think it is leaving a lot of uncertainty.

I want to go back again to Ms. Stoner. She said that permits will not be applied for the application of fertilizer to fields or surrounding ditches or seasonal streams. She says that the pesticide general permit only requires a permit when pesticides are applied directly to the waters of the United States. But looking at the rule, I don't see how that she can make such a broad statement because the rule is pretty clear. It says all water in a floodplain and all seasonal streams are federally regulated waters of the United States. And so the application of fertilizer or pesticides would seem to apply here and require a permit.

Mr. PERCIASEPE. I will just try to—because this is something we need to work on. The floodplain is a geography—it is under the science of fluvial geomorphology. It is something that is created as a natural part of the hydrology of a river system and a stream system. We are using that characteristic to say if there is a water in that area that can be deemed as being adjacent to the main stream or the traditionally navigable water, but it still has to be a water as defined in the regulation, which is again a stream with a bank, a bed, a normal high-water mark, a wetland that has hydric soils and hydrophitic vegetation. So the chances are pretty high that those are not going to be farmed to begin with but if you have a field and you have been farming it before this rule, you are going to be able to keep farming it, and if it does get wet and if you are a farmer who is so inclined to spray fertilizers and pesticides on a wet field, which doesn't make it very effective, but you will not need a permit to get—to do that. You will not come under the general permit that is already out there. You will have to avoid spraying it directly on those other waters there.

Mr. NEUGEBAUER. Thank you.

Mr. SCHWEIKERT. Thank you for yielding back. Ms. Kelly.

Ms. KELLY. Thank you.

I guess I wanted to follow up on what some of my colleagues have already mentioned. It seems like there is so much misunderstanding and misinformation and rumors about what this new ruling would do, and I just encourage you to do everything you can to work with the farmers. My district, people are always surprised when I say I have more farmland than city land, and I was just with one of my farmers yesterday and they made me stop at different places and say that is going to be covered by the rule and they are very, very concerned. So whatever you can do to make it

clearer to all of us, I think that would be very helpful and go a long way.

The other thing is, in its testimony before the House Transportation and Infrastructure Committee last month, the American Farm Bureau Federation suggested that the exemption for agricultural stormwater and irrigation return flows would be severely undermined by the proposed rule because the proposed rule would regulate as waters of the United States, the very ditches and drains that carry stormwater and irrigation water from farms. Can you please comment on this statement and the impact of the proposed rule on the exemption for agricultural stormwater and irrigation return flows?

Mr. PERCIASEPE. Our intent is that those remain exempt. We have not changed the exemptions. We are struggling to find out how to understand how people make that interpretation, but whether it is playas or whether it is the agricultural irrigation ditches, these are not jurisdictional and we believe we have not changed that, but we obviously have to make that clearer or somehow convince the people who want to help continue the confusion, we can get them to be a little more focused on what we really need to do to fix the rule.

Ms. KELLY. It just sounds like communication is such a big issue.

Mr. PERCIASEPE. Yes.

Ms. KELLY. Okay. Thank you. I yield back.

Mr. SCHWEIKERT. Thank you, Ms. Kelly. Mr. Collins.

Mr. COLLINS. Thank you, Mr. Chairman, and I am going to be submitting for the record a letter dated May 1 that I sent to Ms. McCarthy and the Hon. John McHugh signed by a majority of the Members of Congress, over 230 members, Republicans and Democrats, simply asking that this rule be withdrawn. Withdrawn. Now, obviously, your Administration denied that. I have only been in Congress 18 months but I will say as I have heard you say again and again here, there is confusion. It is our intent. We need to do a better job. We should make that clear. The problem is, the public doesn't trust the EPA. The farmers don't trust the EPA to not overreach. Congress doesn't trust the EPA. And what we have here today is a proposed rule, defective. As you have stated, we need to make things clearer. Our intent is not clear. We need to do a better job. But the rule is out there, and the very fact that you intercepted our questions and thought you had the audacity that you had that control, none of us trust for two seconds that the EPA isn't just going to let this train roll right down the tracks and saying all these good things and putting things on your blog doesn't make it so, especially when what you have shown is a disregard for listening. You don't listen. And if you don't listen, what is going to happen. So you are saying you are getting this input, you are getting this input. Frankly, Congress doesn't trust you, the Farm Bureau doesn't trust you, counties don't trust you, the public doesn't trust you to simply ignore all that you are hearing, and when you say that these puddles and streams aren't regulated and then you put on your blogs they are not regulated, but it is not clear. So I don't understand why in our very simple request, withdraw the rule. Send it back to the agency. Then if you come out with a proposed rule, as you say, to take this further, at least it

would be there. It is not there now. All these things you are claiming are not intended, I mean, do you agree, they are just not there now?

Mr. PERCIASEPE. There is a difference between making it clearer because others are trying to make it unclear and whether I believe the rule we proposed does what I say, because I believe it does. So I believe that it does and meets the intent of what I am saying——

Mr. COLLINS. Do you care that a majority of the Members of Congress, Republicans and Democrats alike, don't agree with you? That apparently doesn't—see, that is the arrogance of your agency. You are just displaying right here in front of us.

Mr. PERCIASEPE. I am not being arrogant. I am telling you—you asked me what I believe, and you are trying to tell me what I believe. I am telling you that I believe we need to do a better job of explaining——

Mr. COLLINS. Why not withdraw the rule and start over?

Mr. PERCIASEPE. Because I believe the rule does what I am saying.

Mr. COLLINS. But Congress doesn't agree with you. The Farm Bureau doesn't agree with you. My counties, they are all passing regulations——

Mr. PERCIASEPE. I also have the Supreme Court saying we need to do rulemaking. I have hundreds of letters saying we should do rulemaking.

Mr. COLLINS. Well, this one is so defective. All we have asked is, withdraw it, because you have got a process moving. At the end of all of your fact gathering, you come up and say we think it is just fine. I mean, you are saying right now you think it is just fine but then again, you say we need to do better, it was our intent, we need to make it clear. So you are almost contradicting yourself, that you are saying the rule is fine but then you are saying we need to do a better job. If it is fine, why do you need to do a better job?

Mr. PERCIASEPE. I want to say again there is a difference, and I am not being disrespectful. There is a difference between explaining and perhaps writing it more clearly than saying that what we intended to do we didn't do. We intended to exclude conservation practices. People read that differently. I think they are reading it too narrowly, but we will even expand on that.

Mr. COLLINS. I understand——

Mr. PERCIASEPE. This is what goes on in normal comment period that you do when do an administrative process.

Mr. COLLINS. I will just state for the record the problem is, we don't trust the EPA. We the people don't trust the EPA. Congress doesn't trust the EPA. The rulemaking is rolling down the tracks. We have, and I think it was a reasonable request signed by a majority, Republicans and Democrats in Congress, that have said withdraw the rule, send it back to the Agency, and then if you want to come out with a new rule, have these exclusions in it right from the get-go at which point maybe we would trust what you are going to do.

Mr. Chairman, I yield back.

Mr. SCHWEIKERT. Thank you, Mr. Collins. And Mr. Collins has a UC request to put a couple letters into the record. Are there any objections? No objections heard. So ordered.

[The information appears in Appendix II]

Mr. SCHWEIKERT. Ms. Esty.

Ms. ESTY. Thank you very much, and thank you for being with us here today. I would like to turn a little bit to climate change and the expected impact or possible impact and how that would tie into these regulations and the Agency's thinking.

According to the Third National Climate Assessment, droughts are expected to intensify in most regions of the United States. Additionally, flooding is projected to increase even in areas where total precipitation is expected to decline, the basic message being that climate change will have a dramatic impact on water demand and water use. Could you comment on the importance of the proposed rule and protecting the Nation's water supply in light of these projected impacts of climate change? Thank you.

Mr. PERCIASEPE. Thank you. Well, I think stepping back just a little bit, recognizing that from surface waters in the United States, in these tributaries or in these traditionally navigable waters, about 100 million people in the United States get their drinking water from surface waters. It is more than 100 million but I am just going to use that number. The quality of the water coming into their systems is affected by how development takes place or pollution is discharged above the streams where they receive it. This is one of the key things that the Science Advisory Board pointed out to us, that you have to look at that connection. And so having proper jurisdiction and availing of the pollution control programs that are in the Clean Water Act to those areas is a pretty important thing to protect drinking water. On the wetlands side, when you have more erratic meteorological events or weather events, wetlands provide a very effective flood control and flood mitigation function, again, well established in science, and these are key things that also are a very strong reason why as states and cities and counties are starting to look at how they can be more resilient in the face of climate change, that they also are looking toward how not only do they do some additional work with green infrastructure but also how they maintain the existing natural systems so that they can get the attenuation from those. So those are some quick points on that.

Ms. ESTY. I hail from the State of Connecticut, and we both along our coastlines have been looking at these issues as well as significant issues around borders around our streams for exactly this reason, to attenuate the flooding that we have been seeing with these more intense weather events.

In your testimony, you discuss the importance of clean water to the Nation's economy, listing numbers of businesses and industries that need a reliable supply of clean water to function. Can you elaborate a little bit on how the agency is thinking, is the agency looking not just at health effects but also at economic impacts for those industries that actually utilize clean water?

Mr. PERCIASEPE. Well, I think three sectors in the economy who absolutely rely on clean water are agriculture, sports, outdoor recreation, hunting and fishing, and manufacturing, I will say

Coca-Cola or Pepsi Cola or some other drink. They need supplies of clean water, and this is where there is a natural partnership with our colleagues in the agricultural community because they are stewards of the land and they need to have that same objective in mind. And so, our approach here is to build on their ability to do conservation work, and that is what we want to be able to encourage. So these are pretty broad sectors but they are pretty—clean water is pretty important to them.

I might add that many of our developed parts of the country—cities—have turned back to the waterfronts as a way to spur on economic development and revitalization of their communities. Baltimore, just north of here, the Potomac River, Cleveland, all of these places have had a resurgence of the vitality of their community around cleaner water than it was 40 years ago. So these are pretty important aspects.

Ms. ESTY. And finally, if you could quickly comment on the inclusion of "all adjacent waters" rather than "adjacent wetlands." This is an issue I have been questioned about at home. Thank you.

Mr. PERCIASEPE. There are three perhaps kinds of adjacent waters. "Waters" is a more general term. You could have an intermittent or a perennial stream that has the characteristics of a bank and a bed and a normal—an ordinary high-water mark. You could also have wetlands which have the hydric soils and the hydrophitic vegetation but you could also have a standing lake. So all of those would be waters, and determining whether they are adjacent to a navigable water are the tests we are trying to develop here in this proposal.

Ms. ESTY. My time is expired. Thank you, Mr. Chairman.

Mr. SCHWEIKERT. Thank you, Ms. Esty. Mr. Johnson.

Mr. JOHNSON. Thank you, Mr. Chairman, and Mr. Perciasepe, thank you for joining us here today.

I would like to take off a little bit on the exchange that you had with my colleague, Mr. Collins. Let me tell you why I believe that Congress in general and the American people specifically don't trust the EPA. You made a statement just a few minutes ago. You said the Supreme Court has said that the EPA needs to do a rulemaking. I think that is what I heard you say. I think what the Supreme Court actually said is that under the law, you have the authority to do rulemaking. I think that is what the Supreme Court said. And I think what the American people, who by the way all three branches of the Federal Government is subject to the American people, I think what they expect the EPA to do is to provide a responsible regulatory environment that protects public safety, protects public health, but that does not disadvantage American businesses and American workers and cripple our economy, and from the shutdown of the coal industry through EPA regulations, through the stranglehold that EPA regulations have over our manufacturing sector, you name it, that is why the American people and Congress don't trust the EPA.

Let me go into a few questions here with you. You know, there are enough new definitions and new ideas in this rulemaking that it is obvious that agencies will spend money figuring out how to actually implement this rule, and it is clear that the EPA is driving the bus, even though the Army Corps of Engineers, key permitting

programs will also be affected. It is also apparent that other agencies' programs could be affected, given that the rule which is all corners of the Clean Water Act and not just the wetlands programs. So has the EPA consulted with other federal agencies that have administrative responsibilities under the Clean Water Act as well as considering the costs that these agencies will incur when the rule is implemented?

Mr. PERCIASEPE. In order to put out a proposal under the Administrative Procedures Act and under the Executive Orders that we operate under in terms of the Office of Management and Budget, all proposed rulemakings that EPA or any other agency does go through an interagency review process for 90 days before they——

Mr. JOHNSON. What feedback have you gotten from those other agencies? Does the EPA know how other agencies will interpret this rule and whether other agencies will require more resources to understand how this rule affects their ability to administer their own programs? Have you reviewed that input from the other agencies?

Mr. PERCIASEPE. We took it into account when we did the proposal, and for instance, the work we did to try to identify the conservation practices that would be clearly exempt from having to have a clean water permit was something we worked on directly with the Department of Agriculture before——

Mr. JOHNSON. What did the Army Corps of Engineers say?

Mr. PERCIASEPE. Well, they are coauthors of the rule.

Mr. JOHNSON. Okay. So they provided you input?

Mr. PERCIASEPE. They helped write it.

Mr. JOHNSON. Okay. If small businesses have never obtained a permit under the Clean Water Act before, how do they know if they will need to get a permit under this new rule?

Mr. PERCIASEPE. Well, it depends on what their action is. Are they discharging pollution?

Mr. JOHNSON. How will they know whether their action requires it?

Mr. PERCIASEPE. Well, if you discharge pollution, you have to get a permit. I mean, that is the current law.

Mr. JOHNSON. Well, I mean, they may know that now but they never had to do it before, so how will they know if this additional rule will require them to do a permit?

Mr. PERCIASEPE. Well, if you do not have—if you are not regulated under the Clean Water Act now under the existing regulations, you will not be regulated under this proposal.

Mr. JOHNSON. Say that again.

Mr. PERCIASEPE. We are not expanding the jurisdiction of the Clean Water Act.

Mr. JOHNSON. Okay.

Mr. PERCIASEPE. So unless they are operating illegally under the current regulation, they would not have to——

Mr. JOHNSON. How long on average will it take the Agency to determine—let us say a business comes to the Agency and says we think we need a permit. How long on average will it take the Agency to determine whether a permit is required?

Mr. PERCIASEPE. Well, I don't have any information on that right here. Our estimate is that there will be a reduced time because we

will have better definitions of where the jurisdiction is, and so that step of trying to determine whether or not it is a jurisdictional water or not, which currently goes on under the 2008 guidelines that were put out in the 1986 regulations that are in place would be reduced. The number of those analyses would be reduced. So the Corps of Engineers clearly feels that they would have a reduced amount of time doing those because they would have a reduced number of those jurisdictional determinations that they would have to do. But I don't have an estimate from them right now or I don't know what their estimate is on that.

Mr. JOHNSON. Okay. Thank you. Mr. Chairman, I yield back.

Mr. SCHWEIKERT. Thank you, Mr. Johnson.

Ms. Edwards.

Ms. EDWARDS. Thank you very much, Mr. Perciasepe, for being here.

And I just want to say for the record that I am one of the Members who actually both appreciates and respects and values the work of the Environmental Protection Agency and the hard work that the folks at the EPA do every single day to protect our water, to make sure that our air is clean and that our health as a result is safe. And so it is not a foregone conclusion that the Members of Congress don't like or respect or value the EPA, and I think it is important for us to clarify that for the record and then other Members who feel otherwise can speak their piece but I have spoken mine.

I want to go to some of the questions that you tried to address earlier and in your testimony. I want you to describe if you would the variability that exists across the country in interpretation of the scope of the Clean Water Act following the Supreme Court decisions and tell me if you would what other areas were considered jurisdictional by some states and not by others that has resulted in what you describe in your testimony as the lack of clarity following those decisions?

Mr. PERCIASEPE. The clarity issue—and again, we have defined in this proposal clear hydrologic science-oriented approaches to determining jurisdiction as opposed to the general one under the current regulations, which is will it have an effect on interstate commerce. So I think that is pretty important and it is going to really instruct the field people who do this work, mostly in the Army Corps of Engineers, to have a more consistent approach and a more consistent sense of how they get the work done.

I think that that is my primary reason why I believe that this would be a significant improvement over the existing situation, and I—which I—and I am highly confident that the comments we are getting through the normal administrative process will help us even further improve that.

Ms. EDWARDS. And let me ask you about that normal administrative process because you issued the rule in—the proposed rule, and let's be clear that it is a proposed rule in April; then you did extend the time period I believe for response because you heard from people that they—from States and from affected individuals, companies, et cetera, that they wanted to be able to respond, and so you have extended that. And so now comments are due by October 20. Is that correct?

Mr. PERCIASEPE. Yes. I think it is 20. It might—I—21st, 20th——

Ms. EDWARDS. Around——

Mr. PERCIASEPE. October, yes.

Ms. EDWARDS. Needless to say, it is from April now extended October 20 and we still haven't gotten to a place where you have begun to then assemble all the comments, sift through comments, review the work of the SAB, and then incorporate that into what might then become a final rule, is that correct?

Mr. PERCIASEPE. That is correct, but again I am being open here in saying that we have seen patterns already from our own conversations, mine personally, where I think there are some things that are just—people are not reading it or whatever and then some are where we need to do the work that you normally do in an administrative process to improve how things are written. So I think we will have more of it.

I want to also mention because I think this is important to this Committee, one of the other reasons we extended the comment period in addition to the fact we were getting a lot of comments is we wanted to make sure, as I have committed, that the work on the final rule would be not only aided by some of those comments but also aligned with the Science Advisory Board's process. You know, they are going to look at this rule itself and they are also going to look at the connectivity report that was associated with it, but their work will be done in the fall time frame as well. So we want to make sure that we get aligned with the Science Advisory Board.

Ms. EDWARDS. Thanks. And just to go back to an earlier point, do you have some estimate of how long it takes under the current guidelines to make a jurisdictional determination?

Mr. PERCIASEPE. I don't. I apologize to everyone who asked this question. I don't have some information on that but I am happy to get whatever information we have with the Corps of Engineers on the current amount of time it takes to generally go through a jurisdictional——

Ms. EDWARDS. I think that that would be useful because I think it would help to underscore why it is that we need to bring some clarity that would begin to refine the jurisdictional determination period because that again would help in terms of moving forward decision-making. And so anything you could do in that regard would be helpful.

I want to further ask you if you can elaborate on the role of the—of clean water in supporting the American economy? What does it mean when we have clean water in terms of its economic impact?

Mr. PERCIASEPE. Well, I think we have had an opportunity to talk about this a little bit but I will just summarize here. I think that there are a couple of key areas where clean water is pretty essential in addition to human consumption is agriculture. Agricultural productivity in the country depends on clean water and the ability to move it around and unimpaired by unnecessary regulations. It—many manufacturers require clean water or they end up having to spend money to treat it themselves to use it, and I want to say also that many communities and their—the quality of life in a community is improved by having water bodies nearby that peo-

ple feel comfortable that they can recreate in and around, and I will just point to the Potomac River as an example.

Ms. EDWARDS. Thank you.

Thank you, Mr. Chairman.

Mr. SCHWEIKERT. Thank you, Ms. Edwards.

Mr. Broun.

Mr. BROUN. Mr. Chairman, before I start my time I have a unanimous consent request. Administrator Perciasepe made a comment that agriculture and business are in favor of this new rule and I have got two letters, one from Gary Black, our Georgia Commissioner of Agriculture from the Department of Agriculture in Georgia, opposing this rule, as has been presented. The other one is from Chris Clark, who is the President and CEO of the Georgia Chamber of Commerce again opposing this rule.

And I ask unanimous consent that these be entered into the record.

Mr. SCHWEIKERT. Without objection, so ordered.

[The information appears in Appendix II]

Mr. BROUN. Since I haven't started my question, please restore my time. I would appreciate that.

Administrator Perciasepe, I have to hand it to you and compliment you. In my four terms in Congress, you are one of the very best witnesses I have ever seen of filibustering a question and not answering, and that is not only to Republicans but it is Democrats also.

Now, the Chairman showed you a map, the Connectivity Report Map. You made the statement that you already had control over all of that property, is that correct? Yes or no?

Mr. PERCIASEPE. We do not control——

Mr. BROUN. No, you said that you——

Mr. PERCIASEPE. —the land. I want to make it clear——

Mr. BROUN. You control the water over that—on all that area——

Mr. PERCIASEPE. We do not.

Mr. BROUN. —in that map, correct? Yes or no?

Mr. PERCIASEPE. You know, I am not going to do that.

Mr. BROUN. Well, you did say that. Are you expanding your authority here with this proposed rule?

Mr. PERCIASEPE. No.

Mr. BROUN. None whatsoever?

Mr. PERCIASEPE. No.

Mr. BROUN. Why have the new rule then?

Mr. PERCIASEPE. Because the existing rule, as I mentioned, is based on flawed approaches to determining jurisdiction. It is actually more broad than the Supreme Court has asked us to——

Mr. BROUN. Well, let me ask you this then. Do you believe this rule improves the overall clarity of EPA's jurisdictional authority? Yes or no?

Mr. PERCIASEPE. Yes.

Mr. BROUN. You think it does? Well, you are absolutely incorrect. You can just see the questions that we are asking here. This rule is not needed. The Supreme Court didn't tell you to make a new rule. It said that you could. And to me it is expanding the authority and reach of the EPA and that is the reason there is so much dis-

content all across this country, not only in my State of Georgia but in every State in this country because you all are expanding your authority.

Now, you talked about if anybody wants to put a pollutant into water, they have to get a permit. EPA has recently—fairly recently said that CO_2 is a pollutant. We are all breathing out a pollutant according to you all's determination. Now, given the importance of this issue, why has the EPA not done more original research on this issue and looked at a number of questions such as significant nexus?

Mr. PERCIASEPE. Yes. Well——

Mr. BROUN. Quickly, please. I don't have much time. I have got a number of questions. Why have you not done the research?

Mr. PERCIASEPE. We have looked at over 1,000 peer-reviewed studies that have already been done.

Mr. BROUN. You just looked at the literature, is that correct? You have not done any more research than——

Mr. PERCIASEPE. Our scientists compiled a synthesis report on the existing research that exists——

Mr. BROUN. But you have not done any original new research, is that correct? Yes or no?

Mr. PERCIASEPE. Not——

Mr. BROUN. No, you have not. It looks like the EPA has been cutting corners by not doing a new study. Shouldn't EPA's rulemaking be based on sound science as determined independently by the Agency?

Mr. PERCIASEPE. It is based on sound science.

Mr. BROUN. No, sir, it is not. And in fact you even intercepted our questions against the law and are, as the Chairman and Mr. Cramer was talking about, you have gone against what should be done. Why did EPA not do a new study given the Supreme Court's rulings that previously rejected EPA's reliance on bed, banks, and high water mark, why only a literature review?

Mr. PERCIASEPE. I am not aware that the Supreme Court rejected bed, banks, and ordinary high water mark. I know that they rejected in the SWANCC opinion making jurisdictional cause solely on the basis of migratory birds, which gets me back to the interstate commerce problem of the existing regulation asking field biologists and hydrologists to make a determination of what is affecting interstate commerce. So we need to get away from that. The Supreme Court wants—would like us to get away from that.

I want to clarify for the record, Mr. Chairman, that Chief Justice Roberts did suggest that the Agency conduct a rulemaking.

Mr. BROUN. But was you all's proposed rule is so unclear that everybody—farmers, businessmen, landowners, politicians, Democrats, and Republicans alike—are requesting you all to take away this proposed rule, to abandon it and do something else, and I request that you do the same thing.

It is beyond me why you all are continuing to do so. You are cutting—with your coal rules, your—the President has been very clear. He wanted to shut down the coal industry. He said he is going to bankrupt any company that puts out a new coal plant. And he is—he and you all, through the EPA, is doing just exactly that. In fact, you are shutting down 15 power plants in Georgia,

and it is not fair to poor people and senior citizens on limited income because, as the President said, his policies are going to necessarily skyrocket the cost of energy, and that is exactly what you guys are doing at the EPA and that is unfair, unfair to poor people. It is unfair to senior citizens who have a limited income. And what you are doing now is expanding the jurisdiction and scope of the Corps of Engineers as well as the EPA. Would you agree—one question—one final question since my time is up. Would you agree that every drop of water that falls on this country is going to eventually wind up potentially in a navigable stream? Yes or no?

Mr. PERCIASEPE. That is the science of hydrology.

Mr. BROUN. Well, yes or no?

Mr. PERCIASEPE. Yes.

Mr. BROUN. It does. And what you are going to do as you are going to——

Mr. PERCIASEPE. It could end up in groundwater——

Mr. BROUN. —control every——

Mr. PERCIASEPE. It could end up being groundwater or——

Mr. BROUN. You are going to control every piece of land and every landowner.

Mr. Chairman, I yield back.

Mr. PERCIASEPE. But those are not jurisdictional. The backyard water is not jurisdictional. Mr. Chairman, can I please——

Mr. SCHWEIKERT. No, we will come back to that.

Mr. Broun, thank you.

Mr. Hall.

Mr. HALL. I think this is a very interesting hearing, Mr. Chairman, and I thank you. I have learned a lot about arrogance. I agree with Mr. Collins and I think Dizzy Dean always said that it ain't bragging if you could do it and I have always heard the professor asked one of his students did he know the difference between ignorance and apathy? He said he didn't know and he didn't care so I think I have got an idea about what you are going through out there because Ms. Edwards recommends you and enjoys you and sees the best in you and she is a lady and attempting to do what all of us are doing, trying to get you to tell us the truth, to do what you say you are going to do.

And I thank you for holding this hearing, Mr. Chairman. This controversial proposal that raises a lot of questions about the rules, the potential impact on property owners, on businesses, States, and I want to examine just some of these as long as I have the time.

First, I would like to submit a letter and a resolution for the record from the Morris County Commissioners Court in my district. Morris County Judge Linda Munkres writes that "Morris County is against any action by the EPA and the Army Corps of Engineers that would infringe upon the sovereignty of Texas to appropriately regulate water to the State of Texas." She continues, "if adopted, this would increase the need for burdensome and costly permitting requirements that infringe on private property rights and circumvent the legislative process and the will of the people of Texas."

Now, to go on, in February this Committee heard testimony from Kenneth Dierschke, President of the Texas Farm Bureau, expressing farmers' concern with the proposed rule that would mean more permits, more permit requirements, and the threat of additional

litigation against farmers and ranchers, and he also expressed concern that EPA seems to routinely ignore the requirement that Science Advisory Board panelists be fairly balanced.

Mr. Administrator, as you know, the EPA Administrator's Office is responsible for appointing members of the Agency's scientific advisory panels, including the Science Advisory Board, and late last year EPA assembled a panel to review the Agency's Draft Connectivity Report, a highly influential assessment that you stated would inform EPA's expanded interpretation of its power under the Clean Water Act.

Well, your office appointed 27 experts to this panel. Many of these 27 were state, local, or tribal regulators. How many do you think were? It is my understanding that answer is zero. Nine highly qualified state and local experts from the Arizona Department of Water Resources and the North Carolina Division of Water Quality and elsewhere were nominated to serve on this panel. Why did the EPA not appoint any of these state and local experts?

Similarly, last year EPA assembled a Science Advisory Board panel to review the Agency on ongoing study of hydraulic fracturing. Thirteen qualified scientists from state and local agencies were nominated, including two top-notch toxicologists from the Texas Commission on Environmental Quality. Despite their vast experience, Mr. Administrator—their experience with oil and gas regulation, none of these nominees were appointed to the 39-member board and I wonder why they weren't.

And would you explain in some areas that lacked local water quality regulation of oil and gas activities state and local officials have more expertise than the EPA, would you agree that the States have decades if not centuries of experience in some of these areas?

Former Chairman of the Railroad Commission, Elizabeth Ames Jones, has so testified before this Committee. And I ask you will you commit to appointing geographically diverse state and local experts to all EPA's scientific panels in the future?

And finally, sir, in view of the potential impacts and costs of the EPA's proposed rules, shouldn't the States have more opportunity to provide input and shape a rule because they will bear so much of the cost?

EPA says it has consulted with States regarding a proposed rule, but in your recent testimony before the House Transportation and Infrastructure Committee, you cannot name a single state that had come out in support of the rule and you promised to survey the States. Has that survey been conducted and what methodology is being used to conduct the survey?

Mr. Chairman, the rule has far-reaching implications that need to be thoroughly, absolutely thoroughly examined, and I thank you for your leadership on this Committee. I yield back the time that I am absolutely out of, so maybe you will answer this in a letter I will send to you.

Mr. Chairman, I yield back two seconds.

Mr. SCHWEIKERT. Thank you, Mr. Hall.

And, Mr. Hall requests a U.C. to put documents in the record?

Mr. PERCIASEPE. I will respond for the record.

Mr. SCHWEIKERT. Put documents in the record, so ordered.

[The information appears in Appendix II

Mr. HALL. Thank you.

Mr. SCHWEIKERT. Even though he is out of time, please give us a bit and then we will continue to move on.

Mr. PERCIASEPE. Thank you, Mr. Chairman.

We do have a defined process for picking members of the Science Advisory Board. It is a public process. An advertisement goes out to get nominees. You mentioned that some of those nominees came in. They are screened by the SAB staff for conflicts of interest and ethics issues and we do strive to have a diverse board, so I would certainly commit to looking at how we can continue to improve to do that and it is our intent to have a diverse board. And I want to——

Mr. SCHWEIKERT. And on that——

Mr. PERCIASEPE. —absolutely agree that the states have significant and important—and we need to rely on expertise in the area of hydraulic fracturing.

Mr. SCHWEIKERT. And for the staff sitting behind you, if you would be willing to send Mr. Hall a note——

Mr. PERCIASEPE. Yes. Yes. Absolutely.

Mr. SCHWEIKERT. —sort of explaining some of the mechanics.

And with that, Mr. Hall, because I am going to do some switching around with my own slot, Mr. Hultgren, please.

Mr. HULTGREN. Thank you, Chairman, so much. I appreciate your flexibility on that.

First, I would ask unanimous consent to submit for the record a letter from the Illinois Chamber of Commerce in opposition to the rule. I am gravely concerned about what they talk about would significantly add to the already unprecedented level of uncertainty our members face from new rules and regulations so I would ask that the——

Mr. SCHWEIKERT. U.C. requested. Any objections?

So ordered.

[The information appears in Appendix II]

Mr. HULTGREN. Thank you, Mr. Chairman. Thank you, Administrator, for being here today.

It really is crucial that the EPA regulations are based on science, so I appreciate you being here so that I can learn and try and explain to my constituents the process that you all go through before drafting and finalizing new rules and regulations. My concerns will deal directly with the scientific advisory board. So the first thing I will ask, and I hope this will be a simple "yes" answer, but does EPA hold the findings of its scientific advisory board in high esteem?

Mr. PERCIASEPE. Extreme high esteem.

Mr. HULTGREN. This is certainly good to hear because science should always be the backbone of what you are doing it EPA, something your Administrator frequently cites and that we normally hear when receiving testimony from your agency before this Committee. Interestingly enough, it was not in your 10-page written testimony here today.

I understand that a draft rule is just that, a draft, but you have said throughout your testimony that this rule is something that is supposed to bring clarity to the jurisdiction that the Agency already has. Unfortunately, as we can see from discussion today, this

rule is not very clear and my constituents have a number of questions about how it will be affecting them.

In the draft rule, does EPA define what a shallow subsurface hydrological connection is? Is this something you leave to further examination of the literature or is it expressly defined in the rule? And at what depth does water below the surface cease to be shallow subsurface and turn into groundwater?

Mr. PERCIASEPE. The use of the shallow subsurface water I think—I am going to say I think——

Mr. HULTGREN. Does it define—my question was does the EPA define what sub shallow subsurface hydrological connection is—or is that left to further examination of the literature as expressly defined in the rule?

Mr. PERCIASEPE. It is something that the Science Advisory Board is looking at. It is something they gave us some advice on in their draft statement, but I want to point out and I want to be really clear, groundwater is not covered by this rule.

Mr. HULTGREN. So this is not expressly defined in the rule and the depth where water ceases to be shallow surface and turn into groundwater is not defined, so that is—although you are saying it is not under the rule, the fact is it is not defined of when it turns into groundwater and therefore does fit under the rule.

