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Committee on Environment
and Public Works Washington, D.C.

HEARING ON EROSION OF EXEMPTIONS AND EXPANSION OF FEDERAL CONTROL - IMPLEMENTATION OF THE DEFINITION OF WATERS OF THE UNITED STATES

Tuesday, May 24, 2016

United States Senate
Committee on Environment and Public Works
Subcommittee on Fisheries, Water, and Wildlife
Washington, D.C.

The committee met, pursuant to notice, at 2:30 p.m. in room 406, Dirksen Senate Office Building, the Honorable Dan Sullivan [chairman of the subcommittee] presiding.

Present: Senators Sullivan, Whitehouse, Barrasso, Capito, Boozman, Fischer, Rounds, Inhofe, Cardin and Markey.

STATEMENT OF THE HONORABLE DAN SULLIVAN, A UNITED STATES SENATOR FROM THE STATE OF ALASKA

Senator Sullivan. The Subcommittee on Fisheries, Water, and Wildlife will now come to order.

Good afternoon. I want to thank all the witnesses for being here. I want to thank the members for coming out to this important hearing.

The purpose of the hearing is to discuss the implementation of the waters of the United States and the expansion of Federal control that has come with it. Again, I would like to thank all the witnesses for their testimony. We have a distinguished panel of witnesses today, and it is very important for this Subcommittee and for all of Congress to hear what is really happening on the ground when our constituents try to develop projects on their private property or build homes or expand economic opportunity in their States.

Erosion of property rights, that I think we are going to hear about today, has been happening for years, not just this Administration. But it has been happening without any change in the Federal Clean Water Act and without any change in the regulatory definition of waters of the U.S. In fact, based on testimony we will hear today, it is clear that the purpose of the Obama Administration's WOTUS rule was to paper over the

gross expansion of Federal control that the Corps and the EPA have been trying and focusing on expanding for years.

I want to take a minute to talk about what has been happening in my State, in Alaska. These are really important issues for Alaskans.

Already a huge percentage of Alaska falls under the Federal Clean Water Act jurisdiction. Alaska has 43,000 miles of coastline, millions of lakes, and more than 43 percent of our State's surface area is composed to wetlands, which accounts for 65 percent of all the wetlands in the United States. Let me say that again. Sixty-five percent of all wetlands in the United States of America are in one State. This is why this is such an important issue for us.

Now the Corps and the EPA are trying to expand their reach in terms of what constitutes a wetland by claiming that land with permafrost, a layer of frozen soil, is also within their jurisdiction, although there is no statutory or regulatory authority to grant them that jurisdictional expansion.

Permafrost can be found beneath 80 percent of the State of Alaska. Alaska is 663,300 square miles. That means over 530,000 square miles of Alaska overlays permafrost. That area, in case you are wondering, is twice the size of Texas and larger than three times the size of California.

Currently, permafrost does not meet the regulatory definition of a wetland, which has not changed in decades. To change the definition to include permafrost, the Corps would have to revise their 1987 manual, following notice and comment and rulemaking, which they have not done. But they have expanded the definition anyways.

For example, the Corps is now telling constituents of mine, like the Schok family of North Pole, Alaska, that they cannot build on their land because of frozen soil. I want to thank the Pacific Legal Foundation for fighting for the Schoks and Damien Schiff for being here today to share their stories and other stories of landowners around the Country who are experiencing similar Federal overreach.

The stories in the written testimony of today's witnesses are incredible, and in many ways shocking. Not only does the EPA and the Corps think frozen ground in Alaska is waters of the United States, but Federal agencies are asserting authority over even more features, such as previously converted crop land, stock ponds, water and soil far beneath the surface, puddles in dirt roads, tire ruts, and depressions in gravel parking lots, and on activities in adjacent lands such as plowing and changing crops.

Now, one of the things that I have tried to emphasize and seen in this Committee is we all believe in the need for clean

water and we all believe in the need for clean air. And certainly there is no monopoly on the truth of that issue. Sometimes my colleagues on one side want to say it is only Democrats who believe in these things. We all believe in it.

But we also all believe, I hope, that agencies have to abide by Federal regulations and by statutes, and they cannot expand their jurisdiction on their own. The expansion of the jurisdiction of the Clean Water Act and the Clean Air Act belong in one realm in our Federal Government, and that is the Congress of the United States.

One of my biggest surprises on this Committee is how often we are not conducting oversight for this kind of Federal overreach. The EPA and the Corps are bypassing Congress and ducking Supreme Court rulings to get to their jurisdictional conclusions, and this is happening all over the United States, and even though the WOTUS rule has been stayed by a Federal Court of Appeals.

I want to thank the witnesses for being here this morning. I look forward to hearing the testimony of our witnesses.

Now I would like to provide the Ranking Member, Senator Whitehouse, with his opportunity for opening comments.

Senator Whitehouse.

[The prepared statement of Senator Sullivan follows:]

STATEMENT OF THE HONORABLE SHELDON WHITEHOUSE, A UNITED STATES SENATOR FROM THE STATE OF RHODE ISLAND

Senator Whitehouse. Thank you, Mr. Chairman. Before I get to my opening comments for this particular hearing, let me thank you again for the, I thought, terrific bipartisan hearing that you led on marine debris. It was a terrific opportunity, I think, for both sides of the aisle to come together on an issue where we have significant common cause in your very large ocean State and my much smaller ocean State.

Today, however, we have a rather different agenda. The Subcommittee meets again to paint the Environmental Protection Agency and Army Corps of Engineers' implementation of the Clean Water Act as an overreach of Government authority and a minefield of regulations aimed at taking down the little guy.

In reality, for over 40 years the Clean Water Act, passed in a bipartisan manner, has strengthened the health of our waterways. Rivers and wetlands that were once unusable due to pollution are again swimmable and fishable.

Just last week the Providence Journal ran a column from its nature columnist, Scott Turner, called Savoring the Smell of Salt Water. He wrote, "When we moved to Providence in 1996, the smell of oil and sewage or rotting algae and shellfish signified the arrival of warm air. That was because the first southern air of the spring season showed up after passing over polluted

Narraganset Bay. My, how things have changed," he continued. "On May 11th this year, for example, the first sustained southern winds of the season puffed into Providence. That warm welcomed air did not stink. Instead, those breezes conveyed the salty smell of the sea from the reaches of upper Narraganset Bay. Hallelujah!"

That's Rhode Island's story.

Last October I traveled to Ohio, and there I went out fishing with charter boat captains on Lake Erie. Significant rains last summer washed fertilizer and manure into Lake Erie, turning the lake thick as soup with algae and bacteria, requiring a drinking water advisory and ruining fishing grounds.

I would like to submit for the record the September 2015 article from The New York Times that highlights one of the most toxic blooms in recent history, as well as the piece from the Providence Journal.

Senator Sullivan. Without objection.

[The referenced information follows:]

Senator Whitehouse. Thank you, Chairman.

Lake Erie has seen similar events over and over again in recent years. Large rain bursts, expected more often due to climate change, pour agricultural runoff through the Clean Water Act's blanket loophole for agriculture.

If you are an upstream State, you may say the Clean Water Act is too strong. Downstream States may have a different view.

As a downstream State, Rhode Island understands the importance of headwaters and the influence of upstream pollution. Our streams and wetlands are vital for fish and wildlife and for Rhode Island vibrant recreational industry. What enters waters upstream affects our Narraganset Bay, our ocean, our beachgoers, and our fishermen. Rhode Islanders love fishing. People come from everywhere to fish our waters. It is an important business.

Strong enforcement of the Clean Water Act is our best defense against the upstream pollution that is marring our streams, rivers, lakes, and oceans. The jurisdictional confusion left in the wake of the Supreme Court's decisions in this area weakened the efficacy of the Clean Water Act and created uncertainty for both regulators and the regulated, which is why, in 2014, the EPA and Army Corps promulgated the new

Clean Water rule, to provide brighter line rules for jurisdiction and add clarity to a blurred world.

The Sixth Circuit Court of Appeals has temporarily stayed the rule nationwide, forcing the EPA and Army Corps to continue to rely on the guidance they developed before the Supreme Court decisions.

Whether my colleagues are willing to accept it or not, the reality is that the Clean Water Rule is an important regulation. It will clear up years of uncertainty about protecting water resources. It has broad support from businesses and sportsmen alike, and it should have the support of my colleagues on the Subcommittee. Attacks on this rule have been often based more on government conspiracy theories than on the actual rule itself.

For the record, let me emphasize first that the rule has substantive legal support, which was well documented by EPA and the Army Corps. The agencies included an entire chapter in their response to public comments on the legal grounding of the rule and published a technical support document entitled, Statute, Regulations, and Case Law Legal Issues.

Second, EPA and the Army Corps did not develop this rule in some secret lair in the base of a volcano. In promulgating the rule, the Corps and EPA compiled over 1,200 peer-reviewed scientific publications, held over 400 public meetings with

stakeholders around the Country, and considered over 1 million public comments, nearly 90 percent of which were in support of the rule.

Third, and most important for this hearing, the rule does not represent an expansive power grab by the Federal Government, nor does it eliminate exemptions under the Clean Water Act. It simply aims to restore what was protected before Supreme Court decisions in 2001 and 2006.

All previous exemptions and exclusions were maintained, and the rule went so far as to explicitly label some specific waters as non-jurisdictional for the first time. The rule actually reduces coverage of total waters protected by the Clean Water Act and, according to the Corps and EPA, would only lead to around 3 to 5 percent more assertions of jurisdiction over U.S. waters as compared to before the rule.

And for those of us downstream, we like, Mr. Chairman, this protection. Thank you.

[The prepared statement of Senator Whitehouse follows:]

Senator Sullivan. Thank you, Senator Whitehouse.

