

DRAFT

**IMPACTS OF THE PROPOSED “WATERS OF
THE UNITED STATES” RULE ON STATE AND
LOCAL GOVERNMENTS**

Wednesday, February 4, 2015

HOUSE OF REPRESENTATIVES,
COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE,
JOINT WITH THE
UNITED STATES SENATE,
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS,
Washington, DC.

The committees met, pursuant to call, at 10:06 a.m., in Room HVC–210, Capitol Visitor Center, Hon. Bill Shuster (Chairman of the Committee on Transportation and Infrastructure) presiding.

Mr. SHUSTER. The hearing will come to order.

I want to first take the opportunity to welcome everybody here today and especially our witnesses, Administrator McCarthy and Secretary Darcy. Thanks for being here today.

And, again, welcome to the “waters of the United States,” the proposed rule, on how it is going to work with State and local governments.

Before we get started, I would like to explain how we will begin our hearing today. And, first of all, full disclosure: I have never run a bicameral hearing today. So if I stumble and bumble a little bit, please bear with me.

As I mentioned, on the House side, when the gavel went down, everybody’s name has been logged in, and we will go in the order of seniority if you were here at the gavel. The Senate will follow with Senator Inhofe’s, Chairman Inhofe’s direction.

Opening statements will be limited to 5 minutes, and there will just be four: both full committee chairs and both full committee ranking members. Other Members wishing to make statements may use their questioning time to do so, or they can have their statements entered into the record.

There will be a single round of questioning on each panel. We have two panels. The 5-minute rule will be strictly enforced. I have a quick gavel hand, so when you hear me tapping, please wrap up. Please try to watch.

Again, there is a lot of interest here today. There were 59 members of our committee, which is the entire committee, who said they will be attending today. I believe all the Senators also said, so potential for 79 people to be here asking questions. So, again, I would encourage you to watch the time so I don’t have to gavel you down.

Again, Members will be recognized—we will be alternating between the Senate and the House, Republicans and Democrats—Senate Republican, House Republican, Senate Democrat, House Democrat. That doesn't sound like the way we worked it out. I will figure it out as we go along.

OK. Again, as I mentioned, Members arriving for the gavel will be recognized first, and those that arrived after the gavel will be put in the queue.

Again, I want to thank Senator Inhofe and Senator Boxer for agreeing to hold this bicameral hearing. Senator Boxer has experience with this. We held a bicameral hearing in Los Angeles that I took part in a couple years ago. So she is the pro at this.

As we all know, last April, the administration proposed a rule that would expand the reach of the Federal Government under the Clean Water Act. This proposal is troubling for a variety of reasons, but I will sum up my biggest concerns.

The rule undermines the Federal-State partnership under the Clean Water Act. This partnership is the basis of the act's success over the last 4 decades in improving our water quality. Let me repeat again: Our water quality has continued to improve over the last 4 decades. And Republicans as much as Democrats, people at the Federal level as much as State and local, care about clean water deeply. And that is a positive thing, that we have seen our water continue to become cleaner and cleaner.

Many States and local governments, including my State of Pennsylvania, are objecting to this erosion of the partnership and the authority. This rule wrongly assumes that States and local governments, including Pennsylvania, don't know how or don't care about protecting the waters. And, as I mentioned, I think we all deeply care about that.

And while the agencies has had an opportunity to develop a reasonable rule, they instead chose to write the proposed rule vaguely in order to give the Federal regulators free rein to claim Federal jurisdiction over most any water or wet area.

This rule was developed by the administration without consulting State and local authorities, without considering their rights, their responsibilities, their liabilities, and their budgets, and without realistically examining the potential economic and legal impacts on agriculture and other stakeholders.

If this rule goes into effect, it will open the door for Federal Government to regulate just about anyplace where water collects and, in some cases, regulate land-use activities. This will cause serious consequences for the economy. It will threaten jobs and result in costly litigation. It will negatively impact businesses, farmers, homes, road builders, and other job creators. And, most importantly, it will negatively impact hardworking, middle-class Americans.

It will trample the rights of State and local governments and their ability to make economic development decisions and, more importantly, public safety decisions. It will restrict the rights of private citizens to decide what they do on their own land.

Make no mistake, as I said, it will hurt the middle class, driving up the cost of food, driving up the cost to own a home. And, again, hardworking, middle-class Americans will be affected.

This rule is an end-run around Congress and another example of overreach by the administration. It was twice rejected by Democratic majorities. It was twice rejected by the Supreme Court. This proposal tries to force Federal control over the lives of our citizens, and not all water needs to be subjected to Federal jurisdiction. States should have primary responsibility for regulating waters within their individual boundaries.

Instead of racing to pass down another Federal edict, these agencies should collaborate with the States and local governments and other affected stakeholders.

I am pleased that we are having this hearing today.

And, once again, I want to make note to my colleagues that the 5 minutes just expired and I am finished with my statement. So, with that, I would now like to recognize Chairman Inhofe for an opening statement.

[Mr. Shuster's prepared statement follows:]***** COMMITTEE INSERT *****

Senator INHOFE. Thank you, Chairman Shuster.

It is an honor to be here with our witnesses also.

I have a number of the same concerns that you do and that you stated in your opening statement, which I will not be redundant, but my concerns stem not only from the substance of the rule but also from the thought process employed by your agencies in developing it, I say to Ms. McCarthy.

And let me also make this statement too. The other day, Senator Boxer and I, we remembered, recalled, that the Clean Air Act was successful, that we were both in the House at that time, and we both were cosponsors of the amendments of 1990, was it?

Senator BOXER. Uh-huh.

Senator INHOFE. And so we have had successes. But we have some problems right now that we are looking at that do concern me.

First, I take issue with the fact that the proposed rule, if finalized, would significantly expand Federal authority under the Clean Water Act beyond what was intended both by the act and by the amendments. Agencies can only carry out the authority that Congress gives them; they can't create it unilaterally. And that is what I believe is happening now.

I am troubled by the fact that, for many years, the EPA and the Corps have embarked on what seems to be a relentless quest to expand the definition of "waters of the United States" and, therefore, Federal authority under the Clean Water Act. This agenda has been advanced in individual permit decisions by the Corps districts across our country.

But the Supreme Court drew the line when you tried to claim jurisdiction over isolated ponds and wetlands because birds could fly there and again when you tried to claim jurisdiction over wetlands adjacent to ditches and dry channels. The Supreme Court expressly rejected broad assertions over regulatory authority and made it clear that all water is not subject to Federal jurisdiction under the Clean Water Act.

Instead of respecting these limits on your authority, you then tried to memorialize the most extreme examples of bureaucratic

overreach, first in the 2011 guidance document and now in this proposed rule.

If this rule is finalized without change, few water bodies and, indeed, few areas of land would escape the regulatory grip of the Federal Government, an outcome the Supreme Court deemed unlawful and impermissible.

We all remember what happened in other efforts legislatively. They made an effort to try to change this and, at that time, take the word “navigable” out. As I recall, that was Senator Feingold and Congressman Oberstar. We defeated their efforts. In fact, they were both defeated at the polls shortly after that.

So I think that this is an issue that certainly has everyone’s attention, and I think it is really wise to have this first hearing. This is the first time I remember in 8 years that we have had a joint hearing, but it is that significant.

Now, granted, I am from a rural State, I am from a farm State, and they are very much concerned, in an arid State like Oklahoma, that we could end up with jurisdiction of the Federal Government coming in and doing things that are very punitive. And we are going to do everything we can to see that that doesn’t happen.

So I thank you for joining us and having this as a joint hearing today.

[Prepared statement of Senator Inhofe follows:]***** COMMITTEE INSERT *****

Mr. SHUSTER. Thank you, Mr. Chairman.

And, with that, we will recognize Mr. DeFazio for an opening statement.

Mr. DEFAZIO. Thank you, Mr. Chairman.

Broadly, we are here because I remember this, and many of the Members sitting on this panel are old enough to remember this: The Cuyahoga River actually burned. They used to have signs on the bridges, “Do not throw lighted object from bridge. Flammable object below.” That is good.

So, you know, we passed the Clean Water Act. Good start, based strongly in 20th-century, mid-20th-century science. But Congress has failed to revisit the Clean Water Act meaningfully since 1987. Science has advanced. Our understanding of waters and their value and their permeability over artificial boundaries between States has grown during that time period. Yet Congress hasn’t acted.

The Supreme Court has. We have confusing, conflicting guidance, a 4–1–4 decision by the Supreme Court. They basically begged Congress to act or the agencies to clarify when they put forward that ruling.

Yet what we have had is, you know, we had the Bush administration attempting to put forward guidance, 2003 and 2008. And their guidance was said to be, quote, “a hodgepodge of ad-hoc and inconsistent jurisdictional theories.” That was a comment by the Farm Bureau at the time.

I think their guidance failed on two counts. One is to give us the protections we need and, secondly, to give us the regulatory certainty that the economy needs and those who are working in and around waters of the U.S. Failed on both counts. I think there is some agreement on that, yet last year the House passed a bill that

would have locked us into the 2003/2008 guidance forever. No changes could be made, no matter what was brought forward.

And that is what brings us here today. The issue is, was the rule as proposed initially confusing? Yes. Did it raise concerns, tremendous concerns? Yes. They have had about a million comments. The question is, what has happened since? Has the Agency heard from those million comments? Have they clarified? Have they modified it? I hear they have and they are working on that, and yet there are some who want to bring that process to a halt before it is mature.

If the Agency goes forward with a rule and it is not stopped by Congress—Congress has many tools at its disposal, including the 60-day regulatory review process where, if it is found to be objectionable, Congress can register its objections by overturning the rule. Or we have other tools at our disposal.

But I believe we should let the Agency go forward. I believe they have heard the concerns. I mean, I am going to be questioning on the issues of ditches, on the issues of agriculture practices and erosional features and those sorts of things. Have those things been clarified?

You know, I believe that, in acting, they need to do three things: It should be conducted more transparently. They should post all the comments that have been submitted. They should continue to meet with stakeholders. The final rule should be guided by science and the law. It should not expand Federal authority over waters never before covered by this act. And, third, they need to move quickly to end the confusion and the uncertainty and get the rule out.

So I think what we are here today is to figure out if they are on that path or not. And if they are on that path, I believe we should let them proceed. If they are not, then perhaps further action is warranted.

Thank you, Mr. Chairman.

[Mr. DeFazio's prepared statement follows:]***** COMMITTEE INSERT *****

Mr. SHUSTER. Thank you, Mr. DeFazio.

Now I will recognize Senator Boxer.

Senator BOXER. Thank you so much, Mr. Chairman, for this joint hearing, where I think if everyone shows up maybe half the Congress will be here. It is great for me to be with my House colleagues. I served proudly there for 10 years. I have ultimate respect for the House as well as, of course, for the Senate.

Mr. Chairman, as you know, I have been around a while. I have never had a constituent of either party come up to me and say, Barbara—or Senator Boxer, depending on how well they knew me—Barbara, the water is too clean, you know, the air is too pure. Never. On the contrary, they want their families protected. And this goes for people of every party. And it has been kind of my mantra for so many years to protect them.

And I want to remind folks that the Senate committee is called the Environment and Public Works Committee, not the anti-environment public works committee. And so my concern here today is that we are focusing on the wrong thing. I want to focus on what we need to do to keep our families safe.

We heard eloquently from all my colleagues. Congressman DeFazio reminded us that a long time ago, decades ago, the Cuyahoga River in Cleveland was on fire. Lakes were dying from pollution. Why do you think Congress, in the most bipartisan way, passed the Clean Water Act? Because the people demanded it.

And, unfortunately, the beat goes on. Even with our landmark laws—and my colleague is correct. We agree that the Clean Air Act was successful. He doesn't love it so much now, but he liked it then, and I liked it then. And I think we need to keep on top of the challenges.

Let me tell you one. Recent events in Toledo, Ohio, on the shores of Lake Erie remind us that the battle to protect our Nation's water continues. Last summer, a half-million Toledo residents went without drinking water for days because nutrient pollution washed into Lake Erie, causing toxic algae to bloom. Because what happens is what goes on upstream and flows into our recreational lakes and our drinking water is what this rule is all about, how do we protect that water.

Now, one in three Americans, 117 million people, get some or all of their drinking water from water systems that rely, in part, on small streams, including many that may not flow year-round.

The point is, what we do here—and I want to compliment the Obama administration, represented ably by two fantastic women, I might say—what they are doing is in the tradition of bipartisanism. Because when you look back, defending our waterways from pollution used to be bipartisan. The Reagan administration and the George W. Bush administration defended the broad scope of the Clean Water Act before the Supreme Court. And, for decades, Members of both parties understood that wetlands, lakes, and small streams are interconnected and water pollution must be controlled at its source.

This is not hyperbole. I would not be here were it not for Republicans in my State who support a clean environment. That is the truth.

Now, I guess what I need to tell you is that a variety of stakeholders support the proposed Clean Water rule. A September 2012 poll found that, regardless of political affiliation, 79 percent of hunters and anglers favor restoring Clean Water Act protections to wetlands and waterways, including smaller creeks and streams. A 2014 poll found 80 percent of small-business owners support protections for upstream headwaters and wetlands in the proposed Clean Water rule.

There has been a lot of misinformation. When I heard my colleagues say, "Oh, my God, the Obama administration wants to protect a puddle," I thought, "That can't be." Well, it isn't. You don't, at all. A puddle, swimming pools, stock ponds are not regulated. We know that for a fact. And isolated ponds that were mentioned by my friend, my dear friend Senator Inhofe, they are not involved in this at all.

So let's set aside fact from fiction. Let's work together on a rule that makes sense. So many people have spoken and given their opinions. I have it in this testimony, which I ask unanimous consent to include in the record.

Mr. SHUSTER. With no objection, so ordered.

[The information follows:]***** COMMITTEE INSERT

Senator BOXER. And I am going to ask about some of their comments.

But it is time to restore much-needed certainty, consistency, and effectiveness to the Clean Water Act and put our Nation back on track toward clean and healthy waters for every one of our constituents.

Thank you very much.

[Senator Boxer's prepared statement follows:]***** COMMITTEE INSERT *****

Mr. SHUSTER. I thank the Senator.

And, again, it is my pleasure to welcome our first panel again. Today, it is the Honorable Gina McCarthy, who is the Administrator of the U.S. Environmental Protection Agency, and the Honorable Jo-Ellen Darcy, Assistant Secretary of the Army for Civil Works.

I ask unanimous consent that our witnesses' full statements be included in the record.

Without objection, so ordered.

And since your full statements are part of the written testimony, I would ask you to limit your testimony today to 5 minutes.

And, with that, Administrator McCarthy, you may proceed.

**TESTIMONY OF THE HON. GINA MCCARTHY, ADMINISTRATOR,
U.S. ENVIRONMENTAL PROTECTION AGENCY; AND THE HON.
JO-ELLEN DARCY, ASSISTANT SECRETARY OF THE ARMY
FOR CIVIL WORKS**

Ms. MCCARTHY. Good morning, Chairman Inhofe, Ranking Member Boxer, Chairman Shuster, Ranking Member DeFazio, and members of both committees. I am very pleased to be here to testify with Assistant Secretary Jo-Ellen Darcy to discuss EPA and the U.S. Army Corps of Engineers' proposed Clean Water rule.

Our goal in this rule is very straightforward. It is to respond to requests from stakeholders across the country to make the process of identifying waters protected under the Clean Water Act easier to understand, to make it more predictable and more consistent with the law and peer-reviewed science.

We believe the result of this rulemaking will be to improve the process for making jurisdictional determinations under the Clean Water Act by minimizing delays in costs, to make protections of the Nation's clean waters more effective, and to improve predictability and consistency for landowners.

The foundation of the agencies' rulemaking effort to clarify protections under the Clean Water Act is the goal of providing clean and safe water for all Americans.

Consider these facts about the value of clean water to Americans: Manufacturing companies use 9 trillion gallons of freshwater every day. Thirty-one percent of all water withdrawals in the U.S. are for irrigation. About 40 million anglers spend \$45 billion annually to fish in U.S. waters. The beverage industry uses more than 12 billion gallons of water annually to produce products valued at \$58 billion. And approximately 117 million people get their drinking

water from public systems that rely on seasonal, rain-dependent, and headwater streams.

In recent years, several Supreme Court decisions have raised questions regarding the geographic scope of the Clean Water Act. In response to these questions as well as significant stakeholder requests for our rulemaking, the agencies began developing a proposed rule. The agencies' proposed rule provides continuity with existing regulations where possible. And we can reduce confusion and transaction costs for the regulated community and the agencies as we move forward with the final rule.

To that end, the agencies proposed specific categories of rules that are and are not jurisdictional. The proposed rule also discusses several regulatory alternatives that would reduce or eliminate the need for case-specific evaluations and provide greater clarity.

Using the input from our discussions with the agriculture community, EPA and the Corps are coordinating with USDA to ensure that concerns raised by farmers in the agriculture industry are effectively addressed in the final rule. The final rule will not change in any way existing Clean Water Act exemptions from permitting for discharges of dredged and/or fill materials into the waters of the U.S. associated with agriculture, ranching, and forestry activities.

I also want to emphasize that farmers, ranchers, and foresters who are conducting the activities conducted by the exemptions, like plowing, tilling, planting, harvesting, building and maintaining roads, ponds, and ditches, and many other activities, can continue these practices after the new rule without the need for any approval from the Federal Government.

Additionally, we expect to clarify for the first time in regulation that groundwater is not subject to the Clean Water Act. The proposed rule reduces jurisdiction over ditches and maintains the long-standing exclusions of prior converted cropland and waste treatment systems, including treatment ponds and lagoons.

In preparation for the proposed rule, the EPA reviewed and summarized more than 1,200 peer-reviewed scientific papers and other data, and the EPA's Office of Research Development prepared a draft peer-reviewed synthesis of public peer-reviewed scientific literature. This draft report informed the agencies' development of the proposed rule.

The draft report itself underwent independent peer review, led by EPA's Science Advisory Board. And the final report was published in the Federal Register on January 15, 2015. The final rule will carefully reflect the SAB's recommendations and all the data and information presented in the final report.

We also want to emphasize that EPA responded to a request from the Scientific Advisory Board to review the effectiveness in basing the agencies' proposed rule on the best available peer-reviewed science, and that conclusion is also part of the docket and supportive of this rulemaking moving forward.

So let me conclude by emphasizing my strong belief that what is good for the environment is good also for farmers, ranchers, foresters, manufacturers, homebuilders, small businesses, and everyone in the United States. We all want clean water, and this rule

will help ensure that we can identify the waters necessary to protect with clarity so that all these activities can continue.

So I look forward to answering your questions.

[Ms. McCarthy's prepared statement follows:]***** INSERT
1-1 *****

Mr. SHUSTER. Thank you, Administrator McCarthy.

And now I will recognize Secretary Darcy for her statement.

Ms. DARCY. Thank you. Thank you, Mr. Chairman.

Chairman Shuster, Chairman Inhofe, Ranking Member DeFazio, Ranking Member Boxer, thank you for letting me testify today alongside my friend and colleague Gina McCarthy.

We believe that the proposed rule provides the clarity, the consistency, and the predictability that Members of Congress and the regulated public have requested. It balances the protection of our Nation's aquatic resources while allowing fair and reasonable development. Most importantly, our proposal is based upon science, including a peer-reviewed report on connectivity and the recommendations of EPA's Science Advisory Board.

Under section 404 of the Clean Water Act, the Corps regulates discharges of dredged or fill materials into waters of the United States, including wetlands. Nationwide, the Corps makes final decisions on over 81,000 permit-related activities and approximately 56,000 jurisdictional determinations annually, so efficiency is very important to us as well as the regulated community that we serve.

The proposed rule is fully consistent with several Supreme Court decisions regarding the Clean Water Act jurisdiction, specifically the Riverside Bayview Homes, regarding adjacent wetlands; the SWANCC decision, having to do with isolated water bodies; and the Rapanos decision, which dealt with waters that are not navigable in the traditional sense. It was in the Rapanos decision that Justice Kennedy stressed the notion that waters that possess a significant nexus to navigable waters could reasonably be made, so are subject to Clean Water Act jurisdiction.

Based upon policy guidance that was promulgated in 2003 and in 2008, we have been doing case-specific significant-nexus analysis determination for many categories of nonnavigable streams and wetlands. These determinations require extensive documentation, fieldwork requiring significant resources and time.

Permit applications have on a regular basis—or, permit applicants have expressed concern about how significant-nexus determinations are being made. We have received comments from Congress, business, industry, agriculture interests, scientists, other stakeholders, and the public urging us to pursue a notice-and-comment rulemaking. Chief Justice Roberts himself, in the Rapanos decision, stated that the agencies would be in a better position if they had conducted a notice-and-comment rulemaking.

As noted by the Administrator, the proposed rule retains much of the structure of the Agency's longstanding definition of "waters of the United States," including many of the existing provisions not directly impacted by Rapanos and SWANCC. The agencies are not proposing to substantively change the provisions of traditional navigable waters, interstate waters, and the territorial seas.

For the first time, we are proposing a regulatory definition for the term "tributaries." Only those waters that flow into a tradi-

tional navigable water, interstate water, or territorial sea are jurisdictional as tributaries. We also propose that the term “adjacent” cover both adjacent wetlands and other adjacent water bodies.

These new definitions will significantly clarify what waters are jurisdictional by rule using well-understood ecological concepts. For some categories of waters, no additional site-specific analysis would be required for certain adjacent waters.

Our decision to regulate by rule all tributaries and adjacent waters and wetlands is based on our understanding that these waters, alone or in combination with similarly situated waters in a watershed, have a significant nexus to a traditional navigable water, interstate water, or territorial sea. And this is based on the currently available science.

By decreasing the number of jurisdictional determinations that require a case-specific significant-nexus analysis evaluation, the proposed rule is expected to reduce documentation requirements and processing times for these.

The agencies propose for the first time to exclude by rule certain waters and features over which the agencies have a policy to assert jurisdiction, such as certain ditches. Waters and features that are determined to be excluded from the jurisdiction will not be jurisdictional under “waters of the U.S.”

Over a million comments were received, as the Administrator indicated, and we intend to consider each of those comments when we develop the final rule.

And thank you. I see my time has expired. Thank you.

[Ms. Darcy’s prepared statement follows:]***** INSERT 1–2 *****

Mr. SHUSTER. Thank you, Madam Secretary.

And, with that, again, we are going to go to questions. And the way we are going to run it, again, is I will go to a Senate Republican, Senate Democrat, then back to a House Republican and House Democrat.

So, with that, I yield 5 minutes of questions to Chairman Inhofe.

Senator INHOFE. Thank you, Mr. Chairman.

Ms. McCarthy, when you first opened up, you said that you were responding to the stakeholders across the country. And as I read the statements from the stakeholders across the country, they all seem to be on the other side of this. I would almost have to ask you who you are referring to.

The Small Business Office of Advocacy states, “Advocacy advises the agencies to withdraw the rule” and conduct a small-business review panel prior to promulgating the rule.

And I would ask unanimous consent that that letter be placed in the record at this point, Mr. Chairman.

Mr. SHUSTER. Without objection, so ordered.

[The information follows:]***** COMMITTEE INSERT *****

Senator INHOFE. The Regulatory Flexibility Act requires the examination of impacts of proposed rules. This is something that wasn’t done.

Groups like municipal groups, the U.S. Conference of Mayors, National League of Cities, National Association of Counties, Na-

tional Association of Regional Councils—all of them are very much on the other side.

Now, we are going to hear, I know, from our attorney general, Scott Pruitt, and from others in the second panel, and I am anxious to get to that second panel.

Let me make one comment, Mr. Chairman, that we are having, right now, our confirmation hearing on Ash Carter to be Secretary of Defense. I may have to be leaving from time to time for that purpose.

Ms. McCarthy, our attorney general, Scott Pruitt, believes that your proposal exceeded your authority under the Clean Water Act and points out in his testimony that the Supreme Court stopped the Corps from regulating nonnavigable isolated intrastate water, but your proposal would bring all of these under Federal control because of use by the birds and animals.

