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IMPROVING AMERICAN ECONOMIC COMPETITIVENESS THROUGH WATER RESOURCES INFRASTRUCTURE: FEDERAL PANEL

HEARING

BEFORE THE

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

UNITED STATES SENATE

ONE HUNDRED SIXTEENTH CONGRESS

FIRST SESSION

OCTOBER 23, 2019

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COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

ONE HUNDRED SIXTEENTH CONGRESS

FIRST SESSION

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IMPROVING AMERICAN ECONOMIC COMPETITIVENESS THROUGH WATER RESOURCES INFRASTRUCTURE: FEDERAL PANEL

WEDNESDAY, OCTOBER 23, 2019

U.S. SENATE,
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS,
Washington, DC.

The Committee met, pursuant to notice, at 10:06 a.m. in room 406, Dirksen Senate Office Building, Hon. John Barrasso (Chairman of the Committee) presiding.

Present: Senators Barrasso, Carper, Inhofe, Capito, Cramer, Braun, Rounds, Sullivan, Wicker, Ernst, Merkley, Gillibrand, Markey, and Duckworth.

OPENING STATEMENT OF HON. JOHN BARRASSO, U.S. SENATOR FROM THE STATE OF WYOMING

Senator BARRASSO. Good morning. I call this hearing to order.

There is one change in the agenda. Unfortunately, R.D. James will not be able to join us this morning to testify. In his place to testify is Ryan Fisher, the Principal Deputy Assistant Secretary of the Army for Civil Works, and Acting Assistant Secretary of the Army for Civil Works.

So Deputy Assistant Secretary Fisher, welcome. We are glad you could join us today.

Last month, this Committee held our first hearing on the importance of passing a new Water Resource Development Act for 2020. This legislation authorizes projects and funding for the Army Corps of Engineers Civil Works program.

At last month's hearing, we held from a panel of stakeholders that included cattle ranchers and farmers. We also heard from witnesses involved in marine construction and port operations, and ecosystem restoration projects.

Today we are going to be hearing from the Army Corps on how we can best address water infrastructure needs and the challenges in upcoming legislation. It is also a chance for Committee members to conduct oversight into the implementation of programs and projects that were enacted in America's Water Infrastructure Act which was passed by this Committee and signed into law in 2018.

America's Water Infrastructure Act included numerous EPA water and wastewater infrastructure authorizations. Today we will be hearing from the EPA on the implementation of those provisions.

This Committee has established a tradition of working across the political aisle to pass meaningful water infrastructure legislation every 2 years. We did it in both 2014 and in 2016 under Senator Inhofe's chairmanship. We did it again in 2018 with America's Water Infrastructure Act, which passed the Senate by an overwhelming vote of 99 to 1. I look forward to doing the same again in 2020.

New water resources legislation in 2020 should continue to prioritize flood prevention and the modernization of our Nation's levee systems. This will protect lives and property.

For example, this spring we saw homes and farms and fields across all of Missouri, Mississippi, Arkansas, the river basins destroyed as a result of extreme rainfall and rapid snowmelt. Billions of dollars in economic losses were incurred by America's farmers and homeowners.

This bill should also ensure that western States continue to have adequate water supplies. Wyoming is a good example of how critical water supply really is, not only for drinking water, but also for ranching and for farming. As I said in our September hearing, water is the cornerstone of Wyoming's economy.

The Army Corps needs to prioritize the implementation of America's Water Infrastructure Act provisions to increase water storage capacity. The provisions will reduce sediment in reservoirs, increasing access to water for western States.

This Committee should also continue to be proactive in combating the threat posed by invasive species. Invasive species exist on land and in the water. They significantly degrade water quality and availability for farmers, ranchers, and native species, and rural communities all across America. Species such as the zebra mussels that clog water infrastructure; Russian olive and salt cedar steal precious groundwater.

This bill should also continue the tradition of authorizing important projects that will increase the navigability of our Nation's waterways. Our Nation's inland waterways in particular are a vital commercial network that transports agriculture goods, raw materials, and products from middle America to the coasts and beyond. These projects are vital to the economic health of our country, and will keep America's economy strong.

I look forward to working with my colleagues to pass bipartisan water infrastructure legislation in 2020.

With that, I would like to turn to Ranking Member Carper for his testimony.

OPENING STATEMENT OF HON. THOMAS R. CARPER, U.S. SENATOR FROM THE STATE OF DELAWARE

Senator CARPER. Thank you, Mr. Chairman.

Good morning, everyone, and welcome, one and all.

My thanks again to you, Mr. Chairman; to our colleagues, Senator Inhofe and Senator Cardin; and to your staffs for working with us to improve America's water infrastructure.

Last Congress, I am proud to say we worked together in a bipartisan way, much as we had in previous years under the leadership of Chairman Inhofe and Barbara Boxer, to address major chal-

lenges to our country's water infrastructure. However, we still have work ahead of us.

I believe that every American deserves equal access to clean, safe, reliable, and affordable drinking water. That is why I believe our Committee must continue to conduct oversight on the implementation of the 2018 law, and act, if needed, to refine the Federal programs that are essential to achieving that important goal.

Earlier this year, our Committee held a hearing with stakeholders to kick off the WRDA 2020 process. I expect that today will be a continuation of that hearing and provide us with yet another opportunity to reflect on the last WRDA bill as we look ahead to the next one.

Let me begin by raising an issue that bears repeating. During the drafting process for the last WRDA, this Committee repeatedly heard that the Office of Management and Budget micromanages the Corps of Engineers. There continues to be a troubling lack of transparency with respect to how OMB reviews Corps projects. This concern was echoed by both the Republican and Democratic witnesses last month.

Mr. Chairman, I want to submit for the record witness testimony from Jamey Sanders, Vice President for the Choctaw Transportation Company, who testified last month on behalf of the Associated General Contractors of America.

Senator BARRASSO. Without objection.

[The referenced information was not received at time of print.]

Senator CARPER. Thank you, sir.

In his statement, Mr. Sanders called on Congress to "reform the benefit-cost analyses and eliminate duplicative and confusing accounting process," that is used by OMB. The benefit-cost analyses to which Mr. Sanders is referring is the tool that OMB and the Corps use to prioritize projects, and we have heard repeatedly from stakeholders that this method of prioritization fails to capture all of a project's benefits, because it considers only national economic impacts.

All of this means that the Corps' budget and work plans often fail to include projects that would address critical needs in smaller, coastal, rural, disadvantaged, and tribal communities.

As I understand it, Assistant Secretary James has been working diligently with his team to implement the 2018 law, including fulfilling many reporting and transparency requirements.

However, OMB adds additional layers of review on Corps projects to which no other Federal project agency is subjected. While there are a number of outstanding Corps projects underway, I am confident that Secretary James and General Semonite will ensure the Corps' work is completed.

That said, it is my understanding that OMB, which is under the Office of the President, is the real culprit behind the Corps documents, reports, and projects that remain significantly delayed. Meanwhile, these needless delays are happening at a time when our country faces a tremendous backlog of Corps projects and water infrastructure maintenance needs.

Millions of Americans across the country rely on Army Corps projects to safely navigate waters, to stay safe from flooding and storm damage, and reap the benefits of healthy aquatic ecosystems

and marshlands. At the end of the day, we need greater investment in Corps projects, not less. We also need for OMB to be an effective and cooperative partner, and if that is a role that OMB is unwilling, or unable, to play, perhaps they should consider just stepping aside.

Needless to say, I am disappointed that we do not have a witness here today from OMB.

Let me close by noting that the 2018 WRDA legislation included a number of drinking water and wastewater provisions, the most significant of which was the first reauthorization of the Drinking Water State Revolving Loan Fund in 22 years. Issues surrounding clean drinking water continue to be one of the top priorities for me and I know for many of our colleagues on this Committee and in this Congress.

The fact is, we need to ensure that every American has clean, safe, and reliable water to drink. So, as we get to work on our 2020 WRDA bill, I think it is critically important that we keep that clear goal in mind.

Mr. Chairman, thanks again for pulling this together. I look forward to hearing from our witnesses today and to working with all of the members of this Committee in the months ahead to craft the next bipartisan WRDA bill for the full Senate to debate, amend if needed, and pass so that we can go to conference with our colleagues in the House of Representatives.

We look forward to hearing from R.D. James in his different form; I am sorry he can't be with us today.

Thank you.

Senator BARRASSO. Thank you, Senator Carper.

In just a moment, we will hear from our witnesses. Ryan Fisher, who is the Principal Deputy Assistant Secretary of the Army for Civil Works of the United States Department of the Army; General Todd Semonite, who is the Chief of Engineers and Commanding General of the U.S. Army Corps of Engineers; and Charlotte Bertrand, who is here as the Deputy Assistant Administrator for Policy at the United States Environmental Protection Agency.

Welcome to all of you.

I want to remind the witnesses that your full written testimony will be made a part of our official hearing record today. Please try to keep your statements to 5 minutes, so that we may have time for questions.

With that, I look forward to hearing your testimony, beginning with Mr. Fisher.

STATEMENT OF RYAN FISHER, PRINCIPAL DEPUTY ASSISTANT SECRETARY OF THE ARMY FOR CIVIL WORKS, AND ACTING ASSISTANT SECRETARY OF THE ARMY FOR CIVIL WORKS

Mr. FISHER. Thank you, Mr. Chairman, Ranking Member Carper, and distinguished members of the Committee. I am honored to testify before you here today.

I am here no behalf of my boss, Mr. R.D. James. He is the Assistant Secretary of the Army for Civil Works, and I am here, of course, as an appointee myself, on behalf of the Administration.

Thank you for this opportunity to discuss the U.S. Army Corps of Engineers Civil Works program. I look forward to continuing to

work with this Committee and the Congress on water resource issues that are of interest to the Nation.

The Army Civil Works Program, which is the Nation's largest water resources program, has three main missions: commercial navigation, flood and storm damage reduction, and aquatic ecosystem restoration. Some of the projects that the Corps owns and operates also have ancillary purposes, such as hydropower, recreation, water supply, and fish and wildlife.

We constructed these projects under congressional authorizations, such as those provided through Water Resources Development Acts. The Army Corps, with oversight by the Assistant Secretary of the Army, uses its engineering expertise and its relationships with other Federal agencies, State agencies, our project sponsors, and other stakeholders to develop innovative approaches to address some of the most pressing and complex water resources challenges facing the Nation.

Such challenges include addressing the Nation's dredging capacity to ensure our harbors stay open and navigation lanes clear, the protection of communities from devastating flood impacts, and the restoration of significant ecosystems. It is critical that we work with non-Federal partners and other Federal agencies to develop tangible solutions and get it right.

The Assistant Secretary of the Army certainly recognizes the importance of deliberative and responsive stakeholder engagement as highlighted by a recent decision to further consider policy implications posed by the draft water supply rule.

The ASA Civil Works focus includes identifying the highest priority investments for the Army Civil Works Program, and ensuring that we deliver studies and projects in a more timely and efficient way.

We recognize the importance of delivering authorized water resource projects to the communities of our great Nation, and with the help of Lieutenant General Semonite and his team, the Army Corps is committed to improving the execution of the Civil Works program.

Over the last 2 and half years, the Army Corps has worked to improve its policies and streamline its delivery of infrastructure. We are speeding up how we do business to deliver projects sooner. We are not only accelerating project delivery, we are also improving permitting processes and reforming regulations to enable projects to be built faster, more cost effectively, and certainly more efficiently as well.

We are right sizing decisionmaking; we are moving decisions from Washington to the level appropriate, to where the work is being done and by simplifying unnecessarily complicated and bureaucratic processes. We are completing targeted updates of policies to better deliver infrastructure projects and streamline permitting.

The Assistant Secretary of the Army for Civil Works is committed to ensuring that the Army Corps continues to identify the best ways to manage, develop, restore, and protect water resources in collaboration with our project sponsors and other partners. Our goal is to achieve a high economic, environmental, and public safety return for the Nation, which will benefit all Americans.

Thank you for inviting me here today. I look forward to your questions.

Thank you.

[The prepared statement of Mr. R.D. James, General Semonite, and Ms. Bertrand follows:]

DEPARTMENT OF THE ARMY

WRITTEN STATEMENT
OF

MR. R.D. JAMES
ASSISTANT SECRETARY OF THE ARMY
FOR CIVIL WORKS

LIEUTENANT GENERAL TODD.T.SEMONITE
CHIEF OF ENGINEERS
U.S. ARMY CORPS OF ENGINEERS
AND
MS. CHARLOTTE BERTRAND
DEPUTY ASSISTANT ADMINISTRATOR
U.S. ENVIRONMENTAL PROTECTION AGENCY

BEFORE

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS
UNITED STATES SENATE
ON
WATER RESOURCES DEVELOPMENT ACT: WRDA 2020

OCTOBER 23, 2019

Chairman Barrasso, Ranking Member Carper, and distinguished members of the committee. I am honored to testify before you today and thank you for the opportunity to discuss the U.S. Army Corps of Engineers Civil Works program. I look forward to continue working with this committee and the Congress on water resources issues that are of interest to the Nation. In addition to Lieutenant General Todd Semonite, Chief of Engineers for the U.S. Army Corps of Engineers, I am also joined today by Charlotte Bertrand, Deputy Assistant Administrator for Policy in the Office of Water at the Environmental Protection Agency (EPA). She is here to answer any questions you may have on the implementation of EPA related provisions in WRDA.

The Army Civil Works Program, which is the Nation's largest water resources program, has three main missions: commercial navigation, flood and storm damage reduction, and aquatic ecosystem restoration. Some of the projects that the US Army Corps of Engineers (Army Corps) owns and operates also have ancillary purposes, such as hydropower, recreation, water supply, and fish and wildlife. We constructed these projects under Congressional authorizations, such as those provided through Water Resources Development Acts. The Army Corps, with oversight by my office, uses its engineering expertise and its relationships with other Federal agencies, state agencies, our project sponsors, and other stakeholders to develop innovative approaches to address some of the most pressing and complex water resources challenges facing the Nation. Such challenges include facilitating the transportation of commerce goods on the Nation's coastal channels and inland waterways; working with communities to reduce the risks to from devastating flood impacts, and restoring significant aquatic ecosystems. It is critical that we work with nonfederal partners and other federal agencies to develop tangible solutions and get it right. I recognize the importance of deliberative and responsive stakeholder engagement as highlighted by my recent decision to further consider implications posed by the draft water supply rule of the prior Administration.

My focus as the Assistant Secretary of the Army for Civil Works includes identifying the highest priority investments for the Army Civil Works Program, and ensuring that we deliver studies and projects in a more timely and efficient way. Under my oversight and direction and with the help of Lieutenant General Semonite and his team, the Army Corps is committed to improving the execution of the Civil Works program.