I do want to comment on our hearing from last week. I agree fully with you, I think there is a lot of opportunity for bipartisan support to move forward on the issue of ocean debris, and I look forward to working with you on that.

I will also mention, with regard to broad support, there are 34 States that have now sued to stop the waters of the U.S., so, in my view, there is not that much broad support.

But what I want to do right now is turn to the witnesses. Each witness will have five minutes for their opening statements, and we will provide any other additional written material for the record as you wish.

We will begin with Mr. Don Parrish, the Senior Director of Regulatory Relations for the American Farm Bureau Federation.

Mr. Parrish, you are recognized for five minutes.

STATEMENT OF DON PARRISH, SENIOR DIRECTOR, REGULATORY RELATIONS, AMERICAN FARM BUREAU FEDERATION, ACCOMPANIED BY JODY GALLAWAY

Mr. Parrish. Thank you, Mr. Chairman. Thank you, Ranking Member.

My name is Don Parrish, and I appreciate the opportunity to share with you what our members are already experiencing with the regulation of low spots and ephemeral drains. What I will describe are real on-the-ground experiences for farmers who are facing the consequences of this regulation. We are going to draw from information provided by a Farm Bureau member, a farmer, a biologist, a senior consultant in Northern California, Ms. Jody Gallaway. Ms. Gallaway is sitting behind me here today. Her experiences are provided for the Committee in more detail in the attachment to my testimony.

But I want to be clear. This regulation is a growing disaster for farmers and ranchers. Farm Bureau and others have testified before this Committee and other committees regarding what we believe is the real scope of the WOTUS rule. The reality, despite testimony from top Corps and EPA officials, contrary to what they are saying, normal farming exemptions will not protect commonplace farming and ranching practices from burdensome Federal regulation.

Before the rule was finalized, and despite a nationwide stay by the Sixth Circuit Court of Appeals, we began hearing

from our members that California Corps districts were already implementing some of the rule's most controversial provisions, such as asserting jurisdiction based on features that are not visible to the human eye. The Corps is making jurisdictional determinations and tracking farming activities based solely on imagery that is not publicly available, such as classified or proprietary aerial photography and LIDAR imagery.

The Corps has used historical aerial photographs dating back to unknown periods of time to determine historical landscape conditions and evaluate changes in agricultural activities and farming practices. For example, two farmers invested tens of thousands of dollars to proactively map their private property to ensure that their farming activities would avoid WOTUS and any impacts to WOTUS, only to have the Corps threaten enforcement proceedings for activities related to road building and the construction of stock ponds, both, both exempt activities conducted years before these landowners actually owned the property.

EPA Administrator McCarthy assured Congress that farmers would not be impacted because of the agricultural exemptions. Farm Bureau has been telling Congress that is not true. In practice, the Corps routinely narrows the farming exemptions and interprets the recapture provision too broadly. For example, in California, any plowing, any plowing, no matter how shallow, in

or near a WOTUS draws threats or permit requirements. The Corps routinely sends threatening letters to farmers if they plow their fields, if they change from growing alfalfa hay to cattle grazing and then back to alfalfa hay growing. The California districts routinely require wetland delineations to include puddles in dirt roads, puddles in tire racks, and depressions, depressions in parking lots, gravel parking lots, claiming they provide habitat for endangered species.

The new rule allows the Corps to broadly assert jurisdiction based on indicators, not actual ordinary high water mark. Ms. Gallaway, who sits behind me, has seen the Corps regulators make ordinary high water mark determinations that differ by as much as 50 feet. That has huge implications for on-the-ground projects.

I will conclude with this example. A farmer requested an official jurisdictional determination, but the Corps ignored it, ignored it. After the farmer expressed frustration, the Corps assigned a new regulator. He promptly rejected Ms. Gallaway's delineation and requested more information.

Ms. Gallaway completed an ordinary high water mark datasheet at significant cost to the landowner. The regulator, without collecting any field data, any field data, rejected the field data; instead, identified the ordinary high water mark based on an interpretation of an aerial photograph. When Ms.

Gallaway asked to see the aerial photograph, she was denied. The Corps district said it was a proprietary information.

Based on what we see in California, red tape, the use of secret information, and delays are going to be enormous problems for farmers and ranchers, and they are only going to get worse. Importantly, normal farming exemptions are going to be further narrowed and we are going to see more and more permit requirements for normal farming practices. Congress has to step in.

I will be happy to answer any questions.

[The prepared statement of Mr. Parrish follows:]

Senator Sullivan. Thank you, Mr. Parrish.

The next witness is Mr. Damien Schiff, the principal attorney for the Pacific Legal Foundation.

Mr. Schiff, you are recognized for five minutes.

STATEMENT OF DAMIEN M. SCHIFF, PRINCIPAL ATTORNEY, PACIFIC LEGAL FOUNDATION

Mr. Schiff. Thank you, Mr. Chairman, and thank you also to the Ranking Member, Senator Whitehouse, for the opportunity to talk today about this critically important issue of the scope of the Clean Water Act.

The Clean Water Act is a law that has been controversial for many decades. The Foundation and its attorneys have participated in many cases concerning the scope of the Clean Water Act, including the Supreme Court's two most recent cases addressing that statute, Rapanos v. United States and Sackett v. EPA.

The recent controversy has focused, of course, on the scope of the WOTUS rule, but in my testimony this afternoon I would like to draw the Committee's attention to issues that are not directly raised by the WOTUS rule but nevertheless, in my view, represent the extravagance with which the EPA and the Corps view their authority under the Clean Water Act.

And I would like to begin with a case that, Mr. Chairman, you mentioned in your opening remarks, concerning the Schok family in Alaska. The Schoks own a pipe fabrication business and they want to expand their business and acquire a new location for that purpose. But the Corps has intervened and asserted jurisdiction over approximately 200 acres of that

property, calling it permafrost that is subject to the Clean Water Act.

Now, no one disputes that determining whether a site contains wetlands can be exceptionally difficult. And to provide some measure of predictability, Congress, in 1992, mandated that the Corps use its 1987 wetlands manual for delineating wetlands until a final manual would be adopted.

Now, under the manual it is clear that permafrost does not qualify as a wetland. But to get around that obstacle, the Army Corps, in 2007, promulgated a so-called Alaska supplement. This supplement changes a key criterion for wetlands delineation which allows the agency to regulate permafrost. Again, that is a result that could not be reached under the congressionally mandated, nationally applicable 1987 wetlands manual.

Now, although permafrost is not that common in the lower 48, the principal raised by the Schok family's case pertains throughout the Country. Should a Federal agency be allowed to deviate from its published, nationally applicable rules just to expand its power? The answer clearly is no.

Another example of agency excess under the Clean Water Act comes out of Andy Johnson's battle with EPA over his stock pond. Johnson owns an eight-acre parcel in Fort Bridger, Wyoming. The rural property contains both his home, as well as some surrounding land which he uses to raise various farm animals,

including horses and cattle. Johnson obtained a permit from the State of Wyoming to construct a stock pond in order to improve the water quality on his property.

Unfortunately, EPA didn't care for that and, in January 2014, issued a compliance order against Mr. Johnson, saying that his construction of the stock pond violated the Clean Water Act, this notwithstanding the fact that the Clean Water Act, since the late 1970s, has clearly exempted the construction and maintenance of farm and stock ponds from Clean Water Act regulation.

Nevertheless, the EPA said that the Clean Water Act applied to Mr. Johnson's stock pond because he did not construct it simply for the use of his livestock, but also for the aesthetic pleasure that it might give himself and his family; and, therefore, because his intent was not limited to simply providing water for his livestock, the exemption did not apply. And the compliance order that was issued against Mr. Johnson not only told him that he had to undo everything that he had done, but also threatened tens of thousands of dollars per day in civil penalties if he did not immediately respond to the compliance order.

Now, thankfully, following a lawsuit brought by Pacific Legal Foundation attorneys, EPA agreed to a reasonable settlement with Mr. Johnson, allowing him to keep his stock pond

without having to obtain a permit. But there is no reason to think that the Agency will not continue to enforce its very narrow interpretation of the stock pond exemption to farmers and landowners throughout the Country.

So, in closing, I would just like to emphasize that regardless of the WOTUS rule's fate, the history of the enforcement of the Clean Water Act by the Army Corps of Engineers, as well as the EPA, demonstrates that, frankly, all too often these agencies allow a misguided zeal for protecting the environment to override key constitutional and statutory protections for the Nation's farmers and landowners throughout the Country.

I thank you again for the opportunity, Mr. Chairman, and I look forward to answering any questions the Committee may have.

[The prepared statement of Mr. Schiff follows:]

Senator Sullivan. Thank you, Mr. Schiff.

Our next witness is Ms. Valerie Wilkinson. She is the Chief Financial Officer of the ESG Companies, on behalf of the National Association of Homebuilders.

Ms. Wilkinson, you have five minutes. Thank you.

STATEMENT OF VALERIE L. WILKINSON, CHIEF FINANCIAL OFFICER, ESG COMPANIES

Ms. Wilkinson. Thank you, Chairman Sullivan, members of the Committee. I appreciate the opportunity to testify. My name is Valerie Wilkinson. I am a CPA and the Vice President and Chief Financial Officer of the ESG Companies, a small business based in Virginia Beach, Virginia.

Homebuilders have become frustrated with the expansion of Federal authority over private property and believe the current permitting process is broken. For almost three decades we have been held hostage by the EPA and the Corps, who have continually altered the Clean Water Act 404 permit requirements. This is perplexing, as irrelevant sections of the Act have not changed since 1972.

Our nightmare began when our company proposed plans for a multiuse community to address local housing demand. While we were clearing our land in 1989, the Corps asserted that our property contained jurisdictional wetlands and that a wetland delineation was required. This surprised us, as we had developed land with identical characteristics for years. Clearly, the rules had changed.

