

1 United States Senate
2 Environment and Public Works Committee
3 Field Hearing
4 Impacts of the Proposed Waters of the
5 United States Rule on State and Local
6 Governments and Stakeholders

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8 Hearing held at the hour of
9 10:00 a.m. on March 14, 2015, at Hardin Hall
10 Auditorium, University of Nebraska-Lincoln,
11 3310 Holdrege Street, Lincoln, Nebraska.

12
13 APPEARANCES:

14 Senator Deb Fischer Chair
15 Mr. Justin Lavene Panel 1:
16 Ms. Mary Ann Borgeson Panel 2:
Ms. Barbara Cooksley
17 Mr. Donald Wisnieski
Mr. John Crabtree
18 Mr. Wesley F. Sheets
Mr. Don Blankenau
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1 SENATOR FISCHER: Good morning. Good
2 morning everyone. This hearing will come to
3 order.

4 I am pleased to bring the United States
5 Senate to Nebraska and convene this hearing of the
6 Senate Environment and Public Works Committee.
7 Today's hearing is titled Impacts of the Proposed
8 Waters of the United States Rule on State and
9 Local Governments and Stakeholders.

10 I believe Nebraska is the perfect place to
11 hold this hearing. Our surface water and
12 groundwater are so important to this state.
13 Nebraskans take great pride in their stewardship
14 of these precious resources and they are rightly
15 concerned with the federal government's attempt to
16 seize control.

17 I am pleased to hold this hearing at our
18 very own land-grant university.

19 So, to begin, I would like to say a special
20 thank you to the University of Nebraska for
21 providing today's accommodations.

22 I would also like to thank our staff that is
23 present today. I have two of my Washington staff
24 members present, Michelle Weber, who is from
25 Blue Hill, Nebraska, and Jessica Clowser, who is

1 from Seward, Nebraska. They are tucked back here
2 around the corner. But I am happy that they were
3 able to come home and serve here at the Committee
4 to help me.

5 We also have two Committee staff people that
6 our Chairman, Senator Jim Inhofe of Oklahoma has
7 provided, Laura Acheson and Lauren Sturgeon. So
8 thank you for being here.

9 And Senator Ben Cardin from Maryland on the
10 Majority side has sent a staff person as well,
11 Mae Stevens.

12 So welcome to all of you.

13 I'm excited to welcome a diverse group of
14 Nebraska's stakeholders this morning to share
15 their perspectives on the proposed rule to revise
16 the definition of waters of the United States for
17 all Clean Water Act programs. This hearing will
18 allow us to explore the issue in depth and
19 determine the impact this rule would have on our
20 state and on Nebraskan families. Last year, the
21 EPA and the Army Corps of Engineers proposed a
22 rule that redefines federal regulatory reach to
23 include everything from farm ponds and drainage
24 ditches to low-lying areas that are dry for most
25 of the year. This proposal is a massive expansion

1 of federal jurisdiction beyond congressional
2 intent.

3 Congress limited the federal government's
4 regulatory authority in the Clean Water Act to
5 navigable waters. And the Supreme Court confirmed
6 these limitations in the SWANCC and Rapanos cases.
7 The Court expressly rejected attempts to expand
8 federal control over water, and made it clear that
9 all water is not subject to federal jurisdiction
10 under the Clean Water Act. Instead of following
11 the law, this administration has decided to twist
12 the rule's definition to include almost every drop
13 of precipitation that could eventually make it to
14 navigable water. This was not the intent of the
15 Clean Water Act.

16 Nebraskans take seriously their role in
17 protecting and conserving our natural resources.
18 Responsible resource management, including careful
19 stewardship of our water, is the cornerstone of
20 our state's economy. This is a vital interest to
21 Nebraska's families, Nebraska businesses, our
22 agricultural industry, and our local communities.

23 Nebraskans understand that the people
24 closest to the resource are also those who are
25 best able to manage it.

1 We are blessed to live in a state with 23
2 local Natural Resource Districts served by board
3 members from those local communities, and to have
4 landowners and communities that truly care about
5 clean water and a healthy and productive
6 environment. That's why it came as no surprise
7 that Nebraskans were so offended when the federal
8 government made its proposal without consulting
9 state and local authorities, without considering
10 their rights, and without realistically examining
11 the potential impacts. I am grateful that
12 Nebraskans were quick to recognize the
13 far-reaching consequences of this rule, and to
14 organize a group effort to raise the alarm. The
15 common sense Nebraska coalition should be
16 commended for its efforts to highlight the
17 sweeping implications of this rule on everyone,
18 from county officials trying to build a road, to a
19 farmer managing rainwater runoff.

20 Clean Water Act permits are complex, time
21 consuming and very expensive. They leave
22 landowners and our local governments vulnerable to
23 citizen suits. The proposal would make it
24 difficult to build anything, whether it's a home
25 for a family, a factory to provide needed jobs, or

1 highways and bridges necessary to transport our
2 people and goods.

3 I am entering into the hearing record a
4 letter and analysis from Mike Linder, who served
5 as the Director of the Nebraska Department of
6 Environmental Quality from 1999 to 2013. He
7 states that the rule is an erosion of cooperative
8 federalism that will harm the success of
9 Nebraska's conservation practices and programs.

10 Today's hearing will begin with a witness
11 who can speak to the importance of the state's
12 water protection programs and cooperative
13 federalism.

14 Assistant Attorney General Justin Lavene is
15 the chief of the Agriculture Environment and
16 Natural Resources Bureau at the Nebraska
17 Department of Justice. A native of Bertrand,
18 Nebraska, Mr. Lavene supervises the litigation and
19 legal support for the Nebraska agencies and
20 boards, including the Department of Environmental
21 Quality, Department of Natural Resources,
22 Department of Agriculture, Game and Parks Division
23 and the Environmental Trust.

24 Mr. Lavene, I thank you for being here.
25 And when you are ready, please begin your

1 testimony.

2 MR. LAVENE: Thank you, Senator Fischer.
3 Chairman Inhofe, and Ranking Member Boxer, Members
4 of the Senate's Committee on Environment and
5 Public Works, my sincere thanks for the
6 opportunity to present the Nebraska Attorney
7 General's Office concern regarding the joint
8 proposal by the United States Army Corps of
9 Engineers and the Environmental Protection Agency
10 to define the Clean Water Act's use of the phrase
11 "waters of the United States" in a manner that
12 would appear to dramatically expand the scope of
13 federal authority under the Act. The Nebraska
14 Attorney General's Office, alongside a number of
15 our sister states, previously offered comments to
16 the Agencies on the proposed -- on the proposed
17 expansive definition. The Attorneys General
18 apprised the Agencies of those aspects of the
19 proposed definition which are inconsistent with
20 the limitations of the Clean Water Act, as
21 interpreted by the United States Supreme Court, as
22 well as the outer boundaries of Congress's
23 constitutional authority over interstate commerce,
24 and the principal of cooperative federalism as
25 embodied in the Act. However, it is not certain

1 that those concerns will truly be considered,
2 which is why we appreciate the opportunity to
3 present additional testimony here today.

4 Congress intended the Clean Water Act to
5 recognize, preserve, and protect the primary
6 responsibilities and rights of the states to plan
7 and -- the development and use of land and water
8 resources. Nonetheless, EPA, along with the
9 Corps, persistently violates this principal of
10 cooperative federalism in practice and now seeks
11 to codify a significant intrusion on the states'
12 statutory obligations with respect to intrastate
13 water and land management. Despite Nebraska's
14 consistent and dutiful protection of its land and
15 water resources, in a manner consistent with local
16 conditions and needs, the Agencies seek to further
17 their disregard for State primacy in the area of
18 land and water preservation, and instead make the
19 Federal Government the primary regulator of much
20 of the intrastate waters and sometimes-wet land in
21 the United States. The Agencies may not arrogate
22 to themselves the traditional state prerogatives
23 over intrastate waters and land use; after all,
24 there is no federal interest in regulating water
25 activities on dry land and any activities not

1 connected to interstate commerce. Instead,
2 States, by virtue of being closer to communities,
3 are in the best position to provide effective,
4 fair, and responsive oversight of water use, and
5 have consistently done so.

6 The Agencies propose a single definition of
7 the phrase "water of the United States" for all of
8 the Act's programs. Currently, there is a
9 difference in use and application of the term
10 "water of the United States" for various sections
11 of the Act. In Nebraska, since the 1970s, EPA has
12 delegated authority to the Department of
13 Environmental Quality to implement all programs
14 except Section 404 dredge and fill, and
15 Section 311 oil spill programs. Thus, the Section
16 402, National Pollutant Discharge Elimination
17 System, or NPDES program, the Section 303, water
18 quality standards and total maximum daily load
19 program, and the Section 401, state water quality
20 certification process, are all administered at the
21 state level. This same arrangement exists in all
22 but a handful of states.

23 The continued state administration of the
24 NPDES program requires the Department of
25 Environmental Quality to have an equally stringent

1 regulatory structure, including its own definition
2 of jurisdictional waters. Accordingly, the
3 Department has administered the various Clean
4 Water Act programs using its own "waters of the
5 state" definition for nearly 40 years with EPA
6 approval. However, the regulatory approach used
7 by the Agencies to develop a single definition of
8 "waters of the United States," which will affect
9 all the Clean Water Act programs, is modeled after
10 the existing guidance provided by the Agencies and
11 the United States Supreme Court which was limited
12 on its face to the jurisdictional determinations
13 for federally-administered dredge and fill
14 programs found in the Clean Water Act of 404.

15 When applied in the context of other Clean
16 Water Act programs, the proposal creates
17 significant cost and confusion, it increases
18 unnecessary bureaucracy, and infringes on state
19 primacy, and exposes agricultural producers to new
20 liability. During the 40 years of state
21 implementation of the "waters of the state"
22 requirement, the Department has applied the
23 definition to Section 402 permitting decisions
24 thousands of times. In Nebraska, livestock
25 producers in particular are subject to the

1 requirements of either an individual or the
2 general NPDES discharge permit. In accordance
3 with the terms of their permits, which are often
4 crafted in reliance on the definition of the
5 "waters of the state," these producers often
6 construct waste control facilities and mitigating
7 land features, such as berms or waterways, to help
8 divert runoff from waters of the state. If the
9 proposed definition of "waters of the
10 United States" is suddenly applied to the
11 state-administered Section 402 program, the
12 effectiveness of all the Department's permitting
13 efforts is brought into question. The land
14 features constructed by producers in a good-faith
15 effort to comply with the permitting requirements
16 may constitute a tributary or adjacent water.
17 Moreover, long-exempted operations may unknowingly
18 find themselves subject to Clean Water Act
19 jurisdiction.

20 Similar increased administrative burdens may
21 result with regard to the states' administration
22 of Section 401, state water quality
23 certifications, and Section 303, water quality
24 standards. As the scope of federal jurisdictional
25 waters grows larger with the promulgation of the

1 proposed definition, the number of federal actions
2 requiring Section 401 certification of the state
3 and the number of waters requiring the
4 establishment of Section 303 standards and TMDLs
5 will likely also increase. The Department of
6 Environmental Quality will be responsible for
7 shouldering this burden leading to increased
8 budget and resource demands.

9 The Agencies suggest that the rule does no
10 more than clarify what the Supreme Court has
11 already declared with respect to the scope of
12 federal authority under the Clean Water Act. By
13 now, the Committee members are likely familiar
14 with the Supreme Court's holdings in Solid Waste
15 Agency of Northern Cook County versus the Army
16 Corps of Engineers, or SWANCC case, and Rapanos
17 versus the United States. Respectively, the
18 holdings in these cases confirmed the limits of
19 the federal government's, and the primacy of the
20 states, over intrastate waters and required, at
21 the least, a demonstrated significant nexus
22 between nontraditional and traditionally
23 jurisdictional waters before the agency may assert
24 its authority.

25 However, the proposed categorical inclusion

1 of broadly-defined tributaries and adjacent waters
2 looks to sweep a large mass of previously
3 unregulated land within the ambit of federal
4 jurisdiction. And for any that might remain
5 beyond the Agencies' reach per se, the catch-all
6 is proposed to allow case-by-case determinations
7 for any water meeting the vaguely-defined
8 significant nexus test. The effect of these
9 newly-included categories of land and water
10 features is not clarity, but rather an
11 inconsistent and overbroad interpretation of the
12 Supreme Court's holdings and the limits of the Act
13 which places virtually every river, creek and
14 stream, along with vast amounts of neighboring
15 lands, under the Agencies' Clean Water Act
16 jurisdiction. Many of these features are dry the
17 vast majority of time and are already in use by
18 farmers, developers, or homeowners.

