

Table of Contents

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and Public Works

Washington, D.C.

STATEMENT OF:	PAGE:
THE HONORABLE JOHN BARRASSO, A UNITED STATES SENATOR FROM THE STATE OF WYOMING	3
THE HONORABLE THOMAS CARPER, A UNITED STATES SENATOR FROM THE STATE OF DELAWARE	7
THE HONORABLE KEVIN CRAMER, A UNITED STATES SENATOR FROM THE STATE OF NORTH DAKOTA	14
THE HONORABLE DOUG C. GOEHRING, COMMISSIONER, NORTH DAKOTA DEPARTMENT OF AGRICULTURE	25
TODD FORNSTROM, PRESIDENT, WYOMING FARM BUREAU FEDERATION	30
RICHARD ELIAS, SUPERVISOR, DISTRICT 5 OF THE PIMA COUNTY BOARD OF SUPERVISORS IN ARIZONA	35

HEARING ON A REVIEW OF WATERS OF THE U.S. REGULATIONS: THEIR
IMPACT ON STATES AND THE AMERICAN PEOPLE

Wednesday, June 12, 2019

United States Senate

Subcommittee on Fisheries, Water, and Wildlife

Committee on Environment and Public Works

Washington, D.C.

The committee met, pursuant to notice, at 10:05 a.m. in room 406, Dirksen Senate Office Building, the Honorable John Barrasso [chairman of the committee] presiding.

Present: Senators Barrasso, Carper, Inhofe, Capito, Cramer, Braun, Rounds, Sullivan, Boozman, Ernst, Cardin, Merkley, and Van Hollen.

STATEMENT OF THE HONORABLE JOHN BARRASSO, A UNITED STATES SENATOR
FROM THE STATE OF WYOMING

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

Today we are holding a joint hearing of the Full Committee, as well as the Subcommittee on Fisheries, Water, and Wildlife, on Waters of the United States regulations, or WOTUS.

Since this is a joint hearing, both the Full Committee and Subcommittee Chairmen and Ranking Member will give opening statements.

This is the Committee's first hearing on WOTUS since the Trump Administration published its proposal to redefine the term earlier this year. The Trump Administration is not the first to examine the term "waters of the United States." For more than 45 years, all three branches of Government have struggled to interpret the phrase.

We have heard many times in this Committee about the undue regulatory burden placed on American farmers and ranchers when the term is defined too broadly. Previous definitions have inappropriately and illegally expanded Washington's control over water features all across the Country.

You can look no further than the Obama Administration's illegal so-called Clean Water Rule. In 2017, the Committee held a hearing on the legal, scientific, and technical basis for the

rule. We heard how the U.S. Army Corps of Engineers was cut out of the rulemaking process. Major General John Peabody, who was leader at the Corps during the Clean Water Rule's development, testified to this Committee that the Clean Water Rule was not based on the Corp's expertise or experience.

Under the prior Administration's rule, ranchers and farmers across the Country were told that their irrigation ditches, their ponds, and their puddles were navigable waters and could be regulated by the Federal Government.

The Clean Water Act is a strict liability statute. If the Federal Government claims a landowner has violated the Clean Water Act, that landowner can face thousands or millions of dollars in penalties.

This has played out in my home State of Wyoming. During the Obama Administration, the EPA alleged that Andy Johnson, a farmer in Fort Bridger, Wyoming, owed \$16 million in fines for putting a stock pond on his land in 2012. It was outrageous.

Congress opposed the Obama Administration's rule. Under a joint resolution introduced by Senator Ernst, both Houses of Congress disapproved the rule under the Congressional Review Act. President Obama vetoed the resolution and allowed the rule to be implemented.

The courts have since stepped in and blocked the rule from going into effect in a majority of States across the Country.

Many of those legal battles continue to this day.

Just a few weeks ago, on May 28th, 2019, a federal judge in Galveston, Texas was the first judge to rule on the merits of the Obama Administration's rule. The judge found that the Obama Administration had violated the Administrative Procedure Act when it issued the rule.

While the rule is blocked in a majority of States, it does remain the law in 23 States and in some counties in Arizona. That is why it is critical that the Trump Administration expeditiously repeal the Obama Administration's rule and issue a new lawful definition for waters of the United States, a definition that everyone can understand; a definition that doesn't take away States' rights; and a definition that respects the Clean Water Act and the Constitution.

In the past, the complex WOTUS regulations have forced landowners to hire expensive consultants in order to figure out whether a water body on their land is a water of the United States. The Trump Administration's proposed rule is an attempt to bring more regulatory certainty to American landowners.

That is why I am so pleased that we have this panel of witnesses today. I look forward to hearing their reactions to the Trump Administration's proposal. I want to know if the rule is workable for them. The Administration needs to get this definition right. We need to remove the cloud of uncertainty

that landowners, business owners, businesses, and States have faced over the years.

Today's hearing is an important opportunity to hear from stakeholders on how past definitions have gotten it wrong and what the Trump Administration can do to get it right.

Before we move to our witnesses today, I would like to turn to Ranking Member Carper for his remarks.

[The prepared statement of Senator Barrasso follows:]

STATEMENT OF THE HONORABLE THOMAS R. CARPER, A UNITED STATES
SENATOR FROM THE STATE OF DELAWARE

Senator Carper. Thanks, Mr. Chairman.

People ask me what I like about my job and what gives me joy in my work, and one of the things that gives me joy in my work is working across party lines and getting things done. There is a surprising amount of agreement here amongst us on really important issues that affect our air, our water, our planet. This is an issue that there is less agreement, so I just want to telegraph my pitch and ask you to hear me out.

Thanks, Mr. Chairman, for bringing us together, and our thanks to our three witnesses for joining us today.

As I have said before in this Committee, there is perhaps no other sector of the economy more intrinsically tied to environmental quality than our agricultural sector. After all, our farmers need clean water, they need healthy soil to produce high quality crops, and that is something I often hear when I am in Sussex County, which is Delmarva's southernmost county and home to some of the world's finest farms and farmers and producers.

If you drive through Sussex County, you will see sprawling fields, you will see farms growing soybeans, poultry, corn, and grain. You will see a lot of chicken houses, too. If you stop at a farm stand, chances are you will meet someone whose family

has farmed in Delaware for generations. Back home in the First State, we have proven time and time again that we can have environmental protection for our environment without hampering our agricultural sector's ability to grow and to prosper.

Unfortunately, however, our farmers today are facing real adversity, and it is tangible and it is hurtful. Just this week, my staff heard from someone whose family has been farming for more than a century. Over the years they have figured out how to budget and adjust their growing seasons around unexpected droughts or floods or freezing temperatures, but they could never foresee the impact of this President's trade wars.

I am hearing from farmers who are literally unable to plant a crop because we have so much rain. Too many of our fields are mud. Commodity prices are depressed. Our ability to sell soybeans, for example, to China and other countries has diminished and we are hurting. Farmers never tell you they are having a great year, but I have never heard so many folks say that it is this bad. I think I am fearful that we are pursuing some policies that are not helping, but making it worse.

Meanwhile, in the Midwest, farmers are still reeling from catastrophic floods. This Administration's surrender on climate change ensures that more devastating floods, worsening droughts and fires the size of States like my State will continue to keep farmers and crops off their fields. Add to this the erratic

tariffs and climate denial this Administration's confusing renewable fuels gamesmanship, which is clearly intended to please everyone and, sadly, satisfies no one.

This is not the way to do business. So I ask a simple question: Why should anyone trust the changes that this Administration proposes to the definition of waters of the U.S. are going to deliver for our agricultural producers? I think the answer is we can't.

Even more important, I think, is that despite the incredible hardships besetting of farmers today, they do not really need the false promises of the Administration's new WOTUS definition. Since the days of Republican President Richard Nixon, Congress and EPA have ensured that farmers engaged in normal farming activities are not covered or affected by Clean Water obligations.

In fact, the economic analysis of the WOTUS rule conducted by this Administration's EPA and U.S. Army Corps of Engineers determined that, on average, only eight farmers per year needed 404 permits requiring mitigation. That is right, eight. Not 800, not 80, not 108. Eight.

Developers, on the other hand, required about 990 permits per year. Eight on the one hand for the farmers; 990 for the developers. If you look at the total of 390,000 permits these agencies included in their economic analysis, you will find that

less than one percent of the permits were issued for agricultural-related purposes. With that, I would ask all of us in this room to consider who truly benefits from the proposals from this Administration on this front.

Instead of the promised clarity and simplicity, I am afraid that the faulty and incomplete definitions in the President's proposal will end up demanding a great deal of time and money, and a boatload of consultants, to figure it out. At the same time, instead of reducing costs and cumbersome hurdles for our constituents, with this rollback, the only thing we are sure to have are degraded wetlands and polluted headwaters. The ephemeral and intermittent streams of our headwaters may be small enough to hop across, but under this proposal they will deliver more pollution, higher costs and economic burdens, especially to poor and disadvantaged communities downstream.

These communities will see drinking water bills rise as their utilities have more pollution to scrub. These are neither hypothetical nor hysterical predictions. The American Public Works Association, in its comments on the proposed Trump rule, said recently, and I quote -- this is not me, this is the American Public Works Association. Here is the quote: "The new proposed rule would likely impose higher costs on local agencies and water providers for those bodies to deliver those services. As a result, those bodies would be faced with a choice between

raising rates and potentially pricing members of the community out of those services or risking noncompliance by trying to stretch already thin budgets for water and wastewater treatment.”

Meanwhile, many fishermen and hunters will see wetland habitats destroyed, along with major disruptions to the outdoor recreation industry. And what about farmers downstream? Under the Trump proposal, in those waters no longer defined as waters of the U.S., industries would be free to discharge pollutants as they see fit, and land developers will be able to dredge and fill upstream wetlands. I wonder how farmers in Delaware and elsewhere would feel about having to install water treatment facilities to ensure that they have the clean water they need to raise healthy crops and livestock.

I just don't understand why this Administration would propose a definition for waters of the U.S. that provides less clarity, not more clarity, dirtier water, not cleaner water, disrupted wetlands, and higher costs to just about everybody represented in this room and far beyond.

My dad used to say to my sister and me when we were little kids growing up and we would pull some bone-headed stunt, he would always say, “Just use some common sense.” He said that a lot. We must not have had any common sense. You can probably recall things that your parents said to you when you were little and growing up. If my dad were here with us today, he would

probably say the same thing about common sense, and he would probably be right. We just need to use some common sense.

Thank you, Mr. Chairman.

Thank you all for joining us.

[The prepared statement of Senator Carper follows:]

Senator Barrasso. Thank you, Senator Carper.

We will now hear from Senator Cramer, Chairman of the Subcommittee on Fisheries, Wildlife, and Water.