We hired environmental experts to survey the land; however, the Corps dismissed their assessments. The delineation took years to complete because Corps officials disagreed on the

criteria for determining wetlands. The regulatory environment changed again in 1999, when Virginia adopted the Federal 404 regulations to create an expedited one-stop permitting system and required a permit to excavate the land. We hired more experts to complete another wetland delineation for the Virginia DEQ wetland permit.

DEQ staff confirmed our expert's delineation and we submitted our State permit request. We agreed to revise our plan to further avoid and minimize impacts, and provided mitigation so that for every one acre impacted, two acres of wetlands would be restored and another acre placed in preservation, resulting in no net loss of wetland acreage or functions. The DEQ applauded the fact of our exceeding the typical protective measures and issued a 15-year permit.

Since the State and Federal requirements are the same, we were stunned when the Corps disregarded DEQ's delineation and added 36.7 acres of impacted wetlands to the project. The basis of their decision for this 25 percent increase was vague and unsubstantiated. And although we strongly disagreed, we tried to move the permit forward by offering a number of amendments to our proposal that further lessened the environmental impact and provided an extensive alternatives analysis which proved the other options unfeasible.

Five years after we received the State permit, the Corps, utilizing the same regulations, denied our request. The Corps wrongly claimed that we had not adequately addressed information requests even though we had replied to every one, provided offsite analysis, as well as 17 onsite alternatives, and addressed every public comment to multiple public notices.

Frustrated, we modified our project again in an effort to stay out of court and salvage some of our extensive investment. The significantly reduced plan decreased wetland impacts by 84 percent and the Corps accepted this as a modification to our original application. However, the Corps adopted a new regional supplement which expanded the definition of a wetland and we were forced to start over again with a new set of rules.

It has been 11 years since filing our Federal application. We have responded to countless requests for information, studies, and data, only to be met with more delays and requests to update and revise the information. We have hired consultants and experts for an additional delineation, and although many requests appeared to be stalling mechanisms, we have complied again and again. We have been prevented from developing any of our 428 acres for 27 years, and our 15-year State permit will expire in 2018. Our efforts are reflected in the files on these boards.

We fear that the worst is yet to come. The EPA and Corps have finalized a rule further expanding their authority under the Clean Water Act. This rule will lead to increased litigation and delays. Small businesses will not survive under these rules, as most do not have the time and resources to fight. We have spent over $4.5 million in the process and over $40 million in our investment, and still are not close to a permit. If constructed, our project will create jobs, increase property tax revenue, and provide affordable housing.

Thank you for the opportunity to testify, and I look forward to your questions.

[The prepared statement of Ms. Wilkinson follows:]

Senator Sullivan. Thank you, Ms. Wilkinson. That is very powerful testimony. I appreciate this.

Our next witness is Mr. William Buzbee, Professor of Law at Georgetown University Law Center.

Professor Buzbee, you have five minutes for your opening statement.

STATEMENT OF WILLIAM W. BUZBEE, PROFESSOR OF LAW, GEORGETOWN UNIVERSITY

Mr. Buzbee. Thank you, Chairman Sullivan, Ranking Member Whitehouse, and other Committee members. I am William Buzbee, a professor at Georgetown University Law Center. I am pleased to testify today about both application of current Federal law under Clean Water Act, and also briefly comment on the water of the United States rule, known as the Clean Water Rule.

I should also note that previously I have testified at congressional hearings in the House and the Senate on these questions, and also represented a bipartisan brief of former EPA administrators in the Rapanos case, which was also aligned with the George W. Bush Administration.

I think it is important to remember this has been an area of bipartisan support in the past, and I hope it will be again, too.

Rather than covering the remarks I submitted in writing, I want to focus on two main issues. One is given the claims of regulatory overreach, I will address some of those claims and make a few suggestions. And then I will turn to issues of the Clean Water Rule and ways in which I believe it would be a beneficial and good turn in the law.

So, first, on this issue of regulatory overreach, I think first, and most importantly, Federal policy should never be

based on a story, but an assessment of how a regulatory program works overall. And I note today, as in many past hearings, and really since the SWANCC case, up until today, critics of Clean Water Act jurisdiction focus on wetlands and Section 404. It is important to recall that the waters of the United States issue and jurisdiction is the linchpin for all jurisdiction under the Clean Water Act, including industrial pollution discharges.

Second, it is important to look at where the law stands today compared to where it stood prior to the SWANCC case. The Clean Water Act, as measured now, protects less water or fewer waters than it did during the administration of President Ronald Reagan.

Then, as I read the witness statements for today, a few things jumped out at me. First, as is not to be a surprise to any of us, you see unavoidable interaction of Federal, State, and local regulators, and it is important to remember that States' actions here, although sometimes disliked, are protected under the Clean Water Act; they are never forced to accept a project merely because at times it will be federally protected, they are subject to a strong savings clause.

Second, thinking about the Army Corps' work and EPA's work, for a Country as large as the United States, there is a formidable task in trying to provide regulatory consistency and also show sensitivity to local differences; and there is

probably no area more than the Clean Water Act where the jurisdictional determinations call for this balance of rule-like clarity and sensitivity to local circumstances.

Part of this is a result of the Rapanos case. Several of the groups here today on this panel, and past witnesses in similar hearings, were ardent advocates in the Supreme Court, that the Supreme Court should embrace the so-called significant nexus rule, which required, in many circumstances, close attention to individual waters and their characteristics.

Justice Kennedy's now authoritative opinion in Rapanos embraced that and, for good or bad, unless the Clean Water Rule is allowed to take effect, it requires substantial case-specific judgment by regulators about how lands and waters function, including for things like filtering of pollutants and reducing flooding. So this sort of individual discretionary judgments is unfortunately, right now, in part the result of the significant nexus test embraces in Rapanos.

If this is disliked, the Clean Water Rule would bring greater clarity. Also, the earlier Clean Water Restoration Act that was proposed would also bring greater clarity. And you can't have it both ways; you either need rule-like clarity with more law or you need to have discretionary judgments, and right now the law requires quite a bit of regulatory individual judgments.

Looking at the overall data, I was looking it up in response to testimony today, it is important to understand that skirmishes and permit denials are not the norm here. The recent Army Corps data says that there were 79,000 permit activities this past fiscal year; that the Army Corps authorized 57,000 permits, completed 49,000 jurisdictional determinations, and 95 percent were authorized. The remainder received individual permits, and only 1 to 3 percent are subject to denials.

Now, with my last few seconds I would suggest that the Clean Water rule is well grounded in law and science. I notice in statements there are some arguments that EPA and the Army Corps did not have power to act here. It is important to note that six Supreme Court justices in Rapanos called for action by regulation to bring clarity to the law.

Second, as mentioned by Senator Whitehouse, the Clean Water Rule solidifies exemptions and carve-outs, and actually proposes to eliminate completely the longstanding Commerce clause sweep-up provision that allowed regulators to act based on the existence of commerce and industrial linkages. My sense is that the Clean Water Rule is well founded in science and the connectivity report, and should be embraced.

Thank you very much.

[The prepared statement of Mr. Buzbee follows:]

Senator Sullivan. Thank you, Professor Buzbee.

Our final witness today is Mr. Scott Kovarovics. He is the Executive Director of the Izaak Walton League of America.

Scott, you have five minutes for your opening statement. Thank you.

STATEMENT OF SCOTT KOVAROVICS, EXECUTIVE DIRECTOR, IZAAK WALTON LEAGUE OF AMERICA

Mr. Kovarovics. Thank you, Chairman Sullivan and Senator Whitehouse, members of the Subcommittee. I appreciate the opportunity to testify today on the Clean Water Rule. I am Scott Kovarovics, the Executive Director of the Izaak Walton League of America and I am pleased to be here on behalf of not only the League, but the much broader community of Americans who enjoy hunting and angling and outdoor recreation.

The League's 43,000 members nationwide are leading efforts locally to conserve and restore habitat and improve and monitor water quality. Our members enjoy hunting, angling, recreational shooting sports, and a myriad of other outdoor recreation. And our members and sportsmen nationwide understand that healthy natural resources provide the foundation for the outdoor traditions that tens of millions of Americans enjoy every year.

Ensuring our Nation's streams, wetlands, and other waters are healthy is vitally important to Americans who hunt and fish for communities nationwide and for the outdoor recreation economy.

Wetlands and streams provide essential habitat for fish, ducks, and other wildlife. Prairie potholes throughout the northern plains and southern Canada support 50 percent of the North American duck population in an average year. Ducks that

grow to adulthood and hatch in those wetlands are harvested throughout the United States every fall. Headwaters and other small streams provide vital habitat for coldwater fish, provide essential spawning habitat for trout, salmon, and other fish, and support those fish throughout their lifecycles.

Each year, nearly 50 million Americans go into the field to hunt or fish. The money that sportsmen and sportswomen spend benefits major manufacturing industries and small businesses in communities all across this Country. These expenditures directly and indirectly support more than 1.5 million American jobs and ripple through the economy to the tune of $200 billion annually.

And many other forms of outdoor recreation depend on clean water and a healthy environment. According to the Outdoor Industry Association, boating, including canoeing and kayaking, had a total economic impact of $206 billion in 2012, supporting 1.5 million additional jobs in this Country.

The Clean Water Rule is science-based, limited, and more specifically defines waters that are and are not covered by the Clean Water Act. The final rule narrows the historic scope of Clean Water Act jurisdiction. It clearly defines and limits tributaries through physical features and distinguishes tributaries from dry land ditches and erosional features, and it

preserves and enhances existing exemptions for farming, ranching, and other land uses.

Hunting, angling, and conservation groups, including the League, strongly support the final rule. It is also supported by businesses and industries that depend on clean water and a healthy environment. I will give you two quotes that offer examples.