Let me keep moving because my time is going to go away.

In comments on the connectivity report, the scientific advisory board recommended EPA consider where along a gradient of connectivity groundwater connections are of sufficient magnitude to impact the integrity of downstream waters. The scientific advisory board stated "this represents an important research need for EPA." Considering this is still an active research need and the connectivity report is being used by EPA to support the proposed rule, how does EPA justify the use of shallow subsurface groundwater connectivity to determine jurisdiction?

Mr. PERCIASEPE. We use—the rule—and I think there are a number of different pieces of what you have just suggested there, but the rule uses the connection with subsurface shallow groundwater as a way to determine adjacency, not—the groundwater, I want to be clear, whether it is shallow, deep, anywhere, is not covered by this rule. It is just a hydrologic tool to determine whether or not——

Mr. HULTGREN. See, the problem is it is unclear where it goes from one to the other and that is—if you are having trouble explaining it to us, guess what my constituents are having trouble doing?

Mr. PERCIASEPE. Oh, I am just telling you——

Mr. HULTGREN. They are having great difficulty——

Mr. PERCIASEPE. Subsurface groundwater is not covered by the rule.

Mr. HULTGREN. Mr. Perciasepe, but it slips into it. That is what they are saying is that it becomes—there is—it is undefined of when it moves from sub—shallow subsurface hydrological shallow subsurface into groundwater.

Let me—I have got less than a minute. How can a regular citizen be expected to know whether or not they are digging into something that would be groundwater which would, as you say, is ex-

empt under the rule or shallow subsurface water where the CWA comes into play? Is it the responsibility of the landowner to review the literature since it is not clearly defined in the rule?

Mr. PERCIASEPE. They are both not covered by the rule.

Mr. HULTGREN. So you are saying shallow subsurface water is not covered under the rule?

Mr. PERCIASEPE. Correct. It is used has a hydrologic tool for field people to determine the adjacency of a——

Mr. HULTGREN. In the shallow subsurface hydrological connection. That is the connectivity.

Mr. PERCIASEPE. That is the hydrologic that it looked at to see whether the surface water feature might be adjacent to a traditionally navigable——

Mr. HULTGREN. The message I got——

Mr. PERCIASEPE. Actual groundwater is not jurisdictional.

Mr. HULTGREN. This is less clear to me than when I walked in here. I think it is probably the same for my constituents, huge concern. I hope if nothing else you get the fact that we are concerned about this. There is already such a lack of clarity in so many of the rulemakings, this one probably more than anything else we are hearing huge concerns from business, from farmers. I have got a great business community. I have got a great agriculture community in my district. They just don't understand this and they are scared to death. We need clarity. We need to take a step back.

With that, Chairman, thank you so much for your indulgence and I yield back.

Mr. SCHWEIKERT. Thank you, Mr. Hultgren.

Mr. Weber.

Mr. WEBER. Thank you.

Mr. Perciasepe, the proposed rule asserts jurisdiction over perennial strains, is that right?

Mr. PERCIASEPE. Yes.

Mr. WEBER. Okay. Love the short answers. What about intermittent and ephemeral strains?

Mr. PERCIASEPE. Yes.

Mr. WEBER. Okay. Canals and ditches?

Mr. PERCIASEPE. Mostly no.

Mr. WEBER. Lakes, estuaries?

Mr. PERCIASEPE. Estuaries——

Mr. WEBER. Okay.

Mr. PERCIASEPE. —lakes, yes.

Mr. WEBER. We put up a map here which is provided by the U.S. Geological Survey, USGS, that shows these features in my State, the State of Texas where I live. I would love to—I claim it as mine of course. I am very proud of it.

The key shows the colors that correspond to the features. Now, missing from this map are wetlands, ditches, and other features that the EPA and the Army Corps of Engineers claim jurisdiction over. Can you see that map?

Mr. PERCIASEPE. I see the map but I want to be clear we are not claiming jurisdiction over ditches.

Mr. WEBER. Okay. Well, this map is not for regulatory purposes. We had them made by the USGS based on some of the EPA's—just some of the EPA's definitions. The map is dramatic. But

shockingly, what I have read of the proposed rule, the EPA could go farther than what we see here. In fact, the EPA cites a study that estimated that the USGS maps under-represent drainage networks by 64.6 percent. That is their quote. Scale up the features covered by 60 percent and include wetlands, and we are looking at a regulated area close to double the size of what is on this map. Yet remarkably, you claim that the proposed rule does not—you said this in exchange with one of the other Members—it does not extend the Agency's authority. Then he asked you then why do you need the rule?

There is no way that this is what Congress intended. The Supreme Court has rebuked the Agency for claiming authority over areas that are remote from waters that are "navigable in fact." So why is the EPA disregarding the Supreme Court and Congressional intent? Is the EPA above the other branches of the Federal Government? Are you above the Constitution?

Mr. PERCIASEPE. Absolutely not.

Mr. WEBER. I would agree with that. But it doesn't appear to the American public like—that is you all's mindset.

Let me follow up on a question asked by Chairman Smith. I understand that the EPA has asked the United States Geological Survey to make maps similar to this one here for every State. I think it is important that the EPA release these maps as part of this rulemaking process. Today's entire hearing has been about what is and what isn't covered by this proposal. And as a part of the Randy caucus down there said earlier, and EPA's answers aren't making the situation any clearer. And I would add the truth isn't exactly flowing around here. The EPA needs to release these maps so our constituents can identify for themselves whether they are subject to regulation.

So here today will you commit to releasing these maps that the EPA had made before the end of this month so that people can comment on them as part of the rulemaking process as the Chairman has requested?

Mr. PERCIASEPE. These maps have come up before and I have to apologize. I am actually really not familiar with them.

Mr. WEBER. You are in the dark about this?

Mr. PERCIASEPE. I——

Mr. WEBER. As most of our constituents are about this proposed rule.

Mr. PERCIASEPE. That is unfair.

Mr. WEBER. Unfair. That is our constituents' perception out there.

Let me go on. Mr. Chairman, I think that it is important enough that if this agency doesn't release the maps by the end of July, that this Committee compel the release.

My constituents, our constituents are confused and quite frankly scared by this proposal, this overreach. I think the only way we can get to the bottom of what is being planned here for regulation is to see it laid out on a map. So here today I request that you make available to us and the American people the maps that the EPA had made from the USGS, as well as the wetlands map made by the Fish and Wildlife Service. We want these maps. My guess is that they were created by—with taxpayer dollars unless I miss my

guess. They should be available to the taxpayers in full disclosure and we want you to make these maps available.

Mr. Chairman, I yield back 10 seconds.

Mr. SCHWEIKERT. Sorry, Mr. Weber. And we were discussing whether there should be a penalty box for puns.

Dr. Bucshon.

Mr. BUCSHON. Thank you, Mr. Chairman.

First of all, I would like to ask unanimous consent to enter into the record an analysis of EPA's connectivity study prepared by GEI for the Waters Advocacy Coalition. The Waters Advocacy Coalition is a large group of stakeholders that have come together with concerns about the rule and include everyone from farmers to homebuilders. The analysis point out flaws and with the report's scientific vigor and draws into question the report's usefulness in a regulatory context.

Mr. SCHWEIKERT. And we have a U.C.?

Mr. BUCSHON. Yes.

Mr. SCHWEIKERT. No objection, so ordered.

[The information appears in Appendix II]

Mr. BUCSHON. I would also like to introduce a letter from that Indiana Chamber of Commerce expressing concerns about the potential impacts of the rule on Indiana's economy.

Mr. SCHWEIKERT. Any objection? So ordered.

[The information appears in Appendix II]

Mr. BUCSHON. This is a letter to me and I will just read the last paragraph from the Indiana Chamber of Commerce. "We ask that you stop EPA from finalizing this proposed rule that would create a significant amount of uncertainty and would impact the Hoosier business community in a detrimental way. It seems like another chapter in EPA's lengthy tome of bureaucratic overreach. It is time to put a stop to federal intrusion on intrastate matters, especially when the intrusion is occurring as a result of executive fiat versus Congressional passed legislation."

First of all, I would like to thank you for being here and thank you for your work at the EPA. I think just because we may have philosophical disagreements doesn't mean that you are not working hard to do your job and I understand that and I thank you for that. But we do have some philosophical disagreements probably on this proposed rule and I have got some concerns from my Indiana Farm Bureau.

First of all, I mean this has been on the books for 30 years. Why now?

Mr. PERCIASEPE. The—one of the primary drivers is the fact—and this goes back to the previous exchange—that the Supreme Court has had two separate—actually more than two but two in particular where they have looked at the existing way the agencies plural, the Corps of Engineers and EPA, go about making jurisdictional determination. Where does the Clean Water Act apply? And again, where the Clean Water Act applies will only affect anybody if they are going to discharge pollution and it doesn't affect agriculture, so I want to be clear on that.

But we have to change the way we go about doing that to comply with. And that is—you know, and here is where I think I agree with the mutual respect thing. I think we are trying to comply with

what the Supreme Court has suggested is the way to go about doing it and I think it is totally appropriate but there may be a different point of view on that. So I am not——

Mr. BUCSHON. Okay. I will take you at your——

Mr. PERCIASEPE. I am with you on that.

Mr. BUCSHON. I will take you at your word on that.

Mr. PERCIASEPE. That is what we are trying to do.

Mr. BUCSHON. As far as exemptions go, who has the ability to eliminate exemptions once—say, for example—my main concern is jurisdictional here on this issue, States, local communities versus the Federal Government and the——

Mr. PERCIASEPE. Yeah.

Mr. BUCSHON. —potential expanded jurisdiction of the Federal EPA over the states and the local communities. You know, people in agriculture, for example, they are touting 54 exemptions to agriculture, but who has the ability to change the exemptions once the jurisdiction is established?

Mr. PERCIASEPE. Yeah. Well, the exemptions are pretty—they are outlined generally in the Clean Water Act itself and what we are trying to do is define them a little bit more clearly working with the U.S. Department of Agriculture, particularly the exemptions that refer to conservation practices that take place on agricultural lands. So that would—those are—we feel they are already exempt but the need to clarify specifically which kinds of practices are exempt are what we are trying to do. We have heard from farmers that we are getting too specific and what if they did it in a slightly different way; would that then not cover it? So that is the kind of thing that we normally would here and try to fix.

Mr. BUCSHON. Yeah, because the concern I have which is many of my constituents do, and honestly I think the American people, not specific to the EPA but the Federal Government in general, once the Federal Government has jurisdiction but then the rules—that—you know, then the rules suddenly change. And I think you are saying that in healthcare. I am healthcare provider. I was a heart surgeon before coming here. You know, once jurisdiction has been established at the federal level, backing that away is, first of all, nearly impossible; and secondly, the concern is that the rules will change, including exemptions for agriculture or anything else. And so that is my concern.

I do have a couple specific questions about——

Mr. PERCIASEPE. Okay.

Mr. BUCSHON. —farming and I appreciate your response. These are concerns from Indiana Farm Bureau that farmers have told them. And, for example, ditches, if a farmer has a ditch that runs alongside between farm fields and those ditches carry rainwater that eventually flows to a stream or river, how can the farmer determine whether those ditches are excavated only in uplands and drain only uplands?

Mr. PERCIASEPE. Well, based on what you described, that is what it is and it would not be jurisdictional.

Mr. BUCSHON. But the farmer determines that or the EPA determines that?

Mr. PERCIASEPE. EPA doesn't determine it. The Corps of Engineers does the fieldwork. If the farmer wanted to discharge pollu-

tion into that or do—or something else, but we try to make it clear in the rule and for the first time the definition actually includes these exclusions of these kinds of ditches.

Mr. BUCSHON. Okay. If a farmer has a small depression area in their farm fields where water ponds after rain, how can a farmer know whether these are Waters of the United States under the proposed rule?

Mr. PERCIASEPE. They are not.

Mr. BUCSHON. They are not?

Mr. PERCIASEPE. They are not.

Mr. BUCSHON. It says that in the rule?

Mr. PERCIASEPE. You know, I don't know exactly where it says it in the rule but they are not——

Mr. BUCSHON. Okay.

Mr. PERCIASEPE. —because they don't meet the other definition——

Mr. BUCSHON. Yeah.

Mr. PERCIASEPE. —of being a water. They don't have a bank and a high water mark. They don't have hydric soils. They are——

Mr. BUCSHON. Yeah.

Mr. PERCIASEPE. —farmed lands which are——

Mr. BUCSHON. Yeah. And that is what I am trying to get at with these questions is where the rule—the level of uncertainty on the ground out in the community is about the proposed rule generates these type of questions. And so that is what needs to be cleared up because, again, from my perspective, once the Federal Government establishes jurisdiction, retracting that is a very difficult if not impossible, and also there is concern that the rules within that jurisdiction will change and you are getting this level of uncertainty amongst farmers. I just did an event in my district with farmers, Indiana Farm Bureau. All of these questions came up.

Mr. PERCIASEPE. Right.

Mr. BUCSHON. The main question is jurisdictional, and with that, I am going to have to yield back.

Mr. PERCIASEPE. Okay.

Mr. BUCSHON. Thank you, Mr. Chairman.

Mr. PERCIASEPE. But, rest assured, wet farm fields are not jurisdictional. And I—just to add—to be—help a little bit on the jurisdiction thing, in almost every State, and I think probably every State, the States are responsible for implementing the Clean Water Act, so the jurisdictional determination may determine where they have to do their work but the States are the ones that do most—virtually all of the implementation.

Mr. BUCSHON. Thank you.

Mr. PERCIASEPE. I am sorry, Mr. Chairman.

Mr. SCHWEIKERT. Thank you, Doctor.

Professor Massie.

Mr. MASSIE. I am not a professor.

Mr. SCHWEIKERT. Yes, but we—never mind.

Mr. MASSIE. Very quickly, let me ask you this, Mr.——

Mr. PERCIASEPE. Bob.

Mr. MASSIE. Bob. Okay. Thank you. Do you anticipate having a larger budget at the EPA next year or a smaller budget?

Mr. PERCIASEPE. The—for 2015?

Mr. MASSIE. Yeah.

Mr. PERCIASEPE. The President's budget that was submitted to Congress is smaller than 2014.

Mr. MASSIE. Okay. What is the additional cost of implementing this new rule?

Mr. PERCIASEPE. Well, it is a combination between EPA and——

Mr. MASSIE. We—well, I ask this question——

Mr. PERCIASEPE. —the Corps of Engineers.

Mr. MASSIE. We met before in the Transportation Infrastructure Committee, so I asked the question then. I will ask you again. Hopefully we get the same number. What is the cost of implementing this rule?

Mr. PERCIASEPE. If you let me shuffle a paper, I will give you the same answer. It is——

Mr. MASSIE. I will give it to you. I don't want to put you on the spot. It was $100-$200 million. Does that sound about right?

Mr. PERCIASEPE. That sounds in the ballpark.

Mr. MASSIE. I have the transcript.

Mr. PERCIASEPE. I can get it.

Mr. MASSIE. Isn't it a little bit fiscally irresponsible to undertake a $100-$200 million project when you anticipate your budget will decrease?

Mr. PERCIASEPE. When we do those cost estimates, we are doing those cost estimates on what the cost to the economy is, so that means like 160 to 280 million.

Mr. MASSIE. Okay.

Mr. PERCIASEPE. And those are permit processing expenses and mitigation expenses that might have to come into play if somebody wants to get a permit and they have to——

Mr. MASSIE. So you——

Mr. PERCIASEPE. They can do the activity but they have to do mitigation.

Mr. MASSIE. You plan on passing those costs onto the people that are going to file for permits?

Mr. PERCIASEPE. Well, those are the costs we estimated——

Mr. MASSIE. Um-hum.

Mr. PERCIASEPE. —of doing the permits and also doing the mitigation.

Mr. MASSIE. I think it is fiscally irresponsible to undertake this new rule that will undeniably cost you more money to implement when you know in fact the President acknowledges your budget is going to go down.

Let me ask you another question. Can you have science without measurements, without numbers, without units?

Mr. PERCIASEPE. For most science you need that. Now, I am going to say that——

Mr. MASSIE. That is—I think so, too.

Mr. PERCIASEPE. —there is probably some that you don't, but——

Mr. MASSIE. Well, I am looking at the rule here. I can't find any numbers. I can't find any unit measurements. Let me give you an example. The definition of a floodplain, "the term floodplain means an area bordering inland or coastal waters that was formed by sediment deposition from such water under present climatic condi-

tions and is inundated during periods of moderate to high water flows." Is "moderate to high" a scientific term that——

Mr. PERCIASEPE. I think these are terms that are used routinely in the science of hydrology.

Mr. MASSIE. Can you—you can—okay. Can you convert that to gallons per minute, moderate to high?

Mr. PERCIASEPE. It depends on the size of the stream and the drainage area.

Mr. MASSIE. Okay.

Mr. PERCIASEPE. Or in the case of the Atlantic Ocean, it is pretty big.

Mr. MASSIE. You know what, without facts, all you have is an opinion, and this leaves it open to opinion. So without units, you cannot have science without measurements.

Let me ask you another question from the definition here. These are features that are exempt under this rule. One of them is an artificial lake or pond created by excavating and/or diking dry land. I own a farm and I have built a few ponds. The last place I would put a pond is where there is dry land, where there is no water. How can you dike dry land and create a pond for irrigation?

Mr. PERCIASEPE. Well, you take an area of a stream that—I mean an area of the field or woodland where the slope is in this direction and you——

Mr. MASSIE. Um-hum.

Mr. PERCIASEPE. —put up a——

Mr. MASSIE. So there is a flow of water——

Mr. PERCIASEPE. —dike and when it rains, the water comes down and it——

Mr. MASSIE. Right.

Mr. PERCIASEPE. —settles behind the——

Mr. MASSIE. So you get some water that is not coming—not just landing in the pond but from——

Mr. PERCIASEPE. Yeah.

Mr. MASSIE. —surrounding areas?

Mr. PERCIASEPE. Yeah.

Mr. MASSIE. So there is a flow across that land?

Mr. PERCIASEPE. Yes.

Mr. MASSIE. So if the goal here is to create an exemption for landowners that they can understand, why wouldn't you put a scientific unit of measure in there? Like what is a unit of measure for a pond or lake?

Mr. PERCIASEPE. Gallons.

Mr. MASSIE. It is gallons but that is a little hard to—that is a good number. Acre-feet is another word——

Mr. PERCIASEPE. Acre-feet is a bigger one.

Mr. MASSIE. —is another one that is commonly used. Yeah. So why wouldn't you put a definition in there that is scientific? Because clearly there is flow of water going into this, so there has to be some flow. You could define it in gallons per minute or something like that, the pond in acre-feet, because it is clearly not going to be on dry land if you are creating this or it wouldn't exist. You would have a dry pond, and I have built a few of those, too.

Mr. PERCIASEPE. Well, the concept of dry land is that land is not——

Mr. MASSIE. Explain that to me.

Mr. PERCIASEPE. It is not currently a lake or a stream or a river. It is——

Mr. MASSIE. I think it has to be under a roof really to be completely dry. There has to be some flow. What I am asking here is for some definition——

Mr. PERCIASEPE. It is a term of art in hydrology.

Mr. MASSIE. A term of art. I would like a term of science, like when you define a bank, how tall is the bank in feet?

Mr. PERCIASEPE. There are criteria for a bank——

Mr. MASSIE. How——

Mr. PERCIASEPE. —and there is criteria for a high water mark.

Mr. MASSIE. So on the—let's just—quickly, my time is almost expired—on a floodplain, what are the units to define the size and scope of a floodplain?

Mr. PERCIASEPE. Normally, floodplains are defined by the frequency——

Mr. MASSIE. That is how we define them——

Mr. PERCIASEPE. The frequency of inundation.

Mr. MASSIE. Correct. So why wouldn't you define a floodplain that way instead of leaving it so open-ended to say that it is moderate to high water flows?

Mr. PERCIASEPE. Well——

Mr. MASSIE. Would you agree that is not a scientific term, moderate to high? There is no units, there is no number.

Mr. PERCIASEPE. We have asked for help in defining the size of the floodplain. It is a specific question we have asked in the proposal.

Mr. MASSIE. Well, that is a science that is already established.

Mr. PERCIASEPE. Yes.

Mr. MASSIE. I suggest you go use some science. Thank you.

Mr. PERCIASEPE. So it is 100, 500, you know, we have asked for advice on what size and how to do that.

Mr. MASSIE. Well, it is very clear science. You could use some science in these definitions. Thank you.

Mr. SCHWEIKERT. Thank you, Mr. Massie.

Mr. Brooks.

Mr. BROOKS. Thank you, Mr. Chairman. I don't know, but having heard those questions, it sure seems to me that Mr. Massie has a doctorate. Maybe we ought to give him an honorary one right here and now.

Mr. PERCIASEPE. Yes, it was professor-like.

Mr. BROOKS. Mr. Chairman, I have a letter from Jimmy Parnell of Alabama Farmers Federation dated July 8, 2014, that I would like entered into the record.

Mr. SCHWEIKERT. Any objection? So ordered.

[The information appears in Appendix II]

Mr. BROOKS. Thank you, Mr. Chairman.

It is my understanding that this rule relies on the "significant nexus" test to determine what "other waters" would be regulated. As all hydrological connections are certainly not significant, can you please explain how the Agency plans to identify what constitutes a significant connection? Does the Agency plan to establish some means of quantifying the significance of a hydrological con-

nection? If so, can you provide a real-world example of how the determination would be made?

Mr. PERCIASEPE. We have tried to use two key established approaches to define when it is significant because I think, as many have pointed out already and I think it is worth noting that the broader hydrologic cycle, almost anything can be defined as connected. And so—but significant is a very important component of how we are going to have to do the work here.

So we have proposed that if it is a tributary that runs either all the time or seasonally, as Justice Scalia outlined, that it would have to be—it would have to have water in it enough that it had a defined bank, high water mark, and a bed. Now, there are criteria for those that are defined in the science of hydrology, so if it doesn't have those characteristics, then we are saying there is not enough time that water is flowing in it that it is significant, so it is not significant. So that means the puddle in my backyard, my roof drains, things like that don't have those characteristics so they are not significant, they are not covered. Wet field, same situation. On—and for standing water, obviously if it is a lake that is wet all the time or if there is a wetland that has the characteristic hydric soils and hydrophytic vegetation that is characteristic in science of what a wetland is, then that would be significant.

Then there are other issues that have—that the Supreme Court has asked that be considered, things like adjacency, et cetera. So if you have some of these characteristics but you are not adjacent, you know, are you—that—and we have proposed some approaches to deal with that issue as well.

Mr. BROOKS. All right. Thank you.

Let me move to my second question. Dr. David Sunding, a Professor at the University of California Berkeley, hardly a conservative bastion, has published a report on the Agency's economic analysis of this rule and I am going to quote from his remarks. "EPA is proposing an expansion of the definition of the term Waters of the United States to include categories of waters that were previously never regulated as Waters of the United States such as all waters in floodplains, riparian areas, and certain ditches. The inclusion of these waters will broaden the scope of the Clean Water Act and will increase the cost associated with each program.

Unfortunately, the EPA analysis relies on a flawed methodology for estimating the extent of newly jurisdictional waters that systematically underestimates the impact of the definitional changes. This is compounded by the exclusion of several important types of cost and the use of a flawed benefits transfer methodology which EPA uses to estimate the benefits of expanding jurisdiction. The errors, omissions, and lack of transparency in EPA's study are so severe as to render it virtually meaningless." Now, those are Dr. Sunding's words, not mine.

How can Congress or the public adequately evaluate the scientific and economic impacts of EPA's proposal if the economic analysis is as problematic as Dr. Sunding indicates?

Mr. PERCIASEPE. Well, I—we have that report. I haven't personally read it yet but it is certainly going into the docket. We will formally put it in our docket for this rule and we will analyze it and see what we may need to do to our economic analysis. But I can

tell you right off—and we had a discussion about this earlier and I was probably less successful than I would desire to explain this—but all floodplains are not jurisdictional waters. Just the fact that it is inundated, let's say, annually by a spring flood or every ten years by a ten-year flood does not make it jurisdictional. It is just an indicator that the water that is there all the time or under those other characteristics I just mentioned to you then would be jurisdictional because they are adjacent to the other stream. We use it as a way to determine in the science of hydrology whether it is adjacent.

So if you make an assumption that the entire landmass of a 100-year floodplain would somehow require a permit and everything, then you get into this situation that I think that analysis did where is that we are underestimating. But I am—I want to be more clear on that and we are going to look into that in more detail.

Mr. BROOKS. Thank you, Mr. Chairman.

Mr. SCHWEIKERT. Thank you, Mr. Brooks.

Mrs. Lummis.

Mrs. LUMMIS. Thank you, Mr. Chairman. And thank you, Mr. Perciasepe, for being here.

This is the rule that terrifies people in my State more than any other rule that the Federal Government is proposing right now, so my questions are going to be very specific.

Mr. PERCIASEPE. Okay.

Mrs. LUMMIS. But I want you to know how terrified people are.

Now, I am from the West. I am from Wyoming where water is scarce, precious, carefully administered and the resource about which we worry the most and fret the most. And you just have people in the West completely terrified about this. I just want you to know that. Part of the terrifying effects of this is that the Supreme Court rejected the Clean Water Act jurisdiction over isolated ponds because they lacked a significant nexus to navigable waters, and we don't understand why the panel of scientists is not focusing on what significant nexus means. Instead, this rule is focusing on connection and connectivity. The Courts have repeatedly said that a connection is not enough and yet the EPA is basing this rule on a report that evaluates connections.

So I would argue that that is among the umbrella basis for our huge concerns. The Western Governors are concerned, the Western Attorneys General are concerned, the Western state engineers are concerned, the water users are concerned, the local water administrators are concerned. It is an enormous issue.

Laying that groundwork, here are my specific questions. We don't understand why the EPA allowed only an additional 20-day comment period on the interpretive rule on the ag exemptions. There are some exemptions, 56 practices that are exempt as I understand it, but there are 100 other practices that we believe should be added to this list. Here are my questions. Please provide a detailed analysis of how the National Conservation Resource Service conservation practice standard for irrigation canal or lateral, that is Code 320, aligns with the treatment of these facilities in the proposed rule for the hearing record.

Mr. PERCIASEPE. I can't do that off the top of my head but I am happy to do it for the record.

Mrs. LUMMIS. Fabulous. And the other questions that I have are going to be for the record as well.

Mr. PERCIASEPE. Okay.

Mrs. LUMMIS. Please provide us how the NRCS conservation practice standard for an irrigation field ditch. Now, this ditch, this is Code 388, aligns with the treatment of ditches in the proposed Waters of the United States Rule.

Please discuss how the NRCS standards for a pumping plant, this is Code 533; a stream crossing, that is Code 578; and a structure for water control, this is Code 587, align with the regulatory consequences of the Waters of the United States Proposed Rule. We need detailed written analyses of these for the hearing record.

We also need an analysis in the rulemaking docket so people have an adequate opportunity to consider and comment on these analyses. These are the kinds of details that have heretofore been left out, and when you couple the fact that this scientific committee that was assembled has I think 2 people out of 50 that are connected to tribes, States, and local water regulators provides no comfort for us. And those two that came from state agencies both came from the California EPA. There is almost no state agency that is more disparate from my State, our tribes, our counties, our water regulators' frame of reference than the California EPA. The only other agency that is more disparate is the U.S. EPA. So in other words we really feel from the West that this scientific committee has no expertise in our water jurisdiction, concerns, quantity, quality, and as I said at the beginning of my remarks, there is just no rule that terrifies us more.

Thank you, Mr. Chairman. I yield back.

Mr. SCHWEIKERT. Thank you, Mrs. Lummis. And hopefully staff got that list and you will be able to respond——

Mr. PERCIASEPE. Well, it looks like we will be able to get it somehow if—I tried to write them all down. Thank you.

Mr. SCHWEIKERT. All right. Thank you, Mrs. Lummis.

And now it is finally my turn and I have two letters I wish to put into the record. Without objection, seeing we are the last two here—if there is an objection, I am going to be really worried—from my Irrigation & Electrical Districts Association of Arizona and National Stone, Sand, and Gravel Association.

No objection, so ordered.

[The information appears in Appendix II]

Mr. SCHWEIKERT. It has been fascinating to listen to this because—and I should disclose about six weeks ago right down the hall we did one of those things we tried to do with big pieces of legislation where you invite in a handful of lawyers, and this is an interesting group. A couple of lawyers—I think one had actually even been staff over at the EPA so they weren't necessarily the ideological set and we did that sort of game theory. Let's sort of walk through the sections of this rule and see what it models, see what this means, how absurd could you take it, where would a court take it?

And I think from those sorts of discussions that is where you are picking up the stress——

Mr. PERCIASEPE. Yeah.

Mr. SCHWEIKERT. —from many of us up here. It may not be what you intended but it is what the words say and particularly in a litigious world that we are in right now where if the words have any movement, someone is going to litigate on it.

So could I beg of you—and I know this is sort of a lightning round—let's do floodplains for a moment. In the discussion here floodplains kept being sort of adjacent to an active waterway. For those of us from the desert Southwest, if you were ever to look at Maricopa County, third most populous or fourth most populous county in the United States, but the top part of my county has huge, huge areas that are designated as floodplains even though it may be the every-other-year monsoon season. How does that fall into this? I mean there are areas up there were you have to get a 404 permit to do almost anything.

Mr. PERCIASEPE. Well, I am going to—so we have asked that we get some comment on the concept of using a floodplain, which is obviously associated with a water as a mechanism—a science-based mechanism to determine if there are waters in that floodplain, not at the moment it is flooding but——

Mr. SCHWEIKERT. You know, we are probably not used to the word floodplain——

Mr. PERCIASEPE. Yeah.

Mr. SCHWEIKERT. —for those of us in the desert Southwest where I may get 14 inches a year and it comes on a Tuesday.

Mr. PERCIASEPE. Yeah. Right. And so that floodwater, you know, those lands that are flooded on that particular—you know, I have been in Arizona during the monsoon season and—along the Salt River or Rio Salado, the—you mentioned—the Chairman mentioned I worked at the Audubon society. I worked on that nature center, the Nina Mason Pulliam Nature Center down on think it is Center Street.

Mr. SCHWEIKERT. Yeah.

Mr. PERCIASEPE. So we are using that to say, look, if this area floods, then if there is a stream in that area or a wetland in that area, then the chances are it is probably—has some connection to that——

Mr. SCHWEIKERT. So——

Mr. PERCIASEPE. —to the main river. But it doesn't mean that the whole floodplain is somehow—becomes like a dry——

Mr. SCHWEIKERT. You know, let's grind through this sort of in a mechanical——

Mr. PERCIASEPE. Yeah. Okay.

Mr. SCHWEIKERT. —and then let's do sort of a case scenario. So I am elated you have some experience with the desert Southwest. So those floodplains, water does run through them and they run down and eventually hit another wash that hits another wash that eventually ends up in the Verde River and the Verde River eventually ends up in the Salt River and then your Rio Salado project. So in that case you would see a nexus.

Mr. PERCIASEPE. On the—there would be a nexus on the riverbed, you know, in terms of jurisdiction, and if there was another river or wetland feature that met those other characteristics, had a bed, bank, and a high watermark or hydric soils and vegetation,

then it would be looked at as being adjacent to that water. But the entire floodplain—and this is——

Mr. SCHWEIKERT. No, no, no. That wasn't my question.

Mr. PERCIASEPE. Okay. Okay.

Mr. SCHWEIKERT. My question was that wash—let's back up a little because you have the experience. Salt River bed——

Mr. PERCIASEPE. Yeah.

Mr. SCHWEIKERT. Navigable? Should it fall under the Waters of the United States?

Mr. PERCIASEPE. No. It is probably not navigable except for a few times a year.

Mr. SCHWEIKERT. But would it fall under your jurisdiction?

Mr. PERCIASEPE. But it would fall under a tributary that is tributary to a traditional navigable——

Mr. SCHWEIKERT. So it would?

Mr. PERCIASEPE. —and could—the quality of the Salt River could affect the quality of the navigable water.

Mr. SCHWEIKERT. Okay.