STATEMENT OF THE HONORABLE KEVIN CRAMER, A UNITED STATES SENATOR
FROM THE STATE OF NORTH DAKOTA

Senator Cramer. Thank you, Mr. Chairman. Thank you to you and your staff, and to Senator Carper and his staff for working with me to convene this joint hearing and really for highlighting the importance of this issue by having a joint hearing and raising it here to the full Committee level.

Common sense. I like that. I could probably incorporate that a little bit into my comments, we will see.

Really, ever since the passage of the Clean Water Act in 1972, North Dakota landowners, farmers, ranchers have had to navigate, if you excuse the expression, this very complex regulatory field that changes with water, but also changes with political tides and sort of the culture of the moment.

Under the Obama Administration, the uncertainty really reached a pinnacle with the 2015 WOTUS rule when it was proposed and then finalized. There was nothing simple about it. In fact, I have a tendency to be pretty good at simplifying complicated things, and then the lawyers get it.

But remember the EPA Administrator at the time promised us, "that this rule would save us time, keep money in our pockets, cut red tape, and give certainty to business." Well, she was right, it gives certainty: certain death to business, certain death to lots of farmers if in fact it was to go into effect.

But certainty isn't always the best. The rule did exactly the opposite, really, especially in North Dakota.

Rather than focusing on our shared goal of clean water -- I think we all have to admit we all want clean water -- this rule really was a new massive Federal power grab of farmers' land that Congress never intended the Federal Government to have. The importance of the issue is demonstrated when the State of North Dakota successfully led several States in challenging the 2015 regulation in federal court in *North Dakota v. the EPA*.

The debate that has surrounded WOTUS for decades is really a legal question, a legal and constitutional question, rather than one of science or the water cycle. A lot of members like to go to the water issue. I want to stick with the Constitution and the legal issue. This is a legal question.

It is important to note, again, that we all share the common goal of clean water. In fact, North Dakota farmers, as well as farmers all around the Country, know better than anybody; they are the stewards of their own land and water. They have the most to gain by keeping it clean and the most to lose by ruining it. It is very serious and it is very personal to them.

So we should dispel the notion that those of us who oppose the 2015 WOTUS rule are somehow advocating for dirty water and unscientific water management. It is a matter of who manages your water, not whether it should be managed.

The reality is we have to live within the confines of the law and of the Constitution. In 2001 and again in 2005, the Supreme Court ruled that the Federal agencies went too far when they tried to claim regulatory authority over wetlands and non-navigable waters that had no significant connection to interstate commerce. In both cases the Supreme Court made clear that the Federal Government has limited jurisdiction under the Clean Water Act.

Now, Commissioner Goehring knows this about us, about me and where we all live. A lot of us have pontoons and we dry them on the Missouri River. It is pretty clear to us it is navigable. Now, of course, you can't go to the next State anymore because there is a dam every few hundred miles, but that is navigable. But I can't put it on my uncle's slough and get to the Missouri River; I can only stay on my uncle's slough.

It is not complicated. Interstate commerce requires the movement of let's say North Dakota grain on the Mississippi River. We understand that to be navigable. We understand that to be interstate commerce. When it gets more complex than that, that is when my brain starts hurting.

When the Obama Administration released the rule in 2015, a Federal District Court in North Dakota granted a preliminary injunction blocking implementation of the rule in 13 States. The Chairman referenced that as part of a group of lawsuits. After

the 2019 proposal was released, outside groups like Ducks Unlimited express opposition, citing supposed scientific evidence. To quote them specifically, they said that the proposed rule will leave geographically isolated wetlands without protection.

Now, there are two problems with that statement. First of all, it makes my argument. Isolated is not navigable. Isolated is the very definition that opposes the idea of navigable. Second of all, it ignores that the Federal Government is not the only protector of water in the Country. In fact, the Constitution gives the primary responsibility of that to States. So, with all due respect, it is incorrect and it is not very sound legal argument. The key question is what the legal constraints are established under the law.

I am going to submit the rest of my opening statement for the record and spare you the rest of it.

[The prepared statement of Senator Cramer follows:]

Senator Cramer. I do want to, if I could, Mr. Chairman, without objection, place into the record some of the documents that the comments that were presented by North Dakota farm groups and our attorney general, Wayne Stenehjem.

Senator Barrasso. Without objection.

[The referenced information follows:]

Senator Cramer. With that, I look forward to the questions.

Senator Barrasso. Thank you very much.

Senator Inhofe, you have something you wanted to place in the record as well.

Senator Inhofe. Yes, I have something, unanimous consent to put something in the record. You know, I have learned just now that farmers in North Dakota and the farmers in Oklahoma are about the same. The Obama rule, back when I was chairman of this Committee, was not one of the concerns of farmers and ranchers; it was the concern, number one. Number one concern. And it goes beyond farmers and rancher, so I do want to put this into the record. This is from the Oklahoma chapter of the Golf Course Superintendents Association, very supportive of what the President is trying to do.

Senator Barrasso. Without objection.

[The referenced information follows:]

Senator Barrasso. Senator Duckworth, who is the Ranking Member of the Committee, has an unavoidable conflict. She won't be able to be here. We will include her statement, as well, in the record, and I know that she is going to be monitoring the Committee and the activities today.

[The prepared statement of Senator Duckworth follows:]

Senator Barrasso. Senator Cramer, could I ask you to introduce Commissioner Goehring before he makes his statement?

Senator Cramer. I would be honored to.

I have known Doug for a long time. He and I have been on the campaign trail together. We have been in lots of policy discussions together.

He is a farmer, first and foremost. He is a producer of food for a hungry world. He does it, of course, extremely well, along with his sons, his family. It is a family business like it is in most places in this Country. He has been the Commissioner of Agriculture for an awfully long time.

Doug, I don't even remember how many years it has been.

He is also Vice Chair of the national organization, very active on the national scene, if you will, on agricultural policy.

A very good friend. Above everything else, Doug is a personal friend, faithful brother, and I am grateful for his testimony today and his service to our State.

Senator Barrasso. Thank you, Senator Cramer.

I am going to take the privilege also of introducing Todd Fornstrom, who is here and has served as the President of the Wyoming Farm Bureau Federation since November of 2016. He was elected to serve on the Board of Directors of the American Farm Bureau Federation in January of this year.

He owns and operates a farm with his father and his two brothers on the Fornstrom feedlot near Pine Bluffs, Wyoming. His farm consists of irrigated corn, wheat, alfalfa, dry beans, and a cattle and sheep feedlot as well.

He also runs a trucking business, custom harvest business, and runs premium hay products and alfalfa pellet mill.

He is a very busy man in our State. Over the years, Todd and his wife Laura have held many leadership roles at the county level, the district level, the State level. He is also a local school board member, so I assure you that this hearing today will be no more challenging than a local school board meeting.

Also want to congratulate your son, who has just finished his first year at West Point. I know he is getting ready to have two weeks off and I know you are looking forward to having him home.

I want to thank you for everything you do for the people of Wyoming and for being here today.

Senator Carper. Can I ask a question of Richard Elias? Thank you. I think you are two Majority witnesses, one Minority witness.

Are you from Arizona?

Mr. Elias. Yes.

Senator Carper. And are you from a county that is spelled P-I-M-A and pronounced Pima?

Mr. Elias. Pardon me, sir?

Senator Carper. Are you from a county that is spelled P-I-M-A and is pronounced Pima?

Mr. Elias. Pima County.

Senator Carper. Where is it?

Mr. Elias. It is in southern Arizona. We have about 100 miles of border with the nation of Mexico. It is a large county geographically, bigger than six States in the United States; have about a million residents.

Senator Carper. Any States represented here? Probably one or two. And you are a supervisor there.

Mr. Elias. I am a county supervisor there and I am currently the Chair of the Board, and I have been on the Board of Supervisors for 16 years.

Senator Carper. All right, good. We are delighted you are here. Thanks for coming.

Senator Barrasso. And you pronounce it Alias?

Mr. Elias. Alias, yes.

Senator Barrasso. Alias. All right, well, thank you very much, Mr. Chairman, for being with us today as well.

I would like to remind all of the witnesses that your full written testimony is going to be part of the official hearing record. Please keep your statements to five minutes so that we will have time for questions.

Commissioner Goehring, please proceed.

STATEMENT OF THE HONORABLE DOUG C. GOEHRING, COMMISSIONER, NORTH
DAKOTA DEPARTMENT OF AGRICULTURE

Mr. Goehring. Good morning, Chairman Barrasso, Minority Ranking Member Carper, Subcommittee Chairman Cramer, and Minority Ranking Member Duckworth, who could not join us today, and members of the Committee. Thank you. Thank you for the opportunity to present to you today about waters of the United States regulations and their impact on States and on our agricultural producers.

My name, for the record, is Doug Goehring, North Dakota Agriculture Commissioner.

Our more than 26,000 farmers and ranchers own, operate, and manage almost 90 percent of the land, or nearly 40 million acres in North Dakota. Agriculture is our State's largest industry. It accounts for 25 percent of our total economy. Although only two percent of our population are farmers and ranchers, it supports 24 percent of our State's workforce.

Now, comparatively, that is higher than nationally, which is approximately 19 percent of the Nation's workforce is supported by agriculture.

As you can see, we have a map up here. This relates back to the State and as I get into prairie potholes.

Under the longstanding traditional navigable water definition, there were 5,100 miles of jurisdictional waters in

our State. The 2015 rule would have expanded that Federal jurisdiction to 85,604 miles in North Dakota.

North Dakota is one of five States in the prairie pothole region and the 2015 rule would have asserted jurisdiction over a wide array of dry land features, isolated features, and vaguely defined other waters. It almost would have encompassed the entire prairie pothole region in our State.

It conceivably placed every river, creek, stream, and vast amounts of adjacent lands in our State under Federal jurisdiction. North Dakota would have witnessed the takings of approximately 80 percent of our State.

I am greatly concerned about the 2015 rule as it attempted to infringe and encroach upon the sovereignty of our States. The most fundamental management practice in agriculture is effective water management. It is either to retain, conserve, or convey. An overly rigid one-size-fits-all Federal regulatory scheme is not reasonable, it is not workable, and it is not appropriate.

Unlike the 2015 rule, the 2019 rule was crafted with input from the States. We advocated for a new rule not for partisan reasons, but because the previous rule creates uncertainty for producers, it conflicts with State jurisdiction and regulates large tracts of land where no rivers or streams exist.

Overall, we are seeking a new rule that will allow farmers and ranchers to visually see what is and is not jurisdictional

without forcing them to hire a consultant. We need to craft a rule that adheres to the text and the legal precedent of the Clean Water Act and gives farmers and ranchers clear lines to operate within. As such, I support further changes to the 2019 proposed rule that will clarify navigability, more clearly define tributaries, and improve clarity regarding ditches and wetlands.