Can you explain to us how the use of water by a bird or animal can be a legal basis for regulating water under the Clean Water Act, briefly?

Ms. MCCARTHY. Senator, it is my understanding that that is not sufficient as a sole reason for jurisdiction. And that was indicated—

Senator INHOFE. All right. That is—

Ms. MCCARTHY. —by the Supreme Court. But that is not what this rule intends to do or specifically does.

Senator INHOFE. All right.

Adam Putnam, the Florida Commissioner of Agriculture, says that on farms in Florida there are low spots, ditches, irrigation channels that capture, store, and carry water from rainfall.

Will your final rule make it clear that these features are not “waters of the United States”?

Ms. MCCARTHY. In this final rule, we actually reduce the jurisdiction of the Clean Water Act relative to ditches by making clear that there are a variety of other ditches that should be excluded from jurisdiction.

And we do the best we can to explain those from erosional features, but I will say that there has been a lot of comment that indicate confusion there. And we are really looking forward to clarifying that, because in no way do we intend to reduce the exclusions or exemptions that are currently in the Clean Water Act.

Senator INHOFE. Thank you.

The EPA has described concerns about Federal control over fields and industrial facilities, really any piece of land that is not flat, because when it rains, that water runs downhill and forms drainage features such as—and they declare that as a myth.

Now, this thing here is from Tennessee. It is a picture of a farmer’s field in Tennessee. The State of Tennessee said it was a wet-weather conveyance. In other words, it only had moving water when it rains. But the Corps called it a stream, subjecting it to your proposed new regulation.

Do you agree with the Corps?

Ms. MCCARTHY. I am sorry, sir. I can’t, on the basis of a picture, make a science determination.

Part of the reason to do this rule is to look at the current science and to try to provide the clarity that people need so that the determinations are clear, the reasons why are clear, and people can ac-

tually do farming and agriculture and ranching with much more certainty.

Senator INHOFE. Ms. Darcy, was that an accurate representation of your or the Corps' comments?

Ms. DARCY. Yes, sir.

Senator INHOFE. All right.

And you also said in a press conference, you said that the increase—talking about the President's budget—the increase that would be going to the Corps was linked to the proposed rule that we are talking about today. Was that accurate?

Ms. DARCY. Yes.

Senator INHOFE. So if this proposed rule goes final, are you going to need those additional resources to regulate more waters?

Ms. DARCY. We will need those additional resources to implement the rule, sir.

Senator INHOFE. Thank you, Mr. Chairman.

Mr. SHUSTER. Thank you, Mr. Chairman.

And, with that, Senator Boxer is recognized for 5 minutes for questions.

Senator BOXER. Thank you, Mr. Chairman.

I would like to place into the record letters that I have received at the committee from over 1,000 groups from 44 States supporting this proposal.

And I am going to read just some of them to give colleagues an idea of the broad support this rule is receiving: America's Great Waters Coalition, American Fisheries Society, American Public Health Association, American Rivers, American Sustainable Business Council, Association of State Floodplain Managers, Great Lakes Coalition, Outdoor Alliance, Outdoor Industry Association, Rural Coalition, Society of Wetland Scientists, Southern Environmental Law Center, U.S. Shorebird Conservation Partnership, Waterkeeper Alliance, Alaska Independent Fishermen's Marketing Association, EPA Region 10 Regional Tribal Operations Committee, the Alabama Rivers Alliance.

In California, just to name a few: the California Association of Sanitation Agency, California's water boards, the Golden Gate Salmon Association.

In Colorado, a joint comment letter from 43 elected officials.

In Oklahoma, the Conservation Coalition of Oklahoma, the Groundwater Protection Council, the Indian Country Agriculture and Resource Development Corporation, a number of others.

In Oregon, a number, including the city of Portland.

In Pennsylvania, a joint letter from 74 Pennsylvania NGOs, a whole list from Pennsylvania, including a Philadelphia resolution in support of the rule, League of Women Voters of Pennsylvania, and it goes on.

So I want to put those letters in the record, if there is no objection.

Mr. SHUSTER. Without objection, so ordered.

[The information follows:]***** COMMITTEE INSERT

Senator BOXER. Ms. McCarthy, we have heard claims that many waters would be regulated that are actually exempted from your rule.

So can you clarify? If you can do it with a “yes” or “no” or a “maybe.” And then if you say “maybe,” we will go into it.

Isolated puddles.

Ms. MCCARTHY. Exempted.

Senator BOXER. I can’t hear you.

Ms. MCCARTHY. I apologize. They continue to be exempt.

Senator BOXER. So isolated puddles are not regulated. Is that correct?

Ms. MCCARTHY. That is correct.

Senator BOXER. Isolated ponds not connected to other waters, are those going to be regulated under your rule?

Ms. MCCARTHY. No.

Senator BOXER. Artificially irrigated areas, will they be regulated under your rule?

Ms. MCCARTHY. No, Senator.

Senator BOXER. Reflecting pools and summer pools, will they be regulated under your rule?

Ms. MCCARTHY. No, Senator.

Senator BOXER. What about water-filled depressions that are incidental to construction, will they be regulated under your rule?

Ms. MCCARTHY. No.

Senator BOXER. Jo-Ellen Darcy, do you agree with that?

Ms. DARCY. I do, Senator.

Senator BOXER. OK.

I would ask unanimous consent to place into the record a very interesting press release from business leaders who support this rule, the American Sustainable Business Council. So I would ask permission to get that into the record.

Mr. SHUSTER. Without objection, so ordered.

[The information follows:]***** COMMITTEE INSERT *****

Senator BOXER. And, finally, I wanted to talk about the many comments that were received. Could you tell us how many comments were received approximately? My understanding is about a million, but I am not sure I am right on that.

Ms. DARCY. Yes. The last number I saw was over 900,000, so we are talking nearly a million comments.

Senator BOXER. OK.

And I want to make sure, because Congressman DeFazio talked about transparency. Have you extended the rulemaking time so that even more people could get their comments in? And are these comments open, and can we all read the comments?

Ms. DARCY. We extended the comment period this fall till—I think the public comment period closed November 14th of 2014. We had added an additional, I think, 45 days from the initial comment period, so there was additional time given. Because the proposed rule went out last spring.

Senator BOXER. And the comments will be published; is that correct?

Ms. DARCY. Yes.

Senator BOXER. For all to see?

Ms. DARCY. Yes.

Senator BOXER. Well, Mr. Chairman, you know, I am confused because I think people are arguing against some mythical rule.

And I do think the Obama administration has been very careful not to overreach on this.

And we keep hearing about how this President issues more Executive orders. Now, this is a rule, but, just for the record, President Obama has issued fewer Executive orders than President Reagan, both Bushes, President Clinton.

And I think this rule is an example of your ability—two leading voices here, who have common sense. We don't want to regulate a puddle. That is ridiculous. That doesn't hurt anybody. We want to regulate a body of water that has pollutants in it and those pollutants wind up in the drinking-water system in Ohio or California or Pennsylvania or Oklahoma or Oregon or any other place.

So I want to just thank you so much.

And, again, Mr. Chairman, thank you for this opportunity.

Mr. SHUSTER. Thank you, Senator Boxer.

With that, I am up first. And the chairman's prerogative, I am going to go first to the gentleman from Ohio, the gentleman who is the subcommittee chairman on Water Resources, also a farmer, also the former chairman of the Ag Committee in the Ohio State legislature. So he is not only a policy expert, he knows practically what this means to farmers out there.

So, with that, I yield 5 minutes for questions to Mr. Gibbs.

Mr. GIBBS. Thank you, Mr. Chairman.

And just to clarify from some of the opening statements, everybody in this room wants clean water and clean drinking water and to protect the environment. But, unfortunately, this rule, as proposed, doesn't get us there, and we do need clarification. And I am going to try to demonstrate that in a couple minutes.

Secretary Darcy, I want to start where we left off in my committee last year. We were talking about the erosional feature, and I actually gave an example on my farm, and you said that would not be under "waters of the United States."

And I happen to have the same picture; it is just a little bit smaller than Senator Inhofe's, but I want to bring that up a little bit. I won't even ask the question. I will just start.

This is in Tennessee, like Senator Inhofe said. This was declared a tributary of "waters of the United States." This was declared a "waters of the United States."

Now, it looks like to me it is an erosional feature. OK? And maybe it looks like to me it should be a grass waterway. But if they are going to already make that—and the reason it was already declared, because this landowner had to go get a permit. And here is the permit. And they spent a pile of money getting through that.

Now, the problem is, when that kind of land feature or farm land layer is declared "waters of the United States," that means they have to get a section 404 permit to fill that in or to put in a grass waterway. They would have to get a 402 permit from the EPA if they are going to spray herbicides or pesticides.

And this is where I think you go backwards a little bit. Because if farmers are working with the Soil Conservation Service, trying to do the right thing, like I did on my farm, but now, if it is already declared "waters of the United States" by the interconnectivity rule, the neighbors in that watershed are automatically declared

that, so then they have to go get a 404 permit to fix that. And that might take some time, it is going to overburden the agencies, and I don't think we are going to enhance the protection of the environment.

And so that is the first concern I have on that aspect. Then, if you the Corps is going to declare that "waters of the United States," obviously, then, township road ditches are going to be declared "waters of the United States," if you are going to declare an ephemeral like that. So that is my first concern.

And then we have a second picture. This was done by an engineering firm who are experts in this field, and this is the current jurisdiction of "waters of the United States" on some property just south of Ohio and Kentucky. You can see the creeks there in the blue and some of the intermittent streams. There are 96 miles of intermittent streams, 47 miles of perennial.

Then the next picture—hold that up—is what it would be under the proposed new rule. We now have 384 ephemeral streams. And that just opens it up to the whole thing and causes a lot of concern. So that is where the agriculture community is really concerned.

So, you know, I think the pictures say what the issue is here. And if you want to comment, Secretary, quickly, you can, because I want to move on.

Ms. DARCY. I would just say, Congressman, that the picture you showed earlier, similar to the one from Senator Inhofe, that it was determined jurisdictional under the current rule; however, under the proposed rule, it would not be jurisdictional.

Mr. GIBBS. OK. So we have your commitment that those wouldn't be in the—

Ms. DARCY. Under the proposed rule—

Mr. GIBBS. OK.

Ms. DARCY. —they would not be jurisdictional.

Mr. GIBBS. Administrator McCarthy, you put out a press release today and said that 60 percent of the streams and millions of acres of wetlands across the country aren't clearly protected from pollution and destruction. And you went on to say that your agencies have proposed to strengthen protections to Clean Water. I thought this was all about clarifying, not strengthening.

But I want to back up here, where you say clearly—aren't clearly protected. It is my understanding that the State EPAs have to, every 3 years, submit a plan of action to your agency. And that is where the—you know, the oversight and the guidance, and that is what creates the cooperative federalism to work together.

So, when I read your press release, I would have to kind of assume that maybe your agency is not doing what you are supposed to be doing.

Ms. MCCARTHY. Well, Congressman, it is our intent in this rule-making to make sure that the confusion that has arisen from earlier Supreme Court decisions are clarified. And I think it is incredibly important that we minimize delays and we minimize costs associated with the implementation of this rule, that we make our protections more effective.

Mr. GIBBS. Well, I would also—

Ms. MCCARTHY. And we are going to do that by—

Mr. GIBBS. Excuse me. Reclaiming time, let me go on. Let me go back here, you know, to this example in Tennessee. Tennessee, on stormwater and the picture we had, had actually more stringent rules than what the EPA currently has. So they are doing their job. And now you are going to add more cost, because they are going to have to redevelop their plans, and it is going to add more cost.

And when you look at some of the 900,000 comments, a lot of them are by Governors, majority of the States, and they question—the process is inadequate. You did not consult the States, you did not consult the State EPAs. They say that in their comments.

So, you know, this process is broken. You need to stop the process and go back, and let's start over.

I yield back my time.

Mr. SHUSTER. And, with that, I will allow the witness to respond to that.

Ms. MCCARTHY. Well, I think we have been working very closely with the States for many years, and it is, in fact, the States, as well as stakeholders and the Supreme Court, who told us we needed to go back and take a look at the science and make this on much more sure footing in terms of what the science tells us today about what waters are essential for protection.

But I would just reinforce the fact that I understand that everybody here wants clean water. I also understand that the agriculture community is sincere in wanting to have clean water but also certainty that they can continue to farm and ranch and do the silviculture that we all rely on.

That is what we are trying to clarify with this rule. That is the predictability. That is how we are going to get better and enhance our relationship with the States and our effectiveness as Federal agencies.

Mr. SHUSTER. Thank you.

And, with that, I would like to ask unanimous consent that the permit that Mr. Gibbs had be submitted to the record.

So, without objection, so ordered.

[The information follows:]***** COMMITTEE INSERT

Mr. SHUSTER. And, with that, I recognize Mr. DeFazio for 5 minutes.

Mr. DEFAZIO. Secretary Darcy, as I understood your response to this case in Tennessee, you said, because of what has been referred to as the Farm Bureau view, the hodgepodge of ad-hoc and inconsistent jurisdictional theories in the Bush rules, that was ruled, apparently, as a wetland. But you are saying, under the new clarified rules, it would not be. If it is a farming activity, it would be exempt.

Is that correct?

Ms. DARCY. That is correct.

Mr. DEFAZIO. OK.

So if we are stuck with the Bush guidance, then that farmer is stuck with that ruling. If we move beyond the Bush guidance, that farmer and other farmers would be exempt, given similar circumstances—

Ms. DARCY. Correct.

Mr. DEFAZIO. —with erosional features. OK. Excellent.

You know, you have received a million comments. I assume that, you know, as we heard, they are all going to be posted. They haven't been. I think that would be useful. You don't have to post 108,000, 200,000, 300,000 identical postcards but at least an example of one thing. There are 300,000 postcards like this. But it should all be posted.

Now, have you listened? Are we going to have clarifications and changes in the final rule, Administrator McCarthy?

Ms. MCCARTHY. Yes, sir.

Mr. DEFAZIO. OK. So we are going to have changes.

Ms. MCCARTHY. Yes.

Mr. DEFAZIO. Has any member of this panel seen those proposed changes?

Ms. MCCARTHY. Not as yet, no.

Mr. DEFAZIO. OK. Have any of the advocacy groups on either side of the issues seen those proposed changes?

Ms. MCCARTHY. Not as yet, no.

Mr. DEFAZIO. OK.

So you are going to be responsive to concerns that have been raised about ditches, about erosional features, and other major, you know, consistent, persistent concerns that I have heard in this rule. You are going to clarify. And you go on to say that, in fact, ditches will be—there will be more clarification and exemption for ditches than under the Bush rule.

Ms. MCCARTHY. That is correct.

Mr. DEFAZIO. OK. So why would we want to stop that?

Ms. MCCARTHY. I think one of the reasons to go to rulemaking, which was a judgment that this administration made, was to listen to all of the people who said that this is important enough. And the transparency and certainty of the rulemaking process is what we need. We put a proposal out specifically to generate comment—

Mr. DEFAZIO. Right. But the comment—

Ms. MCCARTHY. —to learn from that.

Mr. DEFAZIO. You will admit that the initial rule did create a good deal of confusion.

Ms. MCCARTHY. Yes.

Mr. DEFAZIO. You had to keep issuing statements saying, it doesn't do this, it doesn't do that, it doesn't do this, it doesn't do that.

And then now people think—and please clarify this; this is a major objection—that if you haven't specifically exempted something in this rule or with your clarifications, that everything else is covered. Will you please clarify that that is not true?

Ms. MCCARTHY. That is not true.

And you are absolutely right; we are looking to provide more clarity on the basis of the comments we received. We are not expanding the jurisdiction of the Clean Air Act. We are not taking away current exemptions. We were making an attempt to take a look at the science and provide as much clarity as we could.

And we are going to listen to those comments, and we are going to make changes in a variety of areas where the comments have been very robust and clear, and we will respond to those. We are intending to use this rulemaking process in the way we described

it. We are going to protect what we need to; we are going to leave alone what we don't.

Mr. DEFAZIO. Former subcommittee chairman Bishop offered an amendment last year which prohibited the rule from going into effect if it expanded the authority over waters never before covered by the act.

Do you have any problem with that? Would that affect this rule? Are you covering waters never before covered?

Ms. MCCARTHY. We cannot expand the jurisdiction of the Clean Water Act. We are simply trying to provide clarity in terms of what that is with this rulemaking.

Mr. DEFAZIO. OK. So if we passed an amendment or statute that said that, it wouldn't affect this rule because you are not expanding the authority.

Ms. MCCARTHY. We are not expanding the authority of the Clean Water Act. We cannot do that.

Mr. DEFAZIO. OK.

Let's get back to ditches. To Ms. Darcy, you mentioned roadside ditches. All exempt?

Ms. DARCY. The particular exemptions in the proposed rule relate to upland ditches, which are dry ditches going from dry land to dry land. And I am going to have to check my notes here as to the other specific exemption for ditches.

However, within the public comment period, we have had a great deal of focus on ditches and how do we define those for possible further exclusion. So we will be looking at the "ditches" definition in the proposed rule as well as those recommendations of clarification from the public.

Mr. DEFAZIO. You mentioned agricultural practices. How about a quarry that creates a pool of water within the quarry because as you mine down you hit the water table? Is that going to become jurisdictional?

Ms. DARCY. The way you define it, it sounds as though it is an isolated—

Mr. DEFAZIO. It is groundwater that is bubbling up. It is not flowing out.

Ms. DARCY. We do not regulate groundwater in this rule.

Mr. DEFAZIO. OK. And even though there is a pond or whatever body of water within the quarry that was artificially created, not covered.

Ms. DARCY. Not covered.

Mr. DEFAZIO. OK. Thank you.

Thank you, Mr. Chairman.

Mr. SHUSTER. That you, Mr. DeFazio.

Now, just to give you a heads-up on the lineup so people know who is in the queue to ask questions—OK, the Senate just through a curve at me.

First, we are going to go to Senator Barrasso, then Senator Whitehouse. Then I am going to take my turn questioning, and then Ms. Norton will be fourth.

So, with that, I recognize Mr. Barrasso for 5 minutes.

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

Ms. McCarthy, thank you for being here.

I want to show you a map of the State of Wyoming, my home State. And this states it was prepared by INDUS Corporation under contract with the U.S. Environmental Protection Agency. The map has at the bottom the symbols of the U.S. Geological Survey, the EPA, and the U.S. Forest Service.

And this map depicts surface-water features in Wyoming, including perennial, intermittent, and ephemeral streams, which are all color-coded here. That means that everywhere in this map that isn't white is a potential "water of the United States," requiring communities, requiring ranchers, requiring small-business owners to obtain costly permits to do any sorts of activities.

Now, Wyoming is a High Plains State. It is considered an arid State. So I can't understand how the EPA can determine with this map that most of the State of Wyoming is a potential "water of the United States." I can only conclude that the Agency is counting Wyoming land covered in snow during the winter.

In 2014, one of my constituents was threatened with fines of \$75,000 a day—\$75,000 a day—for building a stock pond that the Corps said was somehow connected to a "water of the United States." And under this map, the entire State of Wyoming would be subject to threats of fines for even putting a shovel into the ground.

So both Congress and the Supreme Court said that the Federal control over water should be limited. This map proves this rule would be doing exactly the opposite.

And that is why I will once again introduce legislation, working with Chairman Inhofe, to stop this bureaucrat overreach. So I urge my colleagues to once again join me in this effort with this legislation impacting the "waters of the United States."

Now, Ms. McCarthy, in a March 27, 2014, hearing before the House Appropriations Subcommittee on the Interior Environment, you told Chairman Rogers that the EPA has, quote, "some mapping in the docket associated with this rule that people can access at this point." You went on to say that there had been no mapping before and that you had taken the opportunity to map water bodies that you felt the Federal Government needed to protect.

Now, can you explain to me why these maps that you obviously considered significant were never made available for public comment?

Ms. MCCARTHY. I am sorry, Senator. I think the maps that you are holding up are maps that EPA has worked with both USDA and Fisheries to take a look at water bodies across the U.S. They were, as far as I know, not used to determine jurisdiction and not intended to be used for jurisdiction. They are entirely different, with different data sets. They were not used specifically for the purpose that we are here to talk about, and they are not relevant to the jurisdiction of the "waters of the U.S."

Senator BARRASSO. Well, you said there had been—your actual quote is there had been no mapping before, there has been no certainty, so we are identifying the rivers and streams and tributaries and other bodies that science tells us is really necessary to protect the chemical, physical, and biological integrity of navigable waters.

So I would say, then where are the maps that you are referring to?

Ms. MCCARTHY. Senator, I don't know what the specific quote was referring to. But I do know that those maps were commissioned to have a better understanding of waters across the U.S., which I am very happy my water office wants to do. But those were not done specifically to inform this rulemaking, as far as I know. And I was the decisionmaker on this proposal, and those were not called to my attention in any way, shape, or form. And they are not consistent with how we look at the jurisdiction of the Clean Water Act.

Senator BARRASSO. So my question is this: If these maps don't show the scope of the waters protected, could your proposed rule capture even more than what is on this Wyoming map and other State maps? You know, more specifically, is this map, is this a ceiling of what you intend to capture, which would be terrible, or is this map a floor of what may be captured? Then this is actually catastrophic for people all across the country. What is your—

Ms. MCCARTHY. It is neither of those. This proposed rule speaks to what characteristics water bodies need to have in order to be jurisdictional. Those are in no way related to the maps that you have behind you.

And, again, we are not expanding the jurisdiction of the Clean Water Act. We are not eliminating any exemptions or exclusions from the Clean Water Act in this proposal. We are in fact narrowing the jurisdiction of the Clean Water Act, consistent with sound science and the law.

Senator BARRASSO. So if you are not going to use these maps, can you commit to me and to this committee that the final rule will rely on actual field observations to identify Federal jurisdiction as opposed to EPA and the Corps establishing Federal jurisdiction over Wyoming's water from your desks in Washington using some other tool?

Ms. MCCARTHY. This proposed rule actually identifies what we believe should be jurisdictional, what we believe should not be jurisdictional, and then, on a case-by-case basis, you make determinations.

Senator BARRASSO. Thank you, Mr. Chairman.

Mr. SHUSTER. Thank you, Senator.

With that, we will go to Senator Whitehouse.

Hold it a second. Somebody else is—

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

Mr. SHUSTER. Hold on 1 second, Mr. Whitehouse. We are operating on your side under Senate rules, so I have to defer to Mr. Inhofe. And I believe that since Mr. Cardin is senior, he gets the 5 minutes now.

Mr. Cardin?

Senator WHITEHOUSE. Works for me.

Senator CARDIN. I think there will be virtually no difference between Senator Whitehouse and my view on the work being done by EPA on the "waters of the U.S."

So let me first, though, welcome the Administrator and thank her very much.

The Administrator knows my concerns for the Chesapeake Bay. All of our stakeholders have been involved in cleaning up the bay.

The Clean Water Act is a critically important part of everyone working together.

The headwaters are critically important to the efforts, and our farmers are making a real effort to help us clean up the bay. Our developers are making efforts. Our local governments, private sector—all working together in a collaborative way to deal with the challenges of the Chesapeake Bay, the largest estuary in our hemisphere.

The concern is, if we don't deal with the headwaters, it is a huge problem. Now, before the Rapanos decision, I think it was pretty clear as to what was regulated waters and what were not. The Rapanos decision put that in question. And then there was a desire for clarification.

Congress should have acted. Congress did not. The opponents of these rules didn't really want Congress to act. And now we need regulation, and they are saying there is confusion, but they are fighting regulation.

So I just really want to give you a chance to tell us what these regulations are all about. Are we trying to do something different than we have done in the past? Or are we trying to have clarity on waters that affect water qualities in bodies of water such as the Chesapeake Bay, that we have sensible definitions for what is included—but it seems to me you have gone to an extreme, to exclude those areas that may be of concern. Which, quite frankly, I think you probably pulled it back further than we had before the Rapanos decision.

Ms. MCCARTHY. Well, thank you for a few minutes.

First of all, thank you for your commitment to Chesapeake and other beautiful areas that are so important to us.