19 More importantly, the imposition of
20 Clean Water Act requirements on waters and lands
21 far removed from interstate commerce or navigable
22 waters is harmful not only to the states
23 themselves, but to the farmers, developers and
24 homeowners. Ninety-two percent of Nebraska's
25 77 thousand square miles of area is used for

1 agricultural production. The proposal treats
2 numerous isolated bodies of water as subject to
3 the agencies' jurisdiction resulting in landowners
4 having to seek permits or face substantial fines
5 and criminal enforcement actions. Nor must lands
6 have water on it permanently, seasonally, or even
7 yearly to have it be a "water" regulated under the
8 Act. And if a farmer makes a single mistake,
9 perhaps not realizing that his land is covered
10 under the Clean Water Act or Rapanos, he or she
11 can be subject to thousands of dollars of fines
12 and even prison time.

13 Members of the Committee, we ask that
14 Congress continue to work to ensure that the EPA
15 and the Corps recognize, preserve, and protect the
16 primary responsibilities and rights of the states
17 to plan the development and use of land and water
18 resources in our state.

19 Thank you for the opportunity to be heard.

20 SENATOR FISCHER: Thank you, Mr. Lavene.

21 Now I'd like to go through a series of
22 questions with you, if we could.

23 MR. LAVENE: Okay.

24 SENATOR FISCHER: I have a number of
25 questions here and I would appreciate your

1 response to those.

2 Can you talk about the role of the state in
3 protecting water quality and administering the
4 water protection programs, and what is that
5 cooperative federalism that we hear about and why
6 is it so important that states have that strong
7 role in water protection?

8 MR. LAVENE: Sure.

9 With regard to the state protecting water,
10 as I kind of mentioned in my testimony, and this
11 kind of gets into, obviously, the cooperative
12 federalism issue, we have a situation where under
13 the Clean Water Act federal government regulates a
14 portion of the Act's responsibilities. And the
15 State of Nebraska separately administers some of
16 the other programs. As I stated before, the
17 Department of Environmental Quality in the State
18 of Nebraska regulates discharge permits under
19 Section 402, water quality standards, and total
20 maximum daily loads under 303, and also water
21 quality certifications under -- under Section 401.
22 Again, it's a shared responsibility that is --
23 it's basically the function of the cooperative
24 federalism. And that is basically shared
25 responsibility between state and federal

1 governments to implement these laws. Now, part of
2 the reason that that occurs is that both the
3 federal government and the states have somewhat
4 separate interests. The federal government does
5 have an interest in protecting interstate streams.
6 So that is originally why the Act was passed
7 dealing with "waters of the U.S." that were
8 basically navigable in fact. But the states have
9 always historically had a strong interest in
10 protecting waters in the state itself. So
11 interstate land use and water issues. And so in
12 examining that and looking at the Clean Water Act,
13 it's appropriate that the state perform the
14 function of dealing with those intrastate waters.
15 Especially those that would allow, in fact,
16 interstate commerce. And so, again, that
17 cooperative federalism is out there, and I think
18 it works well and has worked well for a number of
19 years under the current definition of "waters of
20 the United States". The problem here is you --
21 you get to a point where that cooperative
22 federalism could come into jeopardy, and I think
23 that's because you have a situation where the
24 federal government is -- through this new
25 definition, would be inserting itself or

1 interjecting itself into some of the primary
2 responsibilities of the state. And that is
3 reaching out into intrastate waters that should be
4 solely regulated by the state and not the federal
5 government.

6 SENATOR FISCHER: And when you talk
7 about the permitting decisions that are -- that
8 are currently out there, those are
9 state-administered programs; correct?

10 MR. LAVENE: Yes.

11 SENATOR FISCHER: And this proposed
12 rule -- well, if we're going to apply this
13 expanded definition now to state programs, what do
14 you think the impact would be on the Nebraska
15 Department of Environmental Quality?

16 MR. LAVENE: Well, part of the problem
17 here is, again, I probably mentioned a couple of
18 themes or topics here a couple of times, but the
19 State of Nebraska and its ability to implement and
20 administer those federal programs under the Clean
21 Water Act, the State of Nebraska must go through a
22 process of adopting state statutes. And then the
23 Department must go through a process of adopting
24 rules and regulations. Now, those states and
25 those rules and regulations need to be approved by

1 the Environmental Protection Agency to make sure
2 that they're consistent with the -- the Clean
3 Water Act and the provisions there. And they at
4 least need to be as stringent as -- as the federal
5 law. One good example that I think I discussed in
6 my testimony is that the State of Nebraska has its
7 own statutory definition of "waters of the state."
8 And it is different than the definition placed on
9 federal laws of "waters of the United States."
10 But that definition as codified in Nebraska state
11 statutes has been approved by the Environmental
12 Protection Agency and has been regulated. That
13 definition has been used and regulative of Clean
14 Water Act programs. The problem here, moving
15 forward then, is in how it will affect the
16 Department. I think there's a lot of uncertainty
17 with regard to how the new definition is going to
18 affect their administration. Will the agency have
19 to go back and go through another review process
20 with the EPA with regard to this new definition
21 and our current state laws and rules and
22 regulations? That's somewhat of an unknown. We
23 don't know if we have to do that. We don't know
24 if we'd have to change the definition of the
25 "waters of the state." We don't know if we'd have

1 to basically amend those rules and regulations.
2 Basically what I'm saying is, we're not sure that
3 our actions today are currently appropriate under
4 the new definition or if the changes are going to
5 have to be made for us to continue to administer
6 those programs.

7 SENATOR FISCHER: And I understand that
8 this rule is going to expand the practice on a
9 case-by-case jurisdictional determination. How is
10 that going to really impact our state operations;
11 do you have any idea? I mean, I know there's a
12 lot of unknowns out there, but how -- how do you
13 think that will impact the operations here in the
14 State of Nebraska?

15 MR. LAVENE: I -- I think it's going to
16 cause some confusion on behalf of both the
17 Agencies and the individuals that will be
18 regulated. I think what you have here is, under
19 this new definition, you're going to have
20 basically a per se -- basically an increase in the
21 per se categorical determination of what is a
22 "water of the U.S." And so that's going to expand
23 geographically in the state to encompass waters
24 that probably were previously not under the
25 jurisdiction of the Clean Water Act. But in doing

1 so you're also going to leave some isolated bodies
2 of water out of there that there are going to be
3 questions on. Basically, when you look at the
4 proposed rule and definition and what these
5 isolated waters are, these other waters, if you
6 will, you do have to go through a case-by-case
7 analysis of that, and it really determines or
8 comes down to whether or not there's some
9 significant nexus to a core water. Again, the
10 problem is, we're uncertain how EPA is going to
11 deal with that. And so because EPA hasn't given
12 us that additional information and/or guidance on
13 how they're going to handle that, the State of
14 Nebraska's unsure on how we can implement our
15 programs using that same definition.

16 SENATOR FISCHER: Have you requested
17 guidance?

18 MR. LAVENE: We have gone through --
19 well, I know that there have been various meetings
20 with EPA and the Department of Environmental
21 Quality prior to this rule coming on, but I don't
22 think that those -- those meetings were -- I
23 wouldn't consider them consultation and
24 collaboration, if you will, on trying to develop
25 language for the proposed rule to basically meet

1 needs and requirements at the state level. I
2 don't think there was really that give and take,
3 if you will, between the state and federal
4 government.

5 SENATOR FISCHER: And you explained the
6 State has been delegated authority over the Clean
7 Water Act program since the '70s?

8 MR. LAVENE: Yes.

9 SENATOR FISCHER: And we have our unique
10 "waters of the state" definition that's been in
11 effect for 40 years; correct?

12 MR. LAVENE: Yes.

13 SENATOR FISCHER: And if the certainty
14 of that definition and the four decades of
15 decision making by the Nebraska Department of
16 Environmental Quality is basically turned
17 upside down by this proposed rule, what do you
18 think's going to be the result? And address
19 liability concerns, if you would.

20 MR. LAVENE: Again, I go back to this
21 common theme of confusion and uncertainty for the
22 agency. And, again, that goes back to, we are
23 uncertain how the Environmental Protection Agency
24 is going to interject itself into the State's
25 current administration of the federal programs

1 under the Clean Water Act. Again, we don't know
2 if new laws need to be passed, new rules need to
3 be adopted. I think the Department of
4 Environmental Quality, and I think most everyone
5 would agree, that the -- that the Department of
6 Environmental Quality has done an outstanding job
7 in the last 40 years to protect the State's water
8 quality. So if you look at it that way, we're not
9 sure what issues need to be fixed. But here,
10 without knowing how we're going to proceed
11 forward, you're basically going to upend that 40
12 years of, basically, certainty that both the
13 Agency had, along with the regulating community,
14 and what they -- what they understood. And so
15 basically by doing that you're going to have
16 producers out there that are now uncertain about
17 whether or not an action that they might take
18 could be or will be covered underneath the Clean
19 Water Act, which causes concerns and also, again,
20 for the agency side, for DEQ, until we get that
21 guidance from EPA, we're -- we're just uncertain.
22 That uncertainty and that confusion basically, in
23 my mind, breeds litigation, and it -- it breeds
24 potential liability on behalf of those producers.
25 Because if they go out and take an action that is

1 then, you know, after the fact determined to be
2 the waters of the U.S., again, they can be exposed
3 to fines and potential criminal penalties. And so
4 when you have that situation of uncertainty along
5 with the potential of fines and, you know, jail
6 time, you're going to get to a point where there's
7 going to have to be litigation on this between
8 producers and the agencies that are enforcing
9 these -- these laws.

10 SENATOR FISCHER: For the benefit of the
11 public here, if you could explain the holdings in
12 those two Supreme Court cases that both of us
13 mentioned in our statements about confirming the
14 limits of the federal government's authority over
15 water that Nebraska -- or that Congress has
16 established in the Clean Water Act, if you could
17 go into a little detail on those two cases, I'd
18 appreciate it.

19 MR. LAVENE: I will. And I'll kind of
20 maybe put them together.

21 SENATOR FISCHER: Okay.

22 MR. LAVENE: They're pretty substantial.
23 But the SWANCC case, or the earlier case in the
24 State of Illinois, was against the Army Corps of
25 Engineers. And both SWANCC and Rapanos basically

1 dealt with bodies of water. In one case a pond,
2 and in another case a series of wetlands. And
3 that these bodies of water are -- were adjacent to
4 non-navigable tributaries. So they were not
5 directly connected to a "water of the U.S." under
6 the current definition, if you will. In the
7 SWANCC case the entities that actually wanted to
8 do a dredge and fill went to the Corps and asked
9 whether or not they needed to have a 404 permit.
10 The answer was no. Until it was later determined
11 that some birds were flying overhead and landing
12 on the pond and using it like a natural habitat.
13 And because they were migratory birds, the Corps
14 then felt that that was something that affected
15 interstate commerce. And because it affected
16 interstate commerce, the Agency felt that it would
17 be determined to be waters of the U.S., which
18 would be then subject to the Clean Water Act
19 jurisdiction and requirements of a 404 permit.

20 In that case you basically had a decision
21 that the Court said, that's way too tenuous of a
22 line to draw between an interstate commerce for
23 migratory birds and a body of water that does not
24 meet a navigable stream. And so that was one
25 limitation on the federal government in SWANCC.

1 The other one, in Rapanos, there are actually two
2 opinions that came out, the plurality opinion and
3 an opinion by Justice Kennedy. Both of these were
4 dealing with the secondary water issues
5 definitions. The two opinions kind of had a
6 different viewpoint on how they should analyze it.
7 However, they both came to the conclusion that
8 these wetlands should not be considered waters of
9 the U.S. and there's a limit on that jurisdiction
10 by the federal government. The plurality opinion
11 in that case basically stated that these secondary
12 waters with these wetlands, that there needed to
13 be some continuous surface water connection to a
14 permanent water. And so you had to have a strong
15 connection, a permanent connection to a navigable
16 water. Justice Kennedy took a little different
17 tack to it. But he basically came out and said,
18 look, there at least has to be a significant nexus
19 from the secondary water to an in fact navigable
20 water. And when he was going through that -- that
21 ruling, or his decision in that, you know, if
22 someone would look at that as a hydrologic
23 connection, but it had to be more than a
24 hydrologic connection, it had to be something that
25 really dealt with the science or biological or

1 chemical makeup of the wetland affecting that
2 navigable water.

3 And so both of those cases, what they did
4 was truly limit the scope of the agency in the
5 jurisdictional waters of the U.S. by saying, if
6 there's not a connection then it's not going to be
7 underneath the purview of the federal government
8 for a 404 permit.

9 SENATOR FISCHER: So let me ask you, in
10 your legal opinion, do you think this proposal by
11 the EPA and the Corps would adhere to or violate
12 those Supreme Court decisions?

