

THE ADMINISTRATION'S PRIORITIES AND POLICY INITIATIVES UNDER THE CLEAN WATER ACT

(116–31)

HEARING BEFORE THE SUBCOMMITTEE ON WATER RESOURCES AND ENVIRONMENT OF THE COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE HOUSE OF REPRESENTATIVES ONE HUNDRED SIXTEENTH CONGRESS FIRST SESSION

SEPTEMBER 18, 2019

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U.S. House of Representatives
Washington, DC 20515

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SEPTEMBER 9, 2019

SUMMARY OF SUBJECT MATTER

TO: Members, Subcommittee on Water Resources and Environment
FROM: Staff, Subcommittee on Water Resources and Environment
RE: Subcommittee Hearing on “The Administration’s Priorities and Policy Initiatives Under the Clean Water Act”

PURPOSE

The Subcommittee on Water Resources and Environment will meet on Wednesday, September 18, 2019, at 10:00 a.m. in Room 2167, Rayburn House Office Building, to receive testimony from the U.S. Environmental Protection Agency (EPA) and stakeholders related to the Administration’s priorities and policy initiatives under the Clean Water Act.

BACKGROUND

The EPA has initiated several policy priorities over the past two-and-a-half years under the Clean Water Act. Below are a few of the issues that have been of interest to Members of the Subcommittee on Water Resources and Environment.

UPDATE TO EPA’S NUTRIENT POLLUTION MANAGEMENT EFFORTS

The EPA has focused on promoting “collaborative approaches” to address excess nutrient pollution.¹ On February 6, 2019, EPA announced a new policy memorandum aimed at helping states, tribes, and stakeholders use market-, incentive-, and community-based programs to address nutrient pollution through water quality trading and other programs. This new water quality trading memorandum reiterates the Agency’s support for water quality trading and is one piece of a larger collaboration with stakeholders across the country, aimed at coordinating federal resources towards addressing nutrient pollution.²

WATER REUSE ACTION PLAN

On February 27, 2019, the EPA announced its intent to develop a Water Reuse Action Plan,³ with the stated goal of leveraging the government’s and industry’s knowledge to ensure the proper management of our Nation’s water resources including ensuring water availability and mitigating the risks posed by droughts through water reuse and other means. On April 17, 2019, the EPA asked for public input on the Water Reuse Action Plan, with the docket closing on July 1.⁴ A draft of the Plan is expected to be released in September of this year.⁵

¹ Nutrient pollution is the process where too many nutrients, mainly nitrogen and phosphorus, are added to bodies of water and can act like fertilizer, causing excessive growth of algae and impairment of water quality. See <https://oceanservice.noaa.gov/facts/nutpollution.html>.

² See <https://www.epa.gov/npdes/frequently-asked-questions-about-water-quality-trading>

³ See <https://www.epa.gov/waterreuse/water-reuse-action-plan>

⁴ See <https://www.epa.gov/waterreuse/water-reuse-action-plan>.

⁵ Lape, Jeffrey. U.S. Environmental Protection Agency, Office of Science and Technology. April 17, 2019. *Memorandum Posting EPA-HQ-OW-2019-0174 to Regulations.gov for Public Access (Development of a Draft Water Reuse Action Plan)*.

STEAM ELECTRIC EFFLUENT LIMITATIONS GUIDELINES

Effluent Limitation Guidelines (ELGs) are national wastewater discharge treatment standards developed by the EPA on an industry-by-industry basis.⁶ These are technology-based regulations intended to represent the greatest pollutant reductions that are economically achievable for an industry. The standards for direct dischargers are incorporated into National Pollutant Discharge Elimination System (NPDES) permits issued by States and EPA regional offices and permits or other control mechanisms for indirect dischargers.

In 2015, the EPA finalized a rulemaking for a new ELG for steam electric power generating facilities;⁷ however, in response to petitions from industry for reconsideration and an administrative stay of provisions of EPA's 2015 final rule, the EPA announced it would initiate a new rulemaking that may result in revisions to the 2015 rule.⁸ Specifically, the EPA may revise the best available technology economically achievable effluent limitations and pretreatment standards for bottom ash transport water and flue gas desulfurization wastewater for existing sources. According to the regulatory information website of the Office of Information and Regulatory Affairs (OIRA), Office of Management and Budget, the EPA planned to release a Notice of Proposed Rulemaking in June 2019,⁹ but still has not. The final rule is anticipated in August 2020.¹⁰

CLEAN WATER ACT SEC. 401 CERTIFICATION

Under Section 401 of the Clean Water Act, a federal agency may not issue a permit or license to conduct any activity that may result in any discharge into navigable waters unless: (1) a state or authorized tribe where the discharge originates (or would originate) issues a Section 401 water quality certification verifying compliance with applicable requirements of the Act; or (2) the State or tribe waives this certification requirement.

On April 10, 2019, President Trump issued Executive Order 13868,¹¹ directing the EPA to review its section 401 guidance, including timing, scope, types of conditions to be included, and how much information an applicant must provide to States or tribes to make their decision. The Executive Order also directed the EPA to issue new guidance and a new regulation for implementing Section 401. On August 8, 2019, the EPA signed a proposed rule to replace existing water quality certification regulations pursuant to Section 401.¹² This proposal would establish a new process for establishing the scope of issues that a State could review using its section 401 authority, the time under which the State could review the activity, and what information related to the activity a State could require to carry out its review.¹³ The 60-day public comment period ends on October 21, 2019.¹⁴

WATERS OF THE UNITED STATES

The jurisdictional reach of the Clean Water Act is the “navigable waters”, defined in the Act as the “waters of the United States, including the territorial seas”¹⁵ The definition of navigable waters/waters of the United States governs the application of Clean Water Act programs—including tribal and state water quality certification programs, pollutant discharge permits, and oil spill prevention and planning programs. States may also protect water quality and regulate activities in their respective State waters; however, according to a study of the Environmental Law Institute, current state laws may also limit the ability of state agencies to protect wetlands, streams, and other water resources more broadly than federal law.¹⁶

⁶ See <https://www.epa.gov/eg/learn-about-effluent-guidelines>.

⁷ “Effluent Limitations Guidelines and Standards for the Steam Electric Power Generating Point Source Category,” (80 FR 67838; November 3, 2015).

⁸ See https://www.epa.gov/sites/production/files/2017-08/documents/steam-electric-elg_epa-letter-to-petitioners_08-11-2017.pdf.

⁹ Executive Office of the President of the United States, Office of Information and Regulatory Affairs, Office of Management and Budget at <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201904&RIN=2040-AF77>. According to the OIRA website, the unified agenda reports on the actions administrative agencies plan to issue in the near and long term.

¹⁰ *Id.*

¹¹ See <https://www.federalregister.gov/documents/2019/04/15/2019-07656/promoting-energy-infrastructure-and-economic-growth>.

¹² See <https://www.regulations.gov/document?D=EPA-HQ-OW-2019-0405-0025>.

¹³ See <https://www.epa.gov/cwa-401/guidance-section-401-certification>.

¹⁴ See <https://www.epa.gov/cwa-401/updating-regulations-water-quality-certification>.

¹⁵ See 33 U.S.C. 1362.

¹⁶ See <https://www.eli.org/research-report/state-constraints-state-imposed-limitations-authority-agencies-regulate-waters>.

On February 28, 2017, the President signed the “Executive Order on Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the ‘Waters of the United States’ Rule.”¹⁷ In it, the President directed the EPA and the U.S. Army Corps of Engineers (Corps) to review the final rule issued by the EPA and the Corps in 2015 aimed at addressing the jurisdictional reach of the Clean Water Act,¹⁸ and consider proposing a new rule to rescind or revise the 2015 Rule.

On June 27, 2017, the EPA and Corps proposed a rule to repeal the 2015 Rule and replace the 2015 Rule with the regulatory text that existed prior to 2015 for the definition of waters of the United States.¹⁹ On July 12, 2018, the agencies published a Supplemental Notice of Proposed Rulemaking, asking for additional comments on the agencies’ proposed repeal. According to OIRA²⁰, the final rule was anticipated in August 2019; however, as of the date of this memo, no final action has yet been taken to repeal the 2015 Rule.

The agencies are also pursuing the development of a new rule to replace the regulations determining the scope of the Clean Water Act. To that end, on December 11, 2018, the EPA and Corps proposed a revised definition of waters of the United States and the proposed rule was published in the Federal Register on February 14, 2019.²¹ According to OIRA, the final rule is anticipated December 2019.²²

SECTION 404(C) REGULATORY REVISION

Under the Clean Water Act, the Corps and EPA have complementary roles in implementing the Section 404 permit program. Under Section 404, the Corps issues permits for the discharge of dredged or fill material, using a set of environmental guidelines promulgated by EPA in conjunction with the Corps (pursuant to Section 401(b) of the Act) to evaluate permit applications.²³

Section 404 also authorizes the EPA to restrict, prohibit, deny, or withdraw the specification by the Corps of a site for the discharge of dredged or fill material, if the agency determines that the discharge will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas. This authority, commonly called the agency’s 404(c) veto authority, authorizes the EPA to “prohibit the specification (including the withdrawal of a specification) of any defined area as a disposal site, and . . . to deny or restrict the use of any defined area for specification (including the withdrawal of specification) as a disposal site, whenever he determines, after notice and opportunity for public comment, that the discharge of such materials into such area will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreation areas.” Since enactment of the Clean Water Act in 1972, the EPA has exercised its 404(c) authority 13 times.²⁴

On June 26, 2018, the EPA signed a memorandum to the Office of Water and Regional Administrators outlining changes that EPA will propose to update the regulations governing EPA’s role in permitting discharges of dredged or fill materials under Section 404 of the Clean Water Act (CWA). In addition, according to OIRA, EPA is expected to issue a notice of proposed rulemaking to consider changes to EPA 404(c) review process that would govern its future use.²⁵

WASHINGTON STATE WATER QUALITY CRITERIA

The Clean Water Act implementation regulations require that the EPA formally approve state- and tribal-developed water quality standards before they can go into effect for state waters.²⁶ In 2016, the State of Washington submitted 45 human health criteria for toxic chemicals in state waters to the EPA, which approved them on November 15, 2016, and issued a final rule that revised 144 additional human

¹⁷ Executive Order 13778. “Presidential Executive Order on Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the ‘Waters of the United States’ Rule” at <https://www.whitehouse.gov/presidential-actions/presidential-executive-order-restoring-rule-law-federalism-economic-growth-reviewing-waters-united-states-rule/>.

¹⁸ 80 Fed. Reg. 37054 (June 29, 2015).

¹⁹ Proposed Rule was published in the *Federal Register* on July 27, 2017, at 82 Fed. Reg. 34899.

²⁰ See <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201904&RIN=2040-AF74>.

²¹ See 84 Fed. Reg. 4154.

²² See <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201904&RIN=2040-AF75>.

²³ 33 CFR §320.4(a)(1).

²⁴ See <https://www.epa.gov/cwa-404/chronology-cwa-section-404c-actions>.

²⁵ See <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201904&RIN=2040-AF88>

²⁶ 40 CFR 131.

health criteria for the State of Washington's waters.²⁷ On August 6, 2019, in response to petitions from industry groups, the EPA issued a proposed rule to consider withdrawing its previous approval of State-developed human health criteria applicable to waters in the State of Washington.²⁸

GROUNDWATER

On April 15, 2019, the EPA issued an interpretive statement, with the express goal of "clarifying the application of Clean Water Act permitting requirements to groundwater."²⁹ The 2019 interpretive guidance reverses prior EPA interpretations that "pollutants discharged from point sources that reach jurisdictional surface waters via groundwater or other subsurface flow that has a direct hydrologic connection to the jurisdictional water may be subject to Clean Water Act permitting requirements."³⁰ EPA recognizes that the U.S. Supreme Court was granted a petition of writ of certiorari in *Hawai'i Wildlife Fund v. County of Maui*, 886 F.3d. 737 (9th Cir. 2018), a Ninth Circuit case that deals directly with the issue that is the subject of the interpretive statement. EPA has stated that it may take further action if necessary, after the U.S. Supreme Court has issued a decision.

SEWAGE BLENDING

The administration's Unified Agenda states that the EPA is considering updating existing Clean Water Act regulations regarding publicly owned treatment works (POTWs) operations when wet weather events impact the ability of a POTW to treat all incoming wastewater.³¹ According to OIRA, the goal of the update is to clarify permitting procedures to provide POTWs with flexibility in how they manage and treat peak flows under wet weather events.³²

CLEAN WATER ACT HAZARDOUS SUBSTANCES SPILL PREVENTION

Section 311(j)(1)(C) directs the President to issue regulations establishing procedures, methods, and equipment; and other requirements for equipment to prevent discharges of oil and hazardous substances from vessels and from onshore facilities and offshore facilities, and to contain such discharges. The President has delegated the authority to regulate non-transportation-related onshore facilities and offshore facilities landward of the coastline, under section 311(j)(1)(C) to EPA.

In February 2016, the EPA agreed, as part of a court-ordered settlement, to propose hazardous substance spill-prevention rules for industrial sites by June of 2018, and to issue a final rule in 2019. After soliciting input about hazardous substance spills across the country, the EPA issued a proposed rule to establish no new requirements related to spills of hazardous substances under the Clean Water Act.³³

WITNESSES

PANEL 1

- The Honorable Dave Ross, Assistant Administrator, Office of Water, U.S. Environmental Protection Agency

PANEL 2

- Ms. Maia Bellon, Director, Department of Ecology, State of Washington
- Ms. Becky Keogh, Secretary, Arkansas Energy and Environment, State of Arkansas
- Mr. Ken Kopocis, Associate Professor, American University College of Law
- Mr. Michael Hickey, Hoosick Falls, NY
- Ms. Pam Nixon, President, People Concerned About Chemical Safety
- Mr. Geoffrey R. Gisler, Senior Attorney, Southern Environmental Law Center

²⁷ See 81 Fed. Reg. 85419 (November 28, 2016).

²⁸ See 84 Fed. Reg. 38150 (August 6, 2019).

²⁹ See <https://www.epa.gov/npdes/releases-point-source-groundwater>.

³⁰ See 83 Fed. Reg. 7126, 7127 (February 20, 2019).

³¹ See <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201904&RIN=2040-AF81>.

³² See *id.*

³³ See 83 Fed. Reg. 29499 (June 25, 2018).

THE ADMINISTRATION'S PRIORITIES AND POLICY INITIATIVES UNDER THE CLEAN WATER ACT

WEDNESDAY, SEPTEMBER 18, 2019

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON WATER RESOURCES AND
ENVIRONMENT,
COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE,
Washington, DC.

The subcommittee met, pursuant to call, at 10:01 a.m., in room 2167, Rayburn House Office Building, Hon. Grace F. Napolitano (Chairwoman of the subcommittee) presiding.

Mrs. NAPOLITANO. Good morning, everybody.

I call this hearing to order, and we are going to get started as soon as we have everybody set.

Today's hearing focuses on the Trump administration's policies and priorities under the Clean Water Act and the impacts on our communities.

Let me begin by asking unanimous consent that committee members not on the subcommittee be permitted to sit with the subcommittee at today's hearing and allowed to ask questions.

Without objection, so ordered.

I also ask unanimous consent the chair be authorized to declare a recess during today's hearing.

Without objection, so ordered.

Today's hearing has been a long time in coming and is long overdue. This is our first opportunity in 3 years to question this administration on its vision of the Clean Water Act, and whether their vision is consistent with the law and in line with the wishes of the American people. We have much to discuss.

In the past 3 years, this administration has taken unprecedented steps to critically weaken our Clean Water Act, one of our Nation's most important environmental laws for protecting our health and the health of our environment.

In just 3 short years, EPA has repealed efforts to restore long-standing protections for rivers, streams, and wetlands that provide drinking water to over 117 million Americans. In just 3 years, EPA has proposed to eliminate Reagan-era protections on an estimated 50 million acres of wetlands and over 2 million miles of rivers and streams—more than half of the remaining wetlands and stream miles in the entire country.

In just 3 years, the EPA has ground Clean Water Act enforcement to a standstill, imposing political influences on decisions

when or if to enforce the law and relying on unproven and unquantifiable so-called compliance initiatives to make it sound like the Agency is doing something.

In just 3 years, the EPA has attacked the foundational underpinnings of the 1972 Clean Water Act, including the long-standing Federal-State partnership in co-administering the law, the backstop EPA veto authority which ensures that projects with unacceptable impacts to the environment cannot move forward, and the authority to prevent pollution from existing point sources.

Finally, in just 3 short years, this administration has actively tried to eviscerate, undermine, and silence the scientific and technical expertise and effectiveness of the Agency, clearly demonstrating this administration's fear of science, and its view that a weakened, underfunded, understaffed agency is a compliant agency.

As noted in the recent testimony of former Republican EPA Administrator Christine Todd Whitman, she stated: "Today, as never before, the mission of EPA is being seriously undermined by the very people who have been entrusted with carrying that mission out ... The Trump administration has explicitly sought to reorient the EPA toward industrial and industry-friendly interests, often with little or no acknowledgment of the Agency's health and environmental missions."

Administrator Ross, I am glad you accepted our invitation to testify this morning, and I appreciate your being here. However, as you can surmise, Members on both sides of the aisle are frustrated by the seeming disconnect between your actions and the missions of the EPA. I can only imagine how much polluters love what you are doing. However, when 63 percent of Americans tell us that they are a great deal worried about pollution and drinking water; when 57 percent of American people worry a great deal about pollution in their rivers, lakes, and reservoirs; and when hard-working Americans and communities of color say that they are more concerned about water pollution than any other time in recent history, something is clearly wrong.

Today, your job is to answer to the subcommittee and the American people why you think a weakened Clean Water Act is in the best interest of hard-working American families.

Please don't fall back to the tired, false choice of economy versus the environment. We can easily point you to both the Clinton and Obama administrations where the economy was strong, as was our Clean Water Act protections. We will continue to protect EPA's stated mission.

[Mrs. Napolitano's prepared statement follows:]

Prepared Statement of Hon. Grace F. Napolitano, a Representative in Congress from the State of California, and Chairwoman, Subcommittee on Water Resources and Environment

Today's hearing has been a long time in coming.

This is our first opportunity in three years to question this administration on its vision of the Clean Water Act—and whether this vision is consistent with the law and in line with the wishes of the American people.

We have a lot to discuss.

In the past three years, this administration has taken unprecedented steps to critically weaken our Clean Water Act—one of our nation’s most important environmental laws for protecting our health and the health of our environment.

In just three short years, this EPA has repealed efforts to restore long-standing protections for the rivers, streams, and wetlands that provide drinking water to over 117 million Americans.

In just three years, this EPA has proposed to eliminate Reagan-era protections on an estimated 50 million acres of wetlands and over 2 million miles of rivers and streams—more than half of the remaining wetlands and stream miles in this entire country.

In just three years, this EPA has ground Clean Water Act enforcement to a standstill, imposing political influences on decisions when (or if) to enforce the law and relying on unproven and unquantifiable so-called “compliance initiatives” to make it sound like the agency is doing something.

In just three years, this EPA has attached the foundational underpinnings of the 1972 Clean Water Act, including the long-standing Federal-State partnership in co-administering the law, the backstop EPA veto authority which ensures that projects with “unacceptable impacts” to the environment cannot move forward, and the authority to prevent pollution from existing point sources.

Finally, in just three short years, this administration has actively tried to eviscerate, undermine, and silence the scientific and technical expertise and effectiveness of this agency—clearly demonstrating this administration’s fear of science, and its view that a weakened, underfunded, and understaffed agency is a “compliant” agency.

As noted in recent testimony by the former Republican EPA Administrator, Christie Todd Whitman:

“Today, as never before, the mission of EPA is being seriously undermined by the very people who have been entrusted with carrying that mission out . . . The Trump administration has explicitly sought to reorient the EPA towards industrial and industry-friendly interests, often with little or no acknowledgement of the agency’s health and environmental missions.”

Administrator Ross, I am glad you accepted our invitation to testify here this morning and appreciate your being here.

However, as you can surmise, Members on both sides of the aisle are frustrated by the seeming disconnect between your actions and the missions of EPA.

I can only imagine that polluters love what you are doing.

However, when 63 percent of the Americans tell us they are a *great deal* worried about pollution in their drinking water, when 57 percent of American worry a great deal about pollution in their rivers, lakes and reservoirs, and when hard-working Americans and communities of color say they are more concerned about water pollution than any time in recent history—something is clearly wrong.

That is your job today—to answer to this Subcommittee and the American people why you think a weakened Clean Water Act is in the best interests of the hard-working American families.

And, please, don’t fall back to the tired, false choice of economy versus the environment. I can easily point you to both the Clinton and Obama administrations where the economy was strong, as was our Clean Water Act protections.

I wish you luck.

Mrs. NAPOLITANO. At this time, I am pleased to yield to my colleague, ranking member of our subcommittee, Mr. Westerman, for any thoughts he may have.

Mr. WESTERMAN. Thank you, Chairwoman Napolitano, for holding this hearing, and thank you to our witnesses for being here to discuss EPA’s initiatives under the Clean Water Act.

In particular, I would like to acknowledge Assistant Administrator Dave Ross from EPA’s Office of Water for taking the time to be here. And on the second panel, I am glad to be able to welcome Becky Keogh, who is the secretary of energy and environment from my home State of Arkansas.

Water is obviously critical for life. We can’t live without it, and I can’t stress enough the importance of protecting our Nation’s water supply and quality and how water policy shouldn’t be about

politics but about applying the best science with the most common-sense approach.

Living in rural Arkansas or living anywhere in this country, you know that we all rely on clean water for drinking, for our homes, for our businesses and farms. And we also rely on effective wastewater management and irrigation to preserve the livelihoods of many people who produce the food that feeds our country.

Protecting our waters is absolutely critical to communities and ecosystems at home and all around the Nation. We have made substantial progress over the past four and a half decades improving water quality in our Nation. But I also understand that some challenging issues still remain. The most effective way to address these issues is through implementing effective and pragmatic environmental policies under the Clean Water Act that balance environmental, economic, and social outcomes.

States need to be empowered and engaged as equal partners with the Federal Government in working to achieve these objectives. Neither the Federal Government nor a State should become overbearing and upset that balance. Maintaining the balanced Federal-State partnership that Congress originally intended under the Clean Water Act is fundamental to achieving the objectives of the act. This is cooperative federalism.

It is critical that neither the Federal Government nor a State takes too heavy-handed an approach. We can and must protect and restore America's waters and wetlands with effective and pragmatic policy and regulation that provides regulatory certainty and is devoid of armies of consultants and lawyers. Legal and policy decisions must be informed by good science, be clear and concise, and preserve States' traditional authorities.

I look forward to hearing testimony today from the EPA and stakeholders on how we can strike a balance between regulatory clarity and the need for robust environmental protection of waters and wetlands, and also maintain the Federal-State partnership that was envisioned under the Clean Water Act.

[Mr. Westerman's prepared statement follows:]

Prepared Statement of Hon. Bruce Westerman, a Representative in Congress from the State of Arkansas, and Ranking Member, Subcommittee on Water Resources and Environment

Thank you, Chairwoman Napolitano, for holding this hearing, and thank you to our witnesses for being here to discuss EPA's initiatives under the Clean Water Act. In particular, I'd like to acknowledge Assistant Administrator Dave Ross from EPA's Office of Water for taking the time to be here today, as well as Secretary of Energy and Environment, Becky Keogh, from my home state of Arkansas.

Let me be clear, I am a staunch supporter of our environment and cannot understate the importance of protecting our Nation's water quality. Living in rural Arkansas, many of my friends and constituents rely on clean water for their drinking water, and homes, businesses, and farms rely on effective wastewater management and irrigation to preserve their livelihoods. Protecting our waters is absolutely critical to communities and ecosystems at home and all around the Nation.

We have made substantial progress over the past four and a half decades improving water quality in our Nation. But I also understand that some challenging issues still remain.

The most effective way to address these issues is through implementing effective and pragmatic environmental policies under the Clean Water Act that balance environmental, economic, and social outcomes. States need to be empowered and en-

gaged as equal partners with the federal government, in working to achieve these objectives. Neither the federal government nor a state should become overbearing and upset that balance.

Maintaining the balanced federal-state partnership that Congress originally intended under the Clean Water Act is fundamental to achieving the objectives of the Act. This is "cooperative federalism."

It is critical that neither the federal government nor a state takes too heavy-handed an approach. We can and must protect and restore America's waters and wetlands with effective and pragmatic policy and regulation that provides regulatory certainty and is devoid of armies of consultants and lawyers. Legal and policy decisions must be informed by good science, be clear and concise, and preserve states' traditional authorities.

I look forward to hearing testimony today from the EPA and stakeholders on how we can strike a balance between regulatory clarity and the need for robust environmental protection of waters and wetlands, and also maintain the federal-state partnership envisioned under the Clean Water Act.

Mr. WESTERMAN. And, Madam Chairwoman, I ask unanimous consent that the written testimony be submitted for the record on behalf of the following: The U.S. Chamber of Commerce and the Chamber's Business Task Force on Water Policy, the National Association of Home Builders, and the American Forest and Paper Association.

Mrs. NAPOLITANO. So ordered.

[The information is on pages 106–112.]

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

Mrs. NAPOLITANO. Thank you very much.

We now have the chair of the full committee, Mr. DeFazio.

Mr. DEFAZIO. Thanks, Madam Chair.

Long before I was in Congress, 1972, an overwhelming bipartisan majority and President Nixon agreed that the fact that Lake Erie was declared dead, the Cuyahoga River caught fire, and in my State, the Willamette River was an open sewer, that we needed to do something about it. So, hence, the Clean Water Act.

We are now at a point where we are facing 21st-century challenges to our clean water, and also new challenges in terms of climate change and severe climate events.

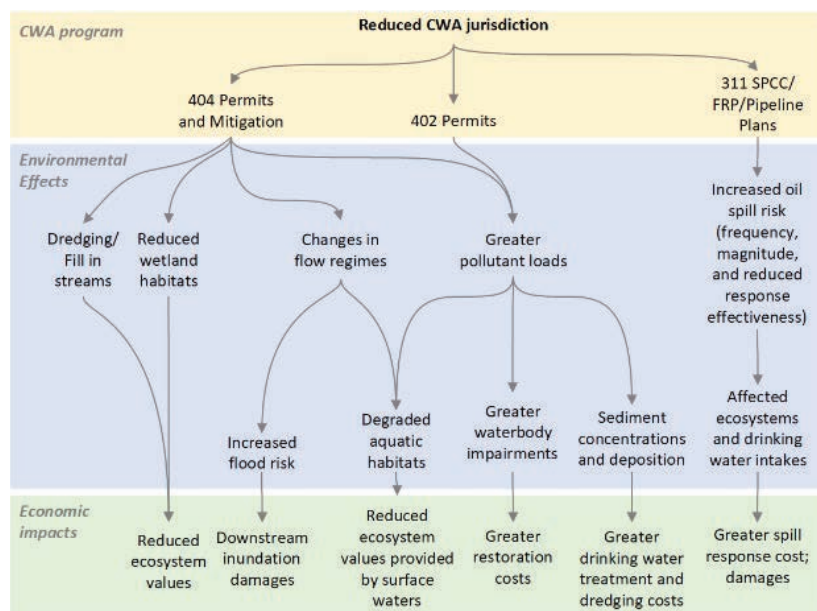
So what was the reaction of this administration? Well, they are leading a campaign to dismantle the Clean Water Act. Historic, I guess, being pushed by the mining industry, oil and gas, small and large industrial polluters. They want to go back to pre-1986 Reagan-era rules. They want to roll back the scope of the waters that are covered. That would strip clean water protections for over 60 percent of stream miles and close to half of remaining acres of wetlands.

In the West, it would remove all protections for intermittent and ephemeral streams, they are already proposing significant cut-backs, but let's get rid of all of those things. Well, that would be 74 percent of the stream miles in my State of Oregon that would be unprotected, 87 percent in the State of California, 99 percent in the State of Arizona, 97 percent in the State of New Mexico, and 96 percent in the State of Nevada, and a nationwide impact elsewhere, but I don't have time to go through every State and the impact. But every State, all Americans, would be impacted by this proposal.

In fact, look at this handy chart provided by this administration.
[Slide.]

Figure IV-9 from “Economic Analysis for the Proposed Revised Definition of ‘Waters of the United States,’” by the U.S. Environmental Protection Agency and Department of the Army, December 14, 2018, Submitted for the Record by Hon. Peter A. DeFazio

Figure IV-9: Overview of potential environmental impacts to selected CWA programs from proposed changes in CWA jurisdiction for certain waters



Note: This figure assumes no state responses to changes in CWA jurisdiction. The analysis in Section II.A suggests that many states will continue to regulate newly non-jurisdictional waters, thereby reducing any potential impacts from the changes in CWA jurisdiction.

Mr. DEFazio. These are the predicted impacts of their rule. Oh, minimal kind of stuff. Let's forget about the environment section in the middle. Let's just go to economic impacts. Hmm. Section 404 permits and mitigation. Ah, reduced ecosystem values, i.e., recreation, hunting, fishing, would be severely damaged.

Oh, how about this one? Downstream inundation damages. Think of the broke Federal Flood Insurance Program already in huge deficit and the challenges that FEMA has. But, hey, we are going to make it worse. Don't worry about it.

And then, oh, we could just say look over here, under the section 402 permits, greater drinking water treatment and dredging costs. Well, the States will do it. The States will do it. The States will clean up the water that came across the border from another State that is doing nothing about the filth going into it, and they will pay for it, not the Feds. And we are not going to make that other State clean it up. No, no, no. They can dump whatever they want in because it is an economic value to them, and it just flows over the border to another State. That State will just have to clean it up—if their people want to drink it, that is their problem.

This is unbelievable. You know, I sat in this committee back during the Gingrich era, and we had a markup that went on for a week. It was embarrassing. And it was essentially what you people are proposing. That was Bud Shuster's darkest moment. And that bill was so embarrassing and so bad, that dirty water bill, that Newt Gingrich wouldn't even bring it to the floor.

But you people have the gall to try and do all this stuff administratively, dismantle more than half a century of progress. I mean, this is unbelievable. I mean, I can go on and on about this. But rivers flow across borders, groundwater migrates everywhere. And, oh, States will take care of it. Well, the States are, you know, pretty pressed.

We used to help build wastewater systems. I was a county commissioner. We got an 80-percent Federal match. You know what the match is today? Zero. Zero. And, in fact, Trump has proposed to cut the very minimal amount of money that we use to assist the States with wastewater, and those systems are wearing out.

The EPA itself says we need \$270 billion in the next 20 years. And that doesn't even include new expenditures for resilience and climate change. I have areas where these systems go under water now regularly. We have to take care of those things. But what is the Federal Government going to do? Well, the Trump administration is going to cut Federal partnership down to virtually nothing for everybody.

And then there has been this horrible tragedy that happened in the Southeast. And the committee held hearings at the time, then we lost the House and Congress didn't do anything about it that was meaningful.

But, you know, exposure to toxic pollutants. The first update, the powerplant regulation since 1982 came out of President Obama. We held hearings on the TVA Kingston Fossil Plant coal ash pond disaster in 2008. We couldn't get anything out of a Republican Congress. The Obama administration took action.

What is this administration going to do? They are going to undo that. Don't worry, you will get your daily dose of, you know, selenium, cadmium, arsenic, and all of those things, under their proposed rule. We will do nothing about the coal ash.

The Obama rule would reduce the amount by 1.4 billion pounds, 90 percent. They are going to put that 1.4 billion pounds or allow that to go back in. And your own—your own analysis says that this Obama rule had minimal impacts on electricity prices and the amount of electricity generating capacity. But now we are going to do away with the rule because somebody wanted it. Coal industry? I am not sure who.

Now, I don't know. Are we using new science? No, I don't think so. This is all very political, and it is very shortsighted.

We are no longer doing enforcement. We have a new rule. You find someone violating the Clean Water Act, first off, not really doing—not allowing the people to go out and do inspections anymore. But you find someone in violation and you recommend that there should be penalties; it has to be approved by a political appointee. Not a scientist, not a career person. A political appointee. Do you know what the answer is going to be? Hell, no, we don't

enforce that law. We are not going to make those polluters pay a fine.

This is outrageous. And, Madam Chair, I regret that I won't be able to stay for the entire hearing, because I have two other major things this morning. But I will be around long enough to at least engage in one round of questions. And I may use an extended period of time, and I will grant the same amount to the minority for them if they want to apologize for his actions.

Thank you.

[Mr. DeFazio's prepared statement follows:]

Prepared Statement of Hon. Peter A. DeFazio, a Representative in Congress from the State of Oregon, and Chairman, Committee on Transportation and Infrastructure

We are here today to talk about actions taken by the Trump EPA and the impacts they will have for years to come on our public health and environment.

Clean water is a basic human need and human right. Our families rely on rivers and streams to supply clean drinking water to our homes and businesses. Our farmers and brewers rely on clean water to produce good food and drink. Hunters, anglers, and birders need water and wetlands to sustain wildlife and the \$887 billion outdoor recreation industry.

The Clean Water Act was enacted in 1972 on an overwhelming and bipartisan basis. Before the Act, rivers served as little more than open sewers, Lake Erie was pronounced "dead," and Ohio's Cuyahoga River literally caught on fire. Thanks to bipartisan efforts over decades to implement the Clean Water Act, our rivers and lakes are cleaner and safer.

Yet, the Trump administration has taken and is taking several misguided, misinformed, and fundamentally flawed actions that will undo the progress we have made.

First, the Trump administration is leading a campaign to dismantle our nation's Clean Water Act—all at the behest of the mining industry, oil and gas sectors, and small and large industrial polluters. Trump's EPA recently finalized a roll back of CWA protections—all the way back to what they were in 1986.

The administration's next step is to roll back the scope of waters covered by the Act—protecting far fewer rivers, lakes, and streams than even President Reagan thought appropriate. Preliminary estimates suggest that the Trump proposal would strip Clean Water Act protections for over 60 percent of stream miles and close to half of our remaining acres of wetlands.

If the Trump administration takes the most radical approach and removes protections for both intermittent and ephemeral streams, as many as 74 percent of stream miles mapped in my State of Oregon could be left without protections; 87 percent of stream miles in the State of California; 99 percent in the State of Arizona; 97 percent in the State of New Mexico; and 96 percent in the State of Nevada. That is a lot of stream miles that could become more polluted in the future.

In the Trump administration's own economic analysis of their flawed proposal, they include a chart that shows the potential environmental and economic impacts of the Dirty Water Rule. Even though EPA chose to look at the impacts to just three Clean Water Act programs, the potential impacts are great.

The environmental impacts include: reduced wetland habitat; increased flood risk; more pollution into waterbodies; degraded aquatic habitats; increased oil spill risk; and affected drinking water intakes. The economic impacts include greater costs related to downstream flooding; greater drinking water treatment costs; greater spill response costs; and greater damage from oil spills.

This administration will tell you states will fill in the gaps in federal law and take up the role of protecting these waters. Don't be fooled. States and localities have shown no interest in backstopping the protections stripped by the Trump EPA—states and localities have less incentive and fewer resources to ensure that waters that flow out of their boundaries are clean. We tried that approach before enactment of the Clean Water Act, when there was a patchwork of state laws, and saw what an epic failure that was.

Second, we are in an infrastructure crisis. The EPA estimates that some \$270 billion in infrastructure investment is needed over the next 20 years—and that is just to get our country's current wastewater infrastructure into good shape. That doesn't

include what we need to invest to ensure that our infrastructure is resilient and ready to deal with the impacts of climate change and stronger and more persistent storms.

Despite these demonstrated needs, the Trump administration proposed massive cuts to the primary water infrastructure investment program—the Clean Water State Revolving Fund program—asking for barely \$1 billion for Fiscal Year 2020. That is a ridiculously low amount given the need.

The President claims to be the best at building things, but to date he has not put together a comprehensive plan for successfully upgrading and maintaining our infrastructure—wastewater or otherwise.

Third, the Trump EPA is undoing the previous administration's efforts to limit communities' exposure to toxic pollutants from power plants. In 2013, the Obama administration proposed the first update to power plant regulations since 1982 by proposing limits on the toxic metals power plants can discharge.

This Committee held oversight hearings when the Tennessee Valley Authority Kingston Fossil Plant coal ash pond disaster occurred back in 2008. While there have been various efforts in Congress to address coal ash pollution, the first effort from EPA was when the Obama administration attempted to protect communities from toxic pollution in coal ash from power plants across the country.

The Obama administration determined there would be significant benefits related to their proposal. The monetary benefits were projected to be \$451–\$566 million each year and was expected to reduce heavy metals entering waterways by 1.4 billion pounds, or 90 percent. At the same time, the analysis showed the new discharge limits would have “minimal impacts on electricity prices and the amount of electricity generating capacity.”

Now, the Trump administration is blocking the implementation of these important safeguards.

Is it because EPA is looking at new science or other data that indicates we don't need to limit exposure to things like arsenic, selenium, lead, mercury, boron, and cadmium? Or is it because industry groups persuaded the Trump EPA to delay implementation of these important protections? Spoiler alert: it is the latter.

Unfortunately, the Trump administration is up to more than just that. The Trump EPA is dropping the ball on enforcing the law, finalizing fewer civil enforcement actions in its first year than the previous three administrations during similar time periods. In addition, the political head of EPA's enforcement office issued new procedures requiring political appointee sign off before enforcement actions move forward.

The Trump administration is also restarting projects already found to be bad for the environment, such as Pebble Mine in Alaska and the Yazoo Pumps in Mississippi; stripping EPA of an important “veto” tool to intervene when a project threatens water quality; shrugging off setting standards after a chemical storage facility in West Virginia released 10,000 gallons of waste, affecting 300,000 residents; and the list goes on and on.

President Trump often says he wants “clean water,” but, time-after-time, his actions undermine or eliminate existing protections of our waters and put the health of our families and our local economies at risk. This administration has made it a priority to dismantle the Clean Water Act, regardless of the science or the law.

Clearly, the winners of this administration's roll backs are the developers, manufacturers, and corporate farmers that don't want to be responsible for the pollutants they dump into our rivers and streams.

The losers are our families, our local communities and businesses, and our environment that will have to live with the long-term consequences of dirty water.

Mrs. NAPOLITANO. Thank you, Mr. DeFazio. Now tell us how you really feel.

I love it.

Without objection, I ask unanimous consent to insert the following letters and documents into the record, along with the ones that are given by the minority: A series of oversight letters from this committee to EPA, some of the responses we have received thus far; other correspondence the committee has received relative to the issue to be discussed today; map of the PFAS pollution, and a letter from the attorneys general requesting congressional action on PFAS.

Without objection, so ordered.

[The information is on pages 112–128.]

Mrs. NAPOLITANO. Now we will proceed to hear from our witness who will testify.

And I thank you for being here. You are in the hot seat, Mr. Ross, but I thank you anyway.

You are welcome to the hearing, and your prepared statement will be entered into the record. And all witnesses are asked to limit their remarks to 5 minutes.

The Honorable David Ross, Assistant Administrator, Office of Water, U.S. EPA. You are on.

TESTIMONY OF HON. DAVID ROSS, ASSISTANT ADMINISTRATOR, OFFICE OF WATER, U.S. ENVIRONMENTAL PROTECTION AGENCY

Mr. ROSS. Well, good morning, Chairwoman Napolitano, Ranking Member Westerman, Chairman DeFazio, and members of the subcommittee. I am Dave Ross, EPA's Assistant Administrator for the Office of Water. It is a pleasure to be here today.

I want to begin by thanking the dedicated professionals working within the Office of Water for their service to this country and for their passion in delivering on the Agency's core mission of protecting public health and the environment.

The Office of Water has an extensive portfolio of responsibility. But I would like to begin today by highlighting a few priority areas for the subcommittee, including modernizing and rebuilding America's water infrastructure, encouraging the adoption of water reuse, and ensuring a sustainable workforce in the water sector.

My written testimony provides a more indepth discussion of some other additional topics.

One of the highest priorities for the Office of Water is to ensure that the Agency implements our appropriated grant and loan programs as expeditiously and transparently as possible. It is our job to put our hard-earned taxpayer resources to work as quickly as possible.

One program that I would like to highlight in particular is the Water Infrastructure Finance and Innovation Act program, or WIFIA for short.

The WIFIA program is complex, and it took some time to set up, but it is now operating at full capacity and is producing tremendous results. In the past year, the EPA has announced 11 WIFIA loans, leveraging approximately \$3 billion in taxpayer resources to help finance over \$6.5 billion in water infrastructure projects, and we anticipate announcing several more loans in the very near future. In fact, with existing appropriations, the WIFIA program is slated to leverage approximately \$10 billion in credit assistance, to finance over \$20 billion in water infrastructure investments, while creating thousands of jobs in communities throughout the country.

Another priority for the Office of Water is promoting the reuse of water for beneficial purposes instead of treating it as waste. Forty of our State partners anticipate some freshwater shortages in the next decade, and all levels of Government have a responsibility to ensure that Americans have access to reliable sources of clean and safe water.

That is why last week, at the WaterReuse Symposium in San Diego, EPA and our Federal partners released a draft National

Water Reuse Action Plan for public review and comment. There is innovative work happening throughout the water sector to advance water reuse, and the action plan is intended to help facilitate adoption of water reuse to support improved water resiliency, sustainability, and security.

To protect our Nation's investments in aging infrastructure and capacity development, we must not forget about our human capital needs. Without a capable, knowledgeable, and diverse workforce of water professionals, our financial investments will be put at risk.

The water sector workforce is underappreciated. I began my career working alongside wastewater treatment operators in southern California, and looking back now, I realize how valuable they were to my education and professional development. They are the true environmental heroes, protecting public health and the environment every day, and they deserve the same recognition in society as our emergency responders, teachers, and public health professionals.

We know that more than one-third of our water and wastewater operators will be eligible to retire in the next 10 years, and technology is outpacing training. While this is primarily a State and local issue, I see an important role for Federal leadership. That is why EPA is working with our Federal partners to support water workforce training and development.

For example, we are working with the Department of Veterans Affairs to provide information on water careers to disabled veterans and are exploring other collaborative opportunities with our military services. The country relies on this workforce every day, and it is imperative that we focus resources on supporting this critical sector.

Finally, I want to conclude by describing my touchstone for addressing many of the complex regulatory questions facing the Office of Water, determining first what the law is, not what we want it to be. Under our system of laws, an executive branch agency can only exercise the power that Congress delegates to it.

The Federal Government has a poor track record in Supreme Court cases involving the Clean Water Act in which it was a party. For example, in the last three major cases, *Sackett*, *Hawkes*, and *NAM*, Federal positions failed to secure a single vote from any Supreme Court Justice. That is almost impossible to do. That is why under this administration, the Office of Water is focused on restoring the rule of law and providing regulatory certainty by starting with a robust analysis of our base legal authorities before deciding our policy positions.

Members of the subcommittee, thank you for the opportunity to testify today. I look forward to answering any questions you may have.

[Mr. Ross' prepared statement follows:]

Prepared Statement of Hon. David Ross, Assistant Administrator, Office of Water, U.S. Environmental Protection Agency

Good morning Chairman DeFazio, Chairwoman Napolitano, Ranking Member Graves, Ranking Member Westerman, and members of the Committee. I am David Ross, Assistant Administrator of the U.S. Environmental Protection Agency's Office

of Water. Thank you for the opportunity to speak about the Administration's priorities and policy initiatives under the Clean Water Act. Given the frequent convergence of surface and drinking water quality issues, I am also happy to address questions related to our drinking water and other national water program areas.

I want to begin by thanking the dedicated professionals working within the EPA Office of Water for their service to this country and for their passion in delivering on the Agency's core mission of protecting public health and the environment every single day. America's drinking and surface water quality is much better today than at any point during the history of our Agency. The laws of Congress, as carried out by the Executive Branch, are working, and today the United States is a global leader in drinking water quality and draws millions of visitors from around the world each year to enjoy and play on our inland and coastal waters.

That said, historical issues remain and new challenges have emerged, from aging infrastructure to managing excess nutrients in surface water to addressing emerging contaminants in drinking water. The EPA Office of Water has an extensive portfolio of responsibility, and I would like to highlight a few priority action areas for the Subcommittee. These include: modernizing and rebuilding America's water infrastructure; reusing water for beneficial purposes instead of treating it as waste; ensuring a sustainable workforce in the water sector; using innovative approaches to reduce excess nutrients in waterbodies; and addressing priority and emerging contaminants in drinking water. I also want to highlight two priority regulatory actions under the Clean Water Act which may be of interest to the Subcommittee.

MODERNIZING AND REBUILDING AMERICA'S WATER INFRASTRUCTURE

One of the highest priorities of the EPA Office of Water and a personal priority of mine is to ensure the Agency implements our appropriated grant and loan programs as expeditiously and transparently as possible. The Water Infrastructure Finance and Innovation Act (WIFIA) program and the Clean Water and Drinking Water State Revolving Funds (SRFs), for example, are vital for supporting communities in meeting their clean water and drinking water goals.

The WIFIA program is complex and took some time to set up, but it is now operating at full capacity and is producing tremendous results. To date, the EPA has announced 11 WIFIA loans, totaling nearly \$3 billion in credit assistance to help finance over \$6.5 billion in water infrastructure projects and create more than 10,000 jobs. Additionally, three more projects are currently under review and likely to be announced soon, totaling approximately \$725 million in credit assistance. This past November, the EPA invited another 39 projects in 16 states and the District of Columbia to apply for WIFIA loans—projects that, when approved, could help finance more than \$10 billion in total water infrastructure investments and create up to 155,000 more jobs. In response to the EPA's third WIFIA Notice of Funding Availability, the Agency received 51 letters of interest, collectively requesting \$6.6 billion. This exceeds the \$6 billion that the EPA is offering, demonstrating the critical need for investment in our nation's water infrastructure and strong interest in the WIFIA program.

The EPA's Clean Water and Drinking Water SRFs continue to provide critical funding to states to improve wastewater and drinking water infrastructure and reduce water pollution and public health threats. Combined, the SRFs have provided more than \$170 billion in financial assistance to more than 39,900 water quality infrastructure projects and 14,500 drinking water projects across the country. The SRFs continue to be one of the most impactful EPA programs in protecting public health and the environment, and the Agency is working with our state partners to ensure their SRFs are operating as efficiently and effectively as possible.

REUSING WATER FOR BENEFICIAL PURPOSES

Another priority for the EPA Office of Water is reusing water for beneficial purposes instead of treating it as waste. Forty of our state partners anticipate fresh water shortages in the next decade, at least in portions of their states. Although states, tribes, local governments and the water sector are actively working to diversify their water portfolios to meet anticipated demand, water reuse is an underutilized tool for meeting the needs of the Nation. The federal government is committed to working with our state and local communities to ensure that all Americans have access to reliable sources of clean and safe water. That is why last week at the WaterReuse Symposium in San Diego, California, the EPA and our federal partners released a Draft National Water Reuse Action Plan for public review and comment. There is innovative work happening throughout the water sector to advance water reuse, and the draft Action Plan is intended to help accelerate adoption of water

reuse as a critical component of an integrated water resources management approach that can support improved water resiliency, sustainability, and security.

ENSURING A SUSTAINABLE WORKFORCE IN THE WATER SECTOR

The EPA also recognizes the need to ensure a capable, knowledgeable, and diverse workforce of water professionals. The great work of these environmental heroes protects public health and the environment every single day. In addition to their critical role in providing clean and safe water to our communities, water utility workers are key in protecting the Nation's investments in water infrastructure. We know that roughly one third of water and wastewater operators will be eligible to retire in the next 10 years, and technology is outpacing training. While this is primarily a state and local community issue, I see an important role for federal leadership. That's why the EPA is working with our federal partners to support water workforce training and development. For example, we are working with the U.S. Department of Veterans Affairs to provide information on water careers to disabled veterans and with the U.S. Department of Labor to promote tools like their Water Workforce Competency Model, which can help utilities and others set up apprentice programs. The country relies on this workforce every day and the EPA can play a unique role in helping to support this sector.

USING INNOVATIVE APPROACHES TO REDUCE EXCESS NUTRIENTS IN WATERBODIES

The EPA is also prioritizing using innovative approaches to reduce excess nutrients in surface waters. Excess nutrients in our waterways is a significant and ongoing water quality challenge that can trigger harmful algal blooms, a growing drinking water concern for many communities. Excess nutrients come from a variety of sources, including urbanization, growing populations, wastewater discharges, septic systems, stormwater runoff, and agriculture. States, tribes, local governments, communities, the federal government, and a diverse network of engaged stakeholders have worked hard to reduce excess nutrients.

While much progress has been made, there is more work to do. At the federal level, the EPA will continue to use traditional regulatory and financial tools that are available to us. But to truly make a lasting difference, we need to think more holistically. That is why the EPA Office of Water has been so focused over the past year on thinking more creatively about the use of market-based mechanisms and how the power of innovative financing tools can help us create lasting and beneficial change in this area. For example, we believe water quality trading is an untapped opportunity to make significant gains in water quality improvement, particularly as applied to excess nutrients in surface waters. That is why we published a new water quality trading policy in February and currently have additional recommended policy enhancements out for public comment.

The Agency is also strengthening our partnership with the U.S. Department of Agriculture (USDA) and is working more closely with the utility and agricultural sectors. We are thankful for their engagement and collaboration, and we are grateful for farmers' expertise as long-standing conservation stewards of the land.

ADDRESSING PRIORITY AND EMERGING CONTAMINANTS IN DRINKING WATER

I would also like to highlight some important efforts the EPA Office of Water is undertaking to support safe drinking water. The EPA has established protective drinking water standards for more than 90 contaminants, including drinking water regulations issued since the 1996 amendments to the Safe Drinking Water Act that strengthen public health protection. Today, more than 92 percent of our population served by public drinking water systems is delivered water in full compliance with federal standards, and EPA is working aggressively with our state partners to push that number higher.

While these actions have improved drinking water across the country, we continue to look forward. For example, we are working on comprehensive revisions to update the Lead and Copper Rule (LCR) for the first time in nearly three decades, and we look forward to releasing the proposed rule for public comment. We are also continuing to work with primacy agencies to ensure that the current LCR is being properly implemented. We continue to coordinate with and provide support to the City of Flint and the State of Michigan in their efforts to ensure that all LCR requirements are being met, and the EPA has been and will continue to help the City of Newark and the State of New Jersey evaluate potential solutions to establish long term stability in controlling Newark's lead issues. Our goal in each of these cities is to protect public health, ensure public confidence in the public water system, and

work collaboratively with the local and state experts to ensure federal requirements are met now and in the future.

The EPA is also focused on emerging contaminants such as per- and polyfluoroalkyl substances (PFAS) and continues to make progress outlined in our PFAS Action Plan. The Agency will propose a regulatory determination for perfluorooctanoic acid (PFOA) and perfluorooctane sulfonate (PFOS) under the Safe Drinking Water Act by the end of this year and will propose nationwide drinking water monitoring for a suite of PFAS under the next Unregulated Contaminant Monitoring Rule cycle. The EPA recently concluded public comment on the draft Interim Recommendations for Addressing Groundwater Contaminated with PFOA and PFOS, another key commitment under the Action Plan, and is reviewing public comments. The regulatory development process to propose designating PFOA and PFOS as Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) hazardous substances is also well underway.

PRIORITY RULEMAKINGS

The federal government has a poor track record in Supreme Court cases involving the Clean Water Act in which it was a party, including losing the last two cases (*SWANCC* and *Rapanos*) in which the scope of Clean Water Act jurisdiction was at issue. In fact, in the last three cases (*Sackett*, *Hawkes*, and *NAM*), federal positions failed to secure a single vote from any Supreme Court Justice. That is why under this Administration, the EPA Office of Water is focused on restoring the rule of law and providing regulatory certainty. Two priority regulatory actions to help accomplish these goals are the revision to the definition of “Waters of the United States” and revisions to regulations related to section 401 of the Clean Water Act.

REVISING THE DEFINITION OF “WATERS OF THE UNITED STATES”

Under the President’s Executive Order 13778, the EPA and the Department of the Army are engaged in a two-step rulemaking to: (1) repeal the 2015 rule defining “Waters of the United States” (WOTUS); and (2) draft a new regulation to revise the definition of WOTUS.

On September 12, 2019, EPA Administrator Wheeler and Assistant Secretary of the Army for Civil Works James announced our final rule repealing the prior Administration’s 2015 Rule and reinstating the pre-existing regulations (referred to as Step 1). Step 1 provides regulatory certainty as to the definition of “Waters of the United States” following years of litigation surrounding the 2015 Rule. The two federal district courts that have reviewed the merits of the 2015 Rule found the rule legally deficient and issued orders remanding the rule back to the agencies. These and other courts have also enjoined the 2015 Rule from taking effect in a majority of the country, with a shifting patchwork of decisions adding to the regulatory uncertainty associated with the prior Administration’s WOTUS definition.

After an extensive rulemaking effort, the EPA and the Army have jointly concluded that multiple substantive and procedural errors warrant a repeal of the 2015 Rule. For example, the 2015 Rule:

- Did not implement the legal limits on the scope of the agencies’ authority under the Clean Water Act as intended by Congress and reflected in Supreme Court cases;
- Failed to adequately recognize, preserve, and protect the primary responsibilities and rights of states to manage their own land and water resources;
- Approached the limits of the agencies’ constitutional and statutory authority absent a clear statement from Congress; and
- Suffered from certain procedural errors and a lack of adequate record support as it relates to the 2015 rule’s distance-based limitations.

With this final repeal, the agencies will implement the pre-2015 regulations that are currently in place in more than half of the states, informed by applicable agency guidance documents and consistent with Supreme Court decisions and longstanding agency practice.

In December 2018, the agencies signed a proposed rule that would revise the definition of WOTUS informed by the guidance of that Executive Order. The agencies are in the process of reviewing more than 600,000 comments received on the proposed rule and plan to take final action by this winter.

REVISING THE REGULATIONS RELATED TO SECTION 401 OF THE CLEAN WATER ACT

In April 2019, President Trump issued Executive Order 13868 on Promoting Energy Infrastructure and Economic Growth, and directed the Administration to take

appropriate action to accelerate and promote the construction of pipelines and other important energy infrastructure. The President's Executive Order directs the EPA to consult with states and tribes on reviewing and updating guidance and regulations related to section 401 of the Clean Water Act.