This rule is really about responding to the confusion that has arisen over the years. And it is a conversation we have been having, frankly, for decades.

And what we really need to do with this rule is to clearly explain what waters the Clean Water Act was intended to protect. And those are waters that are most important to protecting drinking-water supplies, that are most important to protect us from flood damage, that are most important in many different ways for both fishing as well as the recreational opportunities that we all enjoy.

And so we have used the opportunity to spend many years looking at the science, telling us what waters we need to protect, so that we can minimize our focus and our resources in areas where it is not critically important.

So this rule is about clarifying what is in, about maintaining the examinations, in fact, expanding the exemptions based on what we know now on the science, and making it abundantly clear so that people can go about their business with more clarity and more certainty.

We won't have to spend the resources. Stakeholders won't have to spend the resources. But, frankly, this is all about the science. They told us, the Supreme Court told us, get the science right. And we are doing that with this rulemaking.

Clearly, there is work to do between proposal and final. We are up to this task. And one of the reasons to do this with a rule-making instead of guidance is to gather the information we need

to get it right. And we will.RPTR HUMISTONEDTR
HOFSTAD[11:04 a.m.]

Senator CARDIN. You have given some clarity, some detail in the regulation. As you pointed out, it is open for comment right now—

Ms. MCCARTHY. It is.

Senator CARDIN. —so people who have concerns can express those concerns.

And in our conversations with EPA, we have seen a willingness to make sure that is a very open process. You want to be judged by the best science, but you want to make sure you get it right.

Now, you have given a lot of detail. So if people have questions about the details, it is up to them now to comment, is it not? Isn't this an open process?

Ms. MCCARTHY. It is. And if you look at the comments, you know, nobody is going to say, I think you got it all right or all wrong. They are very good, substantive comments.

And so when we raised issues of did we get the definition of “tributary” right, did we narrow it appropriately—we looked at how do you define “adjacent waters.” We set up ideas for how to do that. We solicited comments on alternatives. We tried to narrow where the uncertainty was, limit the amount of case-by-case analysis that would need to be done. And we teed up these issues specifically to get these comments.

We have had over 400 meetings, met with 2,500 people, had a local government advisory committee going across the U.S. We are doing what we need to get this right.

Senator CARDIN. I will just make one final comment, if I could, and that is, there needs to be action.

Ms. MCCARTHY. Yes.

Senator CARDIN. If Congress wants to pass a law, fine. If not, we need to have regulation on clarity. That was very clear from the Supreme Court decision. And I thank you very much for carrying out the responsibility that you have by proposing these regulations.

Ms. MCCARTHY. Thank you, Senator.

Mr. SHUSTER. Thank you, Senator.

Now I will recognize myself for 5 minutes for questions.

First, Administrator McCarthy, did you say on that map that Senator Barrasso put forth that you weren't aware of that map?

Ms. MCCARTHY. No, not specifically. I was made aware of it after last summer.

Mr. SHUSTER. OK. Well, that is a huge concern of mine, that the Administrator—and it is not just the EPA; it is all these departments across the Federal Government. The political appointees don't get the real information from folks down below. When these laws come out, they are significantly changed and interpreted in a different way.

And, you know, my good friend talked about the mythical rule. Well, but history shows us that it is mythical to have a view that the EPA or the Corps is not going to interpret these things in a much different way as we go down the road. So that is the huge concern we have here today. There is a lot of uncertainty for all of us.

Ms. MCCARTHY. Well, Mr. Chairman, I—

Mr. SHUSTER. Well, let me finish.

Ms. MCCARTHY. Oh, I am sorry. I apologize.

Mr. SHUSTER. My good friend from California, she had a list. Well, I want to give you my list, and it is 34 States: Colorado, Georgia, Maine, Michigan, Missouri, Montana, New York, Ohio, South Carolina, Tennessee, Wisconsin, Wyoming, Arkansas, Alabama, Arizona, Iowa, Indiana, Pennsylvania, on and on. There are 34 States that oppose and want this revised or oppose and withdraw. That is a real list of people that have to deal with these, and that brings us to why we are here today.

And the question is, why haven't we included the States in this? And why do we have 34 States, two-thirds of the States, saying, revise or withdraw? They oppose with a revise or oppose and withdraw. Can you answer that question?

Ms. MCCARTHY. Mr.—

Mr. SHUSTER. About the States.

Ms. MCCARTHY. Mr. Chairman, the States have been very actively involved in this and other issues. In fact, the States wrote to us and said, stop using guidance, get to a rulemaking process.

The only thing I am asking this joint committee is to take a look at how we are going—have we proposed this, the robust outreach. The comments we have received, you say two out of three don't like everything? Two out of three gave us robust comments that will inform the final.

Mr. SHUSTER. I have—

Ms. MCCARTHY. This is a partnership with the States that we are going to maintain.

Mr. SHUSTER. Two out of three want this—they oppose this with significant revisions, and almost half the States, 22, say they want you to withdraw it.

Ms. MCCARTHY. It depends on who you are talking to, Mr. Chairman.

Mr. SHUSTER. I don't believe you are consulting, and the States aren't full partners in this, in this rulemaking. And it is based upon what they are telling us.

Also—it was mentioned in Mr. Gibbs' questioning—I wanted to know if both of you would commit to explicitly stating in the rule that erosional and ephemeral features on farm fields are exempt from the regulation. Are you willing to put that in the regulation?

Ms. MCCARTHY. We have actually made a very good attempt to identify those erosional features, not—

Mr. SHUSTER. That doesn't sound—

Ms. MCCARTHY. No, no—

Mr. SHUSTER. That sounds to me like—

Ms. MCCARTHY. We have maintained the exemption, and we are trying to explain it more so that people will have more certainty.

Mr. SHUSTER. That sounds to me like that an "attempt," you are "trying" to—when the rule goes in and it is that vague, as it trickles down to the middle management of the EPA or the Corps, over the years, this is where the reach is going to come from. This is what the farmers, this is what the developers, this is what people that do things around this country, this is what they are concerned about. And this rule I do not think makes it clear.

Another question.

Ms. MCCARTHY. Mr. Chairman, we will clarify—

Mr. SHUSTER. Let me ask one other question. I will let you answer after—

Ms. MCCARTHY. Yeah.

Mr. SHUSTER. You can answer any way you want to.

Ms. MCCARTHY. OK.

Mr. SHUSTER. Are we defining navigable waterways as tributaries? We are going from navigable to tributaries; that is sort of what my understanding is of the rule.

Ms. MCCARTHY. OK.

Mr. SHUSTER. Is that actual?

Ms. MCCARTHY. Actually, we are helping to apply the Supreme Court's understanding that navigable waters include tributaries.

Mr. SHUSTER. OK. So water, doesn't it eventually, maybe it takes years and years, but doesn't it eventually seep into bigger bodies of water that are navigable under today's definition?

Ms. MCCARTHY. I think that is the challenge, is for us to recognize what tributaries are significant contributors enough that they can impact navigable waters.

Mr. SHUSTER. So you would say that in a farm field that was shown earlier, there is water laying there; eventually, 2 years, 10 years, 20 years, it eventually seeps into navigable waters. Is that true or not? I am not a scientist, so I am asking the question.

Ms. MCCARTHY. The science establishes connections, but it is on a gradient. And what the Supreme Court made clear to us and what this rule attempts to do is to identify only those that could significantly impact the physical, chemical, and biological integrity of downstream waters. So just because you are connected, it does not mean you are jurisdictional.

Mr. SHUSTER. But it could mean it does.

Ms. MCCARTHY. If that connection is significant for drinking-water protection—

Mr. SHUSTER. That is the basis why I believe these 34 States are opposing this rule. That is why my colleagues believe—and what Mr. Cardin said. I think it is time for Congress to act. I think it is time for us to come forth and help to clarify the rule, because there is no doubt it needs to be clarified.

And I do not believe that this rule is going to clarify it. It is going to make it vague. And I would predict, if this rule goes into effect, 5, 10 years down the road, it will cost working and middle-class Americans more to buy homes, more to buy food, because of the EPA and the Corps and the regulations that they are putting out there, making it far more difficult for them to do their work.

Ms. MCCARTHY. Mr. Chairman, I am sorry that I interrupted you earlier. I just—

Mr. SHUSTER. That is all right.

Ms. MCCARTHY. —wanted to let you know that I understand this confusion between tributaries and erosional features. We are going to tackle that confusion head-on.

Mr. SHUSTER. I appreciate it. And I am sorry I got exercised, but this rule is of great, great concern to me, my constituents—

Ms. MCCARTHY. I appreciate that.

Mr. SHUSTER. —and 34 other States.

Ms. MCCARTHY. I appreciate that.

Mr. SHUSTER. So, with that, I recognize Ms. Norton for 5 minutes.

Ms. NORTON. Thank you, Mr. Chairman.

And I do want to say you, Administrator McCarthy and Secretary Darcy, in less than an hour of testimony, you have already exploded some of the major myths surrounding the rule.

And I want to say that we already know that our roads and our transit and our underwater infrastructure and our ports are falling apart. Congress is letting it happen as we speak. Please spare us our clean water.

Mr. Chairman, I want to ask that a letter from the Department of the Environment of the District of Columbia be included in the record.

Mr. Chairman? I ask that a—

Mr. SHUSTER. I am sorry about that.

With unanimous consent, so ordered.

Ms. NORTON. Thank you.

[The information follows:]***** COMMITTEE INSERT

Ms. NORTON. I have a question that is fairly representative, I think, of urban jurisdictions around the country.

Administrator McCarthy, as you know, because we appreciate that you came out to the District of Columbia to tour our own efforts to revise our stormwater overflow system, these systems around the United States are often a century or more old, and they are being remodeled, I must say, with almost no Federal help.

Now, these rules are being criticized both for being too vague and too broad. For myself, I think rules ought to have some breadth, particularly in this area where we are dealing with the waters of the United States of America in the most diverse landmass in the world.

So this is my question, and I apologize because it is particular. I am trying to find out whether the kind of work we are doing and is being done all over the United States with stormwater overflow, under the rule, would include piped sections of streams in the definition of "tributary."

As you know, many of these pipes run under tributaries, and if they are required to go through the permitting process for municipal stormwater, then, of course, there would be considerable delay and considerable cost.

My question really goes to clarification. I think the way the rule is structured I don't have any criticism of, but I want to clarify whether or not such underwater, don't-see-the-daylight streams, pipes under streams, would need to be permitted.

Ms. MCCARTHY. Thank you. And I am actually glad you raise the issue because there has been some confusion about this.

And let me be very clear that EPA has not intended to capture features as you described them that have already been captured in what we call MS4 permits, which was part of, I think, what you and many other urban areas are concerned about. It is our intent to continue to encourage and to respect those decisions and to also encourage water reuse and recycling, which very much is consistent with the Clean Water Act and our overall intent.

I would also mention green infrastructure. It was never our intent to—

Ms. NORTON. So does that mean that the projects to repair these under water would be subject to—

Ms. MCCARTHY. No. It means they would not.

Ms. NORTON. —to permitting?

Ms. MCCARTHY. It means we are trying to make very clear in the final rule, working with these urban areas that have these issues, what features that are involved in the capture of stormwater in urban areas, what features would be specifically not jurisdictional under the Clean Water Act, because people are concerned that it doesn't have the specific clarity.

We will build that in. They will not be jurisdictional. And we will be outlining those with much more specificity just to avoid any additional concerns.

Ms. NORTON. Thank you for that clarification.

I yield back, Mr. Chairman.

Mr. SHUSTER. I thank the gentlelady.

And, with that, I now recognize Senator Crapo for 5 minutes for questioning.

And just a heads-up, Mr. Whitehouse. I assume you will be next, as long as no Senator more senior to you comes in, so stay on your toes.

Senator WHITEHOUSE. Stand by.

Senator CRAPO. Thank you much, Mr. Chairman.

And, Administrator McCarthy, welcome here to the hearing. I appreciate your being here and our conversations that we have had privately about this regulation.

As you know, I am one of those who is very, very concerned about the regulation. And the concern I have is that, as we have gone through now several Supreme Court cases trying to provide some clarity on what the actual jurisdiction of the agency is over the Clean Water Act, it has become clear that the word “navigable” is in the statute and that the courts intend to insist that that be the definition and the nexus of what we are trying to deal with here.

It seems to me that where the agency is headed in interpreting what the Supreme Court has required, however, is beyond what I read as the Court's approach.

And what I am asking you is this. In the case in which—excuse me. In the Rapanos case, the four-Justice plurality held that, to be subject to the Clean Water Act, water must be relatively permanent surface water. There was a concurring opinion by Justice Kennedy that said that water must have a significant nexus. And then there were four Justices who dissented, who would have applied a broader jurisdiction based on intertwined ecosystems.

Am I correct about that legal analysis?

Ms. MCCARTHY. I hate to play lawyer, especially here, but I understand the point you are making, and it is very challenging.

Senator CRAPO. I think that is a fair general explanation of where we were.

And, as I see it, where the agency is heading right now is to identify significant connections between intertwined ecosystems, in essence. And if that is the case, then it appears that the agency

has flipped the Supreme Court case and is essentially pursuing the rationale of the minority and the dissenting opinions.

And I would just like you to comment on that.

Ms. MCCARTHY. Well, let me be clear what our intent was, and hopefully that intent is reflected in the proposal.

We are trying to be very clear. And I think the one thing that everybody did agree to on the Supreme Court was that the definition of “navigable” is not the traditional one, and so we had to do a better science job at defining the connections between these upstreams and downstreams that would have a significant—potentially a significant impact on navigable waters.

So we tried really hard to basically use the science to further define what we knew, based on science, would be the types of waters that would be in. We tried to make sure that we proposed additional exemptions or exceptions where we could based on science. And then the third area was where we were looking at what are the other waters.

But you are absolutely right that the challenge for us is to look at individual tributaries and adjacent waters but, also, to look at where we may have systems that, because of their geography and function, may work as a system.

So it is challenging, but we tried not to make assumptions there, as opposed to propose a number of alternative ways to try to narrow this case-by-case resource—

Senator CRAPO. Well, let’s take a—because we have run out of time very quickly in this, let’s take a specific example.

Ms. MCCARTHY. Yeah.

Senator CRAPO. Evaporation. If water can evaporate from a relatively arid area after a rainstorm and by evaporating and going into the clouds and then ultimately raining on a navigable water or an ocean, does that mean that the water is navigable?

Ms. MCCARTHY. It has to have a connection to downstream that is certainly more than evaporation. It has to be a significant connection where that water supply or that water body, wetland, or system would be able to significantly impact and degrade the downstream waters.

Senator CRAPO. But I guess the question is, is evaporation is significant?

Ms. MCCARTHY. No. No, sir.

Senator CRAPO. Would the agency conclude that the evaporated water that went—

Ms. MCCARTHY. No, sir.

Senator CRAPO. —that could have rained on a navigable water was significant?

Ms. MCCARTHY. No, sir.

Senator CRAPO. So you are saying that would not be a jurisdictional claim under the rule.

Ms. MCCARTHY. No, sir. It would not. And we tried to make this very clear, specifically for ditches. We tried to make this very clear, but we know there is additional work that needs to be done.

Senator CRAPO. Well, what about—let’s go to the—well, not the reverse, but another example. What about water that seeps into the groundwater from a ditch or from a puddle or a rainstorm and then, eventually, over time, moves through the groundwater and

ends up in a navigable river? Is that going to be a jurisdictionally claimed significant connection or nexus?

Ms. MCCARTHY. Well, groundwater is not regulated under the Clean Water Act, but it can be a—establish a connection between upstream and downstream. It can be.

Senator CRAPO. So I am hearing you say, yes, it could be.

Ms. MCCARTHY. Well, there are conditions that you need to look at, sir. But, again, it doesn't need to just be connected; it needs to be a really significant connection sufficient to warrant Federal jurisdiction.

Senator CRAPO. I see my time is up.

Mr. SHUSTER. I thank the gentleman.

And we have Senator Whitehouse, 5 minutes.

Senator WHITEHOUSE. Thank you very much, Chairman.

It is kind of interesting, we seem to have two hearings going on here, one on a mythical rule that would regulate any place where water collects or most any water or any wet place and doesn't consult with States and local officials, and then this actual rule, which is in the middle of a very robust Administrative Procedure Act process with millions of comments and a very active role taken by the States.

With respect to the latter hearing on the actual rule, I would like to ask unanimous consent that a letter from Rhode Island's Trout Unlimited, along with the Massachusetts Trout Unlimited, and a letter from Rhode Island Attorney General Peter Kilmartin, along with several other attorneys general, in favor of the actual proposed rule be entered into the record.

Mr. SHUSTER. Without objection, so ordered.

Senator WHITEHOUSE. Thank you.

[The information follows:]***** COMMITTEE INSERT

Senator WHITEHOUSE. Ms. McCarthy, in Rhode Island, as you know, we take the health of Narragansett Bay very, very seriously. And, as you know, we have spent an enormous amount of effort and money to protect Narragansett Bay, specifically through the combined sewer overflow project, which is the biggest public works project in Rhode Island's history, all to protect the bay. As a result, our current threats to the bay primarily come from nonpoint sources.

How frequent a problem around the country are nonpoint sources at contributing to water pollution?

Ms. MCCARTHY. Well, point-source pollution—we have, I think, done a good job at regulating point-source pollution. Then, by comparison, it continues to be one of the more challenging issues.

Senator WHITEHOUSE. And return flows from irrigated agriculture, for instance, would qualify as a nonpoint source.

Ms. MCCARTHY. Return flows from irrigation would actually be exempt under the Clean Water Act.

Senator WHITEHOUSE. Well, that is precisely my point.

Return flows from irrigated agriculture could well contain fertilizer, pesticides, chemicals, manure, all of the above?

Ms. MCCARTHY. It could, sir, but it is not regulated under the Clean Water Act today, and it wouldn't be under the proposal.

And one of the good things about working with the agriculture community is I recognize that they are taking great efforts to both conserve land where it can help as a filter for those pollutants, but they are also looking at erosional features. Because it is essential to not have runoff for a couple of reasons, not just because it spreads pollution potentially, but it is also important to keep soil on the land enriched.

And so there are many efforts that are underway with USDA and EPA to enrich that relationship and partnership and to recognize that.

Senator WHITEHOUSE. But it is clear and it is a matter of record that this rule would allow pesticides, fertilizers, manure, and other types of runoff to come off of return flows from irrigated agriculture, to flow through ditches that have less than perennial flow, and to allow leakage from settling basins all to go into our waters.

Ms. MCCARTHY. The Clean Water Act exempts stormwater from agriculture from regulation.

Senator WHITEHOUSE. Irrespective of whether it is carrying pesticides and other fertilizers, manure and other contaminants.

Ms. MCCARTHY. There is. But, as I indicate, I think there are many programs that seek to make sure that those issues are resolved in a collaborative way with the agriculture community, and I am confident we can expand those partnerships.

Senator WHITEHOUSE. Yeah. I just want to make the point that no rule is perfect.

Ms. MCCARTHY. Yeah.

Senator WHITEHOUSE. And there are arguments, frankly, on both sides. And for those of us who have vital bays—Chesapeake Bay is another one that Senator Cardin just talked about—where the greatest vulnerability is nonpoint-source pollution, then the failure of this proposal to deal with that will have environmental consequences.

Which isn't to say that I am going to oppose it, because I think the perfect doesn't necessarily always have to be the enemy of the good. But hearing the criticism about the extent of the regulation, at least when not imaginary, causes me to raise the concerns on the other side, that this will allow a significant amount of contamination to flow into waters that we would otherwise want to see protected.

And, with that, I will yield back my time.

Mr. SHUSTER. I thank the Senator.

And, with that, the next three up, just to give you a heads-up, we will go next to Mr. Hanna, then Ms. Johnson will be after that, then Senator Capito after that.

So I recognize Mr. Hanna for 5 minutes.

Mr. HANNA. Thank you, Chairman.

And thank you both for being here.

It strikes me this conversation is not really about clean water. It is absurd to suggest that anybody here or in this country isn't interested in that. And the 36,000 farms that are in New York certainly are vested in that, and I have complete confidence in the New York State DEC.

For me, when you talk about this and you say to us we have nothing to worry about and it is based on science, I think the fun-

damental concern is, what do you mean by “science”? And the subjective nature and the kind of flow of this conversation is more around the fact that people don’t believe it, that people are uncomfortable with whatever outcome you might produce, because, frankly, no one trusts big agencies and big government. And where I live, we don’t need—you know, the theme would be, we don’t need you.

So how do you separate that distrust, moving forward, to come up with a rule that is based on science, knowing the subjective nature and the suspicion that, with all due respect, because we are all—and Mr. DeFazio did a great job of laying out the concerns that people have. They are legitimate, they are real.

And the pushback you feel is not a function of people who aren’t interested in having a great outcome. It is a function of people not trusting the process, not trusting the rule, not being comfortable. It is a huge credibility gap that I am concerned that, no matter what you do, you can’t get through that. And yet I would like to believe that the outcome will be in the direction that you want it to go.

But, saying that, I am perfectly comfortable with New York State and what we have going on now.

With that, I would just give you a chance to speak to that.

Ms. MCCARTHY. Well, let me just say that, first of all, I really appreciate your raising this issue, because you are not wrong. I think we have a communication challenge.

We did a very good job on the science. And it wasn’t us; it is scientists all over the country and, frankly, the world who have looked at this issue. But the current situation is, at least as we have been told by all of the stakeholders and the States, untenable. Because it takes too long, it costs too much money, there is no predictability, there is inconsistency across the U.S., and, as a result, we are overprotecting in some areas and under in others.

And so we are trying very hard to bring certainty to make the situation better. And you are not wrong that we have received a lot of comments that said we didn’t get it right, and they are really concerned about whether we are going to listen to those comments.

And what I would ask you is to look at the history of EPA in terms of how we are listened—we listen to comments that have come in. This is a robust dialogue with the States. This is not just criticism; it is dialogue back and forth. And the proof will be in the pudding, which is, does the final rule clarify this? That is how rule-making works. I want to get to that.

Mr. HANNA. I couldn’t agree with you more. The difficulty is people don’t trust the agency. People don’t believe what—generally, they are concerned. The 36,000 farmers in New York, in my district, they are in somewhat of a panic. Now, you could say to me, there is a lot of misinformation, wrong information. So what you said it true; the proof is in the pudding.

I am deeply concerned that we—the notion of government overreach and the Federal Government impugning all this on a State like New York that does a great job is not only not helpful but not necessary and adds a degree of additional burden that people are going to always reject. And I don’t blame them.

Ms. MCCARTHY. Senator, I just don't want to overstate our—leave the impression that we have not received tremendous support for this rule. Because I don't think—I think that is correct. We have received both tremendous support and comments that question whether or not we got it right. But you have to remember that folks like the Association of State Wetland Managers have actually written in support of the rule. They are trying to make it better.

What should be untenable to this body is leaving the uncertainty on the table today that is costing everybody time and money.

Mr. HANNA. I think some of the absurd things that we have seen, like we saw on the photograph, you really have to push back on that, if you can. And if it is real, I think that also has to be addressed.

But thank you very much for being here.

Ms. MCCARTHY. Thank you, sir.

Mr. SMITH. I thank the gentleman.

Mr. HANNA. I yield back.

Mr. SHUSTER. And, with that, we go to Ms. Johnson, 5 minutes of questions.

Ms. JOHNSON. Thank you. Thank you very much, Mr. Chairman and Chairman Inhofe and Ranking Members Boxer and DeFazio.

In my home State of Texas, the EPA estimates that upward of 11.5 million Texans receive some of their drinking water from some of the small streams and wetlands that could be protected by the proposed rule.

This is important to all of our communities, and that is why I would ask unanimous consent to enter into the record a letter from 25 State elected and local elected officials and another letter from 25 NGOs in support of the rule.

Mr. SHUSTER. I am sorry. What—

Ms. JOHNSON. I ask unanimous consent—

Mr. SHUSTER. Without objection, so ordered.

Ms. JOHNSON. Thank you.

[The information follows:]***** COMMITTEE INSERT

Ms. JOHNSON. Administrator McCarthy, your agency has been criticized on the science used to support the agency's rulemaking, including the science behind protecting clean water in this proposed rule.