13 MR. LAVENE: Well, along the lines with
14 some previous comments that the Attorney General
15 of the State of Nebraska, along with a couple
16 other Attorney Generals sent for comments on this,
17 we feel that the rule does violate the previous
18 decisions of the Supreme Court in limiting that
19 jurisdiction. And the reason for that really
20 comes down to is, we have a situation, as I
21 explained before, is -- is you're having a
22 definition that now is going to have a per se
23 expansion of and categorical jurisdiction over
24 these lands and these waters. If it's in a
25 tributary area with an adjacent water, that could

1 be neighboring, in a repairing area or a
2 floodplain area, if that is determined to be, as a
3 fact, a definitional term, it doesn't matter what
4 connection that body of water actually has to a
5 navigable water. It simply is per se determined
6 to be waters of the U.S. And so what that does is
7 basically strip away the analysis that the
8 Supreme Court said you had to go through, and that
9 is, in the one instance, to at least have a
10 continuous surface water connection to that core
11 water, or at least have a very significant nexus
12 to the core water. We're not making that
13 determination. We're simply making a per se
14 determination that, with a wave of our hands, it's
15 under the jurisdiction of the federal government.
16 That's going to be the problem moving forward and
17 why this appears to violate the Supreme Court
18 rulings.

19 SENATOR FISCHER: And I understand one
20 of your roles in the Justice Department is to
21 enforce the Clean Water Act. Do you know what the
22 consequences are with the penalties in violation
23 of that Act? Can you explain those, please?

24 MR. LAVENE: I'll explain the state
25 level a little bit clearer than probably the

1 federal government.

2 But in the State of Nebraska for -- for
3 having a, basically a discharge into the stream or
4 adding a pollutant to the stream without a permit,
5 that can be either a Class IV felony or you could
6 have fines up to \$10,000 per day. Under the
7 federal -- federal penalties, depending on whether
8 it's a known violation or the like, the fines per
9 day could go anywhere from \$2500 up to \$50,000 per
10 day. And there are also various criminal
11 sanctions that -- if you're polluting the streams.
12 And so, as I kind of stated before, those are
13 pretty big fines, penalties, and possibly criminal
14 sanctions that could be imposed against an
15 individual if they're violating this act.

16 SENATOR FISCHER: Okay. And, in your
17 opinion, do you think this proposed rule is going
18 to, I guess, offer any additional protections to
19 water quality?

20 MR. LAVENE: As I've stated before, I
21 think the Department of Environmental Quality in
22 the State of Nebraska, with its 40 years of
23 history of implementing these federal programs and
24 the Clean Water Act, I think they've done a
25 wonderful job. Without having further guidance

1 and information from the federal government on how
2 they're going to interpret this new rule, it
3 really -- it's really hard, if not impossible, to
4 determine what benefits would come out of it.

5 SENATOR FISCHER: Okay. So let me see
6 if I have this correct from everything you said.
7 We have a proposed rule that's going to infringe
8 on the state's authority to protect and manage our
9 water resources; it will disrupt the successful
10 operation and certainty of our state-run programs;
11 it will create administrative burdens for our
12 Nebraska Department of Environmental Quality; it
13 will increase litigation and liability exposure
14 for our people and businesses; it will violate
15 Supreme Court rulings on the limits of federal
16 authority under the Clean Water Act; and you don't
17 believe that there would be meaningful benefits to
18 this in the end? Did I sum you up pretty well
19 here?

20 MR. LAVENE: I'd say that's a pretty
21 good summary, yes.

22 SENATOR FISCHER: Okay. Good.

23 I thank you for your testimony before the
24 Committee, Mr. Lavene, and appreciate you taking
25 time to be with us today. Thank you.

1 MR. LAVENE: Thank you, Senator Fischer.

2 SENATOR FISCHER: With that, I would ask
3 that our second panel please come up.

4 (Short break taken
5 accordingly -- 10:35 a.m.)

6 SENATOR FISCHER: Well, I would like to
7 welcome the second panel to the table. There are
8 several excellent witnesses representing a very
9 diverse group of stakeholders, and they can speak
10 more of the impacts of the proposed rule and what
11 that will have on citizens, businesses, counties,
12 and livelihoods.

13 We are going to begin with Mary Ann
14 Borgeson. She is the Chair of the Douglas County
15 Board of Commissioners. Commissioner Borgeson
16 is a native of Omaha and became the first
17 female to chair the Douglas County Board in
18 1997. In addition to serving as chair,
19 Commissioner Borgeson serves on the Board of
20 Directors for both the Nebraska Association of
21 Counties and the National Association of Counties.
22 She is currently the president-elect for Women of
23 the National Association of Counties.

24 Commissioner, I am eager to hear how this
25 proposed rule will impact our counties and

1 communities. Please begin your testimony whenever
2 you're ready.

3 MS. BORGESON: Thank you,
4 Senator Fischer, for the opportunity to testify on
5 the "Waters of the United States" proposed rule
6 and the potential impact on county governments.

7 For the record, I have submitted a narrative
8 of my testimony that includes additional
9 information.

10 On a National level, the National
11 Association of Counties, or NACo, has urged the
12 federal agencies to withdraw the proposed rule
13 until further analysis of its potential impacts
14 has been completed. Douglas County concurs with
15 that recommendation.

16 Clean water is essential to all our nation's
17 counties. The availability of an adequate supply
18 of clean water is vital to our nation, and
19 integrated and cooperative programs at all levels
20 of government are necessary to protecting water
21 quality.

22 Douglas County is a "Phase II" community
23 under the National Pollutant Discharge Elimination
24 System, or NPDES, the section of the Clean Water
25 Act. A major emphasis of the County's Stormwater

1 Management Plan is to improve water quality by
2 reducing stormwater runoff volumes. This approach
3 is lockstep with EPA's push to implement
4 "green infrastructure" as a key strategy to
5 improve our nation's overall water quality.
6 Simply put, green infrastructure can have a
7 significant positive benefit for water quality,
8 and with this being an EPA priority, it is
9 essential that the proposed "Waters of the U.S."
10 rule be supportive, and not contradictory to, the
11 continued implementation of green infrastructure
12 across the country. Put another way, if the
13 "Waters of the U.S." rule negatively impacts the
14 implementation of green infrastructure, it will
15 mean more taxpayer dollars being wasted on process
16 rather than being directly spent on water quality
17 improvements.

18 Counties own and maintain a wide variety of
19 infrastructure that is impacted by the current
20 regulations and that would be further impacted by
21 the proposed rule.

22 Projects we are working on already
23 significantly impacted by the current regulations
24 are given the lack of clarity in the proposed
25 rule. We anticipate additional negative impacts.

1 One of our current projects is a prime example of
2 how cumbersome and expensive the for bidding
3 process is, and the costly delays are largely due
4 to the inconsistencies in the application of the
5 rules and the lack of definitions. Our 180th
6 Street project will improve the section line roads
7 from the Old Lincoln Highway to West Maple Road.
8 Besides providing easier access to new developing
9 areas, it will relieve the traffic -- it will
10 relieve the traffic load on Old Lincoln Highway,
11 which is on the National Registry, and on the
12 section line road. The immediate area is
13 currently being passed over for most development
14 due to a lack of access to major roads --
15 roadways, including the Expressway to the south.
16 The project includes two 900-foot bridges over
17 railroad tracks and a flowing creek and two other
18 bridges over an unnamed tributary. The initial
19 environmental permitting process for these bridges
20 went relatively smoothly and involved a
21 Categorical Exclusion, the lowest level of
22 environmental involvement. The process began in
23 2002, with the construction originally scheduled
24 for 2010. Design and permitting work began in
25 2005. But the environmental documents are still

1 not signed. The newest projected construction
2 date is now 2018 because of these delays.

3 The reason for the delays is a small county
4 road ditch which is several feet deep and wide and
5 full of weeds and grasses with a rut at the bottom
6 approximately eight inches wide and an inch deep.
7 There is no ordinary, quote, high -- quote,
8 Ordinary High Water Mark, unquote, associated with
9 this rut because when it rains it is completely
10 under water. However, the Corps of Engineers has
11 declared this rut a "water of the U.S.," prompting
12 a redesign of the project costing the County
13 hundreds of thousands of dollars in delaying this
14 project.

15 An additional concern is storm water
16 clean-up. We deal with disasters such as flooding
17 and wind storms regularly, and these types of
18 storms impact many ditches, culverts, and
19 tributaries. Trying to get permits is already a
20 problem in these situations. Our country has made
21 tremendous strides in improving water quality
22 since the inception of the Clean Water Act, but if
23 the process is not clarified and streamlined, more
24 counties will experience delays in safeguarding
25 and caring for infrastructure and expend

1 substantial dollars in doing so. Dollars that
2 could instead be spent on direct improvement of
3 water quality.

4 To reiterate my prior point, I ask that the
5 proposed rule be withdrawn until further analysis
6 and consultation with state and local
7 representatives have been completed.

8 Again, I thank you for the opportunity to
9 testify on the proposed "Waters of the U.S." rule,
10 and I do welcome the opportunity to address any
11 questions you may have later.

12 SENATOR FISCHER: Thank you,
13 Commissioner.

14 Next I would like to welcome Mrs. Barb
15 Cooksley, the president-elect of the Nebraska
16 Cattlemen. Barb and her family raise cattle on
17 their ranch near Anselmo, Nebraska where they
18 pride themselves on being good stewards of the
19 land and water resources. I'm looking forward to
20 Barb's testimony which will offer great insight on
21 how the proposed "Waters of the U.S." rule will
22 affect this very special Nebraska way of life.

23 Barb, please begin your testimony

24 MS. COOKSLEY: Thank you, Senator.

25 Good morning. My name is Barb Cooksley. My

1 family raises cattle on our ranch near Anselmo,
2 Nebraska. I am president-elect of Nebraska
3 Cattlemen, and thank you for allowing me to
4 testify today on the impacts of the Environmental
5 Protection Agency and the Army Corps of Engineers'
6 proposed rule on the "waters of the United
7 States." I'm here today representing Nebraska
8 Cattlemen's 3,000 plus members but I'm also happy
9 to lend my voice to nearly 50,000 ag producers in
10 Nebraska. In addition to my service to Nebraska
11 Cattlemen, I currently serve on several
12 environmental boards and committees for the areas
13 and state. Land stewardship has been my family's
14 priority for generations.

15 First and foremost, I want to thank you for
16 your interest in this issue and for continuing to
17 be engaged, because EPA intends to finalize the
18 WOTUS rule by sometime this year. I'm also
19 thankful Congress included language in the omnibus
20 package that led to the withdrawal of EPA's
21 Interpretive Rule. That rule was problematic and
22 did not provide clarity or certainty for
23 agriculture.

24 Animal ag producers pride themselves on
25 being good stewards of our country's natural

1 resources. We maintain open spaces, healthy
2 rangelands, provide wildlife habitat while working
3 to feed the world. But to provide all these
4 important functions, we must be able to operate
5 without excessive federal burdens like the one
6 we're discussing today. As a beef producer, I can
7 tell you after reading the proposed rule it has
8 the potential to impact every aspect of our
9 family's operation and others like it by
10 regulating potentially every water feature on my
11 land. What's worse is the ambiguity in the
12 proposed rule that makes it difficult, if not
13 impossible, to determine just how much our family
14 ranch will be affected. This ambiguity places all
15 landowners in a position of uncertainty and
16 inequity. Because of this, I ask the EPA and Army
17 Corp of Engineers to withdraw the proposed rule
18 and sit down with farmers and ranchers to discuss
19 our concerns and viable solutions before any
20 additional action.

21 I would like to use my time here this
22 morning to show you why this rule is problematic
23 for operations like mine and show you some
24 pictures to help color the issues.

25 Welcome to just outside Anselmo, Nebraska.

1 In this picture you will see the home place for
2 our ranching operation. There are several homes
3 on this site since we operate the ranch alongside
4 two additional generations of family members. Our
5 ranch sits in the pristine Nebraska Sandhills.
6 The Sandhills are a unique ecosystem of
7 mixed-grass prairie that has grown on top of
8 stabilized sand dunes. We use cattle to manage
9 this land to ensure this unique ecosystem is
10 protected and maintained rather than deteriorating
11 and literally blowing away

12 This is an aerial photo that's been zoomed
13 out slightly. What look like waves are actually
14 the rolling hills of sand dunes, natural
15 depressions, draws, and dry ruts that may have
16 water in them seasonally. What you cannot see is
17 the unique feature of the Sandhills which is its
18 close connection to groundwater supplies. This
19 close connection makes it possible for grass to be
20 grown on top of the sand dunes. And at times
21 ponds can literally spring up in these depressions
22 of the Sandhills out of nowhere because of this
23 connection. However, within a matter of months,
24 and perhaps for several years, the water may be
25 gone again. As you can see, currently there is no

1 water here. But the question is, is that dried up
2 natural depression a WOTUS? Are my seasonally
3 flowing draws an ephemeral stream? There's no
4 water in the draw, but the proposed rule suggests
5 these features could be jurisdictional. If so,
6 will I be required to obtain a permit to conduct
7 daily activities across my entire property, such
8 as building a fence or moving cattle from pasture
9 to pasture?