Over the last two and half years, the Army Corps has worked to improve its policies and streamline its delivery of infrastructure. We are speeding up how we do business to deliver projects sooner. We are not only accelerating project delivery, we are also improving permitting processes and reforming regulations to enable projects to be built faster, more cost effectively, and more efficiently.

We are right-sizing decision-making by moving decisions from Washington to where the work is being done and by simplifying unnecessarily complicated and bureaucratic processes. We are completing targeted updates of policies to better deliver infrastructure projects and streamline permitting.

I am committed to ensuring that the Army Corps continues to identify the best ways to manage, develop, restore, and protect water resources in collaboration with our project sponsors and other partners. Our goal is to achieve a high economic, environmental, and public safety return for the Nation, which will benefit all Americans. For example, the FY 2020 Budget promotes increased non-Federal participation in the construction of Civil Works' projects to improve project delivery and to increase cost savings. It includes $150 million in the Construction account for the Water Resources Reform and Development Act of 2014 (WRRDA 2014), Section 1043 Non-Federal Construction of Federal Projects program. The Corps would transfer this funding to non-Federal sponsors who have decided to construct an authorized project on their own under Section 1043 of the WRRDA 2014, as amended. The Budget also proposes to extend this program's authorization, which expired on June 10, 2019. The Budget provides $150 million in the Construction account for the Innovative Funding Partnerships program. These funds would be used, in conjunction with funds voluntarily provided by non-Federal sponsors in excess of the non-Federal sponsor's statutory cost share requirements, to accelerate the completion of construction of authorized projects.

Thank you for inviting me to be here today. I look forward to your questions.

Senator BARRASSO. Thank you very much, Mr. Fisher.

General Semonite.

STATEMENT OF LIEUTENANT GENERAL TODD SEMONITE, COMMANDING GENERAL AND CHIEF OF ENGINEERS, U.S. ARMY CORPS OF ENGINEERS

General SEMONITE. Chairman Barrasso, Ranking Member Carper, and distinguished members of the Committee, thank you for the opportunity to testify today.

This is my fourth consecutive testimony before this Committee, and I sincerely appreciate your unwavering support over my tenure as Chief. Together, we have all accomplished a great deal.

Secretary James and I are continuing to work together to address water resource challenges across the Nation. I look forward to speaking with you today about America's Water Infrastructure Act of 2018, and the Corps' aggressive execution of this civil works program.

The Army Corps of Engineers is committed to a performance based civil works program based on innovative, resilient, and sustainable risk informed solutions. Since Congress first authorized our navigation mission in 1824, the Corps has worked hard to develop and implement solutions to our Nation's water resource challenges. We are able to do this because we have a world class work force of talented and dedicated professionals who are absolutely passionate about what we do.

However, none of our work is done alone. We appreciate and value the support of the Administration, the Congress, and all of our partners to succeed in our mission. I am very proud of the work we do, however, we can and must revolutionize the Corps of Engineers.

I have been in command of the Corps for over 3 years. I travel 3 days every single year, and I have done that for the last 3 and a half years. We have to continue to challenge the enterprise to revolutionize how we are doing business.

This does not imply that the Corps is not a world class organization; rather, it demands that we anticipate and respond to the changing requirements and externalities like all world class organizations. We embrace the authorities provided by this Committee to focus current mission areas and to serve as a guide to implement the Civil Works program with a strategic vision, taking pioneering steps to remain relevant and ready for the challenges of tomorrow.

Successful civil works project delivery supports the Nation's current and future infrastructure priorities. The Corps' credibility is measured on our ability to deliver results that are on time, on budget, and of exceptional quality. The Corps is taking bold actions to improve performance to continue to engineer solutions for the Nation's toughest challenges. These actions are realized through modernizing the traditional delivery of the annual civil works program with innovative tools, streamlining internal processes, and exploring alternative financing approaches.

I want to walk you through the three big initiatives we are doing to revolutionize the Corps. The first objective is to accelerate project delivery. It focuses on innovative ways to deliver high quality outcomes as the Corps' top priority. Through looking internally

at our organization, we are identifying policy and administrative changes that can increase the efficiency and the effectiveness of infrastructure delivery.

We believe that risk informed or professional judgment decisionmaking should be implemented and documented without being studied into numerous time consuming reviews. We also seek to incorporate innovative ideas through the life of a project as part of the acquisition strategy, design, and construction process.

One new example we are investigating is a multi-port dredging concept that would explore innovative ways of executing dredging in a logical sequence manner unconstrained by more traditional project specific or account specific execution. We believe that cost and time savings can be achieved through a regional multi-purpose approach implemented over a multi-year timeframe.

Our second big initiative is alternative financing. Fiscal responsibility and budgetary constraints demand that we utilize innovative approaches that allow for accelerated project execution and early realization of benefits with increased efficiency and effectiveness by exploring the development of a Water Infrastructure Finance and Innovation Act, or WIFIA, loan program, as well as seeking public-private partnership opportunities. We are also revising metrics and developing multi-year capital budget concepts in our budgeting process.

Finally, our third objective is to improve our permitting process. We have adopted the One Federal Decision in coordinating our processes to comply with NEPA and other environmental laws. Our goal is to simplify the process for gaining infrastructure permits while protecting the environment in accordance with the law.

In the regulatory program, we continue to streamline permit processes. Where modifications to existing Corps structures are concerned, these are 408 permits; we have reduced those as much as 50 percent.

This includes efforts to reduce redundancy, identifying alternative processes, and delegating authority for decisionmaking to the most practical and appropriate level.

I would love you to ask me about my flat line budget compared to my expanding permitting requirement. Although our budget workload has remained relatively steady in the last 7 years, with more than 80,000 permits a year, the bottom line is our budget has decreased in real time inflation with more than $25 million.

So our workload is flat lined, but our budget is going down, and my guys can't work permits any faster without having additional people to be able to process those in accordance with America's expectations.

Finally, for more than 244 years, the Corps has adapted to meet the challenges of the today. Today is no exception. Our current efforts to revolutionize the Corps simply represent the next chapter in this remarkable journey.

Thank you, Mr. Chairman and members of the Committee. This concludes my statement. I look forward to answering any questions you have.

Senator BARRASSO. Thank you very much for your testimony, General Semonite.

Now, Ms. Bertrand.

STATEMENT OF CHARLOTTE BERTRAND, DEPUTY ASSISTANT ADMINISTRATOR FOR POLICY, OFFICE OF WATER, U.S. ENVIRONMENTAL PROTECTION AGENCY

Ms. BERTRAND. Good morning, Chairman Barrasso, Ranking Member Carper, and members of the Committee. I am Charlotte Bertrand, the Deputy Assistant Administrator for Policy within EPA's Office of Water.

The written testimony provided to you represents joint testimony from the Army Corps of Engineers and the Environmental Protection Agency regarding the Water Resources Development Act. The WRDA provisions EPA administers seek to ensure the American public has access to safe, clean, and reliable sources of water.

I understand the members have questions regarding the implementation of EPA programs authorized by WRDA, and that I was invited here today to answer those questions. I am more than happy to answer those, and I thank you for the opportunity.

Senator BARRASSO. Well, thank you to all of you for being here.

Let me start with General Semonite.

The perception persists that Corps projects are taking too long to complete. What, if any, legislative steps can we take to help you get these projects done faster? And will you commit to working with members of this Committee to find ways to build projects more quickly, more efficiently, at less expense to the taxpayers, while still protecting the environment?

General SEMONITE. Chairman, we are absolutely committed to trying to speed up timelines.

You all need to know that the one thing that is absolutely nonnegotiable in the Corps of Engineers is quality. We have to be able to perform.

You do a great job at giving us those funds. It is our absolute commitment to be able to make sure those funds are expended the right way.

But our timelines are too long. So we are looking at a lot of different things. A lot of this is, How can we speed to be able to get the projects designed? We are doing a lot of innovative things there.

Acquisition processes, we can't be a Corps of Engineers that are stuck in 244 years of doing old contracting. So we have done a lot of work at bringing new people in, new innovative concepts to be able to turn contractors faster.

I personally think we were taking probably too risk adverse an opinion. We will always follow the FAR. We will always do the right things. But there are times that we might have put too many decimal points on the equation, and we are trying to figure out how to streamline.

So anything that we can do. And right now, General Spellman sitting here behind me has over 130 initiatives to be able to speed up process. About 20 of those are legislative things that we need some help in untying the hands of the Corps to be able to do our work better.

Senator BARRASSO. We would appreciate working with you on those 20 things that are legislative, that we could actually, hopefully, get into this next water infrastructure bill.

General SEMONITE. Yes, sir.

Senator BARRASSO. Thank you.

Mr. Fisher, in our hearing last month, Pat O'Toole, who is the president of the Family Farm Alliance, testified about additional water storage projects that could provide beneficial flood risk management and environmental benefits, while also ensuring a more reliable water supply for western communities. He stated in his written testimony, he said, "Adequate water supplies for the future require supply enhancement measures." New and expanded water storage projects, that provide long term solutions across the West.

So will you work with this Committee to develop some of these smaller scale water storage projects that will certainly help our rural communities in the West?

Mr. FISHER. Absolutely, Mr. Chairman. Demand on water certainly is not decreasing, right? I think we all know that in this Committee room. Demand in the West is certainly a priority of my boss and the Administration.

We will work with this Committee. I am sure we have existing authorities we can use to tackle some of these problems. But if other authorities are needed, we are certainly willing to talk those through with this Committee, so that we can ensure a reliable water supply in western States, and all States, for that matter. Thank you.

Senator BARRASSO. Ms. Bertrand, in Section 5004 of the Water Infrastructure Act, we created a grant program for qualified nonprofits to provide technical assistance to small and medium sized wastewater treatment works. This type of technical assistance is crucial in rural communities across the Nation.

Could you discuss, if you could, the difficulties that these small and rural wastewater treatment systems face in just trying to comply with the Clean Water Act and the Safe Drinking Water Act? Also, where are you in the implementation of this important project?

Ms. BERTRAND. Thank you for the question. Small systems have a greater challenge than some of the larger systems in infrastructure development, complying with the Clean Water Act, complying with the Safe Drinking Water Act. They have a smaller rate base.

So when you look at something like the drinking water systems, out of our 50,000 community water systems, 91 percent of them serve fewer than 10,000 people. So their rate base is smaller, and they need more assistance.

The tools that we have been provided through WRDA 2014, 2016, 2018, have improved our ability to help these smaller communities.

The specific provision that you referred to, Section 5004, of AWIA, that is one of the provisions that we have not been able to implement. We had more than 30 different provisions that amended portions of the Safe Drinking Water Act with AWIA. But we did not receive appropriations for all of them. So there were some that we required some appropriations to move forward on.

Senator BARRASSO. Thank you.

Senator Carper.

Senator CARPER. Thanks, Mr. Chairman.

Again, our thanks to each of you for joining us, for your testimony, and now your willingness to respond to some of our questions.

My first question would be to Deputy Assistant Secretary Fisher and General Semonite. It involves oversight letters on climate change.

I am one of those people who focuses on root causes of problems, not on just the symptoms of problems, but on root causes. We spend a lot of time and energy focused on symptoms; we don't do nearly enough to focus on the root causes in too many instances, right? So that is a preface to what I am about to ask.

In April of this year, the Environment and Public Works Committee held a field hearing in Iowa regarding the Corps' management of the catastrophic flooding along the Missouri River that occurred in March 2019. The Chairman has already referred to that. Following that hearing, I sent a letter to General Spellman, he may recall, with some questions for the record regarding climate change. I only received responses this past Monday.

Again, we sent questions for the record regarding climate change, I think following the hearing in March. And we just received answers on Monday. I am going to be submitting those questions, and I am told the responses to the questions were really non-responsive.

General Semonite, I am going to be submitting these questions to you again, as questions for the record. I would just ask that you actually respond to the questions we are asking this time, not dance around the issue of climate change. Just be responsive, please.

I also sent both of you a letter—this will be to Secretary James, and to you, General Semonite—in April 2019, with 14 of our colleagues. That letter asked you to address how the Corps is planning for and combating extreme weather events attributed to climate change.

It has been nearly 6 months since we sent that letter, and despite repeated follow up by members of our staff, we still have not yet received a response. We need a response, please.

And I would just ask, when might my colleagues and I expect a response? It has been 6 months.

General SEMONITE. To all of the Senators on the Committee, we are absolutely committed to being able to support those answers in a rapid timeline. My suspense is 17 days to get them to my higher levels. We meet that suspense.

As the Chairman asked questions coming in about How can we continue to streamline the bureaucracy, I would defer to Mr. Fisher and others, but we will always make our timelines to get them in.

We can talk reports as well. We are committed to get reports in on time. But we have to find a better way of getting our answers to you, sir.

Senator CARPER. All right, thanks.

When I was a member of the House of Representatives and Governor after that, we would measure the number of letters we would receive by maybe the hundreds. We received letters and e-mails by the thousands every month. We have to try to be responsive to our constituents and others who contact us. I know you want to as well. Please do.

Second question, if I could, would be for Charlotte Bertrand. It is regarding PFOS and PFOA.

Ms. Bertrand, during Administrator Wheeler's confirmation process, members of this Committee were alarmed to learn that EPA was not planning to set an enforceable drinking water standard for PFOA and for PFOS. Our concerns were alleviated somewhat when EPA had the Office of Water, David Ross sent a letter to us, and I am going to quote. He says, "The EPA intends," his words, "The EPA intends." Intends what? Well, "to set an enforceable drinking water standard for those two PFAS chemicals."

That was February. And just last month, Mr. Ross seemed to back off of his commitment when he told the House Transportation and Infrastructure Committee that he would not commit to setting a drinking water standard for those two PFAS chemicals after all.

So Mr. Chairman, I would just ask unanimous consent to submit both Mr. Ross's February letter and two articles regarding his September testimony, if I could, for the record.

Senator BARRASSO. Without objection.

[The referenced information was not received at time of print.]

Senator CARPER. And Ms. Bertrand, my colleagues and I don't ask a whole lot of yes or no questions. I am going to ask one of you this morning. Does EPA intend to set an enforceable drinking water standard for PFOS and PFOA as Mr. Ross previously committed?

Ms. BERTRAND. So the Safe Drinking Water Act has a set of provisions in it that requires us to go through a process. It is a legally binding process. We are committed to going through that process. We are, right now, anticipating that we are going to base our regulatory determination by the end of this year.

So that is the first step in developing the NCL that you are referring to.