"The Clean Water Rule is good for our business, which depends on clean fishable water. Improving the quality of fishing in America translates directly to our bottom line, to the numbers of employees we hire right here in America, and to the health of our brick and mortar stores all over the Country." That is from Dave Perkins, the Executive Vice Chairman of The Orvis Company that has some 80 retail operations across the Country and employs 1,700 people.

Next, "EPA's rule gives the business community more confidence that clean water sources, including streams and wetlands, are protected, and removes uncertainty surrounding the Agency's authority to protect our waterways. This is good for the economy and vital for businesses that rely on clean water for their success." That is from Richard Eidlin, the Vice President of Policy and Campaigns at the American Sustainable Business Council, which represents 250,000 businesses across the Country.

The exemptions from the Clean Water Act are maintained and enhanced in the Clean Water Rule. As mentioned, since 1977, the Clean Water Act has included a number of exemptions from the 404 permit process for discharges associated with farming, construction, mining, and other activities. Moreover, in an effort to provide even more clarity and certainty about the types of waters covered by the Clean Water Act, the final rule maintains existing regulatory exemptions and for the first time in regulation explicitly excludes specific waters and features from the definition of waters of the United States.

The following summarizes some of those exemptions: prior converted cropland; many drainage ditches; artificially irrigated areas; artificial reflecting pools or swimming pools; small ornamental waters; erosional features, including gullies and rills; puddles; groundwater, including groundwater drained through subsurface drainage systems.

Conserving and protecting streams, wetlands, and other waters is essential to Americans who hunt and fish and enjoy a wide array of other outdoor recreation. These activities depend on clean water and healthy habitat, including abundant wetlands. And these activities fuel the outdoor recreation economy, which totals hundreds of billions of dollars annually and supports millions of American jobs.

The Clean Water Rule is vitally important to safeguarding our Nation's water resources, hunting and angling traditions, and the outdoor recreation economy. The final rule provides more clarity about the waters that are and are not covered by the Clean Water Act. It is based on overwhelming science and common sense, and it responds to common calls from Supreme Court justices, industry, and landowners to clarify agency regulations.

I appreciate the opportunity to testify and happy to answer any questions. Thank you.

[The prepared statement of Mr. Kovarovics follows:]

Senator Sullivan. Well, thank you.

I want to thank all the witnesses. We have a very distinguished panel, a lot of different views, so I think we are going to have a good hearing this afternoon.

I do want to emphasize again that I don't think that any of us, certainly I can say from my experience on this Committee, we are all very focused on clean water, clean air. But the issues that have been raised here about certainty, about the Federal agencies' statutory authority is very, very important from a perspective of oversight; and it is not just members of this Committee who have concerns.

In the last two years, whether it is the WOTUS rule that has now had a Federal judge put a stay on that, whether it is the Clean Power Plan, which the Supreme Court, first time in its history, has put a stay on that before a district court has even ruled on it; several other cases, or even EPA Administrator McCarthy's statement on the eve of the EPA v. Michigan case, where, when asked if she thought she was going to win, she said, yes, but then she said, "Even if we don't, we promulgated this rule three years ago. Most companies and everybody else are already in compliance. Investments have been made. We'll catch up." Essentially, even if we lose, we win; and that is not how the law works.

So there is a lot of concern.

And I do want to mention, again, Ms. Wilkinson, your point about uncertainty in changing the rules, how that impacts our economy, is also very, very powerful.

So let me start with a question that relates to your case; and this is for Mr. Schiff or Ms. Wilkinson. My understanding is the Corps told Ms. Wilkinson's company that they can regulate land even if there is no surface connection to navigable water.

First, I want to know did they actually say that. And can anyone explain to me how a high groundwater table creates Federal jurisdiction, particularly if the groundwater never reaches the surface? Wouldn't all of the State of Florida, for example, be subject to the EPA's jurisdiction if that is actually their legal view of their jurisdiction?

Mr. Schiff, why don't you take a shot at that?

Mr. Schiff. Thank you, Mr. Chairman. For a long time the Corps has used the idea of what they call shallow subsurface connection to justify the basis of Federal jurisdiction, and at bottom it is really an attempt to regulate groundwater and to expand surface jurisdiction without a congressionally appropriate change in the legislation.

So, under the WOTUS rule, this is carried forward under the idea of adjacency jurisdiction; that if there is that shallow subsurface connection, then the Corps will consider your property to be adjacent to and, therefore, subject to regulation

under the Clean Water Act, adjacent to whatever the nearest navigable water may be where that shallow subsurface flow ends up.

Senator Sullivan. So doesn't that greatly expand the jurisdictional reach?

Mr. Schiff. It is hard to imagine, really, any area that otherwise would at least be, prima facie, subject to jurisdiction, because to some extent you are going to have that shallow groundwater flow in almost any part of the Country.

Senator Sullivan. Let me ask you another question. In a hearing last year I asked EPA Administrator Gina McCarthy if permafrost itself was jurisdictional under the proposed WOTUS rule. And, if so, what is the significant nexus between permafrost, which, again, is frozen water and a navigable water, interstate water, or territorial sea. Her response was that permafrost specifically refers to permanently frozen soil. And while permafrost may underlie wetlands or open waters, it is not, in and of itself, a water of the U.S. subject to the rule and the jurisdiction of the rule.

If that is her response, this is the head of the EPA, does the Corps and Alaska agree, in particular with regard to the Schok case that you are working on or more broadly in terms of their guidance?

Mr. Schiff. No. And it is surprising that the administrator would take that position. But the Corps is certainly not reconcilable, its position is not reconcilable with what Administrator McCarthy said. The position of the Corps is that permafrost can qualify not just as a wetland but, much more importantly, as a water of the United States.

Senator Sullivan. Thank you.

Senator Whitehouse?

Senator Whitehouse. Just to follow up on that, it is not your position that because something is permafrost it could not be regulable under the Clean Water Act; i.e., something that is permafrost could, for other reasons, in addition to it being permafrost, make itself properly regulable under the Clean Water Act, correct?

Mr. Schiff. Senator Whitehouse, certainly under existing law it can't be regulated.

Senator Whitehouse. It can't be regulated as permafrost, per se, but one can have an area that is permafrost that is also a wetland, that is also an area through which a stream runs and so forth. So the fact that there is permafrost underneath a wetland feature doesn't disqualify the wetland feature from being regulable.

Mr. Schiff. I think perhaps, Senator Whitehouse, there may be a semantic issue, because the Corps would say that we are not

talking about permafrost underlying a wetland; we are talking about essentially just permafrost.

Senator Whitehouse. And that, I think, is the difference here, and that is what I want to make sure. But your position is not that something just because it is permafrost can't be regulated under the Clean Water Act no matter what other conditions it may be exhibit. Your point is that just because it is permafrost shouldn't be enough to trigger Clean Water Act regulation.

Mr. Schiff. At the very least, yes, that is correct.

Senator Whitehouse. Okay.

And then to go to Mr. Parrish, you have indicated that the Army Corps, to quote you, "still regulates puddles, including puddles in dirt roads, tire ruts, and depressions in gravel parking lots." Could I ask, as a question for the record, that you send me any and all information that you have, any and all paperwork from the Army Corps that substantiates that statement? That is worth, I think, pursuing. It doesn't have to be right now, but we can take that as a question for the record.

Mr. Parrish. I can do that, but I can also bring forth a technical witness that can support that.

Senator Whitehouse. The other question that I had had to do with arroyos. In your testimony, Mr. Schiff, I believe you said because sediment and fertilizer collected in stormwater

could flow through the arroyo into the Rio Grande, the arroyo was regulated under the Clean Water Act. If you are a downstream water user and somebody upstream is dumping pesticides, manure, waste, anything else into an arroyo that they know, you know, everybody knows is a couple times a year going to just flood and wash all that stuff down into the waterway, isn't that something that the EPA should be able to consider in protecting the downstream waterway?

Mr. Schiff. Senator Whitehouse, I would say, first of all, it is hard to imagine any State in the Nation where that sort of activity would also be legal. So I think that it is a clear example of even in that extreme --

Senator Whitehouse. Well, if it is outright illegal, then it certainly shouldn't be a great burden for the EPA to come in and say, look, we are regulating that too.

Mr. Schiff. Well, then you have a question of duplication of effort. And wouldn't it be much better if EPA could focus its authorities and limited budget on those issues that truly raise a federal question?

Senator Whitehouse. Perhaps. But your question was jurisdictional. You are not suggesting that an arroyo, because it is sometimes dry, is always beyond EPA's jurisdiction, no matter what the polluting effects to that arroyo on the downstream waters when it floods?

Mr. Schiff. Well, it is not so much, Senator Whitehouse, what I am suggesting.

Senator Whitehouse. But it is your testimony, so I am trying to clarify it. So it is exactly what you are suggesting.

Mr. Schiff. Well, what I meant to say, Senator Whitehouse, is that it is not my position so much as it is Justice Kennedy's position in the Rapanos case, where he said that there are some tributaries that, because of the quality or quantity of their flow is so small, that it is not in the appropriate --

Senator Whitehouse. Correct. But one can have an arroyo that is on both sides of the Kennedy test. One could have one where there is a significant enough nexus that even though it is dry sometimes, it could still properly be regulated. Or is it your testimony today that no streambed that ever runs dry should be regulable under the Clean Water Act?

Mr. Schiff. No, that is not certainly my testimony. But I would say that ultimately even the Corps, in the case that you mentioned from my written testimony, the Corps itself realized that this was an arroyo that fell on the other side of the line, so to speak, even under Justice Kennedy's test.

Senator Whitehouse. Good. Okay. I agree with you, they could be regulable or not, depending on local conditions and what the actual factual circumstances there on the ground are.