10 Here's a pond with water in it and one
11 without. This water occurs naturally. Cattle and
12 wildlife utilize this water. And producers want
13 to be able to allow cattle to use this
14 naturally-occurring water body. If this pond is
15 jurisdictional under the WOTUS rule, would cattle
16 or wildlife waste in the water constitute a
17 discharge that I would need a permit for? It may
18 sound silly to say that but in my interpretation,
19 and many others' interpretations, it suggests just
20 that.

21 Here's a photo of the same ponds where you
22 can see they are near an eroded channel that runs
23 to the Middle Loop River. At times, water does
24 run off into this channel. Here's where it gets
25 put all together and see how the proposed rule

1 expands federal jurisdiction. In the top right
2 corner is the Middle Loop River. This river is an
3 interstate water and falls under federal
4 jurisdiction. That's uncontested. Now just to
5 the left, the eroded channel, the beige squiggly
6 line, now it's questionable whether this channel
7 would have been considered federal water prior to
8 the WOTUS rule. But now will most likely be
9 deemed a tributary that meets the definition of a
10 WOTUS. And under the proposed rule, every water
11 body adjacent to a tributary is a WOTUS too. It
12 appears to me they would be federal waters under
13 the proposed rule. If they are indeed "Waters of
14 the U.S.," I will need permits to conduct everyday
15 account activities through those waters. Permits
16 that will cost my family time and money. We will
17 continue to do our part for the environment but
18 this ambiguous and expansive proposed rule does
19 not help us achieve that.

20 We look forward to working with the
21 Environment and Public Works Committee to insure
22 we have the ability to do what we do best, produce
23 the world's safest, most nutritional, abundant and
24 afford able protein, while giving the consumers
25 the choice they deserve. Together we can sustain

1 our country's excellence and prosperity and insure
2 the viability of our way of life for future
3 generations.

4 I appreciate the opportunity to visit with
5 you today. Thank you.

6 SENATOR FISCHER: Thank you very much,
7 Barb, for providing that perspective on the
8 agricultural industry.

9 Next we have Mr. Donald Wisnieski. He is
10 president of the Nebraska State Home Builders
11 Association. A native of Norfolk, Don is the
12 owner of Wisnieski Construction which has served
13 the Norfolk community since 1986, primarily
14 focusing on custom home building.

15 Don, you are to be commended for your
16 community service and operating that successful
17 small business for almost three decades. When
18 you're ready, please begin your testimony

19 MR. WISNIESKI: Thank you.
20 Senator Fischer, thank you for the opportunity to
21 testify today.

22 As stated, my name is Don Wisnieski. I'm
23 the president of Wisnieski Construction located in
24 Norfolk. I also serve as the 2015 President of
25 the Nebraska State Home Builders Association.

1 Home builders have been an advocate for the
2 Clean Water Act since its inception. We have a
3 responsibility to protect the environment. And it
4 is a responsibility I know well because I must
5 often obtain permits for building projects. When
6 it comes to federal regulatory requirements, what
7 I desire as a small business owner is a permitting
8 process that is consistent, timely, and focused on
9 protecting true aquatic resources.

10 Landowners have been frustrated with the
11 continued uncertainty over the scope of the Clean
12 Water Act over waters of the United States. There
13 is a need for additional clarity, and the
14 administration recently proposed a rule intended
15 to do just that. Unfortunately, that proposed
16 rule falls short. There is no certainty under
17 this proposal, just the expansion of federal
18 authority. These changes will not even improve
19 water quality, as the rule improperly encompasses
20 waters that are already regulated at the state
21 level. The rule would establish broader
22 definitions of existing regulatory categories such
23 as tributaries and regulates new areas that are
24 not currently federally regulated, such as an --
25 adjacent non-wetlands, repairing areas,

1 floodplains, and other water areas. And these
2 changes are far reaching, affecting all Clean
3 Water Act programs but no -- but provides no
4 additional protections for most of these areas
5 already comfortably resting under the state and
6 local authorities.

7 I'm also concerned that the terms are
8 overly broad, giving the agencies broad authority
9 to interpret them. I need to know the rules. I
10 can't play a guessing game of, is it
11 jurisdictional. We don't need a set of new vague
12 and convoluted definitions. Under the Clean Water
13 Act, Congress intended to create a partnership
14 between federal agencies and the state governments
15 to protect our nation's water resources. There is
16 a point where federal authority ends and the state
17 authority begins. And the Supreme Court has twice
18 affirmed that the Clean Water Act places limits on
19 federal authority over waters. And the states do
20 regulate the waters under their jurisdiction.
21 Nebraska takes its responsibilities to protect its
22 natural resources seriously.

23 If you look around the country, you'll find
24 that many of the states are protecting their
25 natural resources more aggressively since the

1 passage of the Clean Water Act in 1972.

2 The proposed rule will have significant
3 impacts on my business. Construction projects
4 rely on efficient, timely, and consistent
5 permitting procedures and review processes under
6 the Clean Water Act programs. An onerous
7 permitting process could delay projects which
8 leads to greater risk and higher costs. Also,
9 more federal permitting actions will trigger
10 additional statutory reviews by outside agencies
11 under laws including the Endangered Species Acts,
12 the National Historic Prevention Act, the National
13 Environmental Policy Act. It's doubtful that
14 these agencies will have the equipment to handle
15 these inflow of additional permitting requests.

16 I am uncertain of what the environmental
17 benefits are gained by this paperwork. But I am
18 certain of the massive delays of permittings that
19 will result. The cost of obtaining Clean Water
20 Act permits range from close to 29,000 all the way
21 up to close to \$272,000. Permitting delays will
22 only increase these costs and prevent me from
23 expanding my business and in hiring more
24 employees.

25 The agencies have not considered the

1 unintended consequences of this rule. Under this
2 proposed rule, Low Impact Development stormwater
3 controls could be federally jurisdictional. Many
4 of our builders voluntarily select LID controls,
5 such as rain gardens and swells for the general
6 benefit of our communities. This rule would
7 discourage these voluntary projects if they
8 require federal permits.

9 This proposed rule does not add new
10 protections for our nation's water resources, it
11 just shifts the regulatory authority from the
12 states to the federal government. The proposed
13 rule is inconsistent with previous Supreme Court
14 decision and expands the scope of waters to
15 federally regulated beyond what Congress
16 envisioned. Any final rule should be
17 considered -- or consistent with the
18 Supreme Court's decisions, provide understandable
19 definitions, and preserve the partnership between
20 all levels of government. All are sorely lacking
21 here.

22 I want to thank you for the opportunity to
23 testify. And I do look forward to any questions
24 you may have, Senator. Thank you.

25 SENATOR FISCHER: Thank you, Don.

1 I would like to welcome Mr. John Crabtree.
2 Mr. Crabtree is the Media Director for the Center
3 of Rural Affairs which has accomplished
4 commendable work on rural development
5 opportunities throughout our state.

6 I would note that, as is customary for the
7 Senate Environment and Public Works Committee
8 hearings, we work in a bipartisan manner to select
9 witnesses. And with ranking member Senator
10 Barbara Boxer, our next two witnesses are Minority
11 witnesses.

12 Mr. Crabtree, please begin your testimony
13 when you are ready.

14 MR. CRABTREE: Thank you,
15 Senator Fischer, and good morning.

16 And, yes, I thank the members of the
17 Committee and the ranking members and the staff
18 for working with me to -- to invite me here. But
19 I thank you for inviting me here, too. I really
20 appreciate you bringing this hearing to Nebraska.

21 My name, as you said, is John Crabtree. I
22 live and work in the Northeast Nebraska small town
23 of Lyons, population 851. I'm testifying today on
24 behalf of the Center for Rural Affairs where I
25 work as Media Director and rural public policy

1 advocate.

2 Since its founding in 1973, the Center's
3 resisted the role of advocating for the interests
4 of any particular group. Instead, we've chosen to
5 advance a set of values, values that we believe
6 reflect the best of rural and small town America.
7 And we deeply believe that water quality is one of
8 those -- that clean water is one of those rural
9 values.

10 The need for this rule-making process arises
11 out of the chaos, confusion and complexity
12 surrounding Clean Water Act enforcement as a
13 result of Supreme Court decisions in 2001 and
14 2006. The proposed rule focuses on reducing that
15 confusion, and the Center for Rural Affairs is
16 encouraged by the process so far. We encourage
17 the EPA and the Army Corp of Engineers to continue
18 moving this rule-making process forward.

19 It's worth clarifying that the Center is
20 supportive of the formal rule making process as
21 it's provided the opportunity to craft a stronger
22 and more suitable rule through increased citizen
23 input and engagement. While no proposed rule is
24 perfect, we believe the rule-making process will
25 improve this rule, which is why we provided

1 detailed and substantive comments to the EPA and
2 Corps during the public commentary period. And we
3 believe that an improved rule can and should
4 reduce confusion and provide clarity for regulated
5 entities, including ranchers and farmers, and
6 ultimately improve the quality of the nation's
7 waters for the hundreds of us who utilize and
8 depend upon clean water from our rivers, lakes,
9 and streams.

10 Clean water is vital to farming and ranching
11 and small towns. Water for livestock, irrigation,
12 and other purposes is crucial to the day-to-day
13 operations of farms and ranches. And farmers and
14 ranchers are the tip of the spear when it comes to
15 preserving water quality in America because much
16 of the surface water of the U.S. falls first on
17 American farms and ranches.

18 Streams and wetlands create economic
19 opportunity in small town America through hunting,
20 fishing, birding, recreation, tourism, farming,
21 ranching and small manufacturing. Farmers,
22 ranchers and America's small towns depend heavily
23 on water and our neighbors downstream count on us
24 to preserve the quality of that water for their
25 use as well.

1 Now, despite the assertions that understate
2 the economic benefit and vastly overstate the cost
3 of implementing this proposed rule, the true cost
4 of implementation is estimated to range from
5 160 to 278 million. And according to multiple
6 econometric models, the estimated economic
7 benefits of implementing the proposed rule range
8 from 390 to 510 million, or likely double the
9 costs.

10 Clean water is crucial here in Nebraska too,
11 of course. And vulnerable surface waters are
12 prevalent in Nebraska. EPA estimates that
13 52 percent of Nebraska streams have no other
14 streams flowing into them, and that 77 percent do
15 not flow year-round. Under varying
16 interpretations of the most recent Supreme Court
17 decision, these smaller water bodies are among
18 those for which the extent of Clean Water Act
19 protections has been questioned.

20 EPA has also determined that 525,000 people
21 in Nebraska receive some of their drinking water
22 from areas containing these smaller streams and
23 that at least 197 facilities located on such
24 streams currently have permits under the Clean
25 Water Act and other federal statutes regulating

1 pollution discharges. In addition, the Nebraska
2 Game and Parks Commission has estimated that
3 nearly 829,000 acres of wetlands in the state
4 could be considered so-called isolated waters
5 particularly vulnerable to losing those
6 safeguards.

7 The "Waters of the U.S." rule is the
8 product -- excuse me, I'm sorry, I lost my place
9 there.

10 Chief Justice Roberts has specifically said
11 that rule-making would most likely be required to
12 provide necessary clarification of Clean Water Act
13 jurisdiction. This has been a rigorous
14 rule-making process. EPA and the Army Corps has
15 conducted extensive outreach to -- as I said,
16 conducted extensive outreach and received close to
17 one million public comments on the proposed rule,
18 including from the Center of Rural Affairs and
19 thousands of other organizations and hundreds and
20 thousands of individuals. An estimated 87 percent
21 of those comments support the rule.

22 The "Waters of the U.S." rule goes to great
23 lengths to ensure that farmers and ranchers
24 benefit from preserving water quality but are not
25 overly burdened with the rule's implementation.

1 All the historical exclusions and exemptions for
2 farming and ranching are preserved, including
3 those for normal farming and ranching practices.

4 And that means that dramatic rhetoric such
5 as statements that farmers and ranchers will need
6 a permit to move cattle across a wet field or
7 stream are absolutely false. Likewise, public
8 statements that farm ponds would -- by detractors
9 is supported by the -- despite public statements
10 to the contrary, farm ponds would continue to fall
11 under the longstanding exemption for farm ponds in
12 the Clean Water Act.

13 In the final analysis, streams that only
14 flow seasonally or after rain have been protected
15 by the Clean Water Act since it was enacted in
16 1972. As well they should be, since more than
17 60 percent of streams nationwide do not flow
18 year-round, and yet those very same streams
19 contribute to the drinking water for 117 million
20 Americans.