Mr. PERCIASEPE. And I think that is how the Supreme Court tried to use the concept of if it affects downstream the——

Mr. SCHWEIKERT. Okay. Well, in my remaining—and the beauty of playing Chairman is I am——

Mr. PERCIASEPE. Yes. Yeah.

Mr. SCHWEIKERT. —giving myself more time. So let's do a little game theory. I have an occasional creek behind my home, which runs at certain times of the year, and I go out and I take shovels and shovels and shovels of dirt and throw it in there. Did I violate the rule? And that creek runs down to a river.

Mr. PERCIASEPE. And you are saying that that creek has water in it every year or is it just rain? Is it an erosional feature——

Mr. SCHWEIKERT. Let's say it is running at that time and I am throwing dirt into it, pollutant as defined and so in that case I would have needed a 404 permit to be throwing that dirt in?

Mr. PERCIASEPE. You know, it is just—really—I mean there are so many reasons why it might not be. I can't really focus on——

Mr. SCHWEIKERT. And this actually came from our legal——

Mr. PERCIASEPE. Yeah.

Mr. SCHWEIKERT. —workgroup last month. Okay. So how about if it is an occasional where this time I am throwing dirt into it and it is dry but I am changing sort of the structure of it. But when water does come down, it is going to pick up the additional sediment and run it down to the Verde River in my area. Still probably would fall under——

Mr. PERCIASEPE. Yeah. Recognizing I have a modest amount of familiarity——

Mr. SCHWEIKERT. Um-hum.

Mr. PERCIASEPE. —with what that place probably looks like even if you didn't put the dirt in there, I don't know that it would be noticeable——

Mr. SCHWEIKERT. Okay.

Mr. PERCIASEPE. —because you have got a dry situation where the sand and the——

Mr. SCHWEIKERT. Um-hum.

Mr. PERCIASEPE. —smaller grains and even the stones depending on how torrential the rain might be are going to move downstream.

Mr. SCHWEIKERT. But you can see where that becomes a really interesting standard. So now the standard is noticeable.

Mr. PERCIASEPE. Well, I am——

Mr. SCHWEIKERT. It is not——

Mr. PERCIASEPE. I am sorry. I am sorry. I am just speaking——

Mr. SCHWEIKERT. No, no, no——

Mr. PERCIASEPE. You are trying to engage me in a conversation——

Mr. SCHWEIKERT. No—yeah. No, no, I am not trying to——

Mr. PERCIASEPE. Trying to be a lawyer here.

Mr. SCHWEIKERT. I am trying to get even my own head around it——

Mr. PERCIASEPE. Yeah.

Mr. SCHWEIKERT. —because I have had groups of very smart lawyers and some of them not ideological at all—they are just good lawyers—who are way over here saying, oh, they don't mean that and over here saying I am going to sue and I am going to litigate and I am going to win on this because——

Mr. PERCIASEPE. Right.

Mr. SCHWEIKERT. —here is how it is worded. So that is where the fear comes because——

Mr. PERCIASEPE. Yeah.

Mr. SCHWEIKERT. —for many of us who live out in the desert Southwest, we ride our horses through washes, we plant palo verde trees and then we fertilize them alongside those washes. Have I just created a pollutant because that pollutant runs down and eventually hits a dry Salt River bed. Well, the dry Salt River bed hasn't run water down to the Colorado in, what, 30-some years. Maricopa County is one of the places on Earth where we recycle every drop of our water. We do some great stuff.

Mr. PERCIASEPE. Yeah. I agree.

Mr. SCHWEIKERT. Also, last two things and I know I am way over my time, I know there was some frustration shared from you on people you thought were pushing things, maybe exaggerating, conflating, but we even did it in the conversation here of folks talking about drinking water. Well, that is a different statute so we have to be careful on—for all of us conflating.

Last bit on ditches, okay, let's say I have a ditch; we will call it the Central Arizona Project, the world's longest aqueduct, and it puts water into a large lake, Lake Pleasant, and then picks that water back out of that lake and continues to move it through my state. The fact it was parked in—because the lake is under the jurisdiction currently and in the future rule, right? So did the transfer from that ditch into a holding lake and then transferred back into a ditch all of a sudden turned the water movement there under this rule.

Mr. PERCIASEPE. You know, I am not 100 percent familiar with that situation. I have some familiarity, but the Central Arizona Project would not be——

Mr. SCHWEIKERT. But——

Mr. PERCIASEPE. —jurisdictional in any way, shape, or form.

Mr. SCHWEIKERT. But the ditch itself—I know you have said a couple times a ditch is not, but this is a different mechanic. Remember, we put it into a regulated lake as a holding.

Mr. PERCIASEPE. Well, you know, irrigation ditches are not——

Mr. SCHWEIKERT. But this is—but you can start to see these are where we are——

Mr. PERCIASEPE. Is this lake—I apologize for not having——

Mr. SCHWEIKERT. Lake Pleasant.

Mr. PERCIASEPE. Is it used to recharge groundwater?

Mr. SCHWEIKERT. No. No, no. That is—this is actually mostly for water——

Mr. PERCIASEPE. Supply?

Mr. SCHWEIKERT. —supplies, irrigation supplies, municipal supplies——

Mr. PERCIASEPE. I——

Mr. SCHWEIKERT. —but it is also a large recreational lake.

Mr. PERCIASEPE. Yeah, I would—I——

Mr. SCHWEIKERT. So a large—but you could start to see where we have some design issues because also in desert Southwest type of agriculture we use a lot of ditches where we will gather water, run it around, and then put it back.

Mr. PERCIASEPE. The danger you have with the guy at the top—you know, in either top of the food chain, you know, trying answered these technical questions on particular matter is difficult, but our approach we do not want irrigation systems to be jurisdictional. We certainly don't want ditches that if you took the water away they just go back to being what the land that it was. I mean, that——

Mr. SCHWEIKERT. There will be some other discussions and if we have time, we will send you a couple notes saying there may be a need to change some of that ditch language because, particularly for those of us in the desert Southwest, the way we use them, it is a constant transferring back and forth from different types of bodies and different types of uses and, so, you can see where some of the concerns are.

And I think with that, because it is not like I haven't gone double my allotted time, so I appreciate everyone's patience. I need to thank you as our witness.

To the Members of the Committee, if they have additional questions for you—and we will ask you to respond to those in writing. The record will remain open for two additional weeks, comments and written questions from any Members.

The witness is excused. Thank you for——

Mr. PERCIASEPE. Thank you, Mr. Chairman.

Mr. SCHWEIKERT. —joining us. Anything else?

All right. And then we are adjourned.

Mr. PERCIASEPE. Thank you.

[Whereupon, at 12:15 p.m., the Committee was adjourned.]

Appendix I

Answers to Post-Hearing Questions

ANSWERS TO POST-HEARING QUESTIONS

Responses by The Honorable Robert W. Perciasepe

QUESTIONS FOR THE RECORD
The Honorable Lamar Smith (R-TX)
U.S. House Committee on Science, Space, and Technology

Navigating the Clean Water Act: Is Water Wet?
Wednesday July 9, 2014

Questions for Mr. Perciasepe

1. EPA conducted a literature review on the connectivity of streams: The Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence.

a. Does the "connectivity" report supplement the proposed rule?

Response: The agency's draft report, *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*, was developed by the EPA's Office of Research and Development to inform the EPA and U.S. Army Corps of Engineers proposed rulemaking related to the jurisdiction of the Clean Water Act. The report provides scientific support for the rulemaking but is not a supplement to it.

b. If the Science Advisory Board recommends changes to the "connectivity" report or the science underlying the proposed Waters of the U.S. rule, will you recommend to re-propose the rule?

Response: The EPA final Connectivity Report was issued January 15, 2015, and reflects the comments of the Science Advisory Board's final recommendations. The final rule will be consistent with the best science, including information in the final Connectivity Report.

2. Why did EPA write the rule and formally propose it before waiting for the Science Advisory Board to complete their review process?

Response: As noted above, the EPA developed a draft scientific assessment that is based on more than 1,000 pieces of previously peer-reviewed and publicly available literature. This draft report had already undergone an independent peer review prior to proposal and reflects edits made in response to that peer review, and received generally positive peer review feedback from the Science Advisory Board, which the EPA is currently addressing. The final rule will be consistent with the best science, including information in the final Connectivity Report.

3. What is the EPA position on whether or not there are any isolated wetlands or waters?

Response: The SAB's final peer review report concludes that wetlands and open waters have a gradient of connectivity to downstream waters. EPA agrees with this conclusion.

4. Nancy Stoner recently claimed that this rule does not regulate groundwater. Does the Clean

Water Act give the EPA jurisdiction over groundwater?
a. Please provide a detailed legal rationale and any supporting examples or precedent.

Response: The agencies have consistently interpreted the CWA to exclude groundwater from the geographic scope of the waters of the United States.

b. If it does not, then does EPA use "ground water" as a means of establishing a "connection?" Please provide a detailed legal rationale and any supporting examples or precedent.

Response: The agencies' proposed rule is consistent with the law and current practice. For, example, the agencies' 2008 post-*Rapanos* guidance states, "*Under this definition, the agencies consider wetlands adjacent if one of following three criteria is satisfied. First, there is an unbroken surface or shallow sub-surface connection to jurisdictional waters. This hydrologic connection may be intermittent.*"[1] The agencies have made determinations since the Rapanos guidance which established jurisdiction using shallow subsurface hydrologic connections for adjacency.

5. Some of the scientists on the SAB panel that is reviewing EPA's Draft Connectivity Study have commented that *"when you step on the flood plain you are stepping in the river."* Do you agree with those scientists?

Response: Under the CWA and the agencies' regulations, the lateral extent of non-tidal tributary jurisdiction in the absence of adjacent wetlands extends to the Ordinary High Water Mark.

6. What is your legal justification for aggregating the impacts of isolated waters or wetlands? Please provide a detailed legal rationale and any supporting examples or precedent.

Response: The agencies' proposed rule would rely on the Supreme court decision in *Rapanos* as the basis for evaluating whether or not a water alone, or in combination with other similarly situated waters in the region, have a significant effect on the chemical, physical, and biological integrity of the traditional navigable waters

7. When the SAB panel reviewing the science behind this Clean Water Act rulemaking meets publicly, EPA has refused to make a transcript of the proceedings available or an archived webcast for the public.
a. Why?

Response: It has been a long-standing SAB practice that committee and panel meetings are not transcribed or recorded. Summary minutes of SAB committee and panel meetings are prepared and always made available to the public. Details regarding the conduct of SAB meetings are available on the SAB website at www.epa.gov/sab. The science report (Connectivity of Streams and Wetlands to Downstream Waters: A review and synthesis of the scientific evidence) is available online: http://cfpub.epa.gov/ncea/cfm/recordisplay.cfm?deid=296414. The report was thoroughly reviewed by the agency's independent Science Advisory board (SAB). The SAB has posted information on the

[1] http://water.epa.gov/lawsregs/guidance/wetlands/upload/2008_12_3_wetlands_CWA_Jurisdiction_Following_Rapanos120208.pdf.

background, process for the formation of the ad hoc review panel, advisory meetings and report development, and the final peer review report on their website: http://yosemite.epa.gov/sab/sabproduct.nsf/02ad90b136fc21ef85256eba00436459/7724357376745f48852579e60043e88c!OpenDocument&TableRow=2.3#2. Summary notes (minutes) for each meeting of the ad hoc panel and chartered SAB concerning the Connectivity Report has been posted on the SAB page under the tab "Advisory Meetings and Report Development." The agency's response to the SAB's final peer review report was posted on the same page as the Connectivity report under the tab "Related Links."

b. Will you commit to make either the transcripts public or archived webcasts available to the public? ***Summaries of meetings are not adequate.***

Response: Live access by phone is available for most SAB committee and panel meetings. In addition, live streaming webcasts of SAB committee and panel meetings are provided if there is sufficient public interest in the proceedings. These webcasts are live events designed to share the real time public meeting with all interested parties who wish to watch or listen. The webcasts are not archived. The SAB Staff Office makes all meeting materials available to the public, including draft and final reports.

8. Is EPA's use of non-public scientific data consistent with the agency's Scientific Integrity Policy? Please provide a detailed legal rationale and any supporting examples or precedent.

Response: The EPA's use of non-public scientific data is consistent with the agency's Scientific Integrity Policy. Non-public data can take a variety of forms, e.g., data claimed as confidential business information, Personally Identifiable Information, or data owned by third parties who provide analyses to the EPA but deny the EPA access to the underlying data. The Scientific Integrity Policy promotes a culture of transparency. At the same time, it acknowledges the Privacy Act and other laws, regulations and policies that might limit some data disclosure. See Science Integrity Policy at 2. In particular, the Science Integrity Policy recognizes that the EPA often uses data and information generated by third parties to inform its decisions. See Science Integrity Policy at 2, n.2. The Policy neither forecloses their use nor compels their disclosure. Instead, the Policy focuses on the data's quality, noting that, under the agency's Information Quality Guidelines, the EPA must review and document the quality and soundness of this type of data prior to use. See Science Integrity Policy at 2, n.2.

In the interests of transparency, the Policy also calls upon the EPA to use non-proprietary data and models "when feasible." See Science Integrity Policy at 4. But even this encouragement recognizes feasibility as a limiting factor. Simply put, sometimes the EPA needs to use proprietary data and models to support its policy decisions, even though this information cannot be disclosed to the public. Nothing in the Scientific Integrity Policy prevents the EPA from doing so.

Similarly, as part of its stakeholder outreach or collection of public comments, the EPA often obtains analyses relevant to its decision-making from trade associations, non-governmental organizations or other interested members of the public. But sometimes the stakeholders do not supply the underlying data. The EPA evaluates the quality of these analyses as it would any other information and makes both the analyses and its views available to the public.

The EPA honors the Scientific Integrity Policy in its decision-making.

9. Will you guarantee that all data supporting this rule is publically available?

Response: The rulemaking process will proceed in a legally appropriate and transparent process consistent with the Scientific Integrity Policy and the Administrative Procedures Act.

10. Does the SAB need permission from EPA to answer questions from Congress or the public?

Response: The full policy on SAB interaction with Congress and the public is available at the SAB's website at http://yosemite.epa.gov/sab/sabproduct.nsf/WebSABSO/Membership%20Information?OpenDocument.

With respect to certain congressional inquiries that implicate agency resources, discussions have been ongoing regarding the proper lines of communication between members of Congress and appointed members of the EPA's federal advisory committees, including the Science Advisory Board.

11. Does the SAB or the SAB Chair need permission to testify before Congress?

Response: SAB members are free to testify before Congress. However, SAB members are encouraged to not discuss topics specific to ongoing reviews until deliberations are completed and the final findings report is finalized and approved by the Chartered SAB. The EPA encourages panel Chairs to be the primary spokesperson for the panel and to respond to Congressional requests to testify. The full policy on SAB interaction with Congress and the public is available at the SAB's website at http://yosemite.epa.gov/sab/sabproduct.nsf/WebSABSO/Membership%20Information?OpenDocument.

12. If the scientists on the SAB panel have legal questions, who do they ask? Do they have lawyers who are independent from EPA?

Response: If scientists on an SAB panel have questions or require information from the EPA, they are instructed to contact the Designated Federal Officer (DFO) for the panel. The DFO then contacts the appropriate EPA office to obtain the information needed to respond to the questions. The agency's primary source of expertise on legal matters is the EPA's Office of General Counsel.

13. An early version of the "connectivity" report was reviewed in a process managed by a contractor, Eastern Research group. While your Agency has provided us with a list of individuals involved in that review, you have not released 1) the contractor-provided report, 2) the original EPA draft, or 3) the charge questions posed to these reviewers. Please provide those documents along with the contract agreement(s) and any related correspondence.

Response: The contractor-provided report was part of the publicly available docket as a supporting document for the proposed rule since the opening of the public comment period. In the docket, the document is listed as "Post-Meeting Comments for First Peer Review of EPA's Draft Report: Connectivity of Streams and Wetlands to Downstream Waters - A Review and Synthesis of the Scientific Evidence (independent external peer review report)" and is available at

http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OW-2011-0880-0005. This document is arranged by the charge questions the EPA provided to the peer reviewers.

14. Last month you testified to Congress that "We are ... working with our partners in the states and tribes to assure their voices are effectively represented as we proceed through this rulemaking."

You agreed in the hearing that in some areas, like local water quality or the regulation of some oil and gas activities, state and local officials have more expertise than EPA. Will you commit to appointing geographically-diverse state and local experts to EPA expert panels in the future?

Response: EPA believes that providing geographic diversity is an important principle for the membership of the agency's advisory panels. As an example of the agency's interest in promoting such diversity, the EPA asked the EPA's Local Government Advisory Committee's Protecting America's Waters Workgroup for advice and recommendations on the proposed rule. The LGAC Protecting America's Waters Workgroup held a series of public meetings to hear from local elected and appointed officials at several geographic field locations. The workgroup meetings provided an opportunity for the workgroup to hear from local officials on local issues of concern related to the proposed rule. State, local, and tribal officials were invited to attend these open meetings. The Local Government Advisory Committee is a formal advisory committee chartered under the Federal Advisory Committee Act and is composed primarily of local, state, and tribal elected and appointed officials from around the country. The LGAC sent their final recommendations to the Administrator on November 5, 2014, which the agencies will carefully consider as they work to develop a final rule.

15. If a small business has never obtained a permit under the CWA before, practically speaking how do they know if they need to get a permit?
a. How long on average does it take the EPA/Corps to determine if the small business needs a permit?
b. If it is determined they do need a permit, how long would it take and what are the costs and expenses involved? Are there consultants or lawyers that are usually hired?

Response: CWA section 404 and 402 permits applications are reviewed by authorized state programs or the Corps of Engineers in the great majority of circumstances. State and federal agencies work to be responsive to all permit applicants, including small business applicants. If a small business has a question regarding the need for a permit, they are encouraged to contact their state or Corps permit office. Most proposed pollutant discharges are approved under General permits that are designed to be authorized in a timely manner so that applicants are not delayed and to reduce any costs associated with the review process.

c. If a small business doesn't know that they do indeed need a permit, is there an exemption for honest mistakes?

Response: The Clean Water Act is a strict liability statute and Congress did not provide within the Act an exception for honest mistakes. However, one of the primary goals of the agencies' current rulemaking effort is to provide additional clarity regarding the jurisdictional scope of the Clean Water Act. In this way, the agencies seek to minimize potential confusion regarding Clean Water Act

jurisdiction. The agencies seek to proactively provide information and assistance to small businesses and other stakeholders to ensure they are aware of Clean Water Act requirements. To the extent an unauthorized discharge of pollutants does occur, the agency would consider the applicable circumstances of each case and would work with the small business to resolve the violation in an appropriate manner under one of the multiple options available.

d. Can competitors sue to challenge determinations or permits?

Response: The Clean Water Act includes "citizen suit" provisions that allow third parties to challenge the government for issuance of a permit. A competitor could sue, but they would be subject to the limitations and requirements provided in Section 505 of the Act. Section 505 of the Act includes a requirement to give notice to the EPA, the state and the alleged violator. In addition, the jurisdictional requirements of federal courts, such as standing and ripeness, would apply to any citizen suit.

16. Many small businesses have stated that this would have a disproportionate impact on them, and have asked that a Small Business Regulatory Fairness Act (SBRFA) Panel be convened. Why have you not held a SBRFA panel?

Response: The Regulatory Flexibility Act generally requires an agency to prepare a regulatory flexibility analysis for any rule subject to notice-and-comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. As part of their "Waters of the U.S." rulemaking, the EPA certified that the proposed rule will not have a significant economic impact on a substantial number of small entities.

Under the RFA, the impacts of concern are significant, disproportionate adverse economic impacts on small entities subject to the rule, because the primary purpose of the initial regulatory flexibility analysis is to identify and address regulatory alternatives ''which minimize any significant economic impact of the rule on small entities.'' 5 U.S.C. 603. The scope of regulatory jurisdiction in this proposed rule is narrower than that under the agencies' existing regulations. Because 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 adversely affect small entities to a greater degree than the existing regulations. The agencies' proposed rule is not designed to ''subject'' any entities of any size to any specific regulatory burden. Rather, it is designed to clarify the statutory scope of the "waters of the United States," consistent with Supreme Court precedent. This action if promulgated will not have a significant adverse economic impact on a substantial number of small entities, and therefore no regulatory flexibility analysis is required.

At the same time, the agencies recognize the substantial interest in this issue by small governmental jurisdictions and other small-entity stakeholders. In light of this interest, the EPA and the Corps determined to seek early and wide input from representatives of small entities while formulating a proposed rule. This process has enabled the agencies to hear directly from these representatives, at an early stage, about how they should approach this complex question of statutory interpretation, together with related issues that such representatives of small entities may identify for possible consideration in separate proceedings. The EPA has also prepared a report summarizing their small entity outreach to date, the results of this outreach, and how these results have informed the development of this proposed rule. This report is publicly available in the docket for this proposed rule. Finally, on October 15, 2014, the agencies hosted a second roundtable to facilitate input from small entities, which included

participants from two small government jurisdictions. A summary of this roundtable is also available in the docket for the proposed rule.

17. There are a number of manufacturers that have multiple facilities in different states and multiple EPA and Corps regions. There are manufacturers that do not use storm water systems but instead use a system of ditches, impounds, and fields.
a. How do you currently deal with this situation?
b. Under this rule could these facilities potentially have to get NPDES permits? Is there the potential for any other types of permits? Provide a detailed legal rationale.
c. Assuming that they do, how long it does take to obtain these permits and what are the associated costs and expenses?
d. Where in the economic analysis did EPA study the cost of compliance if it turns out additional permits are needed?
e. Since permits are only good for a maximum of 5 years, did the Agency consider complications that might arise when currently permitted sources are up for review again?
f. Who bears the burden of these additional expenses?

Response: The EPA and the Corps work hard to be as consistent as possible among their regional and district offices in implementing the Clean Water Act. In some cases, a state program may have broader or more stringent requirements than required under the federal Clean Water Act, and the Clean Water Act specifically recognizes the states' prerogative to be more stringent. It is our intent that the proposed rule would not change current jurisdictional status of stormwater systems, and the proposed rule would reduce, not expand, jurisdiction over ditches. We are working now to improve the final rule to make it consistent with our intent and in consideration of public comments. To the extent a particular activity may require a Clean Water Act permit, the NPDES permitting authority (typically an authorized state), or the Corps, as appropriate under section 404, could provide assistance.

As a general matter, industrial facilities must obtain coverage under an NPDES permit for stormwater discharges if they are discharged to a waters of the U.S. and the category of industrial facilities has been identified for regulation in the EPA's stormwater regulation (see 40 CFR 122.26(b)(14)) or if the stormwater discharge has been designated as needing a permit on a case-by-case basis by either an EPA Region or the State NPDES permitting authority. Section 402(p)(2) of the Clean Water Act requires NPDES permits for industrial stormwater discharges. The NPDES permit regulations at 40 CFR Parts 122, 123, and 124 detail who must obtain a permit, what requirements the permit must have, and the procedures for permit issuance. 40 CFR § 122.26 is the primary regulation governing stormwater discharges associated with industrial activity. Where the EPA issues NPDES permits, the agency provides coverage for most stormwater discharges associated with industrial activities through a multi-sector general permit. The Corps also has General permits for dredged or fill material discharges associated with certain stormwater related projects that may require CWA section 404 authorization. The agencies' regulations also include exemptions for certain stormwater related activities, including the Section 404(f) exemptions, and the waste treatment system exclusion.

The EPA's economic analysis for the proposed rule is based on evaluating a sample of existing Corps jurisdictional determinations that were coordinated with both EPA and the Corps under the 2008 Rapanos guidance to determine whether or not particular jurisdictional decisions would change as a result of the proposed rule. As part of their analysis, the EPA recognized that this database may not include some circumstances in which potential applicants previously considered particular waters non-

jurisdictional and did not seek a jurisdictional determination. To help evaluate such circumstances, Exhibits 27 and 28 of EPAs' draft economic analysis explore the extent to which changing the jurisdictional status of such waters would affect the results of the EPA's analysis.[2]

With respect to NPDES permitting and permit renewals, the EPA's economic analysis includes an evaluation of how the proposed rule would affect the NPDES permitting program, and who would bear the burden of such costs.[3] As reflected in this analysis, the EPA does not believe that the *SWANCC* and *Rapanos* decisions have greatly affected traditional NPDES permits, such as those issued for municipal wastewater treatment plants or industrial facilities, and therefore anticipates few costs associated with such facilities in the future. The EPA's economic analysis does consider permitting for construction and development stormwater, concentrated animal feeding operations (CAFOs), and pesticide application, as areas of NPDES permitting where there could be additional costs, and the economic analysis describes the likely costs that the EPA would anticipate. Such costs may include an increase in administrative costs to states (an indirect cost) and implementation costs to the applicant associated with permitting, as well as associated environmental benefits.

18. Please provide detailed metrics related to the jurisdiction this rule claims:

a. How many miles of streams does this rule say the CWA covers?
b. How many miles of shoreline?
c. How many acres of "waters"?
d. How many acres of "wetlands"?
e. Are there any additional types of waters that may not be accounted for by those numbers? If so please provide appropriate metrics.

Response: The agencies' proposed rule does not include a specific delineation and determination of waters across the country that would be jurisdictional under the proposed rule. Consistent with the more than 40-year practice under the Clean Water Act, the agencies make determinations regarding the jurisdictional status of particular waters almost exclusively in response to a request from a potential permit applicant or landowner asking the agencies to make such a determination. The agencies are currently considering a number of options for the treatment of "other waters" under the final rule. Once the rule is finalized, the agencies will work to develop outreach materials for the public to make it as clear as possible which waters are jurisdictional and which are not.

Within the existing framework, the agencies' proposed rule would provide clearer categories of waters that would be jurisdictional, as well as a clearer list of the waters and features that are not jurisdictional. The agencies' proposed rule would not protect any new types of waters that have not historically been covered under the Clean Water Act and is consistent with the Supreme Court's more narrow reading of Clean Water Act jurisdiction. Providing a clearer regulatory definition will streamline the process of making jurisdictional determinations and provide additional clarity and predictability to this process.

f. Does the EPA and Corps have the resources to evenly and fairly enforce this rule across the entire country?

---

[2] See http://www2.epa.gov/sites/production/files/2014-03/documents/wus_proposed_rule_economic_analysis.pdf.
[3] See pages 26-29 of the agencies' economic analysis.

Response: As noted above, the agencies believe that the proposed rule will provide a clearer regulatory definition that will streamline the process of making jurisdictional determinations and provide additional clarity and predictability to this process. The agencies believe that finalizing the proposed rule would help ensure consistent implementation across the country. The efficiencies gained in making jurisdictional determinations are expected to offset the slight increase in jurisdiction that the agencies predict may occur as a result of the proposed rule.

g. How many people enforce the CWA?

Response: Clean Water Act implementation relies upon a cooperative federalism approach between the EPA, the Corps, and the states. Federal agencies, state agencies, permittees, and citizens all play a role in ensuring that the Act is effectively implemented and enforced.

As the EPA does not formulate or allocate its budget by media program, the agency cannot provide a separate breakout of Clean Water Act enforcement related resources as requested. The EPA distributes enforcement resources under broad program projects (e.g., civil enforcement, compliance monitoring, Chesapeake Bay, and criminal enforcement) that support compliance and enforcement work across statutes. The EPA also does not have information regarding the number of Corps or state employees enforcing the Clean Water Act.

19. What are the Constitutional limits to federal authority under the CWA? Please provide a detailed legal rationale and any supporting examples or precedent.

Response: In *SWANCC*, the Supreme Court identified the constitutional authority under which Congress enacted the Clean Water Act:

> *"We said in Riverside Bayview Homes that the word 'navigable' in the statute was of 'limited effect' and went on to hold that §404(a) extended to non-navigable wetlands adjacent to open waters. But it is one thing to give a word limited effect and quite another to give it no effect whatever. The term 'navigable' has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made."*

20. Has the EPA ever used drones for identification of "waters," surveillance, enforcement or other purposes? Can you commit to that the EPA will never use drones of any type over private property?

Response: The EPA has not used drones and has no plans to do so.

21. Why didn't the EPA define "water" in this rule?

Response: The Clean Water Act and its implementing regulations specify that jurisdiction extends to "waters of the United States." As such, the current proposed rulemaking addresses "waters of the United States." The agencies offered proposed new definitions for terms where they felt this would provide greater clarity on the extent of CWA jurisdiction. However, the agencies will be reviewing public comments closely to identify additional terms that could benefit from increased clarity in the final rule.

22. Is water wet?

Response: Yes. However, not all waterbodies are wet all of the time, such as non-perennial streams and some wetlands. As Justice Kennedy stated in his *Rapanos* opinion, waterbodies that do not flow all the time can be important, noting that it makes little sense that "[t]he merest trickle, if continuous, would count as a 'water' subject to federal regulation, while torrents thundering at irregular intervals through otherwise dry channels would not. … To be sure, Congress could draw a line to exclude irregular waterways, but nothing in the statute suggests it has done so" (*Rapanos* at 2242).

23. What is the minimum flow requirement for qualification as a "water of the U.S."?

Response: The EPA and the Corps have not proposed a specific minimum flow requirement for a water to be a "water of the United States." The agencies proposed to define the term "tributary" for the first time in the proposed rule as a water feature that includes a bed and banks and an ordinary high water mark, which are characteristics that are produced by flowing water of sufficient volume and frequency. Water features that meet this definition of "tributary" would be jurisdictional under the CWA when they contribute flow directly or through another water to a navigable water, interstate water, or the territorial seas, unless they are excluded under paragraph (b). Streams that only flow seasonally or after rain have been protected by the Clean Water Act since it was enacted in 1972. More than 60 percent of streams nationwide do not flow year-round, yet they contribute to the drinking water supply for approximately 117 million Americans. Peer-reviewed science strongly supports the ecological importance of these types of streams, and the Science Advisory Board's September 30, 2014, letter to the Administrator stated that the proposed rule's definition of the term "tributary" is supported by science. The draft Connectivity Report concludes that streams, regardless of their flow regime, have important effects on larger downstream waters. The Science Advisory Board's final review of the Connectivity Report strongly supports this conclusion.

24. Are any of the assurances or clarifications offered in speeches, blogs, press releases, or other public outreach the Agencies have given since publication of the proposed rule legally binding?

Response: Jurisdictional determinations are being made now under existing Corps and EPA regulations and guidance, and applicable case law, not under the proposed rule. To help inform the public regarding the proposed rule, the EPA has also taken steps to translate the legal language and scientific principles of the proposed rule into easier-to-understand communications documents. This is the case for any major regulatory action taken by the EPA or any other federal agency. Such documents help explain the proposed rule to the regulated public but do not substitute for it. Once the final rule is issued, the agencies' regulations and guidance, the Act, and applicable case law will continue to provide the legally binding criteria for CWA jurisdiction.

25. Mr. Perciasepe, EPA says it "consulted" with states, but in your June 11, 2014, testimony before the House T&I Committee you could not name a single state that has come out in support of the rule. That was over a month ago, and you promised to survey the states.

a. Please provide that survey and its results.
b. Detail the methodology that you used in conducting this "survey."

Response: The scope of Clean Water Act jurisdiction is an issue of broad importance to states and many states have asked the EPA to respond to Supreme Court decisions in *SWANCC* and *Rapanos* through rulemaking. The EPA works closely with every state as a partner in the implementation of federal and state authorities and responsibilities. In this role, the EPA consulted early with states and state associations to develop the proposed rule. In addition, as previously noted, the agencies have asked the Local Government Advisory Committee's Protecting America's Waters Workgroup for advice and recommendations on the proposed rule. This committee includes representatives from state governments. The LGAC sent their final recommendations to the Administrator on November 5, 2014, which the agencies will carefully consider as they work to develop a final rule.