Section 401 gives states and authorized tribes the authority to assess potential water quality impacts of discharges from federally permitted or licensed infrastructure projects that may affect navigable waters within their borders. The EPA's existing certification rules have not been updated in nearly 50 years and are inconsistent with the text of Clean Water Act section 401, leading to confusion and unnecessary delays for infrastructure projects.

On August 8, 2019, Administrator Wheeler signed a proposed rule to modernize implementation of Clean Water Act section 401. Through this rulemaking, the EPA is seeking to increase the transparency and efficiency of the section 401 certification process and to promote the timely review of infrastructure projects while continuing to ensure that Americans have clean water for drinking and recreation. Additionally, by modernizing the regulations from 1971, we are aiming to provide greater clarity and regulatory certainty for the water quality certification process. The public comment period is currently open, and we will take final action after carefully reviewing the comments we receive.

In conclusion, the EPA Office of Water is busy administering our grant and loan programs, updating our drinking water regulations, modernizing our surface water programs, and conducting priority rulemakings to provide greater clarity and certainty for the regulated community. Chairman DeFazio, Chairwoman Napolitano, Ranking Member Graves, Ranking Member Westerman, and members of the Committee, thank you for the opportunity to discuss the Administration's priorities and policy initiatives for the National Water Program. I look forward to answering any questions you may have.

Mrs. NAPOLITANO. Thank you for your testimony.

And we will start with the questions with the panel.

Chairman DeFazio, you are up first.

Mr. DEFAZIO. Thank you, Madam Chair, for letting me go out of order because of my schedule constraints.

Administrator Ross, in your testimony, you say that we are going to go back to those regulations that existed immediately prior to the 2015 rule. So I assume that means the regulatory definitions from 1986?

Mr. ROSS. Yes, that is correct.

Mr. DEFAZIO. OK. Are you familiar with all the criticism of a number of the groups that are supporting some of what you are doing of the rules in 1986, the arbitrary and inexact nature of those rules which subsequent administrations, Bush administration, Obama administration, tried to fix? So we are just going to go back to this very confusing time with that as a directive?

Mr. ROSS. Well, right now, our direction is to restore the rule of law, and the Obama 2015 rule, one, never went into effect in significant portions of this country. Several courts shut it down because the merits arguments that—

Mr. DEFAZIO. OK. But are you going to try and write an interpretation? Because back at that time, 1986, the U.S. Chamber of Commerce, the farmers, everybody was saying, hey, this is horrible, this is unenforceable, it is arbitrary, it is capricious, it is different everywhere.

So the Bush administration tried. OK. Then the Obama administration tried. And now you are going to say, no, we are not going to do what the Obama administration did. We are just going to go back to 1986. Is that it? Or are you writing a new rule?

Mr. ROSS. Well, we are doing both. One, we are responding to two courts that have remanded the 2015 rule back to the Agency as unlawful.

Mr. DEFAZIO. Uh-huh.

Mr. ROSS. At the same time, we are restoring the existing—and one court said the imperfect but familiar 1986 regime—and we are redrafting and proposing a new definition.

Mr. DEFAZIO. I mean, you are out asking for comment. Now, your initial proposal says that ephemeral streams are out. So what percent is that of what is covered today? Do you know?

Mr. ROSS. Actually, we don't. We do not have maps that actually—

Mr. DEFAZIO. Well, actually, I think those maps do exist. The previous administration substantiated them. Scientists substantiated them. That is 18 percent. Let's try another one.

Clean Water Act protections for intermittent streams, which are 52 percent of the Nation's streams. How many miles of intermittent streams would lose Federal protection? And are you asking the opinion that we should take all intermittent streams out? And I already told you the impact in a number of Western States.

Mr. ROSS. Two things. The last administration actually had the Administrator or the Deputy Administrator and the Assistant Administrator of Water testify and send letters to Congress saying that we do not have maps that show the Clean Water Act jurisdiction. I agree with them.

As far as what our proposal is, right now we have drawn the line at ephemerals. Intermittents are categorically in, as opposed to the 1986 and the 1988 regime where they are in if they satisfy the significant nexus.

Mr. DEFAZIO. Well, actually they did. The Obama administration did do an analysis. There were metrics. We have a document from 2015. But either you can't access the data or maybe that is part of what got wiped out by this administration in trying to undo science. I don't know.

All right. Let's try one more. So let's go to wetlands. A lot of people care about wetlands, including hunters, fishers, recreationists, everybody. So what percent of our wetlands would be eliminated from Clean Water Act protections under your proposal?

Mr. ROSS. Actually, we also do not know that as well because—

Mr. DEFAZIO. So—OK. Wait a minute, wait a minute, wait a minute. So you are proposing to undo protections on intermittent streams, ephemeral streams, and wetlands, and you don't know what the impact of what you are proposing would be. That is great. So is it 50 percent? That is the estimates we see. But you are saying you don't know. So OK. All right. Let's move on.

So how about the economic impacts? If I could have the chart back up. That is your own chart there.

[Slide.]

We talk about—oh, downstream inundation damages, flood risk. What about that? Greater drinking water treatment and dredging costs. These are desirable outcomes? This is like—seriously? Who is going to pay for that stuff?

Mr. ROSS. So in our economic analysis, we did qualitatively discuss if there would be reduced Federal jurisdiction—

Mr. DEFAZIO. Qualitative, not quantitative?

Mr. ROSS. Because we do not have the data—

Mr. DEFAZIO. OK. So you don't have any data. So maybe before you propose anything, you should go out and get some damn data.

Mr. ROSS. That is exactly what I am trying to do. The last administration and the prior administrations failed to develop maps of waters in the United States in this country. In our proposal, if you take a look at our—at our—we actually—

Mr. DEFAZIO. OK. Let's try an easy one. This is an easy one. This is an easy one, because this comes from the Bush era, Republicans.

In 2007, EPA estimated 16,000 existing permitted facilities were located on intermittent, ephemeral, or headwater streams. So if those streams, some percentage of them—you don't know what—are taken out by your new rule, what happens to those permits?

Mr. ROSS. Well, it depends. If they still satisfy the definition of point source and conveyance, they still are regulated under the Clean Water Act.

Mr. DEFAZIO. But you are saying some percent. Eight thousand, ten thousand, twelve thousand polluters would no longer be regulated because those permits would just go away because you deemed that an intermittent or an ephemeral stream is never going to put that crap into a permanent stream?

Mr. ROSS. One, we are not proposing to reduce jurisdiction over intermittent. And, two, if they still satisfy the definition of point source, they will be regulated. And, three, the States have robust environmental programs under State law.

Mr. DEFAZIO. No. Many States, in fact, can't exceed Federal Clean Water Act requirements. So if you deregulate someone and they no longer are regulated by the Feds, many States have laws saying they can't regulate them. They would have to go out and pass a new law and then they would have to set up a new regulatory system with constrained resources, something that the Federal Government has been doing very well. But we are going to abandon that practice. For what reason?

Mr. ROSS. Because of the rule of law. The last administration—

Mr. DEFAZIO. The rule of law.

Mr. ROSS [continuing]. Proposed a rule that courts have already struck down.

Mr. DEFAZIO. OK. Let's go to one last one. I talked about the TVA spill. Horrible, horrible disaster. And later, a bunch of workers died who were cleaning it up, let alone the permanent damage to the environment and the people who lived adjacent to it, all that. And you are going to reverse those efforts that will allow up to 90 percent more pollution by these persistent toxic materials.

Why is that? It has a tiny incremental cost—well, of course, you probably don't have that data—on the cost of energy generation or availability. But, hey, you know, might be a mill per kilowatt-hour, so what if we inundate thousands of acres with toxic materials, kill some more people, whatever.

Mr. ROSS. So the administration is taking a look at the coal combustion rule, which is actually a different program office than mine, so I am not working that particular rule, but I understand—

Mr. DEFAZIO. OK. But I am sure they are going to follow the rule of law.

Thank you very much. I am just pleased you are here today.

Thank you, Madam Chair.

Mrs. NAPOLITANO. Thank you, Mr. DeFazio.

Mr. Westerman.

Mr. WESTERMAN. Thank you, Madam Chair.

Mr. Ross, I am the ranking member on the subcommittee, but I am also a licensed professional engineer. I spent over two decades doing engineering work, and I have actually worked on NPDES permits, on stormwater discharge permits. I have been on the other side of it and seen the regulations that come down from the Federal Government, and also have worked with people who have probably forgot more about permitting and what you have to do to actually meet the requirements of permitting than the collective knowledge of this committee.

It is a lot different when you are in the real world dealing with what comes down from Washington, DC. And I am curious—and the chairman has stepped out—but these maps and information he is talking about, I can tell you a lot of engineers that would really like to see those maps and information if they are out there.

Could you point us to where those maps are that the previous administration developed?

Mr. ROSS. Well, the previous administration actually provided them to Congress but did not include them in the docket for the 2015 rule, because they determined that they were not representative of the jurisdictional waters of the Clean Water Act. They are effectively based on the National Hydrography Dataset that the USGS runs, and also the National Wetlands Inventory, which the Fish and Wildlife Service run.

The National Hydrography Dataset, for example, cannot see and cannot tell the difference, even at high resolution, between intermittents and ephemerals other than in only certain portions of the country. And based on the data that you guys have been citing earlier today, the 117 million Americans was based on the National Hydrography Dataset at medium resolution, which means it can't see ephemerals.

The National Wetlands Inventory has way more wetlands on it than jurisdictional wetlands, because it was created for a different purpose. So those maps are available. They were submitted to Congress in the last administration, but they were not included in the rulemaking for the Obama rule because they are not representative.

So my job is to try to close that gap. The last administration believed that we did not have the ability to map this. I disagree. And so we are working with our Federal partners to try to map this so that 5, 10 years in the future, people will be able to stand on the landscape and identify a Federal versus a State water. I believe we have the skills to do it. It is just going to take us the time to do it.

Mr. WESTERMAN. And it sounds to me like you are actually trying to apply science, trying to use the best mapping technology to come up with something so that people who are out there trying to deal with these regulations actually have something that they can use to meet the requirements. If you don't know what the requirement is, it is hard to meet the requirement.

I have a picture—I am not sure if it is going to be able to be put up on the screen, but it is a 4-acre pond that a constituent of mine sent, in a development in Texarkana, Arkansas, that they went through every permitting regulation, jumped through every hoop and hurdle, they built the pond for retention water, did a remarkable job of improving the environment in this area, but now the Corps of Engineers has come back—here's a picture of the pond—and told them that they have to pay \$340,000 of mitigation credits or remove this dam. That is not something they knew on the front end.

[Slide.]

So I applaud the administration for trying to put some sanity into these regulations so that people know how to deal with them.

How will the new WOTUS definition provide some clarity and end years of uncertainty over where Federal jurisdiction begins and ends?

Mr. ROSS. Well, first and foremost, we started with the touchstone. We took a look at the case law, the Supreme Court guidance, to try to figure out where would the scope of our authority begin and ends. And so with that—you know, my job is to protect the Clean Water Act. And if we continue to drop regulations that push the constitutional envelope of our authority, at some point, a court is going to declare the definition of waters in the United States incapable of definition. That will actually create significant tension for the long-term legality of the Clean Water Act.

So my goal is to defend the Clean Water Act, and we are doing that by staying in within the bounds of our legal authority and then regulating the known waters. The traditional navigable waters, the perennial waters, we have actually proposed to include intermittent waters, and then the adjacent wetlands that we know connect on a regular basis to all of those waters.

The goal is certainty, predicability, clarity. It is out for comment. We have gotten 600,000 comments. We are taking our time to analyze that, and we will move forward with finalizing it as soon as we possibly can.

Mr. WESTERMAN. And the chairman also suggested that we take more time so that we could apologize. I would like to take some time and apologize to all those farmers, those construction workers, everybody that is out there in this country trying to do the right thing, to make the economy better, to protect our water quality. They don't want to sidestep the rules or avoid the rules. They want to know what the rules are so that they can meet the regulations, so that they can carry on with their business, and so that they can provide all the needs that they provide for this country.

So I will take a moment and apologize for the ineptitude of the Federal Government to give them the tools that they need to do their job. That is what most people want to do. They don't want to destroy the environment. They don't want to pollute streams.

Just like this pond up here, that pond provides erosion control, improves water quality. But because of some regulation that somebody felt like on one certain day, now they are saying you have got to go in and tear it out at a huge cost or buy mitigation credits. There is no common sense in what is going on in many of these rules that are getting passed down.

So again, I applaud the administration for trying to put some common sense into the policy to find out what the science is, to provide the maps, to provide the delineations, so that people can do the work that they are trying to do every day.

Section 101(b) of the Clean Water Act states that it is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use, including restoration, preservation and enhancement of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter.

Wouldn't you agree that it was the intent of Congress, through these words, to recognize the primacy of States in protecting their own waters over that of the Federal Government?

Mr. ROSS. I agree. I think that has been lost on the Federal Government in the past several decades.

Mr. WESTERMAN. Do you think the States understand the water issues in their areas better than the Federal Government can understand those issues from afar?

Mr. ROSS. I have had the honor of working for two different States in two different parts of the country, very dry in Wyoming, wet in Wisconsin. When I left this city and went to work for the States, I had a misinformation and misbelief that people in DC knew the resources best and the landscape. I was wildly wrong.

It wasn't until I went and worked for the States that I recognized that they know their resources best. They know how to manage their resources best. Our job is to make sure that they are given the resources and the ability to manage their own resources and work in collaboration with the Federal Government. I didn't know that before I went and worked for the States.

Mr. WESTERMAN. Thank you. I yield back.

Mrs. NAPOLITANO. OK. Assistant Administrator, as a followup to your statement, if I take your statement on the need for additional maps on the status of streams and wetlands at face value, then why would you propose to move forward on a proposal to change that jurisdiction before you have that data?

Mr. ROSS. Well, we are moving forward, one, because the 2015 rule has been ruled and sent back to the Agency as illegal. The second is we are restoring the familiar framework that folks have been operating since the mid-eighties. But we are moving forward with a new proposal because it is time to end the uncertainty and the confusion that the ranking member mentioned that the farmers, developers, the regulated community struggles with, a confusing definition, and every time a court issues a different decision, jurisdiction changes. It is time for us to do our job and provide a clear definition of "waters of the United States" that will withstand judicial scrutiny.

Mrs. NAPOLITANO. I hope you do so with the input from the people involved.

That will begin the questionings. And thank you for your questions—you answered the questions. And we have a timer to allow 5 minutes for each question from each Member. If there are additional questions, we will have a second round or more as necessary.

As in my district, the Department of Defense left behind the legacy of contamination that has threatened the health of my constituents for many years. Today, communities across the country are facing the same concerns with the PFAS pollution. The EPA's PFAS Action Plan recognizes the adverse health effects from exposure to this legacy contaminant.

On the next panel, we will hear from a witness who has been personally impacted by the PFAS contamination in his community.

Do you think PFAS pollution poses a risk to human health? Yes or no.

Mr. ROSS. Yes. Where we have exposure and we know the toxicological profile of the chemicals, yes, there are communities that are impacted by PFAS pollution.

Mrs. NAPOLITANO. Do you agree that a multifaceted effort to reducing additional release of PFAS chemicals and cleanup of those already in the environment are necessary to limit the exposure to these pollutants?

Mr. ROSS. Yes. That is, in fact, the touchstone of our national action plan, is to take a holistic view of all the—

Mrs. NAPOLITANO. How long will it take? We are in a crisis.

Mr. ROSS. Well, we are actually moving quickly on—one is the first action plan across multimedia offices that the Agency has ever developed, and it is a holistic approach that grapples with both the chemical entry into the market, the cleanup, the liability associated with it, the water quality standards, the science—

Mrs. NAPOLITANO. Have you set the standards yet?

Mr. ROSS. Well, we have—in the PFAS Action Plan, we committed to developing a certain set of rules. And, for example, on the Safe Drinking Water Act, we are moving forward with the regulatory determination process for PFOA and PFOS—P-F-O-A, P-F-O-S. It is hard to say those. And so we do—and we committed to getting that done by the end of the year, and we are still on schedule.

Mrs. NAPOLITANO. Before the end of the year, I hope to receive some information on that, sir. It is very important.

I would like to jump to your letter dated September 16 about EPA's draft National Water Reuse Action Plan released on September 10. And we have discussed that. I am passionate about water reuse and innovative technologies so that communities can reuse the water, they clean it up, especially in places like California where resources can be scant. And I appreciate what your agency is doing to move the ball forward.

But can you describe the administration's Water Reuse Action Plan and how it seeks to discourage the development and implementation of new technologies and practice water reuse. And how are you working with other Federal agencies, such as the Bureau of Reclamation, who has a long history of water recycling with their title XVI program, the water recycling program?

Mr. ROSS. Well, one, I want to thank you for your interest and your leadership on water reuse. Very rarely do Federal Governments and State and local governments think holistically about what we are going to need 10, 15, 20 years from now. We usually react to crises.

The National Water Reuse Action Plan is designed to make sure that we have a sustainable source of new supply of water 5, 10, 15, 20 years from now, rather than reacting to a significant drought, for example.

We are working in collaboration with our Federal Government. In fact, when I announced the National Reuse Action Plan, the Bureau of Reclamation Commissioner was with me, Department of the Interior was with me, the Department of Energy, Council on Environmental Quality, Department of Agriculture. It was a broad effort across our Federal family to work with our stakeholder engagement. And so the Federal family is fully invested in this effort.

Mrs. NAPOLITANO. Would this committee be able to find out what the outcome of that collaboration is?

Mr. ROSS. Absolutely. One, I think we sent you the draft action plan. I encourage you to read it. I think our team did a fantastic job with it. Our next 90 days, it is a public comment period, but we are really hoping it to be a public commitment period.

There are 46 actions identified in the action plan under 10 strategic objectives, and we are looking for partners to champion each one of those action items, both from accountability standpoint, identify themselves, and put themselves on a shot clock. Our Federal partners will be committed to doing several actions in the action plan.

Mrs. NAPOLITANO. What can Congress do to further promote water?

Mr. ROSS. Well, there's a lot that Congress can do. One, obviously, you have the power of the purse. And I have actually leveraged the WIFIA loan program and identified water reuse as one of our national strategies. And I am thankful that, in the last year, we actually did receive several applications that will incentivize water reuse in large areas.

But it is also helping provide resources to rural America. Where large communities have the resources and the tax base to go after a ratepayer, small rural America struggles with water resources, and I think Congress needs to spend some attention thinking about rural America.

Mrs. NAPOLITANO. Thank you very much.

I now recognize Mr. Bost.

Mr. BOST. Thank you, Madam Chairman.

First off, let me start off, Mr. Ross, by saying that I don't think there is anybody on this dais or in this Congress that wants to ruin water for our children and our grandchildren. I think what you do is good. But I think whenever you made the statement what you wanted to do was follow the law that is produced by Congress and implement it correctly with the best science possible, and that is what we want to see.

That being said, in drafting regulation, the Agency estimates avoiding costs of up to \$340 million. You know, I have met with several stakeholders in my district about the 2015 water rule. The most common concern expressed was the haphazard way the rule was applied and potentially direct costs associated with permitting. And it didn't matter whether it was farmers or it was other businesses. But the other concerns are impacts the rule has on the economic activity and investments overall. In my district, aggregate

providers indicated that in addition to their own direct costs, the rule was suppressing building an investment by their own customers.

Shouldn't the Agency require to conduct more rigorous economic analysis of their proposed rules to include impacts on jobs and the economy overall?

Mr. ROSS. Well, the answer is yes. Under Executive Order 12866, we actually do take a look at the broad economic consequences of a proposed rule. And so in—our step 2 proposal, for example, we did go after, to the best we could—because some of the questions we were talking about earlier, we lack sort of the mapping capability to watch changes in jurisdiction. But we do take into account economic impact into our rulemakings. And we have a several-hundred-page economic analysis that gets into that that we can share with the subcommittee.

Mr. BOST. OK. And those are the important things that we need to know as we move forward.

But let me tell you that as a Member that spent 20 years in the State legislature as well and watching the States try to implement their own rules, actually having to get a discharge permit, they said just for recording purposes, but then later came back and putting on businesses that could not afford it \$5,000 and \$10,000 discharge charges through the State. Every time we turn around, whether it is a small business, a medium business, a large business, whether it is agriculture, whether it is aggregate, or whatever the business might be, the problem is, is they never really know what is expected of them and we keep moving the goalpost every time we turn around.

Now, I said from the start that the concern that I have is that I want clean water for my children and grandchildren. That being said, your job is to do what you brought up earlier while you were trying to explain, and that was it is the rule of law, created by us, not by you. I think that the previous administration tried to go above and beyond that, and not the rule of law but the rule of administrative rule, to try to implement their own ideas without coming through Congress.

If a Member of Congress has a problem with what you are doing and they can say that, well, they are following the law, and they are not happy with the level of that law, then we need to get that done, not you.

I am very impressed with your ideas of what you are proposing to do and how you are moving forward, and the idea of allowing people who are making investments in this Nation, whether it is a farmer or whether it is a customer or a company that produces widgets, whatever that widget may be, that they at least know the rules of the game as they go in and know that the goalpost can't keep getting moved.

And that was the problem with this rule, and it has been for many years, because it got to the point that the general public was feeling like that the EPA wanted to control the drops of water running off my cap when it rained. I believe that it is very clear what the law is, and I think you are doing a fine job. And thank you for your time.

And with that, I yield back.

Mr. ROSS. Thank you.

Mrs. NAPOLITANO. Thank you, Mr. Bost.

Ms. Mucarsel-Powell, you are—I am sorry? OK. Thank you.

Ms. Mucarsel-Powell, you have the floor.

Ms. MUCARSEL-POWELL. Thank you.

Good morning, Mr. Ross. I represent the southernmost district in the State of Florida, Florida Keys. The Everglades is a huge part of my district. And as you probably know, the Everglades are crucial for all of Florida. The health of the Everglades is essential for our economy, for our health, and for our wildlife.

The Everglades also naturally filters out toxins and harmful nutrients like phosphorus. Higher levels of these pollutants lead to toxic algal blooms, countless dead fish, and red tides. Clean water from the Everglades also provides clean drinking water for more than 8 million Floridians alone.

Now, the Florida delegation has been working closely together, on a bipartisan basis, to push forward Everglades restoration. We recognize the importance of these wetlands. And it seems that now, the administration, after having adjusted its budget request for Everglades restoration to the full \$200 million, which I requested, it is beginning to recognize their importance too.

But what is very difficult to understand is that the administration's actions are in conflict with each other. On the one hand, it says that it wants to fund Everglades restoration. And then on the other hand, it is working to rewrite regulations to make those protections even weaker for our water in Florida.

So either the Trump administration and the EPA care about Florida or they don't. So under your position—and I quote this—“under cooperative federalism, those waters not covered by the Federal Clean Water Act would be addressed by the individual States.”

We saw what happened back in 2016 under the previous Governor, his administration. What they did was the Florida Department of Environmental Protection updated its regulations to permit more toxic chemicals to come into the water.

And I have some images that I would like for you to take a look at. I don't know—have you seen the toxic algal blooms? This is 2 years after the Governor actually eased the regulations, permitting more toxic chemicals to be released into the water.

[Slides.]



**Images of Toxic Algal Blooms in Florida, Submitted for the Record by
Hon. Debbie Mucarsel-Powell**



Ms. MUCARSEL-POWELL. And I heard you talking about economic impact. We had to close several businesses along both the east and the west coast of Florida. Fifteen people ended up in the emergency room. We saw images of thousands of dead fish, dead manatee, dead dolphins. We continue to work on this issue.

So if I hear you correctly, you are saying that you want to leave it up to the States to regulate their own waters, right? Is that correct?

Mr. ROSS. Actually, both Federal and State regulation, depending on the——

Ms. MUCARSEL-POWELL. Both Federal and State.

Can I ask you what you are currently doing? How are you working closely with the Army Corps into how you regulate those toxins that are coming into Lake Okeechobee that have caused these green-blue algal blooms to be released?

Mr. ROSS. So we are working very closely with the Army Corps of Engineers. I have talked to R.D. James and Mr. Fisher specifically about this, working in partnership. Our teams have been down, actually, touring Lake Okeechobee with—

Ms. MUCARSEL-POWELL. When was that, Mr. Ross?

Mr. ROSS. Earlier this year. I sent my Principal Deputy down to actually take a tour of Lake Okeechobee.

Ms. MUCARSEL-POWELL. And have you formed a plan of action here?

Mr. ROSS. Well, there are a couple of things that we are doing. One, we are working with the State and working with the Corps to try to figure out the lake levels associated with, you know, how do you actually grapple with the lake levels and discharges. There is a plan in place in working with the Department of Agriculture—

Ms. MUCARSEL-POWELL. And what about regulating the pollutants that are coming into the lake?

Mr. ROSS. Well, so some of that is nonpoint source pollution that is outside the scope of the Clean Water Act. But I am actually spending a lot of time and energy on excess nutrients in surface water. It is one of—it is one of our—we have our regulatory tools and total maximum daily loads and all those enforcement tools. But we also need to do a better job tapping into our creative market-based mechanisms. And so over the course of this year, I have developed a policy to incentivize market-based mechanisms.

Ms. MUCARSEL-POWELL. If you can provide that plan for me, I would really appreciate it. I am almost out of time.

Mr. ROSS. I would be happy to.

Ms. MUCARSEL-POWELL. One more question that I had for you. In south Florida, we have wet and dry season, as you are aware. And during some dry seasons, which of course fluctuate year by year, significant portions of the Everglades dry up. And I am deeply concerned that the administration's actions will leave much of the Everglades without the Clean Water Act protections.

Can you assure me today that—to me and my Florida colleagues—that any rule that the administration implements as it pertains to the Clean Water Act will ensure that the Everglades and its watershed will receive full Clean Water Act protections, despite dry areas during dry seasons?

Mr. ROSS. So my understanding is the Florida Everglades are the wetlands that would remain subject to our jurisdiction in our proposed rule, one.

Ms. MUCARSEL-POWELL. So can you make that assurance to me today?

Mr. ROSS. Well, holistically, it is a large landscape down there. And so if there are individual—

Ms. MUCARSEL-POWELL. So is that a no?

Mr. ROSS. It is a yes, qualified by I can't speak to every single wetland down in Florida. But the other thing I want to mention is

Florida has a really remarkable wetlands protection program. And so they regulate wetlands——

Ms. MUCARSEL-POWELL. You mean the State?

Mr. ROSS. The State of Florida has a more——

Ms. MUCARSEL-POWELL. You can see what happens when we leave it up to the State.

Now, so is the EPA under the Trump administration going to open up the Everglades for further development and pollution, if you are not willing to make that commitment to me today?

Mr. ROSS. I have no plans to open up the Everglades for further development, but that really is a local and State issue.

Ms. MUCARSEL-POWELL. Thank you.

Mrs. NAPOLITANO. Thank you, Ms. Mucarsel-Powell.

Mr. Palmer, you have the floor.

Mr. PALMER. Thank you, Madam Chairman.

First of all, Mr. Ross, I want to go back to the question about mapping. And I would like to know, is it possible to use maps for regulatory purposes?

Mr. ROSS. So right now, the NHDPlus and the National Wetlands Inventory are not used for regulatory purposes. And, in fact, we can submit significant letters from the last administration saying that. In fact, EPA published a blog in 2014 saying they cannot be used for regulatory purposes now or ever.

The last word I don't agree with. I actually think we can improve these maps and use them in the future. But we have work to do.

Mr. PALMER. So you think you could use maps like the National Hydrography Dataset and the National Wetlands Inventory, those type maps, for regulatory purposes, or particularly for jurisdictional determinations?

Mr. ROSS. We use them—the Army Corps of Engineers uses them a little bit as desktop tools as they go out into the field before they go do their field verification. So they are useful tools as desktop before they go out. But actually making decisions based on those maps, no, they are not designed to do that, and they have never been designed to do that.

Mr. PALMER. Are they complete? Are they——

Mr. ROSS. No.

Mr. PALMER. They are not?

Mr. ROSS. They are not complete. The number one flaw on the National Hydrography Dataset is that they don't really see ephemerals. There are portions of the country—and the USGS, Dr. Reilly and his team, are actually working to improve the resolution to see additional water resources. But right now, they really struggle between differentiating between ephemerals and intermittents.

Mr. PALMER. And it seems to me that we are—we are—the previous administration, particularly, and maybe the administration before that, is making decisions on incomplete datasets.

Mr. ROSS. Well, actually, the last administration decided not to use those maps as part of their rulemaking. They specifically did not use them and did not put them in the docket.

Mr. PALMER. OK. That is what troubles me, is we heard a very impassioned—you received some pretty impassioned questioning from the chairman.

And I know people have great concerns. We have gone through water quality issues before. But it is—first of all, it is insulting to infer that anyone wants to have filthy water, that anyone wants to destroy water for recreational use, much less drinking.

And the thing that gets me is, going back to the 2015 rule, when this first came about, is that it appeared to rely on data estimates that were really about supporting an environmental agenda. They didn't do original research. Is that what you found?

Mr. ROSS. Well, my—and granted, I wasn't around. But that is why I said in my opening statement that my job is to begin with the law as it is written, not what I want it to be. I believe the last administration was pursuing policy objectives before looking at the law.

Mr. PALMER. And that is my point. The last administration transferred benefits from estimates that really didn't apply to the rule. And it became—I really think it became more about more Government control than it was really finding solutions to the problems that we do have.

And I worked for two international engineering companies, one of which was Environmental Systems. And I know we have got the technical ability to make dramatic improvement in water quality, air quality, land use, pretty much anything you want to do. But that has to be your primary objective. It can't be a political objective. If it is just a political objective and you don't apply the right science, the right engineering, the right technology, you don't get the result that you really want to have, unless, of course, the only result you really want to have is control.

So that is what I am hoping will come out of this administration, is a science-based approach to water quality and not just a massive attempt to take over whole aspects of individual lives that impact their property and their ability to support themselves.

Mr. ROSS. We have great scientists at EPA and in the Office of Water, and I rely on them every single day. And so our job is to take a look at science—contrary to what people write about, we are actually looking at science as we are making our decisions.

Mr. PALMER. Well, I appreciate the fact that you are here today. I want you to answer the questions of all the colleagues on both sides of the aisle accurately and confidently. And even when it appears that you are being browbeaten, to speak truthfully about the work that you guys are trying to do.

With that, Madam Chairman, I yield back.

Mrs. NAPOLITANO. Thank you, Mr. Palmer.

Mr. Lowenthal, you are on the floor.

Mr. LOWENTHAL. Thank you, Madam Chairman.

Welcome, Administrator Ross. Thank you for testifying before this committee in this hearing.

Last year, the administration also proposed revisions—another part of the revisions to the Clean Water Act were the regulations on wastewater. This blending proposal could allow for the discharge of untreated sewage into our waterways. We have seen, in my district, which is a coastal district, we have seen the results of this, what I consider, misguided approach. During times of heavy rain, wastewater systems have failed, which results, you know, then when we allow for this, weeks-long closure of our beaches and

our waterways, which have to be done in order to protect the public from untreated, contaminated sewage.

You know, in 2005, EPA withdrew a similar proposal in part because of the lack of evidence that blending will not adversely affect the environment or public health.

Are you aware of any new analyses of the public health or the environmental impact of blending?

Mr. ROSS. The team actually has done extensive stakeholder outreach and is gathering the additional information. And let me be clear. We are not talking about discharging raw sewage into the waters of the United States or in other waters. That is not what our policy proposal is about. In fact, you put your finger on the real issue is, in wet weather events, if you get too much flow through secondary treatment after the grit screens and the primary clarifiers and the secondary treatment, we primarily rely, most places, on bugs. Too much water will blow out those bugs. If you don't manage that, then the actual real environmental concern that I have is that you blow those bugs out, and then you don't have the wastewater treatment system up and running.

So what we are trying to grapple with is, how do systems manage the secondary treatment in a wet weather event such that they don't blow out the bugs?

Mr. LOWENTHAL. But you also—we need to know—do we know how many treatment or publicly owned treatment works engage in this process of blending, and are you going to gather that, and are they monitoring? Because, as you said, it is not we are blowing out sewage. Are we monitoring, EPA, the presence of pathogens in these blended, and could you give us that data?

Mr. ROSS. One, I don't have the data with me, and the team is looking at it, but what we really do in most circumstances where the States have authorized blending, and a lot of times the States are the ones here who are the permanent authority. If they are protecting the bugs, they bring the water back in to the disinfection system. That takes care of the pathogens. So, when they blend it back in before it gets discharged, it does get disinfection.

Mr. LOWENTHAL. Well, my concern is not to find some magic bullet like blending. We are really talking about investment. Too many cities have decades-old treatment infrastructure. Their capacity hasn't kept pace with population growth. But these investments depend upon Federal support. Earlier you talked about the successes of the WIFIA program, and we also have the State Revolving Fund program. Both of those are the backbone of our water infrastructure investment. What I would like you to explain to me is why this administration has proposed severe cutbacks to both those programs.

Mr. ROSS. Well, there are two answers. One, I think in the administration's proposals on budgets, they are trying to balance, you know, kind of the budget, fiscal responsibility and some of the budgets cuts they are proposing were to rely more on the States and—

Mr. LOWENTHAL. So you are saying rely more on the States and so increase or allow the States to propose these blending programs rather than provide the infrastructure because this is an old and,

in many cases, infrastructure that really needs rebuilding. And you have talked about the successes of these programs.

Mr. ROSS. Yeah, so, two things. One, my job first and foremost is to spend the money that Congress appropriates as intelligently, as appropriately as possible. So I get appropriations, and our job is to wheel the money out to grant loan programs, but on the blending issue, that is actually one of the questions is right now, because there is a different regulatory regime across the country. Because of an Eighth Circuit decision called Iowa League of Cities, there are different rules at play depending on what State you reside in. That is not regulatory certainty for the regulated community.

And what happens is there are—the entities that may have to be forced to run water round to protect their bugs are faced with some kind of contingent liability, and rather than—they actually have to think about upgrading their facilities through huge capital investment rather than thinking about managing the episodic overflow.

Mr. LOWENTHAL. I—

Mr. ROSS. If you are talking about infrastructure investment, it is actually this is a more efficient way to go after it.

Mr. LOWENTHAL. It may be a more—my time is up, but I would like to point out again that we are talking about, when treatment facilities cannot handle, because of the peak flow of wastewater, and rather than investing in infrastructure, the administration is proposing cutting infrastructure investment.

Thank you, and I yield back.

Mrs. NAPOLITANO. Thank you, Mr. Lowenthal.

Mr. LaMalfa, you have the floor.

Mr. LAMALFA. Thank you, Madam Chair. I appreciate it.

And, Mr. Ross, thank you for appearing with us today.

You know, again, going back to the 2015 rule, reinterpreting the Clean Water Act of 1972 under the Obama administration, a rule likely tailor-made for environmental groups to find solace and happiness with a new interpretation, so—yet they still consistently sued the Federal Government from that point forward.

So, I guess, you know, rhetorically: How much money do we have to spend defending the Federal Government's action from the environmental groups?

Then, on the other side of the coin, how much has to be spent preventing the economic development of land that is already in production for energy or even agriculture, clearly exempt activities under the original Clean Water Act of 1972—telling farmers and ranchers, these are clearly exempt items?

So, you know, the courts could have struck down the Clean Water Act, but they went after this 2015 rule. So, until last week, we had 22 States that were following one set of rules and 28 that were doing another set of rules. So we had kind of a mess there.

So let me zero in on a couple of things. Really important in my district in northern California, we have had activities to enforce against farming and ranching activities where fallow land had been brought back into production or maybe a change of crop.

Reinterpretations of saying that you now need to have, go through a permit process 3 years long generally and hundreds of thousands of dollars. I don't know how you can spend hundreds of

thousands of dollars getting a permit to do something that is already clearly exempt under the Clean Water Act for farming and ranching specifically. We can get into mining later. But so millions of dollars of fines have been paid by some growers under WOTUS, under reinterpretation of what constituted a need for a permit under Clean Water Act.

So, with this ruling and with it having stood up in court, is the EPA and Army Corp, some combination, going to consider any steps to pay restitution to previous penalties that have been paid by farmers and ranchers, sometimes to the tune of millions of dollars, as a result of this abysmal 2015 rule and having been struck down by the courts?

Mr. ROSS. That is a fairly big-ticket legal question that I am not prepared to answer. My answer is I am not aware of any discussion of that kind.

Mr. LAMALFA. Are you aware that at least the Agency is capable of doing so, having been found that it was out of bounds——

Mr. ROSS. Those——

Mr. LAMALFA [continuing]. From one administration to another, having now gone through the court process, the legal process?

Mr. ROSS. At this point, those are issues I would prefer not to speculate on. What I will tell you is I am aware of two core principles. It is time for the Federal Government, whether or not it is Congress or EPA, to step up and give clear definitions so the goalposts stop changing, one.

Two, I strongly believe in investment certainty. I used to work for the private sector. I understand what it takes to operate a business. I have represented folks who operate a business, and I understand investment certainty.

Mr. LAMALFA. Again, coming back to what rural America has been dealing with on this, you know, some of my colleagues talked about ponds. You have people had made, put together stock ponds just to store water, and the benefits of those, as was discussed, was for erosion control and flood control to an extent, all well-intended, good things happening in rural America.

So I thank the Agency for paying more attention and listening to what happens in rural America instead of just large buildings here in Washington, DC. So farmers and ranchers and others that do outdoor activity are rejoicing over the direction you are going with this, but I still am concerned how much is left in the pipeline litigationwise or what have you that we are still going to have local enforcers like we have seen in northern California, whether it is out of the EPA office or the Army Corps office, working together, to basically freeze agricultural and other activities because of the threat, sometimes not even carried out, of a fine or an action against them.

Can you tell me that this activity will stop and that the divisions out in the field are going to be basically instructed to stop these enforcement activities outside of the intent of the law?

Mr. ROSS. Well, as a former prosecutor for a State, I can tell you that, when I talked, it carried a significant chilling effect. We will continue to implement our enforcement programs under the Clean Water Act. We have a robust enforcement program, but our job is

to take a look at what the law requires before you make an enforcement decision, and I can guarantee you our teams are doing that.

Mr. LAMALFA. I thank you for that because, again, it is about enforcing the law as written and achieving the goal of doing activities that do help keep the water clean.

So, with that, Madam Chair, I yield back. Thank you.

Mrs. NAPOLITANO. Thank you, Mr. LaMalfa.

Mr. Carabajal, you have the floor.

Mr. CARBAJAL. Thank you, Madam Chair.

Welcome, Administrator Ross.

For the past 2½ years, the administration has focused on an outdated 20th-century energy policy to meet the needs of the 21st century. From issuing misguided Executive orders promoting dirty fossil fuels, increasing oil and gas extraction, infracting on public lands, and proposing draconian cuts to agencies like the EPA, the administration has put corporate interests above the health and safety of our communities.

One of the largest cuts to the EPA budget is to the Oil Spill Prevention, Preparedness, and Response program. How can we expect to maintain proper oversight and guard against future oil spills like my district has seen time and time again when this program is facing significant cuts?

Mr. ROSS. Well, again, our job at the Agency is to spend the money that Congress appropriates, and I do know the spill prevention program is a robust program. In fact, I know, was just having conversations the other day about enforcement associated with spill prevention issues. So it is alive and well at the Agency, and it is a robust program and the teams are doing a nice job implementing it.

Mr. CARBAJAL. But with all the cuts that have occurred, do you still have the same span of control and oversight?

Mr. ROSS. With all the cuts. So, actually, my program has been plussed up. So, in the last several years, the Office of Water has gotten more funding and more responsibility. We had dropped 32 new programs on the Office of Water. So, in my personal experience, we have gone up in budget, not down.

Mr. CARBAJAL. Also, in the spill and preparedness program?

Mr. ROSS. I can't speak to the budgets on the spill and preparedness program. A lot of that is run out of a different office.

Mr. CARBAJAL. Because that is the one I was referring to.

With the cutbacks by the EPA, does this mean that compliance with environmental safety rules are less of a priority in this administration?

Mr. ROSS. No, they are not. Susan Bodine does a fabulous job with the enforcement team. I am thrilled as, from a water perspective, she is focused on cutting significant noncompliance and NPDES permitting as one of her core objectives. And another major priority for the Agency is to actually cut back the amount of small and medium communities that are in noncompliance with the Safe Drinking Water Act.

So the enforcement program, from my perspective, is focused on the really core areas I care about in the Office of Water.

Mr. CARBAJAL. In California, there was a proposal to allow for fracking on over 1 million acres of public land by the Department

of the Interior. At the same time, EPA is considering comments on promoting greater reuse of fracking wastewater without clearly responding about the potential risks this poses to our environment and public health.

Does the EPA support requiring full disclosure of any chemical additives to fracking wastewater before that wastewater can be proposed for reuse as a source of irrigation, water on food, or potable reuse?

Mr. ROSS. So, in the Water Reuse Action Plan that we just proposed for public comment last week, produce water is a very significant resource of water. And we have a very long section there to describe, called Fit For Purpose. So, as we study, you know, produce water as a potential viable new water source, we are also taking a look at whether or not it is Fit For Purpose. So what is it intended to be used for? Whether or not it is irrigation, surface water augmentation, groundwater recharge, manufacturing, light manufacturing use, the aspect of the reuse has to be associated with Fit For Purpose. So that is a very significant component of our water use action strategy.

Mr. CARBAJAL. How are you going to address the exemption that exists for fracking operations in the Safe Drinking Water Act that does not require disclosure of chemical additives?

Mr. ROSS. That I actually haven't—that is not in my program, at least I think. I will have to doublecheck, but so I don't have an answer for you, but I can answer the question for the record.

Mr. CARBAJAL. Thank you very much.

Madam Chair, I yield back.

Mrs. NAPOLITANO. Thank you, Mr. Carbajal.

Mr. Woodall, you have the floor.

Mr. WOODALL. Thank you, Madam Chair.

Thank you, Mr. Ross, for being here.

I appreciate the shots that you have taken on budgeting, and I appreciate your response that you spend the money that Congress appropriates to you. Yes, the administration produced a budget. I didn't like everything that was in that budget either, but that is a step higher than what this House did when we produced no budget at all this year. There is no vision of what we are going to do this year, next year, the year after that, no long-term vision of any kind. We have one responsibility on the Budget Committee on which I sit, and we could not fulfill it. So, knowing you were going to take shots, the administration still put forward a budget, and I am grateful to you for doing that.

You know, we, last month, had a court decision in the Southern District of Georgia, a case that Georgia led dealing the overreach of the WOTUS rule. And in that decision, the court said this along the lines of what you said this morning: Congress has delegated the important role of protecting the Nation's waters to the agencies, but in fulfilling that role, the agencies must comply with the law. All you can do is deal with the law that is in front of you, and they have failed to do just that.

And the court went on to say that they were going to block any rule from going into effect as the agencies continue their efforts to change the WOTUS rule in light of the serious defects identified in the order.

We need that clarity. I will put Georgia's environmental stewardship second to none. I am sorry to hear of other States that don't value their State's leadership. I do value our State's leadership, and I understand that you are trying to provide clarity in these revisions of the WOTUS rule. I actually value certainty even more. Clearly, the Obama administration was trying to provide certainty in 2015. And, clearly, they failed, as that litigation continues.

Can you talk a little bit about, as we go on to step 2, what my expectations and the constituents' expectations should be around certainty?

Mr. ROSS. Well, yeah, that is one of our core principles as we are taking a look at the new proposed definition. Rather than just trying to fix around the margins, we started over. So we tried to get to very simple, a simple number of categories of what is in and then a very clear definition of what is out. And the number one exception is, if it is not in, it is out.

So simplicity, clarity, certainty are some of the hallmarks of what we are going after. There are some questions about, you know, how we use the typical year construct for determining jurisdiction over adjacent wetlands. You got a lot of good public comments on that that we are taking into account. We are working with our legal and scientific and policy teams to take a look at that. So we have got a little bit of work to do before we finalize it.

But certainty, clarity is our hallmark in this space. Perfection is a lofty goal, but our, you know, improving and answering this once and for all so that we have certainty so that the courts stop changing the goalpost and we actually have a Federal rule that we can implement, that we know—as Justice Kennedy said in a concurring opinion in 2016, you know, that he was concerned about the ominous reach of the Clean Water Act. We should not have Supreme Court Justices saying that in concurring opinions.

Mr. WOODALL. I appreciate your pointing that out. I am perfectly prepared to disagree with the administration about line item after line item after line item, but I am also prepared to disagree with the courts along those lines.

Our job is to write those laws. Your job is to implement those laws. And the Court's role has been overblown in recent years, and I blame the Congress for many of those failures.

Madam Chair, could I ask unanimous consent that we put in the record the court case that I have referenced out of the Southern District of Georgia? It is *State of Georgia v. Wheeler*.

Mrs. NAPOLITANO. So ordered.

[The information follows:]

***State of Georgia, et al. v. Andrew R. Wheeler, et al.*, No. 2:15-cv-00079 (S.D. Ga.), Submitted for the Record by Hon. Rob Woodall**

[The 84-page order granting summary judgment is retained in committee files.]

In the United States District Court
for the Southern District of Georgia
Brunswick Division

No. 2:15-cv-00079

STATE OF GEORGIA, ET AL., PLAINTIFFS

v.

ANDREW R. WHEELER, IN HIS OFFICIAL CAPACITY AS ACT-
ING ADMINISTRATOR, U.S. ENVIRONMENTAL PROTECTION
AGENCY, ET AL., DEFENDANTS

Mr. WOODALL. Thank you, Madam Chair.

I regret that you are not going to be here after the second panel testifies because I suspect we are going to hear some concerns that you have very rapid responses to and the timing won't be there, but I would tell you that, as I see your narrowing the scope of the enforcement responsibilities to comply within the four corners of the law, I expect you to be able to do a better job with equal resources or more resources as you narrow that focus on which the Agency is targeting. And I would call that targeting an effort to serve my constituency even better and hold the Nation to a higher standard on clean water generally.

Is that, as you have seen it from the inside looking out, is that a fair characterization? I reject the notion that anybody is dismantling anything. It seems to me, from the outside looking in, that you are trying to target, focus, and do better at what we all have tasked you with doing.

Mr. ROSS. That is our theory, that, you know, we focus on the waters that matter. The way the construct of the Clean Water Act, it is actually a well-written statute generally, other than maybe one definition that could have used some additional clarity, but the overall construct for the Nation's waters versus the navigable waters, the Federal Government protects the core navigable waters and the States have sufficient and are provided resources by Congress to help do other waters in the watershed. And it is a partnership between the States and Federal Government. We recognize that.

Mr. WOODALL. I thank you for your service to the country. I thank you for being here today.

I yield back, Madam Chair.

Mrs. NAPOLITANO. Thank you, Mr. Woodall.

Mr. Ross, I want to make sure we heard you correctly. Did you say you don't have the responsibility for the Safe Drinking Water Act? Can you provide—to Mr. Carbajal, for the record, and to this

committee—how you propose appropriate use of fracking wastewater when the Drinking Water Act prohibits the disclosure of fracking chemicals?

Mr. ROSS. Yeah, of course. Thank you for the opportunity to clarify, Chairwoman.

Of course, I have jurisdiction over the Safe Drinking Water Act. In fact, that is where I spend most of my time, you know, particularly with lead and copper and emerging contaminants in this country.

The point I was trying to get at is, you know, regulating the identification of chemicals in frack water, I just, I will be honest with you, I don't know which program office has jurisdiction. It might be mine. So that was what I was trying to get at.

But, more importantly, in fracking and produced water, my job, I serve as a cochair of the Drought Resilience Federal Partnership. And I learned we have drought in this country in areas like New Mexico and Oklahoma and the Permian Basin and Texas.

Mrs. NAPOLITANO. And California.

Mr. ROSS. And so that also happens to be where we have a lot of produced water. So it is our responsibility, our obligation, rather than locking that resource into a ground, into the ground and deep water injection and never using it, is to take a look at water use for the drought-starved portions of the country. That is really my focus.

Mrs. NAPOLITANO. How can you do that without knowing what the chemical components are?

Mr. ROSS. That is why I was mentioning the Fit For Purpose reuse. There is a Fit For Purpose technology-based assessment that will go into, as we look at reusing produced water; for example, augmentation versus surface water flows for aquatic life.

Mrs. NAPOLITANO. We are talking about fracking water.

Mr. ROSS. But that water, when it comes up, before it gets reused for whatever purpose you are talking about reusing it for, we will take a look at the end use. Is it irrigation? You will take a look at what are the chemical constituents in it. So that is what we mean by Fit For Purpose. You will take a look at what is in it before you use it.

Mrs. NAPOLITANO. Well, hopefully, we will be able to get a very clear definition because I understand that the industry will not allow to disclose what components they have, what chemicals they have in that water.

Mr. Delgado, you have the floor.

Mr. DELGADO. Thank you, Chairwoman.

Thank you, Mr. Ross, for being here. You just testified that you spend most of your time dealing with the Safe Drinking Water Act, and you also referenced emerging contaminants. I want to focus the questioning in this arena.

You testified earlier that PFOS, PFOAs are a risk to human health, correct?

Mr. ROSS. Correct.

Mr. DELGADO. And these risks would include things like autoimmune disorders, cancer, kidney disease, thyroid conditions, correct?

Mr. ROSS. Yeah, so for the chemicals that we have the toxicological profiles on, yes, those are some of the health concerns that we have identified.

Mr. DELGADO. You would agree those are very serious conditions?

Mr. ROSS. Yeah, to the people who are exposed, yes.

Mr. DELGADO. And you would agree we should take some pretty important critical steps to get in front of those conditions?

Mr. ROSS. That is why we have developed the national action plan to get out in front and answer the scientific questions where we don't know the answers and to begin the process to grapple with the chemicals that we do know about.

Mr. DELGADO. And on that plan, do you intend to issue a maximum contaminant level?

Mr. ROSS. The process that I have to follow is the safe drinking water process established by Congress in 1996, and it is a multiple-step process. The first step in that process is to issue a regulatory determination. We have committed to doing that by the end of the year, and the teams are on pace to do that.

Mr. DELGADO. I don't know if I heard an answer to my question. My question was, when you issue the plan, do you intend to detail an MCL?

Mr. ROSS. If I say right now we intend to do an MCL, then I have determined the outcome of the rulemaking. And I will be challenged in not having an open mind. So I am following the safe drinking water process that Congress established for me. The first step in that process is that we do the regulatory determination.

Mr. DELGADO. Do you think that there can be a scenario where you complete that plan and that plan is viable and has merit in the absence of an MCL?

Mr. ROSS. In the absence—I guess I—

Mr. DELGADO. You are suggesting that you can go through this whole process and ultimately not land on an MCL.

Mr. ROSS. That is the process that Congress established for us. What I am saying is we go through the process. We rely—

Mr. DELGADO. I am sorry. When you say the process that Congress has established is you can go through this exercise and ultimately conclude we are not in a position to state what the maximum contaminant level is?

Mr. ROSS. So the Agency has done multiple regulatory determinations for a variety of chemicals over the years. When they move forward with the determination as a positive regulatory determination—meaning that there is an occurrence at a level that we can see, there are health effects at levels we are concerned about, and there is something that the Federal Government can do about it to regulate the three primary core considerations we do in the Safe Drinking Water Act—then you move into the next step of the process, which is to go out to our advisory boards for public comment, find out whether or not we have made that first determination correctly, and if you make the determination at the back end of that that, yes, we have the ability to answer all those questions and move forward with an MCL, we do.

Mr. DELGADO. So let me stop you there.

So that is a very elongated process you just laid out, correct?

Mr. ROSS. Yes.

Mr. DELGADO. You have acknowledged earlier that there are some serious risks, health effects, right?

Mr. ROSS. Yes.

Mr. DELGADO. We know this to be the case. The science says that as much, correct?

Mr. ROSS. Yes.

Mr. DELGADO. So what I am trying to get my mind wrapped around is, how is it from your vantage point that what you have just detailed actually reflects the mission of the EPA, which is to protect human health?

Mr. ROSS. Because that is the statute that Congress gave me. I have to follow the law.

Mr. DELGADO. What I am trying to understand is: Let's say you follow law, as you very well should, and you are telling me that the law is telling you there can be a scenario whereby you do all of this research, you go through all these advisory boards, you do all of this effort, meanwhile parents are losing their lives, as some of my constituents have had to endure, mothers are giving birth to newborns with increased levels of exposure to these contaminants. You are telling me that we will sit and we will wait and we will wait.

Meanwhile, States—States like New York—are issuing maximum contaminant levels for certain PFOA chemicals. So you are seeing all these other actors move in one direction to get out in front of this problem, and you want folks all across this country to continue to wait and wait and wait on the off chance potentially that maybe we will get to a point where we just might have enough information to issue an MCL.

Is that what you are telling me?

Mr. ROSS. No.

Mr. DELGADO. What are you telling me?

Mr. ROSS. There are other parameters that—like groundwater cleanup standards. So where we see that we have exposure, particularly in the airfields, you can deal with the groundwater cleanup and put treatment techniques in on the water supply. And so we are working with the States and the local governments and our Federal partners to do that.

We are also moving forward with—

Mr. DELGADO. I want to focus on the MCL. The MCL, we have to be able to set a maximum contaminant level for public water. You spend most of your time in the safe drinking water area. This is what you do. You articulated this now. So what I am trying to understand is, where is the focus on getting to a point where we can assure the public we know the maximum contaminant level of something that we know causes cancer, thyroid diseases, autoimmune disorders? We know this. The science says so. Act like it. Why aren't we acting like it?

Mr. ROSS. We are acting like it. We committed to do—

Mr. DELGADO. You are not. You are telling me you got 18 different steps to go through before you can do anything.

Mr. ROSS. That is the process that you, Congress, gave me to follow.

Mr. DELGADO. But you are not even saying, sir, you are not even saying: OK. Be patient. We will give it to you.

You can't even say that. What you are saying is: Wait. Give us some time. But I can't guarantee you we are giving you anything.

Mr. ROSS. As a Federal regulator, if I tell you the outcome of my regulatory process—

Mr. DELGADO. I am not asking for the limit. I am not asking for you to define for me what the limit is. I am asking you to commit to the fact that you will do everything in your power to land on an MCL that the public can rely upon.

Mr. ROSS. That is exactly what we have committed to do. We have committed to begin the process—

Mr. DELGADO. Then just say so. Then just say we will commit to providing an MCL.