In the 2019 proposed rule, I believe that the proposed definitions of perennial and intermittent are confusing, and, to clarify these terms, I would encourage the Administration to consider the value of physical indicators and continuous surface water flow.

I agree with the intent to leave most ditches and artificial channels out of the Federal jurisdiction. Across this Nation, States, counties, and municipalities regulate water flow through ditches to conserve, to allocate, and maintain water quality.

I applaud the agency for providing a clear definition of upland, though. That ensures isolated wetlands are not jurisdictional.

North Dakota is the lead plaintiff for a coalition of States with a preliminary injunction on the 2015 rule. It continues to have significant interest in the Waters of the U.S. rulemaking. In our State, through its laws, agencies already properly, sensibly, and consistently protect the waters of the State, both the surface and the subsurface.

States have intimate knowledge of their resources and are much better equipped to understand the specific and unique needs of our people and the industries.

Finally, I would like to say no one loves our land and our resources more than we do. We drink the water, we produce the food, and we raise our families on the land with the intent to pass it on to the next generation.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Goehring follows:]

Senator Barrasso. Well, thank you very much for your testimony. We are grateful you are here.

Mr. Fornstrom.

STATEMENT OF TODD FORNSTROM, PRESIDENT, WYOMING FARM BUREAU
FEDERATION

Mr. Fornstrom. Chairman Barrasso, Chairman Cramer, Ranking Member Carper, I am Todd Fornstrom, President of the Wyoming Farm Bureau. I farm on a farm outside of Pine Bluffs, Wyoming with my father and two brothers and our families. We maintain a diversified farm that produces corn, wheat, alfalfa, dry beans, as well as a cattle and a sheep feedlot. Our area is unique. We sit at 5,000 feet and we get between 12 and 14 inches of rain, so it is arid. It is basically a desert, but we use groundwater.

My wife and I, Laura, have four kids, a set of twins that are going to be seniors in high school; we have a senior in college that is going to be out in the world next year, and like Chairman Barrasso mentioned, I have a son at West Point. I also am a member of the American Farm Bureau Board of Directors.

I appreciate the opportunity to appear before this Committee on behalf of the Wyoming Farm Bureau and the American Farm Bureau, and also would like to thank the Committee members for the important role this Committee plays in protecting the Nation's water resources and its critical infrastructure.

On a personal level, I am deeply protective of this water that we talk about. I have raised my children and my brother's families on a well that we farm around every day, so it is not something we talk lightly where we come from.

The Farm Bureau cannot overstate the importance of a clear rule that farmers and ranchers can understand without needing armies of consultants and lawyers. We believe the proposed rule is an important step in bringing the WOTUS definition back in line with what Congress intended to be the scope of the Federal jurisdiction under the Clean Water Act.

The proposed rule gives meaning to the word "navigable" and recognizes that the essential policy underpinning the Clean Water Act is to preserve the State's traditional and primary authority over land and water use.

Congress also intended for the Federal Government to work hand-in-hand with States, which is why the Act deals with illegal dumping and water pollution in a bunch of different ways that do not rely on treating every wet spot in the landscape as waters of the U.S.

The proposal would not weaken the many existing Federal, State, and local laws that protect our resources and wildlife. Nor does it limit the ability of the State and local entities to protect the sources of drinking water.

I want to draw your attention to one protection in particular. Within our State of Wyoming, my operation with its two feedlots is required to get a permit that is administered by the State. This permit did require us to make structural changes to our operation somewhere in the range of \$350,000. It was

expensive and it was not anything that we do on normal farming days.

As part of the program, the State has conducted yearly random inspections on our farm. They are doing a good job. Wyoming's ability to effectively and thoroughly protect water resources within the State through its own regulatory regime is exactly what Congress intended to preserve through the Clean Water Act, and nothing in the new proposed rule changes that.

Many people have spoken out against the rule, have gone out of their way to mischaracterize the scope and impact that is proposed by this rule. In reality, this proposal provides much needed clarity in definition and throughout the whole. It also maintains protections for clean water while preserving States' traditional authority over the local land and water use. Finally, it reflects legal and policy decisions informed by science.

But there are still a few things that we could improve on. We feel there could be more clarity in key terms that are relevant to several jurisdictional categories of water, such as intermittent. We also feel that the agency should eliminate ditches as a standalone category of jurisdictional waters. Finally, the agencies could make it more clear in the definition of wetlands that a wetland must satisfy all three of the Corps' delineation criteria.

I appreciate the opportunity to provide this testimony and look forward to your questions. Remember, the goal of everybody in this room is clean water and clear rules. Thank you.

[The prepared statement of Mr. Fornstrom follows:]

Senator Barrasso. Well, thank you very much for being here. Thank you for your testimony. Sorry for the buzzes and whistles that are going off reflecting what is going on on the Senate Floor. Thank you so much for your testimony and being with us today.

Now, Mr. Elias.

STATEMENT OF RICHARD ELIAS, SUPERVISOR, DISTRICT 5 OF THE PIMA COUNTY BOARD OF SUPERVISORS IN ARIZONA

Mr. Elias. Good morning, Chairman Barrasso, Ranking Member Carper, and Chairman Cramer. Thank you for inviting me here to provide this testimony today.

Pima County, in southern Arizona with Tucson its county seat, has a deep and longstanding interest in protecting our waterways from pollution. As residents of the Southwest, we are keenly aware of the importance of clean water.

I am a seventh-generation resident of Arizona and the arid desert Southwest. Groundwater contamination from surface discharges of the industrial solvent TCE and other toxins have ravaged the district I represent.

TCE reached groundwater used for homes and businesses in the early 1950s, but it was not discovered until 1981. Thousands who were impacted have died. Countless others have suffered painful and debilitating diseases linked to their exposure.

Many of those who suffered or died from TCE exposure were personal friends of mine. Those losses and that suffering still pain me deeply. We cannot allow that to happen again.

The Clean Water Act has served as a critical protection for our water supply because it has been applied since its 1972 enactment to the intermittent and ephemeral watercourses that dominate our area and into which TCE and other toxins were

dumped. The proposed new definition of waters of the U.S. eliminates protections for intermittent and ephemeral streams.

We need to protect our residents and we need to protect the habitat and wildlife corridors that provide nourishment and shelter for our unique Sonoran Desert creatures. In my homeland, much of this habitat and these wildlife corridors are intermittent or ephemeral waterways. They require legal protection.

What is now the City of Tucson was begun on the banks of the Santa Cruz Rive by indigenou inhabitants more than 4,000 years ago. Its water gave them life, water to drink and water for food crops.

Groundwater pumping and use since the early years of the 20th century has dried up most of the ones verdant Santa Cruz. But it, and the numerous intermittent and ephemeral tributaries to it, remain vital parts of our lives and our heritage. They must be protected.

Water still flows in the Santa Cruz, downstream from wastewater treatment plants that serve our urban centers and its quality, and that of the biosolids from the plants, are regulated under the Clean Water Act's existing regulatory scheme.

In order to meet Clean Water Act standards, we recently undertook a \$650 million upgrade of our two largest wastewater treatment plants. Their now-clean discharges into the Santa Cruz

have recreated important riparian habitat and restored an endangered native fish. We must not lose those wonderful benefits.

The treatment plants' biosolids are transported to nearby farms, where they serve as a soil amendment that increases the per-acre production of crops, so they have value in our arid region. We cannot afford to see them contaminated and no longer useful.

Livestock ranching, a livelihood of my relatives and ancestors, and once a significant economic factor in our region, remains an active part of our heritage. This industry relies on the very limited water that flows intermittently and seasonally in ribbons meandering through our area. When water flows, ranchers collect it in pools, known as stock ponds, for their animals. They require clean water.

This proposed EPA regulation would rely on States to protect water quality, but many States have limited their own ability to develop State rules to protect water quality. Two-thirds of the States, including Arizona, have laws requiring that State or local water quality rules be no more stringent than the Clean Water Act. Arizona has no State regulatory program addressing the quality of surface water or wetlands.

The proposed new rule would adversely affect the health and welfare of our community and the entire region. By removing

protections for intermittent and ephemeral streams, it eliminates protections for virtually all of our watercourses, needlessly jeopardizing our drinking water, our watersheds, our agricultural producers, and numerous tribal nations. Pima County residents deserve better. We strongly encourage this body to oppose implementation of this proposed rule.

I would also add that I have learned to forgive those folks and companies and the Air Force who poisoned the water in southern Arizona, but I have also learned that I should never forget what happened to those folks who are not here to voice their objections today.

Thank you very much for listening.

[The prepared statement of Mr. Elias follows:]

Senator Barrasso. Thank you very much for your testimony.

I have a letter that I am going to introduce to the record. The Arizona governor has already indicated his support for a new waters of the U.S. definition and his willingness to change the State law if needed. He sent a letter to the EPA outlining all of this, and I ask unanimous consent to enter this letter into the record.

[The referenced information follows:]

Senator Barrasso. Senator Carper.

Senator Carper. I have a unanimous consent as well, this from another governor, governor of the Commonwealth of Virginia, a letter to enter into the record, and I would ask that it be, a letter from Matt Strickler, Secretary of Natural Resources from the Commonwealth of Virginia. I would like to submit it to the record. The letter makes clear that many States, not just Virginia, but many States, do not support a retreat from the protection and certainty provided by the 2015 Clean Water Rule.

Thank you.

Senator Barrasso. Without objection, that is also introduced.

[The referenced information follows:]

Senator Barrasso. Due to some scheduling conflicts, I am going to defer my opening line of questions and defer my time to Senator Ernst.

Senator Ernst. Thank you very much, Mr. Chair. I appreciate the flexibility.

As Senator Barrasso had mentioned in his opening statement, back in 2015 I was proud to introduce legislation that would have nullified the Obama Administration flawed WOTUS rule. This was a rule that gave the Federal Government authority to regulate 97 percent of the land in Iowa and it posed serious challenges for farmers, for our ranchers, and numerous other stakeholders, and I can truly say this is one of those issues where people that don't normally collaborate together came together in opposition to this far-reaching rule.

Unfortunately, after passing both the House and Senate with bipartisan support, bipartisan support, my legislation was vetoed by President Obama.

Getting this rule off the books has been one of my top priorities, and I am encouraged by the Trump Administration's proposed rule, which provides much needed predictability and certainty by establishing clear and reasonable definitions of what qualifies as an actual water of the United States.