As part of the agencies consultation process, the EPA held three in-person meetings and two phone calls in the fall and winter of 2011, to coordinate with state organization prior to beginning formal rulemaking. EPA also worked closely with states and municipalities after the rule was proposed. Organizations involved include the National Governors Association, the National Conference of State Legislatures, the Council of State Governments, the National Association of Counties, the National League of Cities, the U.S. Conference of Mayors, the County Executives of America, the National Associations of Towns and Townships, the International City/County Management Association, and the Environmental Council of the States (ECOS). In addition, the National Association of Clean Water Agencies (NACWA) and the Association of Clean Water Administrators (ACWA) were invited to participate. As part of the consultation, 12 counties, eight associations and various state agencies and offices from five states (Alaska, Wyoming, Kansas, Tennessee, and Texas) submitted written comments. In addition, the EPA held numerous outreach calls with state and local government agencies seeking their technical input. More than 400 people from a variety of state and local agencies and associations, including the Western Governors' Association, the Western States Water Council and the Association of State Wetland Managers participated in various calls and meetings. The agencies' engagement with states continued through a series of conference calls organized by both the ACWA and the ECOS.

The agencies are currently reviewing comments provided to the agencies by states and state associations during the public comment period, which closed on November 14, 2014. The agencies will include a detailed narrative of intergovernmental concerns raised during the course of the rule's development and a description of the agencies' efforts to address them with the final rule.

26. What specific changes are you willing to make to provide legal certainty and address these serious concerns?

Response: As described in response to question 25, the agencies look forward to reviewing states' concerns, identifying options for addressing them, and working to ensure that the final rule reflects state input and is consistent with federal law.

27. You say that you have held a number of outreach sessions and listening sessions.
a. Summarize the over-all response from the manufacturing, mining, and construction groups. What have been their greatest concerns?
b. Detail the actions you have taken to address those concerns.

Response: To date, the agencies have received and processed over one million public comments submitted on the proposed rule. The agencies are carefully considering comments submitted by industry groups as well as other stakeholders as they work to develop a final rule. At this time, it would be premature for us to speculate on any changes that might be made to the final rule in response to these public comments.

One comment that these stakeholders consistently communicated is a request for an extended public comment period on the proposed rule. The EPA and the Corps addressed these comments by initially extending the comment period by an additional 91 days to October 20, and then further extending the comment period until November 14.

28. EPA keeps telling opponents of this rule to comment.

a. Do you have any legal obligation to make any changes based on the comments you receive?

Response: Under the Administrative Procedure Act, the EPA and the Corps are required to solicit public comments on their proposed rule and to review the comments they received while developing a final rule. To the extent relevant issues are raised during the public comment period, the agencies have an obligation to consider them, and we expect to make improvements to the final rule in response to public comments. The agencies will also prepare a response to all comments received to accompany the final rule which will address the comments and outline how they were considered. The Administrative Procedures Act defers to the federal agency to decide when to make changes in response to public comments.

b. EPA frequently mentions meetings and consultations with governments and businesses. What specifically did the Agencies change as a result of these meetings?

Response: The EPA and the Corps published a proposed rule, on which the agencies solicited public comments until November 14, 2014. As early as 2011, EPA conducted outreach to states, tribes and small businesses to help identify what the agencies should include in a proposed rule. For example, the EPA held a series of meetings and outreach calls with state and local governments and their representatives soliciting input on a potential rule to define "waters of the United States." Similarly, the EPA determined to seek early and wide input from representatives of small entities, enabling the agencies to hear directly from these representatives prior to publishing a proposed rule.

During the public comment period, the agencies met with stakeholders across the country to facilitate their input on the proposed rule. We talked with a broad range of interested groups including farmers, businesses, states and local governments, water users, energy companies, coal and mineral mining groups, and conservation interests. In October 2014, the EPA conducted a second small business roundtable to facilitate input from the small business community, which featured more than 20 participants that included small government jurisdictions as well as construction and development, agricultural, and mining interests. Since releasing the proposal in March, the EPA and the Corps conducted unprecedented outreach to a wide range of stakeholders, holding nearly 400 meetings all across the country to offer information, listen to concerns, and answer questions. The agencies recently completed a review by the Science Advisory Board on the scientific basis of the proposed rule and will ensure the final rule effectively reflects its technical recommendations. These actions represent the

agencies' commitment to provide a transparent and effective opportunity for all interested Americans to participate in the rulemaking process.

The agencies prepared a report summarizing their small entity outreach, the results of this outreach, and how these results informed the development of the proposed rule.[4] By holding these meetings early in the rulemaking process, the agencies were able to hear from these entities at a time when their input could be subsequently reflected in specific regulatory text. For example, many stakeholders indicated that the proposed rule should specifically identify those ditches that are excluded from Clean Water Act jurisdiction, and the proposed rule does so. Similarly, several stakeholders asked that the proposed rule clarify the jurisdictional relevance of breaks in the "ordinary high water mark," whether they be natural or man-made, and the proposal does so. During the public comment period, the agencies received more specific input on their proposed regulatory text, and the agencies are carefully considering this input as we look toward developing a final rule. It is premature to conclude what the agencies will change as a result of the comments received from these groups during outreach and the public comment period; however, the agencies will prepare a response to comments document to accompany the final rule.

29. Why did EPA only look at the cost of 404 permits when developing their economic impact numbers? Did EPA make the determination that there will be cost associated with the other permits such as 303, 311, 401 and 402?

Response: The EPA did consider costs to other Clean Water Act programs in its economic analysis, and did not limit its analysis to Section 404. The EPA considered costs regarding compliance with Clean Water Act Sections 404 and 401, Section 402, Sections 303 and 305, and Section 311. Below is Exhibit 16 of the EPA's draft economic analysis, which illustrates the costs and benefits that the agency estimates for each of these programs. Additional information on these figures is available in the draft economic analysis document. The agencies welcomed public comment on this analysis during the public comment period, which ended on November 14, 2014.[5] The EPA also plans to issue a revised economics analysis with the final rule which will again include an assessment for all programs of the CWA based on the analysis under the section 404 program.

[4] This report is available at http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OW-2011-0880-1927.
[5] The draft economic analysis is available at http://www2.epa.gov/sites/production/files/2014-03/documents/wus_proposed_rule_economic_analysis.pdf.

Exhibit 16. Estimated Incremental Annual Indirect Costs and Benefits (2010$ in millions).[1]

	COSTS		BENEFITS	
	low	*high*	*low*	*high*
CWA 404 Mitigation - Streams [2]	$8.7	$13.0		
CWA 404 Mitigation - Wetlands	$51.0	$100.5	$257.6	$345.1
CWA 404 Permit Application [3]	$19.7	$52.9		
CWA 404 Administration	$7.4	$11.2		
CWA 401 Administration [4]	$0.7			
CWA 402 Construction Stormwater	$25.6	$31.9	$25.4	$32.3
CWA 402 Stormwater Administration	$0.2			
CWA 402 CAFO Implementation [5]	$5.5		$3.4	$5.9
CWA 402 CAFO Administration	$0.2			
CWA 402 Pesticide General Permit [6]	$2.9	$3.2		
CWA 311 Implementation	$11.7		$14.3	
Total	$133.7	$231.0	$300.7	$397.6

(1) Section 303 impacts are assumed to be cost-neutral; Section 402 impacts are components of costs and benefits previously identified for past actions, not new costs and benefits associated with this proposed rule.

(2) Benefits of stream mitigation are not quantified.

(3) Costs of potential delayed permit issuance and costs and benefits of avoidance/minimization are not quantified, nor are any benefits from reduced uncertainty.

(4) Costs to permittees and benefits of any additional requirements as a result of 401 certification are reflected in the mitigation estimates to the extent additional mitigation is the result, yet not calculated to the extent avoidance/minimization is the result.

(5) Benefits apply to large CAFOs only, which account for 85% of implementation costs and 66% of administrative costs.

(6) PGP benefits and government administrative costs are not available.

30. I'm hearing from constituents that the proposed rule adds vague terms and undefined concepts to the Clean Water Act regulations. You claim the rule improves clarity and certainty.
a. Do you believe that it is <u>less likely</u> that businesses will seek jurisdictional determinations for all potential activities as your economic analysis appears to assume?
b. If it is <u>less likely</u>, is that because fewer areas or covered? Or is it because under this rule more places are automatically covered?

Response: As a general matter, the agencies believe that the proposed rule would more clearly define which waters are covered by the Clean Water Act, and which are not. In doing so, the agencies seek to reduce current uncertainty about whether or not particular waterbodies are, or are not, jurisdictional. For

example, the agencies' proposed rule would define the term "tributary" and would define as jurisdictional all waters that meet this definition, unless they are otherwise excluded.

In the EPA's economic analysis, the EPA compared the proposed rule to jurisdiction under the 2008 Army/EPA Jurisdiction Guidance, which interprets and applies the *Rapanos* decision. The agencies used data from approximately 200,000 jurisdictional determinations made by the Corps since the 2008 guidance. Of them, the agencies identified approximately 250 to individually evaluate. From this analysis, the agencies concluded that 3.2 percent of determinations of no jurisdiction would change under the proposed rule to jurisdictional, mostly in the context of the "adjacent waters" change to the proposed rule.

31. A recent study by conducted by Dr. David Sunding a Professor at UC Berkley and Principle at the Brattle Group found that the EPA used data on permitting costs that were almost 20 years old and not adjusted for inflation. Additionally, his analysis showed that EPA's cost estimates excludes costs of avoidance and delay. What is EPA doing to address the concerns with its economic analysis?

Response: The draft economic analysis represents the EPA's best estimate of the benefits and costs of the proposed rule at the time the rule was proposed. The EPA is aware of Dr. Sunding's review of EPA's draft economic analysis and looks forward to reviewing his comments, along with other comments on the draft economic analysis, to ensure that the EPA's final economic analysis most effectively and accurately reflects the benefits and costs of any final rule.

32. The Agencies' economic analysis projects a 3 percent increase in regulatory jurisdiction based upon Section 404 permitting activities in 2009-2010.

a. What factors did EPA consider in selecting this window as the best representative sample?

Response: To construct their economic analysis, EPA determined that the most appropriate baseline to evaluate was implementation of the agencies' 2008 jurisdictional guidance, as this represents current practice in the field. In 2008, the EPA and the Corps published revised guidance on Clean Water Act jurisdiction that accounted for the most recent Supreme Court case (*Rapanos v. United States*). The EPA based its draft economic analysis on data from FY 2009-2010 because this was the first window of time available after the agencies' 2008 Clean Water Act jurisdiction guidance was finalized but before analytical work for the proposed rule had started. The agencies have already received comments from several individuals and organizations regarding the 2009-2010 baseline, and EPA will evaluate options for addressing this issue when developing its final analysis, including using FY13 and/or FY14 data as a baseline.

b. What percentage of people do you estimate never apply for regulatory determinations and are therefore not part of the sample EPA relied on?

Response: To evaluate the extent to which the EPA and the Corps may assert Clean Water Act jurisdiction as a result of their proposed rule, the agencies evaluated data records from FY2009-10 in the Corps' ORM2 (Operation and Maintenance Business information Link, Regulatory Module) database that documents Corps jurisdictional status decisions associated with various aquatic resource types. The

agencies believe that the ORM2 data and the jurisdictional determinations coordinated with both Corps and EPA Regional offices were the best source of information available at the time for evaluating the extent to which Clean Water Act jurisdictional determinations might change as a result of the proposed rule. Consistent with the more than 40-year practice under the Clean Water Act, the Corps and the EPA make decisions regarding the jurisdictional status of particular waters almost exclusively in response to a request from a potential permit applicant or landowner asking the agencies to make such a determination. As such, the Corps' database includes only circumstances in which a landowner or other individual requested a jurisdictional determination, and does not include circumstances in which a jurisdictional determination was not requested.

As part of their analysis, the agencies did recognize that this database may not include some circumstances in which potential applicants previously considered particular waters non-jurisdictional and did not seek a jurisdictional determination. To help evaluate such circumstances, Exhibits 27 and 28 of the EPA's economic analysis explores the extent to which changing the jurisdictional status of such waters would affect the results of the EPA's analysis.[6] The agencies welcome comments from the public regarding additional data sources for helping EPA to evaluate such circumstances in a final economic analysis.

33. Does the proposed rule make all waters in a flood plain federally regulated "waters of the U.S."? Please provide a detailed legal rationale and any supporting examples or precedent.

Response: The proposed rule does not say that all waters in a floodplain would be jurisdictional. The agencies make clear in the proposed rule and the preamble to the rule that the determination of "adjacency" includes a distance determination. Floodplains can be miles wide and it is not the intent of the rule to treat all waters in broad floodplains as jurisdictional. Based on public comments, the agencies are working to evaluate options for providing greater clarity on this issue.

34. Would a permit be needed to spray pesticide on land that is crisscrossed with erosion features that are considered ephemeral streams, even if there is no water present? Would that change if the land was in a flood plain?

Response: Pesticide applications to dry land do not require a NPDES permit, even where the dry land is located within the floodplain. "Erosional features" are explicitly excluded from CWA jurisdiction in the proposed rule. The Clean Water Act requires a permit for a point source discharge of a pollutant to waters of the United States. EPA and the states have issued a general permit to cover point source discharges of pesticides to waters of the U.S.

35. Why did EPA only allow an additional 20-day comment period on the interpretive rule for Agriculture exemptions?

Response: The EPA and the Army reopened the public comment period on the interpretive rule between June 16, 2014 and July 7, 2014, in order to provide additional time for the public to provide comment. The interpretive rule is very short in length and represents the agencies' interpretation of the statute rather than new proposed requirements. Furthermore, the interpretive rule only solicited comments on

[6] See http://www2.epa.gov/sites/production/files/2014-03/documents/wus_proposed_rule_economic_analysis.pdf.

the implementation aspect as opposed to the agencies' interpretation which did not require notice and comment subject to the APA. Update to this response: On December 16, 2014, President Obama signed the Consolidated and Further Continuing Appropriations Act, 2015, which instructs the EPA and the Department of the Army to withdraw the agencies' interpretive rule. The EPA and the Army followed the statutory directive and withdrew the interpretive rule.

36. In the proposed rule, you rely on scientific studies to determine that *any water* in a flood plain, any water in a riparian area, *any water* with a surface or shallow subsurface connection to a jurisdictional water, and *any tributary* – no matter how distant from navigable water – automatically has a significant nexus to traditional navigable waters. That means EPA and the Corps of Engineers do not have to make any case-by-case determination that disturbance or pollution of such water will have an adverse impact on traditional navigable water.

However, many of the studies that EPA relies on never address potential adverse impacts on traditional navigable water. These studies only address the movement of birds, fish, insects and mammals. EPA's Connectivity Study says that you can establish a connection between waters if a bird, fish, insect, or mammal spends part of its life in navigable water and part of its life in a non-navigable water. EPA's proposed rule says that this connection is sufficient to establish federal jurisdiction over the non-navigable water.

a. The Supreme Court has already said that use of water by a migratory bird or an endangered species is not sufficient to establish jurisdiction. How can you establish jurisdiction based on use of water by any species?

Response: The proposed rule took into account the available peer-reviewed scientific literature regarding the connectivity or isolation of streams and wetlands relative to large water bodies such as rivers, lakes, estuaries, and oceans. The agencies' decision-making in the proposed rule regarding which waters are jurisdictional under the Clean Water Act is also necessarily grounded in the text of the Clean Water Act and applicable caselaw. The Supreme Court in *SWANCC* indicated that jurisdiction could not be based solely on the presence of migratory birds, and the proposed rule reflects *SWANCC* by making clear that the presence of migratory birds alone is not a sufficient basis for Clean Water Act jurisdiction in the preamble language.

The significant nexus standard indicates that it is a water's effect on the chemical, physical, *and biological* integrity of downstream navigable waters that informs jurisdiction. The science shows that the connection between waters occurs on a gradient, that the strength of the connection is not the same for all waters. The proposed rule reflects this by clarifying that only those waters meeting the definition of "tributary", for example, are subject to CWA protection. Features not satisfying the definition would be excluded.

It is important to emphasize that the proposed rule does not equate the existence of *any* connection to the "significant nexus" standard articulated by the Supreme Court. Instead, the agencies' proposed rule describes more narrowly how the science supports tributaries and adjacent waters as a class as having a significant impact on the chemical, physical, and biological integrity of downstream waters, when considered together with similarly situated waters in the region, as stated by Justice Kennedy in his Rapanos opinion. The Science Advisory Board's September 30, 2014, letter to the Administrator

supports the EPA's conclusions in the proposed rule that characterizing the connections between these waters as significant is supported by the science.

b. How can you establish a nexus to navigable water that is relevant to the Clean Water Act based on studies that do not even discuss water quality?

Response: As noted above, the agencies considered available scientific information in light of the text of the Clean Water Act and applicable caselaw. The agencies' decision-making with respect to wetlands and open waters in floodplains and riparian areas, tributaries, and the connections among waters are based on the totality of this science, not upon the conclusions of any single study. This science includes peer-reviewed literature on water quality functions and the contribution of nutrients, sediment, and contaminants from upstream sources such as streams, wetlands, and open waters. Moreover, Justice Kennedy's standard established in *Rapanos* indicated that it is a water's significant nexus and its effect on the chemical, physical, and biological integrity on a navigable water that serve as a basis for jurisdiction – not only chemical water quality effects. The Science Advisory Board's September 30, 2014, letter to the Administrator supports the science based conclusions in the proposed rule.

c. How is maintaining the integrity of an animal species the same thing as maintaining the biological integrity of *water?*

Response: Section 101(a) of the Clean Water Act identifies the objective of the Clean Water Act as "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." The biological connections among particular waters and traditional navigable waters, and their effects, can be relevant to establishing a "significant nexus" as articulated by Justice Kennedy in *Rapanos*. The biological integrity of water includes the functions those waters provide to maintain the integrity of the animal species that utilize the waters, both the tributaries and their downstream navigable waters. Anadramous fish species, such as salmon, provide a helpful example. Salmon rely on small headwater streams and wetlands to spawn and to support the growth of salmon fry. As the young salmon grow, they move downstream to larger rivers and ultimately to the sea. Salmon caught in the larger rivers is a multi-billion dollar industry in the U.S. supporting tens of thousands of jobs. Protecting small headwater streams protects the biological integrity of larger downstream waters on which the salmon industry depends. This example clearly demonstrates how protection of a particular species and the waters on which it depends is consistent with maintaining the biological integrity of larger downstream waters.

37. The Agency appears to abandon the Commerce Clause based limitation to jurisdiction and attempt to create a new science-based limitation. Please provide a detailed legal rationale and any supporting examples or precedent.

Response: The proposed rule would revise the existing definition of "waters of the United States" consistent with decisions of the Supreme Court. Justice Kennedy explained the *SWANCC* decision in his concurring opinion in *Rapanos:* "In *Solid Waste Agency of Northern Cook Cty.* v. *Army Corps of Engineers,* 531 U.S. 159 (2001) (*SWANCC*), the Court held, under the circumstances presented there, that to constitute 'navigable waters' under the Act, a water or wetland must possess a 'significant nexus' to waters that are or were navigable in fact or that could reasonably be so made." The proposed rule retains much of the structure of the agencies' longstanding definition of "waters of the United States,"

and many of the existing provisions of that definition where revisions are not required in light of Supreme Court decisions or other bases for revision.

As a result of the Supreme Court decisions in *SWANCC* and *Rapanos,* the scope of regulatory jurisdiction of the CWA in the proposed rule is narrower than the agencies existing regulations that have relied on the Commerce Clause of the Constitution since the 1970's. The most substantial change is the proposed deletion of the existing regulatory provision that defines "waters of the United States" as all other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters: Which are or could be used by interstate or foreign travelers for recreational or other purposes; from which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or which are used or could be used for industrial purposes by industries in interstate commerce. 33 CFR 328.3(a)(3); 40 CFR 122.2. Under the proposed rule, these "other waters" (those which do not fit within the proposed categories of waters jurisdictional by rule) would only be jurisdictional upon a case specific determination that they have a significant nexus as defined by the proposed rule. The proposed rule also requested comment on several alternative ways of addressing other waters, including some that would involve less reliance on case specific determinations.

A more detailed discussion of the legal considerations underlying the proposed rule is available in Appendix B of the proposed rule.[7]

38. How does EPA intend to regulate activity involving thousands of dry washes and arroyos in the West? Everyday activities like maintaining a private road by backfilling a persistent washout or replacing a culvert for a stream could require a permit. This seems to raise safety concerns if roads can't be maintained without first obtaining permits. Has EPA provided any non-farming based exemptions for activities like maintaining private roads?

Response: See answer to question 39 below.

39. Has the agency thought through the practical realities associated with what it is proposing?

For example, how will line crews, construction crews, and the like string or replace power lines and poles, repair substations, etc. in the midst of all these "tributaries" without a permit? Please provide a detailed legal rationale and any supporting examples or precedent.

Response: The Clean Water Act does apply to some waters that do not flow 100% of the time, as the Supreme Court has recognized. This has been true since the Clean Water Act was enacted in 1972, and the proposed rule would not change this. The agencies' proposed rule includes definitions for various terms to make it easier to figure out what is jurisdictional and what is not. In this way, the agencies believe they are providing additional clarity to landowners, utilities, and other stakeholders regarding whether a discharge of pollution into a particular water would require a permit and thus would reduce the amount of time it takes for applicants to receive jurisdictional determinations to support permit decisions.

[7] See http://www.gpo.gov/fdsys/pkg/FR-2014-04-21/pdf/2014-07142.pdf.

For example, the agencies' proposed rule would make jurisdictional, certain waters that meet the definition of "tributary," and then defines a "tributary" as a water having a "bed and bank" and an "ordinary high water mark" and that contributes flow to a traditional navigable water, interstate water, or the territorial seas. These terms have been regularly implemented by Corps field staff for many years and includes, tributaries that do not flow year round. The rule, however, also excludes features not meeting the definition of tributary, including gullies, rills, swales, certain ditches, and erosional features.

At the same time, the agencies' proposed rule would retain all existing Clean Water Act exemptions and exclusions. Additionally, the Corps' Nationwide Permit program, which authorizes Clean Water Act Section 404 discharges that would have no more than minimal adverse impacts to aquatic resources, is available for activities that qualify. For example, Nationwide Permit 3 ("Maintenance"), Nationwide Permit 12 ("Utility Line Activities"), and Nationwide Permit 14 ("Linear Transportation Projects") may specifically apply to the circumstances described above. Some of these activities may be non-reporting while others may require notification to the Corps. The Corps can provide a permit applicant with additional information regarding which Nationwide Permit might apply to a particular activity. In addition, some Corps districts also have State Programmatic General Permits and Regional General Permits for emergency-type activities allowing for efficient permit decision-making.

The EPA and the Corps are actively reviewing public comments submitted during the public comment period on the proposed rule to ensure that any final rule appropriately reflects on-the-ground experience.

40. If people honestly don't know that they need to get a permit, can they still be subject to penalties for violations of the Clean Water Act?

Response: Please see response to question 15c above.

41. Can a jurisdictional determination impact property values? Why or why not? Please provide a detailed rationale and any supporting examples or precedent.

Response: The agencies do not collect information on property values as a part of making jurisdictional determinations. These determinations are made consistent with science and the law.

42. The Forest Service sets Best Management Practices (BMPs) under the Clean Water Act.
a. Will the Forest Service submit these for approval to EPA?
b. Which Federal agency-EPA or the Forest Service- is responsible for assuring that these BMPs are consistent with relevant State laws and regulations, especially in 402 delegation states?
c. What jurisdiction does the Forest Service have under the Clean Water Act beyond assuring, as a land manager, that its employees aren't violating the Act?

Response: The EPA defers to the Forest Service regarding its efforts to comply with the Clean Water Act. We are unaware of any specific Clean Water Act authority that would enable the Forest Service to identify or mandate practices for Clean Water Act compliance for non-Forest Service entities.

d. Has EPA consulted with any other federal agencies that have administrative responsibilities under the Clean Water Act?
e. Please submit all written input that you solicited or received from other agencies thought this entire rulemaking process.

Response: The agencies submitted the proposed rule for review by all relevant federal agencies, including agencies with responsibilities under the CWA such as USFWS and Coast Guard. The agencies submitted the proposed rule to the Office of Management and Budget in late 2013 for interagency review, and received comments from other federal agencies in the course of this review as is stipulated under Executive Orders 12866 and 13563 (76 FR 3821, January 21, 2011). The agencies reflected these interagency comments in the proposed rule they published in the Federal Register on April 21. Documentation of changes made during OMB review under E.O. 12866 is available in the docket for this action.[8]

43. Discuss in detail how the proposed rule will impact tribes and tribal sovereignty.
44. Provide documentation of all tribes that have spoken out in support of this rule.

Response: In compliance with the EPA Policy on Consultation and Coordination with Indian Tribes (May 4, 2011), the EPA consulted with tribal officials to gain an understanding of and, where appropriate, to address the tribal implications of the proposed rule. In the fall of 2011, the EPA sent a Tribal Consultation Notification letter to all federally recognized tribal leaders, via mail and email, inviting tribal officials to participate in outreach and consultation events and provide comments to the EPA. Close to 200 tribal representatives and more than 40 tribes participated in the coordination process, which included two webinars and national teleconferences and face-to-face meetings. In addition, the EPA received written comments from three of 566 federally-recognized tribes during the coordination period.

At the time the agencies published the proposed rule, the EPA concluded that this action does not have substantial direct effects on Indian tribes as specified in Executive Order 13175 (65 FR 67249).

In the spirit of E.O. 13175, and consistent with EPA and Corps policy to promote communications between the agencies and tribal governments, the agencies specifically solicited additional comment on this proposed action from tribal officials. Moreover, the EPA undertook additional tribal consultation on the proposed rule. In October 2014, the EPA sent a second Tribal Consultation Notification letter to all federally recognized tribal leaders via mail and email, and conducted a national tribal call and webinar to ensure that the agencies' rulemaking process reflects tribal input.

45. EPA continues to claim that most ditches are excluded. However, the exemption is narrow because there is no minimum flow requirement, as was in the 2008 guidance. The Supreme Court specified that flow should be considered.

a. Why has minimum flow not been included? Please provide a detailed legal rationale.
b. Why was the change made from the 2008 guidance?
c. How many miles of "waters" will the removal of a minimum flow requirement impact? Please include a detailed description of EPA's methodology in calculating this impact.

[8] http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OW-2011-0880-0007.

Response: The agencies' proposed rule actually reduces regulation of ditches compared to the 2008 Army/EPA Jurisdiction Guidance, which interprets and applies the *Rapanos* decision. The 2008 guidance states that the agencies generally will not assert jurisdiction over "ditches (including roadside ditches) excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water"). In contrast, the proposed rule would exclude ditches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow. By replacing "relatively permanent flow of water" with "less than perennial flow," the agencies are proposing to exclude from Clean Water Act jurisdiction more upland ditches than are currently excluded under the 2008 guidance. Less than perennial flow includes "intermittent" and "ephemeral" flow; ditches with either of these flow regimes are excluded.

As noted above, this change will reduce jurisdiction over ditches. In addition, for the first time, the agencies are proposing to exclude by rule ditches that are not tributaries to traditional navigable waters, interstate waters, or the territorial seas, regardless of their flow regime. These excluded ditches cannot be "recaptured" by any of the jurisdictional categories of "waters of the U.S." under the proposed rule For the reasons mentioned in the response to Question 18 above, the agencies' proposed rule does not include a specific delineation of waters (including ditches) across the country that are currently jurisdictional but that would no longer be jurisdictional under the proposed rule.

46. You testified at a recent House T&I hearing that virtually all highway ditches would be exempted because they are in uplands draining uplands, and that most ditches drain dry land, thereby qualifying for the exemption. However, ditches by their nature provide flood control and may often drain wet areas next to a road.
a. Are ditches draining wet areas included or excluded?

Response: Whether or not a particular ditch is or would be jurisdictional under the Clean Water Act is a case-specific determination that depends upon the particular circumstances of each case. First, some ditches draining wet areas would be excluded under the proposal if either those ditches did not provide flow to a traditional navigable water, interstate water, or territorial sea, or because those ditches had less than perennial flow. As noted in response to Question 45, the agencies' proposed rule would narrow jurisdiction over ditches compared to the 2008 Army/EPA Jurisdiction Guidance. As a general matter, the extent to which a particular ditch would be jurisdictional would depend upon whether or not the ditch was dug in uplands, whether or not the "wet area" that is drained by the ditch meets the definition of a tributary or wetland, the duration of flow of water, and whether the ditch provides flow to a traditional navigable water, interstate water, or the territorial sea.

b. Please provide maps of all covered roadside ditches.
c. Please provide maps delineating all "upland" areas for purposes of CWA jurisdiction.

Response: The agencies' proposed rule does not include a specific delineation and determination of waters across the country that would be jurisdictional under the proposed rule. Consistent with the more than 40-year practice under the Clean Water Act, the agencies make determinations regarding the jurisdictional status of particular waters almost exclusively in response to a request from a potential permit applicant or landowner asking the agencies to make such a determination. The agencies are currently considering a number of options for the treatment of "other waters" under the final rule. Once the rule is finalized, the agencies will work to develop outreach materials for the public to make it as

clear as possible which waters are jurisdictional and which are not. Depending on the option(s) selected for the final rule, the agencies may consider including maps as part of these materials if they determine that these will increase clarity for the public.

47. In her July 1 blog, Acting Assistant Administrator Stoner said that *"Ditches that are IN are generally those that are essentially human-altered streams, which feed the health and quality of larger downstream waters.*
a. Where specifically is this statement made in the rule?
b. Please provide a detailed legal rationale explaining why EPA believes that the CWA only regulates ditches that are human altered streams that contribute flow to larger downstream waters.

Response: This statement is a plain-language statement that ditches that were excavated out of former water features, such as streams that flow periodically or year-round, would be jurisdictional under the Clean Water Act if they meet the definition of tributary, as they do not meet the requirements to meet the exclusions. Such features help to feed the health and quality of larger downstream waters and have always been regulated under the Clean Water Act. As explained further in the preamble to the proposed rule, the body of peer-reviewed scientific literature, the text of the Clean Water Act, and applicable caselaw support the assertion that such ditches have a "significant nexus" to downstream waters.

48. The proposed rule includes two exclusions for ditches but both are very unclear. The first exclusion applies to ditches that are excavated in uplands and drain only uplands if they do not have water year round. But, your rule does not define the term "uplands."

a. Does upland mean any higher elevation land?
b. Does it mean all land that is not a wetland?

Response: The proposed rule does not include a definition of "upland." However, the term "upland" has been used by the agencies for decades in longstanding practice to mean areas that are not a wetland (as defined in Clean Water Act regulations) or other waterbody. Uplands in this sense can be at lower as well as higher elevations. The agencies received many comments on this issue since publishing the proposed rule, and the agencies will review these comments to identify whether a more specific definition of this term would provide more clarity in a final rule.

c. A ditch may be excavated on dry land, but because it is intended to channel water, it may start to grow cattails. Are ditches that grow cattails still exempt?

Response: The exclusion for upland ditches does not change if the ditch grows cattails after it is constructed.

d. If a ditch is ultimately connected to a water of the U.S, disregarding all breaks in continuity in accordance with the proposed rule, does that mean that it is *not* excavated "wholly in uplands?"

Response: The upland ditch exclusion only applies to ditches that ultimately connect to a tributary. This connection does not make an upland ditch jurisdictional under the proposed rule.

e. Is a ditch excluded only if it does not drain?

Response: No. See responses to Questions 46a and 47 a-b.

49. At what depth does water below the surface cease to be shallow subsurface and turn into groundwater?

Response: The agencies' proposed rule does not include a specific definition of "shallow subsurface connection" with respect to depth. This is in part because there is no uniform maximum depth across the country for what constitutes a shallow subsurface connection. However, the proposed rule makes clear that groundwater remains non-jurisdictional under the Clean Water Act. As described in the proposed rule:

> *Shallow subsurface connections are distinct from deeper groundwater connections, which do not satisfy the requirement for adjacency, in that the former exhibit a direct connection to the water found on the surface in wetlands and open waters. Water does not have to be continuously present in the confined surface or shallow subsurface hydrologic connection and the flow between the adjacent water and the jurisdictional water may move in one or both directions. While they may provide the connection establishing jurisdiction, these shallow subsurface flows are not "waters of the United States."* (79 FR 22208)

The EPA's references to "shallow subsurface connections" in the proposed rule is informed by the discussion of how such connections can influence downstream waters, as articulated in the EPA's draft scientific report regarding the connectivity or isolation of streams and wetlands relative to large water bodies such as rivers, lakes, estuaries, and oceans. The Science Advisory Board recently released its final peer review of the EPA's draft report, and we will evaluate the SAB's peer review report and the EPA's final scientific report before publishing a final rule.