Mr. ROSS. You are asking me to presume—

Mr. DELGADO. Yes or no, will you commit to the public that you will rely on the science for as long as it takes? Let's just take it off the table. At some point, at some point, you will provide an MCL.

Mr. ROSS. I will rely on the scientists. I rely on the scientists every single day, and they are the ones—

Mr. DELGADO. I am done. Thank you.

Mr. ROSS [continuing]. This process.

Mrs. NAPOLITANO. Thank you, Mr. Delgado

Mr. Babin, you have the floor.

Dr. BABIN. If you would like to continue explaining about the science, I would like to hear what you have to say, Mr. Administrator.

Mr. ROSS. Yes. So thank you for that question.

So the process of establishing the MCL requires us to take a look at all available science. We take a look at the occurrence data. What we have for PFOA and PFOS suggests that, in about 2 percent of our drinking water systems, the State of Michigan has gone through and analyzed all of their water systems. Several other States are starting to develop MCLs because they have the authority under State law.

The way the system is designed by Congress is we have a process that we go through, and if the States have the authority to move quicker and have concerns for the local citizen, they have the ability to do that, and the States are doing that. That is the way the system is designed.

But what I have done is always taken into account, in fact, on the MCL and on taking a look at the toxicological profiles, we have amazing scientists in the Office of Science and Technology and the Office of Research and Development. They are the ones telling us what the occurrence data is, what the health effects are, what we need to do from a toxicological profile, and they are leading the charge. Our job is to give them the resources to do their jobs, and that is exactly what we are doing.

Dr. BABIN. OK. Thank you very much.

I have the privilege of representing southeast Texas, which is an area that serves as a major gateway for the U.S. trade and is home to some of the country's most significant infrastructure, including one of the busiest ports in the country, and that is the Port of

Houston. It is an essential piece of our Nation's thriving economy and really the hub of our energy industry. Oil and gas sectors continue to be leading the world, in addition to continuing to improve our air quality over the years.

As you know, the EPA's recently proposed rule to section 401 of the CWA has the opportunity to play a significant role in expediting the review process for infrastructure projects, while simultaneously maintaining and promoting strong environmental practices. This new proposal will provide greater clarity and regulatory certainty for our country's water quality certification process.

Some on the left are saying that this administration is guilty of a double standard when it comes to States' rights, particularly as it relates to section 401, the State certifications under the Clean Water Act.

Is the EPA trying to limit States' rights when it comes to protecting water quality under the 401 certification process?

Mr. ROSS. No, definitely not. I have worked for a couple of States. I believe fundamentally in State rights. Our overall portfolio is to protect and respect State rights. In this particular circumstance, the 401 provision is older than I am. It is actually older than the Clean Water Act the way EPA's regulations have been adopted. It is time to modernize it. Right now, the courts are beginning to answer questions for us that the Agency should be providing in modern, up-to-date regulations. We are working through the process right now, but, no, we are not restricting State rights.

Dr. BABIN. OK. And isn't it true that some States have interpreted the language in section 401 as allowing them to use that certification authority to impose requirements that go beyond water quality-related requirements, thereby essentially turning the 401 process into another broad environmental review process like under NEPA?

Mr. ROSS. I do believe that the 401 process is a water quality certification. That is what the statute says. So we should be looking at the water quality impacts of the discharges associated with the Federal permits that the States then get to weigh in and determine whether or not the Federal permit also satisfies their water quality standards within their State.

So it is a water quality provision. That is what we have said in our proposal, and we will look forward to hearing the comments from our stakeholders.

Dr. BABIN. Well, and under that, aren't such States that go beyond water quality-related requirements under the 401 process essentially and effectively using the section 401 certification process as a weapon of such to delay infrastructure and other projects at the expense of significant regional and national benefits, including increased energy security, energy reliability, economic development, and job creation?

Mr. ROSS. Well, we are aware of delays in certain infrastructure and energy-related developments, particularly because Congress basically said the States have a year, up to 1 year to do the certification. The way the system has been developed is someone submits an application. If they don't get it done in a year, they send it back, resubmit, send it back, resubmit. And it could take 4 or 5 years to

go through this process that Congress clearly said there is a year to do.

So one of the things that we are trying to fix is provide clarity and certainty around the 1-year provision.

Dr. BABIN. Thank you.

Madam Chair, I will yield back.

Mrs. NAPOLITANO. Thank you, Mr. Babin.

Mr. Malinowski, you have the floor.

Mr. MALINOWSKI. Thank you, Madam Chairman.

Mr. Ross, we have obviously made a lot of progress as a country since the days of burning rivers, but in its most recent report to Congress, EPA reported that more than 50 percent of the rivers and streams it assessed are impaired; nearly 80 percent of bays and estuaries; 91 percent of ocean and New York coastal waters; and 100 percent of Great Lakes open waters.

Would you agree that it is important to get those numbers down?

Mr. ROSS. Absolutely. The Clean Water Act has been very, very successful, but there is certainly a lot more work the States and the Federal Government need to do.

Mr. MALINOWSKI. Can you name a single major initiative that this administration has taken on the regulatory front that has, as it is expected, significantly reduced those numbers?

Mr. ROSS. Well, yeah, since 2017, we have approved 5,000 total maximum daily loads. We have approved about 240 water quality standards, including reducing the backlog that the Agency failed to act on that the States submit, so, therefore, improving water quality through those States. We have decreased the backlog and have approved several hundred NPDES permits that the Federal Government regulates. I have developed a new water quality training policy. We have developed aluminum criteria. We have developed some aluminum criteria in California. And I could go on and on. So we have taken several major initiatives.

Mr. MALINOWSKI. Well, I am seeing over 80 environmental rules weakened or in the process of being weakened. Waters of the U.S. we have talked about, rules regulating toxic discharge, including mercury, from powerplants. We have talked about the blending proposal, which may allow untreated sewage into our rivers and streams. We have talked about section 401. How are any of these steps intended to or likely to have the effect of significantly altering the numbers that I just read? I am motivated by that kind of thing.

Mr. ROSS. What is not being reported is the amazing work of the Office of Water and the Agency and the regional offices every single day. What gets reported is a few of the big-ticket issues. Ninety-five percent of the Agency continues to go on and performs its mission. There are a few big-ticket issues we are grappling with like the definition of WOTUS that I am trying to restore the rule of law associated with.

So I would love to spend some time educating you about the portfolio of the Office of Water because——

Mr. MALINOWSKI. I am trying to get a motivation here, you know, sir. You said a couple of times, in fact, at one point in this hearing that you have two clear principles that guide your work. One of

them, something to do with not moving goalposts. The second was investment certainty. And I agree with both of those goals.

But I was really struck. You are with the EPA. You are in charge of clean water. Why wasn't the first principle protecting the health and safety of the American people? You have had several opportunities to come to us and to demonstrate that the first thing you think about when you wake up in the morning is protecting our kids and yet what you keep coming back to is investor certainty, rule of law.

Do you work for the Commerce Department, sir?

Mr. ROSS. Of course, I don't.

Mr. MALINOWSKI. Do you work for the Justice Department?

Mr. ROSS. In my opening statement, I actually focused on big-ticket, water infrastructure, water reuse, you know, working for the water sector, and concerns about our workforce. So, every single day, I care about and work for—I got into this—we went into this business because you care about the environment. That was one answer to one question. And, of course, I have multiple core principles.

Mr. MALINOWSKI. It was several answers to the question.

You keep on coming back to the rule of law. So let me ask you about that. In the President's Executive order on defining the scope of clean water protections, he directed the EPA and the Corps to develop a rule that relies on a plurality opinion by Justice Scalia in a case about 13 years ago—I think it was *Rapanos v. the U.S.*—as the sole basis of asserting these protections.

Do you recall how many Justices on the Court supported that plurality opinion?

Mr. ROSS. One, the Executive order said we should be informed by but we are not bound by. So the other thing is, on that opinion, there were three Justices that joined Justice Scalia. So that is four. Justice Kennedy actually concurred. What people forget about is that Justice Kennedy joined Scalia to overturn the overreach of the Federal action in that case.

Mr. MALINOWSKI. Well, five Justices opposed the Scalia opinion. And we are talking about the rule of law here based on a plurality opinion that no court in the 13 years since has said should be binding on anyone or anything. So I don't think that your constant references to the rule of law are particularly convincing.

The role of the EPA, I have some sense of what your role is. You are not the agency in the U.S. Government that is supposed to be fundamentally concerned with investor protection. There are other agencies that have that very legitimate purpose. Your job is to be sitting in there, arguing, often as the lonely voice in the Federal Government, for people. And I have not heard a lot of that ethos expressed here today.

Thank you. I yield back.

Mrs. NAPOLITANO. Thank you, Mr. Malinowski.

Next, we have Miss González-Colón. You have the floor.

Miss GONZÁLEZ-COLÓN. Thank you, Madam Chair.

Mr. Ross, would you like to have additional time to respond to the previous question?

Mr. ROSS. Yeah, you know, the allegation that we are not concerned about the environment is just fundamentally false. It is a nice talking point.

If you are talking about investment certainty, one of the most important things that Congress and the EPA has done over the years is to work with our infrastructure, upgrade our drinking water systems and our wastewater systems. Those are multiple, hundreds of millions or tens of millions of dollars of investment. If facilities and cities and States go through asset management planning, and they have 10-, 15-, 20-, 40-year parameters and they are thinking about how to use their taxpayer money before raising rates for the individual taxpayer, you have to have rules of the game that they understand so they can do their asset management planning, so they can figure out whether or not to spend money on drinking water, stormwater, wastewater, whatever it is. So, if you keep changing the rules of the game, how are cities and States supposed to plan their affairs accordingly?

And so we think about environmental protection every single day, and so I understand this role is to take some of those comments, but I am very, very, very thrilled and pleased with the work of the Office of Water. The career employees are fantastic. I work for them every day, and I see their passion every day.

Miss GONZALEZ-COLÓN. I am going to piggyback on that. One of these complaints we receive about the program is the regulatory patchwork based solely upon the geographic part you are. With the revision again back to 2015, regulations that are currently in more than half of the States, how long will it take for States and Territories to actually adopt the same standards?

Mr. ROSS. I am sorry. There was some noise over here. I couldn't hear the last part of that question.

Miss GONZALEZ-COLÓN. Yeah, I mean, with the revision back to pre-2015 standards, regulations that are currently in half of the States, how long will it take for States and Territories to actually get the regulatory standards, everybody on the same page?

Mr. ROSS. Well, so that is the, I guess, the curse of litigation. So there is a 60-day implementation period. We finished step 1. It will take 60 days before it becomes effective, which theoretically that would restore the common operating platform across all 50 States.

You know, if it is litigated, it is possible that litigation will shut it down in some or portions of the country. And so this story, I believe, will probably continue. We are doing our best. We are controlling what we can. And our litigators, it is a defensible rule. That is why we spent so much time doing it. I know there was concern about we were not moving fast enough, but we moved as quickly as we could so that we could make it defensible, so when that went through the litigation, it will defend it.

So the story is not done, but we have done what we can to restore certainty while we develop our second step 2 rule, which we will finish this winter.

Miss GONZÁLEZ-COLÓN. I really appreciate you highlighting the importance of the role of the Clean Water and Drinking Water State Revolving Fund in order to reduce water pollution and public health threats because, in the case of Puerto Rico, after 2016, we are not able to pay our loans, and, finally, in August of this year,

we actually got through the restoration of the \$571 million in principal with that revolving fund, and that will help us out in some of the cleanups that you just mandate.

As a matter of fact, you asked for sewer repairs in Puerto Rico—Manati, San Germán. And we are very glad that, for the first time in many years, the regional director, Mr. Pete Lopez from New York, has been helping Puerto Rico out. So thank you for that.

I yield back.

Mr. ROSS. Pete Lopez is passionate about Puerto Rico, and I can tell you restoring the SRF, our office director, Andrew Sawyer, has invested huge investment of his time and resources to get that back up and running. When we made that announcement, that was a really great day.

Miss GONZÁLEZ-COLÓN. I will just add to this. Every time we call him—and we do have several situations in Puerto Rico after the hurricane—and I need to say the EPA has been there every time we have been asking for and helping the State to manage many of those incidents regarding, not just water, but 97 percent of the drinking water in Puerto Rico is provided by Puerto Rico Water Authority, which is State-owned basically. So thank you for that assistance and my congrats to Mr. Pete Lopez.

I yield back.

Mr. ROUDA [presiding]. Thank you. The Chair now recognizes Representative Pappas.

Mr. PAPPAS. Thank you very much, Mr. Chair.

And, Mr. Ross, thanks for being with us today.

I want to build off some of the comments of my colleague, Mr. Delgado, because the folks of New Hampshire's First Congressional District are experiencing PFAS contamination at the same levels of the residents of his district. This is beyond an emerging contaminant in my State. It has emerged. It is impacting the health of individuals, and we need to demand more from the EPA.

I am frustrated as well that we don't have the same level of urgency in our Federal Government that we do from State officeholders in New Hampshire. Our State recently set new aggressive levels for PFAS in drinking water. Other States have done that as well. We need a Federal solution on this because States don't necessarily have the expertise at their fingerprints, the capacity to be able to do this.

We need a standard across the country that is going to protect public health and drinking water, and I understand that there is a process, but we want you to share the urgency that people who have been exposed to PFAS contamination have.

Mr. ROSS. You have my commitment. We share the urgency. I know, for the people who are exposed and the communities, that is unsatisfying for me to say that, but I can tell you based on the career team, the scientists, and the regulators that we have working on it, they have an urgency. They are working on it holistically, not just from the drinking water program, but in our Office of Land and Emergency Management and our TSCA program. It is an agencywide initiative. It is a core principle of Administrator Wheeler to push forward on PFOS, and we are doing everything we can as quickly as we can. We understand there is frustration that sometimes the Federal bureaucracy is—you know, part of the Safe

Drinking Water Act, for example, was established to make sure that we engage with our stakeholders, engage with our scientists and our advisory boards. But I understand that, if we go through that process, the outside world and some of the people who are affected may believe that it is not going fast enough, and I acknowledge that.

Mr. PAPPAS. We are counting on you to get something done. I was recently at Pease Air Force Base in Portsmouth. The Air Force has financed a treatment system for groundwater there. They have levels that are hundreds of thousands of parts per trillion, far exceeding the 70 parts per trillion prevailing health advisory by the EPA and far exceeding the new standards that New Hampshire released. They told me it is going to take, if not decades, centuries perhaps to treat all the groundwater in that area so that it is safe to drink. So we are talking about a problem, when you look across the country, just on military bases, that is quite significant.

I am wondering if we could shift to industrial pollution sites. I don't know if you are aware of how many active industrial polluters there are, facilities that are discharging PFAS into lakes and rivers.

Mr. ROSS. Well, I don't have the data in front of me, but my team actually, we are putting together an Effluent Limitations Guidelines Plan. We do that every couple of years. That is out. We have got four or five pages dedicated to this, and we are beginning to take a look at the various forms of dischargers and based on the sectors of the economy in which they operate, and so the Agency, as part of our PFAS action plan, we are looking at that.

Mr. PAPPAS. So experts estimate there are about 500,000 active industrial facilities that are discharging PFAS into lakes and rivers and bodies of water in this country. That is a serious concern. And I am wondering if you could just confirm that you believe that there should be limits on PFAS discharge from such sites.

Mr. ROSS. Well, so we have a couple of facilities, for example, in West Virginia and North Carolina, that are subject to discharge limits. They are the manufacturers.

We are taking a look at what other sectors would we have the authority to regulate and do we have the ability to regulate, and that is part of our Effluent Limitations Guidelines Plan. So we are taking a look at it. That plan will be coming out fairly soon, but in the action plan, it is one of the things that we took a look at over the next couple of years. Obviously, to regulate it all the time, you have to have the science. You have to have the data. And so we are going to focus in on the higher priority areas.

Mr. PAPPAS. Fairly soon. Can you narrow that down for us?

Mr. ROSS. Actually, I don't have the details in my—at my fingertips. I can get back to you on that, but I know I have signed off on the last, on the Effluent Limitations Guidelines Plan. It is going through the publication process. Quite frankly, where in that process, I just don't have the answer, but I can get it for you.

Mr. PAPPAS. Well, the way we can really protect public health from the threat PFAS poses is to first stop the contamination, stop the situation from getting worse, ensure that there is treatment of groundwater, that people have access to safe drinking water, and then work at making sure that we get these chemicals off the mar-

ket. They are called forever chemicals for a reason. They stick around in the environment for a long, long time. And they have been linked to serious chronic health conditions, from cancer to thyroid issues.

We have got to make sure we are doing more on this. This is going to be found all across the country when we test for it, and we need our EPA to be on the front lines of this with up-to-date science, working hard with that sense of urgency to protect the public.

Mr. ROSS. Yeah, you have made the argument for why this is—why we developed a holistic action plan, and the core component and our primary focus—well, I shouldn't say our primary. That is the wrong word. One of our main focuses is on closing the scientific gap. So there is a huge amount of work happening in the Office of Research and Development and with our Federal partners on how to close the scientific information gap. You know, and we are also working on trying to figure out ways to identify more chemicals in basically environmental media, and so all of that is happening as part of our action plan. And if we are just laser focused on one issue, we would ignore the holistic picture.

Mr. PAPPAS. Thank you.

I yield back.

Mr. ROUDA. Thank you, Mr. Pappas.

The Chair now recognizes Representative Gibbs for 5 minutes of questioning.

Mr. GIBBS. Thank you, Chair.

Thank you, Mr. Ross, for being here today. And thank you for all the work you do to protect our environment. When I was chair of this committee for 6 years, this subcommittee, I always said during the WOTUS discussion that the Clean Water Act was passed in 1972 to be a partnership between the Federal Government and State governments, and the State governments are responsible for the implementation and enforcement of the Clean Water Act under the guidance of the Federal Government.

Is that a true statement?

Mr. ROSS. Yeah, as part of the providing authority for the States that run the program, they have to be able to enforce the law.

Mr. GIBBS. And they do send reports frequently or timely or are required to?

Mr. ROSS. Yeah, we report on our performance. In fact, I used to run a—the environmental protection unit was responsible for enforcement in the State. So I actually have firsthand knowledge on that.

Mr. GIBBS. One my concerns has always been, during the Obama administration, on their waters of the United States proposal, implementation, that they tried to do was that one size fits all—you know, you could expand this map, include all the things under Federal jurisdiction. I always made the argument that, you know, we could actually go backwards and the progress we made in point source and nonpoint source pollution, and the reason I say we go backwards is because, at some point, you know, businesses, farmers, they all want to—most people, everybody wants to do the right thing. OK? But when you layer on so much redtape and bureaucracy, at some point, they are going to just throw their hands up

in the air and only going to do what they need to do to get by and may not go the extra mile.

Do you think that is a true statement, too, that that is a possibility?

Mr. ROSS. Well, I know there is frustration in the regulated community. My experience is that, at base, people will do the right thing to protect the environment, but I do sense the frustration if the goalposts keep moving. And so it is——

Mr. GIBBS. Well, you know, as a former hog farmer, you know, it was illegal for me to go out and dump hog manure in the ditch or whatever, even though it was in the Federal waterway. And so there has been lots of editorials recently, because I just saw the move by the Trump administration on this issue, that the editorials actually come out and say that this opens up the door for businesses to pollute because the Feds aren't regulating this. And, as you and I both know, that is not true. If it is illegal for me to do that, the States are doing that.

And my point is, when the Feds open this up to a one size fits all out of Washington, DC, what the issue comes about is it creates more confusion, more redtape, and the States wouldn't do as much as they might have done because they think the Feds are going to do it, and we actually go backwards. And I have held that opinion, and I think it is absolutely true.

So I am glad to see the Trump administration is moving forward with common sense to really implement what the Clean Water Act's purpose really was, and Justice Scalia's in the *Rapanos* decision kind of stated that Federal jurisdiction should be waters, that waters can't be there intermittently, meaning that exempts road ditches from the Federal aspect but not the State aspect, and there has to be some type of features. I think he meant streambanks, if I interpret that correctly.

So I just want to make the point here that all waters are being regulated, and small streams, road ditches, and all that kind of stuff, it is better regulated at the local level, the State level because they have a better hands-on than a one-size-fits-all Washington, DC. In your position now, would you concur that is kind of the way it should work? I mean, it works better that way.

Mr. ROSS. That is the way Congress set it up. That is the structure of the Clean Water Act, is to focus on the core waters under Federal jurisdiction and to provide resources to the States and allow the States to regulate that which they think is more local.

Mr. GIBBS. I do want to mention quickly the President signed the integrated planning legislation here in January that I sponsored. Can you give us a quick update what is happening with that? Is the EPA reaching out to communities that are under enforcement actions to make them aware of opportunities that are out there to try to get to where they want to get to? Where are we in integrated planning?

Mr. ROSS. Let me thank you for the legislation.

This country really does need to focus on integrated planning. Whether that is stormwater, wastewater, drinking water, it all comes back to the same ratepayer, the same taxpayer. And so if you truly understand local asset management planning, integrated planning has to be part of the conversation. So we are robustly em-

bracing integrated planning. It comes up quite a bit in the combined sewer overflow context, and we are working with the Department of Justice and our regulated community to provide additional flexibility to make sure that, for example, if someone, rather than investing \$1 billion in a pipe in a ground, they can do \$600 million—I am just making this up—in green infrastructure and get stormwater management benefits and green space and the environmental benefits of the green infrastructure. We should embrace that, and I think we are.

Mr. GIBBS. OK. That stormwater, our sanitary system, right?

Mr. ROSS. Well, in fact, that is one of the reasons I actually included stormwater in the Water Reuse Action Plan that we dropped last week. Is it reuse? It is an interesting question, but it is certainly a source of water that we should be looking at as a new form of water if we handle it and manage it and treat it correctly.

Mr. GIBBS. I thank you. I am out of time.

I yield back.

Mr. ROUDA. Thank you, Mr. Gibbs.

The Chair now recognizes Congresswoman Fletcher for 5 minutes of questioning.

Mrs. FLETCHER. Thank you, Mr. Chairman.

And thank you, Mr. Ross, for being here today.

I represent the Seventh Congressional District of Texas in Houston, and we are no strangers to pollution when it comes to our waterways. Just this year, we had a major incident when a chemical fire at the Intercontinental Terminals Company raged so uncontrollably that a containment dike failed, spilling countless chemicals into the Houston Ship Channel and, the evidence suggests, all the way into Galveston Bay.

And this hasn't been the only chemical spill that we have seen recently. In 2014, as you know, a chemical storage facility in West Virginia released an estimated 10,000 gallons of coal-processing chemicals upstream of a drinking water intake pipe that left more than 300,000 residents without drinking water for more than a week.

Despite these events and the general risk associated with them, the Trump administration EPA recommended no new requirements under the Clean Water Act to prevent the release of hazardous substances or to require public notification. And earlier this month, EPA reversed its 2016 decision to issue new rules to safeguard against the release of hazardous substances into local water bodies and drinking water sources.

I would like to know why the determination that it wasn't necessary to look at the hazardous substances earlier this month, why that took place, and what data led your Agency to make that determination.

Mr. ROSS. Well, so that is actually a rulemaking that is out of our Office of Land and Emergency Management. So they ran the rulemaking. So I can't speak to the specific detail in the decision-making. I am aware that they did take a look at some of the former chemical spills and took a look at the scope of authority that the agencies have, for example, under my program and NPDES permitting or under the enforcement program to go after those spills.

They took a look at nine common areas and decided that, based on the scope of our existing authorities, they have the ability to manage it, but, as far as specific decisionmaking, that is not my program, and I really should—I would have to defer to Peter Wright, who is the Assistant Administrator of that office.

Mrs. FLETCHER. Well, you would agree with me, would you not, that the public has the right to know when their water has been contaminated by chemicals or compromised by chemical release?

Mr. ROSS. Yeah. And we have the Community Right-to-Know, lots of notifications, the State has notification requirements. And so a lot of the notification is built into our existing systems.

Mrs. FLETCHER. So how many spills have there been since the Charleston incident that have been severe enough to contaminate local water sources?

Mr. ROSS. I don't have that data.

Mrs. FLETCHER. It is my understanding that there have been approximately 600 chemical spills in the last 3 years. Have you heard that number?

Mr. ROSS. No, that is not my program, so I haven't focused on that specific data.

Mrs. FLETCHER. OK. Do you agree with me that it is important, if there have been—let's just assume that that number is correct, there were 600 spills in the last 3 years—do you agree with me that additional measures to reduce or eliminate chemical spills would be an important thing to protect public drinking water?

Mr. ROSS. I would have to take a look at the causes of the spill, the response action, and things like that. So I can't speculate.

Mrs. FLETCHER. Do you know whether the existing EPA programs have caught or been able to identify those chemical spills through the programs that you previously described?

Mr. ROSS. Again, that would be for another office to answer those questions. And I am happy to take those back, those questions for the record.

Mrs. FLETCHER. Yeah. I think it would be helpful to get answers to those questions. Certainly, some of my colleagues have talked about concerns that residents have about PFAS chemicals, PFOA. That is certainly true in Texas. We are attuned to that as well. And I think that what we are concerned about is accountability and making sure that we have the information.

As you know, the ITC chemical fire raised serious concerns about our air quality but also water quality, and that has a lasting impact. And so we have heightened awareness about the potential risk of chemicals in our water and request that you get that information back to us so that we can take the appropriate action to make sure that public drinking water is safe and that public health is prioritized.

And with that, I will yield back.

Mr. ROUDA. Thank you, Representative Fletcher.

The Chair now recognizes Representative Massie for 5 minutes of questioning.

Mr. MASSIE. Thank you, Chairman.

The homebuilders in my district, the people who are providing services to the homes, like the sewer districts, they all understand that there has to be some regulation, and they don't want to pol-

lute. But the two things that I hear from them and all of my constituents is that we need to improve clarity and reduce disparity, because they can deal with these. These are costs of doing business. They get passed on to the consumer, so we should strive to minimize them while taking care of the environment.

But the problem is, if you don't have clarity—like you were talking about the maps, the lack of maps from prior administrations—they are shooting in the dark. And then if they get treated one way on one project and then they go to another project in a different State or a different district, they are treated another way. And these create uncertainty and hardships, not just for those providers, but for the customers.

So, you know, the former EPA Administrator said that their rule was based on science. Yet when I looked at the rule, there were no units of measure, there were no numbers. Like, it was words like moderate flow, heavy flow, intermittent. These things need to be defined in order to improve the clarity and reduce the disparity.

Some of my constituents—and I know some of these issues are Army Corps issues, and maybe that is one of the problems we have here. There are a couple of silos. But one of the recommendations that I have heard from my district, where there is a consent decree—they are under a consent decree that is going to cost the sewer district, which will be passed on to the ratepayers, hundreds of millions of dollars.

One of the questions they asked is—and this is what the developers are asking too. All of this money that the developers are paying in to the mitigation banks, which, frankly, some of it goes to some dubious projects. If you go inspect these projects, it is not clear whether they have improved the environment or the condition of a stream or not. And some of it just goes into buying rural land and locking it up forever from development, which exacerbates rural poverty. When they are trying to save the environment by buying up land in rural counties, it creates hardships for those counties and it takes stuff off the tax rolls.

So here is what they have recommended to me. And I said, you know, this idea will never catch on in DC, because it makes too much sense, common sense. Which this is what they want to do: Take the money that the developers are paying in mitigation fees, when they build homes for new home buyers, and use it for the consent decree, to actually use the money, the mitigation money, OK—ostensibly the developers are having an impact on the environment. Instead of spending that money on projects we are not quite sure—it is hard to prove they improve the environment, why don't we spend it on the neediest projects, which are these sewer overflows that are in the district.

Like, what do you think of that idea? I know it is going to sound crazy to everybody here, because it makes sense everywhere else, but—

Mr. ROSS. Well, there is a lot to unpack there.

So from a high level, my—and, in fact, in a former position in the State is, I believe that you should apply your resources where you get the best economic and environmental value and, more importantly, the environment public health protection value. And so

that is one of the reasons why we are taking a look at updating and modernizing our mitigation policies.

For example, in my Water Quality Trading Policy that we developed in February, one of the six core principles is encouraging multiuse banks. So not just for, you know, wetland mitigation or water quality trading, but also species conservation, so that we work with our Federal partners to take a look at landscape scale conservation and bring multiple sources of revenue to provide a higher level ecological lift for whatever bank that you are talking about.

We are updating the—working with the Corps of Engineers—we have worked really hard to break down the silos between those Federal agencies and have a great working relationship with them.

We are updating our compensatory mitigation rule, with the Corps taking the lead on that. We are working with the Corps on things like if you are taking out a check dam to try to repair a corridor and there is a little bit of fringe habitat around the pond behind the check dam, there was a disincentive to do the check dam removal and repair the stream, because if you had to compensate or offset the impact of the fringe wetland on the pond, it may make it economically unviable. And so we are working with the Corps to modernize those types of mitigation policies.

So at a high level, I agree with you that we need to be more creative in how we use our mitigation and get the best bang for the buck.

Mr. MASSIE. And one of the mitigations I would recommend that they be more flexible in granting, because it has fallen out of favor recently, is allowing the developer to mitigate on the property there locally. Like, what can you do to improve things there locally where people will see the benefit, instead of putting it into this black hole where you are not sure what the money is being spent on? It is actually more efficient that way, I think.

Mr. ROUDA. Time has expired, but the witness can answer the question.

Mr. ROSS. Yeah, that is an historic question. You know, back in the day, it was onsite—you know, onsite, and we found that if you didn't have the sophistication to operate and manage the wetland—for example, wetland mitigation going forward—you know, 10, 15 years later, you may have had a decline in the resource. And so there has to be some balance between the sophistication of the entity who manages the resource going forward. Sometimes it is a local landowner but sometimes not.

Mr. ROUDA. Thank you, Mr. Massie.

The Chair now recognizes myself for 5 minutes of questioning.

Mr. Ross, good to have you here, again, and to hear your testimony.

I want to point out the fact that I think clean water is a bipartisan affair. We all want to make sure that our children and our family and our community has access to safe drinking water. And I also want Americans to fully understand the challenge of PFAS in our drinking water and our food chain.

So just to help clarify, we know that PFOA and PFOS is not being used as it has been in the past. And we even heard testimony last week from 3M that they voluntarily stopped using it and sell-

ing it, a highly profitable product. And the reason they probably did that was because they recognized the environmental impact and the potential liability, liability that resulted in an \$875 million settlement—not a judgment—settlement with the State of Minnesota.

There are 5,000—roughly, 5,000 to 6,000 chemicals in the PFAS family. Is it your belief that all or most of these have health consequences?

Mr. ROSS. We simply don't know, which is why our scientists are working on developing toxicological profiles for the next batch of chemicals and, more importantly, looking at high throughput toxicology work that takes a look at the group of chemicals to figure out if we can sort of weight which ones may warrant quicker, faster study. So the short answer, we don't know.

Mr. ROUDA. But they are all in the same class. They are all in the same class. We have studies out there, even internal 3M studies, that show that accumulation of PFAS, whether it is PFOA or PFOS or the full range of even short-chain compounds, can cause negative consequences.

Are you concerned that the American public is the guinea pig here as we determine the effect of these compounds on our health?

Mr. ROSS. Well, these chemicals have been in production since the 1940s and are part of our everyday life, including—

Mr. ROUDA. Literally.

Mr. ROSS. Literally. Including, you know, putting out fires and saving lives on Navy ships and at airports, and then the medical community relies on these.

And so the challenges, as I have learned from the toxicologists—you know, for example, on the tox work we are doing on Gen X and PFPS, you are seeing shorter chains and—but yet they still have adverse health effects, but they are different health effects than the PFOA and PFOS.

And so we really—right now, the short answer is our scientists need time to really figure this out, and that is one of the primary goals of the Agency right now, is give our scientists the leeway to run and develop and close the information gap.

Mr. ROUDA. So when I look at the overall concerns, you have got a parts per trillion of 70 issued by the EPA. Clearly, there is some scientific evidence that the EPA decided to use that number as the benchmark, where above that is concerning for an individual's health. So even though you haven't done the toxicity studies on every single compound, you have drawn the conclusion that 70 is a benchmark for all compounds, correct?

Mr. ROSS. For PFOA and PFOS, those two compounds.

Mr. ROUDA. OK.

Mr. ROSS. And that was based on specific studies supporting both the PFOA, P-F-O-A, and P-F-O-S.

But as far as the standards, you know, there are chemicals that we don't know the toxicological profile for, and so we don't know what the number would be if we would go through and establish a health advisory. And that is the information that we are trying to gather.

Mr. ROUDA. And again, I emphasize the concern is that we may be looking back 5, 10, 15 years from now and wondering why this

body and the EPA did not take action on a class of chemicals that they knew were diminishing the health of Americans, and allowing it to be dumped in rivers and allowing it to be used on crops, to be introduced into our food chain, and us not taking action quick enough or deep enough to address this issue.

Are you concerned about the EPA not moving fast enough in this regard?

Mr. ROSS. Well, I will tell you, actually it is one of the reasons, when I was talking to our drinking water program and learning from the scientists, early last year, I didn't want to be the person looking back 10 years from now and saying the EPA missed it. And it is one of the reasons why we established the leadership summit that we held, the listening sessions throughout the country, and the development of the action plan. It was designed specifically to make sure that we weren't looking back 10, 15 years from now and said we missed it. And so that was definitely in my forefront of my mind as we were thinking about developing the action plan.

Mr. ROUDA. And as that action plan comes forth and you get the studies done, if we learn that much of the drinking water, significant amounts of the drinking water being consumed by Americans in everyday life is above certain levels, when you look at the remediation that would have to take place—and right now, the best technology to do that is reverse osmosis, which is basically desalination—we are talking major expenses for every single water district that is affected with high volumes of PFAS chemicals, how do you envision us being able to address that?

And my point really being, the sooner we address the dissemination of those chemicals into the environment, the less likelihood we are going to spend a hell of a lot of money on cleanup through improved water.

Mr. ROSS. Well, it is one of the things—you know, we are actually taking a look at the technology, the treatments, because carbon absorption actually takes care of some of the compounds and does that actually gather additional longer chain compounds versus shorter chain compounds. Yes, reverse osmosis is out there. We would actually have to take a look at does reverse osmosis cover everything.

And so, yeah, it is a very, very expensive treatment on the back end, which is one of the reasons why we are really focused on, you know, in the short term, where you have exposure, particularly in groundwater near airfields, trying to get the treatment up—

Mr. ROUDA. I am going to get one last question in here, because I am a little confused by some of the questions about States' rights when it comes to addressing this issue. And on the other hand, we have a President who is constantly trying to take away California's rights in addressing environmental issues.

Is it your testimony or your belief that States should be the primary holders of how we manage the PFAS class of chemicals or is that a—do you expect to have an EPA level set for each of these?

Mr. ROSS. I think we need all of the above, local, State, and Federal Government. We all have a role to play. That is the system that we have. And so while EPA uses its authority to address PFAS, the States are using their authorities, and local commu-

nities are as well. So we need an all-of-the-above strategy. That is my position.

Mr. ROUDA. OK. Thank you very much.

And I yield back.

The Chair now recognizes Mr. Garret for 5 minutes of questions—excuse me, Mr. Graves, for 5 minutes of questioning.

Mr. GRAVES OF LOUISIANA. We are so close, we are on a first-name basis.

Mr. ROUDA. That is right.

Mr. GRAVES OF LOUISIANA. Thank you.

Administrator Ross, thank you for being here. Appreciate it.

I represent south Louisiana. We have gone through the longest period of Mississippi River at flood stage ever, ever recorded. My point is, is that we drain from Montana to New York to Canada, one of the largest watersheds in the world. And the hydrology of south Louisiana is very different than virtually anywhere else.

Do you believe that under the standard established during the Obama administration that there was appropriate clarity for areas like Louisiana where I could read it, and having previously worked in a role where I dealt with regulations—in reading it myself, I believe that I could have applied that to virtually anywhere in south Louisiana, anywhere.

Do you believe that the clarity or the specificity in the Obama-era definition was appropriate or do you think that it needed more clarification and definition, especially for areas like south Louisiana?

Mr. ROSS. Well, I once had an opportunity to cohost an hypoxia task force along the banks of Baton Rouge and learned firsthand about the water challenges down there, and it was extremely informative.

You know, that—one of my concerns on the last administration's proposal is that you really didn't get the certainty, particularly as you got away from major water bodies and particularly because it relied on the significant nexus test.

If you take a look at our proposed step 2 rulemaking, what we have done is what Justice Kennedy articulated in his concurring opinion, which is, absent more specific regulation, he recommended a significant nexus test.

We use a significant nexus concept in the science and the policy to drive our proposal, but then our goal is to eliminate that case-by-case specific analysis using factors that are really hard to grapple with and getting more to certainty and clarity.

So the answer is yes, I think we can do better, providing better certainty, particularly as you get away from the major waters.

Mr. GRAVES OF LOUISIANA. Administrator, I have had dozens and dozens of meetings with just regular constituents—not companies—just regular constituents coming to us and expressing concern or fear over the potential jurisdiction over their property whenever they wanted to do something with it, putting a chill effect on folks doing things like building homes, establishing a small business, and other implications.

A lot of the headlines that I have read over the past few months or past few weeks, I guess, have indicated that this is a rollback.

Could you talk a little bit about data and justification for just the jurisdictional basis of this?

Mr. ROSS. Well, so the rollback for the 2015 rule, it is about restoring the rule of law. The 2015 rule has been found by several courts to have legal defect and has been actually sent back by a court in Georgia and a court in Texas to the Agency to fix it.

So, there was an expansion under the Obama rule. And by restoring the 1986/1988 framework, there is less Federal jurisdictional waters. The question and the problem that we have is we don't have the datasets to be able to do a comparative analysis. There has been a failure of the Federal Government for decades. It is one that we are really focused on. I reject the premise that we can't map it.

The people at USGS, the people in ORD, the people over in NOAA, they are fantastic. You just have to give them the right information so they can add a GIS data layer to the NHD hydrography dataset and also the NWI. So we have the ability to do it, but we don't have the data. And to do this comparative analysis, we need to—

Mr. GRAVES OF LOUISIANA. I would certainly love to work with you, and don't see any reason why that would be a partisan effort to get accuracy and clarity.

Now, shifting gears very quickly, I want to flip over to section 401. I have met with numerous folks across the country, Washington State, California, New York, and other areas, where 401 appears to have become weaponized, meaning that States are using it in a manner, number one, inconsistent with what I believe to be the 1-year timeframe to make a decision.

Is that your belief and understanding as well?

Mr. ROSS. Yeah. The Congress is very clear that it said 1 year. One year means one year.

Mr. GRAVES OF LOUISIANA. OK. So, secondly, this is part of the—it is 401 of the Clean Water Act. Watching some of these entirely irrelevant topics that States are using, or justification that they are using, to refuse to offer the consistency determination is fascinating to me. And, in fact, it has actually led to environmental damages. And I will give you an example.

As a result of preventing gas pipelines up in the Northeast, they actually burned home heating oil and imported gas from Vladimir Putin. Russian gas is 13 percent dirtier emissions than U.S. gas. Home heating oil has extraordinary emissions compared to natural gas as well. So their efforts to protect the environment are actually damaging the environment.

Now, Washington State using things that are entirely unrelated to clean water to stop certification, did you think this is inappropriate?

Mr. ROUDA. The time has expired, but the witness may answer the question.

Mr. ROSS. So water—if it is a water quality certification, water quality means water quality. And I am aware of circumstances where sometimes States lose the forest for the trees.

Mr. ROUDA. Thank you.

The Chair now recognizes Representative Lynch for 5 minutes of questioning.

Mr. LYNCH. Thank you, Mr. Chairman.

Thank you, Mr. Ross, for your willingness to testify and help the committee with its work.

I represent Boston Harbor. I have done that for about—well, including the State senate, for quite a few years, maybe 25 years. And we have spent billions, we have spent billions cleaning up Boston Harbor. And I am happy to say it has been a dramatic improvement. We see, you know, seals, porpoises, you know, things I never saw when I was growing up there, we see now since the cleanup of Boston Harbor, the Deer Island sewage treatment facility. So we have made great progress there.

One of the ways that we have been able to do that is using section 401 of the Clean Water Act, which it basically states that a Federal agency may not issue a permit or a license to conduct any activity that may result in any discharge into navigable waters, Boston Harbor, unless one State or an authorized Tribe where the discharge originates issues a section 401 water quality certification verifying compliance with the Clean Water Act. So we have used that as a shield to protect Boston Harbor.

On August 8, 2019, EPA signed a proposed rule to replace the existing water quality certification regulations under section 401. Part of that would be to limit the State's ability to protect its waterways.

And is that your intention?

Mr. ROSS. No. Quite the contrary. We fully support the States doing water quality certifications. And if folks would read the proposal, they still have the ability to take a look at water quality impacts associated with federally issued permits. That is not—

Mr. LYNCH. Yeah, but—so what you are doing, though, is in this proposed rule, which I oppose, it limits the issues that we can cite in refusing a water quality permit. It also limits the time we have to get our evidence together to fight that.

As a State, we have never relinquished our ability to protect our citizens or our natural resources. We have never done that. There has always been a shared responsibility between the States and the Feds. So I am just worrying if—I am wondering and worrying, you know, do you think constitutionally you can diminish the rights of the State to protect its citizens or its natural resources?

Mr. ROSS. My touchstone is complying with the rule of law, and I intend to do that. We are following the law in proposing a rule that says 1 year means 1 year, and we are not limiting the ability of States to take into account water quality.

I have been to Boston Harbor. One of the first trips I took in this position was to go up and take a look at our Urban Waters Program. It is fantastic.

The section 401 modernization effort that we are going through right now, the States will still have the ability to take in consideration of water quality impacts.

Mr. LYNCH. Not as much as they can now. Under your rule that will diminish this. It is pretty plain the impact of this.

So I have a compressor station that they are trying to build adjacent to Boston Harbor, a pipeline, a gas pipeline that will definitely cause a negative impact on water quality just because of the nature of the discharge and the work they are doing.

Under the existing rule, the State of New York has been able to push back under the Clean Water Act and deny licensing to a pipeline similar to the one that I have in my port.

So I am just worried—I am very worried that your diminishment of State power under this rule will allow this discharge to go on under your rule, under your new proposed rule, that would not have happened when we had the right to protect Boston Harbor. Is that your understanding as well?

Mr. ROSS. If your concern is water quality in Boston Harbor, our rule will not impact the ability of the State to consider water quality impacts associated with that discharge.

Mr. LYNCH. Well, you keep saying that, but you are diminishing the shield that we have to protect our navigable waters.

In another section here, you know, we have a current restriction on farmers who use pesticides and other fertilizers and nutrients near waterways that are currently prohibited, but you are expanding that ability. I mean, with all of the problems we have had down in Florida with the algae blooms and other impacts on tourist areas and beaches, you are allowing that now to happen in a bigger way and restricting States' ability to regulate that as well. You know, I find it stunning, the scope of repeal that you are pushing forward.

Mr. ROSS. Well, I respectfully disagree. So the scope of the repeal on the WOTUS rule was to restore the rule of law because the current—the 2015 rule has been sent back to the Agency as in violation of our statutory authority. And under the 401—I keep saying it, because it is true—States have the ability to analyze the impacts of water quality as part of the certification process.

Mr. LYNCH. I thank you for your indulgence, Mr. Chairman, and I yield back.

Mr. ROUDA. Thank you, Mr. Lynch.

And the Chair now recognizes Mr. Graves who has asked to make a clarification on one of his previous questions.

Mr. GRAVES OF LOUISIANA. Thank you.

Mr. Chairman, I believe that Mr. Westerman had deferred some time earlier, and I am claiming that to clarify.

On section 401, I want to make sure I understand, the second panel, some of the written testimony indicates that the administration's clarification on 401 would actually hamper States' ability to exercise certification. I guess I struggle with that. Because is there anything in the administration's clarification that would prohibit States from making decisions based on water quality?

Mr. ROSS. No.

Mr. GRAVES OF LOUISIANA. So that testimony would be somewhat confusing or perhaps inaccurate?

Mr. ROSS. Well, I haven't read the testimony, so I won't weigh in on or provide an opinion.

Mr. GRAVES OF LOUISIANA. Thank you.

One clarification. The chairman of the full committee put up a chart earlier on the economic analysis of the WOTUS rule and shared his thoughts of what that chart meant. There was a caveat at the bottom that indicated that that chart represented conditions with no State responses, meaning States would not change laws or do anything differently.

Do you believe that to be the case or do you believe that some States would actually act differently in a more dynamic manner?

Mr. ROSS. Well, actually, that is one of the things that we have seen and we had our economists take a look at, that the whole States' race to the bottom theory has been disproved. States will rise. You know, there is—and so if you take a look at the economic analysis associated with the step 2 proposal and also what we have done in step 1, the States will rise. And we have seen it.

You know, after the 2001 SWANCC decision, Wisconsin immediately came in and expanded jurisdiction over wetlands. We have seen it already in response to our proposal. The States have already said we are going to step in and act. So the race to the bottom theory from the 1970s and 1980s I think has been disproved.

Mr. GRAVES OF LOUISIANA. And, Mr. Chairman, just in closing, I just want to make note that this goes back to my first question, is that I believe the States can tailor the clean water solutions to their own States and own hydrology, as opposed to trying to come in and doing a one size fits all. And I think this is a more elegant solution.

I yield back. Thank you.

Mr. ROUDA. Thank you.

The Chair now recognizes Mr. Cohen for 5 minutes of questioning.

Mr. COHEN. Thank you. And for the first time I can say thank you, Chairman Rouda.

Mr. ROUDA. Yes.

Mr. COHEN. Good to follow Mr. Graves.

And I want to thank the subcommittee for honoring my request to hold this hearing today. It is a most important subject. And I was at the Judiciary Committee with FISA and then with some eye doctors on the power of stem cells and recreating vision. So you are in good company, but I am late.

It is very important we have the opportunity to examine the impact of coal plants and coal ash dumps on groundwater quality and to examine the effects of coal ash contamination on the quality of drinking water for communities across this country. The issue of coal ash is very personal to my district and myself. The residents of my State have seen it in two spots in particular.

I have been working alongside my fellow congressman, former fellow Tennessee General Assembly colleague, Tim Burchett, a stalwart on this fight, to continue to shine some light on this important issue.

In 2008, the largest coal ash spill in our Nation's history occurred in Tennessee when a dike failed at TVA's Kingston Fossil Plant, and 5.4 million cubic yards of coal ash cascaded into the Emory and Clinch Rivers and smothered about 300 acres of land. I met with TVA officials yesterday. They assured me they are working on the cleanup and looking into the conditions of the workers who claim they have been damaged with healthcare maladies. And they said this was a preventable accident. And hopefully, we won't see it ever again, and they promised me it won't happen again. TVA has good new leadership, and I am pleased about that.

We are here in 2019, and hundreds of people are still dealing with the aftermath of that disaster, though. Meanwhile, the EPA

seems to be intent on weakening Federal protections for coal ash. And that is disappointing. I would hope that the EPA would work with TVA to see what happened at Kingston and try to see that it doesn't happen again. And in Memphis, they have left a lot of coal ash at a plant, and it is going to be 20 years to rid us of all of it. So that is another area of concern.

Mr. Ross, on April 15, the EPA reversed its position for over 40 years and determined that the Clean Water Act does not apply to discharges of pollutions that flow through groundwater before reaching a river, lake, or stream. This action clearly goes against the plain language of the Clean Water Act and creates a glaring loophole which could have disastrous impacts on water quality.

The Clean Water Act is vital in preventing even more environmental harm from the disposal of toxic coal ash left at coal powerplants across the Nation. And that is what we have got in Memphis is a coal plant out [inaudible].

There are approximately 1,400 coal ash sites across the country where deadly toxic waste has been disposed of, posing threats to clean water and people's health. And Memphis has one of the finest clean water aquifers in the world, and our folks are concerned about us being contaminated.

Ninety-two percent of coal ash ponds covered by this rule are currently contaminating groundwater at levels exceeding Federal health standards. The Allen Fossil Plant in my district is identified as one of the most contaminated sites in the country with levels of contamination hundreds times higher than what could be considered safe.

So, Mr. Ross, my question, for decades, regulation under State laws and other Federal statutes, such as the Safe Drinking Water Act and Resource Conservation and Recovery Act, reportedly have been shown to be insufficient to protect communities from water pollution. How do you plan to protect these communities, such as Memphis and east Tennessee folks in Kingston, living near toxic coal ash sites that are leaching into groundwater and traveling to surface water?

Mr. ROSS. Well, there are multiple mechanisms in play there, whether or not it is a CCR rule or you have some of our—you know, whether or not State authority in—under State law. We have other programs at the Federal level.

But I am going to address the—you know, one of the things that you said about the 40 years of EPA position on the discharges to groundwater. It hasn't been 40 years. We put out a notice early last year trying to decide what is the actual scope of authority under the Clean Water Act for discharges to groundwater. And we got thousands and thousands of comments back. And what we learned is that the EPA originally had a position that we don't regulate discharges of groundwater, because that is exactly what Congress intended.

The EPA Administrator actually asked Congress, up through the debates in the 1972 amendments, to ask for authority to regulate groundwater. There were amendments that were proposed to go after and expand the 402 program to extend to discharges of groundwater, and Congress specifically rejected that. And so in the

world of statutory interpretation, that is fairly significant guidance to us.

And so our position is, you know, we could have—we started with what our legal authority is when we wrote that interpretive statement. We didn't follow the Ninth Circuit or the Fourth Circuit. We didn't follow the Sixth Circuit. We figured out what our legal authority really was before deciding what our outcome is.

Mr. COHEN. And when you figured that out, was that less than the circuits had given you authority to do or more?

Mr. ROSS. So right now, in the Fourth and the Ninth, where those courts have taken the position that—and, Chair, if I may answer the question, I am happy to.

So rather than—even though I don't necessarily agree legally with the rationale of those courts, we are not upsetting the decisions in the Ninth Circuit and the Fourth Circuit, because we know the Supreme Court has accepted cert and is taking this interesting and difficult question up.

And so before EPA goes through a rulemaking, for example, we are going to—if we are—have the benefit of Supreme Court guidance, we are certainly going to take that into account. And so we recognize the decisions in the Fourth and the Ninth Circuit, just like we recognize the decisions in the Sixth Circuit.

Mr. COHEN. I appreciate that, but that wasn't the question I asked. My question was, when you came up with your opinion or your thoughts on what your jurisdiction was, your legal authority, was that more or less than the Fourth, Ninth, and Sixth Circuits allowed you?

Mr. ROUDA. Time has expired, but I'll allow the witness to answer the question.

Mr. ROSS. It is less. As we explained in our interpretive statement, we have a different position than the Ninth and the Fourth Circuit, and we don't believe we have the legal authority to apply the 402 program to direct discharges of groundwater.

Mr. COHEN. Mr. Chairman, if I could ask for another minute or two since I asked for this hearing and just to get it—

Mr. ROUDA. So granted.

Mr. COHEN. Thank you, sir.

Firstly, I wish you would go more expansive. It is the people's health that is at stake. It is the water, water internal, water external, water eternal. That is what we are about. Water creates us. Water makes us live. Water cleans up our lives, allows us to survive. If we have—blessed with clean water, we need to keep it. We don't need to find ways to get around enforcing laws that protect water. Water is the most essential element on earth. I mean, it is there. Oxygen, OK. Water, right together, H₂O, A.

B, we know that coal ash contains toxic chemicals such as mercury, cadmium, and arsenic. The EPA's steam electric power ELG rule was designed to control these and other toxic discharges, expected to eliminate 1.4 billion pounds of toxic discharges or 90 percent of all heavy metals entering the waterways. But the EPA projected \$451 to \$566 million per year in benefits associated with the rule and a minimal impact on electricity generating capacity prices.

Why, despite these numbers, EPA has blocked implementation and is considering revising and weakening these standards?

Mr. ROSS. So the steam electric rule we are reanalyzing, and we took two-way streams out of the five or so that were done under the steam electric rule update. We are reanalyzing the information and the data, and we currently have a proposal over at OMB. And so I am not—at this stage, I will wait for that proposal to hit the streets, and you will have your explanation.

Mr. COHEN. Thank you, Mr. Chairman.

And to close, this was something—I don't know if you are Republican or not. We are all Americans. It doesn't make any difference if you are Republican. But there are Republicans around because of this administration. And this is one of the good things Richard Nixon did. So please uphold this for the people's health and for a little bit that we can think of Richard Nixon in a positive way.

I yield back the balance of my time.

Mrs. NAPOLITANO [presiding]. Thank you, Mr. Cohen.

Mr. Ross, we thank you for your time and for your patience. And you are excused for the rest of the panel. We are calling the second panel up.

Thank you very much, sir.

Mr. ROSS. Thank you, Chairwoman. Thank you for inviting me and providing me the opportunity.

Mrs. NAPOLITANO. You are welcome, sir.

We will now proceed to hear from our second panel.

Thank you for being here. And all of you are welcome. If you will take your seats.

We have Ms. Maia Bellon, director of the Department of Ecology, State of Washington; Ms. Becky Keogh, secretary, Department of Energy and Environment, State of Arkansas; Mr. Ken Kopocis, associate professor, College of Law, American University.

And I do think Mr. Delgado would want to introduce Mr. Hickey, who is next, from Hoosick Falls, New York.

Mr. Delgado, would you like to do so?

Mr. DELGADO. Thank you, Madam Chairwoman.

It is a great honor for me to introduce Mr. Michael Hickey, a good friend of mine at this point—and not just a constituent, but a real friend—from Hoosick Falls, as you know, New York, Rensselaer County.

We all owe him a debt of gratitude for following a discovery he made after the death of his father in 2013. When Michael's father passed away from cancer, he began to look into a connection between cancer and the chemicals used in the local manufacturing facility where his father worked. This would eventually lead to the discovery that there was a higher incidence of illnesses related to PFAS chemicals and extremely unsafe levels of these chemicals in the Village of Hoosick Falls, as well as the Village of Petersburg's drinking water. But Michael's advocacy did not stop there. He turned the memory of his father into a force for good and nonstop public advocacy.

Since 2013, Michael has been leading the charge to increase transparency and accountability for PFAS chemicals at the local, State, and Federal level. And his work led to New York State designating the village as a Superfund site and the EPA declaring one of the manufacturing facilities in Hoosick Falls as a Superfund site.