However, last month, the EPA's Office of Research and Development completed the "Connectivity of Streams and Wetlands to Downstream Waters" report, which noted that the scientific literature unequivocally demonstrates that streams, regardless of their size or frequency of flow, are connected to downstream waters and strongly influence their function.

Mr. Chairman, I would like to ask unanimous consent again to make a summary of this report available to the record.

Mr. SHUSTER. Without objection, so ordered.

Ms. JOHNSON. Thank you.

[The information follows:]***** COMMITTEE INSERT

Ms. JOHNSON. And, in addition, EPA solicited input from EPA's Science Advisory Board, the SAB, on this report before it was final-

ized, and the SAB completed its review of the agency's draft report in October of 2014.

Again, Mr. Chairman, I ask unanimous consent to include a letter from the SAB to EPA that outlines the board's recommendations and advise that—in this hearing record.

Mr. SHUSTER. Without objection, so ordered.

Ms. JOHNSON. Thank you.

[The information follows:]***** COMMITTEE INSERT

Ms. JOHNSON. I would like to read, Ms. McCarthy, some excerpts from these documents and ask for your comments.

First, in commenting on the connectivity report, the SAB finds that the review and synthesis of the literature described in "Connectivity of Streams to Downstream Waters" reflects the pertinent literature and is well-grounded in current science.

In addition, the connectivity report notes that the scientific literature strongly supports the conclusion that incremental contributions of individual streams and wetlands are cumulative across entire watersheds, and their effects on downstream water should be evaluated within the context of other streams and wetlands in the watershed.

Now, Ms. McCarthy, I am not a scientist, but it appears that the scientific literature supports the broad protection of rivers and streams as a necessity to protect the downstream water quality and quantity, as well as a host of other benefits, such as flood control, aquifer protection, and habitat protection.

Can you comment on the connectivity report and whether this science supports what your agencies are proposing as part of this Clean Water protection rule?

And then, secondly, are there areas where the Science Advisory Board review of this report urged the agency to change the report to reflect the best available scientific information on protection of clean water?

Ms. MCCARTHY. Thank you for raising the question.

As I indicated in some of my opening statements and beyond, I am very proud of the work that the agency did to develop the science that the Supreme Court asked us to look at so that we could have a more certain and secure way of determining what waters were jurisdictional and necessary to protect.

Our Office of Research and Development looked at 1,200-plus peer-reviewed scientific literature. They also conducted their own peer-reviewed process. It was also peer-reviewed by our Science Advisory Board. I think the science is very strong.

The real question is, how well have we reflected the science in the rule itself? And I think the Science Advisory Board was very supportive of what we did, but we need to make sure that we look at comments and know all of the nuances that are in the outside world and we are cognizant of those as we draft the final report.

Ms. JOHNSON. Thank you very much.

I think my time has expired.

Mr. SHUSTER. I thank the gentlelady.

It is now my pleasure—I didn't know I get to do this this soon—to recognize my former colleague, the Senator from West Virginia, Ms. Capito, for 5 minutes.

Senator CAPITO. Thank you, Mr. Chairman.

And thank you all for being with us here today.

Administrator McCarthy, first of all, I would like to say, living in the Kanawha Valley in Charleston, West Virginia, we suffered, a year ago, a catastrophe in our drinking water. And I know you are well aware of it. I would like to thank the EPA's help in trying to mitigate that disaster.

But I would caution all my colleagues here, don't take your clean drinking water for granted. I know we don't. But it has a lot more ramifications than just putting the tap on and being able to have a nice glass of water.

So thank you for that.

One of the more alarming provisions, I think, that I am concerned about in the State of West Virginia is the authority over lands that are wet only—and I have heard some of the conversation before—when it rains, called ephemeral streams.

My concern is that “ephemeral” appears over 75 times in your preamble to the proposed rule, yet it is not clearly defined. And it says it is a stream—and your connectivity report defines “ephemeral stream” as a stream or river that flows briefly in direct response to precipitation.

Well, I have a map that the EPA created, and it is a high-resolution map of the streams of West Virginia. Here it is. You really can't see it too well, but it is the green and the blue. It is basically covering the entire State, which is designated streams and waters.

So, in West Virginia, we have a lot of land, as you know, that is not flat, so when it rains the water runs downhill. We have more real streams per square mile than any other State, which I think a lot of the larger States would find remarkable.

But this map, that is almost totally covered in color that was done by the EPA to show water, does not even cover any of the ephemeral drainages. And if you bring these so-called ephemeral waters into the rule—and I noticed in your statements that you are going to try to exempt that—I think it really brings a lot of confusion and uncertainty.

And so, I guess, this is unacceptable in a State like West Virginia. You can't let the whim of a particular Corps or EPA employee decide which private property is now federally regulated.

I have another picture of a gully here. I call it a West Virginia gully, but is it a West Virginia gully or is it an ephemeral stream? We have yet to figure that out, and how can you tell.

So I guess I would ask from you a commitment, a solid commitment, that the final rule will not take control over these ephemeral streams that are ill-defined and, for a State like ours, could have great impact.

Ms. MCCARTHY. I just dropped my pen. Sorry.

First of all, thank you, Senator, for the thank you. And my heart goes out to West Virginia, and it did during the spill and beyond. So thank you for working with us on that, and I was happy to be able to help.

On the ephemeral-stream question, I think people may not be aware, but ephemeral streams are often found to be jurisdictional today. And so the intent of this rule was to try to provide much more certainty on the basis of the science so that we could be clear-

er about what streams are important to protect and what were not as important and wouldn't have a significant impact on those downstream waters that we are seeking to protect.

You have my absolute word that we are going to try to narrow what we are claiming jurisdiction over so that we are consistent with the law and the science and we are as clear as possible about what is in and what is out.

Senator CAPITO. Well, I think that is going to be a bureaucratic nightmare for you and, thus, a bureaucratic nightmare for anybody who is trying to get a definition. Because, as you know, these are millions of these all throughout probably our State and across the country. And it is exceedingly important.

Ms. MCCARTHY. I think—

Senator CAPITO. The other question, if I could ask one more question real quickly, much of our manufacturing is small and medium-sized.

Ms. MCCARTHY. Yeah.

Senator CAPITO. You know, the last thing a small or medium-sized manufacturer or business needs to get caught up in is a bureaucratic maze of, am I registered, am I not? How are you going to mitigate that?

And I would sort of echo what one of my colleagues said. The trust factor here with your agency is not as good in our State as I am sure we would all like it to be. And that is a real question I have from my employers in the State.

Ms. MCCARTHY. Well, we have done an extensive amount of outreach to the small-business community, and we feel obligated and, actually, honored to be able to spend a lot of time with them.

There are a lot of small businesses that have written in in support of this rule for the very reason you are talking about, is they rely on clean water, and sometimes their voice isn't as loudly heard. So we have brought them into the system. We have some great comments, and we will resolve these issues and make this more certainty.

Because the last thing a small business needs to do is ask questions about their obligation when we could have spoken more clearly in the rule to tell them what their obligation was. I don't want to waste their time and money, nor ours and others', and I think we can do a better job.

It is a difficult process, but we will work with the small-business community, and we will make sure that we eliminate confusion as best we can.

Senator CAPITO. Thank you.

Mr. SHUSTER. I just want to point out that the question was asked before about these ephemeral features, and you still haven't declared that you will exempt them. I don't know how we are going to make it more consistent and put certainty out there if you are not willing to do those types of things.

Second question, just a quick—were you aware of that map of West Virginia and all the color that was there? It appears as though the entire State of West Virginia—

Ms. MCCARTHY. It was hard for me see, but, again, Senator, we—I mean, Congressman, we have not—

Mr. SHUSTER. No, don't do that.

Ms. MCCARTHY. Chairman.

Mr. SHUSTER. They will get upset if you—

Ms. MCCARTHY. Chairman. Chairman. How about if I say “chairman”?

Mr. SHUSTER. People on both sides of the Capitol will get upset if you call me a Senator.

Ms. MCCARTHY. Yeah, yeah. I will get in deep trouble.

Again, if that is a map similar to the one that Senator Barrasso raised, that has nothing to do, as far as I know, with any decision concerning jurisdiction of the Clean Water Act.

Mr. SHUSTER. That answer really concerns me, but we will go on to Mr. Webster for 5 minutes.

Mr. WEBSTER. Thank you, Mr. Chair.

And thank you all for appearing today. I am over here on your left.

Ms. MCCARTHY. Oh, thank you.

Mr. WEBSTER. Hi.

And I am from Florida. Florida is basically a wetland. If you dig down about a foot and a half just about anywhere you are, it is a wetland. And so you can have these maps, but our map may be the entire State, in some cases, if we thought about it.

I serve three counties. One of those is named Lake County. It has thousands of lakes. They are all interconnected with all kinds of canals and other things that could be above water, above the surface, could be below. And, again, because of the aquifer being so close to the top of the ground level, a lot of the flows happen there.

So I think the big concern that I am hearing, especially from our agriculture community, is maybe some nondefinitive words. And those words mean a lot.

So I was looking at the economic analysis, which, in there, in several places, it says that the agencies project that the proposed action to change the definition of “waters of the U.S.” would increase assertion of the CWA. So the jurisdiction is going to increase. I mean, you have said that several times in this report that was done jointly by the EPA and the Army Corps.

But inside that, these words were what disturbs most of the people in my area that have contacted me, and that is it says that it is not—these things, these examples of these cost estimates and so forth are not definitive but merely illustrative.

The fear is this. The fear is that maybe the data is incomplete because the scope is not fully determined within this proposal, in that the scope could increase just on a whim. And I think that is the fear of these words that are used, especially the one that just says “merely illustrative.” That is a scary statement, as opposed to something definitive.

Ms. MCCARTHY. Let me try to explain it, because I totally appreciate the fact that you are right, words do matter, and explaining this better will be hopefully what we are able to do.

First of all, relative to the idea that the economic analysis indicates that we are going to get more water into the system of Federal regulation, it doesn't change the jurisdiction of the Clean Water Act. And, in fact, what we have tried to do is narrow the applicability here based on sound science.

But the most important thing to remember is that we wouldn't be here if there weren't confusion about what is in and what is out. And when we took a look at in practice what is happening, we believe that this will clarify it, and some of the waters that are essential to protect for drinking water and other resources will end up being better protected.

The word "illustrative" is the one I want to explain most, is this is a jurisdictional rule, and because it is a jurisdictional rule, it doesn't have a direct and immediate impact where we can estimate the economics, for example, like other kinds of rules that directly impact industry and set standards.

So the reason why we say it is illustrative is that it is all about whether or not somebody wants to pollute or destroy a wetland, and, if you do, there are costs associated with that. But what we are trying to do is reduce the cost and time to ask the question about what is jurisdictional so, if you actually do want to pollute or destroy a wetland, you have a better idea of what needs a permit, what doesn't, and how go about getting that defined.

Mr. WEBSTER. OK. Well, and I appreciate that answer. All I will tell you is "merely illustrative" is not as good as definitive. And if that can change, I would very much appreciate it, because there are just fears out there when you see words like that.

Thank you very much. I yield back.

Mr. SHUSTER. I thank the gentleman.

With that, recognize Mr. Cummings for 5 minutes of questioning.

Mr. CUMMINGS. Thank you very much, Mr. Chairman.

Ladies, it is very good to see both of you.

And, Administrator McCarthy, it was good to be at EPA a few weeks ago. I want to thank all of your employees for what they do every day and both of your employees for trying to make our environment safer and cleaner.

Let me begin by saying that one of my highest priorities is supporting the restoration of the Chesapeake Bay. Restoration of the bay has been and will continue to be a long-term project.

Furthermore, our work is made easier because we know what is harming the bay. The Chesapeake Bay is one of if not the most studied water bodies in the world. We understand in great detail how nitrogen, phosphorous, and sediments enter the bay from runoff that flows across impervious surfaces through eroding urban streams and aging storm sewers and across farm fields. We understand how the discharges that are produced by wastewater-treatment facilities and that leach from septic systems flow into the bay. We also understand the impact of the atmospheric deposition.

We do not need more studying. We need to stop the inflows of pollutants harming the bay, and we need to ensure that we have clean water throughout the Nation.

And I just have two questions, Administrator McCarthy.

Under section 303(d) of the Clean Water Act, the EPA has encouraged some States to put into place total maximum daily load. Maryland and other States in the Chesapeake Bay watershed have led that charge. What gains do States like Maryland and, by extension, the Chesapeake Bay watershed stand to receive from an updated "waters of the U.S." rule?

And my second question is: The Chesapeake Bay region has for decades been working to identify and address ongoing sources of pollution to the bay. How does this proposed rule affect these efforts? Has the current confusion surrounding the scope of Clean Water protections complicated these cleanup efforts?

And I will listen for your answer.

Ms. MCCARTHY. Well, first of all, thank you for coming to EPA and for your congratulations and thanks to the staff, who are working very hard.

First of all, let me thank you for all the work that Maryland and others have done on TMDL. Let me explain to you what I think the benefits of this rule are.

We are faced with significant uncertainty at the moment, which means that people are asking sometimes questions that take a long time to answer about whether or not something is an important water to protect, whether if they intend to pollute it or destroy it in some way, what process they need to go through. And so people are focusing their resources sometimes and money on areas where they don't need to look, and they are missing areas that are significant in terms of our ability to protect clean water and safe water for everyone.

So this is an ability to try to look at the science, cut through some of that uncertainty, focus people where the attention ought to be focused, allow our agriculture community to farm and allow folks to ranch and do all of the work that is so important to us, but also make sure that we are focusing on the waters that we really need to protect. It will save everybody time, everybody money, and it will also be respectful of what the law requires us to do and the science is telling us is most important.

Mr. CUMMINGS. And, you know, one of the things that Senator Cardin talked about is that—and we find it a major problem in Maryland; I am sure they find it throughout the United States—is the trying to make sure that our farming community is protected and, at the same time, trying to make sure that we keep our water clean.

You talked about it a little bit, but, I mean, tell us a little bit more about your interaction with the Secretary of Agriculture. And how do we strike that balance?

Ms. MCCARTHY. Well, the USDA and EPA have been working hand-in-hand in terms of understanding the concerns of the agriculture community so we can better address those concerns in a final rule.

We are working closely, as you know, with how we align what we need to do to protect water, especially beautiful resources like the Chesapeake, and how does USDA craft programs that work with the agriculture community to support conservation efforts, to support the building of buffer zones that connect as filters that can protect water quality.

And so we are working hand-in-hand to understand what we need to do to ensure that this is clear so that the agriculture community recognizes that the exemptions in the law are indeed protected, that they recognize that this rule is all about narrowing the jurisdiction of the Clean Water Act based on what science is telling us is important and not important, and that we continue to work

hand-in-hand with them so they can produce the food, fuel, and fiber we all really rely on—

Mr. CUMMINGS. Thank you very much, Mr. Chairman.

Ms. MCCARTHY. —and do it in a way that is certain.

Mr. CUMMINGS. Thank you.

Mr. SHUSTER. Thank you very much.

And just to give everybody a heads-up, we are going to go to Senator Boozman next and then Senator Sullivan, Congressman Massie and then Congresswoman Napolitano.

So, with that, I recognize for 5 minutes Senator Boozman.

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

Thank you for being with us, Administrator McCarthy.

I am concerned that the EPA is putting out misleading information to justify its efforts to take control of almost all the water in our country away from State and local communities' jurisdiction.

Last summer, EPA's Water Administrator posted a blog on your agency Web site explaining which ditches the EPA wanted to control. The blog described such ditches as, quote, "generally those that are essentially human-altered streams which feed the health and quality of larger downstream waters," end quote.

And I would ask unanimous consent that this be included in the record.

Mr. SHUSTER. Without objection, so ordered.

[The information follows:]***** COMMITTEE INSERT

Senator BOOZMAN. Also, you used the connectivity report to justify this power grab. And it has a graphic where the only example of a ditch is an altered natural stream.

The EPA is clearly trying to convince Americans and Arkansans that this is no big deal and not a massive increase in Federal jurisdiction. However, your proposed rule goes far beyond human-altered streams when it comes to regulating ditches and other channels and water conveyances built by people.

I would really ask three things.

First of all, will you commit to us that your final rule will actually match the rhetoric that the agency is coming out with, posted on such things as the Water Administrator's blog?

Specifically, will you commit that the only artificial channels that would be jurisdictional under the final rule will be channelized natural streams?

And, lastly, I want to clarify, I don't mean streams that were channelized historically. Constitution Avenue, a major road in Washington, D.C., used to be Tiber Creek. Potentially, your final rule could make the curbs along Constitution Avenue into federally controlled waters of the United States.

Ms. MCCARTHY. Senator, I am glad you brought up the issue of ditches, because the proposal actually expands exclusions to the jurisdiction of the Clean Water Act. It doesn't cut jurisdiction. And I can explain that, but let me go right to the heart of the matter.

What we are really most concerned about are ditches that are actually channelized tributaries, that actually were tributaries and look and smell and taste like them. The other issue, though, however, is that there are ditches that are directly connected to the tributary system that actually have the flow and the duration in

them, where they have features that are consistent with how we define tributaries.

So there are those two concerns that we need to address in the final rule more clearly, but we are doing our best to indicate what is in and what is out. And we, in fact, have very clearly reduced what we are considering to be the jurisdiction under the Clean Water Act in this proposal. And I can explain that if you would like me to take the time.

Senator BOOZMAN. So you are committing that the only artificial channels that would be jurisdictional under the final rule would be channelized natural streams?

Ms. MCCARTHY. I think there is a flow component here that I want to make sure that I don't miss.

What is happening today is that, if you construct a ditch in dry land and it flows less than intermittent, it is excluded. What we are trying to say and what we have said in this proposal is that ditches constructed in dry land and flow less than perennial would be excluded. So it expands the exclusion.

So there is a flow component that needs to be considered.

Senator BOOZMAN. Along a separate issue, will you commit to Congress that your final rule will not regulate groundwater or groundwater withdrawals that affect flows to surface waters?

Ms. MCCARTHY. Groundwaters are exempt from jurisdiction under the Clean Water Act, and we—

Senator BOOZMAN. Groundwaters or groundwater withdrawals?

Ms. MCCARTHY. Both. We are not impacting groundwater withdrawals either.

Senator BOOZMAN. OK.

Thank you, Mr. Chairman.

Mr. SHUSTER. Thank you.

I now recognize Senator Sullivan for 5 minutes.

Senator SULLIVAN. Thank you, Mr. Chair.

Administrator McCarthy, nice to meet you here. I look forward to working with you, meeting with you and your staff in a respectful fashion.

As you can imagine, in Alaska, we have a lot of concerns. We love our environment—most pristine environment in the world.

Ms. MCCARTHY. Yes.

Senator SULLIVAN. We are really good at taking care of it, the State is, our people are. But Alaska is also home to 63 percent of the Nation's water subject to Clean Water Act jurisdiction and 65 percent of the Nation's wetlands. So, as you can imagine, this is a very big deal for the people I represent, many of whom oppose this rule.

The Resource Development Council in Alaska believes, looking at this rule, that it could expand that already-incredible jurisdiction in Alaska by a third.

So I just want to ask a few important questions to start out with.

As you know, Ms. McCarthy, the EPA is a creation of Congress, and all regulations promulgated by the EPA must have a substantial basis in the law. Do you agree with that?

Ms. MCCARTHY. Yes. The regulations should reflect what is in the law. Yes.

Senator SULLIVAN. So one request I had, kind of going forward, is a commitment, out of respect for this committee and the Members of Congress, from you and your staff that any action, any regulations going forward, that every time you are testifying, that you or your staff specifically point out the specific provisions of the law that you are acting under, whether it is action or regulation.

Will the EPA commit to doing that in the future?

Ms. MCCARTHY. I am sorry, Senator. I don't exactly know what you are asking—

Senator SULLIVAN. But just—

Ms. MCCARTHY. —me to commit to. But, certainly, we will—

Senator SULLIVAN. A regulation like this—

Ms. MCCARTHY. Yes.

Senator SULLIVAN. —when we start out—

Ms. MCCARTHY. Yes.

Senator SULLIVAN. —come to the committee of Congress that has jurisdiction and say, here is the exact provision in the statute that gives us the power to promulgate this reg.

Ms. MCCARTHY. We make it clear, when we propose a rule, what the actual rule language is and how it changes. And we certainly discuss what the law says and our interpretation of the law—

Senator SULLIVAN. OK.

Ms. MCCARTHY. —and how the regulations are consistent.

Senator SULLIVAN. Great.

So let me get to a little bit of the specifics on this regulation. So, just in terms of chronology, how I understand it, the Clean Water Act defines “waters of the U.S.” Several Supreme Court cases—Riverside, Rapanos—defined it, further limited it.

In May 2009, the EPA came to Congress, urged Congress to expand the jurisdiction of the Clean Water Act to the furthest extent possible. And, from my perspective, that is so far, so good. When you want to expand the jurisdiction of the EPA, you have to do it through the Congress, not through regulations.

Congress didn't do this. And, in the meantime, the EPA was sued by several States on a Clean Air Act regulation, and the Supreme Court reprimanded the EPA for what it viewed as a significant Federal overreach in terms of separation of powers in the *Utility Air Regulatory Group v. the EPA*.

Did you have an opportunity to read that case, the Supreme Court case?

Ms. MCCARTHY. Yes, I did.

Senator SULLIVAN. So there was a provision in that Supreme Court case where the Justices said the “EPA's interpretation is also unreasonable because it would bring about an enormous and transformative expansion in EPA's regulatory authority without clear congressional authorization. When an agency claims to discover in a long-extant statute an unheralded power to regulate a significant portion of the American economy, we typically greet its announcement with a measure of skepticism. We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast economic and political significance.”

I am quoting that because I think that is exactly what is happening here, a significant expansion of EPA jurisdiction over the

U.S. economy, over certainly my State, and I don't think that the Congress has authorized that authority to the EPA.

So I will just be a little bit frank. I don't even think this is a close call. I don't think the EPA has the power to issue this regulation under the Constitution and the statute. I think you are trying to change the statute, and that clearly is a power that belongs to the Congress.

So I want to work with you on this, but I want to request that you withdraw this regulation, start over. There are 22 States that have made a similar request. And I think that that is an important way that you show respect not only to the States but to Congress. RPTR MCCONNELLEDTR WILTSIE[12:03 p.m.]

Ms. MCCARTHY. Senator, I very much respect Congress as well as your opinions, and I will do my best to work with you. I would say that I don't think the Agency is in any way seeking congressional action or otherwise to expand the jurisdiction of the Clean Water Act. What we are just trying to do here is to better define that in a way that everybody can be more sure of its implementation and we can save everybody time and resources.

And I know this is a big issue in your State, Senator, and I am happy to sit down with you. I think we worked very hard to align ourselves with a good government in Alaska, and we are trying to continue that partnership. And if there is anything that we can do to address your issues more specifically, I would enjoy working with you on it.

Senator SULLIVAN. Well, I look forward to working with you as well.

Mr. SHUSTER. The gentleman's time is expired.

Senator SULLIVAN. Thank you.

Mr. SHUSTER. Thank you, Senator.

And, with that, just to give everybody the lineup, we are going to go to Congressman Massie, then Napolitano, then Meadows and Edwards, in that order.

So we have 5 minutes for Mr. Massie.

Mr. MASSIE. Thank you, Mr. Chairman.

After sitting here for 2 hours in this hearing talking about "science-based rules," I am reminded why a lot of people think that Washington, D.C., is a 10-mile square surrounded by reality.

You know, I studied science and engineering at MIT for 6 years, but you don't have to be a scientist or an engineer to understand you can't do science without numbers and you can't do science without units.

I have heard terms like "flow," "duration," "wet," "dry," "intermittent," but these things have not been defined today and are not defined in your rule. I have read the rule. It uses terms of art, but it doesn't use terms of science.

And that is why we are going around the bush here chasing our tails, is because we are not talking about numbers and units. The units we should be using and the units that I see in State law are acre-feet, gallons per minute, 100-year flood, 500-year flood. Let me give you an example.