While the 2015 rule recognized ditches broadly as a water of the U.S., what I would like to do is go ahead -- we will talk

about ditches, but I do want to ask Mr. Goehring the rule recognized ditches broadly as waters of the U.S. The proposed rule only defines certain ditches as waters of the U.S. Though this can be seen as an improvement upon the 2015 rule, do you believe that the EPA and the Corps should provide additional clarification as to what ditches qualify as waters of the U.S.?

Mr. Goehring. Mr. Chairman and Senator Ernst, yes, I believe they need to expand that definition, clarify it, because in many cases ditches are an artificial feature, generally moved to convey water, and many municipalities and States which have authority over the waters of the State already are going to make sure that they adhere to the Clean Water Act and that water is appropriated, allocated, conserved, and retained properly.

Senator Ernst. Very good. I appreciate that perspective. So, ditches is one of those issues that we need to overcome. Another area is, like was described earlier, standing water, maybe perhaps in a field or so.

Mr. Fornstrom, under the proposed rule, intermittent water features are jurisdictional and are defined as surface water flowing continuously during certain times of a typical year. In your testimony, you recommend including a minimum duration of continuous flow for a feature to be considered intermittent. What regulatory challenges or confusion would this change that you have recommended help prevent?

Mr. Fornstrom. Thank you, Senator Ernst. The intermittent issue that we have is we would appreciate a 90-day minimum on a regulation to clarify. We have rainfalls in Wyoming that will start the runoff, and sometimes that coincides with snowpack, a true intermittent. So it would change and clarify the rule so we would know. We are not lawyers; we are farmers.

Senator Ernst. Right. Right. Do you think there would be challenges with trying to enforce the regulation as it is proposed right now, because folks don't know necessarily what the definition is?

Mr. Fornstrom. Yes. The idea that not knowing what the rule actually is makes it hard to actually follow the rule. We want to follow the law. That is what we want to do.

Senator Ernst. Exactly. No, I appreciate that very much.

I do have some time remaining, Chairman. I will yield back. Thank you very much.

Senator Barrasso. Thank you so much, Senator Ernst.

Senator Carper.

Senator Carper. Again, our thanks to each of you.

Todd, I think the Chairman mentioned and you mentioned your son is at West Point, is that right? What year?

Mr. Fornstrom. Yes, he is.

Senator Carper. What year?

Mr. Fornstrom. He just finished his plebe year.

Senator Carper. Oh, that is great. How is he doing?

Mr. Fornstrom. He is doing well.

Senator Carper. One of the joys of my life is nominating people to attend the military, our service academies, including West Point. I am a retired Navy captain. We have great service academies. Yesterday, our congressional delegation from Delaware, all three of us, hosted a reception at the Capitol for our nominees who have been admitted to West Point, to the Naval Academy, Air Force Academy, and Merchant Marine Academy; and their parents came as well, grandparents. It was a big family event. We are close to Delaware, so a lot of people can come, and made a day of it.

I said to the folks, as they were gathered yesterday, that these young people who are going to our service academies are so impressive, just so impressive. I told them all that they had picked the right parents. Usually, when kids turn out that well, it is because their parents had something to do with it, so thanks to you and your wife for raising your son to that commitment to service. Navy salutes Army.

Mr. Fornstrom. Thank you.

Senator Carper. You bet.

A question, if I could, for you, Mr. Fornstrom, and also for Mr. Goehring. As you know, many farms have streams running through them, and I am sure that yours do, too. I would ask you

to put yourself in the shoes of a farm located downstream of a metal plating company at which the ephemeral stream next to the plant was no longer a water of the U.S. under the proposed Trump WOTUS definition. Direct discharge of heavy metals and PFAS chemicals would now be permissible into that stream, which would flow into the farm with the snow melt and after heavy rainstorms.

Here is my question: Do you think that most farmers have an alternative to using the water on their property if the water quality was so bad they could not use it to water livestock or irrigate crops? And do you think that solution is easier or more complicated and expensive than requiring those discharges to be permitted and thus controlled? Please. Two-part question.

Mr. Fornstrom. Thank you. You may have to remind me of all the parts.

[Laughter.]

Senator Carper. I will restate the first question. Do you think most farmers have an alternative to using the water on their property if the water quality was so bad they could not use it to water livestock or irrigate crops? That was the first part.

Mr. Fornstrom. Thank you. First of all, that is the assumption that the State is not regulating that water, rather than WOTUS. In Wyoming, the State would most likely be all over whatever regulation you wanted. I am actually regulated by the

State, not WOTUS. Water is very important to farmers, so they would do what they can with what they have, and that is what they always do.

Senator Carper. Second half of my question is do you think that solution is easier or more complicated and expensive than requiring those discharges to be permitted and thus controlled?

Mr. Fornstrom. I wouldn't be able to answer that.

Senator Carper. That is fine. That is fine.

Mr. Fornstrom. I apologize.

Senator Carper. Mr. Goehring, would you take a shot at those two questions, please?

Mr. Goehring. Yes. Thank you, Senator Carper. First of all, probably the two things on the table would be the Clean Water Act and traditional navigable waters definition and how we get there. The Clean Water Act is the law of the land; it has to be adhered to. There is a difference between the State, who understands their resources, understands the system, and their ability to regulate and oversee that, versus the Federal Government. As a regulator myself, and a farmer, I get those challenges and I understand the resources. In the situation where all States have to monitor and have to adhere to the Clean Water Act, they would be out there doing something with respect to anything that is coming into that system and into that watershed, just as we would do. I would suspect that they would

either start to mitigate, but they would probably prevent any livestock from actually using that water until they find a way in which to address the issue.

With respect to how that is going to happen, I couldn't tell you because I don't have intimate knowledge of what that may look like, but I know in my State how we would manage it.

Senator Carper. Thanks.

Mr. Goehring. And I am sorry, Senator Carper, about the second question?

Senator Carper. That is okay. I need to go to Mr. Elias, if I could.

The Trump Administration claims it cannot estimate the extent of water bodies that its proposal would exclude and therefore cannot estimate the increased harm to waterways or the economic impact on recreation, on drinking water, treatment costs, on flooding damage, public health, and other things. My question of you, Mr. Elias, is as a county official, do you think it is responsible leadership to make decisions without any meaningful idea about what the effects of those decisions could be or would be?

Mr. Elias. As a county official, I think that would be a very bad decision to make. The complex system of tributaries and waterways in southern Arizona and the arid desert Southwest makes water go all over the place underground in our aquifers. In

January, the Air Force Base, Davis-Monthan Air Force there in Pima County, was found that they had released some PFAS into the stormwater drains. Those toxins ended up in a small community named Marana 30 miles away. Without knowing how they got there, without knowing which waterways they entered, it becomes impossible to do that, so protecting small ditches, protecting arroyos, protecting the small tributaries is critical for us, too. Those discharges, just this past week, of the same material at the Air National Guard, same situation; we don't know where those PFAs are going to end up. So, in my mind, in my area, in my homeland, that is a very dangerous precedent to set.

Senator Carper. I understand.

What I would just say in closing is for us to keep in mind, Mr. Goehring and Mr. Fornstrom, keep in mind the many States that cannot regulate waters more stringently than the EPA does. As you know, there are a number of States that cannot.

All right, thanks very much.

Senator Barrasso. Thank you, Senator Carper.

I would like to introduce into the record a letter received from the Pima Natural Resource Conservation District. They commented in support of the proposed 2019 WOTUS rule. The Conservation District has stated that it supports the current proposed WOTUS rule because it restores property rights to private landowners and to the Arizona State Lands Department, and

it provides those parties necessary regulatory relief from Federal Government overreach without sacrificing protection of genuinely navigable waters.

[The referenced information follows:]

Senator Barrasso. Senator Cramer.

Senator Carper. Before we do, Mr. Chairman, could I just also ask unanimous consent to submit a letter from the Back Country Hunters and Anglers that emphasizes that eliminating protection for 18 percent of America's streams and half of our remaining wetlands threatens big game in the Southwest in trout and salmon that need cold, clean waters, and the supporting heritage dependent on those and many other species and habitats threatened by the Trump WOTUS rule? I ask unanimous consent.

Senator Barrasso. Without objection, both will be introduced.

[The referenced information follows:]

Senator Barrasso. Senator Inhofe, we will turn to you.

Senator Inhofe. Thank you, Mr. Chairman. First of all, I appreciate this hearing probably more than anybody else does, since I chaired this Committee during the last Administration.

I have been listening very carefully and I have to tell you, as I said in a comment earlier, that this issue was not just one issue to our farmers and ranchers in Oklahoma; it was the issue. It is number one. I know that Mr. Fornstrom, you are with the American Farm Bureau, so I am sure you hear this from a lot of the others that are out there.

Real quickly, Mr. Fornstrom, the rule that we have, the Obama era WOTUS rule is not currently in effect in your State of Wyoming but is in my State of Oklahoma. Now, you broadly, in your opening statement, talked about some of the costs. Would you specifically talk about some of the costs associated with your situation as opposed to our situation or what we are going to have to be subjected to that you now are not because you are not under this regulation? What are the similar things that States would suffer from under the previous Administration's record? The costs.

Mr. Fornstrom. The costs to the producer? The costs of consultants can be in the thousands, if not in the hundreds of thousands. That is not an excuse to have dirty water. We, as farmers, don't want dirty water. We are happy to do it, but if

the costs is more than what we will get out of it, it is a business decision and they will quit doing it if that is what it comes down to.

Senator Inhofe. Well, you know, there is this assumption that people who own the property are not going to be the best stewards of the property. We had an interesting experience with one of the people from the previous Administration coming out. In fact, I made this a requirement before his confirmation, to come out to Oklahoma on the Partnership program. You are both familiar with that Partnership program. And they came back with glowing reports that, yes, in fact, those property owners in my State of Oklahoma, and I suspect all around the Country, are very much the most concerned people about their own properties; that is not just unique to Oklahoma.

Now, there is this assumption that liberals generally have, is that States are really not competent to get these things done and that they have to rely on the wisdom of the Federal Government to get it done. I would like to ask you, Commissioner Goehring, some of the things that the States are doing right now that we may not be aware of, that are actually being done, in your opinion, better than the Federal Government.

Mr. Goehring. Senator Inhofe, it is interesting that you would ask that because I am confused about all this discussion about the whole definition and reworking everything, revamping,

trying to take control of large tracts of land where there are no rivers or no streams, and only ditches and other problems, isolated water features.

States have a responsibility under the Clean Water Act. They have primacy. They have a cooperators agreement with EPA. They have to maintain and respect the law of the land, which is the Clean Water Act. So, to disregard it or say that States can't be any more strict because their legislators won't allow it, it is irrelevant. You still have to maintain the law of the land. You still have to regulate; you still have to implement. And if the Federal Government has control of it, it doesn't mean that it is going to be any better regulated. In fact, you might be missing unique opportunities in which you are going to be addressing the unique situation of the watershed itself; and that is where the State has the intimate knowledge to go in and do the testing to mitigate issues, to have control without requiring a farmer or a rancher to go get a permit, to pay for a permit, to pay for a consultant to make sure that they are not doing something because it is perceived that way. The reality is the State is still there monitoring, regulating, and they understand the resource better.