Michael's groundbreaking advocacy has contributed immensely to our understanding of PFAS contamination in New York, and it is largely due to him that the community has received funding for blood testing, remediation, and is no longer drinking the water that was poisoning them.

Michael is a true hero in what he has done to spur action on this issue, and I have been proud to work with him to call for Federal regulation on these chemicals, including my bipartisan PFAS Right-to-Know Act that would add PFAS chemicals to the toxic release inventory. And he joined me at my townhall in his hometown of Hoosick Falls that focused on water contamination and our work to hold those contaminating the water accountable.

Additionally, I was honored to have him join me for the State of the Union. Our message then is our message today: The PFAS crisis is urgent, prevalent, and not going away. The administration must step up its efforts to protect the health and safety of communities in upstate New York and across the country.

I look forward to hearing Michael's testimony today. And I appreciate the work of this committee to continue to shed light on the prevalence of the toxic PFAS chemical in our communities. I also look forward to continuing my work with Michael, the Hoosick Falls and Petersburg communities, and members of the committee to address the needs of all upstate residents who deserve drinking water that is free of cancer-causing chemicals.

And just lastly, I don't often get emotional, Chairwoman, but my exchange with Mr. Ross and his lack of desire to commit to an MCL, and the fact that I was bothered to the degree that I was, in many respects has to do with how connected I feel to Mr. Hickey and the community in Hoosick Falls. This is real lives, real people, not just numbers.

Thank you.

Mrs. NAPOLITANO. Well, thank you, Mr. Delgado. I appreciate it very much.

We also have Ms. Pam Nixon, president, People Concerned About Chemical Safety; Mr. Geoffrey Gisler, senior attorney, Southern Environmental Law Center.

And I would like to reintroduce Ms. Becky Keogh for Mr. Westerman to introduce.

Mr. WESTERMAN. Thank you, Madam Chair.

And it is an honor today to get to introduce Becky Keogh. She is the secretary of the Department of Energy and the Environment in the State of Arkansas. That is a recent position as the State has reorganized State government. It is a cabinet-level position. She formerly served as director of the Arkansas Department of Environmental Quality.

She has had a long career in public service and private service. She has worked for an international environmental and engineering firm. She has worked previously in the ADEQ in the State of Arkansas. And she has also been an active member of the Environmental Council of the States since 1997. And when she became the director of ADEQ in Arkansas, she was immediately elected to one of four officer positions in ECOS.

Maybe the thing I like most about Secretary Keogh is that she is a fellow University of Arkansas Razorback alum, College of Engi-

neering. She is a chemical engineer. So she understands these issues very well.

And I want to welcome her to the panel today and look forward to her testimony.

Thank you.

Mrs. NAPOLITANO. Thank you, Mr. Westerman.

And we will proceed with the panel.

Ms. Maia Bellon, you have the floor.

TESTIMONY OF MAIA BELLON, DIRECTOR, DEPARTMENT OF ECOLOGY, STATE OF WASHINGTON; BECKY W. KEOGH, SECRETARY, DEPARTMENT OF ENERGY AND ENVIRONMENT, STATE OF ARKANSAS; KEN KOPOCIS, ASSOCIATE PROFESSOR, WASHINGTON COLLEGE OF LAW, AMERICAN UNIVERSITY; MICHAEL HICKEY, HOOSICK FALLS, NY; PAMELA NIXON, PRESIDENT, PEOPLE CONCERNED ABOUT CHEMICAL SAFETY; AND GEOFFREY R. GISLER, SENIOR ATTORNEY, SOUTHERN ENVIRONMENTAL LAW CENTER

Ms. BELLON. Thank you, Chair Napolitano, Ranking Member Westerman, and distinguished members of the subcommittee. My name is Maia Bellon. I am the director of the Washington State Department of Ecology, and I am honored and privileged to be here today.

Since Congress passed the Clean Water Act over 50 years ago, it has enjoyed ongoing bipartisan support. It has served as the essential framework across the Nation for keeping our waters clean and our communities safe, until now. I am here to speak about deeply troubling circumstances that should alarm Democrats and Republicans alike, and that is EPA's attempt, under this administration, to dismantle the Clean Water Act.

I am gravely concerned that these actions will harm families and communities across the country by putting at risk clean water for drinking, for fishing and swimming, by threatening the economy of our water-based industries, and by ignoring Federal obligations to Tribal nations across the country, including Washington State's 29 federally recognized Tribes.

I take seriously my role to provide clean water to 7 million Washingtonians. I must say that I am relieved to see this subcommittee stand up and take notice of EPA's rollbacks.

Under the Clean Water Act, Congress empowered States to serve as co-regulators with the Federal Government. This includes longstanding State authority under section 401 to ensure that federally permitted projects don't harm our waters. But EPA has now proposed a rule that would, one, dramatically narrow the scope of projects States can review; two, severely restrict the time we have to review applications; and, three, grant themselves ultimate veto authority over our State decisions.

I cannot stress enough how damaging EPA's proposal will be to States. And this is particularly concerning for Washington, because we are a water State. We are the home to the Puget Sound, one of the Nation's largest estuaries. We have hundreds of lakes and thousands of river miles, including the Columbia River.

And as a basis for these drastic measures, EPA's proposal actually points to my agency's denial of a water quality certification for

the Millennium coal export terminal along the Columbia River. The fact is that denial was based on the Millennium project's failure to meet a multitude of specific water quality standards as well as other State environmental standards.

But let's face it, this rule is not about the facts. It is about taking away State's ability to protect clean water. And at the same time the Trump administration is dismantling section 401, they are also shrinking the pool of water bodies protected under the waters of the United States rule. They have created chaos by repealing the 2015 WOTUS rule, leaving vast portions of our Nation's waters unprotected, contrary to Supreme Court rulings. And in one Washington county alone, the WOTUS repeal will result in the loss of Federal protection for over 50 percent of its streams and its wetlands.

And on top of these sweeping rollbacks, EPA is directly targeting Washington State. They just repealed our State's human health water quality standards. These standards apply only to our State and deal with how we protect the health of Washingtonians that consume fish, such as salmon and trout, from our marine and our freshwaters.

This combination of rollbacks on both the national and State level is unprecedented. There is no doubt this administration is dead set on overturning protections that have safeguarded our Nation's waters for decades. And I am here to say that Americans deserve better. Our children deserve better. We all deserve clean water.

But I am not giving up hope, and that is because of this committee hearing today. And I want you to know that Washington State fully supports Congress' much needed oversight of EPA and recognizing the dangerous path that this administration is on to ensure that the Clean Water Act is upheld and to ensure that water is protected for all Americans.

Thank you for the time.

[Ms. Bellon's prepared statement follows:]

Prepared Statement of Maia Bellon, Director, Department of Ecology, State of Washington

Thank you Chair Napolitano, Ranking Member Westerman, and members of the Committee.

My name is Maia Bellon. I am the Director of the Washington State Department of Ecology, and I have been proud to serve in this role for the last 7 years. It is an honor to be here today.

Unfortunately, I am here to speak about a deeply troubling set of circumstances that should alarm Democrats and Republicans alike—the harmful actions being taken by the Environmental Protection Agency (EPA) under President Trump, which amount to nothing less than an attempt at fundamentally restructuring the Clean Water Act.

This is something only Congress has the authority to do.

I am gravely concerned by the ways this Administration's reckless changes will impact families and communities in Washington state and across the country who currently enjoy clean water for drinking, swimming, and fishing—not to mention the economic injury it threatens to our water-based industries, including recreation and tourism. Their actions also ignore federal obligations to Washington's 29 federally recognized Native American tribes, as well as tribal nations across the country.

On behalf of the more than 7.5 million people I serve every day, I am here to implore you as Members of Congress to continue conducting this much-needed oversight, and to reassert your authority over an Administration that is ignoring the

rule of law and imperiling the health of our waters. Americans are depending on you.

THE CLEAN WATER ACT ENJOYS NEARLY A HALF-CENTURY OF BIPARTISAN SUPPORT

Almost 50 years ago, the people of Washington state recognized the importance of protecting our abundant natural resources by establishing my state agency, the Department of Ecology—the first government agency in the country focused on environmental protection, predating even the EPA.

Two years later, a bipartisan Congress took similar action, updating and strengthening federal laws on water pollution in America and formally enacting what is now known as the Clean Water Act. Under the new law, Washington became the first state in the nation to receive federal Clean Water Act delegation. As the first state that received delegation from the federal government, Washington has a long and proud history of effectively implementing federal law to protect our numerous water bodies, including the Puget Sound—the nation’s largest estuary—the Columbia River, hundreds of lakes, and thousands of miles of rivers and streams.

In the nearly half-century since its enactment, the Clean Water Act has enjoyed ongoing bipartisan support in Congress and has served as an essential framework for every U.S. state and territory to keep our waters clean and our communities safe—regardless of each state’s political party, and regardless of how much or how little water we have.

I am here today as the director of a state environmental regulatory agency to confirm that we have been proud and faithful stewards of the responsibilities bestowed upon us by Congress.

Unfortunately, I am also here to report that the Trump Administration is breaking with decades of precedent set by Republican and Democratic administrations that came before it, by knowingly and willfully refusing to execute the law as Congress intended.

EPA’S ASSAULT ON THE CLEAN WATER ACT VIOLATES STATES’ RIGHTS AND CONGRESSIONAL INTENT

This EPA has launched a series of attacks on multiple fronts to undermine state authority, ignore congressional intent, and undercut the guarantee of clean water for all Americans.

What we are witnessing is a deregulatory campaign aimed at systematically dismantling the Clean Water Act as we know it.

Today I want to highlight two such attacks that affect all states and territories, as well as a targeted attack on clean water in Washington state specifically. These systematic attacks illustrate the unprecedented level of overreach and disregard this EPA has for states’ rights and our delegated role under the Clean Water Act, granted to us by Congress.

The first of these attacks is the Trump Administration’s attempt to rewrite the rules established by Congress for states and tribes under Section 401 of the Clean Water Act.

Congress enacted Section 401 to give states the direct authority to grant, condition, or deny water quality certifications for federally permitted activities within our state borders. In doing so, Congress empowered states to be co-regulators with the federal government, and charged us with ensuring federally permitted activities are not inconsistent with, or in violation of, water quality requirements.

In April, President Trump signed an executive order directing EPA to completely rewrite the playbook for states under Section 401. The White House is not shy about the purpose of this directive—they admit plainly it is intended to help private industry get more energy projects approved without “interference” from states like Washington.

Last month, EPA followed through by formally proposing changes to the implementation of Section 401. If finalized, their proposed rule would:

- dramatically narrow the scope of federally permitted projects that states have the authority to certify within our borders;
- severely restrict the amount of time states have to certify or condition a federally permitted project; and
- grant themselves ultimate veto authority over state decisions.

I cannot overstate how damaging EPA’s proposed rule will be to states.

EPA’s attempt to set an artificial timeline shorter than the one-year set by Congress could result in Ecology being forced to issue more denials or have its authority deemed waived. In short, it would make protecting water quality more difficult and result in more delays for projects.

EPA's rule represents a massive overreach by the administration that improperly constrains state authority, ignores both the spirit and the letter of the law, and reveals this Administration's contempt for the right of every state to protect our waters and our communities.

This is particularly concerning for Washington state where we are deeply reliant on clean water for drinking, recreation, commerce, and to fulfill tribal treaty obligations.

EPA's proposed rule cites my agency's denial of a water quality certification for the Millennium coal export terminal on the Columbia River as a basis for these drastic measures. For two years we have been falsely accused of "abusing our 401 authority" and denying the project based on our so-called philosophical opposition to coal. This is frankly nonsense.

The fact is that our decision was based on the project's failure to meet water quality standards, and its further failure to meet our state's environmental standards. The project proponent failed to provide any mitigation for the areas the project would devastate, especially along the Columbia River. The environmental analysis demonstrated that this project would have destroyed 24 acres of wetlands and 26 acres of forested habitat, as well as dredged 41 acres of river bed. It would have contaminated stormwater from stockpiling 1.5 million tons of material onsite near the river—picture, if you will, an 85-foot-high pile of coal running the length of the National Mall, from the steps of the Capitol to the foot of the Lincoln Memorial.

In short, there were many insolvable problems with the Millennium project—I have named only a few. I am confident in the work my agency has done to protect Washington from the Millennium project's irreparable harm. It was correctly and properly denied under our Section 401 authority, which is further demonstrated by the multiple court rulings that have upheld our decision.

The health of the Columbia River, and all of Washington's waters, is vital to our state's agriculture and manufacturing economies, central to our energy production, and relied upon by Washington's 29 federally recognized Native American tribes. It is also critical to maintaining the healthy environment that Washingtonians treasure.

Yet, this administration is set on crafting a false narrative about Washington state and making an example out of us to ensure that we, and states across the country, lose our ability to protect our waters.

The fact is that states have been conducting this process for nearly half a century without issue. That is why no other administration has threatened to erode state authority, put clean water at risk, and hand over the keys to polluters in such a radical way.

This EPA chose to forge ahead on issuing this rule despite bipartisan outcry from governors, and despite failing to engage in meaningful consultation. On January 31, 2019, the Western Governors Association sent a letter to President Trump stating, "We urge you to direct federal agencies to reject any changes to agency rules, guidance, or policy that may diminish, impair, or subordinate states' well-established sovereign and statutory authorities to protect water quality within their boundaries."

Unfortunately, this plea from governors was ignored, and EPA's rule recklessly erodes state authority. It not only contravenes the law and the will of the states, but fails to acknowledge the vast differences and needs among states. It is unacceptable and dangerous, and states will not stop fighting to block it.

Another example of the Trump Administration's systematic assault on the Clean Water Act is the rule change underway to repeal and replace the definition for which bodies of water qualify as a Water of the United States and therefore protection under federal law.

In 2015, EPA completed a long-overdue rulemaking process that finally established a clear and scientifically defensible definition of Waters of the United States that must be protected under the Clean Water Act. The 2015 rule cleared up ambiguities from 1980s-era regulations that made it more difficult for states like Washington to control pollution in our waters. It was a welcome and necessary step after years of litigation that resulted in two seemingly different Supreme Court decisions, leaving the definition unclear and much more difficult to enforce.

But now, President Trump's EPA has once again thrown the law into chaos by taking the harmful step of repealing the 2015 rule and proposing to replace it with a rule that will leave vast portions of our nation's waters unprotected and that conflicts with Supreme Court rulings. In one of Washington's counties alone, it will result in loss of Clean Water Act protection for over 50 percent of streams and wetlands. This ill-advised rule results in the exact opposite of regulatory certainty.

Trump's EPA has left Washington and many other states struggling for ways to protect waters that we have historically regulated and protected. The Administra-

tion's decision to disregard the concept of "significant nexus" for determining which waters are Waters of the United States flies in the face of science and common sense. Waters such as ephemeral streams and adjacent wetlands, which have a significant nexus to a traditionally navigable water, should be Waters of the United States.

Like many other actions taken by EPA over the last two years, this one appears to be rooted in political gamesmanship rather than responsible governance.

TARGETED ATTACKS ON CLEAN WATER IN WASHINGTON STATE

While many of EPA's efforts are aimed at undermining Americans' access to clean water across the country, this Administration has also launched a number of attacks that are aimed directly at clean water in Washington state.

This is perhaps most evident in their repeal of the Water Quality Standards for Human Health Criteria—also known as our "fish consumption rule." This rule only applies to our state and it deals with how we protect the health of Washingtonians that consume fish such as salmon and trout from our marine and fresh waters.

Washington's fish consumption rule was finalized under the Clean Water Act in 2016 after extensive public processes that included the voices of communities, tribes, local governments, and businesses.

Yet in May, this EPA took the counterproductive and punitive step of repealing our rule, creating an atmosphere of regulatory and legal uncertainty that benefits no one.

As we have come to expect from this administration, they acted against the repeated objections of our state and those of Washington's tribes—and without a legal basis for the reconsideration of our standards. Under the Clean Water Act, there are only two circumstances under which EPA can propose new water quality standards for a state, and neither circumstance currently exists in Washington.

We have already filed a lawsuit to stop EPA's overreach because what they are doing is clearly illegal under the Clean Water Act, is creating chaos, and opens up our businesses and local governments to third party lawsuits.

Congress should be equally outraged by EPA's willful disregard for the law.

CONGRESS MUST UPHOLD THE CLEAN WATER ACT

Taken individually, each of EPA's actions threatens clean water and states' congressionally delegated authority to safeguard our natural resources and our communities.

Taken together, it is clear that the Clean Water Act is now under direct and sustained attack, and this EPA will stop at nothing to please polluters—including overturning protections that have safeguarded our waters for decades.

While states are being tossed aside and ignored, Congress has the constitutional authority as an equal branch of government to assert itself and provide critical oversight of an unchecked executive branch.

When it enacted the Clean Water Act, Congress clearly intended for the federal government to administer the law in coordination with states, with both levels of government working in tandem to ensure the law's effective implementation and the protection of our nation's waters.

This EPA's sweeping actions are a violation of that intent, and an insult to the concept of "cooperative federalism."

Rather than treating states as co-regulators, EPA is focused on undermining the right and obligation of every state to safeguard our waters and our residents from environmental harm.

Americans deserve better. We all deserve clean water.

In Washington state, and other states across the country, we take our role to protect water seriously. But we need your help.

We are encouraged that this committee is standing up and taking notice that EPA is no longer faithfully executing the law or implementing the Clean Water Act as intended. Washington state fully supports this much needed oversight to reign in this Administration's outrageous actions.

Together, we can restore the promise of clean water for every American, in every state and territory.

Thank you, and I look forward to answering your questions.

Mrs. NAPOLITANO. Thank you, Ms. Bellon.

Next I have Becky Keogh. You have the floor.

Ms. KEOGH. Thank you, Madam Chair and Ranking Member. I am Becky Keogh, secretary of the Arkansas Department of Energy

and Environment. I bring greetings from the Natural State and from my Governor, your former colleague, the Honorable Asa Hutchinson. It is an honor to be here in Washington, DC, today appearing before the subcommittee.

As our State slogan suggests, in Arkansas, we are incredibly concerned with the health, beauty, and safety of the waters of the United States. In fact, our Governor has recently taken extraordinary steps, both financial and regulatory, to ensure the enduring beauty and quality of America's first national river, the beautiful Buffalo, by successfully negotiating a permanent closure and conservation easement conversion of a 6,500-plus hog operation near the river. Our Governor noted that he believes in farming, but that it must be balanced with efforts to preserve the Buffalo as a national treasure.

Finding the balance between progress and preservation is a constant struggle for environmental regulators, legislators, and increasingly now more often, Federal judges. That is one too many cooks in the kitchen, I think we can all agree. When judges are left to be legislators, we have all failed.

The recent repeal of the 2015 Clean Water Rule is the first step in making sure we are all using the same cookbook and the same recipe. Prior to the recent repeal, 22 States followed the 2015 rule, while 27 did not. And New Mexico was left unclear as to which cookbook to use or even if it was able to cook at all.

Now, Arkansas was not subject to the 2015 rule, but our bordering States of Tennessee and Oklahoma were. Yet we share similar ingredients. The Mississippi River, with Tennessee, creating jurisdictional and adjacent wetland issues, and Oklahoma where we share numerous interstate waters, some tributaries of which may be currently jurisdictional in Oklahoma but not in Arkansas.

Without a consistent definition of what is and what is not a water of the United States, States are left to whip something up from scratch. Arkansas and Oklahoma, with our Cherokee National Tribal partners, are for the first time ever working together on an Illinois River watershed improvement plan. This basin-wide effort seeks to restore and protect the Illinois River by engaging stakeholders, cities, and industry to address historical issues, while ensuring community and agricultural progress continues, a common application of WOTUS, while enabling bordering States to effectively manage shared water bodies.

But it is not only uniformity that we seek. We also want a rule that is lucid, not ludicrous, in its application. The 2015 rule had broad opposition because of its, in pot-stirrer terms, perhaps unconstitutional reach. The rule made it possible to regulate waters on private land that were invisible to the naked eye, with no physical channel or evidence of water flow. With the broad "we will know a regulated water body when we see it" reach of the rule, routine activities, such as home construction, farming, and infrastructure investment were stalled as the EPA and Corps functioned as more local zoning boards than Federal regulators.

Seeking relief from this ambiguity and overreach, we turned up the heat, pushing EPA and the Corps for dramatic overhauls of this rule. We sought respect for the integrity of State regulatory programs through removal of the rule's wasteful Federal duplica-

tion. We don't always need that second helping. We asked them to serve up a solution that abandoned the helicopter mom mentality and regulatory authorization and decisionmaking.

In Arkansas specifically, we needed a rule that supported critical expansion of our broadband and highway infrastructures.

Supreme Court Justice Scalia set out a recipe for success in *Rapanos v. United States* when he instructed that the Clean Water Act apply only to waterways with relatively permanent surface water connections to navigable waters. And last week, Administrator Wheeler and Assistant Secretary James finalized these efforts to repeal the 2015 regulation, clarifying that water bodies like the Buffalo River are subject to the Clean Water Act but our backyard puddles are not.

While limiting ingredients of the Clean Water Act and spelling out each step of a proper recipe, proposed revisions also curtail States who set out to broadly apply section 401 of the Clean Water Act, negatively impacting the economies of other States and perhaps in direct violation of the Commerce Clause. Again, a little bit more pot stirring.

The proposals allow the States the flexibility of "seasoning" a solution, but prevent States with waterways from shutting out neighboring States from entire markets. And while we do not face these same waterway challenges, Arkansas is a net exporter of natural gas and supporting the protective permitting program that reduces environmental risk while at the same time meets market-response and critical-use needs.

This balance is accomplished in Arkansas through innovation, technology, and best management practices. Our secret ingredients—forestry-led initiatives like streamside management zones, proper logging road construction, prescribed-burn academies, and unpaved road initiatives—have contributed to Arkansas' 92 percent adoption rate of forestry BMPs, with resulting water quality protections and wildfire prevention.

In closing, I echo the words of the ranking member, a fellow engineer and a friend to Arkansas, the Honorable Bruce Westerman. In support of a new WOTUS rule and in support of a common cookbook with a workable recipe, he reminds us that rolling back the 2015 rule ends years of uncertainty over where Federal jurisdiction begins and ends. For the first time, we are clearly delineating the difference between federally protected and State-protected wetlands.

Thank you for your time and consideration.

[Ms. Keogh's prepared statement follows:]

Prepared Statement of Becky W. Keogh, Secretary, Department of Energy and Environment, State of Arkansas

Chairman Grace Napolitano (CA) and ranking member Bruce Westerman (AR), I am Becky Keogh, Secretary of Arkansas's Department of Energy and Environment. I bring greetings from the Natural State and from my Governor (your former colleague) the Honorable Asa Hutchinson. It is an honor to be in Washington, D.C. today appearing before the Subcommittee on Water Resources and Environment. As our state slogan suggests, in Arkansas we are incredibly concerned with the health, beauty, and safety of the waters of the United States. In fact, our Governor has recently taken extraordinary steps (both financial and regulatory) to ensure the en-

during beauty and quality of the Buffalo National River, America's first National River, which was designated as such by this very body several decades ago. Arkansas's own senior statesman, John Paul Hammerschmidt, lead the charge to preserve the Buffalo River as both a pristine resource and a majestic treasure. And Governor Hutchinson picked up where Congressman Hammerschmidt left off by successfully negotiating an agreement to further protect the Beautiful Buffalo River and to establish permanent protection through a conservation easement on land where a controversial 6500 plus hog farm was authorized and operating. His action was accompanied by a call for a permanent moratorium on similar facilities in the river's watershed. In the announcement, Governor Hutchinson noted that he "believes in farming," but that must be balanced with efforts to preserve [the Buffalo] as "a national treasure."

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

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

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

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

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

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

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

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

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

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

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

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

Mrs. NAPOLITANO. Thank you, ma’am.

We now may proceed with Mr. Kopocis. You are on.

Mr. KOPOCIS. Thank you.

Thank you, Chair Napolitano, Ranking Member Westerman, for the invitation today. I am here in a personal capacity.

The U.S. has made great strides since our environmental laws were enacted in the late 1960s and early 1970s, but we are only one-half of the way to the goals Congress set in 1972 for fishable and swimmable waters, and that goal was to be met by 1983.

With much work remaining to improve water quality, the Trump EPA appears determined to roll back water quality protection wherever possible. To date, EPA actions include reducing the scope of waters protected from pollution and destruction under the Clean Water Act to levels not seen since the Clean Water Act was enacted.

Just last week, EPA finalized a rule to return the scope of waters protected to those established by the Reagan administration. This is directly contrary to the position of all interest groups following the confusion generated by the Supreme Court. And that point was made quite eloquently by the chairman of this committee.

I was on the staff of this committee at that time, and I can tell this committee that no one argued to retain the status quo. Some argued for regulation, some argued for legislation, but nobody asked for the Reagan-era rule, yet that is the course that the Trump EPA is pursuing.

Even more detrimental to water quality, EPA is finalizing a rule that, as proposed, would further weaken the Clean Water Act by eliminating protection for thousands of stream miles and wetlands nationwide, including 55 million acres of farmland containing wetlands, an area roughly the size of Nebraska.

The proposal was clearly based upon Justice Scalia's plurality opinion in *Rapanos*, which five Justices rejected. And notwithstanding what Mr. Ross said about the concurrence of Justice Kennedy, Justice Kennedy called the Scalia opinion unpersuasive and, quote, "inconsistent with the acts, text, structure, and purpose," close quote.

While there has been a lot of discussion about the proposal providing more clarity, I would argue that it provides far less clarity. If a landowner is supposed to know what is or is not covered on their property—I can read you some of the language that is in the proposal saying that landowners will have to rely on trapezoidal flumes and pressure transducers for measuring surface flow and comparing that to rainfall, but they will need to do regional regression analysis or hydrologic modeling, that the rule itself admits will be challenging to accomplish in the field and could be time-consuming. That is from the proposal.

In developing the Clean Water Rule, EPA's Office of Research and Development prepared an exhaustive synthesis of peer-reviewed science on how waters are connected. EPA has made no attempt to refute the science. Instead, EPA chose to ignore it. EPA ignoring science is like the CIA ignoring intelligence or NOAA ignoring weather forecasts.

The EPA is reconsidering the steam electric effluent limitations guidelines. These controls would annually eliminate 1.4 billion pounds of arsenic, lead, mercury, cadmium, selenium, chromium; 30 percent of all toxics discharged by industry in the United States, as well as nutrients from our waters. The EPA is doing so even as the Fifth Circuit Court of Appeals ordered the EPA to consider stronger controls on discharges, not weaker ones.

And I would also point out that Mr. Ross, earlier in answer to a question, seemed to not want to answer on the coal combustion residuals rule, known as CCR, not Creedence Clearwater Revival. But that rule is also under reconsideration at this point. So the

Agency is currently in the process of relaxing the requirements for water discharges while simultaneously reviewing the rule that would have controlled the existing impoundments, the very issue that the Fifth Circuit told the EPA to look at.

The EPA is allowing greater amounts of pollutants from treatment plants through blending. Make no mistake, this is a reduction in the secondary treatment requirements that Congress wrote into the law in 1972.

We have already heard about EPA reversing its positions on section 401. Ms. Bellon explained very clearly why that is so important to the States. Mr. Ross himself acknowledged that these permits could take 4 to 5 years, yet he would propose to cut off a State's action to act on that permit in year 1, when the State doesn't even know what the project is that it needs to protect its water quality from.

The Trump EPA is systematically taking the cops off the beat by significantly reducing its ability to enforce environmental protection laws through budget cuts and reducing the actions it takes. These reductions are a conscious decision to create more avenues for our bedrock environmental laws to be violated without fear of being caught or responsibility.

Candidate Trump promised to get rid of EPA in almost every forum, leaving, quote, "little tidbits" intact. This may be in the interest of developers, oil and gas, agribusiness, and significant polluters, such as coal-fired plants, but it is not in the interest of the public or the environment. In my 34 years of water law, I have never heard the public say that the water in our rivers, lakes, streams, and ponds is too clean, that there are too many healthy fish to catch and eat, that our drinking water is too clean, or that we need more beaches to be closed due to pollution.

EPA needs to do its job in protecting human health and the environment under the Clean Water Act. This is not a time for retreat.

Thank you.

[Mr. Kopocis' prepared statement follows:]

**Prepared Statement of Ken Kopocis, Associate Professor, Washington
College of Law, American University**

Chairman Napolitano, Ranking Member Westerman, and other members of the subcommittee, thank you for the request to appear today to discuss the "The Administration's Priorities and Policy Initiatives under the Clean Water Act." I appear today in a personal capacity.

In 1972, Congress established the objective of the Clean Water Act, to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. Congress made clear that this objective would be best achieved by controlling pollutant discharges at their source, and reemphasized that objective through the substantial amendments of 1977 and 1987 that tightened controls on pollutant discharges. Congress made improving water quality the heart of the statutory and regulatory program.

Congress also created significant roles for the States in the implementation of the Clean Water Act, and today most of the day-to-day activities for implementing the Clean Water Act are carried out by the States with assistance and approval by EPA.

The President has frequently said that the United States has the cleanest air and water. While that characterization is rated mostly false by PolitiFact, the U.S. has made great strides since our environmental laws were enacted in the late 1960's and early 1970's. We have doubled the waters meeting state-established water quality standards, but we are only one-half the way to the goals Congress set for fishable, swimmable waters in 1972—a goal Congress said should be reached by 1983.

With much work remaining to improve water quality, the Trump EPA appears determined to roll back water quality protection wherever possible. To date, EPA actions include—

Reducing the scope of waters protected from pollution and destruction under the Clean Water Act to levels not seen since the Clean Water Act was enacted.

Just last week, EPA finalized a rule to return the scope of waters protected to those established by the Reagan administration. This is directly contrary to the position of all interest groups following the confusion generated by the Supreme Court in the *Rapanos v. U.S.* decision in 2006. I was on the staff of this committee at that time and no one argued to retain the status quo. Some argued for legislation and some for regulation, but no one wanted to retain the Reagan-era rule. Yet, that is the course the Trump EPA is pursuing.

Even more detrimental to protecting water quality, the EPA is finalizing a rule that as proposed would further weaken the Clean Water Act by eliminating protection for thousands of miles of streams and wetlands nationwide, including 55 million acres of farmland containing wetlands—an area the size of Nebraska.

EPA is reconsidering the steam electric effluent limitations guidelines. These are controls on coal-fired power plants that would eliminate annually 1.4 billion pounds of arsenic, lead, mercury, selenium, chromium, cadmium—30% of all toxics discharge by all industrial categories under the Clean Water Act—and nutrients from our waters. EPA is doing so even as the Fifth Circuit Court of Appeals ordered EPA to consider stronger controls on discharges associated with power plants, not weaker.

The Trump EPA is looking to allow greater amounts of pollutants from treatment plants through dilution—a process called blending. Make no mistake, while plants sometimes use this blending concept during unusual flow events, this is a reduction in the secondary treatment requirements Congress wrote into the law in 1972. If a community has an infiltration/inflow problem or a lack of capacity for treatment that is what should be addressed, plants should not simply dilute untreated waste. These investments have been eligible uses of federal assistance since 1972.

EPA reversed its decades old position that prohibits disposing of waste without limit or treatment though unlined pits or underground where this disposal is so connected to nearby protected waters that the nearby waters become polluted. No public comment, just a reversal to allow greater pollution.

EPA wants to limit the ability of states to protect their waters to state standards by restricting the ability of states affect water quality in federal permits, even while EPA argues in restricting the scope of the Clean Water Act that states know best how to protect their waters.

EPA is placing resource extraction—mining, oil and gas, and logging—above environmental protection by limiting its own authority to protect drinking water and natural resources from unacceptable impacts.

The Trump EPA is systematically taking the cop off the beat by significantly reducing its ability to enforce environmental protection laws through budget cuts and reducing the actions EPA takes.

The Christian Science Monitor conducted a thorough analysis of EPA enforcement data and documented some disturbing results. The Monitor reported that fines against polluting lawbreakers, for fiscal year 2018, totaled about \$69 million—the lowest, by a significant degree, since the EPA's enforcement office was created in 1994.

On another key measure, injunctive relief—the cost of complying with an EPA order—the \$3.95 billion figure reported by the EPA is the lowest in 15 years. The Monitor found that 40 percent of the total is from cases that were settled by the EPA under President Obama. The average annual cost of compliance is \$7.74 billion, nearly double EPA's most recent figures.

Other disturbing findings of the Monitor include: inspections in 2018 were the lowest since records began in 1994; the number of civil cases initiated was the lowest of any year since 1982; judicial referrals for both 2017 and 2018 were 110—the lowest number since 1976 and less than half the average annual number of 239.

While numbers may vary from year-to-year, these precipitous declines are not a mere variance or outlier. These reductions in environmental enforcement reflect a conscious decision to create more avenues to ignore our bedrock environmental laws without fear of being caught or held responsible.

Clean water in adequate supply is essential to our existence. Whether illustrated by the recent droughts in California or the lead contamination in Flint, Michigan, we have daily reminders that water is essential to life. Waters are also important to the environment in which we live. Rivers, lakes, ponds and wetlands supply and cleanse our drinking water, ameliorate storm surges, provide invaluable storage capacity for flood waters, and enhance our quality of life by providing essential habi-

tat, 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 head-water streams.

The EPA and Department of the Army issued the Clean Water Rule in 2015 to ensure that the Nation's waters could continue to provide these essential benefits, making waters better protected from pollution and destruction by having the scope of the Clean Water Act easier to understand, more predictable, and more consistent with the law and peer-reviewed science.

The EPA has repealed the 2015 Clean Water Rule. But its proposed replacement is a retreat from Congress' clearly stated objective of protecting the Nation's waters.

The proposal was clearly based upon Justice Scalia's plurality opinion in *Rapanos*. The proposal rejects the "significant nexus" test that informed a unanimous court in *U.S. v. Riverside Bayview Homes* in 1985 and that was clearly stated by the majority in *Solid Waste Agency of Northern Cook County v. Army Corps of Engineers* in 2001. Rather than adhere to Supreme Court precedent, EPA appears to be challenging the Supreme Court by establishing yet another test, supported by only four of the nine justices in *Rapanos*, for determining which waters will be protected from pollution and destruction by the CWA. Such a path is inconsistent with the CWA, judicial and administrative precedent, and the concurring opinion of Chief Justice Roberts in *Rapanos* wherein he cited Supreme Court precedent on how to interpret a decision when no opinion commands a majority of the Court.

A majority of the Court, five of nine justices, expressly rejected Justice Scalia's plurality opinion in *Rapanos*. In addition to the four dissenting justices who rejected the plurality opinion, Justice Kennedy, while concurring in the judgment to vacate and remand the cases, wrote that Justice Scalia's plurality opinion finding that the CWA did not cover intermittent or ephemeral streams or wetlands "makes little practical sense in a statute concerned with downstream water quality" and was "unpersuasive." He concluded his assessment of the plurality opinion in particularly direct terms, "In sum, the plurality's opinion is inconsistent with the Act's text, structure, and purpose."

A Scalia-based rule also has many adverse practical effects for protecting State waters from pollution and destruction. For example, eliminating the protection for intermittent and ephemeral streams will remove Clean Water Act protection for a significant number of waters. In more arid areas of the country, this could be as high as 80 to 90 percent of waters no longer protected. These waters would no longer be protected by water quality standards, no Clean Water Act permits would be required for discharges of pollutants, funding to address municipal wastewater, stormwater, and nonpoint source pollution would be less available, and Federal authority to respond to oil spills would be curtailed. While some argue that States can and will fill this void, since the scope of the Clean Water Act was first limited in 2001 and further limited in 2006, there is little evidence that the States have done so.

In developing the Clean Water Rule, EPA's Office of Research and Development prepared an exhaustive synthesis of peer-reviewed science on how waters are connected to each other and how they impact downstream waters. This Science Report was also peer-reviewed by EPA's independent Science Advisory Board and subjected to public comment. The Science Report informed the agencies' actions in response to the policy guidance provided by the Supreme Court in both the *SWANCC* and *Rapanos* decisions—how best to consider the significant nexus between upstream and downstream waters when determining the jurisdiction of the Clean Water Act.

The final Science Report provides several key conclusions based on review of the peer-reviewed scientific literature:

1. All tributary streams, including perennial, intermittent, and ephemeral streams, are physically, biologically, and chemically connected to downstream rivers and this connection influences the integrity of downstream rivers.

2. Wetlands and open waters in floodplains and riparian areas are physically, chemically and biologically connected with downstream rivers and influence the ecological integrity of such rivers.
3. Non-floodplain wetlands and open waters (i.e., isolated waters) provide many functions that benefit downstream water quality and ecological integrity.
4. The connectivity of streams, wetlands and other surface waters, taken as a whole, to downstream waters occurs along a continuum from highly connected to highly isolated—but these variations in the degree of connectivity are critical to the ecological integrity and sustainability of downstream waters.
5. The critical contribution of upstream waters to the chemical, physical, and biological integrity of downstream waters results from the accumulative contribution of similar waters in the same watershed and in the context of their function considered over time.

Continuing even to today, the validity and credibility of the science developed by the EPA to support the Clean Water Rule has not been seriously challenged. EPA has not denied or refuted the science. The various litigants challenging the Rule have not put forward newer or better science to dispute the conclusions of the Science Report. If there is better science, those challenging the conclusions, whether public or private, have an obligation to bring such science to the attention of the public and the agencies for their consideration. Without such new information, EPA must stand behind the prior work. Instead, EPA is choosing to ignore it.

EPA ignoring science is like the CIA ignoring intelligence or NOAA ignoring weather forecasts.

The Trump EPA has put forward a false choice that providing protection against polluting and destroying waterbodies somehow is averse to States' interests. Under the Clean Water Act, States decide how clean their waters will be by establishing the designated use for waters within the State. States are also able to establish water quality criteria that support those uses. Forty-seven of the fifty States already implement many day-to-day aspects of the Clean Water Act through state permitting programs. The federal-state partnership has worked well to improve and protect water quality since 1972. This is no time to dissolve the partnership.

The Clean Water Act is often referred to as our most effective environmental law, and it has resulted in great improvements in water quality. However, the work is far from finished—State generated water quality reports indicate hundreds of impaired waters need reduced pollution and increased protection. Abandoning upstream waters and continuing the confusion on how to protect water quality, eliminating or reducing regulatory requirements to eliminate toxic discharges, taking the cops off the beat, restricting the rights of states to protect their waters, and other steps of the Trump EPA do not advance these joint efforts at the State and Federal level.

Candidate Trump promised to get rid of the Environmental Protection Agency “in almost every form,” leaving only “little tidbits” intact. This may be in the interest of developers, oil and gas, agribusiness and significant polluters such as coal-fired power plants, but not in the interests of the public or the environment. In my thirty-four years in water law, I have never heard the public say that the water in our rivers, lakes, streams and ponds is too clean, that there are too many healthy fish to catch and eat, that our drinking water is too clean and abundant, or that we need more beach closures due to pollution. EPA needs to do its job in protecting human health and the environment under the Clean Water Act. This is not a time for retreat.

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

Mrs. NAPOLITANO. Thank you, Mr. Kopocis. Thank you for your testimony.

And I will proceed with Mr. Hickey.

Mr. HICKEY. Thank you very much, Chairwoman. Obviously, public speaking, this isn't really my most favorite place to be, doing, at all. So I really appreciate the opportunity, and hopefully I won't mess this up too badly.

But thank you, Congressman Delgado, for everything that you are doing for our community.

For me, kind of an accidental advocate for my community and, you know, it was really more about a mission for my dad. I started out as a heartbroken son, and I turned into an advocate because

of that. Who is at fault is we have multiple industrial plants. One is called Saint-Gobain that uses PFOA. It has been in Hoosick Falls since 1955. We once had 11 operating plants that had over 500 employees. Now we are down to 2 with 200. So it has been there, and it is the lifeblood of Hoosick Falls.

So my dad was diagnosed with kidney cancer in 2010, the month before my son was born. And he actually had his kidney out the day my son was born. So my dad went into surgery, had his kidney out, and I went upstairs and had my son. So, it was a process, pretty difficult at that point in time. You know, and kind of the next 2 years went by; he was OK. And the kidney cancer came back—and the second kidney in 2012, and he passed away early on in 2013.

My dad worked multiple jobs. He worked in the factory 11 to 7 o'clock, and he drove a schoolbus during the day. And he was retired for 9 months before he passed away. So working two concurrent jobs for 32 years is a lot, and me and my brother and my sister had great opportunities because of the work that my mom and dad did in the plant. And I am not an environmentalist, and I probably couldn't have given you the full definition of what is a Democrat or Republican. You know, and this issue for me has been more common sense. And that is kind of what I have tried to do throughout the process.

So, in Hoosick Falls, we have only 3,500 people on the public water supply, and PFOA at that point in time wasn't tested because our town was too small. It was only 3,500 people. Under the UCMR 3, you had to have 10,000 or above. Actually, how we got to that point was, a year after my dad passed away, a teacher passed away. And I did a simple Google search because I knew what was being manufactured in town at that point. And I typed in "Teflon" and "cancer," and I came across the C8 science panel in West Virginia. And I read for the next 4 months every night probably 11 until 2, 3 o'clock in the morning, probably the most driven I have ever been about anything ever.

And I kept reading because it is a big accusation to blame your local employer about: You contaminated our water. You contaminated the people. You are making people sick.

They are the lifeblood, and we are blue collar. So those jobs are extremely important. You know, that is what our community is about, and I am sure that many of your communities as well. You are hard workers. You are proud to work, and you want to be able to supply for your family.

So, you know, I knew that was a big accusation to make. I went to the mayor, and we didn't test because of our size. So I kept on going. I talked to our local doctor. I said: You know, could there be anything to this, these six illnesses that are related in West Virginia? Do you see a lot of them here?

And, yeah, we did, is what he said. We need to push forward. We need to do something. And then going to the county, to the State, nobody would test.

So I found who did the testing in West Virginia. I ordered the kit from Canada, and we did the testing. I took water from my mom's house, my house, my McDonald's, the local dollar store and sent it back, and it came back at 540 parts per trillion at my house,

460 at my mother's. At that point, we knew we had a problem and brought that back to the mayor because, obviously, I wanted to hand him off a folder and be done at that point. It didn't go that way.

It took another year and a half. I had to get an environmental attorney involved, and I think that that is why I am here today was to speak about the EPA. They played a large role in stopping the water from being drunk in Hoosick Falls under the previous administration, and I have had now the privilege to work with the prior administration and to work with the current. And it is a little night and day at this point in time, to tell you the truth.

You know, Mr. Kelly, "Kell" Kelly, he was the Superfund. He came to Hoosick Falls. I met him. He was really nice. He gave me his card. He said, "Call me whenever you need anything," because we have five Superfund sites, and one Federal. He resigned 3 days later, though. So that didn't really work out that great with him.

I met Mr. Ross when I came for the State of the Union with Mr. Delgado, and I am sure that he is doing everything legally that he can in following the laws, but I think that there is common sense that we are missing out on right now. I think that, you know, the EPA has a position to help all of the States. In New York, we have a lot of resources. We have DEC and the DOH, and they stepped in, but you still needed the EPA to tell us about chemicals. And they are not doing that, and we need to continue to push forward with common sense.

There is 20 years of research on PFAS, if not more. We just need to do some commonsense legislation.

Thank you.

Mrs. NAPOLITANO. Would you wrap it up? Go ahead.

Mr. HICKEY. I am sorry. If I went over my time, I apologize.

[Mr. Hickey's prepared statement follows:]

Prepared Statement of Michael Hickey, Hoosick Falls, NY

Good morning. Thank you, Chairwoman Napolitano, Ranking Member Westerman, and members of the subcommittee for the invitation to speak today and tell my story.

My name is Michael Hickey. I live in Hoosick Falls, which is in upstate New York near the Vermont and Massachusetts border. I was born and raised there with my brother, my sister and my parents.

Hoosick Falls is my home, and it is a casualty of PFAS water pollution that's left its toxic mark on my family and my neighbors.

Just months into his retirement, my father, John Hickey, was told he had kidney cancer. He passed away from this disease in 2013. A year after that, a teacher passed away in her late 40s from cancer. There was speculation around town about how many people were getting these rare illnesses. When you're in a smaller community like Hoosick Falls, you pay attention to that, and I thought there might be something to it.

I knew our village's water wells sat next to the local manufacturing facility that produces Teflon products, so I did a google search for "Teflon" and "cancer." What I found was a C8 science panel from West Virginia and the first thing under the related illness section was a "probable link" between PFOA and kidney cancer—the very disease my dad passed away from.

Teflon is the brand name of a lab-made chemical used in a variety of products, such as nonstick pots and pans. In my hometown, it was used to waterproof big tents. Teflon is made using a chemical called perfluorooctanoic acid, that is PFOA or C8, which is in the PFAS chemical family. These PFAS compounds are known as "forever chemicals" because they don't really break down in nature. They have

been linked to a variety of health problems, from adverse impacts on the liver and the immune system to cancer.

I had never been involved with any environmental issues before, so this was all new to me. I probably read about three hours a night for the next couple of months to try to figure it out. When I thought that I had enough information, I passed it on to a local physician and I asked him to take a look to see if there was a connection. He did. He thought there was a higher incidence of those illnesses in our community.

At that point, we approached the mayor and asked if the city had tested for PFOA, but they had not because the EPA did not require it of smaller systems at that time.

I wanted to be able to sleep at night. I wanted to know if our water was making us sick. So, I looked up who did the testing for the DuPont study and it was a lab out of British Columbia, Canada. After contacting that lab, I went and I tested the water at my house, my mother's house, the local dollar store, and the local McDonalds. The results came back two weeks later—and they were positive for PFOA. My mom's house had the highest at 540 ppt; mine was 460 ppt. At that point, I knew we had a big issue.

Over the next 7 months, I worked with an environmental attorney out of Albany to look into the issue. He reached out to Judith Enck, who was the EPA administrator of Region 2 under the Obama Administration at the time.

Ms. Enck came in and right away basically cut off the entire village from drinking the water. Shortly after that, the village became a Superfund site. To date, there's been about \$30 million spent in Hoosick Falls on updating filtration, blood testing, and remediation. We're still looking for an alternate water source, so there's still things to be done, but it's been a long process.

That's why I'm here today to ask the EPA to do better to prevent contamination in the first place. We need improvement in water infrastructure and to pay more attention to monitoring these chemicals. From what I've observed, this current administration is not as aggressive as the previous one. I met with Director Ross earlier this year and I was unimpressed with the lack of urgency that he gave this issue.

Like the new mayor of Hoosick Falls, I view the EPA's so-called action plan for PFAS to be more of an inaction plan that further delays regulating these toxics. For example, the plan would delay determining if the EPA could possibly regulate PFAS under the Clean Water Act until 2021. The science is clear that we need to protect our water sources now from further pollution from these dangerous chemicals. We should limit PFAS discharges to water bodies by adding PFAS limitations to NPDES permits and developing ambient water quality criteria for PFAS.

The EPA is failing to do its job to protect us. We need a real action plan that treats this issue with the urgency and importance it needs. We need a plan that:

- Regulates PFAS immediately under the Clean Water Act;
- Cleans up the sources of contamination and contaminated water supplies;
- Makes the polluter pay for water contamination cleanup, including the military, which is responsible for many contaminated sites around the country;
- Sets enforceable standards for drinking water for the entire class of PFAS chemicals;
- Provides funding to help communities like Hoosick Falls provide safe water; and
- Provides training for healthcare professionals and medical monitoring in impacted communities.

We need Congress to step up to make sure that smaller communities like Hoosick Falls are taken care of and that they're safe. These illnesses are real. They're affecting people every day.

Thank you for the opportunity to testify today.

HOOSICK FALLS BACKGROUND

Hoosick Falls, a village of 3,500 people northeast of Albany, has become one epicenter of growing concerns around perfluorooctanoic acid (PFOA), an industrial chemical used to make Teflon. It has been called New York's Flint.

In 2014, testing revealed high levels of PFOA in the drinking water. The majority of samples revealed PFOA levels exceeding 600 ppt, which was far higher than the EPA health advisory of 400 ppt at the time. Today the advisory level is 70 ppt, and there is evidence that this level is still far too high. Blood testing results were similarly alarming. Many residents were found to have PFOA levels in their blood that were 100 times the national average.

The source of the contamination appears to be a nearby plastics factory, now operated by Saint-Gobain Performance Plastics, which used PFOA in its manufacturing

process. Groundwater under a Saint-Gobain plant was found to have PFOA levels at 18,000 ppt. The EPA has added the Saint-Gobain Performance Plastics site to its Superfund National Priorities List of the most hazardous waste sites in the country, which requires the agency to ensure that the contamination is cleaned up.

Hoosick Falls is still waiting on a real plan to connect to a new, safe municipal water supply.

PFAS BACKGROUND

Per- and polyfluorinated compounds (PFAS) are a group of lab-made chemicals first created in the mid-twentieth century that have caused widespread water and food contamination. PFAS are often referred to as “forever chemicals” due to their virtually nonexistent natural breakdown over time. As local, state and federal agencies expand testing for PFAS, we are beginning to understand the true scale of the problem. They are found in hundreds of locations across the country, affecting the water supply for millions of Americans.

PFAS have been used to coat a wide range of products to protect against heat, chemicals and corrosion, and they have been used in aqueous film-forming foam to extinguish petroleum fires. While their stable chemical structure and ability to repel both water and oil makes them attractive for a wide variety of applications and products, these characteristics are also the very ones that have led to their widespread contamination of the environment and people.

PFAS chemicals have been found in nearly the entire U.S. population, and a growing body of science has been documenting their toxicity and public health impacts. A 2003 to 2004 survey by the U.S. government estimated that over 98 percent of the U.S. population had detectable levels of PFAS in their blood.

PFAS is a big chemical family. As of 2018, at least 478 PFAS chemicals had been reported to the EPA as being used in U.S. commerce. Other sources report that thousands of PFAS chemicals have been produced and used by various industries, in both the United States and around the world. The most studied and pervasive forms are perfluorooctanoic acid (PFOA) and perfluorooctane sulfonate (PFOS).

- PFOA has been used in the production of the chemical polytetrafluoroethylene (PTFE), best known by the brand name Teflon, which was first synthesized in 1938 by a DuPont scientist and came into widespread use in the 1960s. The compound also has been used in waterproof textiles, electrical wire casing and more.
- PFOS has also been used in the production of everyday household items. One of the most well-known products that contained PFOS was 3M’s line of Scotchgard stain repellants. PFOS also has been used in pesticides, surface coatings for carpets, furniture, waterproof apparel and paper goods.

Recent reports show that new generations of PFAS, such as GenX, have been on the rise, with concentrations vastly exceeding those of the legacy PFAS chemicals. Despite claims of low bioaccumulation, emerging PFAS chemicals are as environmentally persistent as their predecessors. Additionally, there is evidence that these newer chemicals can break down to form their legacy counterparts.

While awareness of these substances seems to have gained momentum in the last few years, evidence of their stubborn persistence and toxicity has been around since the late 1960s and 70s, only to be overlooked until relatively recently. This resulted in delayed intervention, allowing the continued release of the substances into the environment.

Toxicity

PFAS chemicals pose serious risks to human health, and emerging evidence indicates that even very low levels of PFAS exposure may not be completely safe for human health, particularly vulnerable populations such as infants. Infants may be especially vulnerable because of PFOA contamination of breast milk and because of their higher intake of water relative to their body weight. PFOA and related substances have been found in human maternal and cord blood in North America and abroad.

There are a number of well-documented health effects associated with exposure to PFOA and other PFAS chemicals: high cholesterol; thyroid disease; reproductive effects, including decreased fertility and pregnancy-induced hypertension; decreases in birth weight; adverse impacts on the liver and on the immune system; decreased vaccine response; ulcerative colitis; and neurobehavioral effects such as attention deficit hyperactivity disorder (ADHD).

PFAS chemicals may cause cancer. The World Health Organization’s cancer research arm, the International Agency for Research on Cancer, classifies PFOA as a Group 2B carcinogen, or “possibly carcinogenic to humans.” The U.S. EPA con-

cludes that there is “suggestive evidence” of carcinogenicity of PFOA in humans. Highly exposed humans were observed to have correlating increases in testicular and kidney cancer.

Water Treatment

According to the EPA’s Drinking Water Treatability database, PFOA and PFOS can be removed by up to 99 percent by processes such as granular activated carbon, membrane separation, ion exchange and powdered activated carbon. Aside from these technologies, PFAS removal is resistant to many, if not most, water treatment processes, while other technologies may in fact increase their concentrations. Other processes, such as powdered activated carbon, are effective at removing older PFAS chemicals, but become less effective with newer forms of PFAS, many of which are replacing the older “legacy” types of PFAS.

Weak Regulations

PFAS are not currently regulated under the Clean Water Act, and there is no enforceable federal standard for PFAS chemicals in drinking water under the Safe Drinking Water Act. Information on industrial PFAS releases is sparse. Facilities are not required to test for or report PFAS wastewater discharges since the EPA has not classified any of these chemicals as toxic pollutants or hazardous substances under the Clean Water Act.

The EPA has established a lifetime drinking water health advisory level of 0.07 micrograms per liter (mg/L), or 70 ppt, for PFOA and PFOS, but it has not yet issued an enforceable Maximum Contaminant Level for drinking water. The health advisory level falls short not only in lack of effectiveness, but in stringency. Emails disclosed in early 2018 found that the EPA suppressed a scientific assessment of PFASs from a federal health research agency that recommended a much more stringent level of protection that was nearly 7 to 10 times lower than the EPA’s health advisory.