Here is a definition of "flood plain" from your rule. It means "an area bordering inland or coastal waters that was formed by sedi-

ment deposition from such water under present climatic conditions and is inundated during periods of moderate to high water flows.”

What the heck does “moderate to high” mean? Could you put these rules—you say they are based on science. A science-based rule would say 100-acre flood or a—I am sorry—a 100-year flood or a 500-year flood. That is what I see missing from these rules, and that is why we are concerned.

Why are there no numbers or units in the rule?

Ms. MCCARTHY. Actually, we put both definitions as well as we teed up a number of potential ways to actually bring more bright lines into the system. We actually took comment on whether or not it should be 100-year flood plain. So we really were paying attention to the science.

Mr. MASSIE. Well, I would recommend that you heed those comments and use them. This is the fourth hearing we have had on this. Mr. Perciasepe answered a few questions for me.

I believe he was your deputy administrator. Is that correct?

Ms. MCCARTHY. That is correct.

Mr. MASSIE. I asked him about the cost of implementing this rule, and he once testified it was \$100- to \$200 million. And then he later clarified it to say it was \$160- to \$280 million.

Do you agree with those numbers to implement it?

Ms. MCCARTHY. If you give me 1 second, I can tell you what the numbers are. I see the costs identified in the proposal as \$162 million to \$278 million.

Mr. MASSIE. OK. I am glad you agree with him.

Because on page 5 of your written testimony today, you say, “The rule provides continuity with existing regulations where possible, which will reduce confusion and”—I am quoting you here—“will reduce transaction costs for the regulated community and the Agency.”

So how can you say it is going to reduce transaction costs for the community and the agencies and then testify that the cost is \$160- to \$280 million?

Ms. MCCARTHY. Well, because we are looking at the overall cost of implementation and then looking at how effective we are in reaching those waters that are necessary to protect.

And I think I made it clear earlier that part of the implementation challenge is that there are some waters which we are failing to protect that need to be protected and there are others where we are spending significant costs and money to go after waters that are not essential for protection. And we are trying to clarify that.

Mr. MASSIE. Well, you know, outside of this 10-mile square, that sounds like Washington, D.C., speak. You are saying it is going to save money in your testimony, but you are testifying that it will cost money.

I have one final question. This has to do with the farmers.

We have a lot of farming in Kentucky. I farm myself. And on page 6 of your testimony, you say, “This rule maintains the long-standing exclusions for prior converted cropland.” And I am glad for that. That sounds generous.

But anybody who farms knows that you don’t always plow that cropland every year. Some years you have good years. Some years

you have bad years. Some years you use it for pasture. Some years you merely let it go fallow.

And one concern that I have seen with the Army Corps and the EPA is this term called "naturalization" or "renaturalization," where, if something is untended for a period of time, they say it is reverted back to its natural state, and now this exemption no longer applies.

Will this exemption apply if somebody hasn't farmed that cropland or has used it for some other farming purpose or just let it go fallow for some period of time?

Ms. MCCARTHY. You know, I would—I don't think that I can specifically answer your question other than to say this doesn't change the way in which the Agency has been working with the farming community. And the definition—

Mr. MASSIE. Assistant Secretary Darcy, would you care to answer that?

Ms. DARCY. Well, I concur with the Administrator. The prior converted cropland exemption remains. I think your question is how far out does prior converted cropland extend.

Mr. MASSIE. Correct.

Ms. DARCY. And I think because what we have done historically with prior converted cropland would still be the case under the proposed rule.

Mr. MASSIE. What is that? What period of time?

Ms. DARCY. I would have to get back to you on that because I don't know if that—

Mr. GIBBS. [Presiding.] The gentleman's time is expired.

Mr. MASSIE. Thank you. My time is expired.

Mr. GIBBS. Mrs. Napolitano.

Mrs. NAPOLITANO. Thank you, Mr. Chairman.

And I do ask unanimous consent to include in today's hearing for the record—

Mr. GIBBS. So ordered.

Mrs. NAPOLITANO. —comments from the California State and Water Resources Control Board, which I quote, "Strongly supports the Agency's intent to, among other things, provide clarity to the definition of 'waters of the United States' in order to improve efficiency, consistency, predictability, while protecting water quality, public health, and the environment."

Mrs. NAPOLITANO. Mr. Chairman?

Mr. GIBBS. Without objection, so ordered.

[The information follows:]***** COMMITTEE INSERT

Mrs. NAPOLITANO. Thank you.

And, also, Senator Boxer has already included in the record a letter from California Association of Sanitization Agencies, which generally is supportive of the administration's efforts. Also, they are requesting greater clarity on certain points.

And they state that the CWA is a "40-year-old statute that has not been updated to address the needs and realities of today's water quality problems." For the record.

Mr. GIBBS. Without objection, so ordered.

[The information follows:]***** COMMITTEE INSERT

Mrs. NAPOLITANO. Thank you.

I applaud these and many other groups that recognize this proposed rule in an attempt to undo confusion and uncertainty created by the former administration so that we may protect both the Nation's economy as well as its water-related environment.

Bush guidance comments, which this rulemaking will replace, are simply unsustainable. They fail to live up to the congressional framework of the Clean Water Act as well as the framework outlined by the courts.

Simply put, this guidance fails to protect our Nation's water, especially our drinking water. Rulemaking is necessary because nearly 125 million Americans, over one-third of the population, rely on public drinking water systems that draw from surface waters.

Of that number, 117 million Americans obtain their drinking water from intermittent ephemeral or headwater streams. In California alone, my State, over 7 million rely on intermittent ephemeral and headwater streams for their daily drinking water supply.

So we feel we must all do what we must to protect these water resources because this is the only resources we all have. So when this water dries up, our way of life and our local, regional and state economies will dry up with it.

Opponents of the Clean Water rulemaking frame is an attack on private interest, calling it a land grab fueled by Federal greed. However, our Nation has never recognized a right to pollute, which is what opponents of this rule are asking for.

Polluters would rather preserve the regulatory shadows created by the former administration where they can fill wetlands or destroy waters with little to no accountability, as was the case in San Gabriel Valley, where we have a polluted area the size of a small state that has taken over \$95 million to start working to just get it cleaned up. And we have got another \$95- or more to go. This is because of fertilizers, pesticides, et cetera, that have seeped into the groundwater, into our drinking water.

If private interests are successful in blocking this rule, it is the public who will suffer. In my State, it will mean less publicly available drinking water, less protection over those drinking water sources that remain, and an increased likelihood of flooding for our communities.

So we need to let the administration finish what they started. Protect the waters of the U.S. with this current rulemaking.

I do have a couple of things that I do have—in June of last year, I did ask some questions in regard to stormwater drains and, also, water recycling, which you have addressed, and I hope that you will continue working with our agencies throughout the Western States, which are heading into drought cycles again, to be able to protect recycled water. As you say, stormwater cleanup is very important to the whole Nation.

There are many other things that we have discussed ad nauseam, I am sorry to say. We need to put it in language that people will understand and publicly let the people know that EPA is there to help clean the water, but do so in a way that is going to help business, going to help farming.

And I applaud your effort to be able to clarify and reach out to everybody. And I noticed in the reports there is not as much out-

reach to California as I would have liked to see insofar as the water agencies that I know are very critically involved in this.

So thank you very much for all the work you do. And let's work together, hopefully, to be able to ensure that the proposed rule-making comes before Congress and we can all agree to disagree, but agree on the things we need to agree on.

Thank you very much.

Ms. MCCARTHY. Thank you.

Mr. GIBBS. Just real quick, I have two quick questions to the witnesses.

You keep saying that you will fix things in the final rule, that the questions have been raised.

Will you do a supplemental proposal so the public will have a chance to review that before you do the final rule, then, since there has been so many questions raised about what sort of things are going to get fixed in the final rule?

Ms. MCCARTHY. Well, we received a number of comments, as you know, and we are working with the stakeholders on the issue. But a supplemental would only be required if we certainly go outside the boundaries of what we have already teed up in the proposal. And at this point we intend to finalized the rule.

Mr. GIBBS. OK. Mr. Meadows, you are recognized for 5 minutes.

Mr. MEADOWS. Thank you, Mr. Chairman.

Thank each of you for being back with us.

Ms. McCarthy, I wanted to wear my Boston Red Sox hat today just so you would know that—

Ms. MCCARTHY. We did, too.

Ms. DARCY. I am from Massachusetts, too.

Mr. MEADOWS. And I do want to say that there are elements where some of the issues that we are talking about today that we do hear a responsive ear. I am troubled, however, by some of the testimony, as you would probably be well aware.

I have in the past received permits from the EPA from our State, and, as I deal with that, the ambiguous nature of rules and guidelines for those permits, I don't see that being clarified in this rule-making.

So can you tell me today, how much quicker are those permits going to get issued?

Ms. DARCY. Congressman—

Mr. MEADOWS. Because I don't see anything in the rule. I read it and—

Ms. DARCY. Could I answer that one, Congressman?

Mr. MEADOWS. Sure.

Ms. DARCY. We think that by getting more clarity as to what is in and what is out is going to be able to inform our regulators within the Agency.

Mr. MEADOWS. But this doesn't do that. I mean, going back to what Mr. Massie just said, the definitions are still ambiguous.

How in the world can you say, well, medium flow, moderate flow? Moderate flow, to me, is very different, maybe, than moderate flow to you. The definitions even in the rules are not specific.

So how can the average person look at those and say that they can implement it any faster?

Ms. McCarthy?

Ms. MCCARTHY. Well, I think we have done a good job at teeing up opportunities for narrowing where there is uncertainty and, also, narrowing where you have to do case-by-case study based on what the science tells us is in and what the science tells us isn't.

And I would just ask you to take a look at that as well as alternatives we have teed up, because it is clearly our intent to reduce uncertainty here, which will, in essence, reduce costs associated with it.

Mr. MEADOWS. All right. So you mentioned the cost.

Ms. MCCARTHY. Yes.

Mr. MEADOWS. And my good friend from Kentucky mentioned the cost.

Ms. MCCARTHY. Yes.

Mr. MEADOWS. So if we are regulating and making rules on less water, how could that be more costly? How could it cost \$200 million?

Ms. MCCARTHY. Well, let me try to clarify it because I frankly think I did not do a very good job at that. So let me take another shot at it.

The cost increase that we see relates specifically to what we believe to be mitigation impacts and what would need to be done to reduce pollution and impact on sensitive waters that we believe will identify—

Mr. MEADOWS. So you are going to increase the mitigation cost?

Ms. MCCARTHY. No.

Mr. MEADOWS. Because I have gone through mitigation and we already have a two-for-one, one-for-one, four-for-one kind of mitigation.

What mitigation are you talking about?

Ms. MCCARTHY. I explained before that I think there are areas—they are small, but there are areas where we are not sufficiently protecting water that should be. We are being very clear, I think, about what is in and what is out.

But when you apply that to what is being implemented today, there are some areas where they would actually require a permit and require mitigation associated with that.

That is not to increase the per capita transaction—the transaction cost, but it is just a reflection that it will be clearer about some areas that should be protected because they are significant and what areas are not.

Mr. MEADOWS. All right. So maybe dumb it down for me.

How do we make it clearer and easier and it becomes more costly? I don't—explain it to the American people.

Ms. MCCARTHY. Well, we have made, I think, an opportunity available to take a look at how you define tributaries. Right now, that is not well defined. We have defined that—

Mr. MEADOWS. Yeah. Because I live on the Continental Divide. Everything is downhill for me.

Ms. MCCARTHY. We have increased exclusions and exemptions. We have done at least a step forward on ditches, what is in and what is out.

We have tried very hard to identify this adjacency question, which the Supreme Court told us we had to define. We defined it by proposing a variety of options to take care of that.

We have actually identified opportunities to take these other water sections and to try to find ways of doing more categorical exemptions or inclusions—

Mr. MEADOWS. All right. So let me reclaim my time real quickly because I have got one last question.

Ms. MCCARTHY. OK.

Mr. MEADOWS. Ms. Darcy and you and Mr. P, as I would call him before he retired—

Ms. MCCARTHY. Bob Perciasepe.

Mr. MEADOWS. Yes.

—mentioned that this would not affect farmers, that, really, they are kind of quasi-grandfathered in, and, yet, I assume that the American Farm Bureau, the North Carolina Farm Bureau—none of them have come out to endorse this.

So if stakeholders are not endorsing this rulemaking, what is the problem?

Ms. MCCARTHY. Well, it is a complicated rulemaking, and some areas are clearer than others. And we will be working with them on it.

But the agriculture community deserves to have more certainty than what is available to them today, and we are going to try to do that in working with the agriculture community.

And we have not done anything to narrow exclusions or exemptions in the Clean Water Act. In fact, we are expanding those exemptions and exclusions in this rule.

Mr. MEADOWS. I appreciate the patience of the chair.

Mr. GIBBS. The gentleman's time is expired.

Ms. EDWARDS, you have 5 minutes.

Ms. EDWARDS. Thank you, Mr. Chairman.

And I thank the witnesses as well for your patience.

I would ask unanimous consent to enter into the record letters of support and resolutions from various of our small municipal jurisdictions out in my congressional district in our State—well, one of those is not small, the City of Baltimore—but cities like College Park, Capitol Heights, Edmonston, Forest Heights, Mount Rainier, New Carrollton, and the City of Rockville—letters of support from them as well as from Clean Water Action supporting their efforts, from more than 30 of our State senators and legislators who have deep experience in working on these issues in the State of Maryland, a letter from Union Craft Brewing Company, Heavy Seas Brewing Company, and the small bed and biscuit—Hereford Bed & Biscuit in Parkton, Maryland. And I would offer those for the record.

Mr. GIBBS. Without objection, so ordered.

[The information follows:]***** COMMITTEE INSERT

Ms. EDWARDS. Thank you.

And, again, thanks to the witnesses.

Because I have heard from you numerous times. And, to me, it seems fairly, you know, clear. And I am no expert. But I think, like most Americans, I want to just get up, turn on the water, know that I can drink it, wash with it, and that it is clean, my children aren't going to get sick, my immune system won't be jeopardized.

And we depend on the Government to do that. We depend on the EPA and on the Army Corps.

And so, with the two Supreme Court decisions and the guidance documents that were issued in 2003 and 2008, it is my understanding that the regulated community, conservation, and environmental organizations, several States, concede that the current process that has been in place—and, really, you know, for the better part of a decade, that kind of uncertainty that has been in place is confusing, it is inconsistent, it is costly, and it has provided little environmental benefit. And from what I have heard, entities really just want certainty, and I think that is what I have heard from the witnesses today.

The two agencies released in March 2014 a proposed rule that would clarify the jurisdiction of the Clean Water Act and requested certainty. And so, to me, quite simply, it is a proposed rule. It is not a final rule. There is a lot that has gone into the process. You have already explained that there have been a couple of extensions to allow for additional comments and consideration. I can't actually think of a more public process than has been engaged in this rule-making.

And from what I further understand about the rulemaking process, agencies take the comments that are received like you are doing. You have hearings and consultations with a broad swath of interested parties and then you make modifications to the proposed rule before you issue the final rule.

That is where we are right now. And I think we have heard from some of my colleagues that the gross exaggerations that have been made about the scope of the rule are, in fact, that. They are exaggerations. And so I am glad that you are here again today to clarify for us what is in consideration and what is not.

I just want to point out that, in Maryland, 59 percent of our streams have no other streams flowing into them, 19 percent don't flow year-round. And under the varying interpretations of the recent Supreme Court decisions, these smaller bodies are among those for which the extent of Clean Water Act protections has been questioned. And so the EPA says that, basically, nearly 4 million Marylanders—and that is about 70 percent of our population—receive some of our drinking water from areas that contain these smaller streams.

And, as I said, 70 percent of Marylanders get our drinking water from sources that rely on headwater or seasonal streams. We, in fact, in our State are welcoming this clarity.

And so, in view of that fact, I am proud that Maryland joined over 30 States—I am a little confused. 30, 34. Like we have 64 states. But 30 states have joined in asking the Supreme Court to uphold broad legal protection through small tributaries and their adjacent wetlands.

And so I share with Senator Whitehouse that this is not a perfect scenario, but we shouldn't let the perfect be the enemy of the good.

And I wonder if you could just comment for me in the brief time that I have left the agricultural exemptions that you have told this committee about before and the fast-tracking process that the Army Corps will put into place to make sure that discharges associ-

ated with agricultural activities will not have the kind of impact that some of our farmers perceive.

Ms. DARCY. I will take that one, Congresswoman.

The agricultural exemptions that currently exist in the Clean Water Act are still there. That is unchanged by this rule. And they include agriculture stormwater discharges, the return flows that the Administrator talked about earlier, construction and maintenance of farm and stock ponds, maintenance of drainage ditches, upland soil and water conservation policies. These are all in place, and they continue to be in place as a result of this rule.

Mr. GIBBS. Your time is expired.

Senator Fischer, you have 5 minutes.

Senator FISCHER. Thank you very much.

Nice to see you again, Administrator.

Ms. MCCARTHY. You, too, Senator.

Senator FISCHER. I have here many, many comments that were filed by the League of Nebraska Municipalities, and I want to make sure that their concerns are heard and not ignored, as I believe you rushed to issue a final rule by April, assuming a 60-day OMB review period instead of the usually 90 days. And it would give you then only 3 months to review and address over the 1 million comments you have received.

These comments provide a good overview of concerns about your proposal because Nebraska municipalities not only run wastewater, stormwater, and flood control systems, they also provide drinking water, electricity, and natural gas to their citizens.

So I ask unanimous consent that these comments be placed in the record.

Mr. GIBBS. Without objection, so ordered.

[The information follows:]***** COMMITTEE INSERT

Senator FISCHER. Thank you.

Administrator, I also have a copy for you here, if you would take that, and I hope that you will take the time to read through it.

My communities are deeply concerned about the proposal. You know that. The reason they are so concerned is that your proposed rule could regulate all waters in the State of Nebraska.

First of all, you are proposing to regulate all water that has a shallow subsurface hydrologic connection or subsurface hydrology. As you can see from a chart that I have, in large areas of Nebraska, the groundwater table is only 50 feet below the surface. All water located in these areas could be automatically regulated under this proposal.

Second, you are proposing to regulate other water on a case-by-case basis that includes consideration of connections through deeper groundwater systems, and you are proposing to look at all waters in the aggregate in a watershed or in an ecoregion. Most of Nebraska falls in one of the ecoregions that you have identified. Therefore, all water in these ecoregions would be reviewed collectively to determine that they have connections through groundwater. That makes them all waters of the United States.

I want you to understand that municipalities and landowners in Nebraska cannot engage in development activities or construct and maintain wastewater, stormwater, and flood control systems with-

out creating some form of open water that would be regulated under this proposal. I don't believe that is a myth. These are real impacts of the proposal that you are putting forward.

So I would ask: Will you commit that your final rule will not assert Federal control over water based on groundwater connections?

Ms. MCCARTHY. Well, first of all, Senator, thank you.

We actually are working very hard to identify and resolve the issues that you have raised. I would agree with you that there are many legitimate issues that have been raised, and I will also agree that we are not rushing to finalize the rule until we resolve these issues to our satisfaction and so that we can explain to the stakeholders how we listened to them. So I would appreciate walking home with the comments that you have provided.

I am going to fall short of answering your specific question until the dialogue with the stakeholders is concluded and we see how we—we understand that groundwater, while it is not regulated under the Clean Water Act, there are connections that may be important for the quality of downstream waters. But, clearly, folks are asking for a lot more clarity on this and this is one area where we need to work hard together.

Senator FISCHER. Also, I would say to you that many of my stakeholders feel that your staff has refused to provide them with some clear answers during outreach sessions and they are concerned about the intended scope of the proposed rule.

Cities and counties have repeatedly asked your staff if they intend to include the municipal storm sewer systems in the definition of "waters of the United States," and, instead of clearly disavowing any such intent, your staff seems to be very evasive and will only say, "If you don't need a permit today, you don't need one under the proposed rule." I would hope that is correct, but we need clarification on that.

I think that answer is unacceptable. It suggests to me that some storm sewers are going to be considered "waters of the United States." The storm sewers and other water management ditches and canals are not waters of the U.S., but I think your proposal is broad enough that it would bring them under Federal control. And we definitely would have issues with that. We have many issues that come up with industrial facilities, with farmers, wastewater treatment facilities, drinking water utilities, because they all manage water in manmade conveyances.

Mr. GIBBS. The gentlelady's time is expired.

Senator FISCHER. I see my time is up. Thank you.

Mr. GIBBS. Do you want to respond quickly?

Ms. MCCARTHY. Only that, Senator, I would really appreciate it if our staffs could work together. And if there is clarity that we can provide and additional outreach, I would be more than happy to do that.

Senator FISCHER. I appreciate your openness on that, Administrator, and, hopefully, we can get answers to my stakeholders.

Ms. MCCARTHY. Thank you.

Senator FISCHER. Thank you.

Mr. GIBBS. Mr. Woodall, you are recognized for 5 minutes.

Mr. WOODALL. Thank you, Mr. Chairman.

I appreciate you all being here, particularly for those of us at the bottom end of the dais.

I wanted to follow up on Senator Fischer's question, though. I have been a staffer for a decade or so, and I appreciate that you don't always—if your name is on the door, you don't always want the staff disavowing things, because that is the job for the men and women whose names are on the door.

But if it is clear that stormwater clearly is not within Federal jurisdiction, why can't those with their names on the door go ahead and disavow that today and let us take that off the worry list for folks back home?

Ms. MCCARTHY. Well, I would like to take anything off the worry list that I can. So we will do whatever outreach we need to do to be as clear as we possibly can. Staff are obviously conservative in giving opinions during the middle of a rulemaking process, but we need to be a little less so so that we can be frank and build confidence in one another.

Mr. WOODALL. But it would be easy to—I think about the Assistant Secretary. We have had conversations about water treatment facilities in our district. They are built above and beyond. They are just spectacular, a great expense to my constituents, because we are invested in the environment. In fact, I would take issue with anyone who says we are not doing more than our fair share.

And it would be easy to go ahead and disavow a whole string of things that you have no intention of creating, but folks are talking about exaggerations and people being worried for nothing.

I would tell you this. Waters of the U.S. is issue number one for folks into my district. Water, in general, is issue number one. And it seems that we do a disservice, as legislators and regulators, if we have an opportunity to say, "Let's focus on what really is important, what really is a stakeholder contention, and let's move these red herrings off the table."

Why should we be concerned with that?

Ms. MCCARTHY. We had an earlier question about these facilities, these MS4s and others, and I was, I think, very clear that there will be exclusions articulated for those in the final rule.

I think what we see has happened here is our interest in expanding exclusions wasn't our intent to cover everything. And if we didn't articulate everything, people felt that we were specifically narrowing those exclusions. We will do a job at articulating what is in and what is out better than we certainly did it before.

And you will have my assurance that these things that have never been in before, that we have never talked about, will not be in the final rule. We will clarify these so that people will see in writing what they have been asking us about.

Mr. WOODALL. I think about your goals of clarity, cost reduction. These are all goals that every stakeholder in my district shares and, I would argue, stakeholders across the Nation share.

And, yet, amongst your million comments will be letters from our Attorney General taking issue with the proposal, citing the very same case law that you cite to promulgate the proposal. Our Attorney General would cite to negate it, our Chamber of Commerce, our Council for Quality Growth, our Ag Commissioner, on and on and on.

I am very proud of Georgia's record of environmental stewardship, particularly water stewardship. I am one of those anglers who spends \$50 billion a year in U.S. waters.

Can you tell me something that, in your collective experience, that we have failed on in Georgia that—again, sharing the desire that everyone has for clean water, I feel like we are meeting that standard locally today. No one is asking for Federal help today.

Can you talk to me about some failures that we have had in my State that this rulemaking would seek to train us up.

Ms. MCCARTHY. I don't think—and, Jo-Ellen, I am sorry. I am going to be very quick.

I don't think that this should be looked at as an indication of failure on the part of any State. This is trying to respond to States telling the Federal Government that, "It is time that you were clearer so that we can do our business, which is to co-regulate with you in a way that is effective and efficient."