21 Again, I want to thank you, Senator, for
22 having this hearing and for inviting me here
23 today.

24 Just my closing statement, my last comment,
25 here in the west, we do understand that there's a

1 lot of truth to the old joke, whiskey is for
2 drinking and water is for fighting. Water is
3 life, for people, crops, livestock, and wildlife
4 as well as farms, ranches, business and industry.
5 It's in all our interest to protect this most
6 vital of our natural resources.

7 We believe the EPA and Army Corps of
8 Engineers should continue to listen to concerns,
9 make substantive improvements to the rule, and
10 then move forward to finalization. Thank you.

11 SENATOR FISCHER: Thank you,
12 Mr. Crabtree.

13 Next, Mr. Wesley Sheets will be a witness
14 for the Minority as well. Wes is the Nebraska
15 National Director and served on the National
16 Executive Board of the Izaak Walton League of
17 America. Mr. Sheets worked for 32 years for the
18 Nebraska Game and Parks Commission, and I thank
19 him for his service to Nebraska.

20 So welcome, Wes. And your testimony,
21 please.

22 MR. SHEETS: Thank you, Senator Fischer,
23 and members and staff of the Committee on
24 Environment and Public Works. I thank you for the
25 opportunity to provide comments here today.

1 My name is Wes Sheets, and I do live here in
2 Lincoln, Nebraska. I am testifying on behalf of
3 the Izaak Walton League of America, which is one
4 of the nation's oldest recreational and
5 conservation organizations. The Izaak Walton
6 League was formed back in 1922 by a group of
7 outdoor specialists that were concerned with the
8 water pollution impacting the health of our fish
9 and wildlife and other natural resources. The
10 founders of our organization understood that clean
11 water and healthy wetlands are essential to robust
12 populations of fish, and ducks, and other wildlife
13 and, in turn -- aha -- and, in turn, to enjoyable
14 and successful days in the field pursuing them.

15 I am active in all levels of the
16 Izaak Walton League, as the treasurer of the local
17 chapter, as the -- I'm the national director for
18 Nebraska, and I recently became a member of the
19 League's executive board. Today I'm representing
20 our nearly 2,000 members here in Nebraska and our
21 other 45,000 members across the nation. Our
22 members are all from outdoor enthusiasts who hunt,
23 fish, and participate in recreational shooting,
24 boating, and many other outdoor activities.

25 My working career that Senator Fischer

1 alluded to, I spent 32 years with the Nebraska
2 Game and Parks Commission as a fisheries
3 biologist, aquatic scientist, and finally
4 finishing the career as the Agency Assistant
5 Director for fisheries, wildlife and law
6 enforcement. I was very privileged back in the
7 early '70s and mid '70s to participate as an
8 agency representative as the State of Nebraska
9 began the establishment of its first water quality
10 criteria standards under the newly-passed Nebraska
11 Environmental Protection Act.

12 It was a treat to see Senator Smith here in
13 the audience this morning, and I thank him for
14 helping get that process started.

15 I do want to start by acknowledging the
16 interests and concerns of all my colleagues who
17 are testifying here in opposition to this rule.
18 The Izaak Walton League has a long history of
19 working with farmers and ranchers, as well as
20 other industries, on solutions for the
21 conservation issues and we pledge to continue to
22 do so.

23 League members are members -- are farmers
24 and ranchers, or they are employed by other
25 industries represented here. And many of us come

1 from rural and agricultural communities. I myself
2 grew up on a dairy farm down in our neighboring
3 state to the south.

4 We recognize the importance of clean water,
5 as I hope everyone in this room also does. Clean
6 water is fundamentally essential to all life, from
7 humans, to wildlife, to fish and plants. Congress
8 has charged the Environmental Protection Agency
9 with cleaning up America's waters and with keeping
10 it clean. To state the obvious, water flows
11 downstream and can carry sediment, nutrients, and
12 other pollutants with it. There is no line in the
13 watershed above which water and pollutants do not
14 flow downstream, at least to my knowledge. If
15 landowners and businesses below some arbitrary
16 line in the watershed of connected waters would be
17 required to contribute to clean waters, while
18 those above the arbitrary line could send
19 sediments, nutrients and other articles downstream
20 without concern for those impacts, those living
21 upstream would certainly have an unfair and
22 unnecessary economic advantage, I would submit.

23 This highlights the current confusion, and
24 that is also why so many groups have asked the
25 agencies for a clarifying ruling. Science is

1 irrefutable that watershed waters are considered
2 in the rules that are connected. All waters are
3 important, and that includes the ephemeral waters
4 that do not flow all year long perhaps. The rule
5 is important to Nebraskans for very many reasons,
6 not the least of which is the maintenance of
7 fisheries and wildlife habitat, flooding
8 mitigation, water-based recreation, industrial
9 need, and many more life needs. Drinking water
10 tops the many lists. And John just recounted some
11 of the statistics that I wanted to use about how
12 many folks depend on our stream water supplies for
13 their drinking water.

14 Clean water is exactly the type of issue
15 where a federal rule makes particular sense. The
16 vast majority of U.S. waters are part of an
17 interstate network that drains to one of the
18 oceans. What we put into upstream Nebraska waters
19 affects not only Nebraskans but it does affect the
20 hunting and fishing opportunities of people all
21 the way down to Louisiana and into the Gulf of
22 Mexico.

23 The muddying and pollution of waters
24 directly hurts hunting and fishing and all of the
25 businesses that benefit from them. Approximately

1 47 million hunters and anglers in Nebraska
2 generate over \$200 billion in economic activity
3 each year. The rule needs to seek to clarify
4 which waters are covered in this endeavor, and
5 making the process more efficient and effective,
6 and it is a better way to address the concerns
7 about how the Clean Water Act is applied.

8 Nebraskans care as much about clean water
9 and their downstream neighbors as anyone else in
10 the country, and we care just as much about our
11 traditions of fishing and hunting and depend on
12 clean water.

13 Please give the agencies a chance to present
14 a final rule.

15 And I thank you for the opportunity,
16 Senator, for being present here today.

17 SENATOR FISCHER: Thank you, Wes. Good
18 to see you.

19 Finally, I'm pleased to welcome our last
20 witness, Mr. Don Blankenau. Mr. Blankenau is a
21 water and natural resources attorney whose
22 impressive career has enabled him to become a
23 nationally recognized water policy expert.

24 Before we hear from Mr. Blankenau, I would
25 tell you that I'm entering into today's hearing

1 record comments he filed on behalf of the Nebraska
2 Association of Resource Districts, Nebraska League
3 of Municipalities, and the Nebraska Groundwater
4 Management Coalition.

5 Mr. Blankenau, thank you for testifying.
6 You may begin when ready.

7 MR. BLANKENAU: Thank you, Senator.

8 Members of the Committee and staff, we
9 appreciate the opportunity to testify this
10 morning.

11 Again, my name is Don Blankenau, and I am an
12 attorney based in Lincoln, Nebraska specializing
13 in water and natural resources law. My practice
14 has allowed me to engage in water cases in the
15 states of Nebraska, Arizona, North Dakota,
16 South Dakota, Missouri, Georgia, Florida and
17 Alabama. I appear here today to offer my thoughts
18 regarding the proposed rule. My colleague,
19 Vanessa Silke, and I have previously filed formal
20 comments on behalf of this rule regarding
21 compliance to include the Nebraska Groundwater
22 Management Coalition, the Nebraska Association of
23 Resources Districts, the League of Nebraska
24 Municipalities, and the Tri-Basin Natural
25 Resources District and the Lyman-Richey

1 Corporation with the sand and gravel mining
2 operation. As you've noted, Senator, those
3 comments are included in the record today, but
4 I'll offer some additional comments.

5 I'd like to begin with a brief anecdote that
6 I think highlights the philosophical perspective
7 of the federal proponents of this rule. Some four
8 years ago I was at a meeting with the -- with an
9 employee of the Army Corps of Engineers when we
10 began a discussion concerning groundwater
11 management. To my surprise, this employee stated
12 that it was time for the federal government to
13 assert more control over groundwater. I responded
14 to that statement with the observation that the
15 United States Supreme Court in a Nebraska case,
16 *Sporhase versus Nebraska, ex rel. Douglas*, in
17 1982, had determined that groundwater was an
18 article of interstate commerce within the meaning
19 of the Constitution. And I went on to explain
20 that as an article of interstate commerce, any
21 increased federal control was the sole purview of
22 Congress and could not be undertaken by an agency
23 absent expressed Congressional authorization. The
24 Corps employee simply responded, we can do a lot
25 with our rules, and if Congress won't act, we

1 will. The proposed rule I think is the product of
2 that kind of thinking.

3 Whether a rule is good policy is one
4 question. Whether it's legal is another. And in
5 my view, this proposed rule is neither.
6 Article 1, Section 8, Clause 3 of the Constitution
7 of the United States contains the "commerce
8 clause" that authorizes Congress alone to make
9 laws governing interstate commerce. Historically,
10 it was the interstate trafficking of goods and
11 services on the nation's interstate waters that
12 served as the legal lynchpin to Congressional
13 control over those waters. In other words,
14 Congress only had the authority over navigable
15 waters to the extent those waters served as
16 conduits of commerce. It is in this context and
17 under this authority that Congress adopted the
18 Clean Water Act and expressly limited its reach to
19 navigable waters. In the decades that have passed
20 since its passage, the reach of the EPA and the
21 Corps has broadened as those two agencies extended
22 the definition of the term "navigable waters."
23 Contrary to the assertions of its proponents, the
24 proposed rule does not merely codify existing
25 judicial interpretations of navigable waters, it

1 affirmatively extends and expands the meaning to
2 create federal controls that go far beyond what
3 Congress intended when it adopted the Clean Water
4 Act.

5 The proposed rule defines water as navigable
6 if it has a hydrologic groundwater connection to a
7 navigable stream. So while molecules of water in
8 an excavation or pothole may be miles from a
9 stream or decades from ever impacting that stream,
10 the proposed rule defines them as navigable in
11 place today. In Nebraska, the groundwater is
12 commonly hydrologically connected to stream flow
13 and can extend out many miles from the stream.
14 The proposed rule would therefore impact many
15 thousands of people more than the existing rule.

16 Existing permit requirements under the Clean
17 Water Act already add a layer of federal
18 regulatory oversight on top of the state-based
19 regulatory scheme, and result in significant cost
20 increases and overall delay in the development
21 process. For example, due to limited staff
22 support at the Corps' Omaha District Office,
23 individual permits under Section 404 currently
24 take up to 18 months to process. Permit costs
25 typically range between \$25,000 and \$100,000,

1 accounting for legal, technical and logistical
2 costs. Engaging the Corps in the permit
3 application process is no guarantee that a permit
4 will be granted. In those instances where a
5 permit is denied, development of a property at its
6 highest and best use is effectively precluded.
7 These costs, along with the uncertainty of the
8 permit approval process, will only increase under
9 the proposed rule's expansion of the scope of
10 federal jurisdiction and will directly impinge
11 upon land-use decisions at the state and local
12 level.

13 Ultimately, the proposed rule stretches the
14 definition of navigable waters beyond credibility.
15 Which is evidenced by the nearly 1,000,000
16 negative comments that have been submitted. The
17 truth is, and this is important, there is no water
18 quality necessity that requires this kind of
19 federal intervention. None at this time. There
20 simply is no real problem this rule will solve.
21 Instead, the rule is just another example of the
22 ever-growing federal erosion of state authority
23 and ever-expanding regulatory net.

24 I urge the Committee to take all necessary
25 action to ensure the proposed rule does not become

1 law. Thank you.

2 SENATOR FISCHER: Thank you,
3 Mr. Blankenau.

4 At the request of the Minority, I am
5 entering the comments from the Sierra Club
6 Nebraska Chapter into our hearing record. And at
7 the request of my partner in the United States
8 Senate, I am entering into the record a statement
9 from Senator Ben Sasse.

10 I would like to thank all of the panel for
11 your thoughtful testimony. It's clear that you
12 and the groups that you represent all have a very
13 strong appreciation for the importance of clean
14 water, and strong, healthy communities here in
15 State of Nebraska.

16 There are clearly some major issues with the
17 proposed rule that would impact every corner of
18 our state, and so I'd like to open up the first
19 question to the entire panel.

20 In your view, how do we as Nebraskans best
21 take care of our precious water resources and how
22 will this proposed rule impact these important
23 efforts? Is it a top down bureaucratic federal
24 scheme? Is that -- is that a help or is that a
25 hindrance?