Let me make a concluding point in my last 30 seconds. One is that people who are downstream of manure lagoons or heavily pesticide-laden farmland, or extensive use of fertilizer very often experience really significant effects when that runs off and hits the waterways that they love; whether they want to protect the insects that the fish feed on or whether they just want to have a clean stream going by their children's backyard, I do think that they have an interest in that we should protect.

And the second point is that I think that there is a difference we should reflect between, particularly in a large organization, bad bureaucracy that creates a problem by not being helpful and responsive to individual applicants versus an underlying bad statute. And I think that is an important distinction for us to bear in mind.

Ms. Wilkinson, I am sorry that you had a horrible experience, and I gather it continues.

Senator Sullivan. Chairman Inhofe.

Senator Inhofe. Thank you, Mr. Chairman. I want to put a statement in the record that I didn't want to give in the beginning.

Senator Sullivan. Without objection.

[The referenced information follows:]

Senator Inhofe. Mr. Parrish, do you know Tom Buchanan from Oklahoma, who is the Farm Bureau President there?

Mr. Parrish. Yes, sir.

Senator Inhofe. He testified before this Committee just a few weeks ago, sitting in the same chair where you are now. He was really quite outspoken. He had contended for a long period of time that of all the problems that farmers and ranchers in the State of Oklahoma, and he contended outside also, was nothing that is really found in the agriculture bill, but was overregulation by the EPA and specifically the WOTUS bill. Do you agree with Tom Buchanan?

Mr. Parrish. I do, sir.

Senator Inhofe. He was really quite emotional about it, and it is one that we are all concerned about. The last time Secretary Darcy testified before this Committee I specifically asked her why she was ignoring the language in the energy and water appropriation bills that says the Corps cannot require a permit for ordinary farming activity, and she claimed that they were not doing that now.

Do you think they are doing that now? Do you have an example?

Mr. Parrish. Yes. We believe that they are doing that now.

Senator Inhofe. Well, you know, one of the things that they say, I am not sure how formal this is, but I have heard the Corps and the EPA claim jurisdiction if a farmer wants to change just from grazing to growing hay, or from rice farming or to walnuts or something else. Have you heard that?

Mr. Parrish. I have, sir, and I keep hearing that from my members. If the Chairman would like even more information, Ms. Gallaway here has actually seen on-the-ground results of that.

Senator Inhofe. Mr. Chairman, I would like to ask permission for her to join, without objection, to respond to that question.

Senator Sullivan. Without objection, Ms. Gallaway, you are welcome to join the panelists for additional expertise and information that you want to provide.

Ms. Gallaway. Thank you. Yes, it is my experience on the ground. I am a senior regulatory biologist, work mainly in northern California, and my main role is to help farmers, a variety of clients, public works, cities and States, navigate the Clean Water Act process.

Lately, it has been my experience that the Army Corps of Engineers has considered changing from one crop to another a land use change, and when you incur a land use change, that change becomes under their jurisdiction. For example, a rice farmer going from rice to walnuts, the Corps considers that a

land use change and has submitted letters of inquiry notifying my clients that they are under investigation for potential violations to the Clean Water Act. These land use changes they consider from temporary to permanent crops now fall under their jurisdiction and they are requesting farmers to go consult with them before they change crops.

Senator Inhofe. Okay, now, that is interesting. You are say they actually have a written communication to that effect?

Ms. Gallaway. Several.

Senator Inhofe. All right. I would like to ask if you would give this Committee some of the copies of that, where they are actually making that statement. Would you do that for us?

Ms. Gallaway. I would be happy to.

Senator Inhofe. All right.

Lastly, Mr. Schiff, you referred to this, so I direct this to either Ms. Gallaway or Mr. Parrish or Ms. Wilkinson, that the WOTUS rule has been stayed by the Second Circuit Court of Appeals. So that means that we are still operating under the law; nothing has changed. Now, despite this, are you seeing a federal expansion of federal jurisdiction in on-the-ground activities of the EPA and the Corps of Engineers?

Mr. Schiff, you already mentioned that, but how about you, Ms. Wilkinson?

Ms. Wilkinson. Thank you, Senator Inhofe. It has been our experience that each time the rules are further modified or clarified, that this results on on-the-ground increase in jurisdictional impacts. We have had it happen several times now on our property, since this has been going on for so long. I would also say that these changing regulations just makes it so difficult for a small business to play for the future or to run their business when the interpretations are constantly changing and expanding.

Senator Inhofe. Any comment on that?

Ms. Gallaway. I would like to echo Ms. Wilkinson. That is what I see on a daily basis interacting with the Corps, is each regulator has a different interpretation of what is and what isn't waters of the United States, and that creates a lot of confusion on the ground.

Senator Inhofe. Well, let me just, in my final few seconds here, remind this panel up here that they tried to do this through legislation six years ago. That was an effort. In fact, it was Senators Feingold and Oberstar. And not only did they lose their legislation, they lost their careers, too, at the same time. So this is an issue that has been there for a long time. It is very typical of things that are not being able to be done through legislation are now trying to be done through

regulation, and that, I believe, is what we are experiencing now.

Thank you, Mr. Chairman.

Senator Sullivan. Thank you, Chairman Inhofe.

Senator Rounds.

Senator Rounds. Thank you, Mr. Chairman.

Mr. Parrish, in your testimony you have identified numerous examples of the Army Corps implementing the waters of the U.S. rule despite the nationwide stay. Because of this implementation, farmers are losing the ability to manage their land and utilize it in the best way possible. Can you explain the impact of this early implementation of the WOTUS rule and what it could have in terms of an impact on ag production in the United States?

Mr. Parrish. From a global perspective, we saw a shift in the EPA and the Corps exerting jurisdiction back about three years. What we are seeing is not just them having an impact on the practices that farmers use; we are seeing an actual impact on the way farmers can use their land, and actually prohibitions on the way that they propose to use their land. They do everything possible, in a lot of cases, to try to avoid WOTUS or any impacts to WOTUS. And what we are seeing here are things that are going to have ripple effects throughout the

agricultural economy, not only impacting farmers and ranchers, but impacting the quality and the abundance of our food supply.

Senator Rounds. Mr. Schiff, today we have heard multiple examples of the Army Corps implementing the WOTUS rule, nearly to the point where the property that is subject to the permitting loses its value. When ag land is subject to burdensome and unreasonable permitting requirements based on incomplete information or the illegal implementation of regulations, landowners use the ability to cultivate and properly manage their land, which essentially prohibits farmers and ranchers from using the land which they rightfully own.

Would you consider this illegal implementation of the WOTUS rule a regulatory taking by the Army Corps of Engineers? And, if so, what recourse do the property owners have to prevent the Army Corps from devaluing their property to the point that it becomes practically unsaleable?

Mr. Schiff. Thank you, Senator Rounds, for that question. I do believe that in many of these instances there would be a regulatory taking. The idea is that the Constitution says that the Government cannot take your property for public use without just compensation. And the Supreme Court has made clear that includes in cases where, through environmental or other regulation, you can no longer do anything with your property and, therefore, no longer have any value left. And oftentimes,

with respect to the implementation of the Clean Water Act, that is the result.

One big obstacle that property owners have, though, to vindicating their property rights when they are told they can't use it and they seek compensation is the general rule that one cannot seek compensation until one has first applied for a permit. Unfortunately, Federal agencies, including the Army Corps, oftentimes know this and will drag out the permitting process in order to prevent a claim from being ripened, or what they may do, they may very well recognize that just the permitting process itself can oftentimes cost more than the value of the property in question, so essentially it gives a landowner no effective remedy.

Senator Rounds. Mr. Parrish or Ms. Gallaway, would you like to comment on that?

Ms. Gallaway. Yes, I agree. I mean, just the cost of getting a permit, a nationwide 40 permit in California is close to $40,000, and that is just with a half acre or 300 linear feet of fill. So, if you exceed that, you are at an individual permit. The cost of that in California is $350,000. Those costs do not include mitigation, which can also be $300,000, $400,000 an acre.

Senator Rounds. I think the Ranking Member has brought up something which I think is important, and that is what we have

to begin with is a statute, and I don't think any of us disagree with the statute itself. I think the challenge for us is whether or not the implementation of the statute within either the existing language of rules prior to the implementation of WOTUS are appropriate or if they are so ambiguous that we literally need to upgrade them, or if the WOTUS would have been a better alternative, which I don't think it was; I think they went way beyond that.

But I do think that we have to get back to, as the Ranking Member suggested, a more clear and definitive definition and understanding of what the statute really implied in the first place. And if we want to change it to the point where it looks something like what WOTUS did, I think they have to come back to Congress to actually request permission to expand it over and above what the statute provided for in the first place.

With that, Mr. Chairman, thank you.

Senator Sullivan. Thank you, Senator Rounds.

Senator Markey.

Senator Markey. Thank you, Mr. Chairman, very much.

The Clean Water Act is an American success story. We don't talk about the Cuyahoga River being on the higher anymore. We don't talk about the Charles River as dirty water up in Boston; it is a big success story. Summertime in the Bay State is now filled with students sailing on the Charles and beach days at

Revere Beach, which is the first public beach in America. These are success stories of the Clean Water Act.

But the next chapter in protecting our Nation's waterways is still not complete. There is still work to be done. When the Environmental Protection Agency and the Army Corps of Engineers finalized the recent Clean Water Rule, they did so to clarify longstanding regulatory uncertainty. In fact, many groups on both sides of the aisle asked for clarification. And the foundation of the rule was based on the latest scientific developments.

Over 1,200 scientific studies were reviewed. The conclusion was that upstream wetlands and small streams are vital to health of rivers and lakes downstream. The outreach from EPA and the Army Corps was tremendous and demonstrated they understood seriousness and importance that had to attach to this rule. More than 400 stakeholder group meetings were held across the Country. More than 1 million public comments were reviewed after an extended comment period.