50. Are all enforcement decisions left up to EPA, the Corps, or a State Regulator?
a. If EPA says an individual is violating the Clean Water Act, who bears the burden of proof? Does the EPA have to first prove that the creek in your back yard is a "water" and therefore covered? Or does the homeowner bear the burden of proving that the water should not be under EPA jurisdiction?

Response: The lead enforcement agency at the EPA, a state, or Corps, would bear the burden of proving that a particular water is a "water of the U.S." and is subject to Clean Water Act jurisdiction.

b. If fines were levied for an alleged violation, when do they begin to accrue? After EPA proves its case? After EPA sends a notice to the homeowner? Or do they potentially start at the time of the violation-before the homeowner even knows that the EPA or the Corps is asserting jurisdiction?

Response: Any person who violates the Clean Water Act is subject to penalties per day for each day during which the violation continues. Although this means that penalties begin to accrue at the time of the violation, penalties are not due until after the EPA proves its case and a judge or jury has determined liability.

c. Can a neighbor or environmental group sue EPA to force the Agency to enforce against a person? Has this ever happened before? Please provide detailed statistics for all instances of third party complaints.
d. Who currently uses these third party enforcement mechanisms?
e. Who pays for the legal fees when a third-party sues EPA to enforce against someone?
f. If a court ultimately vindicates the accused, detail all remunerations paid to make the aggrieved accused whole. Where does this money come from?
g. Do third party complainants also compensate EPA and DOJ for resources the government has expended in defense of these suits?

Response: The EPA has enforcement discretion, which means the agency is able to choose the enforcement cases it wishes to bring and cannot be forced by a third party – such as a neighbor or an environmental group – to take a specific case. The third party group's case would be against the person and not against EPA, subject to the requirements of the Section 505 citizen suit provision. Also see response to question 15(d) above. The CWA does not provide for compensation of legal fees for defendants in a citizen suit.

51. If certain interpretations are beyond EPA and Corps intent, then how will you prevent third parties from suing to force a more expansive interpretation?

Response: Although the EPA cannot preclude third parties from filing suit pursuant to the Clean Water Act's citizen suit provisions, the EPA and the Corps plan to clearly articulate the concepts embodied in any final rule in order to provide maximum clarity to permit applicants, agencies, and the public. We believe that doing so will reduce, not increase, the possibility that these provisions may be misunderstood by permittees, third parties, or other stakeholders, thereby leading to less litigation. Such clarity will also aid Courts in responding consistently to citizen suits.

52. As I read the proposed rule, *all waters in a flood plain* are regulated unless expressly excluded. There is a limited exclusion for ponds that are used *exclusively* for stock watering, irrigation, settling basins, or rice growing. But I don't see any exclusion in floodplains for standing water in a field, rainwater, puddles, wet spots, or ponds that have other uses.

On July 1, Acting Assistant Administrator Stoner posted a blog that says that water in a field, ponds, and rainwater are excluded from regulation under the proposed rule. The questions and answers posted on EPA's website also says that water filled areas are excluded. On June 11, 2014, you told the House Transportation and Infrastructure Committee that backyards, wet spots, and puddles are excluded.

Where specifically in the rule are these exclusions for these features in floodplains?

Response: Considerations regarding the presence of a floodplain are only relevant to a determination regarding "adjacent" waters. The examples included in the question would not be "waters" as they are typically understood under the Clean Water Act and would therefore not be subject to CWA protection, even when they are located in a floodplain. "Standing water in a field," "rainwater," "puddles," and "wet spots" would not meet the definition of a "tributary" or a "wetland" and therefore would not be jurisdictional. As articulated in the preamble to the proposed rule with respect to puddles:

> *In clarifying the list of waters not subject to CWA jurisdiction, the agencies did not include "puddles" from the lists of waters generally not considered jurisdictional in previous preambles or guidance documents. This is not because puddles are considered jurisdictional, it is because "puddles" is not a sufficiently precise hydrologic term or a hydrologic feature capable of being easily understood. Because of the lack of common understanding and precision inherent in the term ''puddles,'' the agencies determined that adding puddles would be contrary to the agencies' stated goals of increased clarity, predictability, and certainty. In addition, one commonly understood meaning for the term "puddle" is a relatively small, temporary pool of water that forms on pavement or uplands immediately after a rainstorm, snow melt, or similar event. Such a puddle cannot reasonably be considered a water body or aquatic feature at all, because usually it exists for only a brief period of time before the water in the puddle evaporates or sinks into the ground. Puddles of this sort obviously are not, and have never been thought to be, waters of the United States subject to CWA jurisdiction. Listing puddles also could have created the misapprehension that anything larger than a puddle was jurisdictional. That is not the agencies' intent.* (79 FR 22218).

Moreover, the preamble makes clear that "[a]bsolutely no uplands located in "riparian areas" and "floodplains" can ever be "waters of the United States" subject to jurisdiction of the CWA." (79 FR 22207).

In contrast, ponds located in floodplains that are not used exclusively for the activities described in the question may be jurisdictional unless they are part of the waste treatment system exclusion, as well as wetlands that meet the regulatory definition of wetland and are not otherwise excluded from jurisdiction (e.g. prior converted cropland). This would depend on site-specific information about the water in question. The agencies welcome comments on whether other similar ponds located in floodplains should be excluded, and the agencies will work to ensure that the agencies are as clear as possible regarding the features that are excluded in the final rule.

53. Your proposed rule defines "flood plain" as *"an area bordering inland or coastal waters that was formed by sediment deposition from such water under present climatic conditions and is inundated during periods of moderate to high water flows."* The determination of what water is in a flood plain is left to the best professional judgment of EPA and Corp officials.

We are currently in the Holocene geologic time period and the most recent climactic phase of that time period (the Subatlantic) began *2500 years ago.* As some read your definition, EPA and the Corps could decide to regulate any "water" located in an area that that has been flooded in the past 2500 years.

How does the rule define "present climatic conditions?" Please provide a detailed legal rationale and any supporting examples or precedent.

Response: The rule does not specifically define "present climatic conditions." This term is derived from the definition of "floodplain" outlined in the EPA's draft scientific assessment, which includes a discussion of how a "floodplain," which is created under present climatic conditions, can be distinguished from a "terrace," which is created under earlier climatic conditions:

> *Floodplain—A level area bordering a stream or river channel that was built by sediment deposition from the stream or river under present climatic conditions and is inundated during*

moderate to high flow events. Floodplains formed under historic or prehistoric climatic conditions can be abandoned by rivers and form terraces.[9]

The period of current climatic conditions is generally understood as the period during which unconsolidated (loosely bound) sediments have been deposited by frequent flooding, and accumulated to form a modern-day "floodplain." These areas flood during moderate to high flow events, when water reaches levels above the capacity of the current stream or river. Such events occur over years or decades, not over thousands of years. The water bodies in these areas have active hydrologic, biogeochemical, and biological exchanges with river and stream channels.

The implication that the use of this term suggests that agencies would assert Clean Water Act jurisdiction over water features that flood only every 2,500 years is not the agencies intent and they will seek to add additional clarity into the final rule language based on the comments received on this topic.

54. The word "ephemeral" appears over 75 times in the preamble to the proposed rule, but it is not defined. EPA's Connectivity Report defines "Ephemeral Stream" as *"A stream or river that flows briefly in direct response to precipitation; these channels are above the water table at all times."* According the preamble to your proposed rule: *"Rills are formed by overland water flows eroding the soil surface during rain storms."*

a. Please explain in detail definitional difference between an ephemeral water of the U.S. and a non-jurisdictional rill.
b. Where is this distinction made in the proposed rule?

Response: A "tributary," as defined in the proposed rule, must have a "bed and bank" and an "ordinary high water mark," and contribute flow either directly or through other tributaries to a traditional navigable water, interstate water, or the territorial seas, to be a "water of the U.S." An ephemeral stream that meets this definition would be a "water of the U.S." A rill would not. Rills are less permanent on the landscape than streams and do not have sufficient volume or frequency of flow events to demonstrate an ordinary high water mark or bed and banks. Rills are solely erosional features that do not meet the definition of tributary. This is discussed in the preamble to the agencies' proposed rule at 79 FR 22218.

55. In her blog, Acting Assistant Administrator Stoner said that the proposed rule specifically excludes erosional features. She was referring to gullies and rills.

Does EPA believe that the CWA covers erosional features? Please provide a detailed legal rationale and any supporting examples or precedent.

Response: No. Please see response to Question 54 above.

---

[9] See Appendix A, Page A-5, at http://yosemite.epa.gov/sab/sabproduct.nsf/02ad90b136fc21ef85256eba00436459/7724357376745F48852579E60043E88C/$File/WOUS_ERD2_Sep2013.pdf.

56. The preamble to the rule recommends that EPA and the Corps trace a tributary connection through direct observation or U.S. Geological Survey maps, aerial photography or other reliable remote sensing information, or other appropriate information. Does this mean that if EPA, the Corps, or a third party can discern a flow path from an aerial photograph or remote sensing technology, then it could be covered by the CWA?

Response: This statement from the preamble merely describes the types of information that may be useful in evaluating the existence or strength of a connection between a particular waterbody and downstream waters. It does not suggest that any of these pieces of information, in and of itself, would be determinative in establishing (or not establishing) Clean Water Act jurisdiction. Field staff from both agencies currently use site-specific remote sensing information, in addition to any other available information, for determining if waters are tributaries, and so this preamble statement does not represent a change in current practice.

57. The June 5th Draft Report of the SAB on the Connectivity Study notes that light detection and ranging (LiDAR) digital elevation models are increasing the ability to see more features on the land. Some may identify these features as stream networks. "Hence, the degree of connectivity will be determined in some part by in the database and/or data collection technology used for the analysis." Does EPA believe that CWA jurisdiction can expand as technology expands?

Response: The EPA does not believe that technology will lead to an expansion of Clean Water Act jurisdiction. However, the agency believes that such tools can help improve our understanding of our nation's waters, including their location and the connections (or lack of connections) among these waters. As mentioned previously, jurisdictional determinations are typically made on a case-by-case basis based on a request from a permit applicant or landowner, and can use available written and graphic information, as well as field visits.

58. Your definition of tributary includes water that disappears underground in a so-called "natural break."

a. How will the Corps and EPA decide if an upstream channel before a break is the same as a downstream channel after a break?

b. Does either distance or timing matter?

c. Does it matter how far or how long water has to flow underground to be considered all part of the same tributary system when it recharges surface water somewhere downstream, sometime later?

Response: The proposed rule, if finalized, would not represent a change in the agencies' policy or practice with respect to evaluating "natural breaks." The agencies' decision regarding whether a break in OHWM severs jurisdiction would rely on site-specific information, including the nature and the length of that break, for the particular site.

On October 2, 2007, the agencies jointly signed Memorandum for Record 2006-436-FBV, a decision memo for a jurisdictional determination that had been elevated to agency headquarters. The agencies stated that they "agree that a break in the ordinary high water mark (OHWM) by itself is insufficient to isolate the upstream portion of a watercourse. Relevant factual considerations in these circumstances

include presence of a channel both above and below the break in the OHWM. This interpretation is based on the Clean Water Act, the agencies' regulations and existing practice, and the case law, and consistent with the legal memorandum *Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in Rapanos v. United States & Carabell v. United States.*"[10]

As highlighted in previous responses, neither the Clean Water Act nor the proposed rule would regulate groundwater as a "water of the United States."

59. The fact that your rule covers all waters in a flood plain calls into question the municipal, industrial and agricultural use of water. Water from rivers or groundwater aquifers is appropriated or withdrawn (under state law controlling the ownership of water) by municipalities, industry, farmers, and others for use. It may be stored in ponds. It may be conveyed in ditches all year round. But, until it is discharged back into a water of the U.S., any water that is in use should not be considered a water of the U.S. If it is treated, then the water might be considered part of an exempt waste treatment system, but not all water that has been used needs to be treated and some water is never discharged back to a water of the U.S.

In your outreach sessions, EPA and the Corps have told people that you did not intend to regulate these waters. Staff has even suggested that the rule does not reach water that is in use because it is no longer considered "waters" or because a pond or ditch was excavated in uplands.

Unfortunately, there is no clear exemption in the proposed rule that supports these assurances. However, a 2005 EPA General Counsel memo on water transfers says that it is EPA's longstanding position that water that is withdrawn from navigable waters for an intervening industrial, municipal or commercial use and then reintroduced to navigable waters, that reintroduction requires a permit. So, water loses its status as "waters of the United States" when it is being used.

Will the final rule will clearly explain that it does not regulate water that is withdrawn, collected, transported, stored, or used for an intervening industrial, municipal, or commercial use, and this includes all management of water internal to a particular site?

Response: The agencies' proposed Clean Water Act jurisdictional rule would not affect the agency's existing regulations and policy exempting water transfers from Section 402 of the Clean Water Act's permitting requirements. Litigation is currently ongoing regarding EPA's rule exempting water transfers. The water transfers regulation is not within the scope of the proposed waters of the United States rulemaking.

The agencies will consider all comments received on the jurisdictional status of industrial, municipal, and commercial use water features under the Clean Water Act when drafting the final rule language, including ways to increase clarity on excluded features and waters.

60. A little over a week after you testified before this Committee, it was announced that you would be leaving EPA to head the Center for Climate and Energy Solutions (C2ES).

a. When did you first have contact with the C2ES regarding the potential of your employment with the group?

[10] http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/cwa_guide/OHWM_2006-436-FBV.pdf

Response: On May 9, 2014, Mr. Perciasepe told Justina Fugh, Senior Counsel for Ethics and Alternate Designated Agency Ethics Official (ADAEO), that in a couple of weeks, he would be meeting with board members of the Center for Climate and Energy Solutions.

b. When did you first broach the topic of your departure with any EPA employees?

Response: On May 9, 201 4, Mr. Perciasepe told Justina Fugh, Senior Counsel for Ethics and Alternate Designated Agency Ethics Official (ADAEO), that in a couple of weeks, he would be meeting with board members of the Center for Climate and Energy Solutions.

c. Please outline any steps that were taken to safeguard against conflict of interest, or the appearance of inappropriate influence during the time between your initial contact with C2ES and your departure from the Agency.

Response: On May 9, 2014, Mr. Perciasepe notified the ADAEO of his possible future employment with C2ES, thus meeting his requirements under Section 17 of the STOCK Act, Pub. L. 112-105. At that time, the ADAEO counseled him about the seeking employment regulations at 5 CFR Part 2635, Subpart F, and briefly covered the post-employment restrictions at 18 USC 207. As part of his official EPA duties, Mr. Perciasepe was not involved in any specific party matter that involved C2ES, nor was he involved in any particular matter that affected C2ES as a member of a class. The EPA does not directly regulate C2ES as an entity, and C2ES is not an EPA contractor or grantee. Therefore, the ADAEO concluded that Mr. Perciasepe was able to meet his obligations to disqualify himself under 5 CFR 2635.604(a) and, as permitted by 5 CFR 2635.604(b) and (c), did not need to issue a formal written disqualification statement. On May 23, 2014, Mr. Perciasepe again met with the ADAEO, confirming that C2ES was in fact interested in pursuing him for its Executive Director vacancy. The ADAEO counseled Mr. Perciasepe orally and also in writing about his post-employment restrictions.

QUESTIONS FOR THE RECORD
The Honorable Jim Bridenstine (R-OK)
U.S. House Committee on Science, Space, and Technology

Navigating the Clean Water Act: Is Water Wet?

Wednesday July 9, 2014

Questions for Mr. Perciasepe

1. EPA claims this new Waters of the US rule only brings an additional three percent of waters under its authority and that existing exemptions will remain in place. Can you commit to me that EPA will not eventually attempt to use the rulemaking process to once again expand your authority, up to and including eliminating current exemptions for common agriculture practices?

Response: Existing exemptions for agriculture, ranching, and forestry practices are contained in the statute, and only Congress can change these statutory exclusions. We look forward to working with you to ensure the exemptions are maintained.

2. In an op-ed in the Huffington Post, Administrator McCarthy states that "some may think that this rule will broaden the reach of EPA regulations -but that's simply not the case." At the same time, EPA has also tried to dissuade fears about any overreach by claiming this expands the scope of covered waters by "only" 3.2 percent. Does the rule expand what the EPA will regulate or not?

Response: The Administrator's remarks were highlighting the fact that the agencies' proposed rule would protect fewer waters than their existing regulations. No new categories of waters would be covered under the proposed rule than have been regulated since the 1970's.

With respect to the 3.2% figure, this figure can be found in the EPA's draft economic analysis. The EPA and the Corps published revised guidance on Clean Water Act jurisdiction that accounted for the most recent Supreme Court case (*Rapanos v. United States*) in 2008. To construct the economic analysis, the agencies determined that the most appropriate baseline to evaluate was implementation of the 2008 guidance. When comparing field implementation of the 2008 guidance to their proposed rule, the EPA estimated a 3.2% change in negative jurisdictional determinations to positive as a result of the proposed rule.

3. Additionally, EPA has claimed the rule "would not infringe on private property rights" and would not act as "a barrier to economic development." Please explain this claim when, according to EPA's own economic analysis of the rule, landowners and development companies would be most heavily hit by the costs associated with the rule.

Response: The EPA's draft economic analysis reflects their best estimate of the benefits and costs at the time the rule was proposed. The draft analysis concludes that the proposed rule would provide an estimated $388 million to $514 million annually of benefits to the public, including reducing flooding,

filtering pollution, providing wildlife habitat, supporting hunting and fishing, and recharging groundwater. The public benefits significantly outweigh the costs of about $162 million to $278 million per year for mitigating impacts to streams and wetlands, and taking steps to reduce pollution to waterways.

As a general matter, the agencies believe the proposed rule will clarify Clean Water Act jurisdiction and reduce delays associated with making Clean Water Act jurisdictional decisions. The EPA's economic analysis demonstrates a marginal increase in protected waters under the proposed rule compared to current practice using the 2008 guidance. It is important to emphasize that costs associated with CWA permitting are only triggered when someone is proposing to pollute or destroy waters of the United States.

4. The Independent Petroleum Association of America, National Association of Manufacturers, Oklahoma State Chamber of Commerce, and the Oklahoma Farm Bureau are united in opposition to this rule. These groups represent hundreds of thousands of jobs in my state in some of the biggest industries in Oklahoma. When interests this varied oppose this rule, you should immediately withdraw it. Has your agency considered this?

Response: The agencies did not believe that withdrawing the proposed rule would be helpful in achieving the goals of providing additional clarity and predictability regarding the jurisdiction of the Clean Water Act. In response to requests from the public for additional time to comment on the proposed rule, the agencies did extend the public comment period on the proposed rule on two occasions, and the public comment period closed on November 14, 2014. During the public comment period, the agencies have to date received approximately 800,000 public comments, including comments from several of the industry groups referenced in your question. These comments will be extremely helpful for the agencies to consider as they work to develop a final rule.

5. For the following situations, please tell me if your analysis of the scope of the rule grants the EPA regulatory authority:

a. A homeowner installs a pond on their property, and the pond is located on the 100 year floodplain of a navigable water. Can EPA regulate the pond, and therefore their property?
b. A homeowner installs a pond on their property, and the pond is located on the 100 year floodplain of a ditch EPA determines is a tributary to a navigable water. Can EPA regulate the pond, and therefore their property?
c. A homeowner installs a pond on their property, and the pond is located on the 100 year floodplain of a ditch which is adjacent to yet another floodplain of a navigable water. Can EPA regulate the pond, and therefore their property?

Response: The Clean Water only requires permits for point source discharges of pollutants into waters of the United States. The Clean Water Act does not regulate the use of property. Regarding the situations you pose, the proposed rule explicitly excludes from the Act small ornamental waters created for primarily aesthetic reasons by excavated or diking dry land, and farm and stock ponds.

QUESTIONS FOR THE RECORD

The Honorable Kevin Cramer (R-ND)
U.S. House Committee on Science, Space, and Technology

Navigating the Clean Water Act: Is Water Wet?

Wednesday July 9, 2014

Questions for Mr. Perciasepe

1. In her blog, Acting Assistant Administrator Stoner says 'The Clean Water Act only regulates the pollution and destruction of waters." I agree, but I would expand that to say the Clean Water Act regulates the pollution and destruction of navigable waters. You can't read the word "navigable" out of the statute.

You claim you are regulating non-navigable water based on potential impact to navigable water. But, if pollution of a water or destruction of a non-navigable water cannot significantly affect the quality of a navigable water by itself, because it is too distant or is too isolated, what is your justification for regulating that non-navigable water under the Clean Water Act?

Response: The jurisdictional scope of the Clean Water Act is "navigable waters," defined in section 502(7) of the statute as "waters of the United States, including the territorial seas." Both the legislative history and the caselaw confirm that "waters of the United States" in the Clean Water Act are not limited to the traditional navigable waters.

The agencies' proposed rule reflects the Supreme Court decisions in *SWANCC* and *Rapanos* regarding the scope of Clean Water Act jurisdiction. In particular, the agencies have incorporated the "significant nexus" test included in Justice Kennedy's opinion in *Rapanos*. In that opinion, Justice Kennedy provided guidance to the agencies that establishing a significant nexus requires examining whether a water "alone or in combination with similarly situated [wet]lands in the region, significantly affect[s] the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" 547 U.S. at 780. The agencies determined that it is reasonable and appropriate to apply the ''significant nexus'' standard for Clean Water Act jurisdiction that Justice Kennedy's opinion applied to adjacent wetlands to other categories of water bodies as well (such as to tributaries of traditional navigable waters or interstate waters, and to "other waters") to determine whether they are subject to CWA jurisdiction, either by rule or on a case-specific basis.

2. The definition "other waters" makes it sound as if the EPA is concerned there might be something they missed. This definition appears to be a "capture everything else" definition.

a. Please explain why you need a category called "other waters" and how the Agency plans to provide certainty to the regulated community that the Agency will not take the overly broad view that some fear?

Response: Under the proposed rule, "other waters" are those waters, including wetlands, that do not meet the criteria of any of the defined categories of jurisdictional waters, and are not one of the waters

and features explicitly excluded from the definition of "waters of the United States." In the existing regulation, there is a nonexclusive list of the types of "other waters" which may be found to be "waters of the United States." In light of the Supreme Court decisions in *SWANCC* and *Rapanos*, the agencies proposed to modify that category to identify waters that would only be jurisdictional upon a case specific determination that they have a significant nexus as defined by the proposed rule.

In addition, the agencies specifically sought public comment on several potential options for addressing "other waters" to ensure that their approach is based on peer-reviewed science and consistent with the Clean Water Act and applicable caselaw. The agencies will consider the comments received on "other waters" when developing the final language for the rule.

b. Can you site another Clean Air Act rulemaking-not a guidance-where the Agency left open an undefined catch all like the "other waters" term here?

Response: At this time, the agencies have published a proposed rule for public comment, and the public comment period on the proposed rule closed on November 14, 2014. The agencies have not published a final rule. With respect to "other waters," the proposed rule would adopt a case-by-case approach toward determining the jurisdictional status of such waters, as described in response to (a) above. The agencies proposed a specific definition (proposed subsection 7) and include significant discussion in the preamble about how this provision would be applied. Moreover, the agencies specifically sought comment on several proposed options for addressing the question of "other waters" in order to provide maximum clarity and to ensure that a final rule, when issued, is fully consistent with peer-reviewed science, the Clean Water Act, and applicable caselaw. The agencies are currently reviewing the comments we received on this and other issues to inform development of a final rule.

Presuming that this question seeks other Clean Water Act examples in which the EPA has not fully established, by rule, the precise bounds of its authority, the EPA's regulations for stormwater discharges at 40 CFR 122.26(a)(v) allow a state or the EPA Regional Administrator to designate a stormwater discharge as subject to NPDES permitting if it is determined that the discharge "contribute[s] to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States."

c. Over the past few months when faced with questions about the vagueness of definitions, the Agency has often claimed that broad definitions are beyond the EPA intended. What legally binding assurances can the EPA provide? Will legal certainty provide protections from third-party law suits?

Response: Although the EPA cannot preclude third parties from filing suit pursuant to the Clean Water Act's citizen suit provisions, the EPA and the Corps plan to clearly articulate the concepts embodied in any final rule in order to provide maximum clarity to permit applicants, agencies, and the public. We believe that doing so will reduce, not increase, the possibility that these provisions may be misunderstood by permittees, third parties, or other stakeholders, leading to less litigation. Such clarity will also aid Courts in responding consistently to citizen suits.

3. What "waters" does EPA believe it does not and cannot ever have the authority to regulate?

Response: The proposed rule explicitly identifies several types of waters that are not covered by the Act, regardless of whether they fit within one of the categories that would otherwise be considered jurisdictional:

- Ditches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow.
- Ditches that do not contribute flow, either directly or through another water, to a traditional navigable water, interstate water, the territorial seas or impoundment.
- The following features:
  - Artificially irrigated areas that would revert to upland should application of irrigation water to that area cease;
  - Artificial lakes or ponds created by excavating and/or diking dry land and used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing;
  - Artificial reflecting pools or swimming pools created by excavating and/or diking dry land;
  - Small ornamental waters created by excavating and/or diking dry land for primarily aesthetic reasons;
  - Water-filled depressions created incidental to construction activity;
  - Groundwater, including groundwater drained through subsurface drainage systems; and
  - Gullies and rills and non-wetland swales.

In addition, the EPA does not have the authority to regulate waters that lack a significant nexus with traditional navigable waters, interstate waters, or the territorial seas. The agencies have also never interpreted the Clean Water Act as regulating groundwater. Finally, the proposed rule would not change any of the existing statutory and regulatory permitting exemptions.

4. The Agency has made statements that make it sound as if the EPA is being generous in providing agricultural exceptions for 56 accepted conservation practices, but it is my understanding NRCS has over 200 accepted practices and the law actually requires EPA to include these 404 exemptions for normal farming practices.

Response: The agencies worked closely with NRCS to identify conservation practices that could potentially occur in a water of the U.S. The list of NRCS practices in the interpretive rule is not meant to suggest that other conservation practices, not on the list, could not also qualify for the exemption for normal farming and ranching activities. Rather, it is meant to provide regulatory certainty to farmers for those practices that the agencies have specifically studies and determined that they fit within the statutory exemption. Update to this response: On December 16, 2014, President Obama signed the Consolidated and Further Continuing Appropriations Act, 2015, which instructs the EPA and the Department of the Army to withdraw the agencies' interpretive rule. The EPA and the Army followed the statutory directive and withdrew the interpretive rule.

5. Can you explain why a home builder might need to get a Section 402 permit?
a. What does a home builder need to do to obtain a Section 402 permit?
b. What about a 404 permit?
c. What percentage of homes or commercial developments would need some type of Clean Water Act permit?

Response: Section 402: A home builder is required to obtain permit coverage under Section 402 of the Clean Water Act to manage stormwater discharges to waters of the U.S. if construction activities (clearing, grading, and excavating) disturb greater than a specified acreage of land. In areas where EPA is the permitting authority this acreage limit is one acre or more, or projects that involve less than an acre if the projects are part of a common plan of development that, in total, disturbs greater than one acre. States that are authorized to implement the 402 program may have more stringent limits.

Most construction activities resulting in stormwater discharges to waters of the United States are covered by a general permit, which describe the procedures required to obtain coverage under the permit. Most states are authorized to implement the stormwater permitting program pursuant to Section 402, and in such states, developers would need to contact the state permitting authority or review the State's general permit for information on how to apply for a permit. The EPA remains the permitting authority in a few states, territories, and in most areas in Indian Country. In areas where the EPA is the permitting authority, operators must follow the procedures in the EPA Construction General Permit (CGP). A home builder can obtain coverage under the CGP using the EPA's electronic Notice of Intent (e-NOI) system.[11]

A home builder would also need a Section 402 permit for a discharge of other pollutants into jurisdictional waters from a point source should such circumstances exist.

Section 404: A home builder may need a permit under Section 404 of the Clean Water Act if he or she proposes to discharge dredged or fill material into a water of the United States from a point source. For example, if the home builder proposes to fill in a wetland that is a water of the U.S., that activity would require a Section 404 permit. The U.S. Army Corps of Engineers is the permitting authority under Section 404 of the Clean Water Act except in Michigan and New Jersey, where both have assumed portions of Section 404 permitting authority. The Corps can provide assistance to a home builder regarding the permitting process, including whether the Corps' Nationwide Permit 29 (Residential Developments) may provide general permit coverage for a particular discharge. In addition, depending on the specific type of activity related to the discharge there are other Nationwide General Permits that may be applicable, or specific State Programmatic or Regional General Permits in Corps districts. In Michigan and New Jersey, a developer may contact the relevant state agency for information on the permitting process.

Because the Corps is the agency that conducts most of the day-to-day permitting under Clean Water Act Section 404, the EPA is unaware of the overall percentage of residential or commercial development activities that require Clean Water Act Section 404 permits. The EPA also has no data on the percentage of developments requiring Clean Water Act permits requested in question (c). However, when the EPA developed the Effluent Limitation Guideline for Construction and Development, it estimated that there are between 84,000 and 85,000 construction projects (residential, non-residential,

[11] Additional information on how Section 402 of the Clean Water Act applies to such activities is available at http://water.epa.gov/polwaste/npdes/stormwater/Stormwater-Discharges-From-Construction-Activities.cfm

and transportation) per year that are one acre or more. This would represent the universe of construction projects that *potentially* must obtain coverage under a Section 402 permit.

6. It seems like EPA wants to have it both ways. On one hand you are saying that no new waters are being regulated. On the other hand you are saying these changes are going to have huge benefits to the environment.

a. Which is it?

Response: The agencies' proposed rule would not protect any new categories of waters that have not historically been protected under the Clean Water Act, however it would result in a small increase in protected waters compared with current practice under the agencies' 2008 guidance. The agencies' rulemaking efforts are designed to provide additional clarity regarding which waters are protected by the Clean Water Act, which will help ensure these waters' protection from harmful pollution. The projected environmental benefits from the rule come from those waters that the agencies are currently not regulating, but which may be regulated under the rule. Determining Clean Water Act protection for streams and wetlands became confusing and complex following Supreme Court decisions in 2001 and 2006. For nearly a decade, members of Congress, state and local officials, industry, agriculture, environmental groups, and the public asked for a rulemaking to provide clarity. About 60 percent of stream miles in the U.S. only flow seasonally or after rain, but have a considerable impact on downstream waters. And approximately 117 million people – one in three Americans – get drinking water from public systems that rely in part on these streams. These are important waterways for which EPA and the Army Corps are strengthening protection.

b. What in the current guidance do you feel is not sufficiently protective of water compared with the proposed rule?
c. If you are not really changing anything why are we all here today? Why go to all the expense of this rulemaking?

Response: The agencies believe the current guidance creates unnecessarily confusing and case-specific processes for making determinations about Clean Water Act jurisdiction. The guidance has created inconsistencies in the way jurisdictional determinations are conducted and, as a result, uneven protection for the nation's waters. In contrast, rulemaking enables the agencies to create clearer categories, by rule, of which waters are protected by the Clean Water Act and which are not. For example, the proposed rule says that all tributaries to navigable and interstate waters and the territorial seas, and all waters adjacent to them, are jurisdictional by rule, without the need for a case-by-case determination. Creating these categories is not possible with guidance and must be done via rulemaking. For this reason, for nearly a decade, members of Congress, state and local officials, industry, agriculture, environmental groups, and the public asked for a rulemaking to provide clarity. With this rulemaking, the agencies are responding to this call for clarity.

Appendix II

Additional Material for the Record

WRITTEN STATEMENT SUBMITTED BY RANKING MEMBER EDDIE BERNICE JOHNSON

Thank you, Chairman Smith for holding today's hearing to examine the rule proposed by the Environmental Protection Agency and the Army Corps of Engineers to clarify the definition of the "waters of the United States" in the Clean Water Act. I'd also like to thank Mr. Perciasepe for his participation this morning. I'm looking forward to your testimony and our discussion today. There has been a significant amount of confusion about what waters will be subject to the requirements of the Clean Water Act in light of the proposed rule, and today's hearing provides us with the opportunity to clear up any misconceptions.