They are asking us to be clearer. So I would not want folks to go thinking that this is a reflection of any failure on the part of any State.

Mr. WOODALL. And so I am looking at a handout from the Water Advocacy Coalition that lists 11 States submitting comments to say, "We oppose the rules that are promulgated. We need lots of revisions," another 22 States that say, "We oppose it. We want it withdrawn altogether."

You are saying that this process began as a response to these State stakeholders. But given that the majority of those folks have some degree of—or a substantial degree of concern today, would we still say that the rulemaking has addressed those concerns that it set out to address or have we gone far afield?

Ms. MCCARTHY. I think we still have work to do before the final rule, and the final rule will respect that work getting done. I think that it is incredibly important that we retain the partnership we have with States working collaboratively together.

We went through this process specifically to tee up a range of ideas that the States and stakeholders could respond to in the rule-making. That is what you see has happened.

This is not an easy rule, and I won't suggest it is. But we will get this done in a way that we are supposed to, and we will listen and respond to the comments effectively.

Mr. WOODALL. I appreciate that recognition of Georgia's success.

And, Mr. Chairman, I yield back.

Mr. GIBBS. Administrator McCarthy, I have just got a quick clarification.

You told Senator Fischer you will not rush to finalize the rule, but your Web site, EPA's Web site, says you plan to issue a final rule in April.

Is that still the plan?

Ms. MCCARTHY. Well, certainly our goal is to issue it this spring. I am not going to give you a specific timeline more than that because I want to make sure that we are respectful of the full range of comments that came in and we have—

Mr. GIBBS. I just wanted a clarification for what your Web site says. OK. Thank you.

Ms. Titus, you are recognized for 5 minutes.

Ms. TITUS. Thank you.

And thank you, Administrator, for being here.

I represent the First Congressional District of Nevada. That is basically Las Vegas. We live in the desert. If you have ever been there, you know our biggest body of water is the fountains in front of the Bellagio. So we are kind of in a unique situation.

Ms. MCCARTHY. And they are beautiful.

Ms. TITUS. We get about 4 inches of water a year, but we also depend on one source primarily. 90 percent of our water comes from the Colorado River. It serves 2 million people who live there in the valley and 42 million people who come as tourists.

So protecting that river is very important to us. And so I am very supportive of your efforts and generally think what you are doing is right on track.

I have talked to some of the local government agencies, however, and they have a bit of a concern about the definition of "ephemeral tributaries."

And I would like to enter their letters in the record, if I may. One is from the Regional Flood Control District of Clark County, and one is from the Las Vegas Valley Watershed Advisory Committee, if that is all right.

Mr. GIBBS. Yes. Without objection, so ordered.

[The information follows:]***** COMMITTEE INSERT

Ms. TITUS. Thank you.

The Flood Control District is concerned about the definition of "ephemeral washes" in the desert throughout the Southwest because oftentimes they won't carry water for years, but, when they do, it may be a flash flood. So the water level is very high. We would like to figure out how they will fit into the scheme of things.

And the second concern from the Las Vegas Watershed Advisory also is about that same definition, and they would like to know if some facilities that they construct for water projects will actually be included, things like ditches, canals, ponds, manmade features used in the operation of wastewater treatment and supply systems.

So could you address those two things or give me something that I can take back to them—

Ms. MCCARTHY. Sure.

Ms. TITUS. —to assure them that these things are being considered in this process.

Ms. MCCARTHY. Yes. Let me answer two.

One is let us know who you would like us to talk to, because we will be very clear, as we answered before, about the MS4 issues, which is one of your issues. All of the construction that is done to protect stormwater from urban areas and others is extremely important for us to recognize and continue to incent that and not to confuse that issue.

Let me mention the ephemeral washes, because the significant issue for us is: When does an ephemeral flow? When is it sufficient duration and intensity and frequency that it has an opportunity to impact the quality of the water that is downstream? That is the question.

So what we are doing in this rule is trying to define the very water features that you can articulate in the field that reflect a

water flow in those washes that indicate that it is of sufficient flow, duration, and frequency that it would have created a bed, a bank, and a high water—well, I am sorry—ordinary high-water mark—thank you very much—the “O” always eludes me—which are actually features that reflect that it flows sufficiently and frequently enough that it could significantly impact the biological and chemical and physical integrity of the waters that it flows into.

So we are doing our best to define that in a way that you can see it and you can know what is in and what is out and would certainly find it an opportunity to talk to anybody about why we are making those connections and why we think it is respectful of the science and why it will also minimize confusion in a way that will be helpful to everybody.

Ms. TITUS. I appreciate that.

If I can get them in touch with your office, then, to kind of reassure them along—

Ms. MCCARTHY. We are happy to reach out to your office as well.

Ms. TITUS. Thank you so much.

I yield back.

Mr. GIBBS. Mr. Hardy, you are recognized for 5 minutes.

Mr. HARDY. Thank you, Mr. Chairman.

I, too, am from Nevada. I have the north portion of the Las Vegas area and, also, further north to the rural counties. We come from an area, like the Congresswoman said, where I have 7-year-old frogs that don't know how to swim. So it is a dry area.

So, with that, I want to go back to a comment that was made earlier about the \$162 million to \$280 million number. Can you elaborate on this analysis. And did you take into account the sheer mitigating factors? Were there second- or third-layer effects of the supply chain included in this analysis?

Let me go ahead and put it into perspective. As a former businessperson, owner, trying to expand my company, I was not only concerned with the immediate internal facts, like my products, my employees, but I also had to look at the long-term external environment and the legal and socioeconomic and political factors.

Have you looked into those to see what the costs of those would be with this mitigation? You say it significantly outweighs the benefit.

Ms. MCCARTHY. To the extent that we—we followed the Office of Management and Budget guidelines and EPA's guidelines, and we have done an economic analysis for this rule that is consistent with what we believe our obligation is and to the extent that science allows us to do this effectively.

There are benefits that we cannot capture in this cost that we have estimated to the best of our ability. So we think we have done a very thorough economic analysis. But times change.

We are going to relook at that economic analysis and, when we issue the final rule, we will do the best we can to talk about all of those, the benefits and costs associated with this rule not just short term, but long term as well.

Mr. HARDY. OK. I would also like to read a comment from Nevada's Department of Conservation and Natural Resources and the Nevada—Colorado Commission of Water. I would like to hear your reaction to it.

“Nevada has very strong laws and regulations to preserve and protect the waters of the State, which are defined as waters situated wholly, partly, or within the bordering upon the State. The State has the authority to protect all waters, whether or not they are subject to the CWA jurisdiction, and has carried out authority effectively and efficiently for decades.”

I would like to hear your thoughts on this statement and why we continue to need your authority within our State when we are doing a great job.

Ms. MCCARTHY. Well, the States and EPA work with one another in partnership to protect waters. Again, I do not want this rule to look like it is an indication of a lack of diligence on the part of Nevada or any State. Frankly, it is just making sure that the Federal Government does its job to be as clear as we can.

The States have asked for this because they want to eliminate challenges to some of their decisions and they want clarity on what they should be paying attention to. We are just trying to be the best partners we can with the States.

Mr. HARDY. And I think that is where this comes into effect. You know, the Federal Government has a tendency to one-size-fits-all. I don't think one size for Nevada fits anybody else. It doesn't fit the West, nor does it fit any State in the United States.

We have 50 significant different States and different environments. So this one-size-fits-all—we have to be very open on how we are going to deal with this.

Another of the comments that was made here, if you wouldn't mind reading it: “The EPA has attempted to collaborate with the States and other affected parties after the fact and address issues of concern that have already been proposed.”

That is a concern to me when you say you—you have specifically said yourself that you have worked with the States, but they are telling us it is after the fact you come to them with this—with your proposal.

Ms. MCCARTHY. These are issues that EPA and the States have been working on, literally, for decades. But no matter how you perceive the pre-proposal work that we did, there is no question, I don't think, that the docket will reflect that we have done significant outreach with the States on this. We have reached out to them through our regions and through headquarters. We are going to continue that discussion.

Mr. HARDY. One final question before my time runs out.

“The CWA has not intended to apply the management of groundwater. While we applaud the proposed rule exclusion of groundwater, the issue becomes blurred when the shallow subsurface hydraulic connections are used to establish jurisdiction between surface waters. This opens the door to interpretation and the argument of extension of the CWA jurisdiction to groundwater resources.”

Any comment on that?

Ms. MCCARTHY. That was the exact same issue that Senator Fischer raised, and we are happy to continue that discussion.

Mr. HARDY. Thank you.

I yield back.

Mr. GIBBS. Mr. Huffman, you are recognized for 5 minutes.

Mr. HUFFMAN. Thank you, Mr. Chairman.

And I want to thank Administrator McCarthy and Assistant Secretary Darcy for your patience and testimony here today and, really, for your good work over the course of several years.

It is remarkable how much public process you have brought to this issue, how much science, and how many iterations of peer review and analysis have gone into this, the fact that we have had drafts and revisions and a listening tour that really is more extensive than anything I have seen in my short time here in Congress.

And I think the real story of what you have done here is a story of the way a serious rulemaking ought to work. You have, frankly, just done good work, and I want to commend you for that. And you have maintained your patience in the face of, I think, some pretty outlandish accusations about this proposed rulemaking.

In fact, I think there is—if there is any story from today's hearing, I think it has to be how weak and unfounded and just plain wrong some of the claims about this rulemaking are.

We have seen a map that was never intended to depict Clean Water Act jurisdiction or even jurisdictional expansion, but it was represented that way. And then, when you clarified that the map appeared to be prepared for fisheries purposes or for completely unrelated purposes, some of my colleagues across the aisle said they were very troubled by your answer. It is really rather remarkable what passes for congressional oversight sometimes.

We saw a photo of something that seemed to be represented as a bit of a smoking gun, an erosion feature in a farm field. And, yet, when we had a chance to listen to you, we found that that is actually something that was found to be jurisdictional under the current rules, not under your proposed rulemaking, sort of illustrating the problem, the problem we have with the status quo that comes to us not through the exhaustive science and public process that you have brought to this issue, but it comes to us from policy guidance that was handed down without any process, without any science, without any advanced notice or comment from the Bush administration in response to some Supreme Court decisions.

And the guidance that we are left with draws from two different Supreme Court Justices' opinions who had two different ideas about how one ought to find jurisdiction under this matter and leaves with us a case-by-case analysis that is cumbersome, that has been litigation prone, that frankly leaves us with a status quo that nobody should be very satisfied about.

So I am glad you have taken on this tough issue at the request, we need to always remember, of stakeholders, of the Supreme Court, of so many folks that have asked you to do this. And, again, I think you have done very good work.

I represent a lot of farmers and ranchers, a lot of forestry in the north coast of California, and I do continue to hear some of these concerns that you have very clearly, I think, spoken to on many, many occasions.

But I just want to ask you one more time: Are there any farming, ranching, or forestry discharge activities that are exempt from permitting today that would lose that exempt status because of anything you are doing in this rulemaking?

Ms. DARCY. No, Congressman.

Mr. HUFFMAN. All right. And I know we continue to hear concerns about dry washes and even truck tire ruts and things that you have clarified many, many times. But I want to ask you where you are going with that process of clarification.

Because, clearly, no matter how many times you say it, it doesn't appear to satisfy the folks who keep trotting out these examples. And I think I understand that you are going to try to address this through defining the term "bed and bank."

We saw a picture, I think, from Senator Capito that was represented as a dry wash. But, to me, it looked like it might have had a bed and bank. I don't know. But I think we have heard that you may be in the process of providing some real definition of this "bed and bank" standard, science-based definition.

Can you just tell us what we might expect in the final rule on that point.

Ms. DARCY. Because of the public comment on that issue in particular—because that is part of the definition of "tributary," which is being defined for the first time ever in the Clean Water Act and in regulation.

And I think, because it was the first time the definition was out there and the definition is it has to have a bed and bank and ordinary high-water mark, that is getting a lot of comment.

And I think part of the comment is, "So further define that." And I think, in response to public comments, that is probably a challenge for us to address in the final rule.

Mr. HUFFMAN. So you think we can expect some specific definition of this "bed and bank" standard?

Ms. DARCY. I think we need to consider it, especially because it has raised concerns. And, again, we are trying to get certainty and, if we can better get some certainty here, that is the way to do it.

Mr. HUFFMAN. All right. Thank you.

Mr. GIBBS. Senator Carper, you are recognized for 5 minutes.

Senator CARPER. Thanks, Mr. Chairman.

It is great to be here with all of you at FedEx stadium. This is a big room. And it is nice to be with my—some of my former House colleagues with whom I served a number of years ago.

It is nice to see you from afar, from all the way up here to down there. To our Administrator and to our Assistant Secretary, thank you for coming today and for hanging in here for all of this time. I think you are just the first panel, which has been a pretty long morning, I am sure, for you.

I have just come from a hearing on Homeland Security and Government Affairs Committee and we focused on the President's action with respect to immigration and providing some protections, if you will, for those that are here in certain status as opposed to others that are not allowed to stay any longer.

And one of the messages that came out of that hearing was the reason why we are having that hearing in the Homeland Security and Government Affairs Committee is because the Congress hadn't done its job, that we didn't pass comprehensive immigration reform, and if we had, the issues that we were discussing would have been moot.

And I think there is a parallel here. And I think the parallel is, if we had done our job, if we had actually passed legislation to pro-

vide for the clarification that was needed following some Supreme Court intervention, we wouldn't be holding this hearing. Is that correct?

Ms. MCCARTHY. It could have reduced some of the existing confusion, that we can and will reduce the regulatory action as well.

Senator CARPER. All right. I am really tempted to ask what is a question that you wish had been asked you. Let me ask that. What is a question you wish had been asked? Out of all of the questions fielded today, what do you wish you had been asked that never was asked? Anything at all? Did we exhaust everything?

Ms. MCCARTHY. I actually was going to say: Would you like a bathroom break? But I thought that would be too rude at this point in time.

Senator CARPER. Well, in that case, I will hurry this up.

All right. Can both of you name for us two concerns that you have heard from stakeholders that you intend on addressing in the final rule. Each of you, two. A double shot, if you will. Two concerns that you heard from stakeholders that you intend on addressing in the final rule.

Ms. DARCY. The continued lack of clarity, which is what we are attempting to do in the rule, was to be more clear and definitive about, as Gina has continued to say, what is in and what is out. And I think that is what we have to continue to look to improve upon in the proposed rule.

That, as well as how we can better cut down the time that permits take. And I think, by providing some more clarity and definition, we might be able to get after that as well.

Senator CARPER. All right. Thank you.

Ms. MCCARTHY. Let me just add, the definition of "tributary" and how it relates to ephemeral streams is extremely important, how that all relates to erosional features that are exempt, are excluded, from the Clean Water Act jurisdiction. I think people have asked for more clarity on significant nexus. I think we need to provide it.

And the ditch issue, it drives me crazy, as it does everybody else. So there is a lot of issues that have been raised around ditches, and we need to be very clear about the fact that we are not just respecting the current exemptions, but we are expanding on those. But we are also defining those unique ditches that actually deserve to be protected from pollution and destruction through a normal permit process.

Senator CARPER. All right. Good. Thank you for that.

It is my understanding that attorney generals from, I think, a half dozen or more States, including my own State, former Delaware Attorney General Beau Biden who just stepped down a month or so ago. But I understand that they sent a letter to the EPA and the Army Corps—I want to say last September—and in their letter they were in support of the waters of the U.S. proposal.

In that letter, the AGs pointed out the need for predictability. They spoke to the need to address discharges that can happen in one State, but impact States downstream.

And I just want to say: Is that correct? Just yes or no. Is that a fair statement?

Ms. MCCARTHY. I believe so.

Senator CARPER. However, I understand the EPA has also heard from other States with extreme concerns over the rule. I am sure you have heard that today.

Why do you believe there is such a diversity of views from State to State on this issue? Do you believe this rule does provide needed predictability? And do you believe that there are some changes that you can make in the final rule to address some of the concerns we are hearing from these other States?

You already answered the second question, in part, because you told me you actually think some followup needs to happen. So why such a disparity? I mean, you have got some States that say, "This is good. Let's do this" and other States who raise all kind of heck about it.

Ms. MCCARTHY. I think it points out that there is a tremendous amount of lack of clarity and uncertainty today. And so part of it is, I think, when we explained what is actually jurisdictional today, some people were surprised by that.

And when we tried to explain exclusions, they didn't understand that that list was not exhaustive. So if they didn't see themselves in the exclusions, even though it was much larger than current exclusions, they thought we were sending a signal that they weren't excluded.

So there was a lot of misinformation and legitimate misunderstandings and legitimate need for continued clarity on these issues.

Senator CARPER. OK.

Ms. MCCARTHY. And we just need to face that and deal with it in the final rule effectively.

Senator CARPER. Thank you both so much.

Thank you, Mr. Chairman.

Mr. GIBBS. Ms. McCarthy, I have got just a quick question here to follow up.

Ms. MCCARTHY. Yes.

Mr. GIBBS. You told us about you are resolving all these issues before the final rule and you are working with the States and stakeholders.

But what specifically is the process for resolving these outstanding issues?

Ms. MCCARTHY. To continue to look at the comments received, to continue to have discussions as appropriate and docketed with the stakeholders.

Mr. GIBBS. So you are having interaction with the States?

Ms. MCCARTHY. Absolutely. Yes, we are.

Mr. GIBBS. OK. Mr. Mica, you are recognized for 5 minutes.

Mr. MICA. Well, thank you.

And let me follow up a little bit with the EPA administrator. It is my understanding that 34 States expressed concern and asked for withdrawal or significant revision.

Is that a correct number?

Ms. MCCARTHY. It is a—I don't have any number—

Mr. MICA. Well, that is what I am told, 34. It is not—

Ms. MCCARTHY. It may be, but—

Mr. MICA. It is not just a few States. It is 34.

Ms. MCCARTHY. The only thing I would indicate is that the same States—

Mr. MICA. And 34 is about two-thirds of the States. I think we still have 50 States. Seems like it is a significant number.

How long have you been working on this proposed rule?

Ms. MCCARTHY. When did we first propose it? Last April in 2014. But certainly well beyond that.

Mr. MICA. And you came out with your proposed language and consulted different folks, States, which aren't happy.

When was the exact date you came out with your proposed rule?

Ms. MCCARTHY. April 21st of 2014.

Mr. MICA. 2014.

Ms. MCCARTHY. But that reflected the guidance document that—

Mr. MICA. And how much longer would you take before you finalize the decision on the rule?

Ms. MCCARTHY. We have not finalized the decision.

Mr. MICA. No. I want to know how much longer it would take to come out with a final rule. What is your prediction?

Ms. MCCARTHY. Well, we are hoping to propose it—we are hoping to finalize it this spring. I do not have an exact date.

Mr. MICA. This spring. OK. But I am trying to get some time.

Ms. MCCARTHY. Sure.

Mr. MICA. I did everything I could to block changing the law after the Supreme Court decision because there were other definitions. I found in that discussion that one of the things that happens—and I heard earlier testimony from the Corps of Engineers that there is some significant impacts.

In fact, you testified earlier, didn't you, Corps representative, that there will be additional costs, additional services required of the Corps, to take on this new responsibility?

Ms. DARCY. There will be some additional implementation costs if the rule is finalized. Yes.

Mr. MICA. OK. So there is additional cost.

One of the things that concerns me—maybe the big corporations can comply with this. First of all, having been in business, when you change this rule, you are going to create legal havoc because you are changing years and years of law and definitions.

And there is—you talk about clarity. Well, when you adopt a new rule with new language, it creates uncertainty. It creates lawsuits. It will create havoc for many businesspeople. And maybe the big guys can handle this. The small guys can't handle it.

What concerns me, too, the information we have is the Small Business Administration's Office of Advocacy recently concluded that EPA and the Corps have improperly certified the proposed rule under the Regulatory Flexibility Act because it would have direct and significant effects on small business. This isn't something I am saying. This is what they are saying.

So, again, the small guy is going to get screwed—pardon—that is a highly technical term, but—with whatever you do because it will be new. It will be subject to suit. It will be subject to interpretation. It will be subject to new regulation which you are imposing that has a cost.

So the ones that were—you know, what is the biggest job creator in the United States? Do you two know? Where do we get the most jobs from? Do you know?

Ma'am?

Ms. MCCARTHY. Small businesses is what I understand.

Mr. MICA. Small business.

And according to, again, their advocacy group, they don't feel consulted. They don't even feel that you complied with the requirements to consult them.

So any change, I think, is going to raise havoc and some costs documented here, uncertainty. Possibly there are things that we need to do for improvement. And I think you can do many of those things for water quality in this country without changing this definition.

Again, if you implement the rule—if you adopt the rule this spring, when would it be implemented?

Ms. MCCARTHY. It would be effective on publication in the Federal Register.

Mr. MICA. So everyone would have to comply with that. That is kind of handy-dandy because that is the rule. You create the chaos, the uncertainty, the havoc.

We could pass a bill, and I think there is enough support to pass a bill in the House and Senate to undo your rule. More than likely, that will take time. We have seen the slow roll on Keystone.

Did you want to comment or—

Ms. MCCARTHY. I just wanted to—I neglected to indicate that it is actually 60 days beyond that date, which does allow Congress to take a look at it.

Mr. MICA. OK. That is probably even worse.

But, in any event, what that does is give the President a bill that will rescind what you are doing. I predict that will happen. And then the President would veto it, and it will be much more difficult for us to override that veto.

That is the scenario I see, Mr. Chairman, and it is not a pretty one for small business or anyone who is concerned with government regulations or its impact. RPTR HUMISTONEDTR HOFSTAD[1:04 p.m.]

Mr. GIBBS. The gentleman's time has expired.

Just for a point of information, they will be calling votes here in the next 15, 20 minutes, and we are monitoring that. So we will break for a recess when it is the appropriate time so nobody misses votes.

Mr. Garrett Graves, you are recognized for 5 minutes.

Mr. GRAVES OF LOUISIANA. Thank you, Mr. Chairman.

Thank you very much for being here today. Good to see you. And I also appreciate your perseverance through this hearing. I know you have been sitting there a long time, so thank you.

I am from south Louisiana and have very strong concerns about the approach that you are taking in the rule and the regulation.

I think we all know, if you look back at the statute, the Clean Water Act, you have the reference to "navigable waters." And you have seen the Supreme Court come in and repeatedly narrow or reject the rules that have been promulgated in an effort to regulate wetlands in particular.

I am concerned that we are actually headed down the same course right now with this proposed regulation, that we are going to see a perhaps third rejection and narrowing of the regulations as it pertains to the Clean Water Act. And I think that probably

what is happening is that the agencies are writing a rule in an effort to try to recapture a similar scope and just taking a different direction, as happened after SWANCC, as I recall.

In particular, you know, I want to focus on the word “navigable.” That word, you know, it seems that we may have a disconnect in the statute versus what you often referred to was the science. And if that disconnect is there, it seems like it is Congress’ job to actually modify the statute if that is something that Congress and the agencies believe need to be done. But I am concerned that we are stretching these regulations in order to create the same footprint—in fact, perhaps a growing footprint.

An example of that is your own cost analysis that you have done that has been, I guess, rejected or some concerns have been expressed by small business, among others, showing that you actually have a higher regulatory cost. I don’t understand how you have a higher regulatory cost if you have more certainty, greater certainty, and if you do not have an expanded footprint of jurisdiction here. That seems to be inconsistent, and I am very concerned about that.

Secondly, when you actually go through and read the regulation, you have terms like “case-specific basis,” “significant nexus” that I note was part of the Kennedy statement, not part of the plurality opinion. You have comments like “waters with a shallow subsurface hydrologic connection or confined surface hydrologic connection to such a jurisdictional water.”

This is Louisiana. The whole thing is water. You could take some of these terms that you have in here, “tributary,” “ephemerals,” you could apply—I am going to guess that, if you look at this, you could probably give me 90 percent of the undeveloped property in south Louisiana and I could figure out a way to apply your proposed rule to south Louisiana. Nationwide permits don’t apply down there. We have much greater compliance challenges.

This is your own—Secretary Darcy, I am sure you recognize this one. This is your picture of the watershed.