Senator CARPER. All right. I am going to ask the same question, not right now, I guess, again for the record. I am looking for a clear yes or no answer. So just be looking for that question for the record, and please respond to it, yes or no.

I think that is my time for right now. I will look forward to the next round.

Thank you.

Senator BARRASSO. Senator Inhofe.

Senator INHOFE. Thank you, Mr. Chairman. I have two questions, both of them for General Semonite, and both of them kind of on two unrelated subjects that he is very familiar with.

The first one is, I have to explain to people sometimes that we are navigable in Oklahoma. They talk about, oh, they don't realize that we have can remember taking World War II submarine all the way up from Orange, Texas, to Muskogee, Oklahoma. That still didn't register to most people what our capacity is there.

But we have a 9-foot channel that we have had for a long period of time. I am particularly interested in this, because my father-in-law had a lot to do with then Governor Kerr. I used to consider it, it may be a boondoggle, but it was our boondoggle, and it worked.

But anyway, we have the 9-foot channel. But if we were—as you know, we have been trying for a long period of time to get that into a 12-foot channel.

Now, we are at 90 percent, all the way from the Gulf to Oklahoma. Ninety percent, a 12-foot channel. But it is that other 10

percent that is the problem. I think to do that, you could increase the capacity by about 50 percent, just to get that other 10 percent of the whole waterway done.

So I would like to see if you had anything you could say briefly, because I want to have time for my second question, and if not, do it for the record. What can we do in Congress, what can we do in concert with the State government and all the other forces who are trying to line up on this, to accomplish this 12-foot channel?

General SEMONITE. Senator, we think very highly of that particular channel. We would strongly endorse it. As you know, it was not in the 2020 budget, so it did not get any funding.

It needs two things. It needs, obviously, some funds, but it also needs a new start. The biggest thing the Committee gives us is when we get the additional money above the President's budget, you give us work plan money. We have more flexibility in work plan money than we actually do in the President's budget.

So this, I think, would continue to compete well, but we would have to get both the funds and a new start to be able to see that through. But you are right, this is a great capability.

Senator INHOFE. I think together, we can do that.

General SEMONITE. Yes, sir.

Senator INHOFE. Now, let me say something about General Semonite that most of you don't know. This guy is a real tiger. When you are talking about some of your employees, some of your staff, and what your expectations are, they should see you in action.

We had a flood, we have a levee that is called the Sand Springs-Tulsa Levee, it was built back in the 1940s. We had a really big time flood just last year. I mean, it was devastating. I remember going up into our dams and seeing it come within 2 feet of my feet down there. And the levee was starting to break, but it did hold up.

Now, this guy, General Semonite, I walked in, and I saw him stacking sandbags on the levee. And I thought, this guy literally has his finger in the dike on this thing.

So I just want to tell you what a great job you did there.

But we also want to do something about that feasibility study. You have heard me talk about this for a long time. Originally it was going to be 3 years; we had it knocked down to 2 years.

Now, my feeling is, I know that you probably are scheduled to leave around April. I would like to have a big celebration with you and sign that report prior to that time that you leave.

Now, the question I would have is, If the chief's report for it was completed this year, you could include it in your budget for fiscal 2021. That is correct, isn't it?

General SEMONITE. It is, Senator, and I owe all of you, I think right now on my list of chief's reports, I have about 25 more that I am planning on signing before I leave. And that is one of them.

So we are pushing hard, I told my guys, don't give me 500 pages if 200 is good enough.

Senator INHOFE. Where does that rank with the other 24?

[Laughter.]

General SEMONITE. They are all very, very important, sir.

[Laughter.]

Senator INHOFE. Thank you for your great work.

Thank you, Mr. Chairman.

Senator BARRASSO. Senator Gillibrand.

Senator GILLIBRAND. Thank you, Mr. Chairman and Ranking Member.

Ms. Bertrand, I was very disheartened when during a House committee last month, David Ross, the Assistant Administrator for the Office of Water at the EPA, was unable or unwilling to commit that the EPA would make a determination to regulate PFAS chemicals under the Safe Drinking Water Act by setting a maximum contaminant level.

You may be aware that under the Safe Drinking Water Act, there are three criteria that the EPA must consider when deciding to move forward with setting a drinking water regulation.

The first criteria is that a contaminant may have adverse health effects. The EPA's own website titled Basic Information on PFAS states that "There is evidence that exposure to PFAS can lead to adverse human health effects." So I think we can check the box on that one.

The second criteria is that the contaminant is known to occur or there is substantial likelihood the contaminant will occur in public water systems with frequency and levels of public health concern. The Environmental Working Group has compiled a publicly available map of known PFAS detections in 49 States, many of which are at levels well above the EPA's health advisory level. I think we can check that box, too.

The third criteria is that in the sole judgment of the Administrator, the regulation of the contaminant presents a meaningful opportunity for reducing health risks. My question for you is this: Why is it taking you so long?

Ms. BERTRAND. So, the Safe Drinking Water Act requires us to go through a process. And we are actually getting very close to proposing one of the first steps in that process, and that is the regulatory determination, where we will be speaking to the three items that you just referred to in the Safe Drinking Water Act.

We can't prejudge the outcome of a regulatory process. That would make our decision indefensible. So to make those defensible, we have to work through each one of those steps and follow the law. So that is what we are doing right now.

Senator GILLIBRAND. But why is it taking so long? There is so much publicly available information already that supports conclusions on those three elements.

Ms. BERTRAND. We want to make sure that we get it right. And so we are carefully looking at all the information, and we have made a commitment in our action plan to do this first step by the end of the year.

Senator GILLIBRAND. But your first step is just to decide whether or not you are going to regulate. That does not sound like a hard decision to make.

Ms. BERTRAND. It requires us to carefully look at the record; it requires us to look at the data and start to build a defense, a defensible record. So we are on track.

Senator GILLIBRAND. What are you on track to do?

Ms. BERTRAND. By the end of the year, to have our proposed regulatory determination.

Senator GILLIBRAND. OK. The EPA's regulatory agenda indicates that regulatory determination will be posted by December 2019. Has a draft regulatory determination been sent to OMB yet?

Ms. BERTRAND. It has not been sent yet. Our team is working very hard on getting the final document ready to submit.

Senator GILLIBRAND. Mr. Fisher, as you may be aware, communities along the shoreline of Lake Ontario have suffered back to back severe flooding, due to high water levels in the lake. I worked with my colleagues to push for a Great Lakes coastal resiliency study to develop a proactive plan for protecting communities along the Great Lakes, including Lake Ontario, from coastal storms and flooding.

This is something that is desperately needed in so many communities that I represent. The Army Corps Buffalo District is ready to go, but the study needs to be funded.

Will you commit to working with me and the other Great Lakes Senators to make this study a priority for the Army Corps?

Mr. FISHER. Yes, we will. Lake Ontario, the Great Lakes in general, remain an invaluable resource to this country. The Army Corps recognizes that, and we certainly want to work with you to reduce flooding and improve those ecosystems there.

Senator GILLIBRAND. Thank you.

Mr. Fisher, the Army Corps has an authorized project to restore the ecosystem of the heavily polluted Caño Martin Peña in San Juan, Puerto Rico. I visited the community and had the opportunity to see firsthand the truly devastating environmental impacts that the polluted water has on a very low income neighborhood. That was even before Hurricane Maria made everything so much worse.

We have to get this project done. We have requested that this project be included in the President's budget or as a new start on the Army Corps' annual work plan. But we seem to have gotten nowhere.

From the Administration's perspective, what is currently blocking this project from moving forward?

Mr. FISHER. I don't think there is necessarily anything blocking it. I think preliminary preconstruction engineering design is scheduled to be complete, I think, later this year if not early next.

The Assistant Secretary of the Army, my boss, has actually been to visit that project, has been to meet with sponsors down there, and we are certainly willing to look for solutions.

Senator GILLIBRAND. Thank you. Can you please brief my office on progress and timing as it becomes available?

Mr. FISHER. Absolutely.

Senator GILLIBRAND. Thank you.

Thank you all.

Senator BARRASSO. Thank you, Senator Gillibrand.

Senator Braun.

Senator BRAUN. Thank you, Mr. Chair, Ranking Member.

My question would be for Mr. Fisher and Ms. Bertrand.

Aquatic ecosystems and the restoration and protection of them; I know as a landowner that manages many acres of farm and tim-

ber ground, farming seems to keep at bay a lot of the invasives that are out there, because you manage that ground every year. You have a clear field, so you can get a good crop.

It has been amazing to me in what a short period of time that—and I will get to water in a moment—forests have been infiltrated by so many invasives. Literally a beetle coming over on a pallet from China has eliminated ash trees, which constitute 8 percent of all hardwood trees. And it has happened over 15 years.

So in some cases, it moves so quickly, you can't even get a handle on it. When I look at things like Japanese stilt grass, which looks like a normal, native grass, grows in the woods, and it completely smothers out regeneration.

When it comes to waterways, it shares that same characteristic with forest ground. You generally can't see all the invasives at work. It is hidden. Of course, I know Asian carp are in our Indiana waterways. They can jump out of the water and hit you in the head.

So I would like both of you to comment on aquatic ecosystems and give me your opinion of what our worst nightmare is out there in terms of trying to rein them in, and what the progress has been on things like Asian carp, zebra mussels, and many of the other things I am probably not even aware of.

Mr. Fisher, would you start, please?

Mr. FISHER. Sure. The Corps has multiple missions, aquatic ecosystem I would classify is one of the top three right now, navigation, flood control, aquatic ecosystem restoration.

Asian carp in particular has been certainly a nuisance problem. The Corps has things like a fish barrier to keep those from moving into the Great Lakes, but they are certainly monitoring the Ohio River and others there around Indiana. It is going to be a lot of monitoring, a lot of preparation to make sure we have the proper infrastructure in place to contain fish and other invasive species where they—and remove them from areas that we don't want them, and contain them.

Senator BRAUN. What else other than Asian carp would be on your radar?

Mr. FISHER. Any submerged aquatic vegetation, things like this, all around the country. We have harmful algal blooms, things like this, pop up in lakes all over the country. And we want to make sure that we have the authorities to address those.

Where we don't have the authorities, we certainly want to work with this Committee to figure out what might be needed, so we can be of assistance in those matters.

Senator BRAUN. Ms. Bertrand.

Ms. BERTRAND. Thank you. We also recognize that this is a challenging area, and we do have a lot of different activities going on related to invasive species, and related to harmful algal blooms. I would ask that if I could please give you more information for the record, that we can probably give you a little bit more detail.

Senator BRAUN. Especially on Asian carp, if you could both get back with my office, I would like to know whether it is being pushed back, whether they are progressing, and a progress report. Then maybe each office, give me a report on the next two most

challenging aquatic invasives, and some idea on whether we are making progress or not.

One other question; I have a little time left. This would be for General Semonite.

I know in my own area of southern Indiana, we have one of your projects done back in the 1970s, Patoka Lake, which has been a godsend for rural water. Also, seemingly in concert with the Corps when it comes to waters of the U.S., and the issue that besets farmers, and I know that is something we are grappling with in other areas here.

Where does the Corps weigh in when it comes to issues that would be tied in or related to waters of the U.S. where many farmers are now confused in terms of what they can and can't do in their own ditch management?

General SEMONITE. Sir, I will just hit it quickly, and then Mr. Fisher or EPA can weigh in. As you know, there was a decision put in the Public Register yesterday, on the 22nd of October, on repeal of that. It has 60 days, and then that will be implemented.

As far as us, we give technical advice. But when it comes to the policy of that, I will defer to Mr. Fisher.

Mr. FISHER. I would just add that the Army Civil Works Office is focused on implementation. The Corps of Engineers is tasked with implementing the Clean Water 404 program. We want to make sure it is being implemented consistently across the country.

We recognize there are a variety of challenges between various geographic regions of the country. But we want to ensure consistent implementation going forward.

Ms. BERTRAND. I defer to my colleagues.

Senator BRAUN. OK.

Thank you so much.

Senator BARRASSO. Senator Rounds.

Senator ROUNDS. Thank you, Mr. Chairman.

Lieutenant General Semonite, as we spoke just before this meeting began, I do look forward to meeting with you in my office. I understand we have a get-together sometime after the first of November.

I also wanted to take this opportunity to sort of thank you for your 40 years of service, which includes tours in Bosnia, Afghanistan, Iraq, as well as multiple civil works and disaster response assignments with the Corps. Thank you for your service.

Mr. Fisher, I would also like to take this opportunity to thank you and your team, including Mr. James, and this thanks is probably a little bit overdue, for your successful efforts to provide the initial fiscal year 2019 funding and budget for an additional $3 million in fiscal year 2020 for the Missouri River Basin snow pack monitoring system. The capability that this provides will enable more precise forecasting and better decisionmaking by the Corps' Missouri River water management team.

I do look forward to receiving an implementation plan brief from Major General Spellman in just the next few weeks.

At times I have been tough on the Corps, but I want to publicly thank both of you and the 35,000 employees for the good job the Corps has done in really managing a very difficult year on the Missouri River, in the aftermath of floods this past year. It is not done

yet, but clearly, the Corps has taken a lead role in trying to make improvements and in trying to respond in a timely fashion to some real heavy precipitation, probably record breaking precipitation in the Missouri River Basin.

My question is, first of all to both of you gentlemen. The Corps of Engineers has been grappling with a proposed so called Surplus Water Rule for the better part of the last decade. I myself don't even agree with how the Corps uses the term surplus water. Personally, I think it is offensive, and I think a lot of our citizens in the West feel the same as I do. They view it as an unlawful taking of what is a constitutionally protected right of the States to the natural flows of the river systems.

The Flood Control Act of 1944 highlights the preeminent role of States and localities with respect to water rights. Surplus water appears undefined in Section 6 of the Flood Control Act. In the decades since the passage of the Act, with the exception of the previous Administration, the Corps has declined to define surplus water.

Yet in December 2016, the Corps sought comment on a proposed Surplus Water Rule. The original deadline for this action was February 2017; the comment period was extended. But a decision, which was scheduled to be made in August, was deferred for 6 months.

Mr. Fisher and General Semonite, it was never the intention of Congress to federalize all of the water in our country's major rivers. I am going to ask you, where are we now with this proposed rulemaking action, and how will you balance responsibilities of the Corps as authorized by Congress with the rights and interests of the States?

Mr. Fisher.

Mr. FISHER. We certainly don't want to federalize waters, as you hinted at just then. Where we are with it right now, we are in the federalism process, I am not sure—originally, we had done all the gathering of feedback from States and tribes around the country. That is where we are getting all the input we possibly can.

You referred to the 6 month extension. When we get to that point, hopefully we will be prepared with all the info we have heard from States, Governors, tribes, to be able to move forward with a decision on that.