As my colleagues are aware, I am a strong supporter of EPA's mission to protect public health and the environment. I am also a believer that a strong economy and a healthy environment go hand in hand. It is clear that clean water plays an important role, not just in the day to day lives of every American, but in nearly every sector of our economy. The availability and quality of water is critical to manufacturing, agriculture, recreation and tourism, energy production, and commercial fisheries.

In 1972 Congress recognized the value of the Nation's water supply to our economy and quality of life and enacted the Clean Water Act to protect this vital and finite resource. However, rulings by the Supreme Court in 2001 and 2006 have created ambiguity regarding what waters are subject to the Act's jurisdiction.

For nearly a decade, stakeholders ranging from the American Association of State Highway and Transportation Officials to the Environmental Defense Fund to the American Petroleum Institute have been calling on EPA and the Army Corps to provide clarity about what is and what is not a "water of the United States." And while there may be differences in opinion about the proposed rule, I applaud the agencies for addressing this need and working to provide "greater clarity, certainty, and predictability" to the regulated community and state and local governments that share the task of implementing and enforcing the Clean Water Act.

As we will likely hear today, streams, lakes, and wetlands offer a variety of ecological benefits and services. For example, wetlands can store excess water after a heavy rainfall, reducing the possibility of flooding; they can trap sediments and filter out pollutants, improving water quality; and they can serve as a breeding ground for fish and other aquatic life, increasing biological diversity.

As a representative from the great state of Texas, I have seen first-hand the impact water shortages can have on public health and the economy. In 2011 Texas experienced one of the worst droughts on record with nearly 1,000 public water systems implementing restrictions on the use of water. In fact, 23 of those systems believed they would run completely out of water within 180 days. Additionally, about 16 percent of the Texas' power generation relies on cooling water from sources that are at historically low levels. Competition for water in the state is already high, but climate change is likely to further increase competition for this critical resource as shortages are expected to rise and the quality of our water resources is predicted to decline.

We need a reliable supply of clean water in order for our economy to remain strong. The proposed rule we are discussing today will go a long way in protecting this critical resource, and this hearing can be a constructive mechanism for all of us to learn more about the proposed rule.

Thank you, Mr. Chairman and I yield back the balance of my time.

LETTERS SUBMITTED BY CHAIRMAN LAMAR SMITH

Texas and Southwestern Cattle Raisers Association
1301 W. SEVENTH ST. ★ SUITE 201 ★ FORT WORTH, TEXAS 76102-2665
817-332-7064 ★ 800-242-7820 ★ F:817-332-6441 ★ WWW.TSCRA.ORG

The Cattleman
CATTLE RAISERS INSURANCE

July 8, 2014

House Committee on Science, Space and Technology
2321 Rayburn House Office Building
Washington, DC 20515

RE: Proposed regulations by the U.S. Environmental Protection Agency and U.S. Army Corps of Engineers

Dear Chairman Smith, Ranking Member Johnson and Members of the Committee:

As you know, the Texas and Southwestern Cattle Raisers Association (TSCRA) is a 137-year-old trade association and is the largest and oldest livestock organization based in Texas. TSCRA has a membership of more than 16,500 beef cattle operations, ranching families and businesses. These members represent over 50,000 individuals directly involved in ranching and beef production that manage over four million head of cattle on more than 76 million acres of range and pasture land primarily in Texas and Oklahoma, but throughout the Southwest.

TSCRA is greatly concerned about the proposed joint regulations by the U.S. Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers (Corps) redefining what waters will come under federal jurisdiction through a new definition of "Waters of the United States" (WOTUS) under the federal Clean Water Act (CWA). TSCRA strongly opposes these regulations because they will endanger landowners' long held private property rights and cost them millions of dollars.

The proposal attempts to make all waters jurisdictional and then either excludes certain categories of waters from WOTUS or exempts certain activities from permitting requirements under one specific program of the CWA, the Sec. 404 Dredge and Fill permit.

The difference between the two is fundamentally important. Exempting activities means the water in question is still a WOTUS, while an exclusion means that the water itself is not a WOTUS and is outside the CWA. The change to the definition in this proposal expands every single program under the CWA, including Sec. 303 Total Maximum Daily Loads (TMDLs) and water quality standards, Sec. 311 Spill Prevention Control and Countermeasure (SPCC) oil spill plans program, Sec. 402 National Discharge Elimination System (NPDES) program, and Sec. 404 Dredge and Fill permit program, which means that an exempted activity from the Sec. 404 program is not necessarily exempt from regulation under these other programs.

In addition, the EPA and Corps have already implemented an interpretative rule (IR) including a Memorandum of Understanding (MOU) with the U.S. Department of Agriculture that states activities associated with 56 select Natural Resource Conservation Service (NRCS) conservation practices are exempted from requiring a 404 Dredge and Fill permit if the applicable NRCS standards are followed exactly. EPA signed the MOU with USDA recognizing these 56 practices as exempt activities that might cause a "fill" of a WOTUS on the land associated with the practice.

TSCRA believes this provision actually narrows the current statutory exemption for normal ranching practices and creates more legal liability for ranchers and landowners who undertake voluntary conservation activities. State conservation practice standards would not receive the exemption and could require a 404 permit for implementing or maintaining them. The agencies have also asserted that grazing, putting in fence, prescribed burning and other activities that make up the 56 select practices are "discharge activities" under the CWA that

would require a permit. Lastly, the IR turns the NRCS, a federal agency with a strong history of providing valuable technical assistance to ranchers and landowners, into a regulatory compliance agency for CWA enforcement purposes.

TSCRA has requested that these agencies pull these proposed regulations down immediately and also respectfully requests that the United States Congress do everything within its authority to stop the actions of these agencies.

Thank you for your attention to this very important issue. Please contact TSCRA if you need further information.

Sincerely,

Pete Bonds
President

DATE: 8 July 2014

FROM: Cord Switzer
Fredericksburg Winery
247 W. Main Street
Fredericksburg, Texas 78624

TO: Lamar Smith - Chairman
Eddie Bernice Johnson - Ranking Member
U.S. House Committee on Science, Space, and Technology
2321 Rayburn House Office Building
Washington, D.C. 20515

SUBJECT: EPA Rule Change to Clean Water Act (EPA–HQ–OW–2011–0880)

As a member of the Texas Wine Industry for many years I wish to express my concern and opposition to the expansion of the "navigable waters" concept. Any additional rules and regulations do nothing but hamper the expansion of our industry. Grape growing is extremely water conservative but also - as with any farm crop - water dependent.

The Texas Wine Industry had an economic impact of $1.8 billion in 2011 - is 5th in wine production in the United States and 7th in grape growing. The industry is expanding planted acres each year but now I am already hearing a hesitancy about next year. It was our intent to start replanting an 18 acre vineyard but due to this potential rule change we will postpone for further evaluation.

The intrusion on the concept of "property rights" strikes a fear in every property owner but in particular when you are a farmer who makes their living from the land. Now you add on the negative economic impact of more government rules and regulations with more reporting, permit requirements and government oversight and the issue is compounded even more.

Any additional rules or regulations puts an **"undue burden on small businesses"**. With a few exception most of the growers and wineries are small and family owned – even the larger ones by Federal definition fall under the category of small business.

For the betterment of our state and our nation I request that you stop the rule change.

Respectfully,

Cord Switzer

PRO-BUSINESS • PRO-TEXAS
FOR OVER 75 YEARS

July 3, 2014

The Honorable Lamar Smith
U.S. House of Representatives
2409 Rayburn HOB
Washington, DC 20515

RE: EPA Proposed Rule on Waters of the United States

Dear Congressman Smith,

In advance of the House Science Committee's hearing on the Environmental Protection Agency's Waters of the United States proposed rule, I am writing to express the concerns of the Texas Association of Business (TAB) with the potential impact of the proposed rule on our members and essentially all businesses and local communities in Texas.

TAB is a broad-based, bipartisan organization representing more than 4,000 Texas employers and over 200 local chambers of commerce. As Texas' leading employer organization for more than 90 years, TAB represents some of the largest multi-national corporations as well as small businesses in almost every community in the state.

I would like to register my support for the effort of the House Committee on Science, Space, and Technology to address this important issue. The Supreme Court has twice affirmed that both the U.S. Constitution and the Clean Water Act place limits on federal authority over intrastate waters. Moreover, Congress has decided not to change the careful balance between federal and state regulation.

EPA and the U.S. Army Corps of Engineers (Corps) proposed this rule to change the definition of "Waters of the United States" under the Clean Water Act (CWA). This change is comprised of a complicated set of regulatory definitions, including new and poorly defined terms, based on ambiguous and untested legal theories and regulatory exclusions. The result is a proposal that asserts jurisdiction over waters, including many ditches, conveyances, isolated waters, and other waters, that are presently under the jurisdiction of the states and that is inconsistent with Congressional intent and recent Supreme Court decisions.

EPA's proposed rule will create a great deal of uncertainty for our business members, and could put potential projects and investments in a holding pattern due to the uncertainty of what would be covered jurisdictionally and who would or would not need a permit.

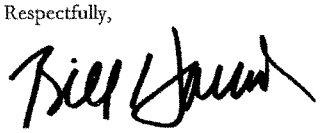
1209 Nueces • Austin, Texas 78701
512.477.6721 • 512.477.0836 fax • www.txbiz.org

This proposed rule could also impact existing operations or facilities by expanding the jurisdiction to cover businesses that were not previously required to hold a permit.

In addition to the new permitting requirement and use restrictions businesses will face, the EPA's permitting process does not provide any certainty for planning purposes. Recently, the EPA for the first time used its power to retroactively veto a valid CWA permit, thereby halting an on-going and lawfully permitted operation. EPA currently is in the process of potentially using its power to prospectively veto another project before companies involved could even apply for a permit but, after hundreds of millions of dollars had been spent in up-front expenditures. Subjecting businesses to this type of uncertainty in the permitting process will send investment dollars elsewhere.

I ask that you stop EPA from finalizing this proposed rule that would create a significant amount of uncertainty and would impact the business community in a detrimental way. Thank you for your time and consideration to this matter.

Respectfully,



Bill Hammond
Chief Executive

TEXAS FARM BUREAU

KENNETH DIERSCHKE
President

DAVID STUBBLEFIELD
Vice President

RUSSELL W. BOENING
Secretary-Treasurer

ROBERT GORDON
Dalhart

DAN B. SMITH
Lockney

MICHAEL WHITE
Vernon

BEN F. WIBLE
Sherman

MARK R. CHAMBLEE
Tyler

DAVID STUBBLEFIELD
Colorado City

DAVE EDMISTON
Brady

NEIL F. WALTER
Ogleshy

LARRY W. JOINER
Huntington

RONNIE MUENNINK
Hondo

BOB REED
Bay City

RUSSELL W. BOENING
Polk

DALE MURDEN
Monty Alto

July 8, 2014

The Honorable Lamar Smith
House Committee on Science, Space and Technology
2321 Rayburn HOB
Washington, D.C. 20515

Dear Mr. Chairman:

Texas Farm Bureau appreciates the Science, Space and Technology Committee conducting this hearing to review proposed rule changes to the Clean Water Act (CWA). Texas farmers and ranchers are concerned about the impact this rule may have on their ability to conduct normal farming practices and impose restrictions on use of acreage they cultivate.

The proposed rule by the Environmental Protection Agency and the US Army Corps of Engineers under the Clean Water Act (CWA) redefines the term "waters of the United States." The definition blurs the lines between point source pollution and agriculture non-point source runoff. Furthermore, it directly contradicts the *SWANCC* and *Rapanos* decisions of the U.S. Supreme Court.

The agencies claim to have preserved CWA agriculture exemptions. But the interpretive rule specifies 56 normal farming practices as exempt **only** if producers adhere to stringent Natural Resource Conservation Service standards.

We applaud the agencies for work done to improve point-source pollution problems. However, they should not exceed legal authority and impose improper restrictions on farmers and ranchers as they produce necessary food and fiber. The attached fact sheet provides a point-by-point explanation of our concerns about the proposed agency rule.

Again, we appreciate your conducting this hearing regarding proposed Clean Water Act changes. We look forward to working with the Congress to protect both natural resources and private property.

Sincerely,

Kenneth Dierschke

Kenneth Dierschke
President

KD:SP:cjg

7420 Fish Pond Rd.
Waco, TX 76710

o 254.772.3030

TEXASFARMBUREAU.ORG

Impact of Proposed Clean Water Act Rules
On Farmers and Ranchers in Texas

In March 2014, the Environmental Protection Agency (EPA) and US Army Corps of Engineers (Corps) proposed rules to "clarify" the agencies' jurisdiction under the Clean Water Act by defining the term "waters of the United States."

The proposed definition expands jurisdiction to practically every place where water collects and flows. Regardless of the presence of water or the magnitude or frequency of flow as long as the water is somehow connected to larger, downstream waters it is regulated.

The proposed rule would expand federal jurisdiction to the following "water" features.

- Ditches and drainage features
- Floodplains
- Areas adjacent to streams
- Isolated wetlands
- Dry arroyos
- Farm ponds (if found to have connectivity)
- Erosion control structures
- Low areas in fields
- Riparian corridors
- Playa Lakes

The proposed rule is in direct contradiction to the *SWANCC* and *Rapanos* decisions. The US Supreme Court ruled that federal jurisdiction was limited, and that agencies must establish a "significant nexus" to navigable waters in order to claim regulatory jurisdiction.

Impact to Farmers and Ranchers
This expanded jurisdiction blurs the lines between agricultural non-point source runoff (which is exempt from Clean Water Act regulations) and point source pollution (which is regulated). – Which subjects farmers and ranchers to new permitting requirements and fines of up to $37,500 per day.

EPA and the Corps have taken additional steps to narrow the interpretation of "normal farming practices". In the "interpretive rule", the agencies specify that 56 farming practices are exempt from permitting **only if** these practices adhere to stringent NRCS standards – which are not subject to rulemaking.

The new rules also increase the potential for litigation under third-party, citizen lawsuits provisions of the Clean Water Act. They afford activist groups the opportunity to seek federal prosecution against farmers and ranchers for normal farming activities.

EPA claims to have preserved agricultural exemptions granted by the Clean Water Act and that proposed rules will have no impact on farmers or ranchers. However, this is simply not the case. The proposed rule will extend regulations for rivers and lakes, into fields and onto farms.

The result will increase costs, delays, and result in loss of revenue for farmers and ranchers. Furthermore, land use restrictions could result in the loss of tens, if not hundreds of thousands of productive farmland acres across the United States.

If these newly created "waters of the U.S." also subject privately held lands to Endangered Species Act regulations, the impacts would be much greater – dwarfing the impacts of the Clean Water Act itself.

LETTERS SUBMITTED BY REPRESENTATIVE KEVIN CRAMER

July 3, 2014

The Honorable Kevin Cramer
U.S. House of Representatives
1032 Longworth House Office Building
Washington, DC 20515

Dear Representative Cramer:

Bottineau County Farm Bureau encourages you to take action against the Environmental Protection Agency's proposed rule change to expand its Waters of the United States overreach.

If the proposed rules go into effect, farming as we know it will end. Federal agencies will have the power to dictate land use and farming practices. This is unacceptable.

The proposed rule is a blatant end run around Congress and the U.S. Supreme Court that should not go unpunished. In fact, in two separate decisions, the U.S. Supreme Court has said there are limits to EPA's authority under the Clean Water Act.

By removing the term navigable, EPA gains a foothold to every spare foot of America. Wherever rain falls and water pools will be a "Water of the U.S." and EPA regulators will be telling us what we can and can't do with OUR land, in OUR businesses, and in OUR lives. This has to stop.

Congress, not federal agencies, makes the laws. Please help us by convincing your colleagues in Congress that the proposed rule cannot stand. Our livelihoods depend on it.

Sincerely,

Tom Henry

Tom Henry, President
Bottineau County Farm Bureau

July 3, 2014

The Honorable Kevin Cramer
U.S. House of Representatives
1032 Longworth House Office Building
Washington, DC 20515

Dear Representative Cramer:

McLean County Farm Bureau is asking for your help to stop the EPA's blatant disregard for farmers and ranchers by opposing the proposed rule that would expand its Waters of the United States overreach.

By removing the term navigable, the EPA gains a foothold to every spare foot of America. If the agency can regulate every water body from the largest to the smallest, and even those areas that aren't wet most of the time, as it is proposing in this rule, then there are effectively no limits to the agency's regulatory reach.

Congress needs to take back its oversight responsibility and stop the federal government's intrusion into our lives, our families and our businesses. We believe you understand what this proposed rule change would mean for North Dakota – and we hope that you can convince your colleagues on Capitol Hill to give the EPA a serious reckoning. The EPA is getting seriously out of hand with its efforts to control every part of our lives. Somebody has to look out for the people, and we think you are just the person to make sure that happens.

Please convince your colleagues in Washington D.C. to rein-in the EPA and stop this regulatory overreach.

Sincerely,

Katie Heger

Katie Heger, President
McLean County Farm Bureau

May 28, 2014

The Honorable Kevin Cramer
US House of Representatives
1032 Longworth House Office Building
Washington, DC 20515

Dear Representative Cramer:

We at Nelson County Farm Bureau are extremely concerned over the proposed rule change to the Clean Water Act as it pertains to the EPA's expansion of navigable waters of the United States. The proposed rule change significantly expands the scope of navigable waters subject to the Clean Water Act's jurisdiction. As we read the proposal it would allow the federal government to regulate ditches, small waters, and all drains. Of these areas most aren't usually wet very long much less navigable. The Supreme Court has ruled repeatedly that Congress meant what it said "Navigable water does not mean all waters".

The EPA and other environmentalist refuse to accept the Supreme Court ruling over navigable waters and the limits to their jurisdiction. The proposed rule change will force roadblocks for farmers and ranchers when doing ordinary land use activities such as spraying, fencing, and tillage. The farming and ranching exception in the current law is important but has been very narrowly applied by the agencies and will not protect farmers and ranchers from the proposed water rule and government regulatory over-reach. The proposed rule does not provide clarity or certainty as EPA has stated. The only thing that is clear and certain is that, under this rule, it will be more difficult to farm and ranch, or make changes to the land – even if those changes would benefit the environment.

We at Nelson County Farm Bureau are asking for your help to block the EPA's continued disregard of Congress and the Supreme Court's ruling on this matter.

Sincerely,

Kristie Sundeen

Kristie Sundeen, President
Nelson County Farm Bureau

July 6, 2014

The Honorable Kevin Cramer
U.S. House of Representatives
1032 Longworth House Office Building
Washington, DC 20515

Dear Representative Cramer:

Members of Traill County Farm Bureau are firmly opposed to the EPA's proposed rules regarding Waters of the U.S. This is a clear case of government and regulatory overreach by unelected bureaucrats.

The original intent of the Clean Water Act would be completely hi-jacked if these people get what they want. And it seems what the EPA wants, by this action, is to drive farming in America out of business.

If the proposed rules go into effect, it will be an invasion of our personal rights, our property rights, and even state sovereignty. It must be stopped. We hope that you and your colleagues on Capitol Hill will rein-in the EPA once and for all.

Sincerely,

Dana Kaldor, President
Traill County Farm Bureau

LETTERS SUBMITTED BY REPRESENTATIVE PAUL C. BROUN

Congress of the United States
Washington, DC 20515

May 1, 2014

The Honorable Gina McCarthy
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, D.C. 20460

The Honorable John M. McHugh
Secretary
Department of the Army
The Pentagon, Room 3E700
Washington, D.C. 20310

Dear Administrator McCarthy and Secretary McHugh:

We write to express our serious concerns with the proposed rule re-defining the scope of federal power under the Clean Water Act (CWA) and ask you to return this rule to your Agencies in order to address the legal, economic, and scientific deficiencies of the proposal.

On March 25, 2014, the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (USACE) released a proposed rule that would assert CWA jurisdiction over nearly all areas with any hydrologic connection to downstream navigable waters, including man-made conveyances such as ditches. Contrary to your agencies' claims, this would directly contradict prior U.S. Supreme Court decisions, which imposed limits on the extent of federal CWA authority. Although your agencies have maintained that the rule is narrow and clarifies CWA jurisdiction, it in fact aggressively expands federal authority under the CWA while bypassing Congress and creating unnecessary ambiguity. Moreover, the rule is based on incomplete scientific and economic analyses.

The rule is flawed in a number of ways. The most problematic of these flaws concerns the significant expansion of areas defined as "waters of the U.S." by effectively removing the word "navigable" from the definition of the CWA. Based on a legally and scientifically unsound view of the "significant nexus" concept espoused by Justice Kennedy, the rule would place features such as ditches, ephemeral drainages, ponds (natural or man-made), prairie potholes, seeps, flood plains, and other occasionally or seasonally wet areas under federal control.

Additionally, rather than providing clarity and making identifying covered waters "less complicated and more efficient," the rule instead creates more confusion and will inevitably cause unnecessary litigation. For example, the rule heavily relies on undefined or vague concepts such as "riparian areas," "landscape unit," "floodplain," "ordinary high water mark" as determined by the agencies' "best professional judgment" and "aggregation." Even more egregious, the rule throws into confusion extensive state regulation of point sources under various CWA programs.

In early December of 2013, your agencies released a joint analysis stating that this rule would subject an additional three percent of U.S. waters and wetlands to CWA jurisdiction and that the rule would create an economic benefit of at least $100 million annually. This calculation is seriously flawed. In this analysis, the EPA evaluated the FY 2009-2010 requests for jurisdictional determinations – a period of time that was the most economically depressed in

PRINTED ON RECYCLED PAPER

nearly a century. This period, for example, saw extremely low construction activity and should not have been used as a baseline to estimate the incremental acreage impacted by this rule. In addition, the derivation of the three percent increase calculation did not take into account the landowners who – often at no fault of their own – do not seek a jurisdictional determination, but rather later learn from your agencies that their property is subject to the CWA. These errors alone, which are just two of many in EPA's assumptions and methodology, call into question the veracity of any of the conclusions of the economic analysis.

Compounding both the ambiguity of the rule and the highly questionable economic analysis, the scientific report – which the agencies point to as the foundation of this rule – has been neither peer-reviewed nor finalized. The EPA's draft study, "Connectivity of Streams and 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 the rule was sent to OMB for interagency review. The science should always come before a rulemaking, especially in this instance where the scientific and legal concepts are inextricably linked.

For all these reasons, we ask that this rule be withdrawn and returned to your agencies. This rule has been built on an incomplete scientific study and a flawed economic analysis. We therefore ask you to formally return this rule to your agencies.

Sincerely,

CHRIS COLLINS
Member of Congress

KURT SCHRADER
Member of Congress

BILL SHUSTER
Chairman
House Committee on
Transportation and Infrastructure

LAMAR SMITH
Chairman
House Committee on
Science, Space, and Technology

FRED UPTON
Chairman
House Committee on
Energy and Commerce

DOC HASTINGS
Chairman
House Committee on
Natural Resources

FRANK LUCAS
Chairman
House Committee on Agriculture

COLLIN PETERSON
Ranking Member
House Committee on Agriculture

HAL ROGERS
Chairman
House Committee on Appropriations

SAM GRAVES
Chairman
House Committee on Small Business

BOB GOODLATTE
Chairman
House Committee on Judiciary

DAVE CAMP
Chairman
House Committee on Ways and Means

DARRELL ISSA
Chairman
House Committee on
Oversight and Government Reform

JOHN KLINE
Chairman
House Committee on
Education and Workforce

PETE SESSIONS
Chairman
House Committee on Rules

JEB HENSARLING
Chairman
House Committee on Financial Services

JEFF MILLER
Chairman
House Committee on Veterans' Affairs

CANDICE MILLER
Chairman
House Committee on House Administration

MIKE ROGERS
Chairman
House Permanent Select Committee
on Intelligence

BOB GIBBS
Chairman
Subcommittee on
Water Resources and Environment

MIKE McCAUL
Chairman
House Committee on Homeland Security

PAUL RYAN
Chairman
House Committee on Budget

CC: The Hon. Dr. Howard Shelanski, OMB Office of Information and Regulatory Affairs

IL-18

Michael Burgess

Tom Petri

Bennie G. Thompson

Gene Chandler

Shelley Moore Capito

Ralph M. Hall

Matt Salmon

Doug Lamborn

Tim Murphy

Mike Coffman

Sanford D. Bishop Jr.

Paul Broun

Mike McIntyre

Tim Walberg

Blaine Luetkemeyer

Pete Stark

Robert Latta

Lynn A. Westmoreland

Ron Paul

Steve Pearce

John J. Duncan Jr.

Hansen Clarke

Tom Rooney

Paul A. Gosar

Keith J. Rothfus

Doug La Malfa

Randy K. Weber

Ted S. Yoho

Don Bacon

Austin Scott

Pete P. Gallego

Doug Collins GA-09

Tom Graves

Richard Hudson

Joseph R. Pitts

Scott Rigell

TN-04

David B. McKinley

Dave Reichert

Phil Gingrey

Ann Wagner

Martha Roby

Jackie Walorski

Tom Cotton

J. Rady Hoches

Ed Whitfield

Ken Calvert

Steve King

J.T. Smith

Walter B. Jones

Don Young

Dan Burton

John Kline

Filo Vela

Billy Boyd M.C.

Robert E. Latta

Ron Paul

Adrian Smith

John Barrow

Walter B. Jones

Mike Simpson

Bill Owens

Tom Feeney

Jim Sensenbrenner WI-05

Robert J. Wittman VA-01

Brett Guthrie

Gregg Harper

M.C.

Glenn GT Thompson

Chris Stewart

Mike Rogers (AL-03)

Adam Schiff

Larry Bucshon

Jay Obernolte

Vicky Hartzler

Kay Granger

Lance Gooden

Bill Flores

Pete Sessions

Mike Garcia

Steve Womack

Mark Takano

Roger Williams

Doug Lamborn

Jaime Herrera Beutler

Bill Cassidy

Terri Sewell

Tim Griffin (AR-02)

Brad R. Wenstrup

Bill Huizenga

Mike Kelly

Dave Schweikert

Andy Barr

Randy Neugebauer

Billy Long

Susan W. Brooks

Mark Kelly

Raúl R. Labrador

Bill Johnson

Bill Posey

Rob Woodall

Marsha Blackburn

Duncan Black

Mo Brooks

Sam Johnson

Luke Messer

Tom Rice

Thomas Price

1941-03

Erik Paulsen

Robert Pittenger

Pete Olson

Tom Marino

Devin Nunes

Michael A. Grimm

Kevin McCarthy

Virginia Foxx

Steve Chabot

Robin Hongyica

Greg Walden

Joe Wilson

Howard Coble

Scott Garrett

Joe Barton

Michael N. Simpson

Frank R. Wolf

Gary G. Miller

P. Roskam

Kurt Bertsvolis

Patrick T. McHenry

Cathy McMorris Rodgers

Howard C. Buck McKeon

Paul Cook

Thomas Rex Petterson

Jim Renacci

Member	Party	District
Don Young	R	AK-AL
Bradley Byrne	R	AL-1
Martha Roby	R	AL-2
Mike Rogers	R	AL-3
Robert Aderholt	R	AL-4
Mo Brooks	R	AL-5
Spencer Bachus	R	AL-6
Terri Sewell	D	AL-7
Rick Crawford	R	AR-1
Tim Griffin	R	AR-2
Steve Womack	R	AR-3
Tom Cotton	R	AR-4
Paul Gosar	R	AZ-4
Matt Salmon	R	AZ-5
David Schweikert	R	AZ-6
Trent Franks	R	AZ-8
Doug LaMalfa	R	CA-1
Jeff Denham	R	CA-10
Jim Costa	D	CA-16
David Valadao	R	CA-21
Devin Nunes	R	CA-22
Kevin McCarthy	R	CA-22
Howard "Buck" McKeon	R	CA-25
Gary Miller	R	CA-31
Tom McClintock	R	CA-4
Ken Calvert	R	CA-42
Dana Rohrabacher	R	CA-48
Darrell Issa	R	CA-49
Paul Cook	R	CA-8
Scott Tipton	R	CO-3
Cory Gardner	R	CO-4
Doug Lamborn	R	CO-5
Mike Coffman	R	CO-6
Jeff Miller	R	FL-1
Rich Nugent	R	FL-11
Gus Bilirakis	R	FL-12
Tom Rooney	R	FL-17
Steve Southerland	R	FL-2
Mario Diaz-Balart	R	FL-25
Ileana Ros-Lehtinen	R	FL-27
Ted Yoho	R	FL-3
Ron DeSantis	R	FL-6
John Mica	R	FL-7
Jack Kingston	R	GA-1
Paul Broun	R	GA-10
Phil Gingrey	R	GA-11
John Barrow	D	GA-12
David Scott	D	GA-13
Tom Graves	R	GA-14
Sanford Bishop	D	GA-2
Lynn Westmoreland	R	GA-3
Tom Price	R	GA-6
Rob Woodall	R	GA-7
Austin Scott	R	GA-8
Doug Collins	R	GA-9
Tom Latham	R	IA-3
Steve King	R	IA-5
Raul Labrador	R	ID-1
Michael Simpson	R	ID-2
William Enyart	D	IL-12
Rodney Davis	R	IL-13
Randy Hultgren	R	IL-14
John Shimkus	R	IL-15
Adam Kinzinger	R	IL-16
Aaron Schock	R	IL-18
Peter Roskam	R	IL-6
Jackie Walorski	R	IN-2
Marlin Stutzman	R	IN-3
Todd Rokita	R	IN-4
Susan Brooks	R	IN-5
Luke Messer	R	IN-6
Larry Bucshon	R	IN-8
Todd Young	R	IN-9
Tim Huelskamp	R	KS-1
Lynn Jenkins	R	KS-2
Kevin Yoder	R	KS-3
Mike Pompeo	R	KS-4
Ed Whitfield	R	KY-1
Brett Guthrie	R	KY-2
Thomas Massie	R	KY-4
Hal Rogers	R	KY-5
Andy Barr	R	KY-6
Cedric Richmond	D	LA-2
Charles Boustany	R	LA-3
John Fleming	R	LA-4
Vance McAllister	R	LA-5
Bill Cassidy	R	LA-6
Andy Harris	R	MD-1
Dan Benishek	R	MI-1
Candice Miller	R	MI-10
Kerry Bentivolio	R	MI-11
Bill Huizenga	R	MI-2
Justin Amash	R	MI-3

Dave Camp	R	MI-4
Fred Upton	R	MI-6
Tim Walberg	R	MI-7
Mike Rogers	R	MI-8
John Kline	R	MN-2
Erik Paulsen	R	MN-3
Michele Bachmann	R	MN-6
Collin Peterson	D	MN-7
Ann Wagner	R	MO-2
Blaine Luetkemeyer	R	MO-3
Vicky Hartzler	R	MO-4
Sam Graves	R	MO-6
Billy Long	R	MO-7
Jason Smith	R	MO-8
Alan Nunnelee	R	MS-1
Bennie G. Thompson	D	MS-2
Gregg Harper	R	MS-3
Steven Palazzo	R	MS-4
Patrick McHenry	R	NC-10
Mark Meadows	R	NC-11
George Holding	R	NC-13
Renee Ellmers	R	NC-2
Walter Jones	R	NC-3
Virginia Foxx	R	NC-5
Howard Coble	R	NC-6
Mike McIntyre	D	NC-7
Richard Hudson	R	NC-8
Robert Pittenger	R	NC-9
Kevin Cramer	R	ND-AL
Lee Terry	R	NE-2
Adrian Smith	R	NE-3
Scott Garrett	R	NJ-5
Steve Pearce	R	NM-2
Mark Amodei	R	NV-2
Joe Heck	R	NV-3
Michael Grimm	R	NY-11
Chris Gibson	R	NY-19
Peter King	R	NY-2
Bill Owens	D	NY-21
Richard Hanna	R	NY-22
Tom Reed	R	NY-23
Chris Collins	R	NY-27
Steve Chabot	R	OH-1
Michael Turner	R	OH-10
Patrick Tiberi	R	OH-12
David Joyce	R	OH-14
Steve Stivers	R	OH-15

Jim Renacci	R	OH-16
Brad Wenstrup	R	OH-2
Jim Jordan	R	OH-4
Robert Latta	R	OH-5
Bill Johnson	R	OH-6
Bob Gibbs	R	OH-7
Jim Bridenstine	R	OK-1
Markwayne Mullin	R	OK-2
Frank Lucas	R	OK-3
James Lankford	R	OK-5
Greg Walden	R	OR-2
Kurt Schrader	D	OR-5
Tom Marino	R	PA-10
Lou Barletta	R	PA-11
Keith Rothfus	R	PA-12
Charlie Dent	R	PA-15
Joe Pitts	R	PA-16
Tim Murphy	R	PA-18
Mike Kelly	R	PA-3
Scott Perry	R	PA-4
Glenn 'GT' Thompson	R	PA-5
Jim Gerlach	R	PA-6
Patrick Meehan	R	PA-7
Mike Fitzpatrick	R	PA-8
Bill Shuster	R	PA-9
Mark Sanford	R	SC-1
Joe Wilson	R	SC-2
Jeff Duncan	R	SC-3
Mick Mulvaney	R	SC-5
Tom Rice	R	SC-7
Kristi Noem	R	SD-AL
Phil Roe	R	TN-1
John J. Duncan, Jr.	R	TN-2
Chuck Fleishmann	R	TN-3
Scott DesJarlais	R	TN-4
Diane Black	R	TN-6
Marsha Blackburn	R	TN-7
Stephen Fincher	R	TN-8
Louie Gohmert	R	TX-1
Michael McCaul	R	TX-10
K. Michael Conaway	R	TX-11
Kay Granger	R	TX-12
Mac Thornberry	R	TX-13
Randy Weber	R	TX-14
Ruben Hinojosa	D	TX-15
Bill Flores	R	TX-17
Randy Neugebauer	R	TX-19

Ted Poe	R	TX-2
Lamar Smith	R	TX-21
Pete Olson	R	TX-22
Pete Gallego	D	TX-23
Kenny Marchant	R	TX-24
Roger Williams	R	TX-25
Michael Burgess	R	TX-26
Blake Farenthold	R	TX-27
Henry Cuellar	D	TX-28
Sam Johnson	R	TX-3
John Carter	R	TX-31
Pete Sessions	R	TX-32
Marc Veasey	D	TX-33
Filemon Vela	D	TX-34
Steve Stockman	R	TX-36
Ralph Hall	R	TX-4
Jeb Hensarling	R	TX-5
Joe Barton	R	TX-6
John Culberson	R	TX-7
Kevin Brady	R	TX-8
Rob Bishop	R	UT-1
Chris Stewart	R	UT-2
Jason Chaffetz	R	UT-3
Jim Matheson	D	UT-4
Robert Wittman	R	VA-1
Frank Wolf	R	VA-10
Scott Rigell	R	VA-2
J. Randy Forbes	R	VA-4
Robert Hurt	R	VA-5
Bob Goodlatte	R	VA-6
Morgan Griffith	R	VA-9
Jaime Herrera Beutler	R	WA-3
Doc Hastings	R	WA-4
Cathy McMorris Rodgers	R	WA-5
Dave Reichert	R	WA-8
Paul Ryan	R	WI-3
Jim Sensenbrenner	R	WI-5
Tom Petri	R	WI-6
Sean Duffy	R	WI-7
Reid Ribble	R	WI-8
David McKinley	R	WV-1
Shelly Moore Capito	R	WV-2
Nick Rahall	D	WV-3
Cynthia Lummis	R	WY-AL

Georgia Department of Agriculture

Gary W. Black, Commissioner

19 Martin Luther King Jr. Drive, SW • Atlanta, Georgia 30334-4201

Congressman Paul Broun
2437 Rayburn House Office Bldg.
Washington, DC 20515

Dear Congressman Broun:

The rule proposed by the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (the Corps) to change the definition of Waters of the United States (WOTUS) under the Clean Water Act (CWA) has caused much debate throughout Georgia's agricultural industry. While the goal of this revision is to clarify confusion over the scope of CWA, the Georgia Department of Agriculture (GDA) has serious concerns about the consequences it will have for Georgia.