1 And we'll start with Commissioner, please.

2 MS. BORGESON: Thank you, Senator.

3 We protect our water resources by using the
4 best construction practices and as -- as we
5 develop our communities. And we use real water
6 professional -- resource professionals to help us
7 do that. The EPA and the Corps of Engineers have
8 done a great deal of good to improve the water
9 quality. In general, having an organization that
10 can coordinate the clean-up of our waters and work
11 together to establish this goal would seem to be a
12 reasonable solution. But in speaking with our
13 engineer staff, they believe that the original
14 concept, when properly implemented, can -- can be
15 of help. But, unfortunately, they believe that
16 because of the inconsistencies in enforcement, and
17 the lack of clear definition of what is expected,
18 has become quite a hindrance. The problem that's
19 developed is that many of the individuals within
20 the program seem to have forgotten that this is a
21 combined effort of all those involved to improve
22 and protect one of our most valuable resources.
23 And so there has to be consistency in the way the
24 rule is administered, and that it has to start
25 with the clear and accurate definitions that are

1 interpreted by the regulators in a consistent
2 manner.

3 A top down bureaucratic federal scheme would
4 work best if the rule -- or regulation is written
5 in a way to incentivize communities rather than
6 punish them. And then we -- you know, if we're
7 spending all of our resources on process, we're
8 spending less on -- and directly, on things that
9 would impact and improving the water quality.

10 SENATOR FISCHER: Thank you.

11 Miss Cooksley, your thoughts, please?

12 MS. COOKSLEY: Thank you. I'd like to
13 answer that last question first, would it be a
14 help or a hindrance. In my view, it would a
15 hindrance to have a federal top down. And the
16 reason being, as a private landowner, I am on the
17 land every day. I depend on that land to be
18 managed properly to sustain the -- the grass on
19 the sand dunes which provides wildlife habitat and
20 food for the cattle. Our family has been on that
21 ranch for over a hundred years. Having local
22 management makes more sense. We see impacts more
23 immediately and we can address those. And we
24 would like to see going forward that we develop
25 relationships with our agencies and that they

1 provide incentives, not regulations, and that they
2 provide information, not burdens. And so I would
3 like to keep local management.

4 SENATOR FISCHER: Thank you.

5 Mr. Wisnieski?

6 MR. WISNIESKI: There's essentially a
7 system in place at this point with the Clean Water
8 Act and, as developers and builders, we're mostly
9 voluntarily working on the state and local levels
10 with what that system is in place. So time and
11 money is not always of the essence on projects and
12 stuff like that. To raise costs and have more
13 regulations upon us is just such detriment.
14 25 percent of a new home to date is literally
15 regulatory costs. So we can't allow that to be
16 increased with more regulations. So it's simply,
17 leave the system in place as is.

18 SENATOR FISCHER: Thank you.

19 Mr. Crabtree?

20 MR. CRABTREE: Well, thank you, Senator.

21 I guess the first part of your question
22 is -- I'll take that first. Just about everybody
23 up here has mentioned the concern about the
24 uncertainty about jurisdiction in Clean Water Act
25 under the rule but, of course, there's much

1 uncertainty that exists in Clean Water Act
2 enforcement today that was created by the
3 Supreme Court decisions that sort of put the
4 system in find kind of a -- in a bit of flux.
5 That uncertainty really does detract from our
6 ability to effectively enforce the Act and protect
7 the "Waters of the U.S." So, you know, my
8 testimony I mentioned, just to reiterate, the
9 Supreme Court, including Chief Justice, have said
10 we're probably going to need rule-making to clear
11 up these jurisdictional definitions. I, and I
12 must say, continuing to have dialogues like this
13 on what's vitally important because I don't
14 believe that any one person or any one agency is
15 going to absolutely get this right. We don't
16 believe the rule is perfect in its drafting. We
17 had critical comments and supportive comments.
18 But we are in a situation of great uncertainty
19 today in enforcing the Clean Water Act. And so
20 rule-making that clears up those jurisdictional
21 questions is necessary. It's not simply a matter
22 of the status quo, because that was -- the
23 status quo that existed for 20 or 30 years has
24 largely been absent for the last ten because of
25 those Supreme Court decisions. And as far as, you

1 know, how do we best do this, I think we draw on
2 the things that we do best. We talk to each
3 other, even when we disagree. The Center for
4 Rural Affairs has had a long history of working
5 with farmers and ranchers and conservation
6 programs, federal and state conservation programs,
7 to help people -- to help provide incentives for
8 people to do things that improve water quality
9 without a regulatory process. But, again, through
10 conservation and stewardship. That's what we do I
11 think best, and that's why the rule, I think, is
12 supportable in that it creates all the -- it
13 reenforces all the exemptions that exist for
14 farming in the Act previously.

15 SENATOR FISCHER: Thank you.

16 Mr. Sheets?

17 MR. SHEETS: Thank you, Senator.

18 Obviously, the folks that I represent are
19 basically users of water, and water quality is
20 very important. We've all talked about the
21 confusion of the existing situation and I think
22 that's the nemesis of what we face. The best
23 solution to me is not to border on a top down or a
24 bottom up answer to this dilemma. I think it
25 really borders on working together in a compromise

1 to find an immediate solution where probably
2 everybody is a bit upset but we all win in the
3 final analysis. So, you know, I think
4 organizations need the opportunity to voice their
5 opinions. I think the regulators need to develop
6 pertinent and intelligent responses to those
7 comments, and in final analysis maybe will come to
8 a better understanding of what it is we want to
9 accomplish and how we're going to get there.
10 The process needs to continue on and -- no
11 question in my mind.

12 SENATOR FISCHER: Thank you.

13 And Mr. Blankenau?

14 MR. BLANKENAU: Thank you, Senator.

15 You know, frankly, my testimony in
16 opposition to this rule here today is against my
17 personal interests because as a lawyer I can
18 guarantee you I will make money if this rule
19 passes.

20 I think it's always bad policy if a state or
21 federal agency by rule usurps the role of the
22 legislature. That's what's occurring here. The
23 legislature specified that the waters that are to
24 be impacted are those that are, in fact,
25 navigable. The geographic extent that this rule

1 will reach out is so significant that only the
2 legislature should step in and deal with that kind
3 of expansion. So I do think it is bad policy in
4 this instance, and I do think it's illegal, and
5 clearly against the Constitution.

6 And I would go back to some previous
7 statements. I'm sure everyone in this rooms
8 believes that it's important that we maintain
9 clean water. That's not really what's at issue
10 with this rule. There are no present water
11 quality concerns that this rule will address.
12 This is rather about control of the individuals
13 and development. And I would urge the Committee
14 to do what they can to quell this rule.

15 SENATOR FISCHER: Thank you,
16 Mr. Blankenau.

17 Commissioner Borgeson, I have a few
18 questions for you, please.

19 In your testimony you spoke about the
20 efforts in Omaha to address the combined sewer
21 overflows to improve the water quality of the
22 Missouri River. And that is going to be a very
23 expensive undertaking. I think it's estimated to
24 cost the citizens approximately \$2 billion. Omaha
25 is going to -- increasing their rates. I've heard

1 about that, as I'm sure you have as well. And
2 that's a, really a burden on families and
3 especially some of the poorest communities within
4 the City of Omaha. I understand that green
5 solutions are being proposed as part of that
6 solution to the challenge, but this proposed rule
7 that we're talking about right now, it's really a
8 potential threat, I think, to the government's
9 ability to maintain those facilities in the future
10 without having to go through this permitting
11 program that we're talking about. Do you agree
12 with that? Can you kind of speak to that problem
13 that Omaha may be facing when it looks at green
14 solutions to such a costly problem that they're
15 facing and their citizens are being -- are having
16 to pay for?

17 MS. BORGESON: Yes. The one project in
18 Douglas County, Omaha is the example of one of our
19 combined elementary schools. The name is
20 Saddlebrook, and it's an elementary school, it's a
21 library, and it's a community center, and it has a
22 green roof. And it catches all of the rain and it
23 keeps it from getting diverted onto the parking
24 lots and then into the storm sewers. And then it
25 adds a great deal of insulation to the building as

1 well. Pretty -- pretty neat project. But no one
2 knows for certain what the possible consequences
3 are of the new rules and how that -- they will
4 affect projects such as these. The Board could
5 claim jurisdiction over these green solutions. So
6 the concern of the new regulations is if these
7 special permits are required for some of these
8 things, what will it cost, what will the length be
9 between the time that, you know, were intended to
10 do the construction and actually getting the
11 permit, and what other controls on the surrounding
12 project will the permit want to exert. So, you
13 know, again, it's essential that the proposed
14 WOTUS rule does not negatively impact the use of
15 green infrastructure, both from the installation
16 and the ongoing maintenance on a standpoint of the
17 project.

18 SENATOR FISCHER: You know, I hear from
19 citizens, I hear from business people, I hear from
20 government, local government, state government,
21 about frustrations with regulations that the
22 federal government mandates and is passed down and
23 that we all then have to deal with. But I can
24 tell you, the example you gave about 180th Street
25 in your testimony, that has to be at the top of my

1 list on really frustration that's out there and
2 the time involved and the cost that's involved.
3 How exactly do you think this proposed rule is
4 going to further exacerbate that problem?

5 MS. BORGESON: Well, first of all,
6 the -- I want to compliment you on the
7 Build Nebraska Act, the LB 84, because it's been
8 an absolute tremendous help to both the state and
9 the local and funding projects to improve the
10 transportation needs. And we are very, very
11 appreciative of that.

12 But the major problem is the rules are not
13 applied consistently. Primarily the lack of
14 insufficient definition, use of terminology and,
15 of course, you run into different personalities.
16 The term that -- terms that are already a problem
17 are still not clearly defined in the new rules.
18 Plus, the new terms are being added that obviously
19 extend the control of EPA and the Corps of
20 Engineers over both government right-of-way but
21 farther and farther into private land. And so the
22 80th Street -- 180th Street project is a great
23 example, you know, of both ends of the cooperation
24 spectrum. The -- our engineer's office met
25 informally with the Corps of Engineers, the

1 primary enforcers of the Clean Water Act, to
2 discuss the project. And at that meaning the
3 Corps would not give any formal opinion but did
4 take suggestions about the bridge design and the
5 location of the two major bridges that would be
6 acceptable so that we could avoid some problems
7 with an active stream. Well, these suggestions
8 were incorporated into our original design, but as
9 the design work continued we suddenly started to
10 have problems with that rut at the bottom of the
11 ditch that, again, was eight inches long and an
12 inch deep. And so the latest construction date
13 that we have is 2018, or fiscal year 2019, and the
14 original start date, again, was 2010, and it was
15 at a cost of about \$20 million. So just to put it
16 in perspective, assuming that a three percent
17 increase in construction costs per year, and a
18 30 percent cost increase due to required changes,
19 that have nothing to do with the primary "Waters
20 of the U.S.," or the historical highway that's --
21 that it's going over, the project and the time
22 value money on the increased cost is now estimated
23 to be a minimum of \$36 million. And that's -- and
24 a large of it is paid for by -- a large percentage
25 is paid for by the federal highway. But it's all

1 taxpayer money. And so, of course, you know,
2 we're -- we're affected by it, so...

3 SENATOR FISCHER: You know, when you
4 talk about the regulations that counties are
5 under, cities are under, you spoke in your
6 testimony about once that a project is deemed to
7 be under federal jurisdiction then other federal
8 requirements kick in as well with NEPA, the
9 National Environmental Policy Act, with, of
10 course, endangered species, has an affect on that
11 as well. I would assume then that adds additional
12 time, additional cost to taxpayers, is that -- is
13 that correct?

14 MS. BORGESON: Yes, it does. I mean, it
15 means, again, a lot more time and a lot more
16 additional paperwork and expense. And a good
17 example, again, is the 180th Street project
18 because that --

19 SENATOR FISCHER: That's like the poster
20 child.

21 MS. BORGESON: Yeah. Because the
22 state -- well, the State Historical Society
23 insisted that our initial plan for the two
24 900-foot bridges that span the Old Lincoln
25 Highway -- and, again, that's a piece of the

1 national historic highway, and we're very proud of
2 that, but that -- and we have spent hundreds and
3 thousands of dollars to maintain that because of
4 its historical value, but -- and the West Papio
5 Creek and the railroad tracks, they insisted that
6 those be changed to include an historical
7 consistent design to go along the Old Lincoln
8 Highway. So, in simple terms, for a county this
9 means additional time, additional expense, is
10 added to each one of these projects and -- and
11 more so just even in -- a big concern is even in
12 our routine maintenance that may fall under these
13 federal jurisdictions just because the water may
14 drain through county ditches into waterways. So
15 we're very, very concerned about that.

16 SENATOR FISCHER: As I think all
17 counties are. I don't remember my exact numbers
18 on this, but we look at the state highway system
19 and the thousands of miles of road, well, here in
20 Nebraska we have about ten times, I think, the
21 county roads that have to be maintained as well.
22 So I can appreciate the cost to citizens in this
23 state to maintain the production and the problems
24 they're going to be facing now in the future.