General SEMONITE. And Senator, on the Corps side, Secretary James has delegated to General Spellman the approval of reallocation reports and surplus water contracts just in the last week or so. So we are right now in the middle of writing implementation guidance as to how we are going to do that. And we would like to think we can get that done in 60 days.

There are 10 contracts that have still been out there. Our goal is as soon as those implementation instructions are done to be able to act on those 10 and get the books clear so we can then continue to be much more responsive on supply contracts.

Senator ROUNDS. General, can you imagine if we talk about the natural flows, is there any possibility that the Corps considers the natural flows of the river to belong to anyone except those defined by Constitution and western water law? Is there any question at all about that?

Mr. FISHER. No, there is not. Like I said, we are not looking for the Federal Government to take control of these things. We certainly recognize States' rights.

Senator ROUNDS. They clearly recognize the natural flows of the river do not belong to the Federal Government, and they clearly recognize that they do belong to the States and the local entities?

Mr. FISHER. Yes. There is complex—right, you can put a reservoir in, and it changes the natural flow. So we have to consider all those sorts of things. But yes, natural flow, correct.

Senator ROUNDS. Let me just follow this for a second. If you have a natural flow of a river, you haven't added anything to it. That natural flow is still there, and that is all that there is there.

How do you come up with surplus water? It is part of the natural flow. Even if you may have the opportunity to slow down its release, it is not surplus. And it clearly belongs to those States from day one in this country. And I have yet to figure out why in the world it has taken so long for the Corps to figure that out.

I want you to be aware that this is one that is really important to the western States. We have exactly the same constitutional rights that were granted to the original 13 States. And this is one that needs to be repaired and fixed and dealt with as soon as possible. I don't understand any reason why it has taken this long to get this far.

Thank you.

Thank you, Mr. Chairman.

Senator BARRASSO. Thank you, Senator Rounds.

Senator Duckworth.

Senator DUCKWORTH. Thank you, Mr. Chairman.

First off, I would like to say that I am very sorry to learn that Assistant Secretary James is not with us today. I want to thank Mr. Fisher for filling in. And I hope that we will get to see Mr. James soon. I hope he feels better soon as well.

General Semonite, thank you for being here. It is good to see you again.

President Trump's consistent destruction of ethical norms and clear disregard for our Constitution and laws was on full display last week when he awarded himself a no-bid contract to host a G7 Summit at one of his properties. Thankfully, bipartisan pushback from Democrats and Republicans forced the President to retreat from this appalling proposal within 48 hours of its announcement.

Unfortunately, this is only the latest bizarre and troubling episode of President Trump attempting to steer Federal contracts outside of the official process, and potentially outside of the law, to benefit himself, his friends, or his allies. In May, the Washington Post reported that President Trump directed officials to fast track billions of dollars of construction contracts, seize private land, and disregard environmental rules in order to construct his border wall ahead of the 2020 elections.

In some cases, when staff suggested that his orders were unlawful or unworkable, the President reportedly dangled pardons for anyone willing to break the law on his behalf. As far as I can tell, the White House still hasn't denied these reports. They merely tried to claim that the President was actually joking, or quickly changed the subject.

General Semonite, given my deep respect for you and the Corps of Engineers, it pains me to ask you these questions. But given several press reports outlining the President's efforts to influence Army Corps contracting decisions, I would like to clarify your views on proper Federal procurement rules.

As a general rule, do you believe full and open competition, free of political influence, is critical to protecting taxpayers and the Government, while making sure that the best solution is advanced?

General SEMONITE. Absolutely, Senator.

Senator DUCKWORTH. Thank you. Have you ever personally involved yourself in an Army Corps contracting decision to overrule the source selection authority and steer a contract award to a company you personally favor?

General SEMONITE. I do not get involved in contract actions. I have an unbelievably world class team, and I make sure that I stay out of that. We do everything exactly in accordance with the FAR. And as this Committee knows, for 10 years, we have had clean audits on every single thing we do.

Senator DUCKWORTH. I would expect no less.

If you or your staff are ever pressured by the President or anyone speaking on behalf of the President to violate a law, a regulation, rule, or constitutional protection, will you immediately notify this Committee?

General SEMONITE. Ma'am, we are apolitical. I tell my guys, what we do, we get our taskings from a higher authority, we are concrete and steel. We start at one place; we end at the other place. I stay out of why and how. We mainly worry about what we are building and to get it done in accordance with the law.

Senator DUCKWORTH. Thank you, General. That is very reassuring.

Mr. Chairman, I ask for unanimous consent to include three press reports about these issues.

Senator BARRASSO. Without objection.

[The referenced information was not received at time of print.]

Senator DUCKWORTH. Thank you.

Mr. Fisher, as ASA James and I have discussed in the past—and I do want to thank him for being so very approachable and accessible—efficient navigation on our inland system is key to our global economic competitiveness. I am sure you agree.

Every time a lock faces an unscheduled closure, freight traffic shifts to roadways and rail, costs rise for shippers, and already razor thin margins for farmers and manufacturers are further eroded. Despite the critical nature of our inland system, it always seems to take a backseat to other infrastructure efforts.

Highway projects, for example, generally enjoy an 80-20 cost share between Federal and non-Federal sponsors. Airport construction projects receive 75-25 cost share, as do harbor construction projects. Yet lock and dam projects still rely on an outdated 50-50 cost share, which exacerbates the $8 billion construction backlog.

Mr. Fisher, if this Committee is able to secure an increase in the Federal cost share for inland projects, does the Corps have enough projects in the pipeline to accommodate the cost share change?

Mr. FISHER. We do. I think the overall backlog, beyond inland waters, is about $100 billion. I don't know what the exact number on inland water is, but it is significant.

That trust fund you referred to is typically depleted each appropriation cycle, so yes, there would be projects to get at if this Committee and this Senate and Congress were to adjust the cost share.

Senator DUCKWORTH. Thank you.

General, would you agree with Mr. Fisher?

General SEMONITE. I do. However, if you don't increase the top line, and then you fence 75 percent of the current budget, you are basically reducing our operating capital by about 25 percent. So therefore, that means things are not going to get done.

So if we change that cost share, I would want to make sure that we identify to the Committee what is the risk you are incurring if the regular top line is the same.

Senator DUCKWORTH. I think that is a great note of caution, and we will take it into consideration as we work on the change. Thank you.

I want to thank you for Secretary James' August 16th letter that reinforced his commitment to completing a review of the Corps' Urban Flooding Policies as required by language in WRDA. His letter states that he hopes to have the report completed by the end of the year. Is that still the plan?

Mr. FISHER. I am sorry, the report due at the end of the year?

Senator DUCKWORTH. Yes.

Mr. FISHER. Yes, that report, any reports, I realize we can be quicker on these things, but yes, we are shooting for reports at the end of the year as quickly as we can, and we will try to expedite these for the Committee.

Senator DUCKWORTH. Thank you.

Thank you, Mr. Chairman.

Senator BARRASSO. Thank you, Senator Duckworth.

Senator Wicker.

Senator WICKER. Thank you very much, Mr. Fisher, and General Semonite. I want to ask about the Bonnet Carré Spillway on the Mississippi River.

According to NOAA, conditions from July 2018 to June 2019 set the 12 month precipitation record in the United States, a historically wet year. The U.S. Army Corps of Engineers opens the Bonnet Carré Spillway to ensure that no more than 1.25 million cubic feet per second of the Mississippi River passes New Orleans. This is based on science, engineering, and forecast.

This year's openings lasted for an unprecedented 123 days. It just devastated the Mississippi Sound. Because what happens is, the Bonnet Carré Spillway empties out into Lake Pontchartrain, which eventually gets into the Mississippi Sound with a bunch of freshwater and destroys our saltwater shrimp and oysters.

I have submitted a WRDA request for language that would authorize a comprehensive study of water management techniques, structures, and features within the RNT, and to look at this. We certainly want to do what we can on Mississippi River flooding. But I just don't think it has to be done at the expense of our small businesspeople and residents who depend on the saltwater in the Mississippi Sound.

General, if you could comment on that, and then Mr. Fisher.

General SEMONITE. Senator, you know this is where we have eight authorized purposes. Sometimes those compete against each other. As much as we care about the environment, the habitat, the economy, there is absolutely no doubt in our mind the most important thing is life safety. There was some confusion in the Missouri River when our guys would say, We have eight authorized purposes, but it is always to be able to take care of people and their property first.

So the challenge here is that if you didn't release that much water, could we have found some way of absorbing those impacts if you didn't have that water going downstream? We would welcome a study. Anything we can do to try to do this better, we want to do.

But the last thing we want to do is hold water back and kill a human when we are trying to preserve the environment. The environment is important. But it is that balance that is hard to be able to manage.

Senator WICKER. Well, I am glad you welcome the study. It is not just the environment, although the environment is very important. It is the livelihood of the people who depend on the saltwater in the Mississippi Sound.

Mr. Fisher, do you have anything to add?

Mr. FISHER. Senator, I am not sure I do. I think life, property, environment, economy, those local businesses, are certainly important. When you have competing water resource issues in Bonnet Carré or other spillways, there are tough decisions.

We look forward to working with this Committee to ensure that we are operating those spillways in an appropriate manner and protecting everything that they are authorized for.

Senator WICKER. I am glad that the General would welcome the study.

I have also, with regard to permitting and economic development, I have submitted, Mr. Chairman, a provision to WRDA to our communities to work on the front end with the Army Corps to review sites in advance in order to recruit projects to locations that require wetland mitigation. I have found that certain districts interpret the current law differently across the Nation.

Section 404 of the Clean Water Act regulates the discharge of dredged fill material into waters, including wetlands. We want to mitigate, but we would like an opportunity to do this in the most efficient way, so that when a community has an opportunity to act quickly to engage in job creation, they can do so.

Would you agree that local communities should be able to work collaboratively with the Corps and other resource agencies when engaged in responsible economic development, and that working collaboratively on the front end could allow the Corps to be a stronger partner with local communities around the country in job creation?

General SEMONITE. Senator, certainly. Anything we can do to reduce that overall time. There is a lot of things on the front end both the locals can do, but also the other resource agencies, the interagency fish and wildlife and other capabilities.

The other thing that you talked about, consistency, we want to delegate and empower. We want to push things down. But that means you have a hard time making sure everybody does it the same.

General Spellman and I had a meeting with our permitting people yesterday to be able to make sure that we have systems in place to be as consistent as possible. If we find a district that is not consistent, call me personally, and I will make sure we get that fixed.

Senator WICKER. Mr. Fisher.

Mr. FISHER. We have the Clean Water Act; we have an eye toward implementation. And Mr. James certainly, and the Administration, certainly want districts to be reviewing the same science, using the same documents and making decisions consistent across the Nation.

Senator WICKER. Thank you very much.

Thank you, Mr. Chairman.

Senator CARPER [presiding]. Senator Capito, the Chairman's list has you next, followed by Senator Ernst.

Senator CAPITO. Thank you.

I want to thank you all for your presentation, and Lieutenant General, thank you for your service, and thank you for the great service that the Corps provides.

I was just out at the Robert C. Byrd Locks to watch the dewatering of the locks with our Colonel Evers in our Huntington District, who does a great job working with our offices. I will say this, when you peer down into the chamber, you realize why these projects are so expensive, because it is a massive undertaking to repair those locks and give them the lifetime that they need through the next several years. So I am very appreciative of that.

I do have a bit of—the last time that everyone was here in March, we submitted some questions that we have yet to have answers responded to. I heard your first response to Senator Carper, but I wanted to put that one out on the table as well.

General SEMONITE. [Remarks off microphone.]

Senator CAPITO. Thank you.

Ms. Bertrand, I am working with Senator Cardin on an issue that I think is important to everybody, and that is the leakages that we have with all the water out of all the water systems we have.

We had a report in our newspaper just recently that said that a small community was having trouble with its water system, and they estimated that 60 percent of the water that is going out through these pipes is getting lost before it even gets to the customer.

So we are looking at a way to help our small infrastructure, our public service districts, to be able to answer this question, and we are introducing Assuring Quality Water Infrastructure Act, where the EPA is going to be playing a role of—because you are now supposed to be providing, and you talked about this a little bit, educational materials on asset management.

But how do you think small water systems are addressing the issue of asset management? Is your message getting received?

Obviously, they don't have the money to repair these, or know how to do it or determine the leaks. How are we going to be able to help small water systems with this?

Ms. BERTRAND. Thank you for the question. We share your interest in this asset management. It is just a critical part of planning for infrastructure upgrades, understanding when you may need funding, how to obtain the funding.

In AWIA, we have been through, what AWIA authorized us to do, we have been providing more information on asset management. And we are requiring States to start to incorporate that into some of their planning.

We would be happy to work with you on proposals and provide technical assistance on anything that you put forward in this area.

Senator CAPITO. There have been numerous reports from other States with a water shortage. If we have leakages everywhere else, we are really wasting water in a lot of States because of older systems that I think you can be of great assistance here.

The other thing I would like to say, too, since this is a bipartisan issue, that I have worked with Senator Cardin on, and that is the PFOS and PFOA drinking water level. You said twice in response to two questions that you are trying to get your regulatory determination. I get that, but that sounds like such bureaucratic stuff, when we realize that over 3 years ago, the EPA came down hard on two of our communities, telling us that the level of PFOA and PFOS in our water systems was higher than what would be considered healthy, without much warning and without much assistance at the same time.

So I just want to register to you the frustrations with the timelines, the kind of what I perceive to be—and I think we all do—is a sort of a pushback from the EPA trying to slow the process. I understand science, and we want to get the science right, and all of that.

But the determination here has already been determined by EPA, that these are chemicals that we need to watch as they are going into our water system, for a lot of different reasons. So I am going to add my voice to the level of concern on this particular issue.

So I am going to ask Mr. Fisher a quick question, if I can.

We have some—in one of the bills, it is water infrastructure where the Corps helps with money with ARC and EDA to help get our water systems its environmental infrastructure authorities. In our region—the Appalachian region, specifically West Virginia—we are running up against our authorization level in terms of funding.

We are having issues trying to figure out how to bump those levels up. We understand it has to go through—and you will have to tell me this—the 7001 process. I would like to enlist your help in trying to get us to meet the challenge of lifting these authorization levels as they meet the challenges of the very expensive replacement of the energy infrastructure, or infrastructure, the water infrastructure that we have in our States.

Mr. FISHER. Yes, certainly, if the communities you are working with are pursuing environmental infrastructure programs, and they need assistance filling out their annual 7001 request, we cer-

tainly can step up, and the Corps and our office, the Army Civil Works, can help with that.