THE EPA NEEDS A REAL PLAN OF ACTION

As we begin to understand the scope of the problem, emerging research tells us that there are no ‘safe’ levels of PFAS in our drinking water. The EPA’s PFAS Action Plan announced in February fails to implement immediate limits to effectively regulate PFOA and PFOS, or other PFAS. In addition, there are concerns about conflicts of interest within the agency. David Dunlap, a former Koch Industries official, runs the EPA’s research arm that will shape regulations for dangerous chemicals in our water, such as PFAS. This raises red flags because Koch Industry’s Georgia Pacific company is facing at least one class action lawsuit in Michigan related to PFAS contamination,¹ and as of February 2019, a company spokesperson said it may still be manufacturing products with these chemicals.²

The EPA needs a real plan of action that immediately protects people and the environment from these dangerous chemicals:

- 1) The EPA must regulate PFAS under the Clean Water Act requiring enforceable effluent limits in NPDES permits and developing ambient water quality criteria for PFAS.
- 2) The EPA must regulate PFAS under the Safe Drinking Water Act by setting enforceable limits on PFAS in drinking water as soon as possible.
- 3) The EPA must regulate all PFAS chemicals as a class, rather than individually. Because of the number of different chemicals that are PFAS, considering them as individual chemicals will require too many resources and too much time. After decades of delay and widespread exposure by a large portion of the population, action is urgently needed and the fastest way to tackle this issue is to regulate PFAS chemicals as a class.
- 4) Due to widespread PFAS contamination of water supplies nationwide, the EPA must allocate funds to states and municipalities for the testing and any needed treatment of drinking water from community water systems and individual household wells. If treatment or groundwater remediation is untenable or unsuccessful, support should be provided to connect systems and households to alternative water supplies. Congress should provide federal funding to ensure that every household has access to clean, PFAS-free water.

¹ Barrett, Malachi. “Lawsuit alleges 3M and Georgia-Pacific caused Parchment PFAS emergency.” MLive. November 21, 2018.

² Snider, Annie. “Former Koch official runs EPA chemical research.” *Politico*. February 4, 2019.

- 5) To assist communities in assessing the extent of the contamination of their water systems, EPA should provide guidance on testing for PFAS and investigate the possibility of using a broader screen, such as total organic fluorine level.
- 6) The EPA must research water treatment technologies that address the removal of the newest generation of PFAS.
- 7) The EPA should provide guidance and resources to test individual household water wells for PFAS contamination, and the Agency should provide support for nonprofit technical assistance to households and small community water systems to test and remove PFAS from drinking water.
- 8) The EPA should ban the use of sewage sludge (biosolids) as a soil amendment.
- 9) The EPA must more clearly communicate information about health risks to the public, particularly regarding new generation PFAS chemicals.
- 10) The EPA must do a better job at monitoring these emerging contaminants and informing the public of their prevalence and toxicity. The EPA collects data for six types of PFAS, including PFOA and PFOS. However, there are hundreds of PFAS that are documented in U.S. commerce that lack sufficient environmental and health data. Emerging PFAS contaminants like GenX and others, used to replace legacy chemicals, have growing, but still relatively little, data on their prevalence in the environment and their toxicity.
- 11) The EPA should designate PFAS as Hazardous Substances under CERCLA.
- 12) The EPA should finish the recommendations for contaminated sites, including providing guidance on water treatment technologies.
- 13) The EPA should provide support for communities dealing with contaminated sites, including establishing biomonitoring and medical monitoring programs, as well as education for medical professionals in impacted communities.
- 14) The EPA should expand its PFOA Stewardship Program to work toward the complete elimination of all new manufacturing and import of all types of PFAS chemicals, including newer generation, shorter-chain compounds, to prevent further contamination.

The American people have been exposed to these toxic chemicals for decades without any safeguards. It's beyond time to start the work to address this crisis. Our country deserves an urgent and comprehensive response to this crisis.

Mrs. NAPOLITANO. Thank you very much for your very moving testimony, and it was really informative and educational, and hopefully, we will continue to take action on that. Thank you very much.

Next, we have Ms. Pam Nixon. You may proceed.

Ms. NIXON. Yes. Thank you for allowing me the time to testify today.

I am president of the nonprofit organization People Concerned About Chemical Safety, also known as PCACS, out of Charleston, West Virginia. We are an affiliate of Environmental Justice Health Alliance for Chemical Policy Reform, also known as EJHA.

On January 9, 2014, there was a major chemical spill into the Elk River from a tank farm located along the Elk River in Charleston, West Virginia. Ten thousand gallons of crude MCHM mixed with PPH were released into the river, only 1½ miles upstream of our public drinking water supply intake. Our Governor and public officials called for a do-not-use order. This meant that approximately 300,000 residents in 9 counties could only use our tap water to flush our toilets. Nearly 600 people ended up visiting emergency rooms complaining of symptoms related to the spill, and 13 were hospitalized. Schools and businesses were closed. Noncritical surgeries were canceled, and our legislators had to temporarily adjourn. Businesses in the area lost at least \$61 million during the first month.

The most vulnerable were the low-income residents, the elderly, and the people of color who did not own vehicles. They had the difficulty of trying to get to the temporary water stations, to carry

their bottles with them sometimes, and then they had to carry the heavy bottles of water back home to be able to take care of their whole family.

When the spill occurred, West Virginia did not have spill prevention regulations for aboveground storage tanks storing hazardous chemicals and neither did, nor does, the EPA.

After reconvening in 2014, our legislators wrote in and passed the comprehensive AST bill, Aboveground Storage Tank bill, which Governor Tomblin signed into law. But within 3 years, those provisions have been amended and weakened twice. Congress passed the Clean Water Act in 1972, which directed the President to issue spill prevention regulations for facilities that stored oil and hazardous substances. President Nixon delegated the responsibility of that section of the Clean Water Act to the EPA. The EPA quickly issued spill prevention regulations for oil. But despite promising a spill prevention rule that covered all AST under their jurisdiction, the EPA never finalized hazardous substance spill laws.

In 1982, Congress created a Federal program regulating underground storage tanks that contained petroleum and hazardous chemicals. Between 1984 and 2015, Congress passed five actions to improve and strengthen requirements for the underground storage tanks and even created a trust fund for cleaning up leaks.

Forty years later, in 2015, EJHA and PCACS, my organization, and the Natural Resources Defense Council filed a lawsuit against EPA over the failure to issue hazardous substance spill prevention regulations for aboveground storage tanks. In February of 2016, EPA agreed in a consent decree to develop the spill prevention rule, accept comments, and publish the final rule by the summer of 2019.

In June of 2018, EPA Administrator Pruitt signed a proposal to take no action by pointing to existing regulations that provide only limited regulatory protections. On August 22nd of this year, Administrator Wheeler signed the final take-no-action rule, and it was published in the Federal Register on September 3rd.

Residents in many States lack any spill prevention laws, remaining as vulnerable as we were in 2014. Without a comprehensive rule, EPA continues to put the health and safety of millions of American citizens in danger. The country needs a robust Federal AST, or aboveground storage tank, spill prevention program to protect our waterways.

We need regulations to minimize tank leaks and all ASTs containing oil products and hazardous substances and to protect our drinking water sources. We need a trust fund to clean up AST leaks and spills. We need regulations that will ensure that the design and construction materials and secondary containment systems meet the established engineering standards. We need leak detection and corrosion systems for aboveground storage tanks. We need transparent third audits. We need the public to have the right to know and access to information about the hazardous chemicals and aboveground storage tanks where they live, work, and play.

One more. I am sorry.

We also need robust notification to our public and to public drinking water systems in a timely manner when a spill does occur.

And if EPA continues to ignore providing rules for aboveground storage tanks, we hope that Congress will step up and again require them to do so.

[Ms. Nixon's prepared statement follows:]

Prepared Statement of Pamela Nixon, President, People Concerned About Chemical Safety

Good morning. My name is Pamela Nixon. Thank you for allowing me time to testify on the EPA's No-Action decision on the Hazardous Substance Spill Prevention Rule for aboveground storage tanks. I am representing the organization People Concerned About Chemical Safety, which is an affiliate of the Environmental Justice Health Alliance for Chemical Policy Reform.

On January 9, 2014, there was a major chemical spill at the former Freedom Industries tank farm located on the banks of the Elk River in Charleston, West Virginia. Ten thousand gallons of crude MCHM (4-methylcyclo-hexanemethanol) mixed with PPH (primarily dipropylene glycol phenyl ether and propylene glycol phenyl ether) were released into the river only 1½ miles upstream of our public drinking water system intake.

The governor and public health officials called a Do Not Use order for our drinking water supply. Approximately 300,000 residents in nine counties were advised *not* to use tap water for drinking, cooking, showers, washing dishes, or washing clothes. Nearly 600 people visited emergency rooms complaining of symptoms related to the spill, and 13 were hospitalized. A few days after lifting the Do Not Use order, the West Virginia Bureau for Public Health announced that pregnant women should continue to drink bottled water, which caused confusion.

Schools, businesses, and hotels were closed, non-critical surgeries were canceled, patients were transferred to other hospitals for surgeries, and the 2014 West Virginia Legislative Session had to temporarily adjourn because of the chemical spill. Businesses in the area lost at least \$61 million dollars during the first month because of this disaster. (1)

Low-income residents and the elderly were the most vulnerable and negatively impacted. Bottled water stations were located on parking lots that could accommodate the large trucks. If a household didn't have a vehicle, they had to rely on public transportation (bus), ask neighbors or family members to take them to get water, or walk. If they walked or rode a bus, they had to carry the heavy bottles of water back home to their families. Unless you have been through a disaster like this, you tend to take for granted just how dependent we are on water. To this day I continue to buy bottled water for drinking and cooking.

At the time of the spill, West Virginia did not have spill-prevention regulations for aboveground storage tanks (ASTs) storing hazardous chemicals and neither did, nor does, the U.S. EPA.

When the 2014 West Virginia legislature reconvened, they wrote and passed Senate Bill 373, a comprehensive AST bill, which the governor signed into law. But, under industry pressure, those provisions have been amended, and weakened, twice.

When Congress passed the Federal Clean Water Act in 1972, it directed the President to issue spill-prevention regulations for facilities that store oil and hazardous substances, like ASTs. (2) President Nixon delegated that responsibility under Clean Water Act section 311(j)(1)(C) to the EPA. (3) The EPA quickly issued spill-prevention regulations for oil. (4) And in 1978, the EPA proposed spill-prevention rules for hazardous substances like ammonia, benzene, PCBs, and hydrochloric acid at certain industrial facilities. (5) But despite promising a spill rule covering all ASTs under EPA jurisdiction "in the near future," the EPA never finalized any hazardous substance spill rule for ASTs.

In 1982, Congress created a federal program to regulate underground storage tanks (USTs) containing petroleum and hazardous chemicals to minimize tank leaks. Congress directed the EPA to establish operating requirements and technical standards for tank design and installation, leak detection, spill and overfill control, corrective action, and tank closure. Between 1984 and 2015 there have been five Congressional actions to improve and strengthen requirement for UST owners as well as create a trust fund for cleaning up leaks. (6)

In an effort to ensure similar requirements and standards are in place for ASTs, the Environmental Justice Health Alliance for Chemical Policy Reform (EJHA), People Concerned About Chemical Safety (PCACS), and Natural Resources Defense Council (NRDC) filed suit against the EPA in 2015 over its failure to issue haz-

ardous substance spill-prevention regulations for ASTs, as Congress had required over 40 years before. (7) In February 2016, EPA agreed in a Consent Decree to develop a proposed hazardous substance spill-prevention rule, accept comments, and publish the final rule by this summer. (8)

In June 2018, EPA Administrator Scott Pruitt signed a proposal to take no action to prevent hazardous substance spills from ASTs. He did so despite the Clean Water Act's clear command that the EPA "shall issue regulations" and EPA's own finding that industry self-reports nearly 1000 hazardous substance spills each year. To justify his proposal, Administrator Pruitt pointed to existing regulations that provide only limited protections for some types of hazardous substances at some subset of ASTs at chemical facilities. (9)

Despite many comments identifying the flaws in EPA's analysis and the holes in existing regulations, (10) Administrator Wheeler signed the final do-nothing rule on August 22 of this year. It was published in the Federal Register on September 3. (11)

Many states across the country lack any spill prevention laws for ASTs. Residents in those states remain as vulnerable today as we West Virginians were on January 9, 2014. It is imperative that EPA develop and implement regulations directly designed to prevent spills of hazardous substances, as Congress mandated over 45 years ago. By not finalizing a comprehensive rule, EPA is continuing to put the health and safety of millions of U.S. residents in potentially dangerous situations.

A robust federal spill-prevention program for aboveground chemical tanks should do the following:

1. Regulate ASTs containing petroleum and hazardous substances to minimize tank leaks and protect drinking water sources supplied by surface and groundwater;
2. Create a trust fund to clean up AST leaks, similar to the fund for USTs;
3. Develop regulations for ASTs that will ensure the designs, construction materials, and secondary containment systems meet established engineering standards;
4. Require leak and corrosion detection systems for ASTs;
5. Require transparent third-party audits;
6. Ensure the public has the right to know and access to information about the hazardous chemicals in ASTs near where they live, work, and recreate; and
7. Provide robust notification to the public and public drinking water systems in a timely manner when a spill does occur. (12)

If EPA continues to ignore its duty to issue these necessary regulations, Congress should step in and again require them to do so.

Thank you for considering my testimony.

END NOTES

- (1) Lessons from the Elk River Spill—Environmental Health Perspective. <https://ehp.niehs.nih.gov/doi/pdf/10.1289/ehp.122-A214>.
- (2) Pub. L. No. 92-500, § 311(j)(10), 86 Stat. 816, 868 (codified at 33 U.S.C. § 1321(j)(1)).
- (3) Executive Order No. 11735, § 1(4), 38 Federal Register 21243 (Aug. 7, 1973).
- (4) *Oil Pollution Prevention, Non-transportation Related Onshore and Offshore Facilities*, 38 Fed. Reg. 34,164, 34,164 (Dec. 11, 1973); see also 40 C.F.R. part 112.
- (5) *Hazardous Substances Pollution Prevention for Facilities subject to Permitting Requirement*, 43 Fed. Reg. 39,276 (Sept. 1, 1978).
- (6) EPA Underground Storage Tanks (USTs). How have Congress and EPA responded to concerns about USTs? <https://www.epa.gov/ust/learn-about-underground-storage-tanks-usts#how>.
- (7) *Compl., Envtl. Justice Health All. for Chemical Policy Reform v. EPA*, 15-cv-5705 (SAS) (filed S.D.N.Y. July 21, 2015).
- (8) Consent Decree, *Envtl. Justice Health All. for Chemical Policy Reform v. EPA*, 15-cv-5705 (SAS) (entered S.D.N.Y. Feb. 16, 2016), available at <https://www.documentcloud.org/documents/2714720-2-16-16-Haz-Mat-Consent-Decree.html>.
- (9) *Clean Water Act Hazardous Substances Spill Prevention. Proposed Action*, 83 Fed. Reg. 29,499 (June 25, 2018), available at <https://www.federalregister.gov/documents/2018/06/25/2018-13470/clean-water-act-hazardous-substances-spill-prevention>.
- (10) *E.g.*, Comments of Environmental Justice Health Alliance et al. (Aug. 24, 2018), available at <https://www.regulations.gov/document?D=EPA-HQ-OLEM-2018-0024-0184>; Comments of the Association of Metropolitan Water Agen-

cies (Aug. 23, 2018), available at <https://www.regulations.gov/document?D=EPA-HQ-OLEM-2018-0024-0160>; Comments of the National Association of SARA Title III Program Officials (Sept. 9, 2018), <https://www.regulations.gov/document?D=EPA-HQ-OLEM-2018-0024-0152>.

- (11) Clean Water Act Hazardous Substance Spill Prevention. Final Action, 84 Fed. Reg. 46,100 (Sept. 3, 2019), available at <https://www.govinfo.gov/content/pkg/FR-2019-09-03/pdf/2019-18706.pdf>.
- (12) *See generally* Comments of Environmental Justice Health Alliance et al. on Docket ID No. EPA-HQ-OLEM-2018-0024-001 (Aug. 24, 2018), at 25–33.

Mrs. NAPOLITANO. Thank you very much for your testimony, Ms. Nixon, and truly good testimony.

Mr. Gisler, you may proceed.

Mr. GISLER. Thank you, Chairwoman Napolitano, Ranking Member Westerman, and members of the subcommittee. I appreciate the opportunity to speak to you today.

My name is Geoff Gisler, and I am an attorney with the Southern Environmental Law Center. I lead our organization's clean water program. It is in that capacity that I worked on a number of issues that are before you today. I have described five of those in my testimony and have described them as they relate to the Cape Fear River in North Carolina.

The Cape Fear is North Carolina's largest river system, and it provides the drinking water for more than 2.1 million people. It faces many challenges. Those include threats created by this administration by the proposed changes to the section 401 certification regulations, by the threat of coal ash pollution, the threat caused by sewage blending, the changes to the waters of the U.S. definition, and from PFAS contamination.

It is those last two that I want to talk about today in this opening statement, but I am happy to answer questions about any of those topics.

I want to first talk about the waters of the U.S. change and the radical proposal put forward by this administration in February of this year. I think it is best to do that by looking at Fayetteville, North Carolina. It is one of the major cities on the Cape Fear and is home to our largest military base in Fort Bragg.

The change in the definition of waters of the U.S. will have a significant impact in Fayetteville, North Carolina. It will eliminate protections for more than half of the streams that are in the immediate vicinity of Fayetteville and more in a higher percentage of wetlands. That matters in Fayetteville for two reasons.

First is that Fayetteville gets its drinking water from the Cape Fear. So, when the streams and wetlands that flow through the Cape Fear are not protected, that drinking water will be dirtier and more contaminated. The second reason is that Fayetteville has survived two record-setting floods in the last 3 years from Hurricanes Matthew and Florence.

We know that the very streams and wetlands that are threatened by this administration, those that dry up for part of the year, are the ones that have the greatest flood storage capacity. They are the ones that protect our community and buffer us against storms and flooding. We cannot protect places like Fayetteville if we do not protect streams and wetlands.

If we go just downstream from Fayetteville, we run into Chemours Fayetteville Works facility. For nearly four decades,

Chemours and its predecessor have dumped Gen X and other PFAS directly into the Cape Fear at levels that are hundreds of times higher than what the State of North Carolina recognizes as a safe level. They have not only done that through their discharge pipe; they have done it through severe contamination of groundwater under the site. Some samples have shown levels of PFAS at 46 million parts per trillion. The State standard for Gen X—that is for Gen X. And the State standard for Gen X or the health advisory level is 140 parts per trillion.

That groundwater flows into the Cape Fear and combines with our discharge from their pipe and flows 55 miles downstream where it is taken into the drinking water supply for more than 200,000 people who live in Pender County, New Hanover County, and Brunswick County, North Carolina. Those people have been drinking highly contaminated groundwater for decades—drinking water for decades from a plant that is more than 80 miles away.

Unfortunately, this administration has not responded to that crisis. The PFAS action plan that has been proposed doesn't include any meaningful action that will help the communities like Wilmington, like those in Pender and Brunswick Counties. It does too little, and it takes too long. If EPA were serious about addressing this issue, they could take immediate action that would stop PFAS from getting into our waterways and not only focus on how we can clean it up after it is out in our environment. The Agency has chosen not to do that.

It has also decided that reversing decades of legal interpretation of the Clean Water Act, that it is OK for Chemours and companies like it to pollute our drinking water so long as they pollute the groundwater first and let that flow into our drinking water supply; so that is acceptable under the Clean Water Act. It is not. It is not allowed, and the statute prohibits it. This EPA should as well.

The Cape Fear is unique in many ways. This story is not unique. Many of our rivers across the country face these same challenges. And if this administration is successful, these stories will end in disaster.

Thank you for the opportunity to testify today, and I welcome your questions. Thank you.

[Mr. Gisler's prepared statement follows:]

Prepared Statement of Geoffrey R. Gisler, Senior Attorney, Southern Environmental Law Center

In the more than forty years since the Clean Water Act passed, we have made significant progress in our national effort to rescue our rivers from their perilous state in the early 1970s. This administration threatens to reverse that progress, having proposed or implemented rules and taken policy positions that will substantially undermine federal, state, and citizen efforts to protect waters across the country.

As the leader of the Southern Environmental Law Center's Clean Water Program, I have had the privilege of working with attorneys across our six-state region to educate the public about the actions of this administration and to represent communities affected by degraded water quality protections. We have submitted comments to the Environmental Protection Agency on each phase of its efforts to re-write the waters of the United States definition to take protections from streams and wetlands, its efforts to increase toxic industrial discharges, and its recent proposal to strip states of their authority under Section 401 of the Clean Water Act. In each

instance, we have asked this administration to do more to protect our waters; in each instance, it has done more to increase pollution.

Clean water has been a priority of the Southern Environmental Law Center since our founding in 1986. We represent clients from the smallest organizations or communities focused on a single watershed to national organizations looking to protect our varied water resources. In our more than 30 years, we've stood for the unremarkable principle that our rivers should be safe places to swim, fish, and get our drinking water. We appreciate this committee's efforts uphold that principle. Thank you for the opportunity to submit this testimony.

I. More protection is necessary to achieve the Clean Water Act's objective.

As a nation, we have made progress towards meeting the Act's objective to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."¹ Compared to the conditions that prompted its passage, when rivers and streams were "little more than open sewers,"² we have had some success in most places. The massive algae blooms that choked the Great Lakes, killing millions of fish and tainting the water supplies of millions,³ are less frequent. The biologically "dead"⁴ Lake Erie has come back to life. Then, wetlands were disappearing at an alarming rate—depriving coastal areas and river valleys of critically important flood control protection and ecological benefits.⁵ Now, we have wetland protections and a "no net loss" policy that has slowed wetlands destruction while restoring many that were previously degraded.

That said, we have more work to do. Although we have slowed stream and wetland loss and degradation, we have not stopped or reversed it. Under existing law, more wetlands and streams are degraded or destroyed than are restored or replaced through mitigation.⁶ With that destruction, we lose valuable habitat, pollution control, floodwater storage, and a host of other ecosystem services provided by those streams and wetlands.

Our rivers are still threatened by pollution. Some of that pollution is what motivated the passage of the Clean Water Act—more than 85 million gallons of raw sewage were spilled into North Carolina streams and rivers in the last year.⁷ In addition, coal ash stored in leaking, unlined pits continues to taint our waterways with arsenic, mercury, lead, and other toxic pollutants. New research is uncovering the breadth of pollution from per- and polyfluoroalkyl substances (PFAS); dangerous chemicals that persist in the environment, bioaccumulate, and are toxic to people. PFAS are just one of many chemicals of emerging concern that are slipping through the cracks of our regulatory system and into our waters.

In its most recent report to Congress, EPA reported that more than 50 percent of the rivers and streams it assessed are impaired.⁸ Nearly 80 percent of bays and estuaries assessed are impaired, as are 91 percent of ocean and near-coastal waters and 100 percent of the Great Lakes' open waters.⁹ These areas do not yet meet the Act's goal of making waters fishable and swimmable.¹⁰ They suffer from harmful bacteria, nutrient pollution, and sediment overload that suffocate fish and other aquatic wildlife.¹¹ Based on EPA's own assessment, we are far from reaching the objective of the Clean Water Act: "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." By all accounts, more protection for clean water is necessary if we are to achieve the Clean Water Act's objective.

This administration, however, is intent on making that objective impossible to reach. This administration has proposed to dramatically reduce the reach of the Act by narrowly defining the phrase "waters of the United States" so that it would eliminate federal jurisdiction over millions of acres of wetlands and thousands of

¹ 33 U.S.C. § 1251(a).

² S. Rep. No. 111-361, at 1 (2010).

³ *Id.* (citing 138 CONG. REC. D612 (daily ed. Sept. 22, 1992) (Prepared Statement of LaJuana S. Wilcher, Assistant Administrator for Water, at EPA, Hearing Before the Committee on Environment and Public Works, United States Senate)).

⁴ S. Rep. No. 111-361, at 1 (2010).

⁵ *Id.*

⁶ *See, e.g.*, 2017–18 Annual Report, N.C. Division of Mitigation Services at 7, https://files.nc.gov/ncdeq/Mitigation%20Services/Administration/Reports/2017_2018ar/AR-2017-2018-FINAL-REPORT.pdf (describing impacts authorized compared to mitigation required).

⁷ SELC analysis of N.C. Department of Environmental Quality statewide sanitary sewer overflow data from August 1, 2018 through July 31, 2019.

⁸ *See* EPA, National Summary of State Information: Water Quality Assessment and TMDL Information, http://ofmpub.epa.gov/waters10/attains_nation_cy.control; EPA, National Water Quality Inventory: 4 Report to Congress (Aug. 2017).

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

miles of streams. In addition to gutting federal protections, the agency proposes to restrict states' abilities to protect their waters through the issuance of 401 certifications, stripping states of an essential tool used to ensure that federally approved projects comply with state law. The EPA has also threatened to eliminate one of the means that citizens have used to protect their drinking water from toxic pollution from industrial sites; this spring, the agency reversed decades of agency interpretation to conclude that indirect discharges of pollution through hydrologically connected groundwater are not covered by the Clean Water Act.

Still, the administration intends to go farther to pollute our waters. EPA has postponed requirements to clean up wastewater from coal-fired power plants, allowing more toxic pollution to flow into our rivers. Soon, the administration is expected to propose allowing sewage blending, or the dumping of partially treated sewage in our streams and rivers—choosing to make swimmers, anglers, and boaters sick rather than investing in essential infrastructure that is necessary to handle waste responsibly.

With each of these attacks on our streams, rivers, and wetlands, this administration shifts the burden of cleaning up pollution from those who create it to the families and communities downstream—from those most responsible and best equipped to control the pollution to those most vulnerable to its harms and least able to defend against them.

Although these varied attacks arise separately, their effect on our rivers will be significant and cumulative. The Cape Fear River exemplifies this problem. The Cape Fear is the largest river basin in North Carolina. It drains more than 9,100 square miles as it flows from central North Carolina to the Atlantic Ocean near Wilmington. The headwaters of the Cape Fear begin in North Carolina's Piedmont region and flow into the Deep and Haw Rivers. Those rivers merge into the Cape Fear just below Jordan Lake—the drinking water supply for much of the Raleigh-Durham-Chapel Hill area. From there, the river flows past Fayetteville, the home of Fort Bragg, on to Wilmington and the beaches of southeastern North Carolina.

Five examples from the Cape Fear illustrate the harm from this administration's actions:

1. *Flooding in Fayetteville, North Carolina.* In 2016, Fayetteville was devastated by a 1-in-500+ year flooding event during Hurricane Matthew.¹² Two years later, flooding from Hurricane Florence surpassed the records set by Matthew.¹³ Under the administration's proposed replacement for the Clean Water Rule, nearly half of small streams in and around Fayetteville could lose protections; wetland losses could be even more extreme. Loss of these streams and wetlands would expose the city to increased flood risk.
2. *Construction and operation impacts from Mountain Valley Pipeline-Southgate.* The Federal Energy Regulatory Commission recently released the draft environmental impact statement for a 70-mile gas pipeline that would cross more than 200 streams and wetlands that flow into the Haw River, one of the main tributaries to the Cape Fear River. The project will require a 401 certification from the state of North Carolina before a federal permit approving the project can be issued. The administration's recently proposed restrictions on 401 certifications could significantly limit North Carolina's ability to enforce its state laws during that process.
3. *PFAS contamination from The Chemours Company—Fayetteville Works Facility.* In June 2017, residents of southeastern North Carolina learned that, for decades, DuPont and The Chemours Company had released toxic GenX and other PFAS into the Cape Fear River without disclosing it to state regulators or the public. More alarmingly, residents learned that their new drinking water treatment plant could not filter out the chemicals. The administration has failed to take meaningful action respond this crisis or to prevent further PFAS contamination.
4. *Coal ash contamination from the Sutton Steam Plant.* For decades, Duke Energy polluted Sutton Lake with coal ash wastewater, contaminating the lake, the Cape Fear, and its neighbors' drinking water. The utility viewed it as a waste dump and polluted the lake both directly from its coal ash lagoons and indirectly through hydrologically connected groundwater. While these dis-

¹² Hurricane Matthew Annual Exceedance Probabilities, National Oceanic and Atmospheric Administration (Oct. 18, 2016), https://www.nws.noaa.gov/ohd/hdsc/aep_storm_analysis/AEP_HurricaneMatthew_October2016.pdf.

¹³ Flooding: Fayetteville residents flee catastrophic flooding as waters rise, Asheville Citizen Times (Sept. 16, 2018), <https://www.citizen-times.com/story/news/nation/2018/09/16/florence-fayetteville-residents-flee-catastrophic-flooding-waters-rise/1328023002/>.

charges were occurring, the public was told that it was a fishing lake, and the state promoted the fishery.

That would have continued had citizen groups not intervened to enforce protection for the lake. EPA has now taken two actions to increase pollution from coal plants: it has reversed its longstanding position that the Clean Water Act prohibits contaminating streams and rivers through hydrologically connected groundwater and postponed restrictions on toxic pollutants in coal plant discharges.

5. *Sewage spills in the Cape Fear watershed.* Last year, wastewater treatment plants spilled more than 37 million gallons of untreated sewage into the river. As with many systems across the country, the dozens of wastewater treatment plants in the Cape Fear watershed need to be upgraded. The administration's sewage blending proposal would make dumping partially treated sewage an accepted practice—threatening the health of people who use the Cape Fear and putting off essential improvements.

II. The Clean Water Act of 1972 responded to a crisis.

The consequences of the EPA's efforts to gut the Clean Water Act are best understood through the context that spurred its creation. By the late 1960s, the Nation's rivers, lakes, wetlands, and streams suffered mightily as a result of industrial pollution, municipal waste, and indiscriminate filling.¹⁴ The Cuyahoga River was so polluted with industrial waste, it caught on fire.¹⁵ Massive algae blooms choked the Great Lakes, killing millions of fish and tainting the water supplies of millions.¹⁶ Biologically, Lake Erie was "dead."¹⁷ Wetlands were disappearing at an alarming rate, depriving coastal areas and river valleys of critically important flood control protection and ecological benefits.¹⁸ Of the estimated 221 million acres of wetlands that were originally present in the coterminous states, more than half had been lost to dredging, filling, draining, and flooding.¹⁹

The proverbial race to the bottom was underway, and the public was losing. Many of the states tasked with addressing water pollution had shirked their responsibility. To remedy the national crisis, Congress passed the Federal Water Pollution Control Act Amendments of 1972, commonly known as the Clean Water Act. The Act marked a major turning point.

Congress replaced the prior system—"a patchwork of ineffective state laws, and the Federal Water Pollution Control Act that dated to 1948,"²⁰—with comprehensive legislation "to restore and maintain the . . . integrity of the Nation's waters."²¹ "[T]o achieve this objective,"²² Congress listed seven broad goals, including "protection and propagation of fish, shellfish, and wildlife," "recreation in and on the water," elimination of "the discharge of toxic pollutants in toxic amounts," and "the control of nonpoint sources of pollution."²³ Congress also required the states or federal government to adopt water quality standards for all waters covered by the Act "taking into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes, and also taking into consideration their use and value for navigation."²⁴

III. The EPA's proposal to exclude streams and wetlands from federal protection will harm our rivers, communities, and economy.

In what would be the biggest rollback in clean water protections in the 47 years since the Clean Water Act became law, this administration has proposed to redefine "waters of the United States" to drastically restrict Clean Water Act jurisdiction, particularly over smaller streams and wetlands. The administration's own analysis shows that mining, energy, and development interests would be the greatest bene-

¹⁴ See, e.g., H.R. Rep. No. 92-911, at 1 (1972); S. Rep. No. 92-414, at 7 (1971).

¹⁵ *Id.*

¹⁶ *Id.* (citing 138 CONG. REC. D612 (daily ed. Sept. 22, 1992) (Prepared Statement of LaJuana S. Wilcher, Assistant Administrator for Water, at EPA, Hearing Before the Committee on Environment and Public Works, United States Senate)).

¹⁷ S. Rep. No. 111-361, at 1 (2010).

¹⁸ *Id.*

¹⁹ U.S. Fish & Wildlife Service, Wetlands: Status and Trends of Wetlands in the Coterminous United States, Mid-1970s to the Mid-1980s (1991).

²⁰ S. Rep. No. 111-361, at 1 (2010).

²¹ Pub. L. No. 92-500, § 101(a), 86 Stat. 816 (1972) (codified at 33 U.S.C. § 1251(a)).

²² 33 U.S.C. § 1251(a).

²³ *Id.* § 1251(a)(1)-(6).

²⁴ *Id.* § 1313(c).

ficiaries of the proposal,²⁵ while those downstream would suffer.²⁶ “Waters of the United States” is the jurisdictional linchpin for virtually every one of the Act’s critical safeguards, including the Act’s core prohibition established by section 301 against the discharge of pollutants without a permit, the requirements regarding dredge and fill material in section 404 of the Act, the obligation that states develop water quality standards, and several other key statutory provisions.²⁷

In proposing a drastic reduction in federal jurisdiction, the EPA and U.S. Army Corps of Engineers diagrammed the numerous negative consequences of their action.

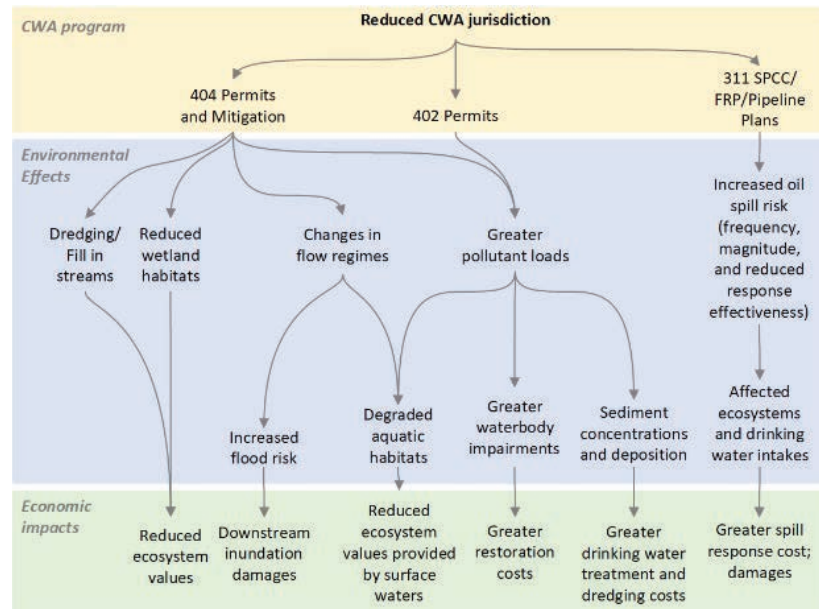


Figure 1: Overview of potential environmental impacts to selected CWA programs from proposed changes in CWA jurisdiction for certain waters.²⁸

Despite these substantial, widespread harms, the agencies continue forward with the proposed new definition, frequently relying on the hope that previously regulated entities will voluntarily continue more protective practices.²⁹

A. The proposed rule is based on a misreading of case law and legislative history.

Two fundamental legal errors underlie this rulemaking. First is the agencies’ dependence on Justice Antonin Scalia’s plurality opinion in *Rapanos v. United States*³⁰ as controlling—even though the opinion was rejected by the majority of the Supreme Court. The agencies treat it as binding even though, in the 13 years since *Rapanos*, no court has found Justice Scalia’s opinion to control. Instead, Justice Anthony Kennedy’s opinion sets forth the science-backed analysis that previous Supreme Court case law requires. The approach outlined in the proposed rule reverses decades of law and agency practice, but lacks any meaningful, valid explanation for the agencies’ departure.

²⁵ See U.S. Environmental Protection Agency and Department of the Army, Economic Analysis for the Proposed Revised Definition of “Waters of the United States” at 96–97 (Dec. 14, 2018) (quantifying permit requirements by industry) (EPA WOTUS Econ. Analysis).

²⁶ *Id.* at 133.

²⁷ See 33 U.S.C. § 1311; see also 43 Op. Att’y Gen. 197, at 200–201 (Sept. 5, 1979) (“The term navigable waters ... is a linchpin of the Act. ... Its definition is not specific to § 404, but is included among the Act’s general provisions.”).

²⁸ EPA WOTUS Econ. Analysis at 133 (Table IV–9).

²⁹ See *id.* at 46, 88, 90, 92, 93, 107, 109, 113, 114, 115, 211 (relying on voluntary continuation of current requirements to avoid harms allowed by the proposal).

³⁰ *Rapanos v. United States*, 547 U.S. 715 (2006).

The second foundational fallacy is the agencies' assertion that Congress intended for states to have sole jurisdiction over streams and wetlands essential to achieving the Act's objective. That is not so. Congress did the opposite. Faced with two competing proposals to define the role of federal and state governments in implementing the Act, Congress rejected an approach like the one proposed by this administration—the abandonment of federal jurisdiction to give states exclusive control when it comes to protections for smaller streams and wetlands. Instead, Congress carefully defined the role of states by giving states the authority to implement sections 402 and 404 of the Act if their state programs meet federal minimum requirements, as well as empowering states under section 401 of the statute. As our Supreme Court has long recognized, when Congress speaks so clearly, “that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.”³¹

With the Clean Water Act of 1972, Congress replaced the state-led, risk-based regulatory scheme that only addressed pollution if it caused “unreasonable harm” with a framework based on regulating pollution before it was discharged.³² At the time, Congress knew the states could not be relied on to “develop sufficiently tough regulatory controls on water pollution to make real progress on cleaning up the nation’s rivers and lakes.”³³ Because the Clean Water Act of 1972 was intended as a “total restructuring,”³⁴ to put the federal government in the primary role for implementing the new water pollution control system, Congress added section 101(a). “Section [101](b) was trumped by new § [101](a), announcing a national goal to ‘restore and maintain’ the nations waters.”³⁵

Still, questions arose regarding the states’ role under the new act—the same questions that are raised by the EPA and U.S. Army Corps of Engineers in the ongoing waters of the United States rulemaking. Leading up to the 1977 amendments, the House of Representatives and Senate took different approaches to resolving concerns about the role of states under the Clean Water Act. The House bill dramatically limited federal jurisdiction, leaving states complete discretion as this administration has proposed in its waters of the United States definition. The administration’s proposal mirrors the 1977 House bill. Much like the agencies, the House Committee on Public Works and Transportation argued that “[t]he activities addressed by section 404, to the extent they occur in waters other than navigable waters ... are more appropriately and more effectively subject to regulation [by] the States.”³⁶ To address these concerns, the House defined navigable waters to significantly reduce federal jurisdiction.

The Senate described the states’ role within the statute with more specificity. The underlying premise of the Senate’s approach was that “the discharge of waste directly into the Nation’s waters and oceans is permitted ... only where ecological balance can be assured.”³⁷ The Senate bill did three things. First, it made clear that “[t]o limit the jurisdiction of the [act] with reference to discharges of the pollutants of dredged or fill material would cripple efforts to achieve the act’s objectives.”³⁸ Second, it added the extensive exclusions included in section 404(f).³⁹ Third, it adopted an amendment to implement the “stated policy of Public Law 92–500 of ‘preserving and protecting the primary responsibilities and rights of States [to] prevent, reduce, and eliminate pollution.’”⁴⁰ That amendment did so by providing “for assumption of the permit authority by States with approved programs for control

³¹ *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984).

³² N. William Hines, History of the 1972 Clean Water Act: *The Story Behind the 1972 Act Became the Capstone on a Decade of Extraordinary Environmental Reform*, JOURNAL OF ENERGY & ENVIRONMENTAL LAW 80 (Summer 2013).

³³ *Id.* at 82.

³⁴ See *City of Milwaukee v. Illinois*, 451 U.S. 304, 317 (1981) (explaining that explained that the CWA was “not merely another law ‘touching interstate waters’” but was “viewed by Congress as a ‘total restructuring’ and ‘complete rewriting of the existing water pollution legislation.’”); see also *id.* at 318 (“Congress’ intent in enacting the [CWA] was clearly to establish an all-encompassing program of water pollution regulation.”); see also *Middlesex Cnty. Sewerage Auth. v. Nat’l Sea Clammers Ass’n*, 453 U.S. 1, 22 (1981) (existing statutory scheme “was completely revised” by the enactment of the Clean Water Act).

³⁵ Oliver Houck, *Cooperative Federalism, Nutrients, and the Clean Water Act: Three Cases Revisited*, ENVIRONMENTAL LAW REPORTER, 44 ELR 10,426, 10,428 (2014), https://www.google.com/url?sa=t&ret=j&q=&esrc=s&source=web&cd=2&ved=2ahUKEwi46Ivc9NHhAhXJrFkKHe5jBKYQFjABegQIBhAC&url=http%3A%2F%2Fudel.edu%2F-inamdar%2Fnp2007%2FHouck2014.pdf&usg=AOvVaw1tAf6gLse2StebbO4VgkU__.

³⁶ H.R. 95–139 at 22 (1977).

³⁷ S. Rep. 95–370 at 4 (1977).

³⁸ *Id.* at 75.

³⁹ *Id.* at 76.

⁴⁰ *Id.* at 77.

of discharges for dredged and fill material in accord with the criteria and with guidelines comparable to those contained in 402(b) and 404(b)(1).⁴¹

The Senate bill prevailed. In amending the Act, Congress created “a State program . . . which is established under State law and which functions in lieu of the Federal program” as long as the program complied with minimum federal standards.⁴² This was Congress’s plain intent for implementing section 101(b)—an intent that the administration’s proposal violates.

B. The loss of federal protections for streams and wetlands would be devastating.

The importance of those minimum federal standards is magnified in the South. Our Streams, rivers, lakes, estuaries, and oceans are central to our region’s history, culture, and economy. Those resources, combined with the South’s underfunded state water-quality programs, make the region especially vulnerable to the loss of federal clean water protections. North Carolina, South Carolina, and Georgia alone have approximately 18 million acres of wetlands, many of which are pocosins, Carolina bays, cypress domes, or other unique wetland types that are only found in the South. These distinct regional wetlands were appropriately granted clearer protection by the 2015 Clean Water Rule, and are now at risk of destruction under the agencies’ short-sighted proposal.

The southeastern United States is a hotspot for vital species of plants and animals, containing some of the most species-rich amphibian, reptilian, and freshwater fish communities in North America.⁴³ Our fisheries and recreation industry benefit when small streams and wetlands, which are integral for fish and wildlife habitat, are protected. In 2011, in the six states where the Southern Environmental Law Center works—Virginia, North Carolina, South Carolina, Georgia, Alabama, and Tennessee—the U.S. Fish and Wildlife Service reported that a total of \$19 billion was spent on wildlife recreation, including \$5.7 billion on fishing; more than 15.9 million people participated in recreational activities throughout the six-state region.⁴⁴ The Ecological Economics Journal estimates the Clean Water Act has been responsible for adding as much as \$15.8 billion in economic benefits for the Commonwealth of Virginia, alone.⁴⁵ And a host of Virginia industries rely on access to clean water—including tourism, which employs 350,000 Virginians and generates \$18 billion for the economy.⁴⁶ In 2016 alone, tourism around our beaches generated nearly \$8 billion in gross domestic product and over 190,000 jobs.⁴⁷ Recreational fishermen catch trout in our mountain streams, bass in our piedmont lakes and streams, and any number of saltwater fish in our extensive estuaries and beaches.⁴⁸ Commercial fishermen fish our estuaries and ocean waters, landing more than \$300 million worth of catch in 2017.⁴⁹ Each of these parts of the southern economy depends on clean water.

In addition to the impacts on tourism and industry, the agencies’ proposal threatens drinking water sources for seven out of ten southerners, over 32 million people.⁵⁰

In the aftermath of hurricanes Matthew, Irma, Maria, Florence, Michael, and Dorian—six major hurricanes that have hit the southeast in the last four years—we

⁴¹ *Id.*

⁴² *Id.* at 104.

⁴³ Clinton N. Jenkins et al., U.S. Protected Lands Mismatch Biodiversity Priorities, PROCEEDINGS OF THE NATIONAL ACADEMY OF SCIENCES, 5081 (2015); See Letter from K. Moser, SELC, to A. Wheeler, EPA (April 15, 2019), Exhibit A: Guinessey et al., A Literature Review: The Chemical, Physical and Biological Significance of Geographically Isolated Wetlands and Non-Perennial Streams in the Southeast 11, 12, 28 (Apr. 12, 2019) (Literature Review), <https://www.regulations.gov/document?D=EPA-HQ-OW-2018-0149-9717> (last visited Sept. 12, 2019).

⁴⁴ See U.S. Department of the Interior, U.S. Fish and Wildlife Service, U.S. Department of Commerce, and U.S. Census Bureau, 2011 National Survey of Fishing, Hunting, and Wildlife-Associated Recreation, 95–97 (Feb. 2014); see also Ex. A, Literature Review at 22.

⁴⁵ Jim Epstein, *Clean Water Is Vital for Success of Virginia Business*, The Daily Progress, https://www.dailyprogress.com/opinion/opinion-column-clean-water-is-vital-for-success-of-virginia/article_54a3fad0-71c6-11e4-ab71-23593a302e82.html.

⁴⁶ *Id.*

⁴⁷ National Ocean Economics Program, *Ocean Economy Data* (GA, NC, SC, VA) (2016).

⁴⁸ See Pete Flood, *Top 10 Fishing Spots in the Southeast*, Folding Boat Co. Blog, <https://www.foldingboatco.com/blog/2017/4/11/top-10-fishing-spots-in-the-southeast> (last visited Sept. 11, 2019).

⁴⁹ See NATIONAL MARINE FISHERIES SERVICE, ANNUAL COMMERCIAL LANDINGS STATISTICS (AL, GA, NC, SC, VA) (2017), https://www.st.nmfs.noaa.gov/st1/commercial/landings/annual_landings.html (last visited Sept. 12, 2019).

⁵⁰ SELC GIS, Population Served by Drinking Water in the Southeast—Methodology and SELC GIS Drinking Water Analysis Data (collectively, “SELC GIS Analysis”).

have never depended more on our wetlands for flood control and storm surge protection. With abundant coastlines, lakes, marshes, and rivers, our communities and states stand to lose the most if industries are allowed to dodge the basic protections that keep our water clean and safe from pollution. We depend on consistent minimum federal standards to safeguard clean water and protect our communities, families and everyday life.

It is unacceptable and unrealistic to pretend that states will fill the gap in protections that the administration proposes to create—Southern states simply do not have the resources to protect the waters at risk under the agencies’ proposal. Our states have some of the largest budget shortfalls in the country.⁵¹ Even when Southern states are able to take action, they cannot address water quality issues on their own. Virginia regulators, for example, have worked hard to clean up the Chesapeake Bay. But without a strong, consistent level of nationwide protections for clean water, that effort stands to be undone. A patchwork of state laws would not maintain water quality in the many tributaries feeding the Chesapeake Bay from multiple states, and weaker protections imposed by other states would both unfairly add to Virginia’s burden and prevent progress in the Bay.

C. The Cape Fear Region will be significantly affected by the redefined waters of the United States.

The Cape Fear River is particularly vulnerable to the administration’s efforts to drastically reduce federal jurisdiction over streams and wetlands. It is the largest watershed in North Carolina, draining more than 9,100 square miles,⁵² and is home to several larger municipalities (Greensboro, Burlington, Chapel Hill, Sanford, Fayetteville, and Wilmington) and many larger rural communities (Dunn, Clinton, Warsaw, and Burgaw). Along its 200 miles, it travels through 26 of North Carolina’s 100 counties. In total, the Cape Fear watershed includes approximately 23,100 miles of streams and rivers.

Many of those waters are threatened by the EPA’s proposal to redefine waters of the United States. According to data collected by the North Carolina Department of Environmental Quality, 35 to 54 percent of streams in the Cape Fear watershed are small streams that have no tributaries.⁵³ Similarly, 20 to 46 percent of streams in the watershed do not flow all year.⁵⁴ These are the types of streams that not only provide essential ecosystem services, they are most vulnerable to being destroyed or polluted under the EPA’s proposal. In addition, the agency’s proposal threatens many wetlands within the Cape Fear watershed. The EPA estimates that there are more than four million acres of wetlands in North Carolina,⁵⁵ a significant portion of which are in the Cape Fear watershed.

The communities along the Cape Fear cannot stand to lose the floodwater storage and other ecosystem services provided by these small streams and wetlands. From Fayetteville to Wilmington, residents have experienced 500- to 1000-year flood events twice in the last three years. In 2016, Hurricane Matthew caused record flooding in Fayetteville. Less than two years later Hurricane Florence exceeded those records in Fayetteville and caused such extensive flooding in the Wilmington area that supplies had to be airlifted into the city. The communities in this watershed cannot withstand the rampant stream and wetland destruction that would occur under EPA’s proposal.

IV. The EPA’s proposed 401 certification regulations restrict states’ ability to protect their waters.

In re-writing the waters of the United States definition, the administration claims to defer to states’ ability to protect their waters. With EPA’s proposed 401 certification rules, it proposes to take away the states’ best tool for doing so. Section 401 of the Clean Water Act ensures that states have a voice in federal decisions that affect our rivers, streams, and wetlands. For those activities that require a federal permit or license, the state where the project is proposed has the opportunity to ensure that the project complies with state laws.⁵⁶ On August 22, 2019, EPA proposed a rule that would limit states’ authority to only those state laws that are part of a federally approved program, would force states to make certification decisions on

⁵¹ Truth in Accounting, *Financial State of the States* (September 2018).

⁵² N.C. Dept. of Environmental Quality, Cape Fear River Basin, <https://deq.nc.gov/cape-fear-river-basin> (last visited Sept. 11, 2019).

⁵³ See Letter from K. Moser, SELC, to A. Wheeler, EPA (April 15, 2019), Exhibit B, Appendix 2 at 10 <https://www.regulations.gov/document?D=EPA-HQ-OW-2018-0149-9717> (last visited Sept. 12, 2019).

⁵⁴ *Id.*

⁵⁵ EPA WOTUS Econ Analysis at 220.

⁵⁶ 33 U.S.C. §1341(d).

compressed timelines even if they do not have adequate information, and would grant federal agencies broad authority to reject conditions on state-issued certifications that states have determined to be essential.⁵⁷

The faults in EPA's proposal are plain when looking at a recent example: the Atlantic Coast Pipeline's 401 certification issued by the state of North Carolina. The application for the certification was submitted to the North Carolina Department of Environmental Quality on May 9, 2017. That application was woefully inadequate. The Department of Environmental Quality made five requests for more information between September 14 and December 14, 2017.⁵⁸ According to the state agency, that information was "necessary to continue to process" the application.⁵⁹ Even with the five information requests, the agency failed to collect adequate information on trenching methods, long-term effects of construction, wetland standards, minimization efforts, or restoration plans.⁶⁰

Over the objections of many organizations, DEQ issued the certification on January 26, 2018.⁶¹ The certification authorized impacts to more than 450 acres of wetlands and nearly 7 miles of streams.⁶² The certification also authorized significant impacts to riparian buffers that are protected by North Carolina laws designed to safeguard the Albemarle-Pamlico and Neuse estuaries from nonpoint source nutrient pollution and harmful algal growth.⁶³

The certification includes many conditions related to the project's effects on streams and wetlands as well as state laws governing nonpoint source pollution and drinking water wells. Two stream crossings were eliminated.⁶⁴ Conditions were added to reduce the effect of other crossings.⁶⁵ The certification required compliance with North Carolina laws related to wildlife, sediment and erosion control, and drinking water well protection.⁶⁶

Had EPA's proposed 401 restrictions been in place, the ACP 401 certification would have gone down a very different path. First, EPA's proposal suggests that state agencies may be limited in how long they have to request information, potentially to as little as 60 days, and limited in the types of information they can seek through those requests.⁶⁷ Second, the proposed rule would prevent DEQ from evaluating the full breadth of impacts to water quality—excluding important considerations for wildlife, riparian buffers, and well owners.⁶⁸ And although inadequate information and no certainty that water quality standards will be met should be a sufficient basis for denial of a certification, the proposal also gives federal agencies significant authority to override a 401 certification denial.⁶⁹

The ACP is not an isolated instance. DEQ will soon evaluate a 401 certification for the Mountain Valley Pipeline Southgate project. This 70-mile pipeline in the Cape Fear River's headwaters would cross more than 200 streams or wetlands. DEQ's ability to meet state laws will depend on the agency being able to collect adequate information and impose conditions that fulfill the state agency's obligations. The EPA's 401 proposal would prevent the agency from doing so.

V. The administration has failed to take meaningful action to address existing and future PFAS contamination.

In the last several years, the list of states with extensive PFAS contamination has grown. Perhaps the earliest and most notorious case arose at DuPont's, and now Chemours', Washington Works Facility in Parkersburg, West Virginia. In Colorado, Peterson Air Force Base has been the focus. In Michigan, PFAS have been found

⁵⁷ Updating Regulations on Water Quality Certification, 84 Fed. Reg. 44,080, 44,081–82 (Aug. 22, 2019).

⁵⁸ See Letter from J. Poupart, NCDEQ, to L. Hartz, ACP, at 1 (Sept. 14, 2017), <https://deq.nc.gov/news/key-issues/atlantic-coast-pipeline> (under heading "Division of Water Resources") (last visited Sept. 11, 2019).

⁵⁹ *Id.*

⁶⁰ See, generally Letter from G. Gisler, SELC, to J. Poupart, NCDEQ (Nov. 22, 2017), <https://deq.nc.gov/news/key-issues/atlantic-coast-pipeline> (under heading "Comments Submitted") (last visited Sept. 11, 2019).

⁶¹ Letter from L. Culpepper, NCDEQ, to L. Hartz, ACP (Jan. 26, 2018), <https://edocs.deq.nc.gov/WaterResources/DocView.aspx?dbid=0&id=623752&page=1&cr=1> (last visited Sept. 11, 2019).

⁶² *Id.* at 3.

⁶³ See *id.* (describing riparian buffer impacts).

⁶⁴ *Id.* at 4.

⁶⁵ *Id.* at 7.

⁶⁶ *Id.* at 6–8, 10–13.

⁶⁷ 84 Fed. Reg. 44,080, 44,115 (Aug. 22, 2019).

⁶⁸ See *id.* at 44,105 (describing limitations on conditions).

⁶⁹ EPA's proposed rule would, however, give federal agencies extensive authority to override a 401 certification denial. 84 Fed. Reg. 44,080, 44,110 (Aug. 22, 2019).

in 10 percent of drinking water systems.⁷⁰ In Minnesota, 3M contaminated drinking water in the Twin Cities.⁷¹ Drinking water in Vermont was contaminated by Saint-Gobain Performance Plastics.⁷² In North Carolina, the areas surrounding Wilmington and Fayetteville have been the center of attention because of contamination from Chemours' Fayetteville Works Facility.⁷³

In early 2019, the Environmental Protection Agency announced its "Per- and Polyfluoroalkyl Substances (PFAS) Action Plan." The plan is purportedly designed to respond to the ongoing crisis of public drinking water contamination with these persistent, toxic, and bioaccumulative chemicals, but fails in that task for at least two reasons. First, it focuses primarily on only two of the thousands of PFAS in existence. Second, it lacks any action that would prevent PFAS or other emerging contaminants from being released into the environment.