25 MS. BORGESON: Absolutely.

1 SENATOR FISCHER: And so thank you very
2 much.

3 Ms. Cooksley, I wanted to ask you a
4 question, and if you could kind of clear something
5 up. You know, a lot of times what we hear the
6 most about this proposed rule and the idea that
7 EPA and the Corps now would be regulating ditches
8 under that proposed rule. And some agencies are
9 saying, well, that's not true, ditches are going
10 to be exempted. But I continue to hear, really,
11 uncertainty and some certainty that those ditches
12 are going to be included under the rule. Can you
13 address that for us?

14 MS. COOKSLEY: I will try.

15 The rule does say that ditches are exempt.
16 But it's very vague to us that read it. It
17 excludes ditches that are excavated wholly on
18 uplands, drain only uplands, and have less than
19 perennial flow. When I go up on an upland, to me
20 that's higher than lower ground. That ditch also
21 had to occur through water, a perennial flow. The
22 term "upland" was not defined further, so we're
23 still in a fog on what does that mean. It does
24 not exempt ditches that do not contribute flow
25 either directly or through another water to

1 navigable waters or tributaries. And to qualify
2 for an exclusion a ditch must contribute zero flow
3 to navigable water tributaries. And since most
4 ditches that I know of convey water somewhere
5 indirectly or directly to minor tributaries, it
6 has no benefit. It muddies the water, so to
7 speak, to us trying to understand and work within
8 this rule.

9 SENATOR FISCHER: What about floodplains
10 and regulation of floodplains, do you have
11 thoughts on how this proposed rule would affect
12 that?

13 MS. COOKSLEY: The proposal would make
14 everything within the floodplain and a repairing
15 area a federal water by considering that adjacent
16 waters. And it fails to define how far a
17 repairing area goes, which is the area around the
18 water body. It doesn't distinguish flood
19 intervals. And perhaps the most concerning to me
20 is the rule says, best professional judgment by
21 regulators to be used on a case-by-case basis.
22 That allows me no flexibility to plan. How can I
23 get ready for this? How do I manage this? So,
24 again, we're back to the uncertainty.

25 SENATOR FISCHER: And I know that you

1 and your family have a wonderful history of
2 conservation and in taking care of your land and
3 using those best management practices. How do you
4 think -- how do you think you're going to be
5 affected when you try to follow the state-approved
6 best management practices that truly affect the
7 environment that you live in if this rule takes
8 effect as it's proposing?

9 MS. COOKSLEY: If it takes away the
10 certainty from the state in managing the waters,
11 and I have used their guidelines, then that puts
12 me, as a private landowner, as a land manager, at
13 risk. Such as Mr. Blankenau had said, if their --
14 if the state authority is taken away, then, again,
15 I am uncertain as to what I can and cannot do.
16 And I am out there trying to do the right thing
17 every day.

18 SENATOR FISCHER: You know, you keep
19 mentioning uncertainty. And I guess I would ask
20 you, how do you define that? What do you mean by
21 uncertainty with this rule, and what kind of
22 impact does this uncertainty that you talk about,
23 what impact does that have on your planning and on
24 your management? I guess I want to dive down a
25 little deeper there into what you're saying.

1 MS. COOKSLEY: In ranching, a short-term
2 goal may be five years. A long-term goal may be
3 the next generation. So we're looking a long ways
4 down. We do need certainty. We need to know, is
5 this depression, pond, a wetland that appears,
6 disappears? Is that going to be regulated by the
7 federal government; will it not be? Will it be
8 regulated by the state; will it not be? I have to
9 be able to plan management of that native
10 Sandhills grass for the long term, which is into
11 the next generation. So we need clear definitions
12 and clear guidelines. And it gets back to
13 certainty.

14 SENATOR FISCHER: Thank you.

15 Don, I've got a couple questions for you as
16 a home builder. You know, that's an American
17 dream for people to be able to own their own home.
18 I've -- I truly was shocked to hear when you said
19 that 25 percent of the cost of a home is because
20 of regulation. That just delays, I think, the
21 American dream for our citizens.

22 When you look at those permitting delays,
23 how does that affect you as a builder

24 MR. WISNIESKI: Well, as the saying
25 goes, time is money. Things have to move along

1 pretty good. You know, if you go -- if you're
2 working with a bank for loans, those are typically
3 going to start happening within a six-month
4 period. If you have a Clean Water Act wetland
5 permit or something like that that is proposed
6 it's supposed to be in a timely manner. So you --
7 we rely on that to be on a timely manner. And too
8 many times this takes months or even years for
9 that to be processed and get done. There was a
10 2002 study that was cited by the EPA in its
11 economic analysis that the proposed rule found
12 that an individual Clean Water Act wetland permit
13 takes an average, now this is an average, of
14 788 days. That years. That's a long time. And a
15 so-called stream wide, nationwide permit can take
16 an average 313 days. Very close to a year. And
17 without proper -- as a developer or builder,
18 without the proper permits in place, or not
19 knowing if you have those all -- those permits all
20 in place, it's a great risk of running of fines,
21 that we're aware of, up to \$37,500 in a day, so...
22 And keeping in mind, the bank's continually
23 knocking. So that has to -- that has to keep
24 going.

25 The big fear is, in a lot of communities

1 across the state, with shortage of housing,
2 shortage of builders, work force, developers, the
3 big fear is too many of those individuals are
4 going to throw their hands up in the air and say,
5 I don't need to deal with it. It compounds the
6 problem that we're already facing. We can't go
7 that direction. It needs to be streamlined. It
8 needs to be timely. It needs to be consistent.

9 So hopefully that answers that.

10 SENATOR FISCHER: It did.

11 And home builders, I know that sometimes you
12 have to obtain those permits, Section 402 and 404,
13 for you to complete your projects. What exactly
14 are those and what do you have to follow in order
15 to have those permits included?

16 MR. WISNIESKI: The matrix behind each
17 one of those is very difficult in its own way. In
18 essence, the 402 is basically storm water related;
19 the 404 is going to be your wetland related. Keep
20 in mind, I'm a small businessman, I like to grab a
21 hammer and build a house. I have to rely on the
22 lawyers in the community to help with these type
23 of issues.

24 MR. BLANKENAU: God bless you.

25 SENATOR FISCHER: Too --

1 MR. WISNIESKI: It's a money-making
2 issue.

3 But some of those things that are, you know,
4 involved with these are the pre-application
5 consultant -- consultation consulting with these
6 folks. There's individual permit applications
7 that have to be submitted; there's public
8 notifications; there's 15, 30-day public notice
9 comments, and so on and so forth, that have to be
10 done; opportunity for public hearings; there's
11 Corps reviews; the public comments and evaluations
12 for the permit applications; and finally the
13 Corps' decision to make the permit, or issue it or
14 deny it. So there's -- the answer to that is
15 actually pretty long if we want to get into it. I
16 would rather get you information on that.

17 SENATOR FISCHER: Okay.

18 MR. WISNIESKI: And provide that at a
19 later date because we could go on literally for an
20 hour on this. So if I could be allowed.

21 SENATOR FISCHER: Okay.

22 MR. WISNIESKI: I have a lot of
23 information that I'd love to get to you.

24 SENATOR FISCHER: Thank you. I look
25 forward to receiving that.

1 Can you tell me, in your testimony you were
2 talking about any waters or wetlands within a
3 floodplain, that they could be subject to the
4 Clean Water Act, their jurisdiction there. How
5 does that affect home builders? I've -- I hear
6 from people all across the state, mostly in the
7 eastern part of the state though, that have really
8 deep concerns about being in a floodplain and
9 what's all involved in that. Can you give us a
10 little information on that, please?

11 MR. WISNIESKI: Yeah. Floodplain is
12 vaguely defined and will result in unpredictable
13 and inconsistent applications as far as the Act.

14 Do I need to get closer? Just holler at me
15 next time.

16 A landowner's not able to look at a map and
17 objectively know exactly the extent of those
18 floodplains. That's probably the biggest problem.
19 If you look at his property, at his or her
20 property, and it's -- you've got to decide whether
21 you want to even purchase that property because
22 you don't know how far those extensions actually
23 reach out. It's just difficult to know where
24 those boundaries are. And it makes it difficult.
25 Is that my responsibility; is it the homeowner's

1 responsibility; the developer's responsibility?
2 So on and so forth. Or we have to wait for a
3 field inspector to come out in the -- and walk the
4 property and subjectively determine this is where
5 it's going to or not going to go. So it's a big
6 issue that way.

7 SENATOR FISCHER: Okay. And we heard
8 the Commissioner talk about green projects and,
9 you know, that's -- that's so important that we --
10 that we look at what's available and how we can
11 move to more green projects. And I know there's
12 some -- there's some states and localities that
13 require or encourage home builders to start
14 building more of the low-impact development, these
15 green projects that are out there. You heard the
16 Commissioner's answer on some of the issues that
17 counties, cities, deal with. What about home
18 builders and, you know, people who want to move in
19 that direction and then when they're building a
20 home and what -- what are you faced with on that?

21 MR. WISNIESKI: Well, as I said
22 earlier --

23 SENATOR FISCHER: Or what do you think
24 you're going to be faced with?

25 MR. WISNIESKI: Well, it's more of a

1 fear than anything. As I stated in the testimony,
2 a lot of the developers or builders are
3 voluntarily doing those type of deals, whether we
4 put swales in, whether we put water gardens, or
5 whatever you want to call them, in. But if a rain
6 garden develops wetland plants or vegetation and
7 soils and happens to fall within a floodplain or a
8 nearby river or stream, and a landowner, he wants
9 to do something with it, if he has to dredge those
10 out or maintain them -- now, typically that's the
11 backyards of a lot people -- you know, a lot of
12 folks' homes -- not knowing what he can or can't
13 do to that, and if you start to remove soils from
14 there to maintain that, or pesticides for any kind
15 of controls for whatever that might be, there's
16 going to be a lot of fines or uncertainty what you
17 can and can't do to those areas. We'll stop
18 putting them in, and that's not what we want to
19 do. We do want to control that. They serve a
20 great purpose. And on a voluntary basis, or on a
21 local level that or we work with state or local
22 levels to do that, that's a great option and we
23 want to keep doing those. We don't want to
24 eliminate folks from doing those because they're
25 going to have a hard time maintaining them. Or

1 the length of time to get a permit to do that, now
2 they're over-silted or whatever the case might be.
3 So it's an issue.

4 SENATOR FISCHER: Right. Thank you.
5 Thank you very much.

6 Mr. Crabtree, you stated that 80 -- I think
7 I heard you correctly, that 87 percent of the
8 total comments support the proposed rule.
9 However, it's my understanding that the bulk of
10 these comments were not substantive and they did
11 not evaluate the content of the rule. In fact, as
12 Secretary Darcy stated publicly, out of the
13 comments that the agencies classify as
14 substantive, 58 percent of those oppose the rule.
15 Were you aware of Secretary Darcy's statements?

16 MR. CRABTREE: Yes, Senator. Actually,
17 I think I had that in the written testimony that I
18 submitted to the Committee. And I apologize for
19 not emphasizing it.

20 Yeah, I think you're right, I think that
21 that's probably the case. And, I mean, I think we
22 should also be careful because, for example, the
23 substantive comments that the Center for Rural
24 Affairs provided, which I was involved in
25 drafting, had multiple criticisms. But they were

1 detailed and specific. And the overarching, you
2 know, I don't know, tenor of it was that we -- we
3 think that we're moving in the right direction.
4 That they should continue. Now, I don't know how
5 we would count that. I don't know if we're in
6 58 percent or the 42 percent. So I would assume
7 that we're, you know, what they thought was
8 appropriate. But, honestly, I can't tell you. So
9 that -- I'm not -- I'm not dis -- I don't find
10 that matter too disconcerting but it is worthy of
11 wondering about. But I still believe, even though
12 that -- because the difference between a
13 substantive comment, a comment which they call
14 substantive, which, you know, actually comments on
15 a specific element of the rule, versus a statement
16 by an individual citizen who says something that's
17 not specifically detailed but says, I support this
18 rule, I mean, I think there's still value in that
19 too. So I think that 87 percent number is still
20 pretty remarkable. Involves a lot of people in
21 this country, said, we think doing this to protect
22 water quality is important.

23 SENATOR FISCHER: I think it's also
24 important that we base public policy that will
25 affect the citizens of our state and the citizens

1 of this country on fact and based on science. I
2 always appreciate comments from constituents, but
3 policy has to be based on fact.

4 So I am going to put Secretary Darcy, her
5 letter that she sent to the House with those
6 numbers in it into today's hearing record.