Senator CAPITO. But you see what I am saying here; we had a certain authorization level through—I mean, I know it is incumbent upon us to raise those levels. We are having some issues with earmarks and those kinds of terminologies. So I would really like to work with you all to figure out how to do it. Because you have been really, really critical to some small projects in your world, but very large projects for communities.

Mr. FISHER. We understand. We are certainly willing to work with you.

Senator CAPITO. Thank you so much.

Senator CARPER. Senator Ernst, I indicated that you would be next, but Senator Markey has come back, so he is next, and you are right after him, and then Senator Cramer.

Senator Markey.

Senator MARKEY. Thank you, Mr. Chairman, very much. Earlier this month, the Army Corps released a draft report of the Sagamore and Bourne bridges on Cape Cod. These two bridges are vitally important. They connect the nearly 250,000 residents of the Cape with the rest of Massachusetts, and the tourism community is obviously very important.

Unfortunately, these two bridges are over 80 years old, and as the Army Corps just concluded in its draft report, structurally deficient and in desperate need of replacement.

Replacing the bridges is one of the most critical infrastructure projects in Massachusetts. That is why I led my colleagues in Massachusetts to send a letter to you, General, last week, urging the Army Corps to include all necessary funding for the Cape Cod bridges in the Corps work plan for fiscal year 2020.

Although we must keep working to identify long term solutions for these bridges, an initial allocation of money to get this project moving as soon as possible is important, including startup funds for Cape Cod in the next Army Corps work plan would represent a significant down payment and a responsible long term investment. So thank you, General, and thank you for all the work you do for our country as well. Much appreciated.

So I would just like to take this opportunity to urge you again to include all necessary funding for the Cape Cod bridges in the Corps' 2020 budget and to ask for your response.

General SEMONITE. Senator, I have been to those bridges three times personally. I have talked to the Governor personally about this. We need to look at an out of the box solution here.

Before you came in, the Chairman had said right up front, there are times where bureaucratic rules don't allow certain projects of very, very important value to be able to meet into the budget. These are ones that can't go through a benefit-cost ratio. It is going to end up having a cost, and very easily might not be able to qualify.

These are going to be obsolete by 2025. This is something of a strategic value. It is going to fall into the same category of the Soo Locks, where it has to have some additional capability.

So I would encourage not only for this particular project, but for other projects that this Committee has that are so important to

this Nation, and they are a single point of failure, that we have to find another way of getting some of these projects approved. You have our commitment in the work plan and just from an engineering perspective to fight to get these done.

Senator MARKEY. So you will invest the necessary startup funds for this project in the plan?

General SEMONITE. Unfortunately, my work plan doesn't necessarily keep its integrity all the way through. But you have my commitment, and I think it will compete very, very well with my guys putting our work plan together.

Senator MARKEY. OK, thank you. I think that is absolutely imperative.

We, in the aftermath of Hurricane Sandy, also had to look at what the potential risk was up in the northeast. I am pleased that Massachusetts has a State specific study, but that study is unfortunately incomplete. In particular, the city of Boston has not been studied by the Army Corps despite its significant vulnerability to coastal flooding and sea level rise.

General, do you agree that Boston faces major climate risks to its infrastructure, including flooding and sea level rise?

General SEMONITE. It definitely does. Unfortunately, the rules on this particular study—it is called the North Atlantic Comprehensive Study—did not allow Boston to be included. So we want to work with your staff to figure out, How do we continue to be able to address the Boston challenges? But it might be through some other venue.

Senator MARKEY. So you will commit to me to working to find a way to study climate resilience and infrastructure in Boston?

General SEMONITE. Without a doubt.

Senator MARKEY. Beautiful. That is very, very important.

And again, I appreciate your work in the Army Corps.

Secretary James came and visited with me the bridges on Cape Cod and Boston Harbor. He came out on a boat with me to take a look at it as well. And you, I know, are on this and understand it fully.

Every American should have access to safe, healthy drinking water. In too many communities across the country, we are failing to deliver on that promise. High levels of lead, copper, pesticides, and other invisible contaminants are actively hurting children and families. We can't ignore this crisis or sweep it under the rug.

That is why I have introduced the Clear Drinking Water Act. I urge this Committee to include my legislation in any WRDA package as a part of this WRDA reauthorization. We must take action to address drinking water issues.

I urge all members to look at my proposal. I think it deals with every region's problems comprehensively. I hope that we can, once again, on this Committee serve as a model that we work together on a bipartisan basis to pragmatically solve problems.

So I thank you both, Mr. Chairman and Ranking Member Carper.

Senator BARRASSO [presiding]. Thank you very much.

Senator Ernst.

Senator ERNST. Thank you.

General Semonite, I want to thank you very, very much. I appreciated the time that you took this last couple of weeks while Congress was back in their home States to visit us in Cedar Rapids at their first federally funded portion of their flood control system. It meant a lot to have you there, working with you and others on your team to find a path forward for the citizens of Cedar Rapids. They fought very hard for that project, and we are very thankful for that.

So kudos to you and your team.

And General Spellman, you joined us earlier this year in April in western Iowa, in Glenwood, Mills County, for a very healthy discussion and field hearing on the flooding that we have seen throughout the western part of our State.

I would like to talk a little bit about that with you, General Semonite. We have had very devastating flooding in western Iowa. A number of those communities are still under water. If you could this morning, could you provide us with an update on the progress that the Corps is making with repairing and rebuilding a number of those levees in southwest Iowa?

General SEMONITE. Yes, ma'am. So as you know, this was probably the second wettest year in the last 124 years. We really have broken this repair down into three big phases. We had 212 levee breaches, 13 of them repaired as of today. We have on our second phase the ability to be able to go back and to be able to restore those levees. We have 182 different requests.

We think we have that under control. It really goes back to the longer plan of how do you continue to recommend a study for the flood protection, to be able to make that happen. We are absolutely committed to be able to restore that back and to be able to get the level of safety back.

If you don't mind, I just would want to go back to your thing on Cedar Rapids. It probably also affects Senator Cramer. As you know better than anybody in this room, that would never have seen the light of day had we continued to be able to have a benefit-cost ratio of 2.5 where people are either losing their lives or they are losing their property. We are having the same thing in Fargo-Moorhead.

We as a committee and we as a Federal Government have to find a way of somehow getting those projects—the supplemental was the savior here. It was able to get your project approved. But the bottom line is, we still have communities that are affected with an arbitrary metric that we have to be able to figure out a way around.

Senator ERNST. Yes, absolutely, I agree completely with that. The benefit to cost ratio is very detrimental to those of us that live in rural communities. It is not that our lives or property are less valuable to us than somebody living along the coastlines, where they may have million-dollar homes and so forth. But certainly, we do need to make sure that that is adjusted, that it will work better for everybody across the United States.

Just as a follow up for the first question, what we have heard is that there will only be minimal levels of protection in place for a portion of southwest Iowa before the start of next year's flood season. What plans are being worked on, maybe in coordination

with FEMA or other agencies, to make sure that the communities along the miles of these compromised levees will have adequate protection come next spring?

General SEMONITE. I think we probably need to lay this out for you and show you exactly what the plan is. Obviously, we can really only do the response, that is what is under our control.

But also, Congress has been very, very good in the supplementals. The $17.4 billion that has gone in the ground, a lot of this could very easily be covered in the next supplemental that is coming.

So that is where you go from really that short term recovery into a much, much longer plan to be able to give you the level of resilience you need out in those communities.

But if you want, I will have my staff come and lay that out for you with what is currently going in the ground, and where do we see future tasks that could be done, and what is the funding mechanism to make that happen.

Senator ERNST. Right. That would be fantastic.

Both, General, for you and Mr. Fisher, you are both familiar with the situation, I hope, that we have in Hamburg, Iowa. General Spellman is nodding his head.

It is a really difficult situation. As we begin working on this next WRDA, do you have any recommendations or policy changes that could help some of these small communities like Hamburg improve their flood protection infrastructure, or potentially continue using temporary structures?

Mr. FISHER. From a policy perspective, I think we certainly want to work with you, Senator, and this Committee on what authorizations and what things we might need to address problems like that. I will let the General address what is currently being done and what is being done here in the near term.

General SEMONITE. I think on the tactical side, the State was very good. They stepped up with $6.3 million. We got the design all done; the city still needs $3 million. So we are at a little bit of challenge. Whatever we can do, we will get the Federal side covered.

I don't know if we initially have a solution there. Maybe we can go back and redesign somehow to get it at a cheaper cost. But we are all in to try and figure out how we can fix Ditch Six Levee in Hamburg.

Senator ERNST. Thank you, yes. God bless Mayor Crain and all the citizens there in Hamburg. It has been a really challenging number of decades, we will put it like that, for that community. Because it is a rural, very, very small community, they are economically challenged when it comes to putting up those types of dollars as well.

Thank you, Mr. Chair, I really appreciate it.

Senator BARRASSO. Thank you, Senator Ernst.

Senator Cramer.

Senator CRAMER. Thank you, Mr. Chairman. Thank you all for your service and for being here. Right up front, General Semonite, I want to express my gratitude for both your understanding and commitment to this benefit to cost ratio issue that has prevented

really important jobs from getting done. I look forward to working with you and my colleagues on that issue. Thank you.

I unfortunately was presiding when you had your discussion with Senator Rounds on the Surplus Water Rule. So I am going to dig into that a little bit for you.

As you know, last month, I sent a bipartisan letter that was signed by 18 of my colleagues to OMB, hoping to halt the proposed rulemaking regarding the use of Corps reservoir projects for domestic, municipal, and industrial water supply, otherwise known as the Water Supply Rule.

Similar letters were sent, as you know, to the Corps from the Western Governors Association, Western Attorneys General, National Water Supply Association, Western States Water Council, and National Water Resources Association, all in opposition to the rule.

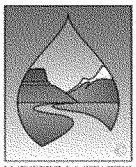
Not only in my view was the rule crafted poorly with without adequate State and tribal consultation, which in my view is just the root of the problem, it is also based, I think, on a wrong premise that somehow the Corps has management control of the water that should remain delegated to the States.

I want to publicly thank all of my colleagues who signed the letter. As Mark Twain famously said, or is believed to have said, whiskey is for drinking; water is for fighting. I think we have started a brawl, if this is any indication.

I would like first of all, Mr. Chairman, to put into the record all of these letters that I just referenced.

Senator BARRASSO. Without objection.

[The referenced information follows:]



August 22, 2019

The Honorable Mick Mulvaney
Director
Office of Management and Budget
725 17th Street, N.W.
Washington, D.C. 20503

Dear Director Mulvaney:

We write to express our collective and continued concerns with the U.S. Army Corps of Engineers' proposed rulemaking, Policy for Domestic, Municipal, and Industrial Water Supply Uses of Reservoir Projects Operated by the Department of the Army, U.S. Army Corps of Engineers (Proposed Rule).[1] The Proposed Rule threatens to interfere with states' sovereign authority to manage and allocate water resources within their boundaries. The Spring 2019 Unified Agenda of Regulatory and Deregulatory Actions lists "Final Action" on the Proposed Rule for August 2019 and "Final Action Effective" for October 2019.[2]

To date, the Corps has failed to meaningfully consult with states during the development and finalization of the Proposed Rule, despite repeated requests to do so from Governors and state officials. Additionally, the comments received by the Corps through its rulemaking docket[3] overwhelmingly demonstrate that, through its Proposed Rule, the Corps has failed to recognize, acknowledge, and address a multitude of substantive concerns expressed by states, local governments, federally recognized Indian tribes, water and power utility districts, industry stakeholders, and environmental organizations. These concerns stem from the effects the Proposed Rule would have on the administration of states' water laws and the traditional balance of state and federal authorities. Commenters across various sectors and political affiliations have largely expressed the same general concerns to the Corps regarding the Proposed Rule, including:

- The Proposed Rule does have federalism implications which trigger the expanded state consultation requirements of Executive Order 13132 despite the Corps' unsupported assertion to the contrary and failure to consult with states;

[1] 81 Fed. Reg. 91556 (Dec. 16, 2016).
[2] RIN: 0710-AA72, available at: https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201904&RIN=0710-AA72.
[3] Docket ID: COE-2016-006, available at: https://www.regulations.gov/docket?D=COE-2016-0016.

- The Proposed Rule would have preemptive effects on, and interfere with, state laws and regulations governing the management, allocation, and protection of water resources; and

- Natural flows (*i.e.*, waters that would have existed within the state despite the existence of the Corps reservoir) must be excluded from any Corps definition of "surplus water," as such waters remain under state authority.

State Authority over Water Resources

No federal laws cited by the Corps that may be applicable to the Proposed Rule preempt state authority to manage and allocate water resources. Rather, the two federal statutes relied upon by the Corps in its Notice of Proposed Rulemaking (NPRM)[4] – the Flood Control Act of 1944 and the Water Supply Act of 1958 – clearly recognize and defer to state law and expressly incorporate Congress' policy of "purposeful and continued deference to state water law."[5] Section 1 of the Flood Control Act of 1944 begins:

> [I]t is hereby declared to be the policy of the Congress to recognize the interests and rights of the States in determining the development of the watersheds within their borders and likewise their interests and rights in water utilization.[6]

Similarly, the Water Supply Act of 1958 states Congressional intent:

> to recognize the interests and rights of the States in determining the development of the watersheds within their borders and likewise their interests and rights in water utilization and control, as herein authorized to preserve and protect to the fullest possible extent established and potential uses, for all purposes, of the waters of the Nation's rivers.[7]

The Senate further stated that the Water Supply Act:

> prescribes a sound division of water supply responsibility between the Federal Government and State and local interests by declaring it to be the policy of Congress to recognize the primary responsibilities of the States and local interests in developing water supplies for domestic, municipal, and other purposes.[8]

Definition and Treatment of Surplus Waters

Under the Proposed Rule, the Corps would assert authority over natural flows by defining "surplus water" to mean any water available at a Corps reservoir that is not required during a specified time period to accomplish an authorized purpose or purposes of that reservoir. This proposed definition is beyond the scope of the Corps' statutory authority and would usurp states' well-established sovereign authority over the natural flows of water through Corps reservoirs. As a result, the

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[4] 81 Fed. Reg. 91556 (Dec. 16, 2016).
[5] *California v. United States*, 438 U.S. 645, 653 (1978).
[6] 43 U.S.C. § 701-1.
[7] 43 U.S.C. § 390b.
[8] S. Rep. No. 1710 (85th Cong., 2d Sess.) (Jun. 14, 1958) at 132-33.