Senator Inhofe. That is an excellent statement. Let's stop and look at what has happened since 1972. We have been very successful in the system that we have used and giving the States

the powers of that regulation. Excellent response. Thank you.

Thank you, Mr. Chairman.

Senator Barrasso. Thank you, Senator Inhofe.

Senator Van Hollen.

Senator Van Hollen. Thank you, Mr. Chairman. Thank all of you for being here today.

I am afraid that the proposed Trump Administration rule is really going to guaranty a lot more litigation in an area that has already been heavily litigated. I think all of you know the history of interpreting the waters of the United States, back and forth to the Supreme Court. In the Rapanos case, Rapanos v. United States, you had a split decision; you had Justice Scalia joined by four Justices with a kind of narrow interpretation. Justice Kennedy, the fifth vote, making up the majority in that case, said that the intent behind the congressionally passed Clean Water Act included waters with a "significant nexus test."

I think what we are going to see now, unfortunately, is this is going to be tied up in the courts. So, it would have been much better, in my view, if the Administration had been more protective than the current rules proposed, because the U.S. Geological Society has estimated that this rule is going to remove federal protections for 18 percent of stream and river miles and 51 percent of wetlands.

Now, I represent the State of Maryland. We are in the

Chesapeake Bay area. Six States have their waters flowing into the Chesapeake Bay, plus the District of Columbia. So it is easy to say that one State or another is going to pass their own State laws to protect their waters, but when their waters are impacting people in another State, I can tell you that there is not as much focus on the need to do that; and that is exactly why we have a Federal Clean Water Act and that is why we are so worried in Maryland about the impact of this law. Our governor, who happens to be a Republican governor, and his head of the Maryland Department of Environment have expressed grave concerns over the impact that these new proposals will have on the Chesapeake Bay and the Chesapeake Bay watershed.

Mr. Elias, if you could just elaborate a little bit more on the point you made, which is that waters that are intermittent from time to time, by definition, that they in fact can have a very damaging and harmful impact on waters downstream if you get pollution into one of those water bodies, what impact it has downstream; and the issue of the wetlands. We have a lot of non-tidal wetlands in the Chesapeake Bay area, so there are times that there is no water there; but then there are times when they are filled with water, and they act as a filtration system for the Chesapeake Bay, they are like the lungs of the Bay. And if you essentially say that that is not covered anymore, you are going to expose the Bay to a lot of harm.

Now, I keep hearing the argument that States are going to backfill, but the reality is today on the books you have, as Mr. Elias pointed out, two-thirds of States, including Arizona, have State laws that prohibit the States from going any farther than the Federal Clean Water Act does.

Now, you can say when we scale this back, these States are going to change their laws to be more protective, but there is no guaranty of that, and there is certainly no guaranty that a State that is up-water, upstream, for example in the Bay, is going to do that.

Mr. Elias, if you could just comment further on what you foresee as the harm that could be done to these sort of downstream, down-water areas, and the notion that we all know, which is that a lot of water does travel, as you pointed out, underground; and the question is who is responsible when that water is contaminated or who is responsible when that water is eliminated because somebody happens to fill up a wetland?

Mr. Elias. Thank you, Senator. I understand the unique situation in Maryland, and it mirrors Arizona in an odd sort of way. We certainly don't have as big a body of water as the Chesapeake Bay anywhere within the borders of Arizona, but what we have is a complex set of aquifers that are fed by the ephemeral rivers and streams that exist in Arizona and in Mexico. So, we had some shared infrastructure issues, similar to

Maryland, and, in fact, the aquifer that serves Pima County and Tucson stretches more or less from Imuris in Sonora all the way to Casa Grande in Arizona. That is a distance of probably 150 miles as the crow flies, so this is a huge aquifer that serves many, many, many people with critical groundwater supplies.

The history of Arizona in terms of providing protection to these rivers and streams that seem to be dry all the time, or at least since the 20th century they have been dry, it doesn't bode well for us in southern Arizona and protecting the people who already have experienced, like I said, a terrible history related to all of this, so there is a specter of fear. There is also a specter of misunderstanding from the State. Arizona is a place of great differences geographically and geologically. The northern half of the State is very green and very mountainous; the southern half of the State, where I am from, resembles my skin; it is somewhat dry.

So, what I would say is it is a complex set of issues that shared infrastructure creates, and when we talk about an aquifer that is shared by a huge expanse of space in southern Arizona, all those minor tributaries become critical, especially in a place where we have significant mining and mineral exploration activities. That has been the source of many discharges in our region for the last 200 years especially.

Senator Barrasso. Thank you.

Senator Carper.

Senator Carper. A couple of additional unanimous consent requests.

By the way, Senator Inhofe, I thought your point was very well taken. Thank you.

Mr. Chairman, I ask unanimous consent to submit a letter from Southern Environment Law Center into the hearing record demonstrating the dramatic effect the Trump WOTUS rollback will have on drinking water sources for well over half of the people living in Alabama, Georgia, North Carolina, South Carolina, Tennessee, and Virginia.

I would also ask unanimous consent to submit a letter from Earth Justice into the hearing record demonstrating the disproportionate impact the Trump rule would have on already disenfranchised communities across our Country.

Two unanimous consent requests, please.

Senator Barrasso. Without objection.

Senator Carper. Thanks so much.

[The referenced information follows:]

Senator Barrasso. Chairman Cramer.

Senator Cramer. Thank you, Mr. Chairman.

Mr. Elias, I appreciated your illustration about the dry skin. I reminded me, coming from the semi-arid climate of North Dakota to Washington, D.C., the one thing my wife often says in the summer is that this climate is good for your skin, but it is bad for your hair.

[Laughter.]

Senator Cramer. So, we are adjusting.

There is another saying of mine that comes to mind as I listened to several of my colleagues ask questions, and that is I am fond of saying, Commissioner Goehring, to the Federal Government, please don't impose your mediocrity on our excellence. We are forever trying to dumb down to be more like the Federal Government, and I don't know why we would ever want to do that.

I want to ask you, Commissioner Goehring, a very simple and direct question regarding the pending litigation. Again, there is this other issue of the environmental discussion, but there is a legal issue here that we sometimes like to forget about, and it is the one that North Dakota is leading in federal court.

Do you think it is imperative during the stay and during the rulemaking process that the litigation in North Dakota continues to go forward?

Mr. Goehring. Chairman Cramer, yes, absolutely.

Senator Cramer. And why?

Mr. Goehring. Because of the patchwork of court decisions that exist for the multiple States out there. I believe there are 26 States that have some sort of stay, but it is all founded on different issues that have been brought forward within the courts. We need a final rule so that we can operate with some certainty.

Senator Cramer. So whether that rules come from a final rule that is upheld or litigation, we need to get to some finality, and I would agree with you. I hope that that can continue.

With that in mind, and the blocking of the rule in North Dakota district court nearly three years ago, many critics, as we are hearing today of the new rule, have characterized the 2019 rule as a rollback of water regulations. I think it is important to remember there is not a rollback of something that has been deemed illegal. In fact, over the decades the Supreme Court continually kicks this thing back because it goes too far, and that is why there hasn't been a rule.

In your role as Commissioner, I know that you sit on lots of other commissions both in official or voting capacity, as well as ad hoc, and one of those commissions, of course, is the North Dakota Water Commission. Given all that we have just been

talking about and the fact that there has been a stay for the last three years, the ultimate conclusion that we draw from some of our friends on the other side of this debate would be that those other 25, 26 States, the water quality must just be horrendous, given that the Obama rule hasn't been in place for the last three years.

Is it your experience as a member of the Water Commission in North Dakota that North Dakota's water is getting worse as a result of the rollback of the Obama rule?

Mr. Goehring. Senator Cramer, actually, that is probably what has been confusing for me in all of this discussion, is, as I have stated before, the Clean Water Act is in place; states have to adhere to it. Whether you choose to have more stringent laws and regulations in place is up to your State, but you still have to work within the confines of the Clean Water Act. Whether the Federal Government has it or not isn't going to mean you have any cleaner water, what it does mean is how do you mitigate and manage those resources, and that is really what it is about; and most States, the colleagues I work with, have a very good understanding of what is in their watersheds and how to deal with it. In fact, you can work with EPA to get extra funds to deal with some unique situations in your State also.

Our water quality has continued to improve in parts of our watershed, and there are places where we have, because of

topography, because of nature and because of the geology, some have impacted waters, and we continue to try to deal with nature to address those issues. Those are places where agriculture doesn't even exist, where, quite frankly, it is more residents and residential properties and lake homes that have provided more problems and impacts for us.

So I get a bit frustrated at times when we try to help and bring solutions to the table when sometimes they are pointing the finger at agriculture. It is not agriculture. In fact, I am proud of how much farmers and ranchers have contributed to the success of managing the resource in the United States. Since 1996, USDA, I believe, recorded 100 million tons of topsoil every year it saved from wind and water erosion because of conservation practices and systems that have been put in place; and because of new practices and technology in precision agriculture we are doing a much better job with managing the resource and protecting it.

Senator Cramer. Thank you.

Senator Carper. Would my colleague yield to me for just 15 seconds, if you don't mind?

Senator Cramer. Sure.

Senator Carper. I am glad to hear what you are saying about conservation and how we do good and do well at the same time through smart conservation practices. I would just have us keep

in mind one of the things that concerns folks on our side, and maybe some on your side, is that the Clean Water Act will not apply to waters removed under the Trump WOTUS rule. Will not apply. That is one of the reasons we are concerned.

Senator Cramer. I yield back. Thank you.

Senator Barrasso. Senator Braun.

Senator Braun. Thank you, Chairman. For me, this is a dear subject because I am actively involved in forestry and farming on the weekends and still manage my tree farm and deal with about seven or eight different farmers, and I am avid outdoorsman. I am a member of the Nature Conservancy. So I have the whole swirl of what we are talking about here.

All I would like to say is that over the last 30 years, I remember when we couldn't fish out of our local river because, just like I was worried about it then, something needed to be done. We now can not only fish, we can eat the fish out of that river and feel safe about doing it.

I know what farming practices were like 30, 35 years ago, and it was before no till, it was before farmers didn't really realize the value of every grain of dirt on their farm, and now do, I think, almost anything they can do to make sure to preserve it. I don't want to backslide.

Then I get home about a month ago and was at one of our local restaurants and had three different farmers come up to me.