The primary focus of the potential regulatory aspects of EPA's PFAS Plan center on perfluorooctanoic acid (PFOA) and perfluorooctane sulfonate (PFOS)⁷⁴—a scope that is too limited to benefit families and communities that are often exposed to broad PFAS contamination. Sampling data from the Cape Fear Public Utility Authority—a utility serving more than 200,000 citizens in and around Wilmington, North Carolina—demonstrate why such a limited focus is inadequate. According to the utility's 2018 Annual Water Quality Report, sampling has detected 21 PFAS in treated drinking water.⁷⁵ Seven of those 21 PFAS, on average, have greater concentrations than PFOA or PFOS. Under the best-case scenario in EPA's PFAS plan, the agency will do nothing to address the threat from 19 of the 21 PFAS in drinking water for more than 200,000 people in southeastern North Carolina.

Much of that contamination comes from The Chemours Company's Fayetteville Works Facility, which sits on the Cape Fear River approximately 55 miles upstream of the Cape Fear Public Utility Authority's drinking water intake. Due to decades of waste mismanagement, the Chemours site is thoroughly tainted with PFAS. Groundwater seeps flowing into the Cape Fear River have been found to be contaminated with at least 20 PFAS that exceed a combined concentration of 670,000 parts per trillion (ppt)—several thousand times higher than health advisory levels available for any PFAS.⁷⁶ Action focused solely on PFOA and PFOS, as EPA has proposed in its PFAS Plan, would do nothing to clean up Chemours' site.

Chemours is not, however, the only contributor of PFAS pollution to the Cape Fear. Samples in the Haw River, one of the major tributaries to the Cape Fear, have detected seven PFAS.⁷⁷ Many of those PFAS are found in greater concentrations than PFOA or PFOS and are ignored by the EPA's PFAS plan.

EPA's plan suffers an even more fundamental flaw—it fails to prevent releases of PFAS into our waters as mandated by the Clean Water Act. As made clear during the GenX crisis, state regulators cannot implement the Act's pollution control standards if they do not know what companies are discharging. North Carolina's Department of Environmental Quality did not know Chemours was discharging GenX and other PFAS. Yet EPA's PFAS Plan fails to prioritize full disclosure of pollutants in industry wastewater.

⁷⁰ Michigan PFAS Action Response Team, Michigan publishes first state study of PFAS in water supplies (Aug. 16, 2019), <https://www.michigan.gov/som/0,4669,7-192-47796-504965--,00.html> (last visited Sept. 11, 2019).

⁷¹ See, generally Minnesota 3M PFC Settlement website, <https://3msettlement.state.mn.us/> (describing nature of 3M litigation and settlement) (last visited Sept. 11, 2019).

⁷² Vermont Environmental Division, State Reaches Settlement With Saint-Gobain: Company Agrees to Fund Waterline Extensions and Other Remediation Measures on Bennington's East Side (April 10, 2019), <https://ago.vermont.gov/blog/2019/04/10/state-reaches-agreement-with-saint-gobain-company-agrees-to-fund-waterline-extensions-and-other-remediation-measures-on-benningtons-east-side/> (last visited Sept. 11, 2019).

⁷³ Toxin taints CFPWA water supply, Vaughn Hagerty, Wilmington Star News (June 7, 2017), <https://www.starnewsonline.com/news/20170607/toxin-taints-cfpua-drinking-water/1> (last visited Sept. 11, 2019).

⁷⁴ See Environmental Protection Agency, EPA's Per- and Polyfluoroalkyl Substances (PFAS) Action Plan at 3 (Feb. 2019), <https://www.epa.gov/pfas/epas-pfas-action-plan> (last visited Sept. 11, 2019).

⁷⁵ Cape Fear Public Utility Authority, 2018 Annual Water Quality Report at 14, <https://www.cfpua.org/Archive.aspx?ADID=777> (last visited Sept. 11, 2019).

⁷⁶ The Chemours Company, Chemours Submission Pursuant to Consent Order Paragraphs 12 and 11.1, Attachment 2: Seeps and Creeks Investigation, Figure 4A, <https://www.chemours.com/Fayetteville-Works/en-us/c3-dimer-acid/compliance-testing/index.html> (last visited Sept. 11, 2019).

⁷⁷ PFAS shows up in Haw River, Pittsboro water, but gets limited local attention, Greg Barnes, North Carolina Health News (July 30, 2019), <https://www.northcarolinahealthnews.org/2019/07/30/pfas-shows-up-in-haw-river-pittsboro-water-but-little-local-outcry/> (last visited Sept. 11, 2019).

Disclosure alone is not enough. EPA must reaffirm the technology-forcing elements of the Act. In setting the ambitious goal of eliminating all discharges by 1985, Congress made clear that the Act is designed to improve pollution controls rather than simply require use of commonly available methods. Technology-based effluent limits are the “minimum” level of pollution control required by the Act.⁷⁸ As the agency’s regulations make clear in circumstances such as this, where there are no effluent limitation guidelines for the pollutants at issue, the permitting agency must conduct a case-by-case technology-based limit analysis.⁷⁹ As demonstrated in a study conducted at Chemours’ facility, technology exists to reduce PFAS to very low levels.⁸⁰

EPA could, if it were serious about PFAS contamination, require full disclosure of pollutants in industrial discharges, and mandate that case-by-case technology limits must be imposed in each NPDES permit that authorizes the discharge of PFAS or other emerging contaminants. Instead, the agency’s PFAS plan will allow PFAS pollution to continue as the agency primarily focuses on two of the dozens of chemicals that are known to contaminate drinking water in communities across the country.

The cost of that inaction is significant. In response to the GenX crisis, the Cape Fear Public Utility Authority and Brunswick County have committed to spending more than \$140 million to upgrade their drinking water treatment plants.⁸¹ At least six cases have been filed against Chemours, initiating litigation that will likely extend for years, if not decades. And even though the facility has stopped directly discharging its manufacturing wastewater into the Cape Fear, PFAS continue to flow into the river through stormwater and groundwater.

None of this had to happen. Had Chemours disclosed what was in its wastewater, the North Carolina Department of Environmental Quality could have imposed pollution control requirements under the Act—technology exists to capture PFAS on site. The federal agency’s PFAS Plan fails to require industry to do so.

VI. *EPA’s Interpretative Statement allowing pollution of waters through hydrologically connected groundwater puts communities in danger.*

For decades, EPA took the position that the Clean Water Act’s strict prohibition of any discharge of any pollutant to waters of the United States without a permit⁸² prevented discharges of pollution through hydrologically connected groundwater.⁸³ In April, the agency reversed course,⁸⁴ creating an exception that is not found anywhere in the Act or its legislative history and has been rejected by the overwhelming majority of courts.⁸⁵

The consequence of EPA’s newly proposed exception, should it be implemented, is clearest with two examples. In recent years, the issue has most frequently arisen in situations where coal-fired power plants chose to store millions of tons of coal ash containing toxic pollutants in leaking, unlined pits next to major rivers. Predictably, the groundwater that the ash sits in is contaminated with toxic pollutants including arsenic, mercury, and selenium.⁸⁶ Duke Energy, one of the largest utilities in the country, chose to use these leaking pits despite EPA’s warnings in the 1970s that this reckless storage of ash risked pollution of groundwater and surface water. As a result of citizen groups stepping in where state and federal agencies have failed to protect our rivers, energy companies have committed to excavating more than 250 millions of tons of coal ash in the Southeast, including ash at the Sutton Steam

⁷⁸ 33 U.S.C. § 1311(b).

⁷⁹ 40 C.F.R. § 125.3(c)(3).

⁸⁰ The Chemours Company, Old Outfall 002 GAC Pilot Study Interim Results Report at 4–5 (Aug. 5, 2019).

⁸¹ See Brunswick County commissioners vote to immediately build RO plant (May 10, 2018), <https://www.brunswickcountync.gov/brunswick-county-commissioners-vote-to-immediately-construct-ro-plant/> (last visited Sept. 11, 2019); CFPUA Board OK’s steps to obtain construction bids, funding for long-term solution to PFAS (April 10, 2019), <https://www.cfpua.org/CivicAlerts.aspx?AID=1019&ARC=2084> (last visited Sept. 11, 2019).

⁸² 33 U.S.C. § 1311(a).

⁸³ See *Upstate Forever v. Kinder Morgan Energy Partners*, 887 F.3d 637, 651 (4th Cir. 2018).

⁸⁴ Environmental Protection Agency, Interpretive Statement: Application of the Clean Water Act National Pollutant Discharge Elimination System Program to Releases of Pollutants from a Point Source to Groundwater (Apr. 12, 2019), <https://www.epa.gov/npdes/interpretative-statement-releases-pollutants-point-sources-groundwater> (last visited Sept. 12, 2019).

⁸⁵ See *Hawai’i Wildlife Fund v. County of Maui*, 886 F.3d 737, 746–47 (9th Cir. 2018).

⁸⁶ See *Cape Fear River Watch v. Duke Energy Progress*, 25 F.Supp.3d 798, 802 (E.D.N.C. 2014).

Plant on the Cape Fear River.⁸⁷ EPA's effort to insulate Duke Energy and other polluters who contaminate our rivers through groundwater would limit future progress in keeping toxic pollutants out of our waterways.

Chemours' Fayetteville Works Facility is another example that demonstrates the potential harm from EPA's reversal. Groundwater at the site is severely contaminated due to years of reckless handling of PFAS-laden wastewater. Contaminated water has leaked through failing wastewater pipes and settling ponds among other sources. As a result, the groundwater at the site has been shown to have levels of GenX, one of the more prominent PFAS at the facility, of 640,000 parts per trillion. That groundwater flows directly into the Cape Fear River through seeps that have been found to have GenX concentrations of 150,000 ppt.⁸⁸ These levels of contamination far exceed North Carolina's health advisory limit for GenX of 140 ppt. The groundwater contamination is so extensive at Chemours' site that it continues to be the primary contributor to PFAS contamination in the intake water for several drinking water providers more than 50 miles downstream from the site.⁸⁹ The administration's PFAS action plan will not provide relief to these and other communities with drinking water tainted by PFAS.

VII. The administration's plan to allow partially treated sewage to be discharged will make an existing crisis worse.

As a country, we have a wastewater infrastructure problem. Our systems are old and failing. Small utilities, and some large utilities, cannot afford to install modern collection systems and treatment technology. One result of the infrastructure crisis is that wastewater treatment plants are often overwhelmed during heavy rains, causing untreated sewage to flow into our streams and rivers. Rather than address that problem head-on, EPA has indicated that it will propose a rule that will allow wastewater treatment plants to discharge partially treated sewage during rain events.⁹⁰ Blending, a practice in which wastewater treatment plants divert waste streams around secondary treatment and discharge partially treated sewage during rain events, has the potential to create significant public health risks.

The agency has previously recognized that blending is not a solution to inadequately sized or maintained systems. "EPA anticipates that, over time, the need to undertake peak wet weather flow diversions at POTW treatment plants serving separate sanitary sewer conveyance systems can be eliminated from most systems in a variety of ways, such as by enhancing storage and treatment capacity and reducing sources of peak wet weather flow volume."⁹¹

EPA has also recognized the risk of failing to properly address our failing wastewater infrastructure. A 2010 study by EPA contractor Tetra Tech found that, during blending, treatment plants are only able to remove 71% of *Cryptosporidium* parasites and 40% to 88% of *Giardia* parasites, while discharging very high levels of fecal coliform and Enterococcus bacteria.⁹² Another study found that the risk of people being exposed to adenovirus and *Giardia* when swimming, wading, and fishing in waters receiving blended sewage flows were about ten times greater than if the waste had received full secondary treatment.⁹³

Now is the time to deal with our wastewater infrastructure. From August 2018 through July 2019, more than 85 million gallons of sewage spilled from wastewater treatment plants in North Carolina.⁹⁴ In the Cape Fear basin alone, 37 million gal-

⁸⁷ See Southern Environmental Law Center, Coal Ash: Protecting Our Water and Health from Coal Ash, <https://www.southernenvironment.org/cases-and-projects/coal-waste> (last visited Sept. 12, 2019).

⁸⁸ The Chemours Company, Chemours Submission Pursuant to Consent Order Paragraphs 12 and 11.1, Attachment 2: Seeps and Creeks Investigation, Figure 5B, <https://www.chemours.com/Fayetteville-Works/en-us/c3-dimer-acid/compliance-testing/index.html> (last visited Sept. 11, 2019).

⁸⁹ The Chemours Company, Cape Fear PFAS Loading Reduction Plan, Attachment 1: Cape Fear River PFAS Loading Model Assessment and Paragraph 11.1 Characterization of PFAS at Intakes at 24 (Aug. 26, 2019), <https://www.chemours.com/Fayetteville-Works/en-us/c3-dimer-acid/compliance-testing/index.html> (last visited Sept. 11, 2019).

⁹⁰ See Public Listening Session; Stakeholder Input on Peak Flows Management, 83 Fed. Reg. 44,623, 44,625 (Aug. 31, 2018).

⁹¹ National Pollutant Discharge Elimination System (NPDES) Permit Requirements for Peak Wet Weather Discharges from Publicly Owned Treatment Works Treatment Plants Serving Separate Sanitary Sewer Collection Systems, 70 Fed. Reg. 76,013, 76,015 (Dec. 22, 2005).

⁹² EPA, Draft Summary of Blending Practices and the Discharge of Pollutants for Different Blending Scenarios at 9 (2014), https://www.epa.gov/sites/production/files/2015-10/documents/sso_lit_review_draft.pdf (last visited Sept. 12, 2019).

⁹³ Water Environment Research Foundation, Characterizing the Quality of Effluent and Other Contributory Sources During Peak Wet Weather Events (2009).

⁹⁴ SELC analysis of N.C. Department of Environmental Quality statewide sanitary sewer overflow data from August 1, 2018 through July 31, 2019.

lons of untreated sewage were released, much of it into waters classified as a public drinking water supply.⁹⁵

In the Cape Fear, that sewage combines with runoff from hundreds of industrial swine and poultry operations, causing the river to be listed as impaired under section 303(d) of the Clean Water Act because it cannot support its natural fish and invertebrate community. Approving regular discharges of partially treated sewage will only make this impairment worse while exposing the thousands of people who swim, fish, or boat in the Cape Fear River to unsafe levels of pathogens.

VIII. The nation cannot achieve the goal of the Clean Water Act if this administration's efforts are successful.

Protecting clean water requires everyone to do their part. The Clean Water Act was written to ensure that everyone does, from industrial dischargers to nonpoint sources. This approach has had great success, though we still have significant work to do if we are to achieve the Act's goal of fishable, swimmable waters nationwide. This administration's actions will make that goal unattainable. The combination of abandoning federal authority, limiting state authority, and creating vast loopholes in the Act will strip agencies of the tools they need to protect the places we swim, fish, and get our drinking water. By shifting the burden of pollution from those who create it to families and communities downstream, this administration would take us back to the era before the Clean Water Act. I ask this subcommittee to defend the Clean Water Act and stand against this administration's efforts to dismantle it.

Mrs. NAPOLITANO. Thank you very much for your testimony. We have votes called already, but we are going to go ahead with the questioning, and then we will recess for about half an hour before we go vote.

My question to Mr. Kopocis is you talked a lot about maps. Based on your experience as the former head of EPA's Office of Water under the Obama administration, what challenges are posed by Mr. Ross' desire for maps? Are there other tools that the EPA has today that the Agency can use to show the waters' core protection is lost by the Trump rule?

Mr. KOPOCIS. Thank you for that question.

Yes, the question of developing maps for the Clean Water Act jurisdiction goes as far back as there was legislation before this committee in the 1980s to do that. What we found back then—and things haven't changed—is that, first of all, developing national maps of jurisdictional waters would be prohibitively expensive. It would also require on-the-ground visits by people to make jurisdictional determinations.

Notwithstanding what Mr. Ross said, it is not going to be possible to do satellite images or to use existing data. Most jurisdictional determinations are made by somebody going out onto the property to find out if it is jurisdictional. So that, to make a national map, you would then have to put people on the ground onto people's property who may have no interest in knowing whether there is a jurisdictional water or not; because they are not planning to pollute it or destroy it, they don't need a permit.

So you would require a physical intrusion onto property all across the Nation anywhere there might be a water feature subject to the Clean Water Act, even to find out if it is not jurisdictional under the Clean Water Act. And because most people undertake their daily activities without triggering any Clean Water Act responsibility, you would be mapping thousands of miles of streams

⁹⁵ SELC analysis of N.C. Department of Environmental Quality Cape Fear basin sanitary sewer overflow data from August 1, 2018 through July 31, 2019.

and millions of acres of wetlands for no particular purpose because nobody plans to do anything with them.

Now, if somebody can come up with a way to do maps, I agree. Everybody would love it, but the hurdles are immense.

Mrs. NAPOLITANO. Thank you. Thank you, Mr. Kopocis.

Ms. Bellon, in your testimony, you mentioned the Trump administration is repealing the State of Washington's water quality standards to protect human health from toxins in fish. It seems to me the State of Washington knows more about protecting the citizens' health than the administration.

What legal standing does the Trump administration have to or by what legal standards can the Trump administration repeal the State's previously approved water quality standards? And if there is no legal standard for repealing those standards, surely they are basing their decision on science. What science has the administration presented to repeal the State's water quality standards?

Ms. BELLON. They have no legal standing to repeal Washington State's fish consumption rule, otherwise known as our Human Health Criteria.

There are two standards under the Clean Water Act for when EPA can reach into a State into a previously adopted rule that that State chose, based on the circumstances, the waters, the beneficial uses, the population, and in our State, for Treaty Tribes to determine that that State rule should be repealed. There are two circumstances that they could have done that. Neither exists at this time.

One is that if we ask them to come in and repeal or revise based on a set of circumstances, which we have not or, two, if they determine essentially that the Clean Water Act is not being met, and these are protective standards that are meeting the law and the intent of the Clean Water Act.

So it is such a dichotomy. For me to sit here today and hear the issue raised about a State's rights and let's revert to State's rights so that we can get States to have a better handle and let them look at these things in terms of their particular view but then to come in and surgically repeal a rule that has been on the books in our State for 3 years that we spent 10 years adopting and getting on the table to answer and deal with water quality issues by virtue of Washingtonians' fish consumption.

Mrs. NAPOLITANO. Thank you very much for your answer.

Mr. Westerman.

Mr. WESTERMAN. Thank you, Chairwoman Napolitano.

And thank you to the witnesses for your testimony.

I have got some pictures I would like to show, and we seem to get wrapped around the wheel a lot on regulations and what they mean, but I want to talk about something that is happening in my State that Secretary Keogh may or may not be aware of, but what you see here is a photograph of a water irrigation system. This is surface water coming right out of the Arkansas River. You can see it has got kind of a brown color to it. It has got quite a few nutrients in it.

[Slide.]

If you don't know the geography, the Arkansas River flows into the Mississippi River, which goes into the gulf. So the algal blooms

and the things we see in the gulf, a lot of that is attributed to nutrients flowing downstream.

I wanted to show this because this shows what the private sector is doing, how they are usually way ahead of us. And there are a lot of benefits to a surface water irrigation system like this. Number one, this is in rice country. If you know, it takes a lot of water to grow rice. For years, we have pumped water out of the Sparta aquifer to flood those rice fields, also to do other row crop irrigation. That aquifer is depleting, which it is very pure drinking water. A lot of areas rely on that water for drinking. So getting water out of the river versus the Sparta is a good thing.

Also, if we could do something to clean this water up, what you see in this picture is the same water.

[Slide.]

It has just been through this irrigation district. And simply what they do is they use the water over and over. They capture the tail water off of one crop. They pump it back into the reservoir. They move it down and irrigate another crop. The success story of this is it has also been able to cut the irrigation costs in half for farmers who are in this water irrigation district. It doesn't require Sparta water, and it is obviously removing sediments and nutrients out of the water, and the only water that you are losing through the irrigation loop is a little bit of infiltration and evaporation. So this water would end up back in the Arkansas River, flowing downstream.

I show this because one problem that is being faced here is that there appears to be considerable opportunities for establishing water quality trading programs around the Nation. And my question is, why aren't we seeing more trading occurring currently if we look at nutrient trading and nutrient offsets? What are the main impediments to establishing a successful water quality trading program?

And, Secretary Keogh, I will ask you that first, what you see on the State level. Then I will open it up to the other panelists.

Ms. KEOGH. Thank you, Congressman.

Arkansas is committed and has formed a nutrient trading rule-making committee now through the Pollution Control and Ecology Commission to advance nutrient trading, as you speak to, understanding that that has true benefits potentially for nutrient management, both to deal with the Arkansas/Oklahoma issue I mentioned in testimony but also as we look at the gulf hypoxic zones.

So we look forward to those advancing. I think the barriers at this point have been somewhat at the Federal level, and I know that this administration has spent and recently reissued a direction to the States on how to implement a watershed management system that could invoke or encompass a trading regime. So we look forward to working with EPA on that.

We believe, in today's world, our ag community, as well as our industry, understands that a strong economy for them relies on effective and strong environment. And, likewise, we believe that effective, strong environment leadership is benefited by a strong economy. So we look forward to that opportunity to tap into those.

Mr. WESTERMAN. Any other panelists have any expertise in this area and would like to make a comment?

Mr. KOPOCIS. If I could, Mr. Westerman, the concept of trading has been around for quite a while. It has met with modest success is how I would characterize it. It is a couple of different reasons, often centering around enforceability, accountability, and responsibility. We have found that, in some instances, the agricultural interest is not interested in being part of the regulatory program, even though they may be stepping in to take on a responsibility of reducing nutrient loads.

So there needs to be a way to bring people in without them having the fear that they are somehow going to become the regulated entity, and that has been a difficult hurdle for the States and for EPA to overcome.

A lot of these trades are based on modeling, and there is some uncertainty. You can measure what comes out of a treatment plant. You can test it and measure it, but you have to model for these kinds of trades that use agricultural lands and that has not been particularly successful yet either. I think conceptually it has a lot of promise. I mean, it is very similar to what the air program has for cap and trade.

I think what you will see as TMDLs come online, there will be a financial incentive for those who are regulated point sources to participate within nonregulated, nonpoint sources in the agricultural sector to reduce the nutrient loadings at a lower cost per unit of reduction, but there has to be some forcing mechanism, and that accountability has to be figured out among the parties.

And I, really, again, I think it is a good concept, but those are the hurdles that I see.

Mr. WESTERMAN. Thank you. I am way over my time, and I think I am going to vote. Are you going to—

Mr. DELGADO. Yes, I have some questions.

Mr. WESTERMAN. OK.

Mr. DELGADO. You can head out.

Mr. WESTERMAN. We will return.

I retract that last statement.

Mr. DELGADO [presiding]. Thank you.

I will give myself 5 minutes for questioning.

I want to just focus, Mr. Hickey, on your testimony. You came back to common sense, and I think you showed a lot of grace in response to Mr. Ross' testimony.

My takeaway from the testimony was that, despite the fact that we know—the science has made it clear—that PFAS can cause cancer and can lead to thyroid conditions and autoimmune disorders, despite this fact, he appeared and the EPA, at least at this point, seems unwilling to at least just go on the record and say, “We will provide an MCL,” not what the MCL will be, but that, despite we know what this toxin can do to people, people are losing their lives, we can't even go on record and common sense and use our judgment to say, “Hey, you know what? We will land at some point on an MCL.”

And that to me I find profoundly frustrating and a disservice to the public. I like—and I know you had to stop your testimony. We can talk about the science, and we can talk about the numbers and the parts per trillion and what that all means, but I think there is nothing more powerful than hearing stories like yours and un-

derstanding the impact that it has on communities and what the community feels in terms of its connection to agencies like the EPA. And you spoke about the night-and-day reality that you have experienced, that I imagine others in your community have experienced on this critical issue.

So I just want to give you back the floor, and if you would like to speak a little bit to what it feels like, what it means for you and the community back in Hoosick Falls to have to engage at this juncture with all the mounting evidence and science with an agency that seems uncommitted to its mission.

Mr. HICKEY. Thank you.

You know, we have, me and you have had multiple conversations about this in the past. And MCL, it really honestly seems crazy, right? The number keeps trending lower, but it is a carcinogen we are talking about. So how much water do you want to give your children that causes cancer? You know, it is a crazy question, right, so that we even have to even consider giving our children water that causes cancer, you know. So zero really should be the MCL with these chemicals. There shouldn't be any question about it.

I think, right now, the debate with PFAS—and you are comparing it much to the tobacco industry at this point, these chemicals versus tobacco. They are similar, right? Cancer, we know they are causing cancer, but the difference is tobacco is a consumer's choice. Water is not, and that is the big difference that we have.

And over the time, over the 5½ years that I have been working on this now, I spent a tremendous amount of time obviously on it. And I have actually felt guilty at times. Why wasn't I involved in this sooner? Why didn't I get involved earlier? But all the science that keeps evolving, you are having more and more States that are getting involved, and there are more contaminations that are being found, and there is no science that is saying that this is good for us. None of it is evolving into saying that these chemicals are going to be positive in the future. There hasn't even been one, right?

So, you know, and the problem is, is that there are 5,000 of them. So there is always one on the back burner, and we are seeing the smaller chains get through the carbon filtration, and that is going to be our problem. So now it is me, as an advocate, I am questioning: Did we do the right thing about PFOA? Should we have had them stop using it, or should we continue to have them use that? Because we don't know what we are getting next. At least we have the science on what PFOA was. We don't know what is going to happen like in the Gen X situation. You know, there is science now that is ruling out, but there is a chemical behind Gen X, too.

So we have these years and years, and we are going to continue to fall behind with the next chemical. So you are making a deal with the devil, I guess, right? You have to choose one or the other because these products are in, these chemicals are in everything that we use. We are never going to be able to completely eliminate them.

We need to figure out how to stop them from getting into the air, getting into the ground. Why are we not talking about the sources they are coming from? We are talking about pulling them out of the water after they get there. Why are we not concentrating more

about how they get there? They came out of the stacks in Hoosick Falls. We should have stopped it from coming out of the stacks, you know. There are spray booths in painting, right, that you prevent the aerosol from getting out into the air. Why are we not doing that with these chemicals? It is just common sense, I think. We are overcomplicating it, and we are causing more years and years of research that we don't need, that is already there. It is a frustrating process.

Mr. DELGADO. Well, I appreciate you saying all of that. And I think it speaks to the fact that, more than anything, the lack of urgency, the lack of prioritization. People can't choose, as you so eloquently put it, to drink water. It is the lifeline. It is essential to our existence. There is no way around that fact. If there is anything the public should be afforded is a Government that promotes its welfare, that protects its welfare. And we need to draw a line in the sand on some of these matters and not make them partisan. Some things aren't partisan when it comes to life.

And so I really appreciate what you said. I appreciate your advocacy. And I encourage you, despite the difficulties that lie ahead, despite the cynicism that can certainly settle in at times, to keep fighting and to know that there are folks here that are in this fight with you.

Thank you.

I ask unanimous consent that the record of today's hearing remain open until such time as our witnesses have provided answers to any questions that may be submitted to them in writing.

No objection.

I ask unanimous consent that the record remain open for 15 days for any additional comments and information submitted by Members or witnesses to be included in the record of today's hearing.

Without objection, so ordered.

I would like to thank our witnesses again for their testimony today. If no other Members have anything to add, the committee stands adjourned.

[Whereupon, at 1:49 p.m., the subcommittee was adjourned.]

SUBMISSIONS FOR THE RECORD

Prepared Statement of Hon. Sam Graves, a Representative in Congress from the State of Missouri, and Ranking Member, Committee on Transportation and Infrastructure

As a sixth-generation farmer, I know firsthand the importance of being good stewards of the land and water. Clean and reliable water is essential to protecting the public health, growing local economies, and conserving the environment.

To that end, EPA plays an important role in supporting and protecting this vital resource, but it should do so in partnership with farmers and other stakeholders. This collaboration will yield the best results.

For example, just last week, I was able to speak at an event with Administrator Wheeler and Assistant Secretary James on the repeal of the Obama WOTUS rule.

The repeal of the Obama WOTUS rule was welcomed by farmers, small business owners, landowners, and many others—not only in my district in North Missouri, but all over the country—because of that rule’s massive federal overreach.

I am thrilled that this Administration listened to those farmers and small businesses about the extreme challenges this rule would have imposed and decided to get rid of it. I look forward to learning about the other initiatives this Administration is undertaking, in partnership with stakeholders, to protect our water resources in a more pragmatic way.

Prepared Statement of Hon. Eddie Bernice Johnson, a Representative in Congress from the State of Texas

Thank you, Madam Chairwoman.

It is with great appreciation that I thank the Chairwoman for holding this hearing today, as it allows us to hear from an EPA witness for the first time about the Clean Water Act since this Administration came into office in 2017.

For two generations we have relied on the EPA to be the Federal Agency to protect the public and the environment from the pollution that comes with being an industrial society. And it is vitally important that EPA keep working to protect public health and improve our environment.

Throughout my career I have fought to ensure that future generations have access to clean water. My work on the House Science, Space and Technology Committee includes introducing clean water research bills to help focus the Federal Government’s research efforts on clean water, a critical natural resource that we too often take for granted.

Contrary to the spirit of the law and EPA’s mission, this Administration is attempting to rollback the progress made in maintaining clean water by yielding to industry demands in increasing permitted levels of pollutants in our water. History has shown that low-income communities disproportionately suffer the most with higher level of pollutants in their drinking water.

For instance, a clear definition of what is considered “waters of the U.S.” is important to protecting public health and the environment. This Administration’s repeal of the 2015 Clean Water Rule and its plans on replacing it with a narrower definition of waters of the U.S., would lead to less bodies of waters being protected under the Clean Water Act. With fewer bodies of water protected, it could endanger sources of clean drinking water for millions of Americans as well as wetlands that support hunting and fishing. By allowing certain rain-fed or seasonal streams to fall outside the jurisdiction of the Clean Water Act, we could potentially adversely impact 117 million Americans whose public drinking water supplies rely on these sources.

Congress' oversight role is critical in finding out what EPA is doing and to get a full accounting of their actions. We are entrusted by the American people to ensure that EPA is working in a way that is beneficial to the public rather than yielding to the political pressure of industry polluters.

I look forward to hearing the testimony from the EPA witness to understand why they are undermining the Clean Water Act. I am also eager to hear from the other witnesses today to learn how EPA's actions are impacting their ability to have clean and safe drinking water.

Thank you. I yield back.

Letter of September 16, 2019, from Neil L. Bradley, Executive Vice President and Chief Policy Officer, U.S. Chamber of Commerce, Submitted for the Record by Hon. Bruce Westerman

SEPTEMBER 16, 2019.

Hon. GRACE NAPOLITANO,
Chairwoman,
Subcommittee on Water Resources and the Environment, U.S. House of Representatives, Washington, DC.

Hon. BRUCE WESTERMAN,
Ranking Member,
Subcommittee on Water Resources and the Environment, U.S. House of Representatives, Washington, DC.

DEAR CHAIRWOMAN NAPOLITANO AND RANKING MEMBER WESTERMAN:

The U.S. Chamber of Commerce appreciates the Committee holding the hearing, "The Administration's Priorities and Policy Initiatives Under the Clean Water Act." The Chamber is committed to proactively working with legislators, regulators, and stakeholders alike to ensure that the Administration implements and enforces all relevant policies and procedures in accordance with Congress's intent when enacting the Clean Water Act ("CWA"), as this is a key priority and essential to building economic prosperity and growth for our member companies and the communities where they operate.

Today's hearing addresses a number of issues important to the business community, and is aligned with the Chamber's Business Task Force on Water Policy principles. When it comes to water policy, as detailed in the attached document, the Chamber supports increased and sustained funding and expanded opportunities for financing, regulatory flexibility and efficiency of service, resilience, small communities and small business needs, and technology innovation.

Notably, the Chamber applauds the Environmental Protection Agency ("EPA") and U.S. Army Corps of Engineers for their recent actions to repeal the 2015 "Waters of the United States" ("WOTUS") rule and recodify the preexisting regulations. The 2015 WOTUS rule significantly expanded the definition of navigable waters well beyond what Congress intended, creating great uncertainty for states, local governments, businesses, and farmers. We look forward to working with those Agencies as they promulgate a new rule that properly defines WOTUS in a manner that provides certainty and clarity for stakeholders and builds upon existing standards to improve water quality.

The Chamber also supports EPA's recent actions to develop a clear and predictable water quality certification process under section 401 of the CWA that comports with Congressional intent and does not unnecessarily delay the permitting process for interstate infrastructure projects, as well as its guidance clarifying that releases from industrial activities that reach WOTUS via groundwater are otherwise not regulated under the CWA's point source program.

Lastly, the appropriate regulation of per- and polyfluoroalkyl substances ("PFAS") is extremely important to the Chamber and its members, and the Chamber supports EPA's "PFAS Action Plan," released earlier this year. The PFAS Action Plan is the most comprehensive cross-agency plan to address an emerging chemical of concern that EPA has ever released and provides the clear roadmap needed to address this important issue.

With that said, it is imperative that any Congressional action taken to address the regulation of PFAS does not circumvent existing regulatory authorities and regulate PFAS as a single class. EPA must retain its traditional authority to assess the array of PFAS and ascertain which among them should be regulated through ongoing Agency efforts.

Sincerely,

NEIL L. BRADLEY.

cc: Members of the Subcommittee on Water Resources and the Environment

“Policy Priorities and Proposals Summary,” Business Task Force on Water Policy, U.S. Chamber of Commerce, Submitted for the Record by Hon. Bruce Westerman

BUSINESS TASK FORCE ON WATER POLICY

POLICY PRIORITIES AND PROPOSALS SUMMARY

Water is among our most precious resources, one that is essential to health and human life. Businesses and communities depend on it to drive the American economy, and significant investments in water infrastructure are needed in the U.S. and around the world. While many organizations have worked over the years to advance water infrastructure investments, an integrated coalition led by businesses and other key water and finance sector partners is required.

The U.S. Chamber of Commerce launched the Business Task Force on Water Policy to catalyze support for water infrastructure investments in the U.S. and elevate water in the national policy discussion. Business as usual and relying on government funding alone will not solve this fundamental challenge.

PRINCIPLES

Below are policy principles that will meet American businesses’ water and wastewater infrastructure needs for generations to come and make the U.S. a leader in bringing clean water and sanitation to the world:

- *Increased and sustained funding and expanded opportunities for financing*—promoting increased federal, state, and local investments in infrastructure modernization and mobilizing private capital.
- *Regulatory flexibility and efficiency of service*—proposing commonsense, flexible policies to improve the enabling environment for businesses to continue creative and innovative approaches.
- *Resilience*—facilitating resilient infrastructure, including water and watershed management and flood control, through funding and policies to support predisaster mitigation and engaging experts and stakeholders.
- *Small communities and small business needs*—providing investments and policy solutions specifically focused on the needs of the agricultural sector, small communities, and small businesses, including improving access to water and sanitation in rural areas.
- *Technology innovation*—increasing innovation and its adoption by reducing barriers to implementation, promoting effective utility management, and helping communities achieve the scale and expertise necessary to deploy technology through additional technical assistance and cooperative arrangements. This effort also supports funding the creation of a National Water Infrastructure Test Bed Network (TBN), establishing a national program for collaborating and sharing best practices, and promoting exports of water technologies, products, and services.

These principles underscore the task force’s interest in the One Water approach¹ to integrate and optimize the use of our finite drinking water, wastewater, and stormwater resources to create a more resilient water future.

PRIORITIES AND PROPOSALS

Following are the business community’s 2019 water infrastructure and management priorities:

- *Provide appropriations to maximize federal water infrastructure investments.* While AWIA included a solid beginning to meet water infrastructure needs na-

¹The One Water approach envisions managing all water in an integrated, inclusive, and sustainable manner to secure a bright, prosperous future for our children, our communities, and our country. One Water is a transformative approach to how we view, value, and manage water—from local communities to states, regions, and the national scale. http://uswateralliance.org/sites/uswateralliance.org/files/publications/One%20Water%20for%20America%20Policy%20Framework%20Executive%20Summary__0.pdf

tionwide, full funding for the SRFs, WIFIA, and the 32 new water management programs is a top priority.

- *Expand opportunities for partnerships.* Congress should harness the authorized, but underutilized WIFIA program and increase its size to support more loan guarantees. To leverage the beneficial impacts of this program, preference should be given to those projects that encompass cooperative arrangements among utilities or that bring private investment to complement the financing of the project. Policies should encourage cooperative arrangements, including those that will more efficiently marshal scarce resources and mobilize private capital. Specific steps follow:
 - Expand WIFIA and provide associated funding for USACE, USBR, and other water-focused agencies as appropriate.
 - Help states create appropriate legal frameworks for deals to occur and replicate.
 - Prioritize regional projects and project bundling for SRF and WIFIA funding.
 - Provide technical assistance to small and rural systems, focusing on developing bankable projects of interest to private investors.
 - Remove barriers to public-private partnerships (P3s):
 - Provide eligibility for private utilities for SRF funding.
 - Remove constraints on asset sales/leasing, such as bond defeasance penalties.
 - Offer legislative safe harbor for acquirer of systems that are out of compliance with regulations.
- *Provide off-site, alternative compliance stormwater solutions.* EPA should provide flexibility for companies to provide off-site stormwater management solutions, including green infrastructure, water quality trading, a stormwater bank, and water reuse. Green infrastructure should be made an explicit eligible activity under Land and Water Conservation Fund programs. Outcomes-based financing should be considered to promote private sector investment and leverage federal funding in green infrastructure or other relevant solutions.
- *Promote water reuse and recycling and remove outmoded barriers to its use.* EPA should eliminate the classification of Advanced Treated Water as “a discharge of pollutants” under the Clean Water Act and regulate it under the Safe Drinking Water Act.
- *Support full funding for the WaterSense program.* Congress should fund this effort promoting water conservation technologies and products and incentivizing consumer adoption.
- *Remove barriers to U.S. government collaboration on water data and resilience.* U.S. government science agencies (e.g., EPA, FEMA, NOAA, NSF, USACE, and USGS) should have specific authority to work together and share water data and information perhaps modeled after the National Drought Resilience Partnership and the new water subcommittee to meet their mission requirements.
- The task force also proposes additional legislative or administrative authority to ensure that appropriate resilience and national security agencies are encouraged to team up to implement resilient water infrastructure and establish a framework for collaboration and deployment of innovative resilient technologies:
 - Develop a water data-sharing platform to improve accessibility and usability for federal, regional, state, and local decision makers.
 - Utilize evidence-based decision making to ensure that water solutions account for economic impact.
 - Address governance of data collection, quality, storage, exchange, analysis, and use, including funding and cost recovery options, to clarify data ownership and the responsibilities of relevant government agencies.
- Promote the development of cybersecurity technologies to protect critical water infrastructure from cyberattacks.
- The task force calls on Congress to establish a federal pilot program to enhance the mapping of urban flooding and associated property damage, including the potential modeling of the impact of extreme weather events and the availability of such mapped data for homeowners, businesses, and communities to understand and mitigate the risks of increasing urban flooding.
- *Support development and funding for a TBN.* Congress should authorize and fund the creation of a national water infrastructure TBN, to promote greater uptake of 21st century water and wastewater technologies. The TBN would bring together the broader water community (e.g., regulators, operators, and consulting engineers) and engage them in piloting and demonstration efforts to

raise confidence in and verify performance for innovative technologies. The TBN could also serve as a national clearinghouse for technology that meets or serves as best available technology for meeting regulatory requirements.

- *Provide \$20 million in funding for the National Priorities Water Research Grant Program.* The task force suggests increased funding for this program, with its cost share requirements, to address priority drinking water, wastewater, water reuse, and stormwater research needs.
- *Encourage NIST's Water Quality and Efficiency Research.* Congress should recommend that NIST support additional research to update the current body of decades-old data regarding on-site plumbing design. Consideration should be given to gathering and assessing new technical information to ensure that systems are designed, installed, and operated to maximize water efficiency, water quality, and energy efficiency.
- *Provide additional flexibility for the environmental trade working group to focus on water.* The administration should utilize the existing ETWG mechanism to promote export opportunities for U.S. water technology innovation by boosting U.S. government commercial diplomacy to expand the export of U.S. technologies and expertise, such as reverse trade missions and engagement with U.S. embassies and missions in key markets.
- *Open international markets to water-related U.S. technologies and approaches.* The task force supports funding for the Department of Commerce's Market Development Cooperator Program (MDCP). It is an important tool in achieving the vision of the U.S. government Global Water Strategy, addressing trade barriers, encouraging innovation, increasing exports, and ensuring global competitiveness.
- *Support funding and expansion of current water and wastewater apprenticeship and other workforce development initiatives.* The SDWA includes several set-asides related to the certification and training of water operators. Congress should reinforce that authority by tasking EPA and the Department of Labor to fund and expand water-focused career paths and apprenticeship programs.
- *Encourage the use of effective utility management, including full-cost accounting.* Consideration should be given to proposals for federal funding that include a utility's full cost of operation, such as those costs associated with systems leaks, as essential first steps in making the cost-benefit case for the deployment of new technologies and funding.
- *Ensure the equal treatment of water efficiency rebates under tax law.* Rebates from energy utilities are tax-exempt, but not rebates from water utilities. With the rapid growth of water-saving programs, millions of Americans face an unexpected tax bill once these rebates are reported to the IRS.
- *Preserve local control in the design of water and wastewater systems.* Local utilities and their engineers are best situated to determine the design and materials appropriate for their needs, with appropriate oversight processes and guidance when needed. The ultimate decision on such matters should be left to their professional judgment.

For more information and to join this important effort, contact Chuck Chaitovitz, vice president for Environmental Affairs and Sustainability.

Letter of September 16, 2019, from James W. Tobin III, Executive Vice President and Chief Lobbyist, Government Affairs and Communications Group, National Association of Home Builders, Submitted for the Record by Hon. Bruce Westerman

SEPTEMBER 16, 2019.

Hon. GRACE NAPOLITANO,
Chairwoman,
House Subcommittee on Water Resources and Environment, Washington, DC.
 Hon. BRUCE WESTERMAN,
Ranking Member,
House Subcommittee on Water Resources and Environment, Washington, DC.

DEAR CHAIRWOMAN NAPOLITANO AND RANKING MEMBER WESTERMAN:

On behalf of the more than 140,000 members of the National Association of Home Builders (NAHB), I am writing to express our support for the Administration's commitment to creating a fair and balanced Waters of the United States (WOTUS) definition. We are pleased that the House Water Resources Subcommittee is taking the

time to hold a hearing on this and other very important Clean Water Act (CWA) issues.

Our nation's home builders construct neighborhoods, create jobs, strengthen economic growth, and help create thriving communities while maintaining, protecting, and enhancing our natural resources. Under the CWA, home builders must often obtain and comply with section 402 storm water and 404 wetland permits to complete their projects. What is most important to these compliance efforts is a permitting process that is consistent, predictable, timely, and focused on protecting true aquatic resources.

In 2015, the Environmental Protection Agency and the Army Corps (the agencies) finalized a regulation to redefine the scope of waters protected under the CWA. The agencies added new terms, definitions, and interpretations of federal authority over private property that are more subjective and provided the agencies with greater discretionary latitude to expand their regulatory authority. The 2015 rule fell well short of providing the clarity and certainty sought by the regulated community. It would increase federal regulatory power over private property, lead to increased litigation and permit requirements, and lengthy delays for any business trying to comply. It is so convoluted that even professional wetland consultants with decades of experience would struggle to determine what is jurisdictional. Thankfully, the Trump Administration recently repealed this 2015 rule and is working to provide a practicable and transparent permitting system rather than expanding their authority over private property.

Meanwhile, the agencies are working on a new Clean Water rule which, if finalized, would put in place a WOTUS definition that more faithfully implements the CWA, draws clearer jurisdictional lines, and preserves states' authority over local land and water use.

Unlike the 2015 rule, the new proposal recognizes that waters which do not fall under the WOTUS definition are nevertheless protected by robust state and local laws, as well as numerous other federal statutes such as the Safe Drinking Water Act. The new proposal also adheres to key principles articulated by the Supreme Court regarding the limits of the CWA's reach while exerting federal jurisdiction over features with the strongest influence on major downstream waterbodies. This new proposal strikes a necessary balance between environmental protection and regulatory certainty and will give the public long overdue clarity.

We commend the subcommittee for providing this opportunity to discuss such important issues. We believe that this rule will go a long way towards improving the way we do business and making the homes we build more affordable. Thank you for giving consideration to our thoughts.

Sincerely,

JAMES W. TOBIN III.

Statement of the American Forest & Paper Association, Submitted for the Record by Hon. Bruce Westerman

The American Forest & Paper Association (AF&PA) appreciates the opportunity to submit this statement for the record for the hearing entitled "The Administration's Priorities and Policy Initiatives Under the Clean Water Act." AF&PA serves to advance a sustainable U.S. pulp, paper, packaging, tissue and wood products manufacturing industry through fact-based public policy and marketplace advocacy. AF&PA member companies make products essential for everyday life from renewable and recyclable resources and are committed to continuous improvement through the industry's sustainability initiative—Better Practices, Better Planet 2020. The forest products industry accounts for approximately four percent of the total U.S. manufacturing GDP, manufactures nearly \$300 billion in products annually and employs approximately 950,000 men and women. The industry meets a payroll of approximately \$55 billion annually and is among the top 10 manufacturing sector employers in 45 states.

AF&PA's sustainability initiative—Better Practices, Better Planet 2020—comprises one of the most extensive quantifiable sets of sustainability goals for a U.S. manufacturing industry and is the latest example of our members' proactive commitment to the long-term success of our industry, our communities and our environment. We have long been responsible stewards of our planet's resources. We are proud to report that our members have already achieved the greenhouse gas reduction and workplace safety goals. Our member companies have also collectively made significant progress in each of the following goals: increasing paper recovery for re-

cycling; improving energy efficiency; promoting sustainable forestry practices; and reducing water use.

AF&PA generally supports the actions taken by the Trump Administration's EPA Office of Water that we expect to be the subject of the hearing. Under this administration, the agency has recognized that Cooperative Federalism is the foundation of the Clean Water Act (CWA). EPA has reviewed and is in the process of reversing several rules issued by the previous administration that did not respect that states have the primary responsibility to implement the CWA, or that inappropriately expanded federal jurisdiction. Two such rules are discussed below.

We also support EPA's focus on market-based measures to promote water quality. For example, EPA recently issued a request for comment on its updated water quality trading policy. The agency recognized that the previous policy was inflexible and that it was inhibiting potential trades. The new policy should allow for more frequent and cost-effective trades to occur.

HUMAN HEALTH WATER QUALITY CRITERIA

Under the CWA, states have the primary responsibility to develop water quality standards. States begin that process with EPA's Human Health Water Quality Criteria (HHWQC) but can use other criteria as long as they are adequately protective of human health. States also have the discretion to set the exposure variables used to calculate the HHWQC.

During the prior Administration, EPA made several changes to its HHWQC policy that resulted in unnecessarily stringent HHWQC and imposed federal criteria on Washington and Maine when those states failed to accede to EPA's policy changes. The agency also threatened to reject Idaho's criteria on a similar basis. These federal criteria could cost municipal and industrial dischargers billions of dollars without the certainty that they can be achieved. Many of these industrial facilities provide high-paying manufacturing jobs in rural communities that cannot afford to lose them.

In the last two years, the agency has reconsidered those policies. Of most relevance to the Committee hearing, EPA has initiated a rulemaking to withdraw the federal rule it imposed on Washington. We support EPA completing that rulemaking as expeditiously as possible, so that the state standards EPA approved in May of this year become the applicable standards for CWA purposes in the state.

WATERS OF THE U.S. (WOTUS)

AF&PA supports EPA's and the Army Corps of Engineers (the Agencies) rescission of the 2015 WOTUS Rule. Its provisions were, in various respects, beyond the Agencies' statutory authority, inconsistent with Supreme Court precedent, and contrary to the goals of the CWA, including the Act's goal to "recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution." 33 U.S.C. § 1251(b). The Agencies' failure to seek input from state and local entities during the development of the 2015 Rule contributed to the rule's legal flaws and lack of clarity.

The 2015 Rule improperly reads the word "navigable" out of the statute, and as more than one court has noted, implicates significant constitutional concerns about the appropriate scope of federal authority. Furthermore, nothing in the record created during the 2015 rulemaking process dictated the adoption of such a sweeping definition of "waters of the United States."

Accordingly, we support the decision to rescind the 2015 Rule and recodify the regulations in place immediately prior so that the Code of Federal Regulations accurately reflects the applicable regulations. We also look forward to a final "Step 2" replacement rule, as we believe the Agencies' proposed Step 2 was much more aligned with the Constitution, the CWA, and caselaw.

PER- AND POLYFLUOROALKYL SUBSTANCES (PFAS)

PFAS are a large and diverse class of chemicals with widely varying uses and properties. AF&PA is opposed to any legislation or regulation that does not distinguish between short and long-chain PFAS, suggesting that all short-chain PFAS have similar potential for harm. We oppose any legislation or regulation that would 1) require the EPA to either directly or indirectly designate all PFAS as hazardous substances under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) or 2) require the EPA to add all PFAS to the list of toxic pollutants regulated by the Clean Water Act and establish effluent and pretreatment standards, which could trigger "back door" CERCLA designations.

We thank the Committee for their consideration on these important matters and stand ready to assist you and offer our expertise as a resource as you shape policy on this important issue.

For more information, please contact: Elizabeth Bartheld, Vice President, Government and Industry Affairs, American Forest & Paper Association, 1101 K Street, NW Suite 700, Washington, DC 20005.

Letters from the U.S. Environmental Protection Agency in Response to Letters from the Committee on Transportation and Infrastructure, Submitted for the Record by Hon. Grace F. Napolitano

LETTER 1 FROM U.S. ENVIRONMENTAL PROTECTION AGENCY, OFFICE OF WATER

NOVEMBER 2, 2017.

Hon. PETER A. DEFAZIO,
U.S. House of Representatives,
Washington, DC.

DEAR CONGRESSMAN DEFAZIO:

Thank you for your August 18, 2017, letter to the U.S. Environmental Protection Agency providing comments on the proposed rule published for public comment by the EPA and the Department of the Army. The rule proposes to rescind the 2015 Clean Water Rule and re-codify the agencies' regulatory text that existed prior to the 2015 regulation defining "waters of the United States" or WOTUS.

The agencies' proposed rule initiates the first step in a comprehensive, two-step process intended to review and revise the definition of "waters of the United States" consistent with the February 28 2017, Executive Order on "Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the 'Waters of the United States' Rule." The focus of the step 1 proposal is to withdraw the 2015 Clean Water Rule and replace it with regulations that the agencies have implemented since 1986 and existing guidance. This action will reestablish procedures for identifying waters covered by the Clean Water Act that have been in place for over 30 years and will provide continuity and certainty for regulated entities, the States, agency staff, and the public. In a second step, the agencies will pursue notice-and-comment rule-making as part of a substantive reevaluation of the definition of "waters of the United States."

We appreciate the comments you provided on the EPA-Army proposed rule. We will include your letter in the official docket for the proposed rule, identified by Docket ID EPA-HQ-OW-2017-0203 at <http://www.regulations.gov>. We will carefully consider your comments and all comments received on the proposed rule when deciding what changes to make to the final rule.

Again, thank you for your letter. If you have further questions, please contact me or your staff may contact Denis Borum in the EPA's Office of Congressional and Intergovernmental Relations.

Sincerely,

MICHAEL H. SHAPIRO,
Acting Assistant Administrator.

LETTER 2 FROM U.S. ENVIRONMENTAL PROTECTION AGENCY, OFFICE OF WATER

SEPTEMBER 12, 2018.

Hon. PETER DEFAZIO,
Ranking Member,
Committee on Transportation and Environment, House of Representatives, Wash-
ington, DC.

DEAR CONGRESSMAN DEFAZIO:

Thank you for your April 24, 2018, letter inquiring about a March 30, 2018, revision to an Environmental Protection Agency internal delegation regarding Clean Water Act ("CWA") section 404 jurisdictional determinations ("JDs"). We appreciate your request for clarification and the opportunity to address any confusion on the issue.

As context for the internal delegation modification, the EPA has "the final administrative responsibility for construing the term 'navigable waters'" under the CWA for all CWA programs, including section 404 (Civiletti Memorandum, 43 Op. Att'y Gen. 197 (1979)). In the section 404 context, however, the Army Corps of Engineers

(“Corps”) is the predominant field presence and has responsibility for making most of the JDs under the CWA (approximately 60,000 a year).

In 1989, the EPA and the Corps outlined how they would address questions of jurisdictional scope in the section 404 context where “significant issues or technical difficulties are anticipated or exist” in a Memorandum of Agreement titled “Determination of Geographic Jurisdiction of the Section 404 Program and Application of Exemptions Under Section 404(f) of the Clean Water Act” (“1989 MOA”). The 1989 MOA established a process for specific instances where the EPA, instead of the Corps, would make “the final determination of the geographic jurisdictional scope of waters of the United States for purposes of section 404.” The process involves two steps: (1) designation of a “generic or project-specific situation” as a special case by the EPA and, subsequently, (2) a final determination of the geographical jurisdictional scope for the special case by the EPA.

The special case process has been used only 15 times, with only two special cases designated since 2008 (the most-recent special case was designated in 2015). As of March 30, 2018, there is one special case designated by the EPA awaiting issuance of a final JD. In addition, several other cases that may pose “significant issues or technical difficulties” have been brought to the EPA’s attention, and the Agency is considering whether to designate one or more of those cases as special cases.

To promote national consistency and increase regulatory certainty in the rare instances when a JD poses “significant issues or technical difficulties,” the Administrator updated the EPA’s internal delegation of authority regarding special cases on March 30, 2018. Under the revised internal delegation, the Administrator’s authority to make final determinations of geographic jurisdiction for special cases, which previously had been delegated to the EPA’s Regional Administrators, was retained by the Administrator in order to promote national consistency and better-utilize the national expertise of the EPA’s headquarters personnel. That personnel is currently engaged in a national rulemaking effort regarding the scope of CWA jurisdiction, a topic that remains subject to significant regulatory uncertainty and ongoing litigation. The EPA regional offices will continue to be responsible for the evaluation and development of special cases in coordination with the Administrator’s Office and the Office of Water. This approach provides a clear process for taking regional variation into account while promoting national consistency in the EPA’s decision-making.