Proposed Rule would conflict with the clear intent of Congress to preserve state water law. Any Corps definition of "surplus water" must plainly exclude natural historic flows from any quantification of waters subject to the Proposed Rule. Additionally, natural flows should be exempt from any monetary charges imposed by the Corps for water storage, as such waters would exist within the streambed in the absence of Corps reservoirs and would not be subject to federal management or the imposition of federal fees.

Failure to Consult with States

In addition to the substance of the Proposed Rule, we are concerned by the process under which the Proposed Rule was developed. The Corps has failed to engage with states in meaningful government-to-government consultation throughout the development of the Proposed Rule, even after extensive comments calling for such consultation were submitted to the Corps' docket. Executive Order 13132, Federalism, requires federal agencies to, "have an accountable process to ensure meaningful and timely input by State and local officials in the development of regulatory policies that have Federalism implications."[9] These policies include:

> regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.[10]

In its NPRM, the Corps declares that it "do[es] not believe that the proposed rule has Federalism implications."[11] For the reasons stated above, we disagree with this unsupported assertion. The Proposed Rule clearly qualifies for further review under Executive Order 13132, as its provisions would have substantial direct effects on the states and their authority over the management and allocation of their waters. The Proposed Rule would also have a preemptive effect on state water laws (*i.e.*, a substantial effect "on the distribution of power and responsibilities among the various levels of government").

Conclusion

We urge you to consider our substantive and procedural concerns as you analyze the Proposed Rule before its finalization. Any Corps definition of "surplus water" in the Proposed Rule must account for, and exclude, natural flows of the river from waters that would be subject to Corps control. Corps reservoir operations must follow Congressional directives not to impair or usurp states' sovereign authority over the management and allocation of their water resources. Additionally, the Corps has failed to meaningfully consult with states, on a government-to-government level, during the development of the Proposed Rule, contrary to the directives of Executive Order 13132. We are ready to assist the Administration to ensure that all Corps reservoirs are operated in compliance with federal and state law.

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[9] 64 Fed. Reg. 43255 (Aug. 10, 1999).
[10] *Id.*
[11] 81 Fed. Reg. 91556 (Dec. 16, 2016).

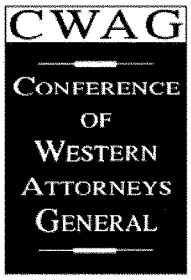
Sincerely,

James D. Ogsbury
Executive Director
Western Governors' Association

Karen White
Executive Director
Conference of Western Attorneys General

Dave Mitamura
Executive Director
National Water Supply Alliance

Tony Willardson
Executive Director
Western States Water Council



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August 22, 2019

The Honorable Donald J. Trump
President of the United States
The White House
1600 Pennsylvania Avenue, N.W.
Washington, D.C. 20500

The Honorable Mick Mulvaney
Director
Office of Management and Budget
725 17th Street NW
Washington, D.C. 20503

RE: COE-2016-0016 – Use of U.S. Army Corps of Engineers, Reservoir Projects for Domestic, Municipal & Industrial Water Supply

Dear President Trump and Director Mulvaney:

The Attorneys General of North Dakota, Idaho, Alaska, Arizona, Colorado, Montana, New Mexico, Oregon, South Dakota, Utah, Washington and Wyoming request that you direct the Corps of Engineers ("Corps") to: (1) withdraw its proposed "Water Supply Rule"; and (2) comply with federal statutes that expressly require the Corps to abide by state law in allocating water from Corps reservoirs for consumptive uses.

In the "Water Supply Rule" ("Rule"), the Corps seeks "to update and clarify its policies governing the use of its reservoir projects pursuant to Section 6 of the Flood Control Act of 1944 and the Water Supply Act of 1958." 81 Fed. Reg. 91556. The "policies" of the Rule, however, are directly contrary to the express congressional policy declarations in these same statutes. In both the Flood Control Act of 1944 and the Water Supply Act of 1958, Congress specifically and unambiguously declared that the Corps' water supply operations are subject to state law. If allowed to take effect, the Rule would effectively override these express congressional declarations, usurp the States' exclusive authority to guide their water allocation and development, and eviscerate cooperative federalism principles that Congress has expressly and repeatedly reaffirmed.

Both the Flood Control Act of 1944, 58 Stat. 887 ("FCA"), and the Water Supply Act of 1958, 72 Stat. 319 ("WSA"), expressly incorporate Congress' historic policy of "purposeful and continued deference to state water law . . . ." *California v. United States*, 438 U.S. 645, 653 (1978). The first section of the FCA is a "Declaration of Policy," which states ". . . it is hereby declared to be the policy of the Congress to recognize the interests and rights of the States in determining the development of the watersheds within their borders and likewise their interests and rights in water utilization and control . . . ." 43 U.S.C. § 701-1.

Similarly, the first section of the WSA states "[i]t is declared to be the policy of the Congress to recognize the primary responsibilities of the States and local interests in developing water supplies for domestic, municipal, industrial, and other purposes . . . ." 43 U.S.C. § 390b(a). The WSA further specifies that it "shall not be construed to modify the provisions" of the FCA's "Declaration of Policy," or the provisions of the Reclamation Act of 1902, 43 U.S.C. § 390b, which requires that the "control, appropriation, use, or distribution of water for irrigation" must "proceed in conformity with [state] law." 33 U.S.C. § 383.

The intent of these provisions could not be clearer. They require the Corps when exercising its authority under the WSA and Section 6 of the FCA to supply water from Corps reservoirs for domestic, municipal, and industrial ("DMI") uses to defer to state law with respect to "the development of the watersheds within [state] borders," "water utilization and control," and "developing water supplies for domestic, municipal, industrial, and other purposes." 33 U.S.C. § 701-l(a); 43 U.S.C. § 390b(a). Indeed, the

Senate Committee on the WSA stated "that [the Water Supply Act] prescribes a sound division of water supply responsibility between the Federal Government and State and local interests by declaring it to be the policy of Congress to recognize the primary responsibilities of the States and local interests in developing water supplies for domestic, municipal, and other purposes." S. Rep. No. 1710 (85th Cong., 2d Sess.) (Jun. 14, 1958) at 132-33.

The Supreme Court confirmed this interpretation of the congressional "policy" of the FCA in the *California* decision. In that case the Court reviewed in detail "the consistent thread of purposeful and continued deference to state water law by Congress." 438 U.S. at 653. The Court determined this policy was motivated principally by congressional concerns about "the legal confusion that would arise if federal water law and state water law reigned side by side in the same locality." *Id.* at 668-69. The Court also relied on one of its previous decisions, in which the Court stated there are only "two limitations to the States' exclusive control of its streams": federal "reserved rights" for government property, and "the navigation servitude." *Id.* at 662 (quoting *United States v. Rio Grande Dam & Irr. Co.*, 174 U.S. 690, 703 (1899)). The Court "was careful to emphasize" that outside of these two exceptions, "the State has total authority over its internal waters. 'Unquestionably the State ... has a right to appropriate its waters, and the United States may not question such appropriation, unless thereby the navigability of the [river] be disturbed.'" *Id.* (quoting 174 U.S. at 709) (brackets and ellipsis in original). The Court interpreted the congressional "policy" of the FCA as confirming rather than undermining these principles. *Id.* at 678.

The FCA goes even further in deferring to water laws of the western states, by eliminating or significantly circumscribing "the navigation servitude" exception to "total" and "exclusive" state control over consumptive beneficial uses of the state's water. *Id.* at 662. The FCA's "Declaration of Policy" states that "[t]he use for navigation" of waters arising in the States wholly or partly west of the ninety-eighth meridian "shall only be such use as does not conflict with any beneficial consumptive use, present or future, . . . of such waters for domestic, municipal, stock water, irrigation, or mining purposes." 33 U.S.C. § 701-l(b).

These congressional directives reflect the fact that supplying water from a Corps reservoir for consumptive beneficial uses pursuant to the WSA

and Section 6 of the FCA is distinct from its operations "to regulate navigation and navigable waters." 81 Fed. Reg. 91563. Federal law precludes the Corps from exercising its authority to supply water for DMI uses under the WSA and Section 6 of the FCA in ways that interfere with or usurp the States' exclusive authority to allocate water under state water laws and water rights.

All these principles are recognized, to some degree, in the "supplementary information" the Corps provided in connection with the Rule. 81 Fed. Reg. 91556. The "supplementary information," however, would not be controlling. The language of the Rule itself is what matters. And it is within the legal and policy context discussed above that the validity of the proposed Rule must be evaluated. Measured against these legal principles and congressional policy declarations, there is no doubt that the Rule exceeds the Corps' authority, contravenes congressional policy, and seeks to usurp the States' power to control the allocation and distribution of their waters. For example:

1. The Rule purports to resolve the "questions" the Corps perceives "as to what uses are covered" by the terms domestic, municipal, and industrial. 81 Fed. Reg. 91569. While the Corps admits that state "prerogatives" to make such beneficial use determinations must be "protected," 81 Fed. Reg. 91560, the Rule tramples on these prerogatives by unilaterally declaring that domestic, municipal, and industrial uses of water include "*any* beneficial use" and "*all* uses of water," other than irrigation. 81 Fed. Reg. 91569, 91575 (emphasis added). Worse, the Corps' justification for this overreach—that different States have different definitions of domestic, municipal, and industrial uses of water—is the very reason that Congress has consistently required federal agencies to defer to state water law, as the Supreme Court recognized: "A principal motivating factor behind Congress' decision to defer to state law was thus the legal confusion that would arise if federal water law and state water law reigned side by side in the same locality." 438 U.S at 667, 668-69.

2. The Rule's limited interpretation of its "[r]elation to State ... water rights" would impermissibly allow the Corps to preclude future water development and beneficial uses of water under state water law and water rights. The Rule limits the Corps' exercise of Section 6 or WSA authority only with respect to *"then-existing* State water rights," 81 Fed

Reg. 91590 (emphasis added), which allows the Corps to interfere with uses under *future* state water rights. But the congressional policy of FCA Section 6 and the WSA prohibits the Corps from adversely affecting any *additional* development or use of water resources that may occur pursuant to state law. *See* 33 U.S.C. § 701-l(a) (declaration of congressional policy "recogniz[ing] the interests and rights of the States *in determining the development of the watersheds within their borders")* (emphasis added); 43 U.S.C. § 390b(a) (declaration of congressional policy recognizing "the primary responsibilities of the States and local interests *in developing water supplies for domestic, municipal, industrial, and other purposes.")* (emphasis added). These principles govern in western states even if FCA Section 6 and the WSA are characterized as an exercise of the federal constitution's Commerce Clause authority "to regulate navigation and navigable waters." 81 Fed. Reg. 91563; *see also* 33 U.S.C. § 701-l(b) ("The use for navigation of waters arising in the [western] States . . . shall only be such use as does not conflict with any beneficial consumptive use, *present or future,* in [such] States . . . of such waters for domestic, municipal, stock water, irrigation, or mining purposes") (emphasis added). In short, the provision of the Rule addressing its "[r]elation to State ... water rights," 81 Fed. Reg. 91590, conflicts with the explicit congressional policy of deference to state water laws and state water rights that circumscribes the Corps' FCA Section 6 and WSA authority. The provision is also inconsistent with the United States Supreme Court's policy interpretation in the *California* decision, and even the Corps' own policy interpretation in the Rule's "supplementary information" preamble. 81 Fed. Reg. 91556-88.

3. The Rule in addressing its "[r]elation to State ... water rights" provides that the Corps "shall not . . . become, by virtue of any agreement executed pursuant to [FCA Section 6 or the WSA], a party to any water rights dispute." 81 Fed. Reg. 91590. This blanket provision is contrary to the McCarran Amendment, which waives the sovereign immunity of the United States in state court suits "for the adjudication of rights to the use of water of a river system or other source" or "for the administration of such rights" when "the United States is a necessary party." 43 U.S.C. § 666. Congress has never exempted the Corps from the McCarran Amendment and has never authorized the Corps to promulgate rules interpreting the McCarran Amendment or excluding itself from the McCarran Amendment. The Rule cannot override the unambiguous

language and intent of the McCarran Amendment, and the Corps cannot unilaterally immunize itself from a McCarran lawsuit. If a state court presiding over a McCarran lawsuit deems the Corps to be a "necessary party" to a lawsuit for water rights "adjudication" or "administration," then the Corps can be joined as a party to the lawsuit despite the Rule's contrary provision.

4. The Rule's declaration that the Corps "shall not obtain water rights" for its water supply operations pursuant to the WSA and FCA Section 6, 81 Fed. Reg. 91590, would unilaterally excuse the Corps from complying with any state law requirement of obtaining a water right to store water for DMI uses. This would fly in the face of the FCA and WSA congressional policy, the *California* decision, and the plain language of the McCarran Amendment. Even if it is assumed that the Corps is correct in asserting that it need not obtain state water rights for its flood control, hydropower, and navigation operations, 81 Fed. Reg. 91563, storing water in a Corps reservoir for consumptive beneficial uses under the WSA and FCA Section 6 is not the same thing as operating the reservoir for non-consumptive flood control, hydropower, and navigation purposes under other statutory authorities. Further, the Corps' assertions that it need not obtain water rights simply because the Corps does not use the DMI water and does not seek title to the water itself, 81 Fed. Reg. 91559, 91563-64, 91589, ignores the laws of many states, especially western states. Under the water law of most western states, a water right is purely a right of use that does not convey title to the water itself (which typically is held by the State), and reservoir operators usually must obtain water rights even if they do not actually use the stored water, but rather allocate or contract it to those who do. The FCA and WSA policy declarations are clear that Congress intended the Corps to be subject to such state water law requirements. 33 U.S.C. § 701-l(a); 43 U.S.C. § 390b(a).

5. The Rule provides that "appropriate mechanisms" of accounting for "available water supply storage" will be included in the Corps' water supply agreements. 81 Fed. Reg. 91589. The Rule also purports to establish an accounting "principle" that "all inflows to and losses from the Corps reservoir are charged or credited proportionately to each water supply account." *Id.* But in many States, and especially the western States, accounting for "water supply storage" in a reservoir, including the "inflows to and losses from" a reservoir, is a determination that is

controlled by state water rights and state laws defining how the available water supply is to be distributed. The Rule's so-called "appropriate mechanisms" and "principles" of water accounting contravene explicit congressional policy requiring the Corps to defer to state law regarding the nature, definition, and administration of state water rights when exercising its authority under the WSA and FCA Section 6. 33 U.S.C. § 701-l(a); 43 U.S.C. § 390b(a). The Rule usurps the States' authority to distribute water pursuant to state water rights and is contrary to States' sovereign authority to determine the use, distribution and development of their water resources.