7 So thank you.

8 Mr. Blankenau, in your comments you state
9 that Section 404 permits can take up to 18 months
10 to process by the Corps' Omaha District Office and
11 the costs can range from 25,000 to a hundred
12 thousand dollars. You know, this is a serious
13 delay, and it's expensive. So we kind of brought
14 it up earlier about what kind of activities are
15 required under that permit. I'd like to know,
16 too, what's going to be required under the
17 proposed rule that you think. And that wait time
18 then, is it going to be more than 18 months? You
19 know, I -- we always hear the horror stories about
20 the permitting process and how long it takes. So
21 what, I guess, what do you see for the future
22 here?

23 MR. BLANKENAU: Well, if the proposed
24 rule does become law, I think it extends the
25 geographic regulatory reach of those agencies.

1 And, as a result, I think it will require more and
2 more permits to be issued. If the Corps' office
3 is already stretched by personnel, and I think
4 they are, I think many of them are hard-working,
5 diligent federal employees, but if they're already
6 stretched, if their workload increases, I don't
7 see how it can do anything but increase these
8 delays and the costs.

9 SENATOR FISCHER: The Regulatory
10 Flexibility Act, it requires agencies to examine
11 the impacts of the proposed regulation on small
12 governmental entities and on small businesses.
13 The EPA and the Corps have certified that this
14 proposed rule will not have significant economic
15 impacts on a substantial number of small entities.
16 But the chief counsel for the Small Business
17 Administration Office of Advocacy, and that is a
18 unit of the federal government, determined that
19 this certification was in error and that it was
20 improper. Can you talk about the EPA and the
21 Corps' actions that I believe undermine the
22 safeguards we have for our Nebraska municipalities
23 and for the protection of our citizens?

24 MR. BLANKENAU: Yes. I think their
25 certification was the product of the narrative

1 that it doesn't change existing law. And I think
2 the Small Business Administration recognized that
3 it, in fact, does change existing law. And
4 further extends that geographic reach. Now, all
5 but two of Nebraska's 530 municipalities and all
6 of its Natural Resources Districts would qualify
7 as small entities. Those municipalities and NRDs
8 are among the most frequently recipients of
9 404 permits because of how much earth they move
10 and all the activities that are involved. I think
11 what you'll see is direct impacts to taxpayers as
12 a result of those activities being delayed and
13 additional processing costs.

14 SENATOR FISCHER: And I would like you
15 to speak to the proposed rule's justification to
16 regulate all the water that has a hydraulic
17 connection. I think you have a very unique
18 perspective because of your profession, because of
19 your positions that you've held in a previous
20 life, so I think you have a really good
21 perspective to share with us how the water here in
22 Nebraska, and specifically that connection that we
23 have, how is that going to be affected?

24 MR. BLANKENAU: Well, it's interesting
25 because both the Corps and the EPA have previously

1 disavowed any control over groundwater. But what
2 they've done by adding the hydrologic connection
3 component, is effectively used groundwater to
4 claim jurisdiction over discreet bodies of water
5 that might be many miles away. So, for instance,
6 you know, I'll use the area that you were from,
7 Senator, as an example. You might have a golf
8 course developer who wishes to create a water
9 feature and excavates a pond which exposes
10 groundwater that might be hydrologically connected
11 to the Dismal River some five miles away by that
12 act of exposing and creating that exposure to
13 groundwater, there's that hydrologic connection
14 which makes that newly-excavated pond now
15 jurisdictional. So while it's technically correct
16 that the proposed rule doesn't regulate
17 groundwater, they use that hydrologic connection
18 of groundwater as the lynchpin to jurisdiction.

19 SENATOR FISCHER: And the Clean Water
20 Act's purpose is to protect the quality of our
21 navigable water; is that correct?

22 MR. BLANKENAU: That's correct.

23 SENATOR FISCHER: And do you see this
24 proposed rule-making as expanding agencies'
25 jurisdiction then, do you think? You alluded to

1 it, but I know attorneys don't ever come right out
2 and say it, but...

3 MR. BLANKENAU: I don't want to beat
4 around the bush of it.

5 SENATOR FISCHER: But, you know, the --
6 I'm very concerned about the regulatory authority
7 that we may see coming because of this proposed
8 rule.

9 MR. BLANKENAU: Well, again, and I
10 really am concerned about what this does to the
11 fabric of the Constitution. The authority of
12 Congress is actually limited in what it can
13 regulate. And it has historically been limited to
14 actual navigation on waters. That was the whole
15 purpose of the commerce clause being inserted in
16 the Constitution to begin with. What we've done
17 here is allowed an agency to define what
18 "navigable" is and extend it to molecules of water
19 that are very distant in time and in place. And I
20 think that stretches the credibility beyond the
21 breaking point.

22 SENATOR FISCHER: You know, this time of
23 year we see the Sandhill crane coming to Nebraska
24 and we have the opportunity as Nebraskans to
25 really enjoy that phenomenon that's out there.

1 But we also have a number of people from around
2 the United States, around the world, that come to
3 view the cranes this time of year. Can you
4 explain how this rule, I think, is attempting to
5 use these birds --

6 MR. BLANKENAU: Yeah.

7 SENATOR FISCHER: -- to expand that
8 federal control over isolated water?

9 MR. BLANKENAU: You've put your finger
10 on one of the really odd things about the proposed
11 rule, and it's the resurrection, if you will, of
12 the Migratory Bird Rule, which I thought the
13 Supreme Court had placed a stake through the heart
14 of in its SWANCC decision. This rule effectively
15 resurrects that concept where if a migratory bird,
16 such as the Sandhill crane, stops at a pond or
17 pothole along the way for a visit, that pond or
18 pothole becomes jurisdictional, all the way from
19 Texas to North Dakota.

20 SENATOR FISCHER: Or Anselmo, Nebraska.

21 MR. BLANKENAU: Or in Anselmo.

22 So, yeah, it's one of the real stretches, if
23 you will, of a definition of what navigable waters
24 are.

25 SENATOR FISCHER: Okay. Thank you.

1 I have some questions for all of the
2 witnesses. So I welcome any of you that would
3 like to address these.

4 We'll begin with, do you believe that this
5 proposed rule will clear up confusion regarding
6 the jurisdiction of the Clean Water Act or do you
7 think it will add to the confusion? You know,
8 we've heard, I think, all of you bring that up in
9 your testimony and in your comments.

10 Commissioner, would you like to address
11 that?

12 MS. BORGESON: Well, we believe it will,
13 and does, add confusion and it's not defined
14 properly. You know, in terms of counties, we do
15 two basic routine maintenance tasks that all
16 counties do. We -- the cleaning and repairing of
17 roadside ditches and the ongoing maintenance of
18 unimproved roads. And so it's imperative and,
19 again, it's just not clear, as to whether or not
20 that routine maintenance of those right-of-ways
21 and those ditches are included in the needs of
22 these permits. We believe that the new rule does
23 say that we would be, as counties, required to get
24 permits for those ditches. In fact in the EPA's
25 video it says in it several times about how

1 important it is for them to have control of the
2 ditches. And so we're very concerned, again, of
3 the length Mr. Crabtree talked about of already
4 overworked workers in the agencies, this just
5 exacerbates it. And, again, it's just very
6 unfair.

7 SENATOR FISCHER: Okay. Thank you.

8 Ms. Cooksley?

9 MS. COOKSLEY: I too feel it would be
10 burdensome. It does not clarify. Every day I
11 have to go out on the land, I need to be able to
12 know what it is that I can do, because I am going
13 out there to manage the land for the long-term
14 viability of the land, keep the hills covered in
15 grass, protect the wildlife, that I enjoy every
16 day, and still maintain a sustainable business.

17 SENATOR FISCHER: Thank you.

18 Don?

19 MR. WISNIESKI: I don't have a whole
20 lot to add to that. I'll pass it on and let
21 somebody else have the time.

22 SENATOR FISCHER: John?

23 MR. CRABTREE: Senator, I actually
24 really appreciate this question because I think
25 this is one of the heart -- sort of the heart of

1 our discussion here. I absolutely respect that
2 people have concerns about what the rule is going
3 to -- what the rule would do to -- what
4 jurisdiction of Clean Water Act would exist after
5 the finalization rule. And Don and Wes and I,
6 indeed, all of us on the panel probably all have
7 six different viewpoints on what exactly that
8 jurisdiction should end up being finally. The
9 question about uncertainty though is a different
10 question. Whether or not it -- some opponents of
11 the rule have said, well, the rule's unclear,
12 it's -- causes all these uncertainties, we don't
13 know what it means. But they also say that it
14 expands jurisdiction. It seems like, you know, a
15 fairly precise examination of it. I am the most
16 troubled by the fact that the uncertainty that we
17 worry about exists today, currently. As
18 Miss Cooksley has very adequately described,
19 ranchers and farmers need certainty to make
20 long-range plans. Ranching in the Sandhills is a
21 long-term venture. It's not something you do this
22 year and stop next year. I mean, it's a life
23 commitment and it requires that kind of certainty.
24 But that doesn't exist today. And from the
25 Supreme Court Justice all the way down to little

1 old me, people have said that we're going to have
2 to define what's jurisdiction in order to provide
3 that certainty.

4 Now, we all -- many of us want to quibble,
5 and reasonably so, about, well, what should it be.
6 And that's one question that we should have that
7 argument. But we also need to recognize the
8 uncertainty that people say they hear in the rule
9 exists today, and so they should hear it today
10 too. We should also be talking about, we need to
11 do rule-making like this, as the Chief Justice
12 said. Because if we don't, Barbara will still
13 have that uncertainty, and every other rancher out
14 there will. It still exists, what's
15 jurisdictional, what can I do, what can't I. And
16 short of hiring an attorney, and potentially going
17 to court and all that to resolve those questions,
18 they won't have an answer.

19 And so that's what's important, in our
20 minds, the Center for Rural Affairs, in my mind,
21 that's what's most important about this
22 rule-making, is providing a definition that's
23 clear and certain. And, again, we're reasonable
24 people, we're more than happy to debate with the
25 people about what exactly that definition should

1 look like, and I think we should continue to
2 debate that. But we have to get that question
3 about would the rule provide certainty? Yes, it
4 would. It absolutely would. It would provide
5 certainty. That doesn't exist today.

6 SENATOR FISCHER: Thank you.

7 Wes?

8 MR. SHEETS: Thank you. I'll try and be
9 very succinct and say, yes, I do believe this rule
10 would provide some certainty. But I'd also
11 qualify that by suggesting that my good friend and
12 counter-opponent on my panel here to my left, has
13 expertise, and I would hope that in the final
14 analysis that the rule would be promulgated or at
15 least exposed or written in some final form and
16 then subjected to whatever analysis that is
17 appropriate to make the decision, whether it would
18 work or not and what the ultimate determinations
19 would be. And at that point then I would urge
20 you, Senator, as a policymaker, to consider
21 whether that's good policy for our country or not.
22 But I'd like to see what has been typed down on
23 paper before I would want to commit to making it
24 into the law.

25 SENATOR FISCHER: Thank you.

1 And, Mr. Blankenau, you'll have the last
2 word today.

3 MR. BLANKENAU: Oh, good.

4 This past October, Justin Lavene and I had a
5 case before the U.S. Supreme Court, and while we
6 were engaged in argument, Justice Breyer made the
7 observation that you could hardly find nine people
8 less qualified to decide a water case than the
9 Court. Which got a good laugh in the courtroom.
10 But he, frankly, makes a point. I mean, these are
11 people that are not schooled in hydrology, and
12 making these kinds of decisions is difficult. I
13 think the way the proposed rule is presently
14 written it creates even more uncertainty than
15 exists today. John's absolutely right, there is
16 uncertainty today and clarity is necessary. But
17 this rule, I think, pumps steroids into that
18 uncertainty rather than bring about some
19 resolution. So I would prefer, and I think what
20 I'm hearing many of these panelists say, is that
21 the Corps and EPA go back to the drafting room
22 table and rework this and to try to do exactly
23 what they set out to do, and that's to provide
24 that certainty.

25 SENATOR FISCHER: Thank you.

1 As we wrap up the hearing this -- today,
2 this afternoon, I want to again express my
3 gratitude to each of the witnesses for testifying
4 today. We were privileged to hear a wide variety
5 of different Nebraska stakeholders who provided
6 details on the challenges families, businesses,
7 communities will face if and when the
8 administration finalizes the proposed Waters of
9 the United States rule.

10 We are blessed to have great water resources
11 in this state, and it is clear that this rule
12 would only undermine the strong work of our state,
13 Natural Resource Districts, local communities, and
14 landowners in managing and protecting this
15 precious natural resource.

16 I have serious concerns about the process
17 that EPA and the Corps used to draft this rule,
18 and its disregard for states, small businesses,
19 and local authorities. It is clear that imposing
20 additional rules and permitting requirements on
21 farmers, small businesses, and local governments
22 will only create uncertainty, cause litigation and
23 liability exposure, and drive up the time and
24 costs of important projects.

25 I have and will continue to support every