It is important to note that the remainder of the delegations under the section 404 program remained entirely unchanged. For example, the Administrator’s authority to designate a special case remained delegated to the Assistant Administrator for Water, which in turn remained redelegated to the Director of the Office of Wetlands, Oceans and Watersheds within the Office of Water.

Again, thank you for your letter. If you have further questions, please contact me or your staff may contact Denis Borum in the EPA’s Office of Congressional and Intergovernmental Relations.

Sincerely,

DAVID P. ROSS,
Assistant Administrator.

LETTER 3 FROM U.S. ENVIRONMENTAL PROTECTION AGENCY, OFFICE OF WATER

NOVEMBER 20, 2018.

Hon. PETER DEFazio,
*Ranking Member,
Committee on Transportation and Infrastructure, U.S. House of Representatives,
Washington, DC.*

DEAR MR. DEFazio:

Thank you for your July 19, 2018 letter to the U.S. Environmental Protection Agency’s (EPA) Acting Administrator Andrew Wheeler regarding the EPA’s Clean Water Act (CWA) Section 404(c) authority and the Pebble gold and copper deposit site in the Bristol Bay region of southwest Alaska. Your letter references the EPA’s June 2018 Memorandum, “Updating the EPA’s Regulations Implementing Clean Water Act section 404(c)” and the ongoing review of Pebble Limited Partnership’s (Pebble’s) Section 404 permit application to the U.S. Army Corps of Engineers (Corps) to develop a mine at the Pebble deposit site. Acting Administrator Wheeler has asked me to respond to you on his behalf.

The June 2018 Memorandum directs the EPA’s Office of Water to develop proposed revisions to the Agency’s section 404(c) regulations that consider multiple changes, including eliminating use of 404(c) either before a section 404 permit application has been submitted to the Corps or state or after the Corps or state has issued a section 404 permit. The EPA is now considering next steps, in accordance

with this Memorandum, to ensure that the Agency is exercising its authority consistent with the principles of due process and in a manner which provides certainty to the regulated community.

With regard to the Pebble gold and copper deposit site in the Bristol Bay region of southwest Alaska, as part of a May 2017 settlement agreement resolving outstanding lawsuits between the EPA and Pebble, the Agency agreed to initiate a process to propose to withdraw the 2014 CWA section 404(c) 2014 Proposed Determination. In the EPA's July 19, 2017, notice proposing to withdraw the Proposed Determination, the Agency solicited public comment on three reasons to support withdrawal:

- First, to provide Pebble with additional time to submit a Section 404 permit application to the Corps.;
- Second, to remove any uncertainty, real or perceived, about Pebble's ability to submit a permit application and have that permit application reviewed.; and
- Third, to allow the factual record regarding any forthcoming permit application to develop.

On January 26, 2018, the EPA issued a notice announcing the Agency's decision not to withdraw the Proposed Determination, leaving the Determination in place pending consideration of any additional information. In suspending the EPA's withdrawal of the Proposed Determination, the Agency considered relevant statutory authority, applicable regulations, and the input the Agency received as part of the tribal and Alaska Native Claims Settlement Act Corporation consultations, the more than one million public comments received, as well as recent developments, including Pebble's submittal of a section 404 permit application.

The EPA remains committed to considering any other information on the potential mine's impact to the region's fisheries and natural resources. The Corps has initiated the National Environmental Protection Policy Act process and begun development of an Environmental Impact Statement (EIS) for the Pebble project. The EPA, at the invitation of the Corps, has agreed to be a cooperating agency in this process and is working with the Corps pursuant to that schedule. In a June 29, 2018 letter, the EPA provided comments to the Corps in response to the Corps' EIS scoping package. The EPA has also provided the Bristol Bay Watershed Assessment to the Corps for their EIS process, which is now posted on the project website.¹

Given the significant public interest on this issue, the EPA will continue to seek input from all stakeholders as the permitting process progresses. Neither the January 2018 decision, nor the previous settlement agreement, guarantees or prejudices a particular outcome in the permitting process or any particular EPA decision-making under the Clean Water Act. Now that Pebble has submitted a permit application, under the terms of the May 2017 settlement agreement, the EPA agreed to provide Pebble until May 2021, unless a final EIS is issued sooner, to advance through the permit review process before the EPA could move to the next step in the section 404(c) review process, if such a decision is made. The steps the EPA has taken demonstrate the Agency's commitment to both the rule of law, fundamental fairness, and upholding the EPA's core mission of environmental stewardship. I can assure you that this commitment will continue through the remainder of the process.

Again, thank you for your letter. If you have further questions, please contact me or your staff may contact Denis Borum of the EPA's Office of Congressional and Intergovernmental Relations.

Sincerely,

D. LEE FORSGREN,
Deputy Assistant Administrator.

cc: Chris Hladick, Regional Administrator, EPA Region 10

[Editor's note: Also submitted for the record and retained in committee files is the same letter addressed to Hon. Tom Carper, Ranking Member, Senate Committee on Environment and Public Works.]

¹For the EPA's Bristol Bay Watershed Assessment, as provided to the Corps, see: <https://www.pebbleprojecteis.com/documents/library>.

LETTER 4 FROM U.S. ENVIRONMENTAL PROTECTION AGENCY, OFFICE OF CONGRESSIONAL
AND INTERGOVERNMENTAL RELATIONS

SEPTEMBER 16, 2019.

Hon. PETER A. DEFazio,
Chairman,
Committee on Transportation and Infrastructure, U.S. House of Representatives,
Washington, DC.

DEAR CHAIRMAN DEFazio:

On behalf of the U.S. Environmental Protection Agency, I am writing in response to your letter dated July 29, 2019, to Administrator Andrew Wheeler, in which you sought information about the Agency's interpretation of Section 401 of the Clean Water Act (CWA).

On August 8, 2019, Administrator Wheeler signed a proposed rule to implement Section 401 of the CWA. The proposed rule, if finalized, would increase the transparency and efficiency of the 401 certification process and promote the timely review of federal permits while continuing to protect the nation's water quality.

Section 401 of the CWA gives states and authorized tribes the authority to assess potential water quality impacts of discharges from federally permitted or licensed activities that may affect navigable waters within their borders. The EPA's existing certification rules have not been updated in nearly 50 years and are inconsistent with the text of CWA Section 401, leading to confusion and unnecessary delays for federally permitted activities, including infrastructure projects.

In April 2019, President Trump issued Executive Order 13886, "Promoting Energy Infrastructure and Economic Growth," and directed the Administration to take appropriate action to promote important energy infrastructure. The EPA was directed to first revise guidance on the CWA Section 401 certification process and then to propose new rules to implement CWA Section 401. The EPA has engaged in formal consultation with state, local, and tribal partners, as well as other federal agencies, to develop this proposed rule. Under the Executive Order, the EPA is directed to finalize this rule by May 2020.

The Agency considered stakeholder input prior to the initiation of and during the formal consultation period, including correspondence from states, tribes, and other entities. The Agency engaged in state and tribal consultation and accepted pre-proposal recommendations in an administrative docket until May 24, 2019. The Agency held two webinars for states, tribes, and their associations on April 17, 2019 and May 8, 2019. The Agency also held two separate webinars for tribes and their associations on May 7, 2019 and May 15, 2019. This stakeholder input, including documents received prior to the opening of the administrative docket and input received at these four webinars, is publicly available (<https://www.regulations.gov/docket?D=EPA-HQ-OW-2018-0855>).

In addition to this pre-proposal docketed correspondence, the Agency received correspondence from states and other entities after the close of the pre-proposal administrative docket. We are enclosing this correspondence for your review. The Agency has placed information on meetings and phone calls with states, tribes, and other entities in the docket for the proposed rulemaking signed on August 8, 2019. These documents are available in the docket for the proposed rule "Updating Regulations on Water Quality Certification" (<https://www.regulations.gov/docket?D=EPA-HQ-OW-2019-0405>). The EPA will continue to accept public comment on the proposed rule for 60 days following the August 22, 2019 publication in the Federal Register, which ends on October 21, 2019. The EPA also held half-day state and tribal listening sessions on September 4–5, 2019 and a public hearing on September 5–6, 2019 in Salt Lake City, Utah. A second series of listening sessions for states and tribes is scheduled for September 16, 2019 in Chicago, Illinois.

In addition to requesting information concerning the Agency's interpretation of CWA Section 401, the Committee's letter requests information and data on state certifications over the past 10 years. The Agency does not have the requested information because there is no national database that contains information from all federal permitting agencies. The Agency does not collect information on the number of certification requests denied or granted with conditions, project types, or the time it takes federal agencies to complete the certification process. However, the proposed rulemaking does include information on the average annual number and type of permits and licenses that require water quality certification. The proposed rulemaking specifically solicits information that may be available to more fully and accurately evaluate such parameters.

The Agency provides an in-depth explanation of the statutory basis for its proposal for what constitutes "appropriate state law" in the preamble to the proposed

rule “Updating Regulations on Water Quality Certification.” Additional information can be found on the EPA’s website (<https://www.epa.gov/cwa-401/proposed-rule-updating-regulations-water-quality-certification-0>).

The EPA recognizes the importance of the Committee’s need to obtain information necessary to perform its legitimate oversight functions and is committed to continuing to work with your staff on how best to accommodate the Committee’s interests. If you have further questions, you may contact me, or your staff may contact Duncan Braid in the EPA’s Office of Congressional and Intergovernmental Relations.

Sincerely,

JOSEPH A. BRAZAUSKAS,
Acting Associate Administrator.

Enclosure

cc: The Honorable Sam Graves, Ranking Member

LETTER 5 FROM U.S. ENVIRONMENTAL PROTECTION AGENCY, OFFICE OF CONGRESSIONAL
AND INTERGOVERNMENTAL RELATIONS

SEPTEMBER 16, 2019.

Hon. PETER A. DEFazio,
Chairman,
Committee on Transportation and Infrastructure, U.S. House of Representatives,
Washington, DC.

DEAR CHAIRMAN DEFazio:

On behalf of the U.S. Environmental Protection Agency, I am writing in response to your letter dated July 29, 2019, to Administrator Andrew Wheeler, in which you sought information about the Agency’s Interpretive Statement clarifying the application of the Clean Water Act (CWA) permitting requirements to releases of pollutants to groundwater.

On April 15, 2019, the EPA issued an “Interpretive Statement on Application of the Clean Water Act National Pollutant Discharge Elimination System Program to Releases of Pollutants From a Point Source to Groundwater,” detailing the Agency’s interpretation of the CWA’s National Pollutant Discharge System (NPDES) permit program’s applicability to releases of pollutants from a point source to groundwater. The EPA concluded that the CWA is best read as excluding all releases of pollutants from a point source to groundwater from NPDES program coverage and liability under Section 301 of the CWA, regardless of a hydrologic connection between the groundwater and a jurisdictional surface water. This Interpretive Statement is a result of a comprehensive analysis of the CWA’s text, structure, legislative history, and judicial decisions, and marks the first instance in which the Agency has issued guidance focused exclusively on whether NPDES permits are required for releases of pollutants to groundwater that reach jurisdictional surface water.

The Agency’s mixed record of prior statements, a split in the federal circuit courts, and recent judicial decisions resulted in a confusing legal landscape in which permitting and enforcement agencies, potentially regulated parties, and the public lacked clarity on when the NPDES permitting requirement set forth in sections 301 and 402 of the CWA may be triggered by releases of pollutants to groundwater. The absence of a dedicated EPA statement on the best reading of the CWA has added to confusion in the courts and uncertainty for EPA regional offices and states implementing the NPDES program, regulated entities, and the public. Through the Interpretive Statement, the EPA has provided clear guidance that balances the statute, case law, and the need for clarity on the scope of the CWA NPDES coverage.

In February 2018, the Agency sought public comment on whether the NPDES permit program applies to releases of pollutants to groundwater and whether the Agency should revise or clarify its position on this issue. Informed by those comments and based on a holistic analysis of the statute, its text, structure, and legislative history, the Agency concluded that the best, if not the only, reading of the CWA is that Congress intentionally chose to exclude all releases of pollutants to groundwater from the NPDES program, even where pollutants subsequently travel to jurisdictional surface waters via groundwater. As the Agency detailed in the Interpretive Statement, Congress purposely structured the CWA to give states the responsibility to regulate such releases under state authorities. Further, other federal statutes contain explicit provisions that address the release of pollutants into groundwater and provide federal authority to address those releases. Thus in accordance with Congress’s intent, state and other federal authority is collectively available to pro-

vide protection for ground and surface water quality in those instances where direct CWA permitting authority is not applicable.

The Committee's requests related to state- or EPA-issued CWA permits are extensive and would require the EPA to generate information and records that do not already exist or are not currently in our possession. Additionally, some of the information requested would require extensive collaboration across the Agency, states, and other permitting authorities and the EPA is uncertain whether these sources could clearly identify the requested information. Due to the nature of obtaining coverage under a general NPDES permit, the EPA has only specific facility information as required to be submitted in a Notice of Intent for Coverage. While the EPA does have information from specific facilities in the applications submitted for individual NPDES permits, the application forms are primarily focused on information about the effluent. Additionally, the Agency expects that the same aforementioned considerations noted for EPA-issued permits would apply to most state programs regarding information about general and individual NPDES permits and discharges via direct hydrologic connection.

Regarding existing pollutant releases not covered by a state- or EPA-issued CWA permits or the variety of types of releases described in the Committee's letter, similar issues exist as described above—the requests are extensive and would require the EPA to generate information and records that do not already exist. For example, as it pertains to non-NPDES permit actions, extensive collaboration across the Agency, states, and other permitting authorities would be required, and the EPA is uncertain whether these sources could clearly identify the requested information.

The EPA recognizes the importance of the Committee's need to obtain information necessary to perform its legitimate oversight functions and is committed to continuing to work with your staff on how best to accommodate the Committee's interests. If you have further questions, you may contact me, or your staff may contact Duncan Braid in the EPA's Office of Congressional and Intergovernmental Relations.

Sincerely,

JOSEPH A. BRAZAUSKAS,
Acting Associate Administrator.

cc: The Honorable Sam Graves, Ranking Member

LETTER 6 FROM U.S. ENVIRONMENTAL PROTECTION AGENCY, OFFICE OF CONGRESSIONAL
AND INTERGOVERNMENTAL RELATIONS

SEPTEMBER 16, 2019.

Hon. PETER A. DEFazio,
Chairman,
Committee on Transportation and Infrastructure, U.S. House of Representatives,
Washington, DC.

DEAR CHAIRMAN DEFazio:

On behalf of the U.S. Environmental Protection Agency, I am writing in response to your letter dated July 29, 2019, to Administrator Andrew Wheeler, in which you sought information about the current rulemaking addressing the management and treatment of peak flows at publicly owned treatment works (POTWs) serving separate sanitary sewer systems.

In April 2018, the Agency announced a new rulemaking effort aimed at clarifying issues associated with the management and treatment of peak flows during wet weather events at POTWs with separate sanitary sewer systems. In this rulemaking, the EPA will be considering changes to the National Pollutant Discharge Elimination System (NPDES) regulations to establish a permitting framework for evaluating management options to provide POTWs serving separate sanitary sewer systems flexibility in how they manage and treat peak flows. The EPA has not yet issued a proposal, but any proposed changes would seek to provide a consistent national approach to permitting peak flows that ensures all applicable permit discharge limitations and requirements are met during peak flow events. At the same time, such an approach should allow for both efficient treatment plant operation and protection of the public from potential adverse health effects of inadequately treated wastewater.

The Agency recognizes the significant expertise that exists among states, tribes, POTWs and municipal officials, private sector engineering firms, public health agencies, and the public related to these issues. The EPA has undertaken an extensive stakeholder engagement effort to encourage individual input for developing a draft

rule that will support a consistent approach to permitting, allow for innovative flexibility, and protect human health and the environment.

In advance of issuing any proposed changes, the EPA solicited public comment from August 31, 2018 to October 31, 2018 and held public listening sessions on October 16, October 24, and October 30, 2018. The EPA will continue to consider all these perspectives when developing a proposed rule to address permitting requirements for the management of peak flows at POTWs with separate sanitary sewer systems. Enclosed is a spreadsheet listing the organizations and stakeholders with whom EPA staff have discussed this rulemaking effort. The EPA expects to release a notice of proposed rulemaking and request for public comment by November 2019 and to take final action on the proposal by July 2020. The docket, accompanying the proposed rulemaking, will contain the information underpinning the Agency's proposed action and will be available for viewing on [regulations.gov](https://www.regulations.gov).

The EPA does not possess data on the total number of facilities that blend or use side-stream treatment, frequency of blending, or volume of blended effluent discharged for the national universe of POTWs. The EPA has limited data on the cost and treatment effectiveness for any installed side-stream technologies as well as pathogen levels in blended wastewater discharges to compare to discharges of wastewater that has received full biological treatment.

Regarding the number of POTWs whose NPDES permits include acute (short-term) limits on pathogens, the EPA used final effluent Discharge Monitoring Report (DMR) data to identify limits for pathogens and pathogen indicators in 6,597 NPDES permits for POTWs serving separate sanitary sewer systems. DMRs do not identify effluent limits as short- or long-term or acute or chronic. Rather, the limits are categorized based on whether they represent a maximum (e.g., daily maximum, instantaneous maximum) or average (e.g., weekly average, annual average, monthly average) condition. The EPA found that 3,492 permits contained year-round maximum limits and 5,380 contained year-round average limits; 431 permits contained seasonal maximum limits and 560 contained seasonal average limits.

The EPA analyzed the POTWs serving separate sanitary sewer systems that discharge into a coastal recreation water or discharge up to 5 miles upstream of a coastal recreation water (as defined in Section 502 of the Clean Water Act) that had a beach advisory or closing at least once in 2018. There were 51 POTWs that discharge into or up to 5 miles upstream of a coastal recreation water that had a beach advisory or closing at 56 beaches at least once in 2018. The EPA analyzed the number and location of POTWs serving separate sanitary sewer systems located in low-income or minority communities with one or more effluent exceedances in 2018 of at least one existing NPDES permit limit. Of the 4,082 POTWs that exceed one or more permit limits in 2018, 945 were located in either low-income or minority communities.

The Committee's request is related to an ongoing regulatory action. Given its current status, we are particularly concerned about protecting the integrity of ongoing Agency pre-decisional deliberations. Some of the documents you seek may well reflect internal advice, recommendations, and analysis by Agency staff and attorneys about the proposed rule. These internal and pre-decisional deliberations are likely to be the subject of additional discussions and analysis among Agency staff and senior policymakers during development of this proposal and subsequent finalization or any regulatory action. It is critical for Agency policymakers to obtain the broadest range of advice and recommendations from Agency staff in order to properly fill its statutory obligations under the Clean Water Act and other environmental statutes. Disclosure of pre-decisional information at this stage of the deliberations could raise questions about whether the Agency's decisions are being made or influenced by proceedings in a legislative or public forum rather than through the established administrative process, which is ongoing. In addition, disclosure of such information could compromise the ability of Agency employees to provide candid advice and recommendations during the Agency's ongoing deliberative process and may make the rulemaking process, as a whole, less robust, potentially impacting the Agency's mission.

The EPA recognizes the importance of the Committee's need to obtain information necessary to perform its legitimate oversight functions and is committed to continuing to work with your staff on how best to accommodate the Committee's interests. If you have further questions, you may contact me, or your staff may contact Duncan Braid in the EPA's Office of Congressional and Intergovernmental Relations.

Sincerely,

JOSEPH A. BRAZAUSKAS,
Acting Associate Administrator.

Enclosure

cc: The Honorable Sam Graves, Ranking Member

LETTER 7 FROM U.S. ENVIRONMENTAL PROTECTION AGENCY, OFFICE OF CONGRESSIONAL
AND INTERGOVERNMENTAL RELATIONS

SEPTEMBER 17, 2019.

Hon. PETER A. DEFazio,
Chairman,
Committee on Transportation and Infrastructure, U.S. House of Representatives,
Washington, DC.

DEAR CHAIRMAN DEFazio:

On behalf of the U.S. Environmental Protection Agency, I am writing in response to your letter dated July 29, 2019, to Administrator Andrew Wheeler, in which you sought information about the implementation of the Clean Water Act (CWA) and the final rule to repeal the 2015 Rule and the proposed rule to revise the definition of “waters of the United States.”

On September 12, 2019, the EPA and the Department of the Army (“the agencies”) signed a final rule to repeal the 2015 Clean Water Rule: Definition of “Waters of the United States” (“2015 Rule”), which amended portions of the Code of Federal Regulations (CFR), and restored the regulatory text that existed prior to the 2015 Rule. With this final rule, the agencies will implement the pre-2015 Rule regulations informed by applicable agency guidance documents and consistent with Supreme Court decisions and longstanding agency practice. This rule is the first step—Step 1—in a two-step rulemaking process to define the scope of “waters of the United States” under the CWA. Step 1 provides regulatory certainty as to the definition of “waters of the United States” following years of litigation surrounding the 2015 Rule. The final Step 1 rule takes effect 60 days after publication in the Federal Register.

The agencies are repealing the 2015 Rule for four primary reasons. First, the agencies conclude that the 2015 Rule did not implement the legal limits on the scope of the agencies’ authority under the CWA as intended by Congress and reflected in Supreme Court cases, including Justice Kennedy’s articulation of the significant nexus test in *Rapanos*.¹ Second, the agencies conclude that in promulgating the 2015 Rule, the agencies failed to adequately consider and accord due weight to the policy of the Congress in CWA section 101(b) to “recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution” and “to plan the development and use . . . of land and water resources . . .

” 33 U.S.C. 1251(b). Third, the agencies repealed the 2015 Rule to avoid interpretations of the CWA that push the envelope of their constitutional and statutory authority absent a clear statement from Congress authorizing the encroachment of federal jurisdiction over traditional state land-use planning authority. Lastly, the agencies conclude that the 2015 Rule’s distance-based limitations suffered from certain procedural errors and a lack of adequate record support. The agencies find that these reasons, collectively and individually, warrant repealing the 2015 Rule. The Step 1 final rule returns the relationship between the federal government, states, and tribes to the longstanding and familiar distribution of power and responsibilities that existed under the CWA for many years prior to the 2015 Rule.

On December 11, 2018, the agencies signed a proposed rule—Step 2—providing a clear, understandable, and implementable definition of “waters of the United States” that clarifies federal authority under the CWA while respecting the role of states and tribes in managing land and water resources within their borders. This proposal contains a straightforward definition that would protect the nation’s navigable waters, help sustain economic growth, and reduce barriers to business development. The proposed rule would provide clarity, predictability, and consistency regarding the scope of federal jurisdiction under the CWA. The proposed rule also details exclusions for specific features that would not be “waters of the United States,” such as features that only contain water during or in response to rainfall (i.e., ephemeral features); groundwater; many ditches, including most roadside and farm ditches; prior converted cropland; certain stormwater control features; and waste treatment systems.

The agencies believe this proposed definition appropriately identifies waters that should be subject to federal regulation under the CWA, while respecting the role of states and tribes in managing their own land and water resources. Many states and

¹*Rapanos v. United States* and *Carabell v. United States* 547 U.S. 715 (2006) (“*Rapanos*”).

tribes have existing regulations that apply to waters within their borders, whether or not they are considered “waters of the United States.” The Step 2 proposed rule, if finalized, would give states and tribes more flexibility in determining how best to manage their land and water resources while protecting the nation’s navigable waters as intended by Congress when it enacted the CWA.

In advance of issuing the proposed rule, the agencies invited written pre-proposal recommendations and established an administrative docket to accept recommendations from all interested parties. The agencies considered the input received from a wide range of stakeholders as they developed the Step 2 proposal. In addition to pre-proposal input, the EPA and the Army held a public webcast to help explain the key elements of the proposed “Revised Definition of Waters of the United States” on February 14, 2019. The agencies also held a public hearing on the proposed revised “waters of the United States” definition in Kansas City, Kansas, on February 27 and 28, 2019. Oral statements and supporting information presented at this public hearing were considered with the same weight as written statements and supporting information submitted during the public comment period. The agencies listened to those directly affected by the regulations.

In developing the Step 2 proposed rule, the agencies also evaluated potential impacts of the proposed revised “waters of the United States” definition to CWA programs and regulated entities. Due to significant data limitations that are discussed in both the Economic Analysis and the Resource and Programmatic Assessment for the proposed rule, the agencies’ analyses are largely qualitative. These documents, which we have enclosed, are publicly available on the EPA’s website (<https://www.epa.gov/wotus-rule/proposed-revised-definition-wotus-supporting-documents>).

The agencies are not aware of any map or dataset that accurately or with any precision portrays the scope of CWA jurisdiction at any point in the history of this complex regulatory program. The agencies attempted to use the National Hydrography Dataset (NHD) at high resolution and the National Wetlands Inventory (NWI) in a Geographic Information Systems analysis to assess the potential change in CWA jurisdiction as a result of the proposed revised definition of “waters of the United States,” but ultimately concluded that the limitations of the datasets (including known errors of omission and commission, positional inaccuracies, misclassification of stream flow permanence, and the fact that neither the NHD nor the NWI were created for regulatory purposes) prohibit using the data to quantify the extent of waters whose jurisdictional status could change under the proposed rule. While the NHD and NWI are the most comprehensive hydrogeographic datasets mapping waters and wetlands in the United States and are extremely useful resources for a variety of federal programs, they have technical limitations that present significant challenges for use as standalone tools to determine the scope of CWA jurisdiction, regardless of the regulatory definition of “waters of the United States.” It is the longstanding position of the agencies that these datasets do not represent waters subject to CWA jurisdiction.²

Regarding information on the number, location, and type of regulated discharges for each existing National Pollutant Discharge Elimination System (NPDES) permitted facility located on an intermittent, ephemeral, and/or headwater stream, the EPA is enclosing documents showing the agency’s preliminary analysis which identifies specific dischargers and the classification of the nearest NHD-mapped flowline relative to the discharge outfall location or discharger’s facility location. However, the EPA is unable to determine in this national analysis if the permitted dischargers were actually discharging to these waters and whether these dischargers would continue to be covered under the CWA due to the data limitations of the NHD described above. Additionally, classification of flowlines as “ephemeral,” “intermittent,” and “perennial” in NHD at high resolution may not accurately reflect

² See, e.g., Letters from EPA Office of Water Acting Assistant Administrator Nancy Stoner to H. Committee on Sci., Space & Tech. Chairman Lamar Smith (July 28, 2014, and August 6, 2014) (“[N]o national or statewide maps have been prepared by any agency, including EPA, showing the scope of waters subject to the Clean Water Act . . . To develop maps of jurisdictional waters requires site-specific knowledge of the physical features of water bodies, and *these data are not available*.”) (emphasis added). See also “The EPA Blog” post entitled “Mapping the Truth” (August 28, 2014) [“While these [U.S. Geological Survey and Fish & Wildlife Service] maps are useful tools for water resource managers, they cannot be used to determine Clean Water Act jurisdiction—now or ever.”], <https://blog.epa.gov/2014/08/28/mapping-the-truth/>. Letter from EPA Office of Water Deputy Assistant Administrator Kenneth J. Kopocis to H. Committee on Sci., Space & Tech. Chairman Lamar Smith (January 8, 2015) (“These [USGS] maps were not prepared for the purpose of, nor do they represent, a depiction of the scope of waters protected under the Clean Water Act. . . . Due to the resolution limitations of the maps, they are not effective in distinguishing consistently between land and water.”).

stream flow permanence on the ground.³ Of note, a NPDES permittee currently discharging to a jurisdictional water that becomes non-jurisdictional under a change to the definition of “waters of the United States” could remain subject to the requirements of the CWA if it continues to satisfy the point source conveyance requirements of the Act.

The Economic Analysis and Resource and Programmatic Assessment for the proposed rule describe how the proposed rule might affect categories of waters and CWA programs. The Economic Analysis presents three case studies to estimate how a potential change in CWA jurisdiction could affect water quality; these case studies describe relevant caveats regarding data limitations as well.

The Committee’s request is related to an ongoing regulatory action, a status that raises particular concerns regarding the integrity and pre-decisional nature of the agencies’ ongoing deliberations. Some of the documents you seek will reflect internal advice, recommendations, and analysis by the agencies’ staff and attorneys about the proposed Step 2 rule. These internal and pre-decisional deliberations are likely to be the subject of additional discussions and analysis among the agencies’ staff and senior policymakers as they consider the approximately 620,000 comments received. It is critical for the agencies’ policymakers to obtain a broad range of advice and recommendations from their staff and to be able to properly execute statutory obligations under the CWA and other environmental statutes. Disclosure of pre-decisional information at this stage of the deliberations could raise questions about whether the agencies’ decisions are being made or influenced by proceedings in a legislative or public forum rather than through the established administrative process, which is ongoing. In addition, disclosure of such information could compromise the ability of the agencies’ employees to provide candid advice and recommendations during the ongoing deliberative process and may have a chilling effect upon future Executive Branch deliberations, making the rulemaking process, as a whole, less robust and harming the agencies’ ability to carry out their missions.

The EPA recognizes the importance of the Committee’s need to obtain information necessary to perform its legitimate oversight functions and is committed to continuing to work with your staff on how best to accommodate the Committee’s interests. If you have further questions, you may contact me, or your staff may contact Duncan Braid in the EPA’s Office of Congressional and Intergovernmental Relations.

Sincerely,

JOSEPH A. BRAZAUSKAS,
Acting Associate Administrator.

Enclosure

cc: The Honorable Sam Graves, Ranking Member

**Statement of Robert Nasdor, Northeast Stewardship and Legal Director,
American Whitewater, Submitted for the Record by Hon. Grace F. Napolitano**

American Whitewater submits this written testimony to the House Committee on Transportation and Infrastructure, Subcommittee on Water Resources and Environment Hearing on the Administration’s Priorities and Policy Initiatives Under the Clean Water Act held on September 18, 2019. We submit these comments to express our strong opposition to: 1) EPA repeal and pending replacement of the 2015 Waters of the United States definition, and, 2) EPA proposed rule to revise and codify EPA regulations on Water Quality Certification under section §401 of the Clean Water Act. Taken together, the repeal of WOTUS and the weakening of section §401 of the Clean Water Act will result in an increase in pollution in our rivers and restrict the ability of states to ensure that federally-licensed energy projects meet water quality standards, and impact water-based outdoor recreation.

American Whitewater is a national 501(c)(3) non-profit organization with a mission to protect and restore America’s whitewater rivers and to enhance opportunities to enjoy them safely. Our members are primarily conservation-oriented kayakers, canoeists, and rafters who enjoy exploring whitewater rivers. As outdoor enthusiasts who spend time on and in the water, our members have a direct interest

³See, e.g., Fritz KM et al., *Comparing the extent and permanence of headwater streams from two field surveys to values from hydrographic databases and maps*. J AM WATER RESOUR ASSOC, 49:867–882 (2013); see also, e.g., Fritz KM, Wenerick WR, and Kostich MS, *A validation study of a rapid field-based rating system for discriminating among flow permanence classes of headwater streams in South Carolina*, ENVIRON MANAGE. 52:1286–1298 (2013).

in the health and water quality of our nation's waterways. American Whitewater works throughout the country to protect healthy free-flowing rivers and restore rivers that have been dammed, degraded, and dewatered through hydropower development. The EPA actions described herein threaten the river conservation and recreation interests of our organization and our membership.

NARROWING THE DEFINITION OF WATERS OF THE UNITED STATES THREATENS PUBLIC HEALTH, RURAL ECONOMIES, PRIVATE PROPERTY, AND RIVER ECOSYSTEMS

Last month, the Administration signed a rule¹ repealing the science-based Clean Water Rule,² which had reasonably defined which rivers and other water bodies were covered by the Clean Water Act. Concurrently, the Administration has proposed a new rule that will replace the Clean Water Rule with less protective standards. These overt efforts to reduce the applicability of the Clean Water Act will allow the discharge of pollution into more waterways, which threatens downstream communities with easily-foreseeable consequences.

For paddlers, water quality directly influences our health, our enjoyment of public streams, our tourism contributions to rural economies, and in many cases our livelihoods. The Clean Water Rule in particular, and the suite of regulations relating to water quality more generally, have allowed river-based recreation to flourish along with many businesses that discharge regulated pollution into our Nation's rivers.

A 2017 report by the Outdoor Industry Association³ found that watersports directly generates:

- \$139,971,810,172 in retail spending
- 1,234,876 jobs
- \$43,893,049,709 in salaries and wages
- \$10,618,742,884 in federal taxes
- \$9,601,521,150 in state and local taxes

The US Bureau of Economic Analysis confirms that the economic benefits of water-based recreation is significant in the United States. The Bureau calculated that in 2017 boating and fishing were responsible for over \$38 Billion of gross economic output.⁴

Clean surface water is an economic engine that deserves protection at least as strong as the Clean Water Rule afforded, if not stronger. People do not want to swim, fish, or paddle on rivers and lakes that are marred by unhealthy or environmentally damaging levels of water pollution. Weakening regulations relating to water quality would directly threaten the recreation and tourism economies of countless communities across the United States. American Whitewater partners with many commercial outfitters, equipment manufacturers, and rural municipalities that would be directly financially impacted if water quality were degraded. We do not feel that the Administration has recognized these economic benefits (jobs) associated with the Clean Water Rule, nor recognized that these benefits would be eroded by weakened regulations. The EPA can best protect rural, recreational, and tourism economies by maintaining or strengthening water quality regulations.

The proposed rule changes would strip protections from many rivers and streams that do not have constant instream flows. This ignores the obvious: when it rains these rivers begin flowing and flush discharged pollution downstreams. Most whitewater rivers and streams can only be descended during these times of higher-than-normal flows caused by rainfall or snowmelt. Surface runoff and pollution often spike during these times, even under the current rules. Additionally, whitewater boating requires submersion as paddlers get splashed, flip over, and occasionally swim. It is part of the fun, but not if the water that gets in our mouths, ears, nose, and any cuts is polluted. Reducing regulatory protections for surface waters can and will make paddlers sick. We believe it is the duty of the EPA to keep citizens who recreate in rivers, from paddlers to kids playing in creeks, safe from water pollution by, at a minimum, maintaining the existing suite of water quality regulations.

The old adage that "we all live downstream" certainly applies as the Administration moves to turn a blind eye to discharging pollution in our Nation's headwaters. Unregulated upstream discharges have the strong potential to impact private property along the river downstream. Pollution could reduce the value of property by tarnishing or eliminating the elevated property values and enjoyment associated

¹ https://www.epa.gov/sites/production/files/2019-09/documents/wotus_rin-2040-af74_final_frn_prepub2.pdf

² 80 FR 37053. 2015-06-29.

³ https://outdoorindustry.org/wp-content/uploads/2017/04/OIA_RecEconomy_FINAL_Single.pdf, pg. 18

⁴ <https://www.bea.gov/data/special-topics/outdoor-recreation>

with being located on a water body that supports swimming, fishing, paddling, and nature observation. It could also impact a property owner's rights to make use of the water for a wide range of purposes from watering their garden to running a canoe outfitting business.

The recovery of our nation's rivers following the passage of the Clean Water Act has been truly remarkable—though the result has been a tenuous balance between pollution discharges and public health. Many rivers and streams are far from thriving, and exist very near critical public health and ecological function thresholds. Loosening regulations would tip many rivers past these thresholds, putting people, fish, and livelihoods at risk.

American Whitewater feels strongly that regulations relating to water quality should be maintained, and only be modified if doing so serves to strengthen protections for public health and water quality. For the reasons stated above, we ask that the Subcommittee do whatever possible to redirect the Administration's efforts to reduce the applicability of the Clean Water Act.

PROPOSED EPA SECTION §401 RULES SEVERELY RESTRICT THE ABILITY OF THE STATES TO PROTECT CLEAN WATER AND REGULATE FUTURE IMPACTS FROM HYDRO-POWER PROJECTS

The EPA is proposing rules that would fundamentally undermine a vital section of the Clean Water Act and weaken the role of the states as the primary guardians of water quality in federally-permitted energy projects. Ensuring that the construction and operation of these energy projects both balance power generation with protecting environmental quality, and in addition, assuring that these projects meet state water quality standards is based on principles of cooperative federalism, a framework that is threatened by these proposed rules.

Section 4(e) of the Federal Power Act states that the Federal Energy Regulatory Commission (FERC) is required "in addition to the power and development purposes for which licenses are issued, shall give equal consideration to the purposes of energy conservation, the protection, mitigation of damage to, and enhancement of, fish and wildlife (including related spawning grounds and habitat), the protection of recreational opportunities, and the preservation of other aspects of environmental quality."⁵ This "equal consideration" established under the Electric Consumer Protection Act of 1986⁶ does not necessarily result in equal treatment of power and non-power values. Congress noted that FERC must "... give these nondevelopmental values the same level of reflection as it does power ...", but this reflection does not "... necessarily result in their equal treatment."⁷ Undermining the vital role of the states in protecting water quality under the Clean Water Act will leave FERC with the discretion to prioritize generation over the protection of environmental quality, resulting in a weakening of water quality protections.

1. Background on Section §401 of the Clean Water Act

Prior to the Clean Water Act, the Federal Power Commission allowed the complete dewatering of rivers for hydropower dams, and we are still dealing with that legacy today. In enacting the Clean Water Act, Congress established a system of cooperative federalism, whereby states—in partnership with federal agencies—are granted meaningful authority to ensure that federally-licensed activities including hydropower generation balance the desire for power generation with the protection of environmental values.

The primary mechanism for maintaining and restoring a high level of water quality is section §401 of the Clean Water Act. Under this section an applicant for a federal license to conduct an activity resulting in a discharge into navigable waters is required to first obtain a certification from the state where the project is located. The applicant must ensure that it will comply with state water quality standards. Section §401 certifications contain conditions that must be included as articles in a FERC license lasting 30–50 years and typically include requirements for minimum instream flows along with other measures relating to its water quality standards. States have one year to either grant, grant with conditions, or deny certification. If they fail to do so within that one year period, they waive their rights and the project can be licensed without certification that the project complies with state water quality standards.

⁵ 16 U.S.C. §797(e)

⁶ Public Law 99–495

⁷ H.R. Conf. Rep. No. 934, 99th Cong., 2d. Sess. at 22.

2. Recent Developments Threatening the Ability of States to Protect Water Quality

Over the past several years, there have been ongoing efforts to undermine the Clean Water Act. In the last Congress, the energy industry and its allies in Congress attempted to pass legislation that would limit the ability of states to determine whether a project complies with water quality standards.⁸ Having failed in its effort to persuade Congress to weaken the Clean Water Act, the energy industry and its allies in the executive branch now seek to circumvent Congress through the administrative rulemaking process. At the same time, a recent court decision interpreting section 401 limits the amount of time that the states have to review projects for compliance with water quality standards.⁹ FERC and now the EPA are attempting to extend the holding in that case to a broad range of energy projects, and revise its interpretation of the certification requirement to overturn two Supreme Court decisions, discussed *infra*, that upheld the authority of states to impose conditions and assure compliance with water quality standards for energy projects.¹⁰ The convergence of an industry-friendly administration willing to disregard environmental impacts combined with a misguided interpretation of the certification deadline by the Court of Appeals has created this perfect storm that poses an existential threat to vital Clean Water Act protections.

Last January, the D.C. Circuit ruled in *Hoopa Valley Tribe v. FERC* that the states of California and Oregon waived their §401 authority by failing to either issue or deny certification within one year of application, invalidating a FERC-approved practice where project applicants would withdraw-and-resubmit their applications for water quality certification by the state in order to extend the 1-year deadline.¹¹ Since the *Hoopa* decision, FERC has found waiver of state section §401 authority in cases where there was no explicit agreement between a state and licensee to withdraw-and-resubmit water quality certification applications.¹²

The threat to state §401 authority from the *Hoopa* decision and subsequent extension by FERC has been compounded by Executive Order 13868 that alleges “[o]utdated Federal guidance and regulations regarding section §401 of the Clean Water Act . . . are causing confusion and uncertainty and are hindering the development of energy infrastructure.” Following the Executive Order, the EPA issued interim guidance and now has proposed new regulations that are basically an industry wish list of ways to eliminate any meaningful role of the states in protecting water quality in federally-issued licenses.

The EPA now proposes a complete rewrite of the section 401 certification regulations that would fundamentally weaken the ability of the states to assure that energy projects comply with water quality standards by limiting the ability of the states to obtain necessary information, limiting the time for the states to review an application, and limiting the scope of states’ mandatory conditioning authority. At the same time, the rules place the burden on the states to justify any conditions or denial, shifts the appeals process from state to federal court, and prevents the states from enforcing its own water quality standards. The intent of the proposed rule is to prevent states from imposing conditions on federal licenses and seeks to aid industry in challenging or appealing certification conditions rather than supporting efforts by the state to assure that federally-licensed energy projects comply with state water quality standards as Congress intended.

3. Proposed Rules Prevent States from Adequately Reviewing Section §401 Applications

While certification is a precondition to the issuance of a FERC license, the CWA provides that certification is waived if the state fails or refuses to act on the certification request within the specified time that the EPA now proposes to shorten dramatically. The proposed rules give the federal licensing agency the exclusive ability to set the deadline for states to complete their environmental review of project impacts on water quality, but in no circumstance can the deadline extend beyond one year. In the case of FERC licenses for hydropower projects the EPA suggests that a six-month deadline is sufficient despite the fact that the applicant may not have provided the state with complete information and despite the fact that FERC will not have completed its own environmental review. For Army Corps section §404 permits, the EPA suggests a 60-day review period is sufficient. This rule change will prevent the states from having enough time to complete a meaningful review of a project’s environmental impacts.

⁸Hydropower Policy Modernization Act of 2017

⁹*Hoopa Valley Tribe v. Federal Energy Regulatory Commission*, 913 F.3d 1099 (2019)

¹⁰*S. D. Warren Co. v. Maine Board of Environmental Protection*, 547 U.S. 370 (2006)

¹¹*Hoopa Valley Tribe v. Federal Energy Regulatory Commission*, 913 F.3d 1099 (2019)

¹²*Placer County Water Agency*, 167 FERC ¶61,056 (Apr. 18, 2019)

The proposed rules start the time clock for state certification when an applicant submits a bare bones request to the state certification agency, rather than when the applicant provides the state with complete information to allow it to begin its environmental review. There is no requirement that the applicant provide any information about the impact of the project on water quality or demonstrate compliance with state water quality standards.

The proposed rule gives state certifying agencies only 30 days to request additional information from the applicant, and in addition, limits the ability of certification agencies to request additional information to only that information that can be collected or generated by the FERC deadline; it also limits the type of information that can be requested. This would only allow states to rely on FERC-approved studies as a basis for making a certification determination. This is a particular concern given FERC's unwillingness to require studies requested by state certification agencies. Because the needs of certifying agencies are distinct from those of FERC, sole reliance on studies required by FERC will not provide sufficient information for those agencies to determine whether the project will comply with water quality standards. Currently there is no such limitation on information requests.

4. Proposed Rules Limit Scope of Section §401 Conditions Allowed

The scope of the certifying agency's section §401 authority is limited under these rules to assuring that a discharge from a permitted activity will comply with water quality requirements. Impacts from activities not related to the discharge are beyond the scope of §401 according to the proposed rules. This limitation is in direct conflict with two of the Supreme Court's seminal Clean Water Act cases. Contrary to the Supreme Court's holding in *S. D. Warren Co. v. Maine Bd. of Environmental Protection*, 547 U.S. 370 (2006), the proposed rules narrowly interpret the word "discharges" to apply only to point-source discharges. In addition, the proposed rules make clear that the EPA seeks to overturn *PUD No. 1 of Jefferson County and City of Tacoma v. Washington Department of Ecology*, 511 U.S. 700 (1994) (PUD No. 1) where the Court held that section §401 empowers states to prescribe conditions addressing impacts from the project activities as a whole rather than only those impacts that result from the discharge itself, relying on the dissent by Justice Thomas despite it having no force of law. Additionally, the proposed rules limit section §401 authority to assuring compliance with water quality requirements rather than water quality standards, further narrowing the scope of review to only those aspects of WQS pertaining to water quality. The rules would limit the ability of states to prescribe conditions relating to anything other than direct impacts to water quality from the discharge, excluding impacts from any other requirements in state laws or regulations, impacts to recreation access for fishing and boating and use of project lands, impacts from non-point source pollution, impacts from project operations on reservoirs, impacts on aesthetics, and impacts on fish passage.

5. Proposed Rules Permit Federal Agency to Reject State §401 Conditions

Under current requirements, federal permit granting agencies may not issue a license for an activity resulting in a discharge into navigable waters where the certifying agency denies a water quality certificate. In addition, federal agencies must include as license conditions all requirements contained in section §401 water quality certifications. The proposed rules would for all intents and purposes eliminate the requirement that federal agencies include state-mandated conditions in project licenses, and in addition, limit the ability of states to deny certification to projects that fail to comply with state water quality standards. The proposed rules require state certification agencies to justify any conditions and to explain whether a less stringent condition could satisfy water quality requirements. We can expect that FERC will find some fault and reject state required conditions whenever they are more stringent than its own. This is a change from the current procedures that require FERC acceptance of state conditions in almost all cases.

While a state certification agency may deny certification if it is unable to certify that the project will comply with water quality requirements, the proposed rules do not allow certifying agencies to deny certification for reasons beyond what the EPA considers to be the narrow scope of the state's section 401 authority, excluding any requirement of state and local laws other than EPA-approved aspects of state water quality standards dealing with water quality impacts from discharges from the project. The proposed rules require that the certifying agency justify its certification denial to the federal agency. It is unclear as to whether the failure of an applicant to provide sufficient information upon which to evaluate the certification request is a sufficient basis for denial. These proposed rules define the failure or refusal to act not only in terms of time, but also as the constructive failure to act through denial of certification or the imposition of conditions based on criteria other than EPA-ap-

proved water quality impacts from the discharge. This is a major change from current requirements and would in our view require a legislative change.

6. Proposed Rules Weaken Enforcement of State Water Quality Standards

The proposed rules shift appeals over state certification conditions from state courts where the project proponent has the burden to show compliance with water quality standards to federal court where the state certifying agency has the burden to show that certification conditions comply with EPA rules. The rules place the burden of proof on the certifying agency to demonstrate that it has acted within the proper scope of authority in imposing the condition or denial rather than placing the burden of showing non-compliance with the EPA, FERC, or project applicant.

Under the proposed rules, state certification agencies have no continuing jurisdiction over compliance with conditions in the certification as enforcement is left to FERC's discretion. The rules attempt to prevent states or individuals from pursuing a cause of action under the CWA to enforce conditions in the certification or to address violations of state water quality standards. The proposed rules also question the appropriateness of provisions that permit certifying agency to reopen certification based on changed conditions or other impacts, and are unclear whether states have jurisdiction over post-license maintenance and repair projects that have an impact on water quality.

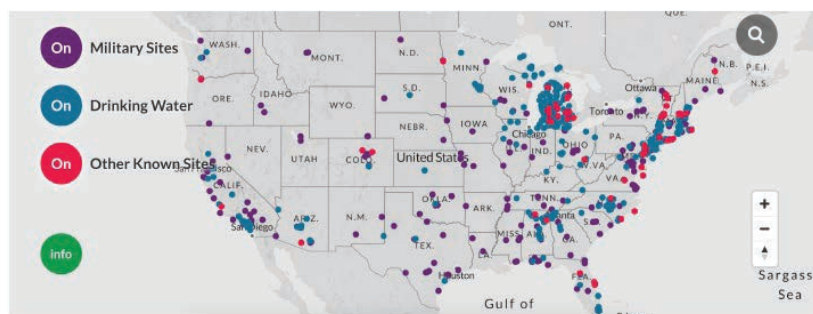
CONCLUSION

American Whitewater appreciates this opportunity to provide this testimony to the House Committee on Transportation and Infrastructure, Subcommittee on Water Resources and Environment, and commends the Subcommittee for its work to maintain essential Clean Water Act protections.

Statement of the Environmental Working Group, Submitted for the Record by Hon. Grace F. Napolitano

Per- and polyfluoroalkyl substances, or PFAS, are a class of widely used chemicals that contaminate countless rivers, lakes, streams and other waterways regulated under the Clean Water Act. PFAS chemicals are linked to cancer, harm to the reproductive and immune systems, hormone disruption, liver and kidney damage, changes in serum lipid levels, and hormone disruption.¹ EWG has identified more than 700 communities contaminated with PFAS chemicals,² including 297 military installations,³ and estimates that over 100 million Americans may have PFAS in their drinking water.⁴

Figure 1: Map of 712 PFAS Sites



A defining characteristic of PFAS is the carbon-fluorine bond, one of the strongest bonds in chemistry. This characteristic means that once PFAS chemicals are released into the environment, they never break down in the environment, leading

¹ https://www.nrdc.org/sites/default/files/media-uploads/nrdc_pfas_report.pdf

² <https://www.ewg.org/release/pfas-map-update-new-data-show-712-contamination-sites-49-states>

³ <https://www.ewg.org/release/new-pfas-detections-reported-90-additional-army-installations>

⁴ <https://www.ewg.org/research/report-110-million-americans-could-have-pfas-contaminated-drinking-water>

some to dub them “forever chemicals.”⁵ PFAS are also highly mobile, which means that after they are released into the environment, they can quickly spread to and contaminate a large geographic area. Because PFAS are so persistent, they will continue for decades to expose people in communities where they have been released, unless the PFAS is removed.

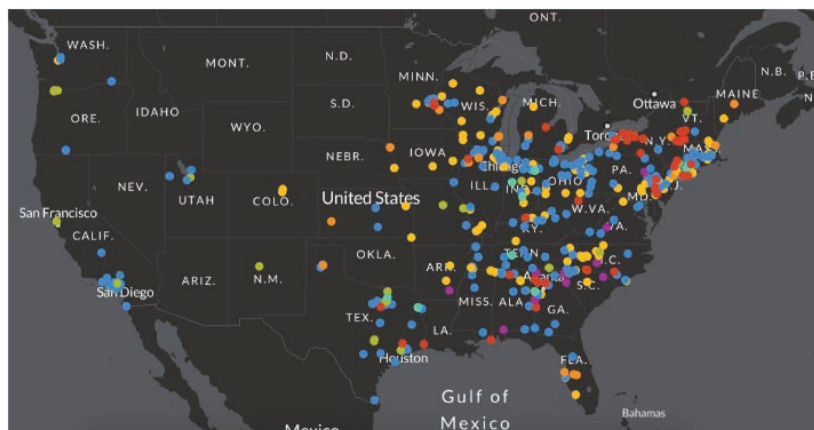
PFAS contaminate ground and surface water used for drinking water. They contaminate the water used to irrigate, and sewage sludge used to fertilize farmland. Crops and plants have been shown to uptake PFAS, so they can contaminate fruits and vegetables.⁶ PFAS build up in animals like fish, deer and cows exposed to PFAS-contaminated water or feed. In some cases, residents have been warned not to eat fish⁷ or deer,⁸ and some farmers have had to euthanize their cattle as a result of PFAS contamination.⁹

PFAS also build up in the blood serum and organs of people who consume contaminated food and water, and they can stay in the human body for decades. One report by the Centers for Disease Control and Prevention’s National Health and Nutrition Examination Survey, or NHANES, found some level of PFAS in the blood of 97 percent of Americans¹⁰ and about one-quarter of Americans have unsafe levels of PFAS in their blood.

PFAS are also almost entirely unregulated under every major environmental statute, including the Clean Water Act. No one knows exactly how much PFAS is released into the environment or the extent of the current pollution. Military and civilian firefighters continue to use PFAS-laden firefighting foams that seep into drinking water supplies. Because these fluorinated foams have been used for decades, hundreds of military installations have been contaminated. Because PFAS have not been designated as hazardous substances under the federal Superfund law, there are no requirements to clean up them up at these military installations or other contaminated sites.

Moreover, manufacturers continue to discharge PFAS into the air and water. EWG suspects that there are nearly 500 facilities that discharge PFAS chemicals into the environment,¹¹ but these manufacturers are not subject to any discharge limits or reporting requirements specific to PFAS. Water utilities are not federally required to remove PFAS from our tap water or even test for its presence.

Figure 2: Map of Suspected PFAS Discharges



⁵ https://www.washingtonpost.com/opinions/these-toxic-chemicals-are-everywhere-and-they-wont-ever-go-away/2018/01/02/82e7e48a-e4ee-11e7-a65d-1ac0fd7f097e_story.html?arc404=true

⁶ <https://www.ncbi.nlm.nih.gov/pubmed/30502744>

⁷ https://www.michigan.gov/pfasresponse/0,9038,7-365-86512_88987_88989---,00.html

⁸ https://www.michigan.gov/pfasresponse/0,9038,7-365-86512_88981_88982---,00.html

⁹ <https://www.theguardian.com/us-news/2019/feb/20/new-mexico-contamination-dairy-industry-pollution>

¹⁰ <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4483690/>

¹¹ <https://www.ewg.org/news-and-analysis/2019/06/pfas-nation-toxic-discharges-suspected-almost-500-industrial-facilities>

H.R. 3616, the Clean Water Standards for PFAS Act of 2019, introduced by Reps. Chris Pappas, Elissa Slotkin, Brendan Boyle, and Madeleine Dean, is an important first step in turning off the tap for toxic PFAS and limiting PFAS releases into the environment. The bill would designate PFAS as toxic pollutants under section 307(a) of the Clean Water Act and require EPA to establish effluent limitations and pretreatment standards for PFAS.

Toxic pollutants are subject to the National Pollutant Discharge Elimination System, or NPDES, permitting program under the Clean Water Act. NPDES permits include limits on the amount of toxic pollutant allowed in discharges from point sources. H.R. 3616 would also require the development of effluent limitation guidelines for key industry sectors that are responsible for discharges of PFAS and other toxic pollutants. Effluent limitations are technology-based regulations that are intended to represent the greatest pollutant reductions that are economically achievable for an industry. Effluent limitations are incorporated into NPDES permits for direct dischargers. H.R. 3616 would also require treatment standards for PFAS before they can be discharged into publicly owned treatment works. Pretreatment standards are designed to reduce toxic pollutant discharges into municipal sewer systems and the environment.