As an agency fully dedicated to the rights of farmers and American citizens alike, we find the reach of EPA under the new rule to be a serious threat. Under the new rule EPA jurisdiction will be expanded to include all waters defined as "other waters" with a "significant nexus" to navigable waters and to the tributaries of these waters. These broad definitions bring EPA jurisdiction into uncharted territory in regards to private property. If not withdrawn, the proposed rule would grant EPA the right to monitor everyday activities on both our farms and residences alike.

In the Economic Analysis provided by EPA and the Corps, the two agencies assess that only 3% of additional U.S. waters will be jurisdictional under the revision with 17% of those being "other waters." This can only be described as a gross understatement of impending, sweeping authority. Increasing the scope of CWA will undoubtedly leave our farms and small businesses at the mercy of EPA and open the door to environmental activists to pursue civil lawsuits under new interpretations of the rule change.

EPA and the Corps anticipate that the losses suffered by the government and regulated entities will be between $162 million to $279 million per year under the new rule. They determine these financial costs will be associated with activities such as administering additional permits and modifying business operations to meet new standards. The reporting agencies go on to estimate the benefits of this rule change to be between $318 million to $514 million per year. These benefits, however, are represented by "values of ecosystem services" and "reduced uncertainty concerning where CWA jurisdiction applies." While the costs will be very real, GDA believes this assessment of benefits to be extremely vague and severely inflated.

This revision will have a direct impact on our farming practices. While the list of agricultural exemptions has been expanded, it comes at the cost of being under EPA scrutiny. These exemptions are only warranted because they would now be operating under the federal jurisdiction of the EPA. This hostile directive threatens to eliminate traditional methods that have been used on our farms for decades.

Agriculture is Georgia's leading industry and our farmers are looking for help in fighting this rule change. This type of overregulation will be damaging to our state's economy as well as our trust in government. In order to protect Georgia, we ask that you join us in using all available measures to remove this proposal from consideration.

Sincerely,

Gary W. Black

July 7, 2014

The Honorable Paul Broun
United States House of Representatives
10th Congressional District - Georgia
2437 Rayburn House Office Building
Washington, DC 20515

Dear Representative Broun:

In advance of the House Science Committee's hearing on the Environmental Protection Agency's Waters of the United States proposed rule, I am writing to express the Georgia Chamber of Commerce's concerns with the potential impact of the proposed rule on our Chamber members and the surrounding community.

I would like to register my support for the effort of the House Committee on Science, Space, and Technology to address this important issue. The Supreme Court has twice affirmed that both the U.S. Constitution and the Clean Water Act place limits on federal authority over intrastate waters. Moreover, Congress has decided not to change the careful balance between federal and state regulation.

EPA and the U.S. Army Corps of Engineers (Corps) proposed this rule to change the definition of "Waters of the United States" under the Clean Water Act (CWA). This change is comprised of a complicated set of regulatory definitions, including new and poorly defined terms, based on ambiguous and untested legal theories and regulatory exclusions. The result is a proposal that asserts jurisdiction over waters, including many ditches, conveyances, isolated waters, and other waters, that are presently under the jurisdiction of the states and that is inconsistent with Congressional intent and recent Supreme Court decisions.

EPA's proposed rule will create a great deal of uncertainty for our business members, and could put potential projects and investments in a holding pattern due to the uncertainty of what would be covered jurisdictionally and who would or would not need a permit.

This proposed rule could also impact existing operations or facilities by expanding the jurisdiction to cover businesses that were not previously required to hold a permit

In addition to the new permitting requirement and use restrictions businesses will face, the EPA's permitting process does not provide any certainty for planning purposes. Recently, the EPA for the first time used its power to retroactively veto a valid CWA permit, thereby halting an on-going and lawfully permitted operation. EPA currently is in the process of potentially using its power to prospectively veto another project before companies involved could even apply for a permit but, after hundreds of millions of dollars had been spent in up-front expenditures. Subjecting businesses to this type of uncertainty in the permitting process will send investment dollars elsewhere.

Ernest L. Greer
2014 Chair

Chris Clark
President & CEO

www.gachamber.com

270 Peachtree Street NW, Suite 2200 | Atlanta, Georgia 30303-1240 | Phone: 404.223.2264 | Fax: 404.223.2290

GEORGIA CHAMBER

We ask that you stop the EPA from finalizing this proposed rule that would create a significant amount of uncertainty and would impact the business community in a detrimental way. Thank you for your time and consideration to this matter.

Sincerely,

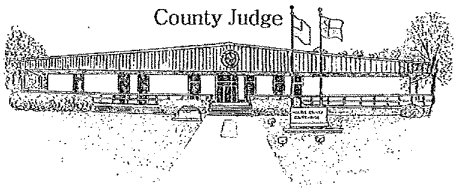
Chris Clark

President & CEO
Georgia Chamber of Commerce

LETTER SUBMITTED BY REPRESENTATIVE RALPH M. HALL

MORRIS COUNTY

LYNDA MUNKRES
County Judge



June 12, 2014

The Honorable Ralph Hall
104 N. San Jacinto Street
Rockwall, TX 75087-2508

Dear Congressman Hall:

I have enclosed a copy of the Resolution passed by the Morris County Commissioner's Court pertaining to the United States Environmental Protection Agency and the United States Army Corp of Engineers proposal to redefine the "waters of the United States." Morris County is, of course, against any action by the USEPA and USACE that would infringe upon the sovereignty of Texas to appropriately regulate waters of the state of Texas.

If adopted, this would increase the need for burdensome and costly permitting requirements, infringes on private property rights, and circumvents the legislative process and the will of the people of Texas.

Please help prevent this redefining of the "Waters of the United States" by these agencies.

Sincerely,

Lynda Munkres

Lynda Munkres
Morris County Judge

sr
Enclosure

500 BROADNAX • DAINGERFIELD TEXAS 75638 • PHONE 903-645-3691 • FAX 903-645-5729

RESOLUTION

WHEREAS, the United States Environmental Protection Agency (USEPA) and the United States Army Corp of Engineers (USACE) have proposed a new rule to define 'waters of the United States" that will vastly expand the Jurisdictional authority of the federal Clean Water Act (CWA), entitled 'Definition of "Waters of the United States" Under the Clean Water Act;

WHEREAS, USEPA and USACE have chosen to selectively interpret various Supreme Court decisions related to the jurisdictional authority of the Clean Water Act (CWA) in order develop a new Guidance which expands their own jurisdictional authority under the CWA to include waters of the state(s) and other waters previously not regulated under either the CWA or judicial proclamation, including some ditches, farm ponds, dry water ways and isolated wetlands;

WHEREAS, the proposed rule, if adopted will infringe upon the sovereignty of state(s) to appropriately regulate waters of the state(s);

WHEREAS, the proposed rule, if adopted would require Counties and special districts to obtain costly and burdensome Section 404 Permits from the USACE for the construction of small bridges and culverts, and routine maintenance of some ditches, canals, and other such water conveyances;

WHEREAS, the proposed rule, if adopted would infringe on private property rights impairing land management activities such as urban development and agriculture production;

WHEREAS, legislation to expand the jurisdictional authority of the CWA as described in the proposed rule has failed in the U.S. Senate; and

WHEREAS, the USEPA and USACE have been criticized by both the U.S. Senate and the U.S. House of Representatives for enacting expansive rules without congressional oversight;

BE IT HEREBY RESOLVED THAT Morris County strongly opposes the proposed new rule to define 'waters of the United States" in that it increases the need for burdensome and costly permitting requirements, infringes on private property rights, and circumvents the legislative process, thus, the will of the people.

BE IT FURTHER RESOLVED THAT Congress, not federal agencies, make the laws and therefore any such change in jurisdictional power of the federal government should only occur as a result of the passage of federal legislation.

Passed and approved this 9th day of June 2014.

Lynda Munkres, Morris County Judge

Dennis Allen, Commissioner #1

Michael Clair, Commissioner #3

Weldon Lilley, Commissioner #2

Gary Camp, Commissioner #4

COUNTY COURT MORRIS COUNTY, TEXAS

Attest:

Vicki Falls, County Clerk

LETTER SUBMITTED BY REPRESENTATIVE RANDY HULTGREN

ILLINOIS CHAMBER
OF COMMERCE

CHICAGO OFFICE
300 S. Wacker Drive
Suite 1600
Chicago, IL 60606
MAIN 312.983.7100
FAX 312.983.7101
www.ilchamber.org

July 8, 2014

Representative Hultgren
332 Cannon House Office Building
Washington, DC 20515

Dear Representative Hultgren,

On behalf of the members of the Illinois Chamber of Commerce, I am writing to express our deep concern with the Environmental Protection Agency's proposed rule, which would change the definition of "Waters of the United States" under the Clean Water Act. I applaud the House Committee on Science, Space, and Technology for devoting time to address this issue in the hearing scheduled for Wednesday, July 9, 2014.

This proposed rule will add to the already unprecedented level of uncertainty our members face from the dozens of new rules and regulations being written by the federal government. Very simply, if enacted, the "Waters of the United States" rule will add to the uncertainty of what would be covered jurisdictionally and who would or would not need a permit. Further, this rule relies on a set of complicated regulatory definitions, including new and poorly defined terms, which are based on ambiguous and untested legal theories and regulatory exclusions.

As a result, the EPA's proposal would allow the agency to assert jurisdiction over ditches, conveyances, isolated waters, and other waters, that are presently under the jurisdiction of the states and that is inconsistent with precedent. Congress has decided not to change the careful balance between federal and state regulation while the Supreme Court has affirmed twice—in 2001 and 2006—that both the U.S. Constitution and the Clean Water Act place limits on federal authority over intrastate waters. The expanded jurisdiction could impact businesses that were not previously required by the EPA to hold a CWA permit.

This rule could also impact existing operations or facilities as it does not provide any certainty for planning purposes. Recently, the EPA used its power to retroactively veto a valid CWA permit. This was the first time the EPA took this step and the result was an immediate halt to an on-going and lawfully permitted operation. The EPA currently is in the process of using its power to veto another project before companies involved could even apply for a permit and endanger hundreds of millions of dollars had been spent in up-front expenditures.

As our economy continues to recover, businesses are looking for certainty from the government in an effort to plan capital investments. Subjecting businesses to this type

ILLINOIS CHAMBER
OF COMMERCE

of uncertainty in the permitting process will send investment dollars elsewhere, or worse, halt investments all together.

I ask that you stop EPA from finalizing this proposed rule that would create a significant amount of uncertainty and would impact the business community in a detrimental way. Thank you for your time and consideration to this matter.

Sincerely,

Benjamin J. Brockschmidt
Director Federal Affairs
Illinois Chamber of Commerce

LETTERS SUBMITTED BY REPRESENTATIVE LARRY BUCSHON

Geotechnical
Environmental
Water Resources
Ecological

July 8, 2014

House Committee on Science, Space, and Technology
2321 Rayburn House Office Building
Washington D.C. 20515

Re: GEI Consultants, Inc., Review of the US EPA Draft Report, *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*

Dear Chairman Smith, Ranking Member Johnson, and Members of the Committee,

On behalf of the Waters Advocacy Coalition (WAC), GEI Consultants, Inc. (GEI), has been evaluating the scientific basis of current efforts by the U.S. Environmental Protection Agency (USEPA) to re-define "Waters of the United States" as part of the April 21, 2014 proposed rule, *Definition of "Waters of the United States" Under the Clean Water* Act (hereafter: "Proposed Rule"). We understand that the scientific basis of this Proposed Rule is currently set forth in USEPA's draft report, *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence* (hereafter: Synthesis Report) (USEPA 2013). We prepared a technical memorandum reviewing the Synthesis Report (hereafter: GEI memo) which outlined several significant concerns we have in using this report as the basis for clarifying definitions of Waters of the United States. A copy of the GEI memo is attached, and summarized further below.

We note that many of the concerns raised in the GEI Memo are echoed by the USEPA Science Advisory Boards (SAB) peer review of the Synthesis Report (the most recent version of these comments was posted on June 5, 2014). Briefly, both GEI and the SAB strongly suggest that connectivity between waters is not a binary concept (i.e., connected versus not-connected), but rather a gradient that ranges from complete isolation to strong chemical, physical, and biological connection. This gradient of connectivity substantially complicates the USEPA Proposed Rule in that the current draft also treats the determination of "significant nexus" to traditional navigable waters as binary. Ultimately, until or unless USEPA can provide a sound scientific basis for making significant nexus determinations that recognize the gradient of connectivity, the Proposed Rule will have little scientific basis.

www.geiconsultants.com

GEI Consultants, Inc.
4601 DTC Boulevard, Suite 900, Denver, CO 80237
303.662.0100 fax: 303.662.8757

Overview of the USEPA Synthesis Report

The Synthesis Report is a review and synthesis of scientific literature on the connectivity of streams and wetlands to downstream waters, including rivers, lakes, estuaries, and oceans. The Synthesis Report focuses on surface and shallow subsurface connections from small perennial, ephemeral, and intermittent streams, wetlands, and open waters, and considers biological, chemical, physical connections. The authors reach three broad conclusions, paraphrased here:

(1) All tributary streams, including perennial, intermittent, and ephemeral streams, are physically, chemically, and biologically connected with downstream waters, and exert a strong influence on the character and functioning of downstream waters.

(2) Wetlands and open waters in riparian areas and floodplains are physically, chemically, and biologically connected with rivers, and are important for maintaining the integrity of downstream waters.

(3) Wetlands that are not located in riparian areas or floodplains (e.g., prairie potholes) provide numerous functions that can benefit downstream water quality and integrity, but because they occur on a gradient of connectivity, it is not possible to make generalizations about their effect on downstream waters.

Primary Concerns with the Synthesis Report

The SAB Draft Review echoes the most significant scientific concerns noted by GEI on behalf of WAC in their comments submitted to EPA on November 6, 2013. *Overall, it is clear from the SAB Draft Review that significant revisions to the Synthesis Report are critically needed to not only improve the scientific rigor of the report, but also its usefulness in a regulatory context.* The Report falls short of providing the kind of scientific analysis necessary to establish a solid foundation for a proposed rule on Clean Water Act (CWA) jurisdiction. Given the significance of any regulatory actions that may result from any such changes in jurisdiction, there is a critical need to revise the Synthesis Report to improve not only its scientific rigor, but also its ability to support the intended regulatory assertion.

The first and most critical step of any scientific inquiry is to ask the right question. Through their limited focus on the *presence* rather than the *significance* of connections among water bodies, the authors of the Synthesis Report failed to *ask* the right question, and consequently failed to *answer* the right question. *Therefore, we recommend that EPA carefully consider and implement the comments and recommendations presented in the SAB Draft Review to improve the content and applicability of the Synthesis Report.*

Specific Comments and Examples

As stated above, the SAB Draft Review is broadly consistent with comments previously supported by WAC and other stakeholders on the original draft of the Synthesis Report. For example, we concluded:

- *The Synthesis Report identifies only the presence of connections, and does not fully address the ecological and/or regulatory significance that these connections may or may not have on the integrity of downstream waters. The Synthesis Report does little to acknowledge the need to link connectivity with significant effects on downstream integrity, yet the need for such a link is clearly evident in the scientific literature. Because the significance of these connections is truly what is needed to apply these concepts in a regulatory context, the Synthesis Report asks entirely the wrong scientific question, and so is of little practical value. (GEI memo, Page 1)*

- *The Synthesis Report falls short of addressing whether the substantial variability in connectivity or the specific point at which a stream, wetland, or open water falls on the connectivity-isolation gradient has any importance or relevance to the effect of the connection on downstream integrity. The role of isolation is discussed to a limited extent in the Synthesis Report, but a full description of the connectivity-isolation gradient is not presented; connectivity alone is the clear focus of this analysis. (GEI memo, Page 2)*

While the SAB Draft Review stops short of asking EPA to specifically define connectivity "significance" in the Synthesis Report, it is clear they share our concerns that EPA is making overly broad statements regarding what constitutes connectivity, and what this means regarding the ultimate regulatory application of the science reviewed in the Synthesis Report:

The Report often treats connectivity as though it is a binary property (connected versus not connected), rather than as a gradient. In order to make the Report more technically accurate, the SAB recommends that the interpretation of connectivity be revised to reflect a gradient approach that recognizes variation in the frequency, duration, magnitude, predictability, and consequences of those connections. (SAB Draft Review, Cover letter, page 1. Emphasis added.)

Owing to this shortcoming in the Synthesis Report, the SAB Draft Review recommended the following, with which we agree:

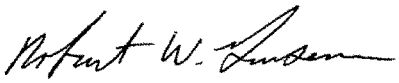
...the SAB recommends that the interpretation of connectivity be revised so as not to sound like a binary, categorical distinction (connected versus not connected) but rather a gradient whereby the consequences to downstream waters are determined

by the frequency, duration, predictability, and magnitude of connections. (SAB Draft Review, page 8)

As stated previously, we recommend that EPA recognize this gradient and evaluate a scientific method for establishing where on this gradient a water body becomes significant. The Synthesis Report does not provide a scientific basis for doing that.

We appreciate the opportunity to provide these comments for your consideration.

Sincerely,



Robert W. Gensemer, Ph.D.
Vice President

Shaun A. Roark, Ph.D.
Senior Ecotoxicologist

Geotechnical
Environmental
Water Resources
Ecological

GEI Consultants

Memo

To: Deidre Duncan and Karen Bennett, Hunton & Williams; Don Parrish, Waters Advocacy Coalition

From: Shaun Roark and Bob Gensemer

CC: Steve Canton

Date: November 5, 2013

Re: Technical Comments on "Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence"

GEI has prepared the following comments on behalf of the Waters Advocacy Coalition (WAC) based on our review of EPA's draft report: *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence* (hereafter: Synthesis Report) (USEPA 2013). This review was based not only on a review of this report, but also on our independent review of many of the scientific studies upon which this report was based. Therefore, the conclusions presented in this memo are a combination of our technical comments on the Synthesis Report and our conclusions based on our independent review of the scientific literature.

Shortcomings of the Synthesis Report

The Synthesis Report makes broad conclusions regarding the concept of connectivity, concluding that wetlands and streams regardless of their size or how frequently they flow, are connected to and have important effects on downstream waters. However, merely documenting the presence of such connections does not provide the basis for concluding to what extent such connections may or may not be of sufficient type, breadth, or magnitude to significantly affect downstream water quality. Providing criteria by which the agencies could determine when one water has such a substantial effect on another is crucial to any subsequent regulatory or policy determination of what constitutes a "significant nexus." USEPA has stated that it plans to use the report to support a new rulemaking regarding the extent of its authority under the Clean Water Act, but the Synthesis Report presents no analysis of connectivity "significance." In effect, the report does not address the right question, and therefore does not adequately inform decisions about Clean Water Act jurisdiction.

Specifically, the following are some of the Synthesis Report's major shortcomings:

- The Synthesis Report identifies only the *presence* of connections, and does not fully address the ecological and/or regulatory *significance* that these connections may or may not have on the integrity of downstream waters. The Synthesis Report does little to acknowledge the need to link connectivity with significant effects on downstream integrity, yet the need for

GEI Consultants, Inc.
4601 DTC Boulevard, Suite 900, Denver, CO 80237
303.662.0100 fax: 303.662.8757
www.geiconsultants.com

such a link is clearly evident in the scientific literature. Because the significance of these connections is truly what is needed to apply these concepts in a regulatory context, the Synthesis Report asks entirely the wrong scientific question, and so is of little practical value.

- The Synthesis Report falls short of addressing whether the substantial variability in connectivity or the specific point at which a stream, wetland, or open water falls on the connectivity-isolation gradient has any importance or relevance to the effect of the connection on downstream integrity. The role of isolation is discussed to a limited extent in the Synthesis Report, but a full description of the connectivity-isolation gradient is not presented; connectivity alone is the clear focus of this analysis.

- The Synthesis Report uses a broad definition of stream that could include many linear features that are not natural stream features but may be considered "connected." Yet, the science on connectivity does not address or review linear features such as ditches, canals, and other industrialized features. The Report also does not discuss the uncertainty in making distinctions among these features. Therefore, the report should clarify that the science is limited to natural stream features, and, as such, industrialized and man-made features are beyond the scope of this report.

- The Synthesis Report suggests that aggregation of streams and other waters needs to be considered to understand effects on downstream waters, but no science is presented to support "aggregation" as a relevant concept in connectivity, nor how much or how little aggregation is needed to have a significant effect on downstream waters. In fact, the Synthesis Report only concludes that the importance of aggregation "might be" substantial, so this concept has too little scientific basis to be of practical value.

- The Synthesis Report creates new categories for wetlands and open waters – bidirectional and unidirectional – which had not been previously used or established by the scientific literature, and broadly concludes that any wetland or water in a riparian area or floodplain can be considered connected to and having an important effect upon downstream waters. In fact, the term "floodplain" itself is poorly and subjectively defined. These categories and the assumptions made about these categories thus are not supported by the scientific literature.

- The Synthesis Report not only suggests that connectivity with downstream waters may extend to adjacent floodplains and riparian areas, but to terrestrial uplands within the watershed as well. If the simple presence of connectivity with downstream waters is used as the basis for Clean Water Act jurisdiction, the scope of Clean Water Act compliance thus has the potential to be substantially expanded to encompass entire watersheds.

This section describes these specific shortcomings of the Synthesis Report in more detail, leading to our conclusion that the science presented in the report is insufficient to support regulatory or policy decisions related to expanding Clean Water Act jurisdiction on the basis of connectivity.

1. *The Synthesis Report does not provide criteria for determining the significance of connectivity on the integrity of downstream waters.*

The Synthesis Report identifies only the *presence* of connections, and does not fully address the ecological and/or regulatory *significance* that these connections may or may not have on the integrity of downstream waters. The Synthesis Report does not discuss whether it is possible to identify scientifically valid thresholds for effects on the integrity of downstream waters that can be specifically linked to recognized measures of "impairment" as set forth in the Clean Water Act and used in regulatory review of attainment/impairment decisions (i.e., section 303(d) assessments) resulting from evaluations of chemical and biological criteria. Further definition and exploration of scientific significance in this context is critically needed to enable and defend regulatory application of the concepts reviewed in the Synthesis Report.

While the issue of significance is of critical importance for regulatory application of these concepts, and the Synthesis Report makes frequent reference to significance, it avoids defining or explaining what constitutes significance. The Synthesis Report states that its purpose is to review and synthesize the scientific literature pertaining to three questions, "What are the physical, chemical, and biological connections to and effects of [three categories of waters] on downstream waters?" [p. 2-1]. We note that despite the requirement of the "significant nexus" test in the *Rapanos* Supreme Court case, the Synthesis Report does not attempt to address the science with respect to how to evaluate the significance of a potential connection (i.e., nexus) between an upstream wetland or ephemeral or intermittent stream on the quality of a downstream water.

Furthermore, the Synthesis Report states that even if a stream or wetland is not currently performing a function, it has the potential to provide that function and thus "can play a critical role in protecting those waters from future impacts" [p. 3-27]. Thus, the report suggests that even if a system has no demonstrable functional linkage to downstream waters at present, it should be assessed from the perspective of all the potential functions it could provide under other conditions. However, the significant nexus test cannot be based on speculative potential effects, and such reliance on potential functions could add a large degree of uncertainty to the regulatory process.

As an example of the recognized need for a better scientific understand of connectivity thresholds associated with downstream effects, Freeman et al. (2007), in one of the publications reviewed in the Synthesis Report, argue that linkages between headwaters and downstream ecosystems must be considered to understand large-scale issues such as hypoxia in the Gulf of Mexico and the global loss of biodiversity. However, these authors also recognize the importance of identifying thresholds of significance with respect to downstream effects: "Given the complexity of hydrologic connections, it is essential that political and legal determinations of thresholds of connectivity (for

purposes of Clean Water Act jurisdiction) be informed by scientific understanding of headwater stream effects on ecological functions at larger scales" (Freeman et al., 2007). Concluding with key research questions needed to further our understanding, these authors ask, "How do cumulative effects of headwater loss and degradation interact with altered hydrologic connectivity and contaminant loading in lower watersheds to modify the transport of contaminants and essential nutrients?" and "[a]t what point do cumulative effects of headwater degradation become so great as to alter ecosystem function, e.g., secondary productivity and population viability, in downstream systems or in adjacent uplands?" These questions illustrate the scientific community's recognition that the simple presence or absence of a single connection does not necessarily equate to significant effects on the condition of downstream waters; yet the USEPA's Synthesis Report does not explore the need to link connectivity with significant effects on downstream waters.

The example above, supported by our review of other studies reviewed in the Synthesis Report, clearly demonstrates that the science of connectivity was not conducted to inform conclusions of significance in such a way to rigorously inform interpretation of Clean Water Act jurisdiction over upstream waters or wetlands. Most of the science of connectivity addressing the importance of the connection of headwater streams with downstream waters has been focused on measuring the flow of resources (matter and energy) from upstream to downstream. While these studies have demonstrated that the matter and energy that flows from headwater streams represents some portion of the matter and energy in downstream waters, these studies have not focused on *quantifying the ecological significance* of the input of specific tributaries or headwaters, alone or in aggregate, and ultimately whether such effects could directly and causally be linked to impairment of downstream waters. The report neglects to quantify the importance of the contribution of matter and energy from upstream tributaries relative to matter and energy derived locally from sunlight and riparian areas that surround downstream waters, and it does not discuss the important temporal and geographic variation that exists in the relative contribution of matter and energy from upstream and downstream sources. Thus, the science reviewed in the Synthesis Report has not given us the quantitative specificity for practical application to a single nexus. Such specificity is critically needed, and if left unaddressed, will significantly limit the practical and regulatory value of this report.

The limited focus of the Synthesis Report on the *presence* rather than the *significance* of connections represents a fundamental flaw in the scientific basis of the report. Given that significance of the connections on downstream waters is of the greatest importance for regulatory purposes, the Synthesis Report in effect asks entirely the wrong question. Asking the right question is a central tenet and first step of any rigorous scientific inquiry, so this represents a significant shortcoming of the report and largely invalidates its practical value for regulatory purposes.

2. *The Synthesis Report falls short of addressing whether the substantial variability in connectivity has any importance or relevance to the effect of the connection on downstream integrity.*

The Synthesis Report describes the science measuring physical, chemical, and biological connections, but falls short of explaining which types of connections or how many connections of what frequency, magnitude, and duration are needed to significantly affect the integrity of downstream waters. Consequently, the Synthesis Report provides inadequate support for any subsequent regulatory application that ultimately would rely on identifying some level of significance. The Synthesis Report clearly states that "connectivity is not a fixed characteristic of a system, but rather varies over space and time" [p. 3-31]. The Synthesis Report discusses numerous studies that have evaluated spatial and temporal variation in the "extent, magnitude, timing, and type of hydrologic connectivity" [p. 3-31]. Further, the Synthesis Report describes five key factors that affect physical, chemical, and biological connectivity within river systems: climate, watershed characteristics, spatial distribution patterns, biota, and human activities and alterations. These five factors are said to interact in complex ways to determine "where components of a system fall on the connectivity-isolation gradient at a given time" [p. 3-33].

However, despite such statements, the Synthesis Report falls short of addressing whether the substantial variability in connectivity or the specific point at which a stream falls on the connectivity-isolation gradient has any importance or relevance on the effect of the connection on downstream integrity. According to the Synthesis Report, simply any connection, no matter how small, is relevant. This answer is not supported by critical scientific analysis, and thus provides little to no value in defining the extent to which connectivity truly will influence downstream waters.

For example, while factors influencing connections between ephemeral and downstream perennial waters are addressed in the Synthesis Report, no analysis is presented that explores these connections in the context of the wide geographic differences that exist among ephemeral waters in different areas of the U.S. The levels and types of connections that might exist between ephemeral and downstream waters will almost certainly differ among different ecoregions, particularly those in arid vs. mesic environments. While section 4.8 of the report explores connectivity in arid southwestern streams (using the San Pedro River in Arizona as a case study), the Synthesis Report does not take the next step and identify where ephemeral streams lie along a connectivity-isolation gradient relative to ephemeral streams in more mesic areas of the U.S. Given the unique physical, biological, and chemical nature of arid southwestern ephemeral watercourses, it is difficult to imagine that the same levels and significance of connections exist between these ephemeral waters and their downstream waters as compared to those in other ecoregions.