And, Mr. Chairman, I want to ask for—hang on, I am getting ready to ask unanimous consent to get double pay for holding my own placard. But—thank you. I am sorry.

No, but this is your own picture of the watershed. We have everywhere from Montana to New York coming down and draining through south Louisiana. That gives you an idea of why this first map looked like it did.

If you look at the definitions that you have here and you say things like—you talk about tributaries “even if they lack a bed and banks or ordinary high-water mark,” and it says, “if they contribute flow.” Well, again, I think that if you wanted to—and, Administrator McCarthy, I am not saying that you are going to be egregious or do bad things, but if you wanted to, I think that you could absolutely take some of these terms and stretch them to apply to virtually anything here, which doesn’t provide certainty or clarity, especially when you combine it with some of the other terms that are used.

You also have a term in there that was interesting that pertained to—it said something about areas that were established through sediment deposition. Well, over on the left, that is Louisiana 60 million years ago, and, as you can see, it doesn’t exist,

because the entire State was created through a deltaic plain through the Mississippi River system.

Again, not saying you are trying to be egregious or regulate my house, but, potentially, if someone wanted to be egregious, I am concerned that could be the case.

Lastly—and I think this is one of the bigger ones. This is south Louisiana. And I want to be clear, Administrator—and Secretary Darcy and I have known each other for a while, but I am not a knuckle-dragger. I am not a guy who is sitting here saying, let's pave all the wetlands. I believe that in my previous life I have probably restored thousands of acres of wetlands and probably, in the last 6 years, more than your two agencies combined, uncompelled, not for mitigation purposes, because it was my job. And so I am a big believer, defender of wetlands.

But we have lost 1,900 square miles of wetlands in south Louisiana. The big concern that I have is that the majority of this loss is attributable to channelization of the Mississippi and Atchafalaya Rivers. That was an action of the U.S. Army Corps of Engineers.

This is the greatest historic, current, and prospective rate of jurisdictional wetlands loss in this Nation. And the agency that is now being charged with the actual administration of these regs, these potential regs, is the greatest cause of wetlands loss in the United States.

The hypocrisy there and the lack of credibility is, I think, one of the greatest concerns. Because the Federal Government, the Corps of Engineers has not come in and restored these wetlands. They have made our communities more vulnerable, and it is a great concern on the part of the residents of south Louisiana.

Thank you.

Mr. GIBBS. The gentleman's time has expired.

Mr. Perry, you are recognized for 5 minutes.

Mr. PERRY. Thank you, Mr. Chairman.

Over here. Ladies, thank you very much for your patience. I know it has been a long that day. And I think that is maybe a testimonial to how important this subject is to everybody and every State and every Representative in every State. We really can't help ourselves.

And, with all due respect, I think that—I come from Pennsylvania—when you say that the Agency has worked hand-in-hand, my experience as a civilian, as a legislator in Pennsylvania is that we have felt put upon by the Agency and in a very heavy-handed way that has been punitive and that has been uneven in its meting out of penalties and of solution sets that we have been forced to abide by.

And so, because of that, we have, I think, a reasonable trust issue. And because of the scope of this—and when the Agency characterized “navigable” in the same context as “subsurface connections,” you know—I said to a lady at a hearing in Altoona on this subject, I said, so you are telling me that the water that flows through the rock strata and the limestone of Pennsylvania is to be considered navigable, and it is navigable? And she said, yes, it is. I said, well, I am waiting for the submarine that is drilling through the rock and doing that, because I haven't seen one yet, but maybe DARPA has one. And so we are skeptical.

But, with that, I want to give you a couple questions here.

You know, we have a clean streams law that gives our DEP jurisdiction over all the commonwealth's waters. And, under this rule, there will be overlap in that jurisdiction, with this clarification, as you call it. And, of course, there is going to be confusion and costs with the additional layer, what we consider an additional layer of regulatory authority.

Under the proposed rule, will Pennsylvania now only have jurisdiction over those waters specifically excluded from inclusion in the rule, i.e., or what I would characterize as groundwater and ditches that drain uplands only?

Ms. MCCARTHY. I am not sure I understood the question because you had a couple of negatives in there. Can you just do it again?

Mr. PERRY. OK. I will try and be more clear.

Ms. MCCARTHY. OK.

Mr. PERRY. Under the proposed rule, will Pennsylvania now only have jurisdiction over those waters specifically excluded from inclusion in the rule? So everything that is specifically excluded would be under Pennsylvania's jurisdiction, i.e., what we—and I clarify that by saying groundwater and ditches that drain upland only.

Ms. MCCARTHY. No, that wasn't the intent. If you are excluded from the Clean Water Act in the final rule, then that would not be jurisdictional under Federal law.

Mr. PERRY. OK. And that is a concern.

In addition to that, during and after local development, who has jurisdiction over swales, basins, ponds, and ditches that will be constructed, altered, filled in, left for drainage, and/or questioned? And how will the answer to those questions—how will they come about? What is that process? And who is paying for that?

Ms. MCCARTHY. Nobody is changing who has jurisdiction to implement the rule or the relationship between the Federal Government and the States to actually address these Federal issues. Nothing has changed.

Mr. PERRY. So if during—

Ms. MCCARTHY. It—

Mr. PERRY. I am sorry.

Ms. MCCARTHY. I am sorry. I just wanted—it is a function of the Clean Water Act and how it is implemented today.

Mr. PERRY. So if during construction there is a nexus made by what is now not considered navigable but someone considers it, some—the Corps comes out—I have done work with the Corps; I used to fly with them and do jurisdiction and so on and so forth—and comes out and says, this falls within the jurisdiction, and the local conservation district says, no, it doesn't, what is the answer? What is the redress?

Because somebody is standing there with a machine that costs \$500 a day and workers and so on and so forth, and here we are. So what is the conclusion to that? What is the process for adjudication?

Ms. DARCY. If a person is seeking a permit or seeking a jurisdictional determination of a water in order to go forward with a construction project of some kind, the Corps of—

Mr. PERRY. With all due respect, what happens is that somebody comes and visits during the project and makes the claim at that

time, at that location, at that time, and everything stops until it is resolved. I am looking for the resolution process, if it is being changed, or what you foresee based on the scenario that I have portrayed.

Ms. DARCY. The resolution process that you just portrayed would not be changed by this proposed rule. Is that your question?

Mr. PERRY. If that is your answer, that is fine. That is not what people believe, but I will accept your answer.

And, finally—ah, my time has expired. Thank you, Mr. Chairman.

Mr. GIBBS. Ms. Comstock, you are recognized for 5 minutes.

Mrs. COMSTOCK. Thank you, Mr. Chairman. I have no questions.

Mr. GIBBS. That speeds it up.

Mr. Davis, you are recognized for 5 minutes. And I am sure you have questions.

Mr. DAVIS. Thank you, Mr. Chairman. You are correct.

I wish I had something like a big portrait to have Mr. Graves drag his knuckles over here and hold it for me, but—

Mr. GIBBS. Well, at least the House pictures got bigger than the Senate's as we went on.

Mr. DAVIS. We are the House.

Thank you very much, Secretary Darcy and Administrator McCarthy, for being here today.

As this hearing is about WOTUS, you have heard a lot about the impact or possible impact of the proposed rule on our ag community, and I think there is really a trust gap between both your agencies and our farmers. And that is why one of the things I advocated for in the farm bill was to include agriculture to have a seat at the table as part of your EPA Science Advisory Board.

In my view, it has been a slow rollout. I know applications are being accepted till March 30th. And as you review the candidates, I want to make it very loud and clear that our intent in negotiating this bipartisan provision was to have voices on this committee that didn't only have scientific expertise but also real-life experience with production agriculture. So having voices on this committee with the real-world experience can help bridge this trust gap.

Can I have your commitment that you will honor our congressional intent by ensuring that Members of this Committee will be part of production agriculture?

Ms. MCCARTHY. I certainly will do the best and as expeditiously as I can to meet what Congress has advised us we should do. And I would look forward to the establishment of this committee so that early on in every process we have an ability to hear what these informed stakeholders have to say.

Mr. DAVIS. Well, thank you. As the author of that provision, I mean, I am clearly stating for the record what our intent is: to make sure that we have not just scientists but people involved in production agriculture. So thank you.

Ms. MCCARTHY. But before you leave, I want to make sure that you know that we did get a request from our ag stakeholders to extend the time for nomination by 60 days.

Mr. DAVIS. Yes.

Ms. MCCARTHY. So I don't want you to think we are being inconsistent in—

Mr. DAVIS. I am not complaining about the process.

Ms. MCCARTHY. OK.

Mr. DAVIS. I just want you to know the intent of what the result could and should be.

Secondly, I sent a letter to your agency on January 22nd in regards to the Mahomet Aquifer and its proposed designation to be considered a sole-source aquifer. That aquifer in central Illinois actually serves over 700,000 people. And I would like you—I will submit this letter to you and your staff to make sure your eyes see this. And I would like to get an update from you, even after this hearing, as to when we could expect a decision on this very important issue to my constituents.

Ms. MCCARTHY. I am happy to look into it. Thank you.

Mr. DAVIS. Thank you.

And, lastly, there has been some concern being raised by many of my colleagues, and I hope that this process is taken very seriously, about this disconnect that we sometimes feel like we see. And not just between the EPA as a whole and the Corps as a whole and all of our districts; really, I think there is some disconnect between what happens and what you think is happening out here in Washington versus what your regional offices, your district offices, are actually doing on the ground.

And just one of the last hearings we had with one of your deputies, Mr. Perciasepe—forgive me if I have mispronounced his name. “Davis” is easier.

Ms. MCCARTHY. We will call him “Mr. P.” It is OK.

Mr. DAVIS. “Mr. P,” perfect. I haven’t gotten any feedback from him when I asked him if, in this new provision, the clarification for sewage treatment facilities, if it includes aboveground individual septic system units. Will they be required to get a permit?

Ms. MCCARTHY. The clarity is, no, they won’t.

Mr. DAVIS. OK. Will you please, then, take the extra step and call the Region 5 office and let them know that the NPDES permit—

Ms. MCCARTHY. You tricked me into this.

Mr. DAVIS. I tricked him, too. So, obviously, he didn’t talk with you after that. But if you could—

Ms. MCCARTHY. If there is any lack of clarity, I will call.

Mr. DAVIS. Well, I have the frequently asked questions for the NPDES permit—

Ms. MCCARTHY. OK.

Mr. DAVIS. —and it clearly uses the Clean Water Act as the justification for asking my homeowners in many rural areas that I represent to actually apply through the EPA for this national permit just to be able to flush their toilet.

And where it disconnects with the proposed rule, the clarified rule that we have been hearing all morning, is that, you know, ditches that are excavated and have less than perennial flow are supposed to not be regulated under the Clean Water Act. That is where many of these discharges go, like in a swale between my home. And gullies and rills and non-wetland swales are not to be regulated.

So you can see the disconnect and the concern that my constituents have when we see what is happening out here, what we are being told, versus what is actually in action in the district. So—

Ms. MCCARTHY. Let me look at it and make sure that there isn't more to this than meets the eye. And I will certainly get back to you as soon as—

Mr. DAVIS. I didn't mean to throw Mr. P under the bus with you, but I am glad I did.

Mr. GIBBS. The gentleman's time has expired.

Mr. DAVIS. Thank you.

Mr. GIBBS. We got one more Member to ask questions, and then we can finish up with this, and we will come back at 2 o'clock. So Mr. Barletta will have 5 minutes, and then we will recess. And we will start with the second panel at 2 o'clock.

Mr. BARLETTA. Thank you, Mr. Chairman.

Ms. McCarthy, in my flood-prone district, many of my constituents live in the flood plain, and I share the concerns of them and the local elected officials about the definition of a flood plain.

Some of our local officials even sent comments. Here I have comments sent to the EPA about their concerns that the term "flood plain" is not clearly defined. And I ask unanimous consent that the county commissioners from Columbia County's letter be part of the record.

Mr. GIBBS. Without objection, so ordered.

[The information follows:]***** COMMITTEE INSERT

Mr. BARLETTA. Can you define for me right now how this rule interprets the term "flood plain"?

Ms. MCCARTHY. Well, first of all, I think the confusion arose over the fact that, when we spoke about flood plain, people thought we were regulating land use instead of just indicating that if you intend to pollute or destroy a wetland within a flood plain that we need to have an exchange about how to do that appropriately so you won't impact down—

Mr. BARLETTA. Is the EPA's definition of a flood plain the same definition that FEMA uses to draw—

Ms. MCCARTHY. Yes.

Mr. BARLETTA. —its flood maps—

Ms. MCCARTHY. Yes.

Mr. BARLETTA. —and determine the 100-year flood plain?

Ms. MCCARTHY. Yes.

Mr. BARLETTA. Are there maps of your flood plains?

Ms. MCCARTHY. That they produce.

Mr. BARLETTA. That who produces?

Ms. DARCY. FEMA.

Ms. MCCARTHY. FEMA produces.

Mr. BARLETTA. And that would be the same definition that you use?

Ms. MCCARTHY. Yes.

Mr. BARLETTA. You know, in Pennsylvania, agriculture is the number-one industry, and I—

Ms. MCCARTHY. I certainly didn't want—I want to make it very clear, we did not intend that normal farming and ranching activi-

ties would stop being exempt from 404 permitting. They are exempt, and we are not intending to change that.

Mr. BARLETTA. OK. I just wanted to know the definition of a flood plain by your standards, and they are the same as FEMA.

Ms. MCCARTHY. It is. Yes.

Mr. BARLETTA. And agriculture is the number-one industry, so you can imagine, you know, why the Pennsylvania farmers are so worried that, when it rains, that any wet spot within a flood plain would be federally regulated. And as I have said once before, sometimes a mud puddle is just a mud puddle. And they would like to know that, that that is the case, and that is not how they feel right now.

Ms. MCCARTHY. OK.

Mr. BARLETTA. I have one more clarification I need. Railroads operate approximately 140,000 miles of right-of-way. Maintenance of ditches is critical to safe rail transportation, obviously. Identifying rail ditches as “waters of the United States” would create regulatory hurdles that would make it almost impossible for railroads to perform prompt rail ditch maintenance due to the extensive permitting delay and expense, leading to less safe rail transportation.

Previously, representatives from EPA have said railroad ditches would not be subject to Clean Water Act jurisdiction under this rule. Will the final rule make this clear?

Ms. MCCARTHY. Senator—Mr. Barletta—sorry—I will get back to you.

I know that we have expanded the definition of ditches that would be exempt under the clean water rule to make it clearer. We have addressed ditches that basically drain dry land along public lands and highways. I am not sure of the conversation that has happened with rail ditches, but I certainly can get back to you. And if you have heard it, I am hoping there will be a comment in the record, and we can take this into consideration and make any necessary adjustments.

Mr. BARLETTA. Yeah. You would agree that this would cause a safety issue, and, obviously, those delays would not be in the best interest—

Ms. MCCARTHY. We have been really clear in this rule that any ditch that is in dry land that doesn't connect to a tributary below is not going to have the significant nexus required to be jurisdictional under the Clean Water Act.

So we will see. Instead of a sector-by-sector approach, we are hoping to do this in a little more scientific and broad way. But we will take a look at that issue and make sure that we have addressed it.

Mr. BARLETTA. And since I am the last speaker, thank God, I think it is clear that, from coast to coast, I could tell you, I have been called out to farms, I have been called out to you name it, the situation where they have literally shown me—I had pictures on my cell phone—literally shown me a ditch that is going to be regulated. This is a problem from the east coast to the west coast, and I hope we can see that it needs to be addressed.

Ms. MCCARTHY. It will. Thank you, sir.

Mr. BARLETTA. Thank you.
Thank you, Mr. Chairman.

Mr. SHUSTER. [Presiding.] This concludes our first panel, so you will be excused.

And we will reconvene—we are recessed for now, and we will reconvene at 2 o'clock with the second panel.

[Recess.]

Mr. GIBBS. OK. The committee will come back to order.

At this time, I would like to call up the second panel of witnesses. It is promptly 2 o'clock, so we are getting started.

On our second panel, we have the Honorable E. Scott Pruitt, the attorney general of the State of Oklahoma; the Honorable Adam H. Putnam, Florida Commissioner of Agriculture, on behalf of the National Association of State Departments of Agriculture; the Honorable Sallie Clark, District 3 Commissioner for El Paso County, Colorado, on behalf of the National Association of Counties; the Honorable Timothy Mauck, District 1 Commissioner for Clear Creek County, Colorado; and Lemuel Srolovic, Environmental Protection Bureau chief for the New York State attorney general.

Hope I got your name right.

Mr. SROLOVIC. You did. It is a tough one.

Mr. GIBBS. OK.

I ask unanimous consent that all witnesses' full statements be included in the record.

Hearing no objection, so ordered.

Since your written testimony has been made part of the record, please limit your summary to 5 minutes if you can.

And, Attorney General Pruitt, welcome, and you may proceed.

Senator INHOFE. Sorry.

Mr. GIBBS. Go ahead.

Senator INHOFE. I want to make a brief—it will be a very brief introduction. But, you know, a lot of times, you have people from your own State come in, and you want to participate in it. In this case, this is one who is not just really a great attorney general and one who is doing things that other attorneys general are not doing, but he also is a best friend.

So I was delighted, Scott, to have you here and participating in sharing your thoughts with us today.

TESTIMONY OF THE HON. E. SCOTT PRUITT, ATTORNEY GENERAL, STATE OF OKLAHOMA; THE HON. ADAM H. PUTNAM, FLORIDA COMMISSIONER OF AGRICULTURE, FLORIDA DEPARTMENT OF AGRICULTURE AND CONSUMER SERVICES, ON BEHALF OF THE NATIONAL ASSOCIATION OF STATE DEPARTMENTS OF AGRICULTURE; THE HON. SALLIE CLARK, COMMISSIONER, DISTRICT 3, EL PASO COUNTY, COLORADO, ON BEHALF OF THE NATIONAL ASSOCIATION OF COUNTIES; THE HON. TIMOTHY MAUCK, COMMISSIONER, DISTRICT 1, CLEAR CREEK COUNTY, COLORADO; AND LEMUEL M. SROLOVIC, BUREAU CHIEF, ENVIRONMENTAL PROTECTION BUREAU, OFFICE OF NEW YORK STATE ATTORNEY GENERAL ERIC T. SCHNEIDERMAN

Mr. PRUITT. Well, you are very kind, Senator Inhofe. Thank you for those kind comments.

Chairmen Inhofe and Shuster, Ranking Members Boxer and DeFazio, members of the Senate Committee on Environment and

Public Works and House Committee on Transportation and Infrastructure, thank you for this opportunity to discuss the Environmental Protection Agency's proposed rule to redefine "waters of the United States" and the significant negative impact such a rule would inflict on States and landowners within our borders.

Respect and protection of private-property rights sets the United States apart from other nations and has fueled the greatest expansion of economic freedom the world has ever known. Indeed, private-property rights are among the foundational rights of any functional democracy, not just our own.

President Obama's EPA currently stands poised to strike a blow to private-property rights through a proposed rule that unlawfully expands EPA's jurisdiction by subjecting land-use and water-management decisions, historically reserved to the States, to the heavy regulatory hand of the Federal Government.

The proposed rule aims to redefine what constitutes a navigable water or "waters of the United States," a term that has long been understood to include only significant bodies of water capable of serving as conduits for interstate commerce. The proposed rule redefines those terms to now include virtually every body of water in the Nation right down to the smallest of streams, farm ponds, and ditches. This is a naked power grab by the EPA.

Now, don't get me wrong. The EPA should have a role in solving and contributing to interstate water-quality issues and answers. But when having a role becomes having regulatory primacy at the expense of State authority, the will of this body is undermined, and landowners and States end up the losers, as they are left to the mercy of Agency power, absent a voice, when the system wrongs them. And wrong them it will.

Simply put, the proposed rule is a classic case of overreach and flatly contrary to the will of Congress, who, with the passing of the Clean Water Act, decided that it was the States who should plan the development and use of local land and water resources.

The EPA has generally been unresponsive to concerns expressed by States, local governments, and individual citizens, with their primary tactic being a public relations campaign designed to sway opinion and rule America. EPA Administrator Gina McCarthy has been documented as dismissing many concerns wholesale, calling them ludicrous and silly, while also asserting that the proposed rule is all about protecting waters, quote/unquote, and providing clarification.

To Administrator McCarthy, who appeared before you today, I say, forgive the skepticism of the States, but these reassurances are from the same administration that said, if you like your health insurance, you can keep your health insurance. So, as the old adage says and commends us, trust, but verify. And though we would like to trust the EPA's intent, something doesn't add up. This rule smells far more like—far more than a clarification. Indeed, it reeks of Federal expansion, overreach, and interference with local land-use decisions.

Notably, there are several United States Supreme Court decisions illustrating that the intended regulatory jurisdiction of the EPA has been limited to the navigable waters of the United States, with all other waters rightly left to the States to regulate.

At the time that the Clean Water Act was passed, the Supreme Court had previously defined “navigable waters of the United States” as interstate waters that are navigable in fact or readily susceptible of being rendered so.

In recent cases, the Supreme Court has made clear that any examination of Federal jurisdiction must first begin with an understanding that Congress intended the States to retain primacy over the development and use of local land and water resources. With the proposed rule, the EPA is ignoring this core tenet of the CWA and endeavoring to write itself a regulatory blank check.

On another note, and critically, the proposed rule includes a vague catchall category, defeating the EPA’s claimed purpose of the rule providing transparency, predictability, and consistency to the scope of the CWA jurisdiction. Instead, the EPA has simply redefined the meaning of “navigable waters” in an extraordinarily broad way so that any landowner may be subject to owners permitting requirements or severe civil penalties if violated, even if unknowingly.

Oklahoma has seen firsthand, Senator, how the Federal Government, specifically the EPA, abuses its regulatory power in States that have interest in energy, farming, and ranching. The States are not and should not be used as a vessel to carry out the will of regulators in Washington, who often seem to have little regard for how their actions negatively impact the economy and private-property rights.

During the comment period for this rule, Oklahoma filed its objections. In fact, my office led a coalition of 16 States to file comments about the lawfulness of this rule, or unlawfulness of it. Additionally, as the chief law enforcement officer of the State of Oklahoma, I can say with confidence that, if the EPA continues forward with this rule as proposed, the rule will be challenged in court.

If this rule is issued as proposed, we will all live in a regulatory state where farmers must go before the EPA to seek permission to build a farm pond to keep their livestock alive, where homebuilders must seek EPA approval before beginning construction on a housing development that contains a dry creek bed, and where energy producers are left waiting for months or even years to get permits from the EPA, costing producers tens, if not hundreds, of thousands of dollars that inevitably will be passed on to consumers.

Chairmen Inhofe and Shuster, Ranking Members Boxer and DeFazio, the EPA’s proposed rule is unlawful and should be withdrawn. We urge the EPA to meet with State-level officials, who can help the agency understand the careful measures the States already have in place to protect and develop the lands and waters within their borders. But most of all, we urge the EPA to take note of the harm that this rule will do to the property rights of citizens across the country and their ability to make land-use decisions.

Thank you, Chairman, for the opportunity to speak to you today. [Mr. Pruitt’s prepared statement follows:]***** INSERT 4-1 *****

Mr. GIBBS. Thank you.

Mr. Putnam, you have the floor. Welcome.

Mr. PUTNAM. Thank you, Mr. Chairman.

And I think I liked the old view better than this view, but I sincerely hope that the plague which has overtaken these two great committees will pass quickly, and our prayers will be with the Members who are unable to join us for this.

But it is a pleasure to be on this panel and to represent not only the Florida Department of Agriculture and Consumer Services but also the National Association of State Departments of Agriculture.

I come here as a farmer of citrus, a cattleman, a former Member of Congress, and an agriculture commissioner and someone who has dedicated much of my career to water policy, water resource development issues. I am proud of the record that our State has in protecting water, including through agricultural best management practices, putting 10 million acres of agricultural lands in the State under best management practices, or 90 percent of our intensive agricultural lands, and saving 20 billion gallons per year of water through those practices.