They let me finish my meal and then they wanted to talk about WOTUS, and I said, well, you know, I know a lot about it. You know, I have been involved in farming. I knew the three farmers personally.

What had happened with them, and the question that I am eventually going to get to is how the current rules, the variability between States in terms of enforcement, but they, in the history of the EPA and up until a year ago, never had a conservation officer run them down over their 160 acres because they saw them out there doing ditch maintenance in ditches that generally don't have water in them other than just maybe a month or two out of the year.

And then I found out that it was not the Corps, it was not the EPA; it was, in our case, IDEM, Indiana Department of Environmental Management, and the Department of Natural Resources that were in overdrive even in the context where I think there is a sense of a little bit of movement back to where farmers and States are being recognized as having as vested an interest as the Federal Government or the EPA would in their own well-being and the health of their farms.

I was surprised that after I had that discussion, I encouraged the State rep and senator to have a few meetings. Two hundred fifty farmers showed up from a county that is not large. That told me that it was important. They felt that it was the

State that was maybe more actively enforcing than what the Corps of Engineers and the EPA representative figured that needed to be done. So, they had that whole ball of confusion.

Start with Doug and Todd, if you want to weigh in. Tell me what is happening in your States. And are we just caught in this crossfire of people so confused that don't know what the degree of enforcement ought to be? Comment on that, please.

Mr. Goehring. Senator Braun, you are very much correct in that farmers and ranchers are confused about who they need to run to, what permit are they going to have to purchase, and how are they going to have to address some perceived issue or potential issue on their farm. States are very aggressive, maybe not all States, and I am sure they operate at different levels of activity depending on how much they are intimate with that resource or issues made about it.

We have done a lot of work in our State to make sure that where we have drainage ditches that they are maintained properly, that they have the right amount of slope to them, that the vegetation exists, and also access to that, because any surface water coming in, you do need to monitor that. We do monitor it. Between the Department of Environmental Quality and the Ag Department in my State, we do monitor surface water for certain things, and we make sure that we adhere to the Clean Water Act. Even if it is waters of the State that we are managing, the Clean

Water Act is still applicable.

And if I could address something earlier that Senator Van Hollen had said, he is absolutely right about the benefits of wetlands; they do filter and they do work. That is why, under Swampbuster, you can't just drain a wetland. And I think we have to keep everything in mind and think about the holistic approach that is already in place and the laws that are there. We just have to be careful that we don't put more burden on those farmers and ranchers and those that are operating and managing and producing out there on the land.

Senator Braun. Past my time.

Could Todd come in on that quickly?

Senator Barrasso. Mr. Fornstrom.

Mr. Fornstrom. The thing that always comes to mind when we talk about regulations like this is the idea that farmers are trying to do the least amount they can to pass a regulation, and that is maddening to me. Farmers and ranchers have been here since the dawn of time in this Country, and they will be here 'til the end; and they have to live there and they work on that land and they are there to make money.

They are there to live there. They are going to pass it down to their grandkids and they got it from their grandparents. The idea that they want to pollute and rape and pillage is crazy. I have no idea where that comes from. If it has been done in the

past, it is in the past. What we have done now is we improve. The way that we farm now is like you said, way better than it used to be. Our organic material, our irrigation maintenance, our GPS-driven tractors, they have done nothing but improve the soils, the land, and the water.

Senator Braun. Thank you very much.

Mr. Fornstrom. Thank you.

Senator Barrasso. Senator Cardin.

Senator Cardin. Let me thank all of our witnesses. I certainly want to underscore that the success of the Chesapeake Bay program in our region is because all of the stakeholders have bought into the responsibilities, including our farmers. The farmers in Delaware, the farmers in Maryland, the farmers in Virginia, the farmers in Pennsylvania, New York, West Virginia all understand the importance of clean water and they are part of the process that we use in order to determine the responsibilities for clean water.

So I agree with they want to do the right thing, but let's be also clear that the largest source of pollution going into the Chesapeake Bay is from farming operations. The largest increase in pollution is coming from runoff, but the largest single source is still from farming, so it is an issue.

And in regards to the importance of wetland, and I know that Senator Van Hollen talked about that, but recognize it is the

intermediate and ephemeral waterways that are critically important to the preservation of wetlands. So, if we are not regulating waters that end up into the navigable waters of America, we are in danger of losing our wetlands, and that is very true with the definitions that have been debated here and what the experts tell me would be the result of what this Administration is suggesting as the definition of waters of the U.S.

Now, the courts caused this issue more so than Congress, in my view. We have been in a state of confusion since the Supreme Court decisions and Federal court decisions, and there have been efforts made to try to get us back to where we were prior to the court decisions. There has been disagreement about that.

One thing is clear that I think everyone can agree upon: there is confusion that needs to be clarified. The lack of certainty is the worst situation for someone to be in, to know whether they can do something or can't do something. So we really have to figure out a way to get together and get a rule that makes sense. But I would urge us to recognize that the waters that we are talking about that are not the direct waters, but lead into the navigable waters, are critically important for clean water; they are critically important for our farmers; they are critically important for public health and drinking water, etcetera.

So, to just say that these are potholes or we are trying to regulate that I don't think advances the debate, so I would just urge us to recognize that we have to find a commonsense way to deal with this, and, to me, I am very much influenced by what the scientists tell us, what the experts tell us. We have a great model in the Chesapeake Bay program. It really has the confidence of all stakeholders, and I would urge that model be used as a way of trying to get us all together on this particular issue.

So, Mr. Chairman, I have been following this hearing. I appreciate the fact that we have a hearing, because I think it is important for this Committee to be actively engaged. I do recognize that all three branches of Government have weighed in on waters of the U.S., and that is part of the problem, but it is up to the Congress to make the final judgments here, and I would hope that we could perhaps use this Congress where we have a House controlled by Democrats, the Senate controlled by Republicans, as a way of listening to each other and coming up with the right solution. I don't believe the rule suggested by the President is going to be the right answer, and I would urge us to take a more active role.

Senator Barrasso. Thank you, Senator Cardin.

Senator Boozman.

Senator Boozman. Thank you, Mr. Chairman.

I also would like to talk a little bit about agriculture. The Obama Administration's EPA stated their Waters of the U.S., the WOTUS rule, circumvented agriculture, claiming farmers and ranchers were protected from regulation by exempting them from 404 permits under 404(f) of the Clean Water Act. In truth, the permitting exemption for ordinary farming and ranching activities was meaningless.

Farmers were told that they would not be subject to the WOTUS rule unless they were performing a new farming activity; any continued farming would be exempted. However, Senate report conducted by this Committee found examples proving that this is not the case.

In 2015, the U.S. Army Corps of Engineers told a landowner that changing the use of a field from growing alfalfa to orchards would constitute a land use change that would allow Corps regulators to pursue enforcement actions if plowing the field to plant trees involved a discharge to wetlands.

The Corps regulator informed the landowner that despite an extensive farming history, orchards were never planted on the ranch, so they are not the same kind of farming and might not be considered a normal farming activity.

According to testimony presented to the EPW Committee, the five-year western drought has forced some farmers to shift their operations from one agriculture commodity to another. However,

according to the Corps, planting a different commodity crop is a change in use that eliminates the ordinary farming exemptions.

So these get into all of this stuff. And I agree with Senator Cardin; we have to come up with a commonsense approach. But what we are dealing with now, you can imagine the frustration, and you know the frustration that farmers are feeling, Mr. Goehring, as they go through these processes dealing with the bureaucracy.

I guess the question is, Mr. Goehring, knowing what we know now, do you believe the Obama Administration's WOTUS rule was good for agriculture?

Mr. Goehring. Senator Boozman, I had a great deal of concerns, and that is why I was very supportive of when we filed a lawsuit and asked for an injunction, a stay. The same things that you referred to were the same conversations we had with EPA about what constitutes a change in agricultural practices and what happens when we change crops. You are exactly right, everybody said we are going to deal with this case-by-case. The problem is you never had a consistent answer depending on who you talked to.

And if a producer all of a sudden wanted to go from raising sunflowers and row crops to cereal grains, or that was part of their rotation, or all of a sudden they put alfalfa in the mix because we do that for soil health, or pulse crops, the problem

was it was perceived as a different farming practice, so all of a sudden it could be detrimental or perceived detrimental and it was going to be harmful for those agriculture producers. A normal common practice would have constituted a permit or permission to actually farm and ranch in a responsible manner.

Senator Boozman. And you would have cases that the rotation, as was done, because farmers do want to take care of their soil, not being allowed to do that or the bureaucracy involved in doing such, you would actually hurt the soil if you didn't do it. Would that be correct?

Mr. Goehring. That is absolutely correct. Even the incorporation of cover crops could be perceived as a different farming practice because you aren't managing them the same way that you would have managed a cereal grain or a row crop.

Senator Boozman. It is sad that you get into all these Catch-22 situations and the poor farmer is doing his best and trying to operate under the rules. And, again, nobody cares more about, because it is their living, taking care of the soil and doing the best that they can to prevent things that disadvantage the quality of water. So thank you very much.

Thank you, Mr. Chairman.

Senator Barrasso. Thank you, Senator Boozman.

Senator Merkley.

Senator Merkley. Thank you very much.

Oregon is an agricultural State that has a huge diversity of what it grows; dryland wheat to every possible crop, the Willamette Valley to orchards. I go around the State and I do a townhall in every county every year, so we have 36 counties, the vast majority of which are agricultural counties; and during this conversation about WOTUS the question I asked was does anyone have a specific example of where they have been impacted in a negative way by the existing rules. So far, the answer has been zero.

So I found the whole conversation, the emotional intensity of it, very interesting because no one in Oregon could point to a single obstruction. And that led to a conversation about all the exemptions that are in the existing law; upland soil and water conservation practices, agricultural stormwater discharges exemption, return flows from irrigated agricultural exemption, construction and maintenance of farm or stock ponds or irrigation ditches, management of drainage ditches, construction or maintenance of farm, forests, and temporary mining roads.

My farmers said, you know, we are worried; we are being told by the national that we have something to fear because somehow something might happen to us, but not one example over these years of this conversation. So, it is an interesting insight on perhaps how there has been a determination to elaborate on a set of fears in kind of a political context, fears that certainly in

my State, with an incredible diversity of both irrigated and non-irrigated land, haven't manifested themselves.

So I just wanted to make that point and continue to extend the invitation to all of my farmers, because it has been years now that I have been extending this invitation to point to an actual challenge that they have encountered.

Now, we change crops all the time in Oregon. Our Willamette Valley, you can grow anything. We grow flowers for export; we grow grass seed. We grow everything you can imagine. We have the largest production of hazel nuts; we have pears, we have apples, we have cherries. We grow it all. People swap crops all the time, and that is why I find the conversation that was just held quite interesting, because not a single example of an actual hurdle reached.