Without considering ephemeral waters in arid regions in the context of a broader connectivity-isolation gradient, it is difficult to evaluate the significance of these connections on downstream waters in a manner that promotes a consistent regulatory framework. Indeed, many aspects of Clean Water Act regulation in arid regions do not easily fit within a default nation-wide framework owing to the unique nature of these systems (PCWMD 2007). Therefore, rather than simply citing arid region ephemeral waters as an example of connectivity, the Synthesis Report instead needs to more fully evaluate where such waters fall upon a connectivity-isolation gradient, what this means

in terms of *significance* of these connections on the downstream waters, and what regionally unique approaches are needed to support any potential regulatory implications of these connections.

3. *The Synthesis Report's definition of stream is overly broad, and it should be clarified that the report does not address the connectivity of man-made industrialized features as streams.*

The definition given in the Synthesis Report for a stream is a "relatively small volume of flowing water within a visible channel, including subsurface water moving in the same direction as the surface water, and lateral flows exchanged with the associated floodplain and riparian areas..." [p. 3-2]. The definition given for a stream is sufficiently broad that any water flowing in a man-made ditch or other industrialized channel could be considered a stream.

It is important to emphasize, however, that the Synthesis Report includes no science that addresses the connectivity of ditches or manmade channels to, nor the effect of any such channels on, downstream waters. Nonetheless, Figure 3-10 of the Synthesis Report implies that during wet seasons, swales, road ditches, and surface field drainage are connected to perennial streams. However, studies are not presented in the Synthesis Report to support this implication. Scientific studies evaluating the connectivity and potential effects on downstream waters of man-made or industrialized features, including ditches, are simply not presented in the Synthesis Report.

4. *The Synthesis Report concludes that aggregation of streams may be needed to understand the effects on downstream waters, but no science is presented on how to make decisions regarding aggregation.*

The Synthesis Report states that, "[i]n many cases, the effects on downstream waters need to be considered in aggregate" [p. 3-27], and that the contribution by a specific ephemeral stream *might be small*, but the aggregate contribution of all the ephemeral streams in a network *might be substantial*. However, the report also states that, "making quantitative assessments of the importance of individual stream and wetland resources within the entire river system is difficult" [p. 3-29]. In fact, the report does not present any scientific studies in which the significance of effects on downstream waters was compared for individual and aggregated streams. It is noteworthy that the discussion of aggregation in Section 3.3.1 of the Synthesis Report (p. 3-27) makes frequent use of the phrase "might be" in comparing contributions between individual and aggregated ephemeral streams. So the conclusion that the contribution of individual streams is "small" whereas that of aggregated streams is "substantial" is based on only a very limited and subjective analysis. Although the Synthesis Report repeatedly makes the case that aggregation of tributaries and other waters is or might be necessary to understand their effect on downstream waters, no quantitative evidence of when aggregation is or is not necessary is presented. The broad assertion that all headwater streams in a watershed have an effect on downstream waters without any studies to support that assertion is not informative for subsequent rulemaking or permitting decisions. The Synthesis Report does not provide sufficient information to infer how large or how connected a stream or

other water needs for it to have an effect by itself, or how many small streams need to be considered in aggregate to have a significant effect on downstream integrity.

5. *The Synthesis Report creates new categories for wetlands and open waters and broadly but with limited information concludes that any wetland or water in a riparian area or floodplain is connected and has an effect on downstream waters.*

The Synthesis Report assigns all wetlands and open waters into one of two categories, bidirectional and unidirectional. This is a new categorization that, to our knowledge, had not been previously described in the peer-reviewed scientific literature. Furthermore, the Synthesis Report makes the broad conclusion that bidirectional wetlands (i.e., all wetlands and open waters in riparian areas and floodplains) are connected by a channel and have a significant effect on the integrity of downstream waters. In contrast, according the Synthesis Report, unidirectional wetlands, may or may not be connected to downstream waters. The Synthesis Report concludes that insufficient evidence was available to make the broad conclusion that all unidirectional wetlands were connected, and therefore a case-by-case analysis would be required. It is not clear what logical basis was used to reach the opposite conclusion of connectivity for bidirectional wetlands. Ultimately, insufficient scientific evidence is presented to support the simple conclusion that all wetlands and open waters can be lumped into unidirectional and bidirectional waters, and that all bidirectional waters as defined can be considered connected to and significantly affecting downstream integrity.

The terms unidirectional and bidirectional, as defined in the Synthesis Report, are said to describe the landscape settings in which wetlands occur, although the terms do not relate to the class or type of wetland. The Synthesis Report presents the following definitions:

- "A unidirectional wetland setting is a landscape setting where there is a potential for unidirectional hydrologic flows from wetlands to the river network through surface water or groundwater" [p. 3-7].
- "A bidirectional wetland setting is a landscape setting (e.g., floodplains, most riparian areas, lake and estuarine fringes, etc.) that is subject to bidirectional hydrologic flows" [p. 3-7].

The Synthesis Report also states that both categories, unidirectional and bidirectional, can include geographically isolated wetlands, and that both categories can include wetlands directly connected to river networks through channels. For example, according the Synthesis Report, a geographically isolated wetland that is surrounded by uplands but is located within a floodplain, is bidirectional and has a significant connection with and a significant influence upon downstream waters. Similarly, according to the Synthesis Report, a geographically isolated wetland that is surrounded by uplands but is *not* in a floodplain would be considered connected, but only if an ephemeral channel or swale connects it to the river network. These subtle distinctions between categories of wetlands have strong implications with regard to Clean Water Act jurisdiction, and it is not clear that the science supports either the broad categorization or the conclusion that any water in a floodplain has a

significance influence on downstream integrity. Indeed, even the definition of floodplain itself is highly subjective:

> "A level area bordering a stream or river channel that was built by sediment deposition from the stream or river under present climatic conditions and is inundated during moderate to high flow events. Floodplains formed under historic or prehistoric climatic conditions can be abandoned by rivers and form terraces" [p. A-5].

Therefore, it would be extremely difficult, if not impossible, to identify whether any given wetland is located inside or outside of this zone.

As discussed previously, the Synthesis Report discusses many types of variability that lead to a gradient between connectivity and isolation, but ignores the implications for effects on downstream integrity. Rather, the report simply concludes that any connection, regardless of magnitude or frequency, has a significant effect on the integrity of downstream waters. The science presented regarding wetlands and open waters, however, is not sufficient to support the broad conclusion that any wetland, regardless of size, volume, or regional climate, in any floodplain, 10-, 100-, or 500-year, is connected to and significantly affects the integrity of downstream waters. Moreover, additional scientific evidence and peer review is needed to support the Synthesis Report's conclusion that any wetland or open water in a riparian area or floodplain has bidirectional hydrologic exchange with the stream network and therefore has a significant effect on the integrity of downstream waters, while any wetland outside the floodplain or riparian area has unidirectional hydrologic exchange and hence may or may not affect the integrity of downstream waters. The substantial variability that exists in the chemical, physical, and biological connectivity of wetlands and waters in riparian areas must be given further consideration with regard to the potential to significantly affect the integrity of downstream waters.

6. The Synthesis Report is Unclear About the Role of Uplands and Terrestrial Habitat.

In this section we explore the extent to which the Synthesis Report considers riparian areas and upland terrestrial habitats important for maintaining the integrity of downstream waters, or as important conduits that provide connectivity between upstream and downstream waters. This is important because the Synthesis Report appears to suggest that broadly using the presence of connectivity as the determinant of Clean Water Act jurisdiction could lead to the extension of compliance into terrestrial uplands.

The Synthesis Report acknowledges the large body of science that demonstrates that most of the energy and matter in rivers originates from terrestrial sources, and notes that "[s]ignificant biological connectivity can also exist between aquatic and terrestrial habitats... but here we focus on connections among components of aquatic systems" [p. 3-29]. The scope of the Synthesis Report was limited to a focus on "surface and shallow subsurface connections from small or temporary

streams, non-tidal wetland, and certain open-waters." Connectivity and downstream effects of three categories of waters were considered:

(1) ephemeral, intermittent, and perennial streams;

(2) riparian or floodplain wetlands and open-waters; and

(3) wetlands and certain open-waters that lack bidirectional hydrologic exchanges with downstream waters.

Nonetheless, it is notable that in the Executive Summary of the Synthesis Report, the specific wording of major conclusions related to the second category extends beyond "riparian or floodplain wetlands and open waters" to include riparian and floodplain areas in a broader sense, perhaps even to include terrestrial upland environments. For example, the Synthesis Report states that "[r]iparian and floodplain areas connect upland and aquatic environments through both surface and subsurface hydrologic flow paths" [p. 1-9]. This statement does not limit downstream connections to *wetlands and open waters* in the floodplain and riparian areas, but instead potentially includes connections resulting from *surface flows and shallow groundwater* from non-wetland riparian and floodplain areas, particularly during rain events and floods. This appears to be a general expansion of the scope of consideration of connectivity into all riparian and floodplain areas.

In addition, with regard to unidirectional wetlands, the Synthesis Report states, "geographically isolated wetlands can be connected to the river network via nonchannelized surface flow (e.g., swales or overland flow), groundwater, or biological dispersal. Thus, the term 'geographically isolated' should not be used to infer lack of hydrologic, chemical, or biological connectivity" [p. 1-14]. The Synthesis Report's inclusion of "swales and overland flow" in this statement clearly implies that an upland area or swale that serves as a conduit for groundwater flow or biological dispersal between an isolated wetland and a downstream water would be considered a component of the river network responsible for the connection between those water bodies. Therefore, the Synthesis Report not only suggests that that connectivity with downstream waters may extend to adjacent floodplains and riparian areas, but into terrestrial uplands as well. If the simple presence of connectivity with downstream waters is used as the basis for Clean Water Act jurisdiction, the scope of Clean Water Act compliance thus has the potential to be substantially expanded to encompass entire watersheds.

Conclusions

The Synthesis Report concludes that downstream waters are connected to *all* upstream waters, including intermittent and ephemeral streams and all bidirectional wetlands, and potentially between many wetlands, riparian, floodplain, and even upland areas (e.g., swales) that are not connected by a channel. However, the Synthesis Report does not consider how to evaluate whether there are quantifiable thresholds that can be specifically linked to significant effects on downstream water quality. Although the Synthesis Report discusses the multiple types of connections and

numerous factors that can alter the degree of connectedness, no consideration is given to whether the degree of connectedness is proportional to the significance of the effect on downstream water quality.

Merely documenting the *presence* of connections does not provide the basis for concluding to what extent such connections may or may not be of the sufficient type, breadth, frequency, or magnitude to directly and *significantly* affect the integrity of downstream perennial waters. It is crucial to define this *significance* prior to any conclusion that Clean Water Act jurisdiction needs to apply to upstream waters to protect the integrity of downstream waters. The Synthesis Report presents no such analysis of connectivity significance in this important context.

Science Advisory Board Charge Questions

The Science Advisory Board (SAB) charge questions were of such limited scope that they will do little to direct the Synthesis Report toward a more useful exploration of the science needed to inform policy. As stated previously, given that the *significance* of the connections on downstream waters is of the greatest importance for regulatory purposes, both the Synthesis Report and the SAB charge questions in effect ask the wrong questions. Asking the right question is a central tenet and first step of any rigorous scientific inquiry. The SAB charge questions should be refocused on questions of the significance of connectivity, rather than simply exploring the mere presence of connectivity.

Without restating the questions entirely, the essence of the SAB charge questions can be summarized as follows:

(1) Comment on the overall clarity and technical accuracy of the draft report.

(2) Was the most relevant published peer-reviewed literature included and correctly summarized?

(3) Identify studies that should be added or deleted.

(4) Are the conclusions supported by available science?

(5) Suggest alternative wording for conclusions and findings that are not fully supported.

These questions will not provide the SAB panel with the needed directive to require substantive revisions to the report such that it addresses key concepts that would better present the science needed to inform policy with regard to Clean Water Act Jurisdiction outlined above. Therefore, the types of charge questions that instead need to be asked of the SAB should include:

(1) Does the Synthesis Report provide sufficient understanding of how the significance of a measured connection (e.g., transport of matter or energy between an upstream water body and downstream water) can be quantified with respect to the integrity of the downstream water?

(2) What specific metrics can be used to determine if a measured connection (chemical, physical, or biological) significantly influences the integrity of a downstream water body?

(3) If such quantitative methods and metrics exist, how will "significance" be rigorously defined either from a scientific, regulatory, or management perspective? In other words, how will public agencies determine and scientifically defend (with a transparent level of confidence) a determination of significance?

References

Cowardin, L. M., V. Carter, F. C. Golet, and E. T. LaRoe. 1979. Classification of wetlands and deepwater habitats of the United States. U.S. Department of the Interior, Fish and Wildlife Service, Office of Biological Services, Washington, DC.

Freeman, M. C., C. M. Pringle, and C. R. Jackson. 2007. Hydrologic connectivity and the contribution of stream headwaters to ecological integrity at regional scales. Journal of the American Water Resources Association 43:5-14.

Pima County Wastewater Management Department (PCWMD). 2007. Arid West Water Quality Research Project User's Guide. Prepared for the Arid West Water Quality Research Project by Camp Dresser and Mckee (CDM) and Risk Sciences.

USEPA. 2013. Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence [External Review Draft]. U.S. Environmental Protection Agency, Office of Research and Development, Washington, DC. September 2013. EPA/600/R-11/098B.

USEPA. 1991. Technical Support Document for Water Quality-Based Toxics Control. U.S. Environmental Protection Agency, Office of Water, Washington, DC. March 1991. EPA/505/2-90-001.

July 8, 2014

Honorable Larry Buchson
U.S. Representative
Indiana, Eighth District
1005 Longworth HOB
Washington, D.C. 20515

Dear Representative Bucshon:

In advance of the House Science Committee's hearing on the Environmental Protection Agency's Waters of the United States (WOTUS) proposed rule, I am writing to express the Indiana Chamber of Commerce's concerns with the potential impact of the proposed rule on our Chamber members and the economy of Indiana.

We would like to register our support for the effort of the House Committee on Science, Space, and Technology to address this important issue. The U.S. Supreme Court has twice affirmed that both the U.S. Constitution and the Clean Water Act (CWA) place limits on federal authority over intrastate waters. Moreover, Congress has wisely decided not to change the careful balance between federal and state regulation.

EPA and the U.S. Army Corps of Engineers (Corps) proposed this rule to change the definition of "Waters of the United States" under the CWA. This change is comprised of a complicated set of regulatory definitions, including new and poorly defined terms, based on ambiguous and untested legal theories and regulatory exclusions. The result is a proposal that asserts jurisdiction over waters, including many ditches, conveyances, isolated waters, and other waters, that are presently under the jurisdiction of the states and that is inconsistent with Congressional intent and recent judicial decisions.

EPA's proposed rule will create a great deal of uncertainty for our members, and could put potential projects and investments on hold due to the uncertainty of what would be covered jurisdictionally and who would or would not need a permit going forward.

This proposed rule could also impact existing operations or facilities by expanding the jurisdiction to cover businesses that were not previously required to hold a permit, increasing compliance costs and administrative paperwork.

Indiana Chamber of Commerce
115 W. Washington St., Suite 850S
Indianapolis, IN 46204

p 317-264-3110
f 317-264-6855
www.indianachamber.com

In addition to the new permitting requirement and use restrictions businesses will face, the EPA's permitting process does not provide any certainty for planning purposes. Recently, the EPA for the first time used its power to retroactively veto a valid CWA permit, thereby halting an on-going and lawfully permitted operation. EPA currently is in the process of potentially using its power to prospectively veto another project before companies involved could even apply for a permit but, after hundreds of millions of dollars had been spent in up-front expenditures. Subjecting businesses to this type of uncertainty in the permitting process will send investment dollars elsewhere.

We ask that you stop EPA from finalizing this proposed rule that would create a significant amount of uncertainty and would impact the Hoosier business community in a detrimental way. It seems like another sad chapter in the EPA's lengthy tome of bureaucratic overreach. It is time to put a stop to federal intrusion on intrastate matters, especially when the intrusion is occurring as a result of executive fiat vs. congressionally passed legislation.

Thank you for your consideration of this matter. Please feel free to share this correspondence with your legislative and committee colleagues.

Sincerely,

Cameron Carter
Vice President, Economic Development and Federal Affairs

LETTER SUBMITTED BY REPRESENTATIVE MO BROOKS

JIMMY PARNELL
PRESIDENT

July 8, 2014

The Honorable Mo Brooks
United States House of Representatives
1230 Longworth House Building
Washington, DC 20515

Re: Navigating the Clean Water Act: Is Water Wet?
Committee on Science, Space, and Technology Full Committee Hearing - July 9, 2014

Dear Congressman Brooks:

The Alabama Farmers Federation appreciates the opportunity to submit for the record the following comments and appreciates the Committee on Science, Space, and Technology holding a hearing to examine proposed changes to the Clean Water Act (CWA). The Alabama Farmers Federation, an affiliate of the American Farm Bureau Federation, is Alabama's largest general farm organization and represents nearly 360,000 members. The economic activity generated by agriculture exceeds $70 billion annually and provides one out of every 4.6 jobs in Alabama.

Farmers, ranchers, and land owners in Alabama are extremely concerned about the impact of changing the definition of "Waters of the United States" under the CWA. The rule proposed by the United States Environmental Protection Agency (EPA) and the United States Corps of Engineers (USCOE) on April 21, 2014, poses a significant threat to the economic viability of farmers, ranchers, and businesses engaged in any enterprise that depends on the use of the land.

While the agencies continue to proclaim that this rule does not change anything and is being promulgated to simply provide certainty to the regulated community, we believe this rule makes sweeping changes to the CWA. In fact, the rule makes it perfectly clear that the agencies intend to regulate features across the landscape that have not previously been regulated.

Ephemeral streams would be regulated as a "tributary" under this rule. Ditches that are dry most of the year would be categorically regulated as a "tributary" under this rule if they ever carry any amount water that eventually flows to a traditionally defined "navigable" water. Low areas or depressions in a farm field that the agencies deem as being adjacent to jurisdictional waters or located in a floodplain would be regulated as well. The concept of "significant nexus" as defined by the agencies in the proposed rule would allow for the regulation of virtually any other feature not specifically or categorically defined as a water of the United States. Collectively, this rule would give the agencies the ability to regulate virtually every isolated wetland, pond, ditch, or low area on farms across the country.

When all of the newly regulated acres are totaled, this rule begins to look more like a federal land grab than a simple rule that would clarify the intent of existing law. One might argue that this point overstates the impact of the proposed rule. However, we are convinced this rule infringes on individual private property rights and will result in more activities on more private lands being subject to regulation.

ALABAMA FARMERS FEDERATION • A MEMBER OF THE AMERICAN FARM BUREAU FEDERATION
P.O. BOX 11000 • MONTGOMERY, ALABAMA 36191-0001 • 334-286-3900 • FAX 334-284-3957
WWW.ALFAFARMERS.ORG

There are an estimated 77,000 miles of rivers and streams flowing though the state of Alabama along with hundreds of thousands of acres of reservoirs, lakes, and ponds. Just over three percent of Alabama's total area is covered in water by any logical definition. With all of the newly regulated land features under this new rule, the total percentage of Alabama's land mass that would fall under federal regulation would no doubt increase dramatically, but the EPA has stated that only a very small number of additional waters, approximately 3.2 percent nationally, will be found jurisdictional under this new rule. We believe this number is based on flawed models because the incremental acreage estimation for all programs relies wholly on section 404 estimates. The actual number of acres impacted by this rule will likely be much more significant.

The agencies point to the long-standing agricultural exemptions in the CWA and tell farmers not to worry, these exemptions will carry forward under this new rule. We are not convinced this is the case. A separate "interpretive" rule, also published in April, clarifies what the agencies view as "normal" agricultural activities. While the interpretive rule claims to continue existing exemptions, it is our belief that it actually narrows the exemption by identifying 56 activities that will be exempt only if conducted in a manner consistent with Natural Resource Conservation Service standards. Congress expressly exempted normal farming, ranching and silvicultural activities from the dredge and fill requirements of the CWA in the 1970s. Those activities, along with dozens of others not identified in the interpretive rule, already qualify as "normal" farming, ranching and silviculture activities under existing law. EPA has stated that the 56 practices add to what is exempt. However, there was no set number of practices listed by the CWA, so how is it possible the agencies can add to a number that was not previously defined? Why identify any specific practices at all, other than to narrow the exemptions?

Lastly, the Alabama Farmers Federation firmly believes that our Constitution expressly granted the ability to make laws exclusively to the legislative branch of government. We continue to see more and more rules, regulations, interpretations, and other bureaucratic terms that carry the weight of law come forth from a myriad of federal agencies, many of them crippling the American farmer. Congress has not given the EPA or the USCOE the authority to make these changes to the CWA and the Alabama Farmers Federation believes this rule should be immediately withdrawn on these grounds if nothing else. Any future changes to the CWA should originate in Congress where the real impact of the proposal can be justly debated and analyzed.

Thank you again for reviewing the status of the CWA in today's hearing, and for accepting these comments.

Sincerely,

Jimmy Parnell

LETTERS SUBMITTED BY REPRESENTATIVE DAVID SCHWEIKERT

nssga

National Stone, Sand & Gravel Association
1605 King Street
Alexandria, VA 22314

Rep. David Schweikert
Chairman of the Subcommittee on the Environment
House Science, Space, and Technology committee

July 9th, 2014

Dear Congressman Schweikert,

In anticipation of the House Science committee hearing on the EPA and Corps proposed rule on the Waters of the United States, NSSGA wanted to make you aware of the impacts this proposed rule will have on our industry.

NSSGA is the world's largest mining association by product volume. Aggregates are the chief ingredient in asphalt and concrete and are used in nearly all construction and road building activities. As the industry that provides the basic material for everything from the roads on which we drive to purifying the water we drink, NSSGA members are deeply concerned that the EPA's proposed rule will stifle our industry at a time when we are just recovering from the economic downturn.

NSSGA members are worried about this vast expansion of federal powers over waters of the U.S., and disappointed that these concerns are being marginalized by EPA as "not understanding" or worse "misstating" the rule's effects. Our members have decades of experience in how the Corps interprets and applies these rules, and we are frustrated that our legitimate concerns over what is actually codified in the rule are being characterized as "speculation." Clean Water Act permits for "dredge and fill" activities, which are essential to resource extraction, can take between 5-10 years to obtain.

Under the proposed revisions, many previously non-jurisdictional areas like waters within floodplains, wet weather conveyances, upland headwaters, ephemeral streams and "similarly situation waters" could be considered jurisdictional. It could make nearly any area our members try to access regulated, and in need of additional permits. EPA's claims it won't "automatically" assert jurisdiction over dry stream beds and waters in flood plains (see Setting the Record Straight). What this means for the regulated community is that these landforms will require a jurisdictional determination, which takes additional months, and must be budgeted and planned for by businesses if there is a chance it will require a permit. EPA and the Corps have offered no indication of how these broad new terms will be implemented, offering even more uncertainty. Uncertainty that they claim this rule is intended to clear up.

EPA continues to say the proposed rule will expand jurisdiction by only about 3%. They do not add that this is based on a very limited data set of past "asks" by the regulated community. The regulated community would not have thought to ask about ditches, dry stream beds and other

waters regulated under this proposed rule in the past, because everyone understood they were not jurisdictional. When our members – experts with decades of experience in the field– look at their existing and future sites, they estimate a change in regulated areas of 50-100%. It is a dramatic expansion for the aggregates industry and will make existing and future operations much more difficult and costly with little or no discernable environmental benefit.

Obtaining a jurisdictional determination can be a significant undertaking. 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. The companies in our industry are concerned that past understandings of what would be jurisdictional will now be subject to review. A change in what is considered jurisdictional can have significant impacts on construction material reserves, which will affect the life of 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.

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 continuously after operations begin. States and local governments are best-suited to make land use decisions and balance economic and environmental benefits, which is what Congress intended.

Yet EPA wants to have it both ways: They claim that it is either not an expansion at all or only a small expansion of 3%. If either of these scenarios are the case, how can the benefit be as large as EPA claims? What are the waters that are currently unprotected that this rule will now include? EPA has not provided a single example or case study.

There is much inefficiency in the current regulatory system; however, adding vague terms and undefined concepts to an already complicated program is not the solution to the problem. In some cases this rule could have negative effects on the environment and safety. Under the proposed rule, ditches will now need permits which can delay much needed repair work, and ditches without maintenance can degrade and lead to increased erosion and sediment problems.

EPA claims this rule is based on sound science, but it is based upon studies of "connection" not whether such connections are significant, which is what they are allowed to regulate. They have, in the draft connectivity study, answered a question no one has asked or disputed. Additionally, they ignored House Science Committee requests to have the Science Advisory Board, the group of independent scientists reviewing it, even consider the issue. Therefore the results of this study will not provide a meaningful basis for EPA's vast jurisdictional expansion.

EPA's economic analysis of the rule does not accurately show what businesses 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 the aggregates industry. Another member calculated that the costs for

mitigation at one of their sites would jump from $200,000 to $2.75 million under the proposed rule. These examples from single sites are more than EPA has estimated for mitigation costs for entire states.

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. The above examples are just *some* of the issues our industry sees as certain to affect operations. There is a startling lack of clarity for a relative short rule, which leads to potential issues that are hard to quantify. For example, EPA says that groundwater is exempt from regulation, yet allows for a "shallow subsurface connection" to be link regulated waters. How is the regulated community to know that waters with no surface connection may be regulated if there is no surface expression? Shallow subsurface water is present over much of the United States and varies widely by season and other factors. There is no way to know if such a connection exists without extensive and costly groundwater studies. Does EPA expect everyone to perform these sorts of studies? If not, they remain at risk that, after the fact, such a connection can be asserted by the Corps and huge fines levied. These are some of the real world implications the proposed rule holds for our industry, and EPA continues to ignore.

If it is determined development of a site will take too long or cost too much in permitting or mitigation, then the aggregates industry 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.

Additionally, EPA conducted little meaningful state outreach prior to releasing this proposed rule. States and localities will bear an enormous financial burden under this rule, as it will affect construction, recreation facilities, and even maintenance of roadside ditches. EPA should have consulted vigorously with the states prior to proposing the rule in order to incorporate local needs and capabilities. When states and local governments discuss the increased costs and delays that (see Transportation and Infrastructure Hearing Testimony) of what this proposed rule does, they are basing their reading of the rule on decades of experience in dealing with these matters in the field. And their concerns are exactly the same as that of our industry and many others. Yet again, their legitimate concerns are being brushed off by EPA as unfounded.

Perhaps the most troubling part of the rule deals with ditches. EPA continues to assert that most ditches are not regulated, but the rule *clearly* includes ditches, not only under case by case

determinations, but as automatically as jurisdictional under the expanded definition of tributary. This means that if water traveling in a ditch eventually enters (directly or indirectly) a waters of the U.S., it is a tributary of said water. This is a remarkable and unjustified expansion. Ditches are intended for flood control and often drain wet areas and connect with many other conveyances. Yet EPA's rule only exempts 1) ditches in uplands that drain uplands and have less than perennial flow or 2) do not contribute flow that EVER ends up in a jurisdictional water. This does not exempt most of the ditches in the U.S., yet EPA continues to claim it does.

Besides the very narrow ditch exemption above, EPA's proposed rule includes no reference to flow, which will be particularly problematic for the arid west. Dry stream beds and other conveyances that may have water only once per decade or more could now be regulated. EPA continues to claim this is not the case, yet the rule clearly includes "waters" that may have no water in them most of the time. This is in stark contrast to the 2008 Guidance and court directives. And yet, even with this enormous increase in jurisdiction, EPA continues to repeat that it is a very minor increase.

We urge that EPA withdraw this rule until a more thorough economic analysis has been performed, a Small Business Regulatory Flexibility Act (SBRFA) panel has been conducted, the states and affected communities have been consulted, and the Science Advisory Board has finished their analysis and allowed stakeholders to comment on their conclusions. Without a thorough outreach to affected communities – which EPA has refused to conduct – this rule will harm not only aggregates operators and our transportation infrastructure, but the economy as a whole.

NSSGA appreciates this opportunity to submit information on the devastating effects of a broad expansion of Clean Water Act jurisdiction on the aggregates industry.

ABOUT NSSGA

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 across the United States.

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; unlike many 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. 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.

Aggregates 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 pervious pavements and other

LEED building practices, the treatment of drinking water and sewage, erosion control on construction sites, and the treatment of air emissions from power plants. While Americans take for granted this essential natural material, it is imperative for construction of our infrastructure, homes, and for positive growth in our communities.

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 seen 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 proposed changes in what is considered jurisdictional will make the problem worse.

Thank you,

National Stone, Sand & Gravel Association

IRRIGATION & ELECTRICAL DISTRICTS ASSOCIATION OF ARIZONA

R.D. JUSTICE
PRESIDENT

ELSTON GRUBAUGH
VICE-PRESIDENT

SUITE 140
340 E. PALM LANE
PHOENIX, ARIZONA 85004-4603
(602) 254-5908
Fax (602) 257-9542
E-mail: rslynch@rslynchaty.com

WILLIAM H. STACY
SECRETARY-TREASURER

ROBERT S. LYNCH
COUNSEL AND
ASSISTANT SECRETARY-TREASURER

MEMORANDUM

TO: Hon. Jan Brewer, Governor of Arizona
Arizona Congressional Delegation

FROM: Robert S. Lynch, Counsel and Assistant Secretary/Treasurer

DATE: June 26, 2014

SUBJECT: Resolution of the American Public Power Association adopted at its June 2014 Annual Meeting

Attached is a copy of a resolution opposing the proposed EPA/Corps of Engineers rule redefining "Waters of the United States", the jurisdictional term of art used in the Clean Water Act. We were pleased to co-sponsor this resolution with Colorado Springs Utilities. It was adopted unanimously.

While the agencies have postponed the comment deadline from July 7, 2014 to October 20, 2014, we hope you will keep this important rulemaking in mind and express your opposition to it. Amazingly, the preamble in the proposed rulemaking admits that no court case has told either agency that the existing definition in their rules, which has been in the rules for decades, is flawed. What the courts, fairly consistently, including two decisions in 2013 in the U.S. Supreme Court, have told the agencies is that their attempts to administratively broaden the rule and the meaning of the jurisdictional limits of the federal Clean Water Act are flawed.

So the agencies' reactions have been to attempt to expand the regulatory definition, ignoring the fact that courts have said that areas they now seek to regulate do not fall within the statute.

For Arizona, should this rule go forward, we can anticipate having to get permits for virtually any activity that takes place in or near any of our dry arroyos or washes or for that matter in any sink or even a low spot that might collect water that would otherwise enter a watercourse and possibly cause downstream temporary flooding.

There are only a few, maybe 3, small closed basins in Arizona. Otherwise, the entire state drains eventually into the Colorado River except for one or two small watercourses that enter Mexico. Thus, this new rule would throw a regulatory blanket effectively over the entire state.

The rule is unnecessary. The rule is bureaucratic overreaching. The rule cannot be justified by pointing to existing water quality problems in this state.

We will look forward to working with you to continue to try to emphasize to these federal agencies that wise regulation is regulation that can be shown to have a demonstrated rational basis and need. This is not it.

RSL:psr
Enclosure
cc: John Anderson, Staff Director, House Water Resources and Environment Subcommittee
Jon Pawlow, House Water Resources and Environment Subcommittee
Rachel A. Jones, House Committee on Science, Space, and Technology
Kiel Weaver, House Water & Power Subcommittee
Brian Clifford, Office of Senator Barrasso
Jeremy Harrell, Office of Senator Heller
Sue Kelly, APPA
Joy Ditto, APPA
Will Coffman, APPA
Bob Johnson, NWRA
Kris Polly, NWRA
Ian Lyle, NWRA
Mark Pifher, Colorado Springs Utilities
IEDA Members

○