The uncertainty about the Clean Water Rule is not good for business; not good for our communities; not good for our environment. We have a choice in our story's next chapter. We can acknowledge the interconnectedness of our Nation's waterways and the importance of ensuring clean water or allow regulatory

uncertainty to endanger our Nation's waterways and the drinking water for one-third of Americans.

I prefer the chapter with clarity, with clean water, and with a healthy future.

Mr. Buzbee, there have been questions at the start of this hearing about dry areas being regulated. Perhaps you can talk legally about how a seemingly dry area can be important to protect under the Clean Water Rule.

Mr. Buzbee. Thank you, Senator. In the Rapanos case, Justice Scalia wrote a plurality opinion were wanted and called for permanent surface flows and connections, but never received a majority vote in support of that. Justice Kennedy's significant nexus opinion, which is now viewed as the governing one, explicitly calls for attention to a waters functioning. And if you look at the science, and especially the science in the connectivity report, areas like arroyos and other seemingly dry features can, during seasonal rains, especially heavy flows, can be critically important to carrying pollutants downstream and impairing water uses that are of great importance; also helping to control, sometimes, flooding. So what seems to be dry can in fact be very important water for much of this Country.

Senator Markey. Do you feel, Mr. Buzbee, that the regulatory certainty in the definition of waters of the United

States would help to resolve some of the jurisdictional confusions we have heard about today?

Mr. Buzbee. Yes, I think it would help a great deal. The regulation, as written, ties its lines and strengthens its exclusions, but with lots of reference to the connectivity report and peer-reviewed science.

Senator Markey. Okay. So given the contradictory, conflicting court decisions, why is this recent Clean Water Rule an appropriate response to those court cases?

Mr. Buzbee. That is a good question. And basically it is if you look at the three major Supreme Court cases, one case unanimously said there was room for rulemaking under the Clean Water Act and defining what is water of the United States. The next case, the SWANCC case, avoided a constitutional question and also didn't question that possibility; and then six justices in the Rapanos case either applauded regulation or called for regulation to bring greater clarity.

Senator Markey. So they are begging for clarification.

Mr. Buzbee. Yes.

Senator Markey. Please help us. Please don't leave this so confusing. And that is in fact what has been happening.

Mr. Kovarovics, in your written testimony you discuss exclusions. Why do you feel the EPA and the Army Corps specifically listed exclusions in the new Clean Water Rule?

Mr. Kovarovics. I think, again, as Professor Buzbee alluded to, this was designed to provide more clarity, and as you were suggesting, more clarity about what is in and what is out; and I would defer to the professor about the legality of that, but I think, you know, what we have heard about so long in this process is some more clarity, some more bright lines, and that is what I believe the agencies attempted to do.

Senator Markey. Thank you.

Thank you, Mr. Chairman.

Senator Sullivan. Thank you, Senator Markey.

I am going to ask Ms. Gallaway if you can just take your seat again in the audience, and if there are other questions, and I might have one, we will have you come up again. So thank you very much for doing that.

Senator Fischer.

Senator Fischer. Thank you, Mr. Chairman.

As we look into the waters of the U.S. rule, I can tell you in Nebraska, Nebraskans from across the State understand that these are rules that are providing an agency with so much overreach that every Nebraskan's life is affected. It is not just what I call the usual suspects, people in agriculture; it is every taxpayer who has to pay more because of these rules in order to construct or to maintain a road; it is homebuilders who continue to see regulations increased on the cost of a new home,

which is an American dream that is not out of reach for most of us. So when we talk about waters of the U.S., we need to realize the negative impact it has on all citizens across this Country.

Mr. Parrish, I would ask you, in your testimony you discuss the Corps' use of classified aerial photographs to evaluate changes in agricultural activities in relation to historical jurisdictional waters. What does that mean and why are these photographs classified?

Mr. Parrish. Thank you, Senator, for that question. Classified and proprietary. It is pretty amazing to me that the Government, our Government, a Government that is supposed to provide clarity, can use information that the public has no access to it. And it is more than just having access to. We are talking about, from a clarity standpoint, Professor Buzbee, allowing our Federal Government to declare something jurisdictional the naked eye cannot identify. That is a problem.

Senator Fischer. That doesn't really help with certainty, does it?

Mr. Parrish. Absolutely not.

Senator Fischer. Thank you.

I would ask Ms. Gallaway, if I could, Mr. Chairman, has she requested access to those photographs.

Senator Whitehouse. Mr. Chairman, we have an order in this Committee, and we have witnesses who are identified in advance. This was not a witness who was identified in advance. I think we have given the Majority an enormous amount of leeway with a person who has been sort of plucked spontaneously from the audience, and I think that should probably run its course about now.

Senator Fischer. I was just following other members, I would answer to the Ranking Member.

Senator Whitehouse. I appreciate it, but I think we have been out of order for quite a while on this subject.

Senator Sullivan. The Chairman would ask unanimous consent to allow Ms. Gallaway.

Senator Whitehouse. To answer his questions, which she did, not to refer a witness for all purposes --

Senator Sullivan. And if Senator Fischer wants to do the same, --

Senator Whitehouse. Then I will object.

Senator Sullivan. Okay.

Senator Fischer. Thank you.

As a follow-up, Mr. Parrish, if the Corps can selectively enforce section 404 permits based on that historical ordinary high water marks in California, can they do it in Nebraska?

Mr. Parrish. Senator Fischer, we are very afraid that, based on the way we have changed our landscape, if the EPA and the Corps can look back into some kind of ethos out in whatever and determine that we have made mistakes as a society, and go back and start fining individual landowners with criminal and civil penalties, that is a problem. It is a problem because it is not only going to be a problem in California; we are already seeing problems in Louisiana and in Georgia, here in Virginia. We are seeing that all across the Country. So, yes, whether you are talking shallow groundwater connections, whether you are talking invisible, secret science or secret data and maps, it is going to be a problem in Nebraska, yes, ma'am.

Senator Fischer. I would agree.

On this Committee, and especially in this Subcommittee, we focus on the impacts of these overreaching regulations, and it is my understanding that even though the courts have ordered a stay on WOTUS, Federal agencies are still implementing that rule. If the EPA and the Corps succeed in this regulation, what do you think the impacts are going to be on our rural economies in this Country and on our Nation's food supply?

Mr. Parrish. Senator Fischer, when we look at what the impacts are, the regulatory footprint of this regulation and what it means, I mean, technically you are talking about trying to regulate navigable waters. EPA says they are providing

clarity. We think we see four-, five-, ten-fold increase in the jurisdiction as a result of this regulation into things that the public has no real understanding of. We all support clean water. And most of the support for this regulation come from people that clicked on the I Support Clean Water icon and they never read a word of this proposal.

Senator Fischer. Well, we all support clean water.

Mr. Parrish. Absolutely.

Senator Fischer. We support the Clean Water Act. We make that clear in this Committee and on the Floor and in our States all the time.

I would ask Ms. Wilkinson to follow up. In March of 2015 I chaired an EPW Committee hearing in Nebraska on the possible impacts at that time on waters of the U.S., and at the hearing we did have that local homebuilder who spoke about what I thought was a very startling statistic, and that was that 25 percent of the cost of a new home is now due to regulations. Would you agree that regulations are going to continue to go up as a direct result of the rules and regulations under Waters of the U.S.? And what impact is that going to have?

Ms. Wilkinson. Yes, Senator, I would. And it creates such extensive costs that become a hidden burden. Most homeowners don't realize what they are spending their money on when they purchase a home or are unable to purchase a home due to that.

So our costs have certainly been tremendous because we have just been in this changing environment and with an increased assertion of jurisdiction.

Senator Fischer. Thank you very much.

Thank you, Mr. Chairman.

Senator Sullivan. Thank you, Senator Fischer.

Senator Cardin.

Senator Cardin. Thank you, Mr. Chairman. I want to thank all of the witnesses. I was here at the beginning of the hearing, and I listened to the Chairman and the Ranking Member both talk about the importance of clean water, and I thought I just really wanted to make a couple points, and I would be glad to get response.

It is one thing to be for clean water. It is another thing to recognize where we were before we had the Clean Water Act, when rivers caught fire, when bodies of water were not safe to be near. I was involved in the development of the Chesapeake Bay Partnership Program. It started in Maryland under Governor Hughes when I was in the State legislature. We got the surrounding States to join us.

It was never a partisan issue; we always had Democrats and Republicans working together. We not only had governmental partners; we had private sector partners. We had partners from States that did not border the Chesapeake Bay; Pennsylvania, New

York. The headwaters, the waters that come into the Chesapeake Bay come through those areas; and, yes, the watershed areas, the wetlands are all critically important to the Chesapeake Bay.

So I know what it took to get everyone together and dealing with it, and what Senator Whitehouse said is absolutely accurate. Before the two Supreme Court decisions, I don't think the enforcement of the Clean Water Act was controversial. I didn't hear from stakeholders that they thought there was a real problem the way that the Clean Water Act was being enforced. But then we had two Supreme Court decisions, and those two Supreme Court decisions basically brought uncertainty as to what is going to be regulated and what is not going to be regulated; and we have been dealing with that for a long time.

The Supreme Court decisions was really a challenge to Congress to clarify, to make sure that we had it moving forward, and I can tell you I tried. I remember introducing legislation and working on legislation and trying to get Democrats and Republicans, as we did with the Clean Water Act, to come together; and the premise was simple: let's just get us back to where we were before the Supreme Court decisions, because that is where most stakeholders said they were comfortable. And we couldn't get congressional action.

And now you have the Obama Administration with a rule that tries to take us to where we were before the Supreme Court

decisions, where a lot of things are said about it that just aren't true; and we are trying to get predictability. And one thing I hear from my stakeholders: let us know what the rules are. Let us have predictability. We will deal with it. As long as it is rational, we can deal with the rules. What we can't deal with is the uncertainty as to whether something is regulated or not.