Putting these limits in place would reduce human exposure to PFAS by significantly reducing the amount of PFAS released into the environment and the subsequent burden on wastewater and water utilities. H.R. 3616 will also give industrial PFAS users more regulatory certainty with regard to potential liability under the Comprehensive Environmental Response Liability and Compensation Act, or CERCLA. Also known as the Superfund Law, CERCLA jumpstarts the cleanup process at many contaminated sites. Another House bill, H.R. 535, the PFAS Action Act, would require the EPA to designate PFAS as hazardous substances under CERCLA. Because releases of toxic pollutants in compliance with section 402 NPDES permits are considered “federally permitted releases,”¹² facilities that release PFAS in compliance with the limits set forth in a section 402 NPDES permit will be shielded from liability.¹³

Congressional action is needed to address PFAS because President Trump’s EPA has refused to act. Last year the Trump Administration proposed a PFAS Action Plan¹⁴ that did nothing to address the growing PFAS contamination crisis.

H.R. 3616 would provide a critical first step toward addressing the ongoing PFAS contamination crisis. The House of Representatives recognized this when it added H.R. 3616 as an amendment to H.R. 2500, the National Defense Authorization Act for FY 2020. However, both the House and Senate versions of the NDAA for FY 2020 include additional critical bipartisan PFAS reforms. In particular, provisions in both versions of the NDAA would require polluters to clean up legacy PFAS contamination; set a deadline for the EPA to develop a set of drinking water standards; end the military’s use of PFAS in firefighting foam and food packaging; ensure proper disposal of PFAS wastes; require the disclosure of PFAS discharges into the water and air; and expand monitoring for PFAS. In particular, the Dingell-Kildee amendment to H.R. 2500 would designate PFAS as hazardous substances under CERCLA. By conferring this designation, the Dingell-Kildee amendment will kick-start the remediation process at the sites most contaminated by PFAS and ensure that polluters pay their fair share of cleanup costs.

EWG appreciates the Subcommittee’s attention to this issue and looks forward to working with the Transportation and Infrastructure Committee this Congress.

¹² See 42 U.S.C. § 9601(10).

¹³ 42 U.S.C. § 9607(j).

¹⁴ <https://www.epa.gov/pfas/epas-pfas-action-plan>

APPENDIX

QUESTIONS FROM HON. PETER A. DEFazio TO HON. DAVID ROSS, ASSISTANT
ADMINISTRATOR, OFFICE OF WATER, U.S. ENVIRONMENTAL PROTECTION AGENCY

Waters of the United States

Question 1. The agencies recently finalized their repeal of the 2015 Clean Water Rule and have proposed a far weaker replacement rule but have not analyzed hundreds of jurisdictional determinations made using the 2015 Rule to see how it worked in practice. Why did the current administration ignore the best evidence of how the 2015 Rule functions?

ANSWER. In developing the final *Navigable Waters Protection Rule*,¹ EPA and the Department of the Army evaluated potential impacts of the rule to categories of waters, Clean Water Act (CWA) programs, and regulated entities. Due to significant data limitations that are discussed in both the Economic Analysis and the Resource and Programmatic Assessment for the final rule, the agencies' analyses are largely qualitative. These documents are publicly available on EPA's website (<https://www.epa.gov/wotus-rule/navigable-waters-protection-rule-step-two-revise>).

As for analyzing the approved jurisdictional determinations (AJDs) that were made under the 2015 Rule, EPA notes there was a relatively small number of AJDs made under the 2015 Rule before it was stayed by the courts nationwide in October 2015. Since the nationwide stay was lifted in early 2018, less than half of the country was subject to the 2015 Rule. The 2015 Rule was never implemented in 13 states and has now been declared to have exceeded the agencies' authority under the CWA,² so the available data are not national in scope.

Question 2. What is your best estimate of the length of streams and the acreage of ponds and wetlands that your proposed rule will exclude from the protections of the Clean Water Act?

ANSWER. Although EPA publishes information on its website (<https://watersgeo.epa.gov/cwa/CWA-JDs/>) concerning locations where EPA or the U.S. Army Corps of Engineers have determined, on a case-by-case basis, whether particular waters are or are not "waters of the United States," the agencies are not aware of any datasets or maps that fully depict the jurisdictional extent of all waters under the 2015 Rule, pre-2015 practice, or the scope of CWA jurisdiction at any point in the history of this complex regulatory program.

Due to existing data and mapping limitations, it is not possible to accurately determine the full scope of waters that are "in" or "out" under any "waters of the United States" definition. When the *Navigable Waters Protection Rule* was proposed, some claimed that 51 percent of the nation's wetlands and more than 18 percent of the nation's streams would lose CWA protection. It is unclear whether those claims were using, as a baseline, the expansive 2015 Rule that has now been found to exceed the federal government's statutory authority, or whether the claims misinterpret the scope of CWA jurisdiction under pre-2015 Rule practice. In any event, these estimates are highly unreliable and are based on stream and wetland datasets that were not created for regulatory purposes and which have significant limitations. Purported statistics of jurisdictional changes are unreliable and inherently inaccurate, in part because:

- there are currently no comprehensive datasets through which the agencies can depict the universe of "waters of the United States;" and
- the datasets used to generate the claims cited above—the U.S. Geological Survey (USGS) National Hydrography Dataset (NHD) and the U.S. Fish and Wild-

¹ The final Navigable Waters Protection Rule to define "Waters of the United States" was published in the *Federal Register* on April 21, 2020.

² See *Georgia v. Wheeler*, No. 2:15-cv-079, 2019 WL 3949922 (S.D. Ga. Aug. 21, 2019), and *Texas v. EPA*, 389 F. Supp. 3d 497 (S.D. Tex. 2019).

life Service (FWS) National Wetlands Inventory (NWI)—were not developed for regulatory purposes and have significant technical limitations that prevent the agencies from using them to identify CWA jurisdiction, regardless of the regulatory definition of “waters of the United States.”

While the NHD and NWI are the most comprehensive hydrogeographic datasets mapping waters and wetlands in the United States and are useful resources for a variety of federal programs, including CWA programs, they cannot be used as stand-alone tools to determine the scope of CWA jurisdiction on a national level. Importantly, the *Navigable Waters Protection Rule* covers tributaries with intermittent flow and excludes other features with only ephemeral flow, but the NHD—even at high resolution—cannot differentiate between intermittent or ephemeral flow in most parts of the country. Further, the NWI uses a different definition of “wetlands” than the agencies’ regulatory definition of “wetlands.” The NWI also does not contain information sufficient to evaluate whether those mapped wetlands meet the definition of “adjacent wetlands” under previous regulations or under the final rule. For example, the NWI does not identify whether a wetland is inundated by the nearest jurisdictional water.

The NHD has other limitations that prevent its use for accurately mapping the scope of jurisdictional waters under the CWA, including:

- errors of omission (e.g., failure to map streams that exist on the ground);
- errors of commission (e.g., mapping streams that do not exist on the ground);
- horizontal positional inaccuracies;
- misclassification of stream flow permanence, particularly in headwaters; and
- inconsistent mapping in different parts of the country.

The NWI also has additional limitations, including:

- errors of omission (e.g., failure to map wetlands that exist on the ground);
- errors of commission (e.g., mapping wetlands that do not exist on the ground); and
- potentially inaccurate wetland boundary identification.

While early in the regulatory process the agencies attempted to use the NHD and NWI to assess the potential change in CWA jurisdiction as a result of the proposed rule, the agencies ultimately concluded that the limitations of these datasets preclude their use for quantifying the extent of waters whose jurisdictional status could change under the proposal. Due to these limitations, which were confirmed during the public comment period for the proposed rule and through an extensive evaluation by the agencies, the agencies did not use the NHD or NWI to assess potential changes in jurisdiction as a result of the final rule.

It has been the consistent position of the agencies that the NHD and the NWI do not represent the scope of waters subject to CWA jurisdiction. Of note, the agencies did not use these maps to estimate changes in jurisdiction when the 2003 *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Eng’rs* (SWANCC) Guidance was issued, when the 2008 *Rapanos* Guidance was issued, or when the 2015 Rule was promulgated. As the agencies promulgated the 2015 Rule, EPA stated at the time that they “do not have maps depicting waters of the United States under either present regulatory standards or those in the final [2015] rule.”³ This remains true today—the agencies do not have maps of “waters of the United States” under the 2015 Rule, under the 2019 Rule, or under the *Navigable Waters Protection Rule*.

In 2015, former EPA Administrator Gina McCarthy testified before Congress⁴ about the NHD and the NWI. According to Administrator McCarthy’s testimony, those datasets:

- were “not used to determine jurisdiction and not intended to be used for jurisdiction”;
- “are not relevant to the jurisdiction of the ‘waters of the U.S.’”;
- “are not consistent with how we look at the jurisdiction of the Clean Water Act”; and
- have “nothing to do, as far as I know, with any decision concerning jurisdiction of the Clean Water Act.”

Under the previous administration, EPA Office of Water Acting Assistant Administrator Nancy Stoner wrote to the House Committee on Science, Space, and Tech-

³See *Response to Comments for the Clean Water Rule*, *Clean Water Rule Comment Compendium* Topic 8: Tributaries, Docket ID. No. EPA-HQ-OW-2011-0880-20872, p. 442, <https://www.regulations.gov/document?D=EPA-HQ-OW-2011-0880-20872>.

⁴Impact of the Proposed “Waters of the United States” Rule on State and Local Governments: Hearing Before the H. Comm. on Transp. & Infrastructure and the S. Comm. on Env’t & Pub. Works, 114th Cong. (2015) (testimony of Gina McCarthy, Adm’r, EPA).

nology that “no national or statewide maps have been prepared by any agency, including EPA, showing the scope of waters subject to the Clean Water Act. . . . To develop maps of jurisdictional waters requires site-specific knowledge of the physical features of water bodies, and *these data are not available*[.]”⁵ Former EPA Office of Water Deputy Assistant Administrator Ken Kopocis wrote a similar letter to the House Science Committee, stating: “These [USGS] maps were not prepared for the purpose of, nor do they represent, a depiction of the scope of waters protected under the Clean Water Act.”⁶ And in 2014, an EPA blog post entitled *Mapping the Truth* stated, “While these [USGS and FWS] maps are useful tools for water resource managers, they cannot be used to determine Clean Water Act jurisdiction—now or ever.”⁷

Thus, the agencies are not able to estimate the length of streams or the acreage of ponds and wetlands that would not be jurisdictional under the proposed rule or the final rule. In the *Resource and Programmatic Assessment for the Navigable Waters Protection Rule: Definition of “Waters of the United States,”* the agencies provided their best attempt to describe the potential effect of the final rule on specific categories of aquatic resources.

- a. If you cannot provide an estimate, do you have any idea how many people’s sources of drinking water supplies will be adversely affected?

ANSWER. One may not assume sources of drinking water will be adversely affected by the agencies’ revised definition. If a source water is not a “water of the United States,” states, tribes, and local governments may have programs and policies in place to protect that source water, and even if those are absent, activities that might result in water quality degradation will not occur on all streams and wetlands. To explore the relationship between “waters of the United States” and sources of drinking water, the agencies attempted to evaluate the spatial distribution of drinking water sources in relation to streamflow classification (*e.g.*, perennial, intermittent, ephemeral) type by overlaying the source protection areas (SPAs) for surface water intakes on the NHD at high resolution. Due to data limitations of the NHD—in particular, the fact that the NHD does not identify intermittent and ephemeral streams as separate categories in many parts of the country—coupled with uncertainty regarding the jurisdictional status of many intermittent streams and all ephemeral streams subject to a case-specific significant nexus analysis under pre-2015 practice, the agencies concluded that the exploratory analysis cannot appropriately or accurately assess the potential effects of the final rule on public water systems. In addition, the agencies note that the mere presence of ephemeral streams in a SPA does not mean there will be water quality degradation following the change in the definition of “waters of the United States,” as mentioned above.

- b. Can you provide an estimate for the amount of increased property damage due to flooding made worse by wetlands loss?

ANSWER. Due to existing data limitations described above, the agencies are unable to make such estimates.

- c. If the EPA is ignorant to the real-world public health and safety impacts of its proposal, how does the agency expect people to meaningfully participate in the rulemaking and how can EPA defend it as good policy?

ANSWER. As part of the rulemaking process, the agencies invited written pre-proposal recommendations and established an administrative docket to accept recommendations from all interested parties. The agencies received approximately 6,300 letters pre-proposal. The agencies considered the input received from a wide range of stakeholders as they developed the proposal to revise the definition of “waters of the United States,” including input received from states, tribes, and local governments during the federalism and tribal consultation periods. The agencies also provided opportunities for the public, states, and tribes to participate in the rulemaking process during the public comment period, via a public hearing, and state and tribal forums held in four locations across the country. The agencies solicited comment throughout the proposed rule’s development on all aspects of the proposal. The agencies listened to those directly affected by the regulations. The public

⁵Letter from Nancy Stoner, Acting Assistant Adm’r, EPA Office of Water, to Hon. Lamar Smith, Chairman, Comm. on Science, Space, and Tech., U.S. House of Representatives (July 28, 2014) (emphasis added).

⁶Letter from Kenneth J. Kopocis, Deputy Assistant Adm’r, EPA Office of Water, to Hon. Lamar Smith, Chairman, Comm. on Science, Space, and Tech., U.S. House of Representatives (Jan. 8, 2015).

⁷U.S. EPA, *Mapping the Truth*, THE EPA BLOG (Aug. 28, 2014), <https://blog.epa.gov/2014/08/28/mapping-the-truth/> (emphasis added).

was given ample opportunity to participate in the rulemaking process, and the agencies considered the comments received in finalizing the rule.

The agencies also note that the final rule is primarily guided by the statutory authority delegated by Congress under the CWA and the legal precedent set by key Supreme Court cases. The Supreme Court has twice ruled that the agencies misinterpreted the scope of their CWA authority, and the agencies' 2015 Rule was found by a federal court to have exceeded their statutory authority. The agencies' *Navigable Waters Protection Rule* is designed to protect public health and the environment while respecting the statutory authority that Congress delegated to them. The agencies are precluded from exceeding their delegated authorities to achieve specific policy, scientific, or other outcomes.

Question 3. Since your replacement proposal is based on Justice Scalia's opinion in the *Rapanos* case, how will EPA implement the Act in those places where federal courts have ruled that Justice Kennedy's more protective approach is controlling?

ANSWER. On February 28, 2017, the President issued Executive Order 13778 entitled *Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the "Waters of the United States" Rule*. Section 1 of the Executive Order states, "[i]t is in the national interest to ensure the Nation's navigable waters are kept free from pollution, while at the same time promoting economic growth, minimizing regulatory uncertainty, and showing due regard for the roles of the Congress and the States under the Constitution." The Executive Order directed EPA and the Army to review the 2015 Rule for consistency with the policy outlined in Section 1 of the Executive Order and to issue a proposed rule rescinding or revising the 2015 Rule as appropriate and consistent with law (Section 2). The Executive Order also directed the agencies to "consider interpreting the term 'navigable waters' . . . in a manner consistent with" Justice Scalia's plurality opinion in *Rapanos v. United States*, 547 U.S. 715 (2006) (Section 3). As explained in the preamble to the final rule, the agencies established a regulation that defines "waters of the United States" to reflect the ordinary meaning of the statutory term, as well as to adhere to Constitutional and statutory limitations, the objective and policies of the CWA, and case law, including the guiding principles that the Supreme Court has articulated in *Riverside Bayview Homes*, 474 U.S. 121 (1985); *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Eng'rs* (SWANCC), 531 U.S. 159 (2001); and *Rapanos* for interpreting the reach of the CWA.

While the agencies acknowledge that the plurality and Justice Kennedy viewed the question of federal CWA jurisdiction differently in *Rapanos*, the agencies find that there are sufficient commonalities between these opinions. These similarities helped instruct the agencies on where to draw the line between Federal and State waters in the final rule.

In the final rule, the agencies note that since the *Rapanos* decision, the Federal government has adopted a broad interpretation of Justice Kennedy's concurring opinion, arguing that his "significant nexus" test provides an independent basis for establishing jurisdiction over certain "waters of the United States." And rather than limiting the application of Justice Kennedy's opinion to the specific facts and wetlands at issue in that case, similar to their treatment of the SWANCC decision, the agencies previously have applied Justice Kennedy's reasoning more broadly to include, for example, the application of the significant nexus test to determining jurisdiction over tributaries, not just wetlands. Many courts have deferred to this position, and some courts rely exclusively on Justice Kennedy's significant nexus test while other courts have held that jurisdiction can be established under either the plurality or concurring opinions. The agencies' final rule, as explained in Section III of the preamble, is informed in several key aspects by Justice Kennedy's opinion, but the agencies now appropriately recognize some of the limiting principles articulated within his concurring opinion, as well as the principles articulated in Justice Scalia's plurality opinion in *Rapanos*, the SWANCC majority opinion, and the unanimous decision in *Riverside Bayview*.

Question 4. The replacement rule would surrender federal safeguards for millions of miles of streams and tens of millions of acres of wetlands, many of which are critical to endangered species. Have you initiated consultation under the Endangered Species Act with the U.S. Fish and Wildlife Service and National Marine Fisheries Service and, if so, what input have you received?

ANSWER. The U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) were part of the interagency review process for the final rule under Executive Order 12866. The agencies have not initiated consultation under the Endangered Species Act (ESA) with the FWS and NMFS and need not have done so, given applicable legal requirements. The agencies address the requirements

of the ESA in the *Resource and Programmatic Assessment for the Navigable Waters Protection Rule: Definition of “Waters of the United States.”*

Regarding any estimates of the change in jurisdiction as a result of the *Navigable Waters Protection Rule*, see the response to Question 2 above.

Question 5. Your proposal assumes that several states will step up to protect some or all of the water bodies that you intend to exclude from the law’s safeguards.

- a. Did you do any analysis of the present administrative, financial, and political landscape in those states and the processes which these states would need to navigate to adopt stricter-than-federal requirements?

ANSWER. The agencies collected information from several sources to characterize states’ ability to regulate waters beyond the jurisdictional scope of the CWA. The agencies’ assessment is presented in the supporting documents to the final rule, which are publicly available on EPA’s website (<https://www.epa.gov/nwpr/navigable-waters-protection-rule-supporting-documents>).

- b. For instance, your economic document predicts that Indiana will fill in these gaps—what is Indiana’s present willingness and capacity to extend the full suite of Clean Water Act protections to all wetlands and streams not covered by the proposed rule?

ANSWER. The commissioned literature review supporting the *Navigable Waters Protection Rule*, which is available in the docket, identified the variables most commonly used in the federalism literature that were useful in anticipating how states could respond to the *Navigable Waters Protection Rule*. The agencies relied on a subset of these variables that were available to them and had the strongest bearing on the way states may respond in order to conduct their analysis of potential state responses to the final rule.

The agencies’ analysis of potential state responses in the *Economic Analysis for the Navigable Waters Protection Rule: Definition of “Waters of the United States”* lists Indiana in the highest response category, which means the available data and information indicate Indiana is likely to continue regulating beyond the scope of the CWA, as Indiana does now, according to the agencies’ research. The agencies cannot predict conclusively how states will act in the future, including whether Indiana will choose to extend its existing protections in the future.

- c. How many states currently have programs established to prevent discharges of pollutants or dredged and fill materials to non-Waters of the US?

ANSWER. The agencies have identified twenty-five states that have chosen to regulate waters of the state that are not subject to federal regulation under the CWA. This information is based on the agencies’ extensive research into how states regulate their aquatic resources. However, the agencies do not have sufficient information at this time to conclude that only those twenty-five states regulate some waters that are not “waters of the United States,” and recognize that other states may regulate such waters based on state program implementation practices that the agencies were unable to include in their analysis of state programs.

Question 6. You said several times during the hearing that you are not proposing to eliminate Clean Water Act protections for intermittent streams.

- a. Your proposal explicitly took comment on excluding all but perennial streams. Is that idea now completely off the table?

ANSWER. The revised definition of “waters of the United States” in the final *Navigable Waters Protection Rule* includes both intermittent and perennial tributaries of traditional navigable waters as “waters of the United States.” The agencies solicited comment on all aspects of the proposed rule, including which tributaries of traditional navigable waters should be regulated as “waters of the United States.” An explanation of the categories of waters that are and are not jurisdictional under the final rule is publicly available on EPA’s website (<https://www.epa.gov/nwpr>).

- b. Please explain how your proposed definition of “intermittent” ensures that all waters which hydrologists would categorize as intermittent will be protected.

ANSWER. Though “intermittent” is a commonly used scientific term, the agencies proposed and subsequently finalized a definition of this term for purposes of CWA jurisdiction to ensure that the regulation is clear. Under the final rule, the term “intermittent” means “surface water flowing continuously during certain times of the year and more than in direct response to precipitation (*e.g.*, seasonally when the groundwater table is elevated or when snowpack melts).”

Some public comments that the agencies received on the proposed rule requested that the final rule require that groundwater contributions be the source for perennial and intermittent flow in “tributaries” as defined in the rule. The agencies recognize that groundwater input is an element of most scientific definitions of perennial

and intermittent flow, but decided not to mandate groundwater input as the controlling element of the definition of “perennial” or “intermittent” in the final rule. As a threshold matter, the agencies believe that such an approach would too narrowly limit CWA jurisdiction over waters that provide continuous or intermittent and predictable flow to traditional navigable waters in a typical year. For example, many headwater streams in mountainous regions flow through channels incised in bedrock with no groundwater interface with the bed of the stream. These streams instead are fed by glacial or high elevation snowpack melt. The same scenario may also exist in northern climates, where spring flows could be fed almost exclusively through melting snowpack absent elevated groundwater tables.

As noted in the final rule preamble, continuous surface flow during certain times of the year may occur seasonally, such as in the spring when evapotranspiration is low and the groundwater table is elevated. Under these conditions, the groundwater table intersects the channel bed and groundwater provides continuous baseflow for weeks or months at a time, even when it is not raining or has not very recently rained. Melting snowpack, as noted above, however, can be the sole or primary source of continuous surface flow in tributaries during certain times of the year. The agencies recognize that intermittent flow in certain mountain streams, for example, may result primarily from melting snowpack, not groundwater contributions to the channel. The agencies did not propose or finalize a specific duration (*e.g.*, the number of days, weeks, or months) of surface flow that constitutes intermittent flow under the final rule because the time period that encompasses intermittent flow can vary widely across the country based upon climate, hydrology, topography, soils, and other conditions. The agencies believe that the definition of “intermittent” is consistent with the scientific meaning of the term but is likely broader than most scientific definitions because of the inclusion of flow generated from melting snowpack.

Question 7. Considering the two letters raising alleged concerns about the impact that disclosing documents would have on EPA’s deliberative process:

- a. Are there documents responsive to the Committee’s requests that you have withheld?
- b. Are any of those documents withheld based on their supposed deliberative nature?
- c. What privilege are you asserting?
- d. Is that the sole privilege being asserted?
- e. What is the basis for assertion of that privilege to withhold documents from the Committee?

ANSWER (a.–e.). At the time, the Committee’s requests were related to ongoing regulatory actions. Given that status, the Agency was particularly concerned about protecting the integrity of ongoing Agency pre-decisional deliberations. Some of the documents you sought may well reflect internal advice, recommendations, and analysis by Agency staff and attorneys about the proposed rules. These internal and pre-decisional deliberations are likely to be the subject of additional discussions and analysis among Agency staff and senior policymakers during development of these proposals and the subsequent finalization of any regulatory action. It is critical for Agency policymakers to obtain a broad range of advice and recommendations from their staff in order to properly execute statutory obligations under the CWA and other environmental statutes.

For ongoing rulemakings, disclosure of pre-decisional information at this stage of the deliberations could raise questions about whether the Agency’s decisions are being made or influenced by proceedings in a legislative or public forum rather than through the established administrative process. In addition, disclosure of such information could compromise the ability of Agency employees to provide candid advice and recommendations during the Agency’s ongoing deliberative process and may have a chilling effect upon future Executive Branch deliberations, making the rule-making process, as a whole, less robust, potentially impacting the Agency’s mission.

As for completed rulemaking, the EPA recognizes the importance of the Committee’s need to obtain information necessary to perform its legitimate oversight functions and is committed to continuing to work with your staff on how best to accommodate the Committee’s interests.

Groundwater Connection

Question 1. The Clean Water Act requires a permit for “Any addition of any pollutant to navigable waters from any point source.” That language does not include an exemption for discharges via groundwater, does it? Is there another provision of the Clean Water Act that expressly exempts discharges via groundwater from permitting?

ANSWER. On April 23, 2020, the Supreme Court issued an opinion in *County of Maui v. Hawai'i Wildlife Fund*, No. 18–260, addressing the question of whether a Clean Water Act National Pollutant Discharge Elimination System (NPDES) permit is required for releases of pollutants from a point source that passes through groundwater before reaching a navigable water. In a 6–3 decision, the Court held that an NPDES permit is required “when there is a direct discharge from a point source into navigable waters or when there is the functional equivalent of a direct discharge.” Slip Op. at 15. In describing the new “functional equivalent” standard, the Court stated that “an addition [of a pollutant] falls within the statutory requirement that it be ‘from any point source’ when a point source directly deposits pollutants into navigable waters, or when the discharge reaches the same result through roughly similar means.” Slip Op. at 15. The Court listed seven factors that “may prove relevant (depending upon the circumstances of a particular case)” in determining if an NPDES permit is required. Slip Op. at 16.

EPA is reviewing the Court’s decision and considering how best to address the Court’s call for the Agency to provide further guidance, including using the tools available to the Agency such as guidance and rulemaking, to provide additional clarity, and less risk of future litigation, for states and tribes, regulated entities, and the public.

Sewage “Blending”

Question 1. The EPA has recently announced that it is considering whether to authorize wastewater treatment plants to discharge partially treated or “blended” sewage during wet weather events.

- a. What information does EPA have about how many publicly owned treatment works currently engage in blending and how much partially-treated wastewater they are discharging into waterways?
- b. How many of these treatment works are located in or near low-income communities or communities of color?
- c. What scientific evidence does the agency have to support that discharging blended sewage is safe for public health and the environment, particularly give the high level of pathogens in blended sewage?
- d. How many wastewater treatment plants are subject to short-term (acute) limits on pathogen discharges in their NPDES permits to protect the public from exposure to pathogens?
- e. What information does the agency have about the effectiveness of alternative or “side-stream” technologies that treatment plants have proposed using in lieu of traditional treatment methods?

ANSWER (a.–e.). EPA’s September 16, 2019 response (enclosed) to the Chairman’s July 29, 2019 letter to the Agency addresses these questions. As stated in EPA’s September 16, 2019 letter, the Agency’s rulemaking will be considering changes to the National Pollutant Discharge Elimination System (NPDES) regulations to establish a permitting framework for evaluating management options to provide publicly owned treatment works (POTWs) serving separate sanitary sewer systems flexibility in how they manage and treat peak flows. Any proposed changes would seek to provide a consistent national approach to permitting peak flows that ensures that all applicable permit discharge limitations and requirements are met during peak flow events. Once the proposal is published in the *Federal Register*, there will be a public docket containing the information underpinning the Agency’s proposed action available for viewing on regulations.gov.

PFAS

Question 1. Mr. Ross, you have testified that PFAS pollution in drinking water supplies poses an urgent threat to public health.

- a. If so, why has EPA failed to use EPA’s authority under Sec. 1412(D) of the Safe Drinking Water Act?
- b. As you know, Sec. 1412(D) permits the EPA to promulgate an interim national primary water drinking regulation to address an urgent threat to public health regardless of whether the agency has completed a cost-benefit analysis.

ANSWER (a.–b.). EPA is committed to following the drinking water standard setting process outlined in the Safe Drinking Water Act (SDWA). This process is designed to ensure public participation, transparency, and the use of the best-available peer reviewed science and technical information. On February 20, 2020, EPA took another important step in implementing the Agency’s PFAS Action Plan by proposing regulatory determinations for PFOS and PFOA in drinking water. The proposed regulatory determination was published in the *Federal Register* on March 10, 2020. In that proposal, EPA is asking for information and data on other PFAS substances, as well as seeking comment on potential monitoring requirements and reg-

ulatory approaches that EPA is considering for PFAS chemicals. After the public comment period closes, EPA will evaluate all comments received, and then finalizing a regulatory determination will be the next step in the regulatory process.

Setting an “interim” National Primary Drinking Water Regulation (NPDWR) under SDWA section 1412(b)(1)(D) would still require the Agency to go through full notice-and-comment rulemaking and to build an administrative record to justify the interim NPDWR. To develop a robust and legally defensible administrative record for a NPDWR, the Agency uses the Health Risk Reduction and Cost Analysis (HRRCA). This tool requires significant data, information and analysis inputs, and much of that information would also need to be developed for an interim NPDWR and included in any rulemaking record. Moreover, the SDWA requires EPA to produce a full HRRCA within 3 years of promulgating an interim NPDWR. Developing a full HRRCA after the fact could mean that the final analysis may or may not support the requirements of the interim regulation, leading to potential revision or withdrawal of the interim NPDWR. As such, this process could result in inefficient use of local, state, and federal resources, diversion of infrastructure replacement funds, increased water bills, and erosion of public trust.

Pursuant to section 1431(a) of the SDWA, EPA also has authority to take necessary action to protect public health from imminent and substantial endangerment to drinking water when state and local action has been insufficient. Among other things, this authority enables EPA to respond to contamination that threatens specific public drinking water supplies. EPA has used its authority under section 1431 to issue orders that require persons who have caused or contributed to PFAS contamination to take actions as may be necessary to protect the health of affected persons, including actions that reduce or prevent exposures. For PFAS chemicals, EPA believes that section 1431(a) provides a more immediate and impactful use of SDWA’s emergency powers for communities with known or threatened contamination.

Clean Water Act Section 401

Question 1. EPA has said that its 401-rulemaking effort represents the first holistic review of section 401 of the CWA. Given that the agency produced guidance on 401 in 1989 and a handbook in 2010, don’t these documents represent EPA’s agency interpretation of the 401 regulations? What is the bar for “analysis?” Where are the elements of analysis defined or listed? What legal precedent is there for throwing out decades of agency documents and case law based on “lack of analysis?”

ANSWER. The Agency’s existing water quality certification regulations pre-date the Clean Water Act (CWA) and do not reflect the actual language of section 401. As explained in the preamble for the proposed rulemaking to update EPA’s water quality certification rule, although the 1989 guidance and the now-rescinded 2010 handbook included a number of recommendations on scope, timing, and other issues related to the water quality certification process, these recommendations were not supported with robust analysis or interpretation of the CWA. Indeed, the 2010 handbook was primarily a compilation of programs adopted by states. EPA’s section 401 rulemaking marks the first time the Agency has undertaken a holistic review of the text of section 401 and the case law that has developed since the 1972 CWA amendments. This is also the first time the Agency has subjected its analysis to public notice and comment.

Question 2. Congress signaled that certifying authorities have expertise and ability to evaluate potential water quality impacts, which EPA acknowledges in the proposed rule. That being the case, why does EPA propose to limit the information that a state can request as part of that certification process, restrict certifying authorities’ ability to condition permits to meet their state resources needs, and limit the time in which they can make their expert decisions?

ANSWER. The proposal does not limit the ability of states to request information as part of the water quality certification process. Further, the proposal’s timeline to act on a certification request simply aligns the proposed regulatory language with the plain language of the statute, which requires states to act on a request for certification “within the reasonable period of time (not to exceed one year).” The proposal includes a scope of certification that is consistent with the CWA and that appropriately focuses water quality certifications and any related conditions on water quality. The EPA has made enhancements in the final rule to provide additional clarity and regulatory certainty.

Question 3. Regarding the scope of certification, section 401 identifies “any effluent limitations and other limitations,” (under specifically identifies CWA regulatory programs) and “any other appropriate requirements under state law” as subject to certification and condition decisions. Given that Congress specifically identifies

CWA Provisions that should be considered for certification and conditions and added “any other appropriate requirements under state law” one would reasonably assume that this addition extends the scope of 401 beyond the already enumerated CWA provisions.

- a. Since it is the EPA’s position that Congress chose its words intentionally, can the EPA explain how it is appropriate to limit the phrase “any other appropriate requirement of state law” to EPA-approved CWA programs?

ANSWER. Section 401 contains several important undefined terms that, individually and collectively, can be interpreted in varying ways to determine the scope of a certifying authority’s review and authority, including the term “any other appropriate requirement of state law.” The EPA has made enhancements in the final rule to provide additional clarity and regulatory certainty. The Agency’s rationale for the final rule is laid out in the preamble.

- b. Why did EPA decide to limit state conditions to state statutes as opposed to administrative best management practices, which provide more flexibility and place less administrative burden on states?

ANSWER. Given the text, structure, purpose, and legislative history of the CWA and section 401, EPA proposed to interpret “appropriate requirement of state law” for section 401 certification review in a proposed definition of “water quality requirements,” which includes those provisions of state or tribal law that are EPA-approved CWA regulatory programs. The Agency’s rationale for this interpretation is laid out in the preamble of the proposed rule (see 84 Fed. Reg. 44080). The EPA has made enhancements in the final rule to provide additional clarity and regulatory certainty.

- c. When the administration finalizes its “Waters of the US” rule, would the 401 rulemaking mean that states could not protect their “non-Waters of the US” from adverse effects of federal permits?

ANSWER. Section 401 applies to potential discharges from federally-licensed or permitted projects into waters of the United States. The proposed section 401 rulemaking does not restrict a state’s ability to protect non-waters of the United States within their borders through state authorities.

Yazoo Pumps

Question 1. On April 3, 2019, EPA Administrator Andrew Wheeler confirmed to a Senate Appropriations subcommittee hearing that his agency is now reconsidering a 2008 decision on the Yazoo dam pumps.

- a. What are the justifications for this reconsideration?
b. What is the status of this EPA action?

ANSWER (a.–b.). Following the significant flooding along the lower Mississippi River and the Yazoo backwater area, EPA and the U.S. Army Corps of Engineers (Corps) have been discussing options to reduce the flood risks in the Yazoo backwater area while protecting wetlands.

The Corps has provided additional data and analyses to EPA, and has explained how it developed this information. At this time, we are discussing what impact the new information might have on options for the Yazoo backwater area, in terms of what an appropriate method might be to reduce flood risks while protecting wetlands.

Pebble Mine Decision

Question 1. Does the EPA continue to support the science and findings of adverse ecological impacts described in the 2014 Proposed Determination for the Pebble Deposit Area, Southwest Alaska?

ANSWER. I have no comment on this matter as I am recused from any decisions related to the Pebble Mine.

Question 2. If not, what new information has arisen to change this determination and reconsider the project in its entirety?

ANSWER. I have no comment on this matter as I am recused from any decisions related to the Pebble Mine.

QUESTIONS FROM HON. LIZZIE FLETCHER TO HON. DAVID ROSS, ASSISTANT ADMINISTRATOR, OFFICE OF WATER, U.S. ENVIRONMENTAL PROTECTION AGENCY

Question 1. During the hearing, I asked you about EPA’s role in the prevention of spills of hazardous substances under the Clean Water Act. As you know, Section 311(j)(1)(C) directs the President to issue regulations establishing procedures, methods, and equipment; and other requirements for equipment to prevent discharges of oil and hazardous substances from vessels and from onshore facilities and offshore

facilities, and to contain such discharges. The President has delegated the authority to regulate non-transportation-related onshore facilities landward of the coastline, under section 311(j)(1)(C) to EPA.

In February 2016, the EPA agreed, as part of a court-ordered settlement, to propose hazardous substance spill-prevention rules for industrial sites by June of 2018, and to issue a final rule in 2019. After soliciting input about hazardous substance spills across the country, the EPA issued a proposed rule to establish no new requirements related to spills of hazardous substances under the Clean Water Act. This in contradiction to the letter of the law and Congress's directive.

The EPA's own analysis determined that 2,491 chemical releases between 2007–2016 were Clean Water Act hazardous substances that originated from non-transportation related sources. In looking at the monetized damages of the spills, EPA failed to consider “water supply contamination.” Given that the 2014 spill by a chemical storage facility in West Virginia left more than 300,000 residents without drinking water for at least a week, it is surprising that EPA would fail to look at “water supply contamination” when estimating monetized damages of spills.

- a. In EPA's release announcing that this administration would no longer take action to prevent contamination of drinking water sources, your former boss, Scott Pruitt, suggested that such measures would be “duplicative and unnecessary”. However, according to EPA's own data, since the Charleston spill, there have been an additional 600 chemical spills into local waterways—14 of which were severe enough to contaminate local drinking water supplies. If we have seen an additional 600 chemical spills in just a 3-year period, explain to me how additional measures to reduce or eliminate chemical spills is “unnecessary”?

ANSWER. EPA recognizes the concerns regarding threats to drinking water systems. In the 40 years since Clean Water Act (CWA) section 311(j)(1)(C) was enacted by Congress, multiple statutory and regulatory requirements have been established under different federal authorities which serve, both directly and indirectly, to prevent and contain CWA Hazardous Substances (CWA HS) discharges.

Those statutory and regulatory requirements include:

- CWA National Pollutant Discharge Elimination System Regulations⁸
- Toxic Substances Control Act Polychlorinated Biphenyl Regulations⁹
- CWA Effluent Guidelines and Standards for various point source categories¹⁰
- Risk Management Program Rule¹¹
- Spill Prevention, Control, and Countermeasure Rule¹²
- Pesticide Regulations¹³
- Resource Conservation and Recovery Act Regulations¹⁴
- Underground Storage Tank Rule¹⁵
- Emergency Planning and Community Right-to-Know Act Regulations¹⁶
- Pulp and Paper Effluent Guidelines¹⁷

EPA identified nine program elements¹⁸ that are commonly contained in EPA regulatory programs provisions and that adequately serve to prevent, contain, or mitigate CWA HS. EPA's analysis indicated that these nine program elements are

⁸ CWA National Pollutant Discharge Elimination System Regulations Pretreatment Standards (40 CFR Part 403) and Multi-Sector General Permit (MSGP) for Industrial Stormwater, issued by EPA in 2015. The MSGP is a general permit that is available to facilities that do not discharge to a state with NPDES permitting authority. Because many states model their industrial stormwater permits after EPA's permit, it was used to identify prevention requirements likely to be present in NPDES industrial stormwater permits issued by states.

⁹ 40 CFR 761

¹⁰ Ore Mining and Dressing Point Source Category (40 CFR Part 440), Transportation Equipment Cleaning Point Source Category (40 CFR Part 442), Construction and Development Point Source Category (40 CFR Part 450), Concentrated Aquatic Animal Production Point Source Category (40 CFR Part 451), and Pesticide Chemicals Point Source Category (40 CFR Part 455).

¹¹ 40 CFR Part 68

¹² 40 CFR Part 112

¹³ Pesticide Management Regulation (40 CFR Part 165) and Pesticide Worker Protection Standard (40 CFR Part 170).

¹⁴ RCRA Generators Regulation (40 CFR Part 262) and RCRA Treatment, Storage, and Disposal (TSD) Regulations (40 CFR Parts 264 and 265).

¹⁵ 40 CFR Part 280

¹⁶ EPCRA Planning Rule (40 CFR Part 355) and EPCRA Reporting Rule (40 CFR Part 370).

¹⁷ 40 CFR Part 430

¹⁸ The program elements identified are (1) Safety Information, (2) Hazard Review, (3) Mechanical Integrity, (4) Personnel Training, (5) Incident Investigations, (6) Compliance Audits, (7) Secondary Containment, (8) Emergency Response Plan, and (9) Coordination of the Emergency Response Program with State/Local Responders.

reflected in the framework of EPA's existing regulatory requirements identified above.

For this rulemaking, EPA analyzed CWA HS discharges reported to the National Response Center (NRC) over a 10-year period between 2007–2016, as well as voluntary survey data, to estimate the frequency, impacts, and causes of discharges to identify what spill prevention requirements are needed. For this period, EPA identified less than one percent of all reports to the NRC for that period as CWA HS discharges originating from non-transportation-related sources, with less than five percent of those discharges having reported impacts. EPA concluded that based on the reported frequency and impacts of identified CWA HS discharges, the existing regulatory framework adequately serves to prevent and contain CWA HS discharges.

EPA is unable to identify the 600 chemical spills cited in the question, and in what three-year period these spills occurred, so the Agency is unable to provide additional clarification. The question also cited the January 2014 chemical spill in Charleston, WV. It is important to clarify that had EPA reached a different conclusion in this rulemaking and imposed additional requirements under CWA 311(j)(1)(c), those requirements would not apply to the Charleston, WV spill. EPA notes that, in addition to the regulatory structure already identified herein, recent statutory amendments to the Emergency Planning and Community Right-To-Know (EPCRA) focus on notifications to State drinking water primacy agencies, as well as on providing community water systems with hazardous chemical inventory data.¹⁹

In summary, based on a review of the existing EPA programs in conjunction with the frequency, impacts, and causes of reported CWA HS discharges, the Agency believes the existing regulatory framework meets the requirements of CWA section 311(j)(1)(C) and is serving to prevent, contain, and mitigate CWA HS discharges. Therefore, in August 2019, EPA determined to not establish new discharge prevention and containment regulatory requirements under CWA section 311.

For more information on the framework of federal programs and corresponding regulations, please see the Background Information Document: Review of Relevant Federal and State Regulations²⁰ and the Supplemental Background Information Document: Additional Review of Relevant EPA Federal and State Regulations in the docket (Docket ID No. EPA-HQ-OLEM-2018-0024).²¹ For a review of the analyses of the frequency of spills, the causes, and the impacts, see the Regulatory Impact Analysis (RIA).²² This information can be found in in Appendix A of the RIA for the final rule.

- b. The number of releases (2,491) between 2007–2016 is likely an underestimate. Even if it this is an accurate number, which EPA admits it has incomplete information, what would be the annual number of Clean Water Act hazardous substances releases before the EPA would decide to use its authority under Section 211(j)(1)(C) and develop comprehensive hazardous-substance spill-prevention regulations? What is an acceptable number of hazardous substance spills in your mind? Alternatively, what is an unacceptable number of spills that would push you to reverse course and pursue protective standards under the Clean Water Act?

ANSWER. As described above, EPA believes that the identified existing EPA regulatory programs adequately serve to prevent, contain, and mitigate CWA HS discharges.

- c. You mentioned existing regulations for hazardous substance spills. EPA claims that existing requirements adequately cover the nine program elements that EPA believes to be key for a discharge and accident prevention program. What percentage of facilities are subject to requirements covering all nine of those program elements for all the hazardous substances they store? If spills are continuing to occur, it would seem the existing requirement are insufficient. Why is EPA not pursuing a comprehensive scheme under the Clean Water Act?

ANSWER. EPA used EPCRA Tier II information as the best available data to estimate the universe of potentially affected facilities by identifying those with CWA HS onsite. EPA's analysis indicates that, for all nine program elements, there are cumulative regulatory requirements for accident and discharge prevention relevant

¹⁹For more information, see America's Water Infrastructure Act, Amendments to the Emergency Planning and Community Right-to-Know Act, A Guide for SERCs, TERCs, and LEPCs [https://www.epa.gov/sites/production/files/2019-12/documents/awia_fact_sheet_a_guide_for_sercs_tercs_lepcs.pdf].

²⁰<https://www.regulations.gov/document?D=EPA-HQ-OLEM-2018-0024-0113>

²¹<https://www.regulations.gov/document?D=EPA-HQ-OLEM-2018-0024-0187>

²²<https://www.regulations.gov/document?D=EPA-HQ-OLEM-2018-0024-0111>

to CWA HS under the existing framework. Based on a review of the discharges and the frequency, causes, and impacts of those discharges, EPA believes that the existing framework, as implemented through existing EPA regulatory programs, adequately serves to prevent, contain, or mitigate CWA HS discharges under section 311(j)(1)(C).

It is important to note that, while the final action does not establish any new requirements, the CWA prohibits discharges of CWA HS in quantities that may be harmful, with exceptions only where otherwise permitted or under such circumstances or conditions as the President may, by regulation, determine not to be harmful, irrespective of whether facilities are subject to hazardous substance spill prevention regulations.

- d. EPA cited spill prevention regulations for oil as one of the existing requirements. What is the justification for refusing to issue regulations for hazardous substances on regulations for a different hazardous substance, like oil?

ANSWER. The CWA HS spill prevention final action is not based on any individual provision and/or program preventing CWA HS discharges, but rather on how the cumulative framework of key prevention elements, as implemented through existing EPA regulatory programs, adequately serves to prevent, contain, or mitigate CWA HS discharges under section 311(j)(1)(C).

QUESTIONS FROM HON. EDDIE BERNICE JOHNSON TO HON. DAVID ROSS, ASSISTANT ADMINISTRATOR, OFFICE OF WATER, U.S. ENVIRONMENTAL PROTECTION AGENCY

Question 1. In your written testimony, you state that EPA's core mission is "protecting public health and the environment every single day." Can you explain how EPA is achieving its core mission by repealing the 2015 Clean Water Rule and narrowing the definition of "Waters of the United States" that will reduce the bodies of water protected by the Clean Water Act, some of which are relied upon by millions of Americans as their source of water supply?

ANSWER. EPA's core mission is to protect public health and the environment by using the statutory authorities that Congress provides to the Agency. Congress recognizes that there is more to environmental protection than exclusive federal authority—the states and tribes are partners that can and do regulate their own water resources.

EPA and the Department of the Army finalized a definition of "waters of the United States" that is superior to both the 1986 and 2015 Rules. The agencies revised previous regulatory definitions of this term to distinguish between water that is a "water of the United States" subject to federal regulation under the Clean Water Act (CWA or Act) and water or land that is subject to exclusive state or tribal jurisdiction, consistent with the scope of jurisdiction authorized under the CWA and the direction in the Act to "recognize, preserve, and protect the primary responsibilities and rights of States to . . . plan the development and use (including restoration, preservation, and enhancement) of land and water resources . . ." 33 U.S.C. 1251(b).

In developing an appropriate regulatory framework for the final rule, the agencies recognize and respect the primary responsibilities and rights of states to regulate their land and water resources as reflected in CWA section 101(b). 33 U.S.C. 1251(b); *see also id.* at 1370. The oft-quoted objective of the CWA to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters," *id.* at 1251(a), must be implemented in a manner consistent with Congress' policy directives to the agencies. The Supreme Court long ago recognized the distinction between federal waters traditionally understood as navigable and waters "subject to the control of the States." *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 564–65 (1870). Over a century later, the Supreme Court in *SWANCC* reaffirmed the State's "traditional and primary power over land and water use." *SWANCC*, 531 U.S. at 174; *accord Rapanos*, 547 U.S. at 738 (Scalia, J., plurality).

Ensuring that states and tribes retain authority over their land and water resources, reflecting the policy in section 101(b), helps carry out the overall objective of the CWA and ensures that the agencies are giving full effect and consideration to the entire structure and function of the Act. *See, e.g., Rapanos*, 547 U.S. at 755–56 (Scalia, J., plurality) ("[C]lean water is not the only purpose of the statute. So is the preservation of primary state responsibility for ordinary land-use decisions. 33 U.S.C. 1251(b).") (emphasis in original). That includes the dozens of nonregulatory grant, research, nonpoint source, groundwater, and watershed planning programs that were intended by Congress to assist the states in controlling pollution in the nation's waters, not just its navigable waters. These non-regulatory sections of the CWA reveal Congress' intent to restore and maintain the integrity of the nation's waters using federal assistance to support state, tribal, and local partnerships to control pollution of the nation's waters in addition to a federal regulatory prohibi-

tion on the discharge of pollutants to its navigable waters. *See e.g., id.* at 745 (“It is not clear that the state and local conservation efforts that the CWA explicitly calls for, see 33 U.S.C. 1251(b), are in any way inadequate for the goal of preservation.”). Regulating all of the nation’s waters using the Act’s federal regulatory mechanisms would call into question the need for the more holistic planning provisions of the Act and the state partnerships they entail. Therefore, by recognizing the distinctions between the nation’s waters and its navigable waters and between the overall objective and goals of the CWA and the specific policy directives from Congress, the agencies can fully implement the entire structure of the Act while respecting the specific word choices of Congress. *See, e.g., Bailey v. United States*, 516 U.S. at 146 (1995); *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. at 544 (2012).

Question 2. In your written testimony, you state that your Office is focused on restoring the rule of law. However, every action EPA has taken is to undermine the safety of clean drinking water. How can you say that your Office is restoring the rule of law when it is overturning decades of precedence and eroding the scope of the Clean Water Act?

ANSWER. As I said in my written testimony, I am thankful for the dedicated professionals working within EPA’s Office of Water for their service to this country and for their passion in delivering on the Agency’s core mission of protecting public health and the environment every single day. America’s drinking and surface water quality is much better today than at any point during the history of our Agency.

EPA is precluded from exceeding its authority under the CWA, Safe Drinking Water Act, and any other federal law the Agency administers to achieve specific scientific, policy, or other outcomes. The Agency can only exercise the authority that Congress delegates to it. EPA is not eroding the scope of the CWA, it is finally providing clarity and predictability tethered to a strong legal foundation that is designed to ensure protection of our nation’s navigable waters, as Congress intended.

Question 3. In your written testimony, you state that the purpose of Executive Order 13868 was to accelerate the construction of pipelines as it related to section 401 of the Clean Water Act. Isn’t “acceleration to construct pipelines” just a code word for ignoring governing environmental protections to benefit industry polluters?

ANSWER. No. EPA’s section 401 rulemaking seeks to increase the transparency and efficiency of the 401 certification process and to promote the timely review of infrastructure projects, while continuing to ensure that Americans have clean water for drinking and recreation.

QUESTION FROM HON. SAM GRAVES TO HON. DAVID ROSS, ASSISTANT ADMINISTRATOR, OFFICE OF WATER, U.S. ENVIRONMENTAL PROTECTION AGENCY

Question 1. In Ms. Bellon’s oral testimony, she stated that EPA recently repealed a water quality rule that the State of Washington spent ten years adopting that addresses water quality issues related to the State of Washington’s citizens fish consumption. Can you explain how EPA’s repeal of the State of Washington’s previously adopted water quality standards is consistent with the concepts of cooperative federalism in the Clean Water Act which this Administration has asserted is a priority?

ANSWER. EPA has not repealed and is not proposing to repeal any water quality rules that the State of Washington adopted. To the contrary, in May 2019, EPA approved a suite of Clean Water Act (CWA) human health criteria that were developed by the State of Washington through a lengthy stakeholder process. EPA had originally disapproved many of those criteria, but upon reconsideration, found the State’s standards to be based on sound science and protective of the State’s designated uses.

Because EPA approved Washington’s criteria, EPA proposed to withdraw its corresponding federally-promulgated human health criteria for waters under the State of Washington’s jurisdiction; EPA’s final rule withdrawing the federal criteria was published in the *Federal Register* on May 13, 2020 (85 FR 28494). Once EPA’s withdrawal of its federally-promulgated criteria goes into effect, the State of Washington’s criteria will be effective for CWA purposes. EPA is respectful of the state’s primary role in determining its water quality standards and its discretion in making resource- and risk-management decisions related to protecting the health of its citizens. This action will restore the balance mandated by the CWA, in which the states lead the standards-setting process.

QUESTIONS FROM HON. PETER A. DEFazio TO MAIA BELLON, DIRECTOR, DEPARTMENT OF ECOLOGY, STATE OF WASHINGTON

Question 1. In your testimony, you mention that the Trump administration is repealing the State of Washington's water quality standards to protect human health from toxics in fish.

- a. What legal standing does the Trump administration have to—or by what legal standards can the Trump administration—repeal the State's previously approved water quality standards?
- b. If there is no legal standard for repealing these standards, surely they are basing their decision on science. What science has the Trump administration presented to repeal the State's water quality standards?

ANSWER (a.–b.). The administration has no legal standing or standards by which they can roll back Washington State's fish consumption rule. That is why we have filed litigation against EPA to stop their unlawful action, and asked them to cease course.

Under the Clean Water Act, 33 USC § 1313(c), Congress provided two circumstances under which EPA can revise a state's existing water quality standards. Neither of these circumstances exist. The first occurs when a state submits new or revised water quality standards to EPA for review. Washington does not have a pending request to EPA to revise or amend our current standards. Three years ago, in August of 2016, we submitted a new rule to EPA for review. Three months later, in November 2016, EPA updated and finalized our current rule. That rule work has been complete and final for three years. The second circumstance is where Congress authorized EPA to revise a state's existing water quality standards only if EPA determines that revised or new standards are necessary to meet the requirements of the Clean Water Act. 33 USC § 1313(c)(4)(B). In its May 2019 decision to repeal Washington's existing water quality standards, EPA did not determine that revised or new standards are necessary to meet the requirements of the Clean Water Act.

Instead of complying with either of the procedures authorized by Congress, EPA has taken the position that it has "inherent authority" to ignore the procedures and timelines established by Congress and roll back Washington's existing standards at any time and for whatever reason it chooses. This also addresses the second part of your question.

Washington's 2016 rule meets the requirements of the Clean Water Act. EPA is not claiming to have repealed Washington's rule for scientific reasons. Along with its notice of repeal, EPA released a Technical Support Document that does not contain any new science or point to any specific science as a basis for their repeal.

QUESTION FROM HON. SAM GRAVES TO MAIA BELLON, DIRECTOR, DEPARTMENT OF ECOLOGY, STATE OF WASHINGTON

Question 1. In your oral testimony, you stated that EPA recently repealed a water quality rule that the State of Washington spent ten years adopting and that addresses water quality issues related to the State of Washington's citizens fish consumption. Can you provide additional details on the State of Washington's decade-long stakeholder engagement and effort to develop and promulgate the standards that EPA recently repealed?

ANSWER. Washington's process to develop our fish consumption rule began in 2010. We brought together stakeholders from the regulated community (including businesses and municipalities) and the environmental community as well as Native American tribes to develop a rule that would work for Washingtonians.

In August of 2016, Washington State adopted a new fish consumption rule and submitted it to EPA for review and approval. That November, EPA issued an updated rule. Once again, we worked alongside similar stakeholders and tribes—and launched a public process—to chart a common path forward to implement the final 2016 rule that would both keep our water clean and help the regulated community achieve compliance as quickly as possible. We have been implementing that rule without issue for three years now. EPA not only acted without first consulting the state of Washington, they did so over our numerous objections and refused to meet with us to hear our concerns. This is not the Washington way.