So, I am just going to conclude by saying that invitation still exists, because it is one thing to have actual obstacles, and then we can have a conversation about those actual obstacles. It is another to have a highly politicized debate that completely kind of misrepresented the real challenges in the agricultural world, and I fear that is where we have ended up, kind of a polarization that is so common in some many issues that we wrestle with. We need more problem solving; we need less polarization.

The people of Oregon care profoundly about the quality of

their water. We have an incredible system of wetlands and streams and lakes. They care a lot about what comes into their - - our water largely comes from surface water, our drinking water, so people really care about the quality of the water. But we don't have some big battle going on of the nature that is being suggested in this dialogue, in this conversation. We don't find any incompatibility between clean water for drinking or the health of our streams. We value our salmon; we value our fish, so I think Oregon is a case model in how you can have both good agricultural, strong agricultural practices and you can have very high water quality standards, so maybe I would invite anybody who wants to follow up with problems they are experiencing in their State to come join us for a conversation in Oregon.

Thank you, Mr. Chairman.

Senator Barrasso. Thank you very much.

Senator Capito.

Senator Capito. Thank you, Mr. Chairman.

Thank all of you for being here.

Before I begin, we have talked a lot about agriculture, but the WOTUS rule has had effect in other different arenas that I want to get into a little bit later, but one is I would like to ask unanimous consent to add to the record a letter on behalf of the West Virginia Golf Course Superintendents Associating supporting a redefinition and clarification of this.

Senator Barrasso. Without objection.

Senator Capito. Thank you very much.

[The referenced information follows:]

Senator Capito. That might help my golf game, although I doubt it. Yes, good luck with that.

Commissioner Goehring, I know that this may not be in your bailiwick, but North Dakota and West Virginia have energy production. Certainly, you have the Bakken and we have Marcellus and Utica plays, and we are very excited about the energy production. I am just wondering, with the rapid acceleration of the discoveries there, much like what we have in our area, in the Marcellus Shale arena, what kind of impacts this WOTUS rule has on the energy production and the ability to continue the full exploration of our resources.

Mr. Goehring. Senator Capito, thank you. Actually, part of this is in my portfolio.

Senator Capito. Well, good.

Mr. Goehring. I have oil and gas production through the Industrial Commission that I serve on, so I am very well aware of energy in our State, both coal and oil and gas.

We have had concerns, or I should say the industry, energy industry has had concerns as to what does this mean with respect to how they access water, how they manage water, and how they will treat water; and they have actually expressed more concern making sure that the farmers and the ranchers in the area and the watershed itself is being managed properly and has proper oversight, because they fall under the jurisdiction of the

Department of DEQ in our State and under the Industrial Commission or the Department of Mineral Resource. So, we have played that role of providing that oversight and that regulatory oversight and making sure that they manage properly.

They haven't expressed a whole lot of WOTUS, knowing that they already answer to us when we regulate them, and it is our job to make sure that we adhere to the Federal law and to the State laws that exist. So I haven't heard a whole lot of comments back from the energy industry on this issue other than they are concerned with how it is being managed throughout the entire watershed.

Senator Capito. Okay, thank you.

The original Obama rule was called the Clean Water Rule, and this is being touted as President Trump rolling back the Clean Water Rule. Sounds terrible, doesn't it? So, I think if we talk about the politicization of where we are going here, I think we need to keep in mind that our goals are all basically the same; it is just how are we going to get there.

So, I am a bit confused on the wetlands conversation because I heard -- Senator Cardin and I share the Chesapeake Bay watershed issues from a different perspective, being at the headwaters in West Virginia. He expressed concerns that wetlands would be influenced, disrupted, be able to be dismantled, etcetera, under this new rule. You said, just half an hour ago,

probably, 20 minutes ago, that this is a great filter for clean water and that it is a very protected region.

How do I square those two comments?

Mr. Goehring. Well, I think that is interesting because it goes back to a State managing their own resources. Wetlands may appear different in different areas. For example, if you have an ephemeral stream that may be feeding a wetland, it may be a closed basin. It serves in the same way, in the same manner of filtering water that then ends up into subsurface water systems.

But when you are talking about -- and I will use North Dakota because I know that a whole lot better. We have a lot of these shallow water depressions that exist from glacial activity, and it is through rain events or maybe even heavy snowfall during the winter, and it is a concentration of those waters that can be miles away from any intermediate stream or within the watershed it would be so difficult because there is no surface connection, which I find, at least in this new proposed rule, in the 2019 proposed rule, they talk about the intermittent streams as having seasonal flow, and that would be jurisdictional.

And I get that, and I haven't heard very many people actually argue on that, because it could be runoff from the mountains. But at least on some of the ditches and the ephemeral streams, if it is just a rain event, six-inch rain event in the area, that would not be.

Now, that brings a lot of comfort and peace to a lot of agriculture producers because now they understand what is going to constitute or at least there is some predictability as to what is going to be considered jurisdictional.

Senator Capito. Right, and that goes back to also the point that I think Senator Cardin made quite well, the uncertainty.

And then when we look at what States is this working for, well, the vast majority of the States it is not even in effect, so you can't say that just because it is working in certain States, whatever the type of agriculture they might have or interactions, the remaining States, as you made a great point, we are all created different here, so it is going to have different impacts in different areas.

Thank you very much.

Senator Barrasso. Thank you very much, Senator Capito.

Mr. Fornstrom, Section 404(f) of the Clean Water Act clearly states that farmers and ranchers should not need permits from the Corps for normal farming, for cultivating forestries, and for ranching activities. Should not need a permit. In the past, I believe the Corps has incorrectly interpreted the provision; the Corps has demanded that farmers and ranchers obtain permits under the Clean Water Act.

Beyond a new WOTUS rule, is more clarification needed to address this issue?

Mr. Fornstrom. Thank you, Senator. Definitely more clear lines of knowing whether we are talking about ephemerals or whether we are talking about navigable water. All of those are necessary so farmers and ranchers can tell what they are dealing with. The Corps has misinterpreted some things, and I really wanted to challenge Senator Merkley and give him his first example, because in California we do have an example of it, of a crop change where a certain individual was fined in the millions, until they figured out that the CRP that it had been in for two terms was farmed before and it was a misinterpretation by the Corps.

With that, it brings me to the idea that dealing with the Federal Government isn't like dealing with the States and isn't like dealing with the locals. Dealing with the Federal Government is intimidating, one; and, for two, they don't understand the area like the local people do, like the States do, and understand the prairie potholes in North Dakota that I have never heard of.

There is a lot of clarification that would be very helpful.

Senator Barrasso. Well, we will make sure that Senator Merkley is aware of the example that you brought, and, if you have others, we will make them also a part of the record. So I would ask anyone who has that information to get it to us and we will include that as part of the permanent record of this

hearing.

Mr. Fornstrom. Thank you.

Senator Barrasso. Thanks for that.

Commissioner Goehring, in the Clean Water Act, Congress clearly stated its intent, it says to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, and to plan the development and use of land and water resources.

Do you believe the new proposed WOTUS definition more faithfully implements this Clean Water Act and preserve States' primary authority over land and water?

Mr. Goehring. Senator Barrasso, I absolutely believe so. Simply stated, because it puts the accountability back where it needs to be. If we understand the resource, we already have the responsibility, we have primacy and we have the cooperators' agreement with EPA. They hold us accountable for making sure that it is implemented and implemented properly.

Senator Barrasso. Mr. Fornstrom, as you know, under previous versions of the Waters of the U.S. Rule, landowners have been forced to hire expensive consultants -- you raised that in your statements -- in order to determine if their land was jurisdictionally under the Clean Water Act, because you just can't tell how people are going to rule. Do you think it is fair for our farmers and ranchers to bear that level of regulatory

burden?

Mr. Fornstrom. I think our Constitution tells us that we should be able to read things simply and be able to tell for ourselves what we do and don't do.

Senator Barrasso. You mentioned that you have a personal interest in protecting the water on your property. We heard about your son, who has now finished his first year at West Point. We heard about your family, the work that you do with your father, your brother. Can you please talk about just the everyday practices that farmers and ranchers use to responsibly manage the water on their land?

Mr. Fornstrom. I would start with, whether it be conservation tillage, minimum till, no till, all of those things are utilized in different ways and different farms. We use low pressure water systems to save water, to help infiltration rates reduce. We use GPS. There are a lot of things that farmers do that not only helps their bottom line, but it is good for the soil; and what is good for the soil is good for the farmer.

Senator Barrasso. Commissioner Goehring, anything you would like to add to that?

Mr. Goehring. I think it has been well said.

Senator Barrasso. Thank you.

Senator Carper.

Senator Carper. A couple more unanimous consent requests,

Mr. Chairman, if I could. The first, I would ask unanimous consent to submit comments and an opinion piece from former members of the EPA Science Advisory Panel that reviewed the science report in the 2015 Clean Water Rule and find that the proposed Trump rule ignores or misrepresents the results of over 1,200 studies that form the foundation for that WOTUS rule. I ask unanimous consent.

Senator Barrasso. Without objection.

[The referenced information follows:]

Senator Carper. And the second unanimous consent, if I could, would ask unanimous consent to submit a special scientific report in the Fisheries Journal that confirms the critical role of headwater streams in sustaining fisheries and ecosystem functions.

Senator Barrasso. Without objection.

Senator Carper. Thank you.

[The referenced information follows:]

Senator Carper. One of the things I like to do in the hearings that we have that have a diverse panel is to see where there is some consensus, where we agree. Not so much where we disagree, but where we agree. I think we all agree we want clean water. We want clean water. We want our families to drink clean water. Whether we happen to be in an urban area, suburban area, or rural area, I think we all agree on that. We want to use some common sense. We always want to use some common sense. We want to encourage sound conservation practices.

We have great examples of farms in Delaware where years ago they started adopting conservation practices and their fellow farmers almost laughed at them. But when those conservation projects turned out to provide the enriched soil and just a better environment in which to grow crops, they are not laughing anymore; they are embracing those practices themselves.

I think we want to provide greater certainty and predictability. My understanding is when the Obama Administration worked on the Waters of the U.S. rule, their goal was to provide clarity and certainty.

I remember hosting a town hall meeting not in a building in southern Delaware, but on a farm. We had farmers and we had people who came, who helped actually draft pieces of the rule that has been questioned by a number of States and at least a couple of courts. But I think we all want greater clarity in

this regard, and there is a strong effort by the people who crafted the rule that is under fire to provide that kind of clarity. I think we do want that clarity, and the question is do we get the clarity that is wanted and needed under that rule or the proposed rule that is before us from this Administration. Those are some of the areas where we agree, instead of just disagreeing.