So I am somewhat perplexed, I really mean this, as to why there isn't more cooperation to try to give direction to what is regulated and what is not. We have exemptions that have been in law. The farming activities, regular farming activities are protected. That is not what is aimed at the Clean Water Act. Standing bodies of water that do not affect the clean water issues are not regulated.

So why isn't there more of a sense to get something done? Why is it always we are going to be opposed to this? I haven't really heard of an effort to try to get where we were before the Supreme Court cases, where I thought most stakeholders thought we should be.

So what am I saying that doesn't make sense? Nothing. I liked your answer.

Mr. Chairman, I will just yield back the balance of my time. I think I made my point. And I am going to continue to fight on behalf of the people of Maryland and the people of this

Country who recognize the importance of clean water, the number of people whose drinking water comes from these water supplies in this Country and my State, the people who depend upon clean water for their commercial businesses, the people who depend upon clean water for recreation, the people who depend upon clean water for public health. They want me to fight to make sure that we don't return to the days we had before the Clean Water Act, and I am going to do everything I can to make sure that we protect America's public health.

Senator Sullivan. Thank you, Senator Cardin.

I think the Ranking member and I are going to wrap up with a few additional questions, so I appreciate the witnesses here.

I wanted to go back to Mr. Parrish, Mr. Schiff, in your experience, back to farming activities, do the EPA and the Corps now claim that ordinary farming activities like plowing constitute a discharge or a pollutant?

Mr. Parrish. Yes, sir. We are seeing the Corps explicitly regulate activities now that three or four years ago they would not. And, again, we think the statute is clear. We think the congressionally authorized exemptions are clear.

But what you have now is not only is the Corps parsing what a farm exemption is, they are parsing what a ranching exemption is, what a farm exemption is. They are trying to parse out

specifically any changes in use. That is tantamount to land use and the control of land use at the local level.

We see big problems in that because, just for instance, in California alone there has been a drought. Farmers sometimes need to shift from crops that use a lot of water to crops that don't use so much water. If they can't make those kinds of decisions without seeking a permit that takes two or more years to complete, there are some real problems.

Senator Sullivan. And how long have you been farming?

Mr. Parrish. Sir, I grew up in a farm and I started my agricultural career back in the 1980s.

Senator Sullivan. And so that has not always been the case, that kind of requirement for Federal permits when you are shifting crops or shifting activities on your farmland?

Mr. Parrish. That is correct.

Senator Sullivan. So you said you have started to see that kick in about three years ago?

Mr. Parrish. Actually, we saw a more intense focus on agriculture after the economy had the big downturn in 2008 and 2009. My friends over here in the homebuilding industry ultimately stopped; they were in a depression. They stopped building. And we have seen the Corps turn their attention to agricultural uses, agricultural land, and we have seen more focus on agriculture and land use activities since that time.

Senator Sullivan. And let me ask you to follow up. Another question that you talked about is that in the WOTUS rule there is an assertion that the Corps can identify a stream complete, bed, bank, ordinary high water mark from an aerial photograph and that the Corps does not need to do a site visit to confirm where the actual water is present on the property.

Now, in contrast, current Corps guidance requires a site visit, it is mandatory. So are you seeing them implement that aspect of the WOTUS rule, where they are just using aerial photography to make that determination, which, remember, that rule has been stayed. Without that rule, they would have no authority to do that. Are you seeing them do that right now?

Mr. Parrish. Senator Sullivan, I will refer you to Ms. Gallaway's testimony, and in her testimony she explicitly says that she has collected on-the-ground data and presented that to the Corps and had it rejected based on information that the Corps had, aerial photos, imagery that they would not even share with the permittee.

Senator Sullivan. Let me turn to the legal issues that I think are very important, very vexing. To Senator Cardin's statement, we did pass out of this Committee S. 1140, which would have provided very much detail, very much certainty on the WOTUS rule, and when we brought it to the Senate Floor it was filibustered on the ability to proceed. So just to be clear,

this Committee, the Senate, we have tried to clarify this rule, and it has been stymied. So I think that that needs to be stated.

Let me just ask Ms. Wilkinson and Mr. Schiff, can you help us understand how a so-called regional supplement can actually change the definition of what a wetland is either in Virginia or even Alaska, and how that, again, raises the issue of uncertainty that you have focused on in your testimony?

Ms. Wilkinson. Yes. Thank you, Senator. Specifically, the supplement that applies to our area I first want you to understand is very extensive. The supplement itself is one and a half times the 1987 manual. So these are extensive changes that are in the supplement.

Some of the key changes is it changed the wetland hydrology criteria to reduce the time the water must be within 12 inches of the surface, which is what the Corps calls the surface, not where you place your foot, from 30 to 14 days. And it also redefined the growing season from starting at March 15th to essentially year-round based on indicators such as bud break. And it expanded, this is very important, the list of primary and secondary indicators that can be used in certain circumstances to identify a wetland.

Very specifically, on our property, we had a Corps-confirmed delineation on our reduced development in 2007, before

the implementation of the regional supplement, and they confirmed 30 acres of wetland impacts. They have done a new confirmation of the wetland delineation since the regional supplement and said we had 47 acres of wetland impact. That is a 57 percent increase. So that is the specific effect of the regional supplement on our property.

Senator Sullivan. Thank you.

Professor Buzbee, I wanted to ask just a few legal questions, very basic. If the EPA is looking at its jurisdictional reach of the Clean Water Act, can it expand its own jurisdiction? Can it say, well, we know that we have, say, 20,000 square miles of wetlands; we are going to expand it with a broader definition? Or is that something that only the Congress can do in terms of expansion of its jurisdictional reach?

Mr. Buzbee. The statute would govern what the agencies can do, the Army Corps and EPA, but the Army Corps and EPA need to look at the best science and respond to that. So as science changes and develops, whether it is Chesapeake hydrology or understanding of Alaska, the agencies have an obligation to look again at that best information, and that may lead to adjustments one way or the other.

Senator Sullivan. So one thing, and Senator Whitehouse mentioned at the outset, he mentioned that even under the new

rule the EPA has admitted that it is going to expand its jurisdiction under the Clean Water Act by up to 5 percent, which doesn't sound like a lot. We were running the numbers. Five percent of the clean water jurisdiction in Alaska would be expansion of 15,000 square miles. That is ten times the size of Rhode Island.

Senator Whitehouse. Thanks so much for pointing that out, by the way.

[Laughter.]

Senator Sullivan. Sorry. We have a lot of fun with that issue.

[Laughter.]

Senator Sullivan. It is a serious point, though. An even 5 percent expansion of its own jurisdiction, its self-declared expansion in certain States can be an enormous expansion. Don't they need the legal authority to undertake that? I mean, the EPA can't expand its own jurisdictional reach, can they?

Mr. Buzbee. Two things. One is the legal standard is the same, but it is important to understand that science and hydrological science has improved vastly in recent years, and if you actually look at litigation under the Clean Water Act, people will rely on the best science all the time; and this Committee and others committees in the past in the Senate have called for agencies to rely on the best peer-reviewed science.

That can lead to changes in what an agency can justify. So that is not legally grabbing power; that is following what the science leads to.

But also, importantly, my understanding is slightly different, that if you go to SWANCC and the pre-SWANCC period, that the level, the amount of water protected was substantially more than now. Then it dropped back as far as actual assertions of jurisdiction dropped back during the uncertain period. The waters of the United States would restore I thought it was 3 to 5 percent of the jurisdiction, but that it would still be less than it stood during the Reagan Administration.

Senator Sullivan. Senator Barrasso.

Senator Barrasso. Thank you very much, Mr. Chairman.

Mr. Parrish, EPA spent an enormous amount of time and resources defending their waters of the U.S. proposal. Most, if not all, of the resources were focused on communications outside of the Federal Register and outside the formal rulemaking process, to the point that they used social media to do more than just educate the public; they did what the GAO called "covert propaganda." Covert propaganda. So do you think the EPA had an open mind, or even fairly evaluated public comments in the rulemaking process? And how do you think that this agency's social media campaign added confusion to the process?

Mr. Parrish. Senator Barrasso, that is a great question. What we experienced during this rulemaking was unlike anything in my 30 years of regulatory effort that I have ever witnessed. From day one, the Agency campaigned to enact this rule. We think they used very, very carefully worded talking points that were true, but misleading. They mislead the public, they mislead our members; they confused the members of the Farm Bureau as to the exact reach of this regulatory proposal.

And not only did they do that; they used social media to do outreach to the public, and they did it during the rulemaking process, when they are supposed to be open-minded and listen to what the stakeholders had to say about their proposal. Now only did they do it during the rulemaking process; they did it after the rulemaking process closed. And the only reason they would do that, the only reason they would do that is because your legislation, S. 1140, was before this Congress, and they were doing it to try to influence the public and to lobby the public, to lobby against your legislation.

Senator Barrasso. So following up on that, both Mr. Parrish and Mr. Schiff, you take a look at your written testimony, it clearly documents the EPA and the Corps clearly attempted to expand what is a water of the United States, despite the current court stay says about the rule. I think it is important because, as you know, I introduced the legislation

you just referred to; it was bipartisan, the so-called Federal Water Quality Protection Act. It was to repeal the rule and have the EPA go back and draft a new more tailored rule that basically protects families and farmers and small business owners.

But rather than vote for the bill, we had 11 Senators who had expressed concerns with the waters of the U.S. rule. They chose to write this letter rather than to vote against the legislation and, instead, they wrote about their concerns to the EPA and the Corps. The letter stated, "We call on the EPA and the Army Corps of Engineers to provide clear and concise implementation guidance to ensure that the rule is effectively and consistently interpreted."