6. The Rule is based in part on the Corps' theory that there is no meaningful distinction between "natural flow" and "stored water." 81 Fed. Reg. 91565. This distinction is often crucial to distributing water under state water rights and state law, however, particularly in the western States. By ignoring or minimizing the important distinction between natural flow and stored water, the Rule presumes the Corps has legal authority to allocate and distribute all the water that happens to flow through a Corps reservoir. This assumption is contrary to the water law of many states for reasons discussed above. It also disregards private property rights. State water rights are often property rights, particularly in the western states. By asserting legal control over all water that flows through a Corps reservoir, the Rule necessarily asserts control over inflows encumbered by downstream senior water rights —that is, "natural flow" the Corps has no right to store or allocate. This works a "taking" of private property rights that have been duly established under state law.

The preceding discussion is illustrative rather than exhaustive. All the above conflicts, and more, are documented in attached comments submitted by the Western Governors' Association and the Western States Water Council, on behalf of the governors of 18 western states. The comments conclusively demonstrate that the proposed Water Supply Rule exceeds the Corps' statutory authority, contravenes the McCarran Amendment and the express congressional policy declarations in the FCA and WSA, usurps the States' authorities to guide and control the allocation, distribution, and development of their water resources, and undermines historic cooperative federalism principles. If implemented, the Rule will result in precisely the type of legal confusion Congress has consistently sought to avoid through its

longstanding policy of deference to state law in the allocation and distribution of water.

We respectfully request that the Water Supply Rule be withdrawn, and the Corps be instructed to comply with state water laws in the exercise of its authority under the WSA and FCA Section 6. We stand ready to engage with the Corps in a collaborative government-to-government discussion on how to address our respective interests.

Sincerely,

Wayne Stenehjem
Attorney General of North Dakota

Lawrence G. Wasden
Attorney General of Idaho

Kevin Clarkson
Attorney General of Alaska

Mark Brnovich
Attorney General Arizona

Philip J. Weiser
Attorney General Colorado

Tim Fox
Attorney General of Montana

Hector Balderas
Attorney General New Mexico

Ellen F. Rosenblum
Attorney General Oregon

Jason R. Ravnsborg
Attorney General of South Dakota

Sean D. Reyes
Attorney General of Utah

Bob Ferguson
Attorney General Washington State

Bridget Hill
Attorney General of Wyoming

Cc: Corps of Engineers

United States Senate
WASHINGTON, DC 20510

September 16, 2019

The Honorable Mick Mulvaney
Director
Office of Management and Budget
725 17th Street NW
Washington, DC 20503

Director Mulvaney:

We write to express our strong opposition to the U.S. Army Corps of Engineers' (Corps) proposed rulemaking regarding the use of Corps reservoir projects for domestic, municipal, and industrial water supply (81 FR 91556). Along with a number of states, tribes, and stakeholders, we have attempted to provide input to the Corps on its proposed implementation of federal law, but our concerns have not been adequately addressed. It is our understanding a final regulatory action by the Corps is imminent and will be submitted to your office for review. We urge you in your capacity to direct the Corps to make the adjustments necessary to follow decades of federal precedent and respect state and tribal water authority.

As it relates to the arid Western states, Congress and the Courts have given clear and consistent deference to states for water allocation from statehood through the 1944 Flood Control Act (FCA) and the Water Supply Act (WSA) of 1958. In the Corps' proposed regulation, it assumes water appropriation authority for all waters surrounded by Corps property. In fact, this has been the practice since 2010 with the implementation of Real Estate Policy Letter 26 requiring water supply agreements. Prior to the 2010 policy and the current proposed rulemaking, all that was required in making a water withdrawal across Corps property was obtaining a real estate easement.

The Corps' preferred alternative ignores both precedent and statute that the natural flows of the river remain squarely under the State's jurisdiction, despite construction of Corps dams and reservoirs. Using the Missouri River as an example, as long as its flows continue to be greater than the overall use granted by the states, water users are not benefiting from storage in Corps reservoirs. Therefore, water users should not be required to obtain water supply agreements with the Corps or pay any fees. If flows are less than appropriated, the states take measures accordingly to reduce water use. Ultimately, the states are responsible and will take the appropriate action. It was never the intention of Congress to federalize all of the water in our country's major rivers. That should not change.

Recently, the Western Governors' Association, Conference of Western Attorneys General, National Water Supply Alliance, Western States Water Council, and National Water Resources Association sent bipartisan letters to you expressing similar concerns. We would like to reiterate our shared concern: "We respectfully request that the Water Supply Rule be withdrawn, and the Corps be instructed to comply with state water laws in the exercise of its authority under the WSA and FCA" … "the Corps has failed to meaningfully consult with states, on a government-to-government level, during the development of the Proposed Rule, contrary to the directives of Executive Order 13132." This rule ought to be withdrawn or at least revised to accommodate state and tribal input in accordance with the law.

Sincerely,

Kevin Cramer
United States Senator

Mike Crapo
United States Senator

James E. Risch
United States Senator

Steve Daines
United States Senator

Kyrsten Sinema
United States Senator

Ron Wyden
United States Senator

John Barrasso, M.D.
United States Senator

Michael B. Enzi
United States Senator

John Hoeven
United States Senator

Ted Cruz
United States Senator

Martha McSally
United States Senator

James M. Inhofe
United States Senator

M. Michael Rounds
United States Senator

Cory Gardner
United States Senator

Jeffrey A. Merkley
United States Senator

John Thune
United States Senator

James Lankford
United States Senator

John Cornyn
United States Senator

Michael F. Bennet
United States Senator

Cc: Russell Vought, Acting Director, Office of Management and Budget

DEPARTMENT OF THE ARMY
OFFICE OF THE ASSISTANT SECRETARY
CIVIL WORKS
108 ARMY PENTAGON
WASHINGTON DC 20310-0108

SEP 23, 2019

MEMORANDUM FOR Commanding General, U.S. Army Corps of Engineers

SUBJECT: Consultation on Rule Making for the Use of U.S. Army Corps of Engineers Reservoir Projects for Domestic, Municipal & Industrial Water Supply

1. I am writing to you on the ongoing consultation process for the development of the final rule for the "Use of U.S. Army Corps of Engineers Reservoir Projects for Domestic, Municipal & Industrial Water Supply." At my direction, the Army will halt issuing a final Water Supply Rule for a minimum of six months to better integrate input from stakeholders

2. I direct you and your staff to continue the ongoing consultation and coordination with the appropriate States, Tribes, stakeholders, etc. Following a minimum six-month delay for further coordination, I require a brief to include a summary of the comments received and the responses to comments.

3. If there are any questions, your staff may contact Stacey Jensen at (703) 695-6791.

R.D. JAMES
Assistant Secretary of Army
(Civil Works)

CF:
DCG-CEO, USACE
DCW, USACE

Senator CRAMER. Mr. Fisher, as I am sure you know, I had to bring this issue all the way to the Secretary of the Army, Secretary McCarthy, when he came before me on the Armed Services Committee as a nominee. I have no doubt this was not his highest priority, and I appreciate that both his and your, and your agencies', responsiveness when you sent the memo putting the Water Supply Rule on hold for at least 6 months to "better integrate input from stakeholders." I appreciate that.

The fact that I had to take it to the Secretary himself and that all of these organizations had to write is concerning to me. But I want to make the point clear that this is part of the problem. For nearly 3 years, my colleagues, Governors, stakeholders have all made their opposition clear. Yet it seemed to fall on deaf ears. Whether the rule or the host of other issues brought up to date, it is clear the Corps is in need of more effective oversight.

Mr. Fisher, I am going to reiterate my thanks for the 6 month delay. It was definitely a win for my constituents and for your constituents, and moving forward, I hope it is even more important that we get this right, not just the process, but the product right in the long run.

To both of you, General Semonite and Mr. Fisher, I have been very vocal in my support of policies that promote and protect federalism, as you know. The proposed Water Supply Rule would interfere with State laws and regulations governing the management allocation and protection of water resources. I want to get very specific here. In both the Flood Control Act of 1944 and the Water Supply Act of 1958, Congress made it clear the Corps was to defer to State water law.

Specifically, Section 1 of the Flood Control Act of 1944 states, "It is hereby declared to be the policy of the Congress to recognize the interests and rights of the States in determining the development of the watersheds within their borders, and likewise their interests and rights in water utilization." This was later affirmed by the U.S. Supreme Court.

So with that in mind, I am going to ask just a few fundamental questions as time allows to General Semonite and Mr. Fisher.

Do you agree with the Supreme Court that any water supply proposal you submit must defer to State water laws?

Mr. FISHER. Yes, we do.

General SEMONITE. We agree, sir.

Senator CRAMER. Thank you. Is it your opinion the current one size fits all proposal that you have on hold adequately defers to State water law?

Mr. FISHER. Yes.

Senator CRAMER. OK. A few weeks ago, I was able to host EPA Administrator Wheeler in North Dakota, where we discussed both the ACE and WOTUS rules, both of which respect State sovereignty. Now, this has been a high priority of the Trump administration, cooperative federalism.

Do you believe that this proposal is in line with the President's stated policies of cooperative federalism as it is?

Mr. FISHER. You asked the previous question about the one size fits all policy; I think I said yes. No would have been the appropriate answer there.

Senator CRAMER. I appreciate that.

Mr. FISHER. One size fits all is not good for any area, when you have the geography and topography around the country, that is difficult.

I am sorry; your follow up question was about the Water of the United States rulemaking?

Senator CRAMER. Just the commitment of the Trump administration to cooperative federalism.

Mr. FISHER. Yes.

Senator CRAMER. Do you think that this rule as it is adheres to that priority of this Administration?

Mr. FISHER. So the letters you just entered for the record were a big part of the reason our office did a 6 month delay. We want to make sure that we are properly conducting a federalism process on this. We want to hear from all States, all stakeholders involved, and make sure their input is considered in this. When we get to the end of a 6 month period, a proper decision can be made at that time.

Senator CRAMER. My time is up, so I will submit some further questions for the record.

Senator BARRASSO. Thank you, Senator.

Senator Sullivan.

Senator SULLIVAN. Thank you, Mr. Chairman.

I appreciate the witnesses being here today. You guys do really, really important work for the country, certainly for my State.

Secretary Fisher, General Semonite, one issue I just wanted to highlight is on the permitting process as it continues going forward on the Pebble Mine. I want to make sure—there is some talk that that has been fast tracked. I don't think that is the kind of project that we should be fast tracking at all.

I also think it is critical that science, not politics, drives the Army Corps' and the EPA's decisionmaking. I have been encouraging all your agencies to not just hear directly from Alaskans on this here, but to get out into Alaska, get out to the region, Bristol Bay. Some did this summer.

And as I am sure you saw, the EPA and the Department of Interior recently submitted comments to the Corps' draft EIS. Many of their comments were highly critical. EPA submitted permits, almost 200 pages. The Department of Interior asked for a supplemental EIS.

We think certainly the burden is now on Pebble and the court to substantially address these concerns based on science as required by Federal law. This is a high bar, as I repeatedly said, we can't trade one resource for another in the region. I just want to make sure that you can confirm to me that it is science and data—not politics—that drive decisionmaking going forward.

Mr. FISHER. Yes, Senator, certainly from a policy level, we want a science based approach. There has been no talk of fast tracking anything. We want the Alaska district to go through their normal process and do all the technical work to make appropriate decisions.

I will let the General discuss current status.

Senator SULLIVAN. That is all right, I want to get to a couple—I just want to get your commitment on that.

Mr. FISHER. OK.

Senator SULLIVAN. General, I want to turn now to the Arctic Port. As you know, and Secretary Fisher, this has been a huge frustration of mine, my constituents, whether Nome or other parts of western Alaska. I put a hold on Assistant Secretary James's confirmation because of this issue, because, look, I love the Corps of Engineers. You guys like to build stuff, but you can be way too bureaucratic.

And I am concerned that once again, once again—it is unbelievable, to be honest—we are experiencing bureaucratic delays at the headquarters over this Port of Nome study. It is outrageous.

And General, you and I have had numerous discussions about this. This is economics, this is national security for the United States of America. If you haven't noticed, the Russians and Chinese are all over the Arctic, and we don't have one damned port where a Navy ship, an icebreaker, can pull up, anywhere near our strategic interests. Every time we try to get it moving, delay, delay, delay.

So my understanding is now another 8 month delay, which I just find remarkable. This is the issue that I talked to the Assistant Secretary about and put a hold on his confirmation on.

So I need to get a commitment from all of you that you are going to work as diligently as possible to meet the deadline of no later than the spring of 2020, so we can have this in the WRDA bill that we are already working on. Can I get this commitment?

And General, no offense, but I have tried to get this commitment from you and many others, including the Assistant Secretary. Secretary Fisher, I would like your commitment.

It is a huge source of frustration. It is not just Alaska. The fact that we don't have a deepwater port that can even handle an icebreaker or a destroyer in this part of America is really detrimental to our national security.

Can I get another commitment, another commitment from all of you? I am kind of tired of getting commitments, because it is not really working.

General.

General SEMONITE. Sir, I don't know exactly the reason for this. So I commit to you to find out. I don't know what the reasons are. And I will come over and personally see you and tell you what the timelines are.

Senator SULLIVAN. I want you to personally see me, and commit to going out to Nome and that region of America to see how important this is.

General SEMONITE. Sir, you and I have met two or three times. I am very aware of the urgency of this as well as the criticality of this. I am not tracking the particular objections.

Senator SULLIVAN. Another 8 month delay is what my team has told me.

General SEMONITE. I will find out and come see you, sir.

Senator SULLIVAN. Look, the Secretary of the Navy, all the leadership in the military are starting to recognize how important this is to our country.

Let me just make one other comment on this. I want to submit for the record, Mr. Chairman, a letter from the Alaska Marine Pi-

lots, who have looked at some of the different alternatives that are being looked at by the Corps. They mention that one of the alternatives is too small for what we have all agreed to needs to be a large, deep draft port for deep draft vessels to safely navigate.

So again, we are going through all this, I want to make sure that once we do get it designed that it achieves the goal that everybody agrees upon.

So again, if you can take a look at this, General. And then finally, can I get your commitment to take a look at this?

General SEMONITE. Sir, we may have a disconnect. My guys said original completion was February 2021, and now we are going to October 2020. So I see this going to the left by 4 months. So I need to come over, and either come over, exactly right.

Senator SULLIVAN. Look, with all due respect, the track record of the Corps on this has been abysmal. That is a fact. We are like 4 years delaying right now.

Administrator Bertrand, just very quickly, clean water, clean sewers; as Senator Markey mentioned his aging infrastructure. You know my State has communities with no infrastructure. Thirty communities who don't have any water or sewer at all. American citizens, some of the most patriotic Americans in the country. Because they all serve in the U.S. military.