I do have a question, and we will start with Mr. Elias. Do you want to dispute, do you want to refute what I just said earlier, or maybe a couple others that you think that are worth noting? Where do we agree?

Mr. Elias. Could you repeat that? I am sorry, I am a little hard of hearing and I didn't quite catch that.

Senator Carper. It was a long question. I ran through about five or six examples of where I think we are in agreement, and I wanted to ask you do you agree with that. Do I have the right points or are there some others that I should have mentioned as well?

Mr. Elias. I think you are right, there is a lot of common ground, and I think we all want to recognize that a proper regulation would take a look at those ephemeral streams and those waterways that seemingly --

Senator Carper. Most people who might be listening or watching this will hear the word ephemeral and not have any idea

what we are talking about. It is in my statements and so forth. My understanding of ephemeral means there would be a stream that flows maybe only when we have snowmelts or when we have really heavy rainstorms. Is that a fair description?

Mr. Elias. Yes, that is a fair definition. Typically, when a big event happens, then those waterways are filled with water and are actually recognized as traditional navigable waterways before the Clean Water Rule of 2015 and since then, again. That was an issue that was contemplated in 1972, when the Clean Water Act was first passed, rivers and streams that run when there are big events.

So, yes, I think we recognize that they need to be protected. I think the question is how and who, and to what level. And I think the thing that is important for us to recognize for somebody like me, who comes from the arid Southwest, is the history that we have of people and communities that have had their faith damaged by discharges into those types of streams and rivers.

So we need to have some kind of clarity that we are going to be offered the same protections that everyone in the United States is going to be offered as well, and I think that is a good common ground that we all share, because we all don't want to face the kind of things that have happened in the district I represent. I can assure you that it is not a wonderful thing. I

hate to bring the subject up today, but I would be severely remiss if we didn't because it is a common ground we share.

Everybody this morning has said we want clean water. The question is, how do we go about getting that and to what level are we willing to protect areas that seem to be dry and not active, when the truth is a really complicated set of science behind it.

Senator Carper. Thank you.

Mr. Fornstrom, same issue, if you would, please.

Mr. Fornstrom. Of course, clean water. You won't sustain life without it. We, in Wyoming, an arid climate also, have the same issues. Our issue with the new rule isn't the idea that we don't want clean water; the idea is that we want to know what is and what isn't in the rule, simply.

Senator Carper. All right.

Mr. Goehring?

Mr. Goehring. Thank you, Senator Carper. Very much agree, we need common sense and I think we really do have consensus that everybody wants clean water. And I think hearing all those that are involved and engaged in this conversation is a first step in the right direction; and, secondly, going back to those that are owning, operating, and managing that land, and respecting their opinion and expertise will take us a long way down that road.

Senator Carper. Thanks.

Mr. Chairman, I want to come back to something I raised earlier, if the rule proposed by this Administration were enacted, the question of whether or not waters in a number of States would lose completely the protection of the Clean Water Act. That is something that I raised earlier and it was kind of left on the table, but I want to come back to that again.

Christophe Tulou, sitting behind me, he used to run the Department of Natural Resources and Environmental Control for Delaware when I was governor, and we worked a lot on ag issues, as you might imagine. But he gave me a sentence that says the Clean Water Act will not apply to waters removed under the Trump WOTUS rule.

Think about that. The Clean Water Act will not apply to waters removed under the Trump WOTUS rule. If that is true, and I think it is, that has to be of concern really to all of us.

The other thing, if you have a place where waters are coming out of springs and then they may disappear under the ground for miles, tens of miles, even 100 miles, and then come back up to the surface again, or maybe we are drawing our drinking water from those aquifers, what do we do about those?

I used to think if you don't see the water, if you don't see it going in a river or stream or whatever, then it is not water, it is not a waterway. Well, as it turns out, there are a lot of waterways under the ground for miles in my State, and probably

your States, too, that we need to protect.

Anybody want to respond to that?

Mr. Goehring. Senator Carper, maybe that is why I have been confused in this conversation. You would have to void the Clean Water Act. It does not matter. The Clean Water Act is the law of the land, and neither the State nor the Federal Government is going to implement it. So when I hear that comment, I am confused why someone has misinformed or stated that to all of you, that the Clean Water Act will not be applicable if it is not on jurisdictional waters, because subsurface and surface water has to be managed and operated by someone; it is either the State or the Federal Government.

So the State has a primary responsibility, every State does, and the Federal Government has the responsibility in those traditional navigable waters, or at least what I would say would be the definition that has existed for many years, for interstate and foreign commerce. Those are the waters that we have always recognized, and they have the primary responsibility there.

When we get into any of those tributaries where I would probably have to say the tributaries still constitute traditional navigable waters. Then, when we get up into the rest of the watershed, the State still has the responsibility for the groundwater and for any of the surface water. So maybe I am confused, and I apologize for that, but the Clean Water Act is

going to hold someone responsible for that oversight.

Senator Carper. Mr. Chairman, this is something I want us to drill down on and find out if indeed it is true that the Clean Water Act will not apply to waters removed under the Trump WOTUS rule. We need to know that.

Mr. Elias, do you have anything on that?

Mr. Elias. Yes, I would like to add to that.

Senator Carper. Sorry to go on so long.

Mr. Elias. Excuse me?

Senator Carper. I apologized to the Chairman for going on so long.

Thank you for being patient with us.

Mr. Elias. Thank you. The reality is, once more, that people who live in Tucson, especially on the west and south side, as I said earlier, their faith has been shaken, and we look to the Federal Government for their expertise because our State does not have a good history in protecting the environment and protecting the waterways of the State of Arizona. That is an ugly legacy to discuss, but it is a reality that we have to face, and I think the fears that people have are perfectly legitimate.

Senator Carper. Mr. Chairman, I have one last unanimous consent request, and that is to submit a letter from the National Congress of American Indians into the hearing record emphasizing our unique relationships with and our obligation to Tribal

Nations, particularly as it relates to safeguarding tribal waters and water-dependent resources.

Our thanks to each of you for being here today and helping to inform our conversation and our understanding. Thank you.

Senator Barrasso. Without objection.

[The referenced information follows:]

Senator Carper. I would just say, Mr. Chairman, there is a lot of agreement here. There is clearly some disagreement, and we need to try to figure this out. I appreciate this hearing.

Senator Barrasso. Thank you.

Senator Cramer.

Senator Cramer. Thank you, Mr. Chairman.

Thanks to all of you for the irrevocable gift of your time and your expertise. I might want to hone in just on something you said, Mr. Elias, in responding to Senator Carper's question about the things we agree on, because I think you hit the nail on the head when you said we agree on these things; the question remains who is it that we look to for protection. You just articulated why you feel people at least in your area and your county are looking to the Federal Government for help given, evidently, a shortcoming in the State level.

That frightens me because, like I said, there are very few people in North Dakota that ever look to the Federal Government for help or expertise on particularly our natural resources. But we are not all the same; it is 50 different experiences, 51 or 52, depending on who all you include.

Commissioner Goehring, you have talked a couple times, and quite articulately, about what I think is the real discussion of the day. In fact, I am intrigued by the letter from the Congress of American Indians because sovereignty is a desire for all of us,

as States, as Tribes. Sovereignty implying that we govern ourselves under the larger umbrella. We don't yield that to the Federal Government. And yet, at the same time, when there is a shortcoming, then we look to the Federal Government.

The issue of primacy, I want to hone in on that because we haven't spent a lot of time talking about that. You have tried to, and I think particularly under Clean Water Act issues, but there are lots of areas. I was a regulator for 10 years in North Dakota, overseeing environmental and particularly environmental regulation in the energy area, and one of the portfolios I carried was the coal portfolio.

So SMCRA laws, which are Surface Mining Control and Reclamation Act, which oversees the reclamation of mining, was under my jurisdiction, but it was Federal laws that we enforced. And that State primacy, that cooperative federalism model works very well when you have the unique understanding and intelligence of the local area under the umbrella of Federal oversight and a relationship with the Federal Government that is mutually respectful, so, regular audits, reporting.

I just think this idea that somehow we are going to trust gun-toting Federal agents or the Corps of Engineers, a military body, basically, or at least under the Department of Defense, we have had more problems, whether it is Swampbuster -- Swampbuster is better because USDA tends to be more farmer-oriented, but

whether it is Swampbuster or WPAs, wildlife protection areas, under the Fish and Wildlife Service, which is more concerning to me, gosh, the closer enforcement can be to the people that you are enforcing, I can't think of many examples where it would be worse than turning it all over to the Federal Government.

So, I would like to see us get back to your point. We all agree on these goals. What is the right mix of enforcement so that people can have a sense of confidence, clarity, and, frankly, better oversight.

The other thing, one of you brought it up, and I don't remember which one, but there actually -- I think it was maybe you, Mr. Fornstrom, that brought up the issue of I call it perverse incentives, that you can actually have an incentive, a well-intentioned goal that is actually perverted when you are punished for your good deed, that it costs more money not to comply than it does to comply, so, consequently, you give up.

I think we have to be very careful about that, too. I like natural incentives that cause, again, the best enforcement and really the best management at the closest level.

With that, if anyone wants to comment on that, you are welcome to for the next minute and 39 seconds, but I just wanted to make that point and just, again, thank all of you for your expertise and your concern for this issue, and all of you for this very good dialogue.

With that, I would either allow anybody to answer or yield back.

Senator Barrasso. Mr. Fornstrom?

Mr. Fornstrom. I agree, and thank you. One of the biggest things we want to put forth is the clarity in the rules, and then knowing who is going to enforce those rules. We prefer the local. But we would like to know, by looking at it, what it is and where it is at, and it is that simple. It is not rolling anything back, it is wanting to know who we are supposed to find.

Senator Barrasso. Well, I want to thank all of you for being here. Senator Cramer has used the word clarity.

Mr. Fornstrom, you used the word clarity. I think you ended your testimony earlier saying what we all want is clean water and clear rules, which focuses on the clarity, and that may be the headline coming out of this meeting today; clean water, clear rules.

So, thank you all. Now, you subjected yourself to 11 Senators asking questions. Others who had unavoidable scheduling conflicts may want to put questions in for the record. We ask that you respond to those, so the hearing record is going to remain open for two more weeks.

But I really want to thank all of you for being here. It was a tremendous hearing. Thank the members who have also attended. Obviously, you have 11 Senators that come and ask

questions; a couple of others came and had to leave before they were able to ask their own questions, but may submit them, but I think it was, I think, a quite fruitful discussion. Thank you.

This hearing is adjourned.

[Whereupon, at 12:02 p.m. the committee was adjourned.]