They went on to say, "Farmers, ranchers, water utilities, local governments and contractors deserve this clarity and certainty." They said, "Should the EPA not provide this clarity or enforce this rule in a way that erodes traditional exemptions, then we reserve the right to support efforts in the future to revise the rule."

So, in your opinion, both of you, has the Corps and the EPA been eroding traditional exemptions since this rule has been issued? And how clear and consistent has the Corps and the EPA been in their decision-making since the rule has been issued?

Mr. Parrish. Senator Barrasso, what we have seen is the agencies eroding the exemptions. We have seen them intrusively trying to not only influence the activities that farmers conduct on their land; they try to influence the way the farmers use their land, flat out. With regard to guidance, it is pure speculation on my part, but I would probably take a bet that EPA and the Corps will not do implementation guidance. They do not plan to; they have stated such. So we don't expect implementation guidance.

Number two, this rule, the specifics of this rule and what expands it, allowing the agencies to use tools that the human eye can't see as affirmative evidence that they can regulate a bed bank and ordinary high water mark, that cannot be changed by guidance. That is an expansion, it is a significant expansion, and the agencies have not been transparent about that. Thank you.

Senator Barrasso. Mr. Schiff, would you like to weigh in on this?

Mr. Schiff. I would just add that it shouldn't be surprising that we are seeing such a dramatic expansion under the WOTUS rule, in part because you look at the exceptions. Why would there be a need to call out an exception for the regulation of puddles or ornamental fixtures? The only reason for those exceptions is because, otherwise, legitimately, the

scope of the rule would cover things like that. So it is not surprising, unfortunately, that the agencies have continued through the WOTUS rule to expand their authority.

Senator Barrasso. Thank you.

Thank you, Mr. Chairman.

Senator Sullivan. Thank you, Senator Barrasso, and thank you for your leadership on this issue. I just wish that your bill would have been able actually to have a vote on the bill because that is what we were trying to do, is bring certainty to this issue.

Again, it was a bipartisan bill, and yet we couldn't get over a filibuster threshold by some of the members of this body, even though it was voted out of this Committee. Some of the members of this Committee voted for the bill, I believe. So the Senate has been trying to bring clarity to this issue because we are hearing you, we are hearing you, and we are hearing from the States.

One final quick question. Professor Buzbee, Mr. Schiff, anyone else, why do you think 34 States have sued to stop the WOTUS rule? That is a pretty big number of U.S. States. I think it is also bipartisan.

Mr. Schiff. I think, Mr. Chairman, one reason is an issue that we haven't touched upon a great deal this afternoon, and that is the federalism implications of the Clean Water Act as

interpreted by EPA and the Army Corps. Nobody is against clean water, but the problem is that the agencies have converted the Clean Water Act, through the WOTUS rule, into a de facto land use ordinance for Federal agencies; and that has traditionally been an area that the States and local governments have been sovereign in, as opposed to the Federal Government. And I think that is what is motivating so many of the States to challenge the rule as a direct threat to their sovereignty.

Senator Sullivan. Professor Buzbee?

Mr. Buzbee. Yes. I am not sure that the number should be taken for all that it appears to be. What started happening now both in Supreme Court litigation and in regulatory matters, is different leading actors in States are taking positions in different cases. So you can have environmental regulators taking one position and the State attorney general is taking another, and then governors taking yet another. So my guess is, if you look at the number of who filed supportive comments and who criticized, the numbers are far more mixed than the number you provided would indicate.

Senator Sullivan. Just for the record, I want to mention a lot of statements about the support for this rule, a million comments. Actually, the head of the Corps testified that only 2 percent of those were substantive comments; 98 percent were form letters or emails that weren't substantive and may have been

part of what Senator Barrasso was talking about, the EPA's social media attempt to get support for their own rule, which was deemed out of line by the GAO.

Senator Whitehouse, I know you want to finish with some questions.

Senator Whitehouse. Thank you. I just wanted to wrap up with a couple of things.

First, Mr. Parrish, same question for the record. Any documents you have that support the proposition that a mere crop change is a regulable activity, I would love to see an exempt of that, or two if you have two examples of it.

Mr. Parrish. We can do that. But you also need to understand, Senator, that the way in which the Corps enforces the Clean Water Act, they scare the dickens out of farmers. They threaten their ability to be an ongoing concern going forward. And we are not talking about big farmers, we are talking about farmers that farm 100 acres or less. And if you are talking hundreds of thousands of dollars to challenge the Agency, they pretty much have to give up the use of their property, or the proposed use of their property and back away from it.

But we will supply that.

Senator Whitehouse. Let's start with just supplying me where a crop change was seen as a regulable event by itself.

Also, you are not suggesting that LIDAR is not a credible means for mapping? We use LIDAR all the time; for coastal mapping, for storm mapping, for FEMA mapping, for all sorts of things. You are comfortable that LIDAR is a legitimate technology, aren't you?

Mr. Parrish. I am comfortable that the Government has access to it; the landowners don't. And the way in which the Government is using it --

Senator Whitehouse. So your issue isn't with the LIDAR.

Mr. Parrish. -- is they are using it in ways --

Senator Whitehouse. Your issue isn't with the use of the LIDAR issue --

Mr. Parrish. They are identifying the -

Senator Whitehouse. Let me just ask my question, if you don't mind. Your issue is not with the use of the LIDAR; your issue is with the fact that the landowner doesn't have access to the information that the Government has generated through LIDAR.

Mr. Parrish. I am taking issue with the fact that they are using it to identify features that you and I could not walk onto the landscape and identify with the naked eye.

Senator Whitehouse. Like altitude?

Mr. Parris. That is problems. That is a problem.

Senator Whitehouse. Well, maybe we need to follow up on this.

Mr. Parris. If they are affirmatively defining, affirmatively using as evidence that information to regulate when the human eye cannot understand or detect it. That is a problem.

Senator Whitehouse. But LIDAR measures altitude.

Mr. Parris. It is, I believe, you know, and these guys are the --

Senator Whitehouse. LIDAR measures the distance.

Mr. Parrish. I believe it is unconstitutionally vague.

Senator Whitehouse. LIDAR, you think, on its own, is unconstitutionally vague?

Mr. Parrish. Using that to define features that are regulated under the Clean Water Act, bring and carry criminal and civil penalties.

Senator Whitehouse. So it would be okay under the FEMA, for coastal protection, but somehow not under the Clean Water Act?

Mr. Parrish. Are you going to find people criminally and civilly liable as a result of that information? That would be the question. And we think that is outside of bounds.

Senator Whitehouse. There are a whole variety of --

Mr. Parrish. We think that is outside of the bounds of a clear regulatory program. There is nothing clear about that, Senator.

Senator Whitehouse. So the Farm Bureau is opposed categorically to the use of LIDAR in Clean Water Act determinations.

Mr. Parrish. We do not have policy on that, but there is a big problem.

Senator Whitehouse. But that is your testimony. Got it. Okay.

Just last, throw the ball to Mr. Buzbee. There have been tons of questions to the agricultural interest and deregulatory interest witnesses and not so many to you, so if you would like to sort of clean up with, I will give you my last minute and 45 seconds.

Mr. Buzbee. Thank you, Senator. I guess the only thing I would say, several people made statements either in questions or witness statements stating that the Army Corps and EPA were effectively enforcing the Waters of the United States Rule, the Clean Water Rule, despite it being stayed, and I don't think there is any evidence of that, and I think it is based on a misunderstanding of how rules work.

So I would just make one quick point about that, which is if an agency promulgates a final regulation and it is put in the Code of Federal Regulations, that becomes binding on everyone; it becomes binding on the courts, it becomes binding on the regulator. And those who are regulated can rely on it to their

benefit or to their detriment; but it becomes the binding law. And that is well established in decades and decades of Supreme Court law.

In the absence of that rule, the agencies still need to undertake regulatory actions. You still have the Clean Water Act; you still have all of the existing regulations which now have not been amended; and you still have these three Supreme Court cases; and you still have the connectivity report, which is what it is, it is a report on science.

So the regulators have been basing actions on all of the existing law and science, as they must do. There is nothing illegitimate about it; indeed, it is their obligation. And if they didn't do so, they would deserve sound criticism.

Senator Whitehouse. And be sued.

Mr. Buzbee. Yes. And the only other point I would say is I don't think anyone would argue in favor of agencies hiding the basis on which they act. If that is going on, then they deserve criticism. But that is different than the issue whether the Clean Water Act itself is misguided. And I don't know enough about the particular actions that are being claimed here, but that is a totally different problem.

Senator Whitehouse. Understood.

Thank you, Chairman.

Senator Sullivan. Thank you. I want to thank the members again. I do want to ask unanimous consent that a letter from the National Association of Realtors and testimony from Mr. Merlin Martin of Martin Firms also be included in the record.

Senator Whitehouse. Without objection.

[The referenced information follows:]

Senator Sullivan. And the record will be open for two weeks to this hearing, so if there is any additional information that you think that this Committee needs to see, please make sure you get it in.

I want to thank the witnesses for their testimony.

Mr. Parrish, I want to respond to your comments about Federal agencies that can scare the dickens out of farmers. I know that some of you continue to deal with the EPA and the Corps on a regular basis. My view is that the vast, vast majority of our Federal Government officials do their job honorably.

But as your testimony indicated, some of you may be concerned about retribution for speaking out. You still have permits, unfortunately decades long in terms of the wait, and if you feel that a Federal employee has in any way treated you, any of the witnesses here, differently because you had the courage to bring your concerns to this Subcommittee and share them with the United States Senate, first of all, that would be unconscionable, it would be illegal. We would certainly want you to inform me or my office if you feel that any Federal official is retaliating against you for providing this very important information to Congress at this hearing today.

Again, I want to thank all the witnesses. This was a very informative hearing for all of us.

This hearing is adjourned.

[Whereupon, at 4:12 p.m. the subcommittee was adjourned.]