So I just want to get your commitment to continue working with this Committee, my office, on trying to address what is a national shame, I think, that we have American citizens that live like they do in third world countries with no flush toilets and water and sewer.

The Administrator is very aware of this, he has been great on it. But if I can get your commitment to work with me on that.

Ms. BERTRAND. You have my commitment to continue to work with you.

Senator SULLIVAN. Thank you.

Thank you, Mr. Chairman.

Senator BARRASSO. Thank you, Senator Sullivan.

Senator Merkley.

Senator MERKLEY. Thank you all very much.

Mr. Fisher, I want to start by thanking the Corps for its prompt response and very open communication regarding the recent shutdown of the navigation locks on Bonneville Dam.

The Columbia River system is the largest system for exporting barley and for wheat, second largest outlet for corn. And when we heard the lock had this major problem, we were terrified that it would be a long shutdown.

I must say, often projects go awry and take much longer than expected. But in this case, everything went incredibly smoothly. It wasn't like this was something that had been done time and time again. So congratulations on both the public engagement on it and the actual engineering and repair that happened with light speed. So well done.

In fact, you all did such a good job, I thought I would invite you to come and exercise, put your expertise to work on the Willamette Falls Locks, which have been in disrepair forever and ever and ever. The community would love to have them fixed.

I don't think they are in your responsibility. But I am just saying, maybe some additional practice, because you know how to do it so well.

Lieutenant General Semonite, thank you for being with us. In Oregon, we have a lot of small harbors. Through the appropriations process each year, we lobby intensely to the Office of Management and Budget to get the funds for dredging those harbors.

In general, we have been getting them dredged every other year. When they are not dredged, it is a calamity to commerce. The wave swells get higher, much more dangerous. We have lost people through dangerous passage.

I think it would be very helpful to have a specific set-aside for the small ports in WRDA, so we are not just lobbying from the outside every year. Is that something that you could conceive of supporting?

General SEMONITE. Sir, I will defer to Mr. Fisher. But I believe we have that right now. We normally exceed the goals of that particular set-aside. You and I talked, I think last year.

We normally, I think, are doing 13 or 14 small harbors because of that. And they don't have to compete. But I would defer to Mr. Fisher.

Mr. FISHER. Yes, actually, I don't know if I could add anything on top of that. We look at the small harbors around the country and the funding allocated to them. I think those compete well in Oregon. We will look forward to working with you.

Senator MERKLEY. I pushed for a set-aside within the funding process. But I don't think we have it in the authorization process. This is where I think it might be useful to have that back.

Mr. FISHER. OK, yes, we certainly are willing to work with you on that.

General SEMONITE. I think you are probably right, sir, it is the authorization side you are looking for. Yes, sir.

Senator MERKLEY. Thank you.

And Ms. Bertrand, I go to every county every year and hold an open town hall. We have 36 of them in Oregon. Beforehand, I meet with our county commissioner, city council, so on and so forth, all the local officials. The issue they raise more than any other is water infrastructure. Clean water supply and wastewater treatment.

This is the reason that I wrote the bill to create the WIFIA program, Water Infrastructure Finance Innovation Act. Eventually, we got it funded, started funding to it. That seems to be up and rolling pretty well. I think it will expand as more communities become familiar with it. It saves a whole lot on the interest for big projects.

But I think we need to have a lot more help for the small communities. WIFIA hasn't worked well, it has a high application fee, $50,000; it has a low minimum, or a high minimum of $5 million project. We have lots of small towns in Oregon that are striving to meet the EPA's standards for clean water supply and wastewater treatment.

Let me ask you this. Do you have any suggestions for how we can do a better job at meeting the infrastructure challenges for small towns and cities in clean water supply and wastewater treatment?

Ms. BERTRAND. Thank you for bringing up WIFIA. We agree with you that it has been a very successful program.

Yesterday, we announced that we invited 38 more projects to apply. Once those loans are closed, it will be $6 billion in new infrastructure. So we are very happy with the progress that we have made in three rounds.

There are some innovative ways that we are seeing that we can get to smaller communities through the loan that we did in Indiana, where we have small projects that can work together. We do offer that assistance to applicants to help them with their letters of intent and through their application process, to help them get through.

We would be happy to work with this Committee on any other new and innovative ways that we can assist small communities in utilizing this important tool.

Senator MERKLEY. I do understand the strategy of having small communities partner together. In reality, on the ground, it is extremely difficult, because projects are in different phases.

Some have done the preliminary work necessary to have an engineering concept, some haven't, et cetera. So I just want to keep working with you all to see how we can make these projects more affordable to small communities.

We still have wooden pipes supplying water in Oregon. Many people didn't even know wooden pipes ever existed. I didn't know until I first had folks tell me about digging them up.

On the wastewater side, the infrastructure is very expensive per person for a small town. So it is a real challenge. I will just look forward to continuing to brainstorm about how we can provide more Federal help on that.

Thank you.

Senator BARRASSO. Senator Carper.

Senator CARPER. Thanks.

Senator Merkley and I found ourselves at the same airport a week ago. He was going one way; I was going the other way. He mentioned to me that he goes to every county of his State every year, at least once every year. I told him there are some days I go to every county in Delaware, we only have three of them.

[Laughter.]

Senator CARPER. It is a unanimous opinion, General Semonite, that the Army Corps, the work you do from one end of our State to the other, is much needed and deeply appreciated. I just want to make that clear.

Senator MERKLEY. Senator, I just might interrupt for a second if I could, and say that I was so impressed that you were able to visit all three of your counties in a single day. I am going to invite you to come to Oregon and have you show me how to visit all 36 of mine in a single day.

[Laughter.]

Senator CARPER. I could probably learn from you.

Senator BARRASSO. People in Iowa are visiting close to 99 counties in Iowa, and they are trying to do it between now and the upcoming election.

Senator CARPER. Yes, that is true. My wife was out visiting, I just told you the other day.

Senator BARRASSO. Chuck Grassley and Joni Ernst, all 99 counties apparently every year. It is astonishing.

Senator CARPER. Yes, it is, especially for Chuck. He is 86 years old, he just celebrated his 86th birthday, if you can believe that, Senator. Senator Grassley, what a guy.

I want to follow up on some things, some concerns that Senator Cramer was raising just a few minutes ago when he spoke and asked some questions.

I just want to follow up if I could with you, Ms. Bertrand, with respect to Waters of the U.S.

When it comes to the role for States and cooperative federalism in the recently proposed WOTUS and 401 certification regulations, it really seems to me that EPA is talking out of both sides of its mouth.

In the WOTUS definition, the EPA argues that States should have the power to protect waters that no longer fall under the Clean Water Act jurisdiction.

Conversely, EPA's proposed 401 regulations argue that States should not have the power to protect their waters from federally permitted projects that would harm their water quality.

I asked earlier for a yes or no, and now I am going to ask for a yes or no as well. Yes or no, does EPA's proposed WOTUS rule rely on State authorities to ensure water quality standards are met?

Ms. BERTRAND. So we are in the middle of a regulatory process right now where we do believe that we are following the appropriate process and interpreting the Clean Water Act in the correct way.

Senator CARPER. Would that be a yes or a no?

Ms. BERTRAND. I think it is a—we believe that we have moved forward in the appropriate way for both of these regulations that you have referred to.

Senator CARPER. Let me try another approach. Yes or no, does EPA's proposed 401 rule give Federal permitting agencies the ability to effectively veto State water quality decisions? Just yes or no, please.

Ms. BERTRAND. Thank you, Senator. I would like to ask if you could direct the question to the record and ask me to provide you a question for the record.

Senator CARPER. Yes, we will.

Ms. BERTRAND. Thank you.

Senator CARPER. And we will look forward to a prompt and timely response.

Ms. BERTRAND. I understand.

Senator CARPER. Another question, if I could, Ms. Bertrand, for you. You testified earlier this morning that—this is I think a quote—due to a lack of appropriations, EPA has not implemented AWIA provisions.

And isn't it the EPA's responsibility to at least request funding for those provisions consistently? I think, if I am not mistaken, this Administration proposes cuts to the EPA budget, not by a little bit, but by a whole lot. That appears to me that this EPA, at least maybe this Administration, really doesn't have an intention of fully implementing AWIA as Congress intended.

Your thoughts.

Ms. BERTRAND. So if I may, I do want to clarify that there were 30 different provisions in AWIA, many of them were the most—it is the most far reaching modifications to the Safe Drinking Water Act since 1996.

There are many that we have been able to move forward on where we do have appropriations, and the nexus between the appropriations that were already existing and the programs were appropriate for us to start to work on. So for example, we have a stormwater infrastructure funding task force that was part of AWIA. We already had an Environmental Finance Advisory Board, and we were able to use part of what already existed to start that important work.

Senator CARPER. I don't mean to be rude, but I am going to have to ask you to hold that and to respond more fully for the record, please.

Ms. BERTRAND. Certainly.

Senator CARPER. On the one hand, for you to say that due to lack of appropriations, EPA has not implemented AWIA's provisions when EPA doesn't ask for money and the Administration, if you do internally, the Administration always kicks it back or kicks it down, that is just not——

Ms. BERTRAND. There are many that are in our 2020 budget, and we would be happy to provide you with more detail.

Senator CARPER. Great. I look forward to it.

One last question, if I could, for Mr. Fisher. This is regarding budgeting for WRDA requirements.

During our May 2019 hearing on oversight of the Corps Civil Works program, Major General Spellman testified that the Corps was able to use funding received under its expenses account to complete most reports and activities required by the 2018 and prior WRDA bills. This came up, I think, due to concerns raised by a number of Senators over the Corps' delays in implementing AWIA provisions.

Mr. Fisher, let me just ask, the Corps consistently responds to these concerns by saying that there are, again, a lack of appropriations to implement various WRDA provisions. In many cases, however, this justification for failure to act seems an excuse for not addressing a specific congressional mandate as it seems the Corps' budget remains at least static in each Administration budget cycle.

Do you anticipate the Administration will increase the Corps' budget request this year, and in future years, to account for the shortfall between existing funding levels and the legal requirements placed on you by Congress?

Mr. FISHER. We are certainly working with the Administration and Office of Management Budget, as well as Corps headquarters, to make sure we are using the resources we have wisely to finish reports and do everything we have. I think General Semonite, I might kick it to you for a status update on some of those.

General SEMONITE. Sir, I think that in the past, we were probably too quick to say we didn't have all the right funding. You asked us to provide 37 reports. So General Spellman and I have been relatively ruthless this year, going back and saying, where do

we get funding, where is there an expectation that that should be able to pay for a report.

Of those 37 reports, three are done, nine are with Mr. James right now, all done, ready to be approved and come over. Fifteen we are still working on; we will get them done in the next couple of months. But they are all funded.

That only leaves 10 that are pretty substantial and we don't have money for those. So we will continue to put them in our budget.

What we are going to try to do, though, is give you an interim report, maybe something just 3 or 4 pages long, that says, here is at least, to be able to meet your intent. And if you want the 100 page version, then we have to find those funds.

But we are committed—when Congress asks us for a report, we are committed to try to give you that answer in a timely manner, and if not, make sure that we identify the funds, like you said earlier, so that you can help us get those moneys.

Senator CARPER. Fair enough. Thank you very much.

Thank you for coming today, and thank you for filling in for Secretary James.

Senator BARRASSO. Thank you, Senator Carper.

Mr. Fisher, one of the purposes of water resource legislation is to authorize water infrastructure projects to ensure America's locks, dams, levees, other related flood prevention infrastructure remains reliable and in good working order.

Recently, we had the sudden collapse in Wyoming of an old Federal irrigation tunnel. I say old; it was built in 1917. I was there, and you can see on the cement, 1917 written, and it was the Bureau of Reclamation, but it didn't say Bureau of Reclamation, because this was even before the Bureau of Reclamation existed, 1917.

So it has created significant economic losses for farmers and ranchers in Wyoming and Nebraska, all the areas, about 100,000 acres that were covered in this irrigation area.

I think it was just a reminder of the threats posed by aging infrastructure. So are there new and innovative tools that you have to better detect vulnerabilities in infrastructure, and specifically water infrastructure, and then go and try to fix them prior to the failures that can occur?

Mr. FISHER. I will probably let General Semonite address some of the technologies and innovations that our Engineering, Research and Development Center are coming up with at Erdrick Dunn and Vicksburg.

On the policy side of things, General Semonite mentioned some of the authorities we are looking to utilize, the public-private partnerships, the WIFIA program that Congress has authorized for the Corps. We will, on a policy side, tackle some of these problems that we are detecting. We want to use as many tools as we have, such as those authorities, to get at them, as well as traditional funding mechanisms, as well.

Senator BARRASSO. General Semonite, anything on the new technology?

General SEMONITE. Mr. Chairman, we are working this in two ways. A lot of this goes back to data. And we are looking at our data very, very closely. We have a bunch of reliability data now,

and predictive analysis. We have 715 locks and dams. So we know pretty much how many times can that gate open before we begin to have some problems.

So even to the point where we are standardizing a lot of our locks and dams, we are able to figure out, when do we need a standby one. Instead of buying a standby gate for every single lock, how do we have one that might fit 10.

The other thing we are doing, though, when it comes to the technology side of stuff, remember the Orville Dam in California; it wasn't a Corps dam, but the spillway there failed. So now we are doing things like ground penetrating radar, how can we go back in and look through the integrity of the dam to try to figure out, are there gaps. Our labs are doing an awful lot of great work here.

I don't think we are where we need to be, but it is not because we don't necessarily understand the requirement. It is just being able to make sure we are leaning on the best and the brightest technologies, really worldwide. We do a lot with Holland on this, the Netherlands. We are trying to figure out what are the best tools out there.

Senator BARRASSO. One last question for you. The Corps has management responsibility for about 34 miles of levees outside of Jackson Hole, Wyoming, in the area that you are very familiar with. These levees are currently being repaired. They are critical to the protection of the community. Will you commit to working with this Committee to ensure these repairs are completed in a timely manner to provide protection to this community?

General SEMONITE. Absolutely, Senator.

Senator BARRASSO. Thank you.

Well, if there are no other questions, and we have had 14 members of the Committee show up here today to ask questions, which shows the great interest and the importance of the work all of you are doing, so we appreciate all of you being here.

Members may submit questions for the record.

The hearing record will stay open for 2 weeks. I ask you to get back and answer all the questions within that 2 week period of time.

I want to thank all of you for your time and testimony today.

The hearing is adjourned.

[Whereupon, at 11:55 a.m., the hearing was concluded.]

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