The EPA asserts that the purpose of this rule is to clarify which waters are and are not subject to the Clean Water Act. The EPA claims that the proposed regulations will not significantly change what currently is considered "waters of the U.S." They also claim that the proposed regulations will not substantially affect regulated communities like ours. I believe this is yet another attempt by the EPA to regulate areas outside their authority and in contradiction to guidance given by the courts.

Counter to the claims by the EPA regarding intent, the proposed rule, in fact, will lack clarity, significantly expand Federal jurisdiction, impose burdensome requirements on agricultural producers, and impede efforts to protect and restore the environment.

The proposed rule creates more ambiguity regarding what areas are subject to the requirements of the Clean Water Act and will most certainly result in an expansion of jurisdiction. Specifically, the proposed rule does not clearly define "adjacent," "neighboring," "riparian area," and "flood plain." In combination, the application of these terms expand Federal jurisdiction to include all wetlands or other waters similarly situated across a watershed or that share a shallow, subsurface hydrologic connection.

What is more concerning is the intent by the EPA and the Corps, as communicated in their narrative accompanying the rule, to evaluate application of "flood plain" and "watershed" on an individual basis. I fail to see how individual interpretation by EPA and Corps staff guarantees clarity to the regulated community in implementation of this rule.

Further, the EPA failed to take into account the unique landscape of States like Florida when developing their approach. Florida's flat topography and broad expanse of flood plains, wetlands, and sloughs could subject nearly all of Florida's water to Federal jurisdiction under the Clean Water Act.

Under this rule, isolated wetlands located miles from the nearest navigable water and never before considered jurisdictional would now be defined as "waters of the U.S." simply because they are located in the same watershed and, therefore, under Federal jurisdiction. Even concrete-lined conveyances and other manmade systems intended to capture and treat stormwater could be subject to Federal jurisdiction.

An independent analysis by Breedlove, Dennis, and Associates, an environmental firm, found in specific instances where the proposed rule, if implemented, would expand jurisdiction from 13 to 22 percent on the two subject parcels alone.

Across the Nation, farmers and ranchers are good stewards of the land, and the expansion of the Federal jurisdiction under this rule will deem many areas of farm land as "waters of the U.S." and, therefore, subject to Federal jurisdiction.

With more areas of farmland categorized as "waters of the U.S.," farmers will be forced to obtain new permits, including section 402 and 404 permits. The requirement to obtain additional permits will involve fees for attorneys and technical consultants, whose expertise is required to ensure an accurate application. An independent analysis conducted in 2002 revealed that section 404 permits cost an average of \$338,000, or \$300,000 more than the permit required for areas not considered "waters of the U.S."

As a national leader in water-quality protection and restoration, the State of Florida works closely with the EPA. And EPA, in the past, has actually praised the work that we do as being among the most rigorous protections in the Nation. But these proposed requirements will impede and, in some cases, dismantle environmental programs statewide.

The expansion of Clean Water Act jurisdiction to marginal waters, such as stormwater ditches and ponds, will actually have the effect of diverting local, State, and even Federal funds from restoration efforts for truly critically impaired and important natural areas. So, instead of funding those priorities, limited resources will be diverted toward municipal storm system upgrades.

Florida's best management practices are an example where farmers and ranchers work cooperatively and in partnership to improve wetlands and watershed areas. The implementation of this proposed rule and the associated expansion of Federal jurisdiction will decrease landowner willingness to voluntarily participate in these programs. The proposed rule will decrease wetland protection and restoration in our State because landowners will now fear that their restoration activities will bring them under Federal wetlands jurisdiction.

Thank you, Mr. Chairman, for the opportunity to be here, and I look forward to your questions.

[Mr. Putnam's prepared statement follows:]***** INSERT 4-2 *****

Mr. GIBBS. Senator Inhofe, I recognize you.

Senator INHOFE. Thank you, Mr. Chairman.

I would ask unanimous consent that Senator Cory Gardner be recognized for the purpose of introducing his good friend Commissioner Clark.

Mr. GIBBS. So ordered.

Senator GARDNER. Thank you, Mr. Chairmans.

And thank you very much to the committee for allowing me to be here today to introduce not only Commissioner Clark but also to welcome Commissioner Mauck, as well, from Colorado. And I know that Senator Bennett was here earlier but, due to scheduling conflicts, unable to, so please welcome both of you.

To the committee, thank you for holding this very timely hearing to discuss the EPA–Army Corps of Engineers’ proposed regulation on “waters of the United States” under the Clean Water Act as we continue to visit this very important discussion.

It is vital to the Federal Government and Congress have a comprehensive understanding of the potential impacts that this rule would have on our Nation’s counties, particularly those counties in the western parts of the United States, where our water and our water law is unique to any other place in the Nation. In Colorado, it is the only State in the 48 contiguous States that all water flows out of and not into, presenting a unique challenge for all of us.

In your effort to do so today, to discuss this issue, I am pleased that you have invited Sallie Clark today. And I am honored to introduce Commissioner Sallie Clark of El Paso County, who is testifying on behalf of the National Association of Counties.

Commissioner Clark serves as the vice president of the National Association of Counties and has been a longtime advocate for—and recent upgrades, recent new promotions—longtime advocate for Colorado, local government, and unwarranted Federal mandates to and on our States.

And I appreciate your willingness and your commitment and dedication to public service.

You know, it has been an incredible, challenging couple of years for El Paso County, Colorado, dealing with forest fires and floods. And in conversations with water districts, conservation districts in Colorado, they continue to believe that, under the “waters of the United States” rule, it could be very devastating for their ability to deliver water for the needs of their customers, their constituencies, and, indeed, the people of Colorado.

With the EPA’s own studies showing that 68 percent of the streams in Colorado are intermittent, this proposal will have major impacts on all Coloradans, including the energy and agricultural sectors.

If you go into the State capitol of Colorado, as both commissioners know, there is a poem written on the wall right in the rotunda that says—and it starts out by saying this: “Here is a land where life is written in water.” Water is tied to Colorado’s history, our land, and our success. And the last thing we need is for the Federal Government to destroy that incredible legacy that we have with a regulation that goes too far in impacting our agriculture, our land, our water, and our people.

Welcome.

Mr. GIBBS. Thank you.

Commissioner Clark, welcome. The floor is yours.

Ms. CLARK. Thank you, Senator, so much.

Thank you, Chairmen Inhofe and Shuster, Ranking Members Boxer and DeFazio, and Members of the Committee, for the opportunity to testify today on the “waters of the United States” proposed rule and the potential impact on State and local governments.

My name is Sallie Clark, and I am the first vice president of the National Association of Counties, the only national organization that represents county governments. For the past decade, I have served as the county commissioner in El Paso County, Colorado,

the home of Pikes Peak. My county is considered urban, with a population of over 640,000, but with a mix of suburban and rural areas and over 113,000 acres of Federal land.

In all my travels as a NACo leader, I have heard concerns from across the country about how counties could be affected by the proposed rule. Hearing these concerns and working closely with our technical experts, county engineers, legal staff, public works directors, and stormwater managers, NACo ultimately called for the proposed rule to be withdrawn until further analysis and consultation with local officials is completed. This decision was not taken lightly.

I want to be clear: Counties support clean water. Our goal is to ensure the public safety and economic vitality of our communities while protecting water quality. In my county and others, we accomplish this through zoning and ordinances, regulating stormwater runoff, prohibiting illegal discharges, and establishing penalties for violations.

That said, I am here today to share with you the four main reasons we decided to call for the withdrawal of this proposed rule.

First, this issue is so important because counties build, own, and maintain a significant portion of public safety infrastructure, and the proposed rule would have direct and extensive implications. Local governments own almost 80 percent of all public road miles and also own and maintain roadside ditches, flood-control channels, stormwater systems, and culverts. Defining which waters and conveyances fall under Federal jurisdiction has a direct impact on counties, as we are legally responsible for maintaining public-safety ditches and other infrastructure.

Second, the agencies developing the proposed rule did not sufficiently consult with local governments. Counties are not just stakeholders in this discussion; we are partners in our Nation's intergovernmental system. By law, Federal agencies are required to consult with their State and local partners before a rule is published and throughout its development. Although EPA did initiate discussions on guidance documents, we were not consulted through the 17 months between the guidance consultation and the introduction of the proposed rule, despite repeated requests.

This leads to my third point. Due to this inadequate consultation, many terms in the proposed rule are vague and create uncertainty and confusion at the local level. For example, the proposed rule now defines terms like "tributary," "significant nexus," "adjacency," "riparian areas," and "flood plains." Depending on how these terms are interpreted, additional public infrastructure could fall under Federal jurisdiction. The proposed rule, as currently written, only adds to the confusion and uncertainty over how it will be implemented consistently across all regions.

Our fourth and final reason for calling for the withdrawal is that the current permitting process tied to "waters of the U.S." already presents significant challenges for counties. The proposed rule only complicates matters. For example, 1 Florida county applied for 18 maintenance exemptions on the county's network of drainage ditches and canals. The permitting process became so cumbersome that the county had to hire a consultant to compile all of the technical material required. And, 3 months later, as the county moved

into its rainy season and after spending more than half-a-million dollars invested, decisions on 16 of the exemptions were still pending. Ditches began to flood, putting the public at risk. And this is just one of many examples.

In conclusion, while many have attempted to paint this as a political issue, in the eyes of county government this is a matter of practicality and partnership. We look forward to working with you and the agencies to craft a clear and workable definition of “waters of the U.S.” that achieves our shared goal, which is to protect water quality without inhibiting the public safety and economic vitality of our communities.

Thank you again for this opportunity.

[Ms. Clark’s prepared statement follows:]***** INSERT 4-3

Mr. GIBBS. I thank you.

Mr. Mauck, the floor is yours. Welcome.

Mr. MAUCK. Thank you. Chairmen Inhofe, Shuster, Ranking Members Boxer and DeFazio, I appreciate this opportunity to testify.

My name is Timothy Mauck. I was elected to the Clear Creek Board of County Commissioners in 2010 and reelected in 2014.

As a county commissioner, I want to convey how important clean water is for my community. The proposed Clean Water rule will protect the headwaters, tributaries, and wetlands that are essential for providing the high-quality water that supports the hunting, fish, rafting, and outdoor recreation that are an economic backbone of my community. Clean water from streams and wetlands also provide drinking water for thousands of our residents.

Clear Creek County is truly a headwater county. We are bordered by the Continental Divide and provide clean water for downstream communities within the Denver metropolitan area. We are also facing the legacy impacts of historic silver and gold mining. We have struggled with maintaining water quality due to mine runoff and have worked consistently to treat contaminated water and reclaim abandoned mine sites.

I know too well the impacts of contaminated water and the cost and time it takes to mitigate and treat it. I also know Clear Creek has made a remarkable rebound over the past 30 years as we have all made progress, like so much of the country, toward the Clean Water Act goals of fishable, swimmable waters.

In addition, these strides in water quality, while important in their own right, have also made Clear Creek County an outdoor recreation destination. By river segment, Clear Creek hosts the second most commercial rafting trips in Colorado. Whitewater rafting alone has a total economic impact to the community of approximately \$23 million annually. Hunting and angling generates a total economic impact of nearly \$6 million to the county.

This is not only the story of Clear Creek but also across Colorado and the Nation. According to the National Shooting Sports Foundation, hunting and angling’s total economic impact is \$192 billion. Outdoor recreation in Colorado generates \$13.2 billion and employs more than 124,000 people. Across the country, it generates \$646 billion and 6.1 million jobs.

Many of these jobs are dependent on clean water and will benefit from the EPA and Army Corps of Engineers' efforts. In fact, 55 percent of stream miles in the historic range of native trout in our State are intermittent or ephemeral and would clearly be protected by the Clean Water rule.

Even with seasonal flows, these waters provide habitat for trout or simply maintain the water quality needed by fish in downstream rivers. And as an avid waterfowler, I have spent many cold mornings in the wetlands, sloughs, and creeks feeding the South Platte and know how important it is to protect these places from irresponsible development.

As an elected official with the responsibility of looking after our county's finances, I am also concerned about undue regulatory burden. The EPA and Corps of Engineers have consistently demonstrated that this rule is not an expansion of the Clean Water Act authority. It will restore jurisdiction to fewer of the waters than had been covered from the passage of the Clean Water Act in 1972 until the first Supreme Court decision in 2001 weakened the law.

During that time period, the population of Clear Creek County increased from approximately 5,900 to 9,400 individuals. Colorado's population doubled from 2.2 million to 4.4 million. The State's gross domestic product increased more than tenfold, from \$13.6 billion to \$181 billion. Furthermore, natural gas production increased from 116 trillion cubic feet to 817 trillion cubic feet, and coal production increased from 5,500 short tons to 33,000 tons.

Although we are small, we are expected to grow in the future. An expansion of Interstate 70 is underway and, along with it, a growth in home and road development from those from the nearby metropolitan area seeking solace in the mountains.

In addition, we face a challenge of economic diversification as we approach the end of life of the Henderson mine, which provides a large portion of our property tax base. There are hundreds of mine claims that exist in undeveloped or undeveloped areas, many of which are very near headwater streams. The rule will help us balance the need for diversification while providing the necessary protection for streams and wetlands as we encourage development of all kinds.

If opponents of the rule were worried about returning to the previous jurisdiction of the Clean Water Act, they should realize that protecting intermittent and ephemeral streams and wetlands is fully consistent with population growth, energy production, and economic development writ large. I am ready to have my county's headwaters and wetlands clearly protected under the Clean Water Act.

Thank you, Mr. Chairman.

[Mr. Mauck's prepared statement follows:]***** INSERT 4-4 *****

Mr. GIBBS. Mr. Srolovic, welcome. The floor is yours.

Mr. SROLOVIC. Thank you.

Good afternoon, Chairmen Inhofe and Shuster, Ranking Members Boxer and DeFazio, and members of both honorable committees. I am Lem Srolovic, the environmental bureau chief in the office of New York State Attorney General Eric Schneiderman.

Thank you for this opportunity to discuss with you the proposed “waters of the U.S.” rule.

Back when I was a boy growing up in Wildwood, Georgia, in the early 1970’s, many of the creeks and rivers where I hunted and fished were in a sorry state. The Tennessee River was contaminated with toxic industrial waste. When my brother and I floated down Lookout Creek, it started stinking when we reached the railway yards in Wahatchee.

But the pollution problems in my boyhood waters were not local; they were not regional problems. They were national problems. Up in New York, the Bronx River, once the home of beavers, was described as an open sewer. In central New York, people driving by Onondaga Lake during the summer rolled up their windows because the lake smelled so bad.

Fortunately, Congress responded and in 1972 passed the Clean Water Act. With the act, Congress fundamentally rewrote Federal water pollution control law. The old law had addressed water pollution by authorizing Federal cures for water pollution problems on an ad-hoc, water-by-water, problem-by-problem basis, but that narrow approach had failed. With the Clean Water Act, Congress replaced that failed scheme with a comprehensive approach to pollution control.

The waters protected by the act are broad, covering, as the U.S. Supreme Court has written, virtually all surface waters in the country. With the act, Congress implemented the tried and true principle that an ounce of prevention is worth a pound of cure.

In the ensuing years, the States, EPA, and the U.S. Army Corps together have implemented the statute, and it is working. My boyhood Lookout Creek now hosts a popular nature center. A beaver has returned to the Bronx River. And Onondaga Lake now is one of America’s top 10 bass fishing destinations.

With the proposed rule, the Federal agencies that Congress charged with implementing the Clean Water Act are doing their job. They are providing much-needed clarification to the question of whether the law applies to a particular water body. Presently, jurisdiction decisions are made on a case-by-case basis subject to fractured and inconsistent legal interpretation by the courts. The result is uncertainty, delay, and further litigation. By clarifying where the law applies, the rule will accelerate jurisdiction decisions and make them more predictable and less costly.

The proposed rule is grounded in solid, peer-reviewed science. EPA’s science report is based on more than 1,200 peer-reviewed scientific studies and has been affirmed by the Agency’s independent Scientific Advisory Board. The science report shows the powerful influence that upstream waters have on the physical, chemical, and biological integrity of downstream waters.

It is important to note that each of the continental States is both upstream and downstream of one or more other States. New York, for example, is downstream of 13 States and is upstream of 19. The proposed rule advances the Clean Water Act’s protection of State waters downstream of other States by anchoring a nationwide Federal floor for water pollution control. The floor is critical for maintaining the consistency and effectiveness of the downstream States’ water pollution programs. This is because the Federal statute pre-

empties many common-law remedies traditionally used to address interstate water pollution, leaving the Clean Water Act as the primary mechanism for protecting downstream States from the effects of upstream pollution.

Critically, by protecting interstate waters, the proposed rule allows States to avoid imposing disproportionate and costly limits on dischargers in their own State in order to offset upstream discharges which might otherwise go unregulated.

A robust Clean Water Act is important to States and municipalities because, by protecting our waters, it keeps billions of dollars in taxpayers' pockets and supports our State economies. In the interest of clean water, the health and welfare of our citizens, and the economy of our States, we should not go back to failed approaches. We should go forward with what is working.

The "waters of the United States" rule provides much-needed clarification regarding the applicability of the act and anchors an essential nationwide Federal floor for water pollution control.

We look forward to the completion of a final rule, and I look forward to answering any questions.

[Mr. Srolovic's prepared statement follows:]***** INSERT 4-5 *****

Mr. GIBBS. Thank you.

I recognize Senator Inhofe for 5 minutes. Thank you.

Senator INHOFE. Thank you, Mr. Chairman.

I will start off with my good friend Scott Pruitt.

Now, confession is good for the soul. I am not a lawyer, and so I have to ask some obvious questions of people who are lawyers.

Now, I want to read something, and tell me, if you would, General, what is ambiguous about this language.

Section 101(g) of the CWA states—and this is a quote. It says, "The authority of each State to allocate quantities of water within its jurisdiction and that shall not be superceded, abrogated, or otherwise impaired by this act."

What is unclear about that?

Mr. PRUITT. Mr. Chairman, I don't think much. And I don't think that it takes a legal mind to draw that conclusion.

I would add this, as well: The CWA states in its text that agencies must recognize, preserve, and protect the primary responsibilities and rights of States to plan the development and use of land and water resources.

This body, Congress, recognized at the creation of the Clean Water Act that the role of the States was important, but, more than important, it was primary in land-use and water-management decisions.

In the State of Oklahoma, we have a water resources board that is required to measure out permits to those that seek to use water in the State. We have a DEQ that is consistently involved in water-quality issues.

The decision and the discussion here today is not whether the EPA has any role in the process. They, in fact, do. But they only have a role when we have navigable waters, interconnectivity, because jurisdiction is at issue here, Mr. Chairman. And I think the EPA, through this redefining of "waters of the United States," is

seeking to extend its authority to displace and duplicate the States' authority.

Senator INHOFE. You know, Commissioner Putnam and Commissioner Clark both said statements to the effect that we in Colorado, we in Florida want clean land, we want clean air, we want clean water. Why do you feel it is necessary to reaffirm that?

And I won't ask you to answer it, because I will answer it for you. There is this assumption that no decisions are good decisions unless they are made in Washington. And whether you picked it up or not during the opening statement of the first panel, they feel—and those individuals who are embracing their new authorities that they are seeking are ones who do not believe that you are capable in the States to do as good a job as they would do in the Federal Government.

What do you think of that?

Mr. PRUITT. Well, Senator, I think, in many instances, even beyond the Clean Water Act, there are those in Washington that populate the EPA and other agencies that see the States as a mere vessel of Federal will. And so long as the States agree with the view and the perspective of the agencies here, there is no conflict. But when there is disagreement about how decisions should be made—and I would add this, decisions that have been reserved by this body, by Congress to the States—that is when the competition and the conflict arises.

And that is what we have here. We have a situation where the EPA is extending its authority into areas that are historically and, I might say, almost exclusively the purview of the States. And they are doing so because they want to dictate to the States how we should manage our water and use our water.

Senator INHOFE. Well, I appreciate that. And we live with this on a daily basis.

There is some other language in here I am going to ask the three of you to respond to, because when I first read this, I know how I interpret it. It says that agencies have told States that these rules will not actually provide any certainty because most of the decisions are left to the, quote, "best professional judgment of the EPA and the Corps of Engineers."

What do you think about that language?

Mr. PRUITT. Well, I think that and also what the commissioner mentioned, Mr. Chairman, about the catchall category, there is a catchall category the EPA is proposing with this rule that they say the purpose is to provide transparency and predictability and consistency with respect to the scope of the CWA, that when it is reduced down to the discretion, the judgment on a case-by-case basis, that definitely does not provide certainty and predictability—

Senator INHOFE. Uh-huh.

Mr. PRUITT. —to those folks that are regulated across the country.

You know, the greatest benefit that we have of rule of law and regulation is that those that are subject to regulation know what to expect and know how to conform their conduct. And when we have decisions made on a case-by-case basis, that is almost impossible to happen.

And so, Senator, I am very concerned not only about what you have raised but also this catchall category that we have already identified.

Senator INHOFE. Yeah.

And to Commissioners Putnam and Clark, does that phrase concern you as much as it does me?

Ms. CLARK. Thank you, Senator.

Yes, it does. And I heard the EPA this morning even say that it was confusing; there were a lot of components that are still confusing.

It broadens the number of county-maintained public safety ditches and infrastructure that would require section 401 or 404 Federal permits, and it is a process that is already cumbersome. There are counties across the Nation that I can look to examples where it has increased the length of time. The clarity is a problem as to how it is being enforced by regions as well as the headquarters.

And I think we heard today that very thing, that there is ambiguity and clarification, and we need to be at the table to help solve that problem.

Senator INHOFE. Thank you.

Mr. GIBBS. Mrs. Napolitano, the floor is yours. RPTR MCCONNELLEDTR WILTSIE[2:40p.m.]

Mrs. NAPOLITANO. Thank you, Mr. Chairman.

There is an area that we really haven't delved into, and that is the cost of inactivity. And I would like to ask either Mr. Mauck or Mr. Srolovic.

Several comments on the proposed rules have expressed concerns about the costs associated with the rule. But in your personal view or that of your organization, is there a cost associated with the inactivity when compared to the existing rule?

Mr. SROLOVIC. Thank you.

I believe there is a cost, and I think the cost is positive. As things exist now, there is fractured conflicting case law. The courts have invited the agencies to clarify that through a rulemaking.

And so I think that, as time goes by and the status quo remains, there will be a continuing cost in greater delay of jurisdiction. I think the rule will very much help clarify when, in most cases, the law applies and when it does not.

It is not perfect. It is undergoing further work. There has been a lot of comments. But I think it will help bring down the cost over the status quo.

Mrs. NAPOLITANO. Mr. Mauck?

Mr. MAUCK. Yes, if I may. Thank you for the question.

As a headwater county, we are consistently under scrutiny in terms of the water and the water quality that flows out of our county and downstream to other users. And for a small county, the treatment of that water continues to increase and it becomes very expensive for us.

And the assurances that we could put in place to assure that the intermittent streams, the headwater, especially in a former mining community like mine where we still have sites out there—that the water that is—it is coming down from those streams are protected. The cleaner that that water is coming into our systems, the cheap-

er it is for us, and easier for us to send better quality down the hill.

Mrs. NAPOLITANO. Thank you, sir.

Mr. Srolovic, suggestion has been made that New York State is opposed to the rulemaking. And is this position true?

Mr. SROLOVIC. Congresswoman, I think there are two points here. The answer is no. New York is not opposed to the rule.

Our Environment and Agricultural Commissioner in New York strongly support agency rulemaking to anchor a Federal water pollution control floor on a national level, which is essential to protect States from upstream pollution. The commissioners raised some concerns about the lack of pre-rulemaking consultation with States and some of the definitions of certain terms in the proposed rule.

While consultation before is always better than after, the Corps and EPA have undertaken significant outreach to States, municipalities, and other stakeholders, holding some 400 meetings around the country. One of those was in Worcester, Massachusetts, where our office participated and gave views, along with many others, about these definitions and the importance of the rule.

So the agencies also extended their public comment period twice and have taken strides to listen to everyone and craft a better, clearer rule.

Mrs. NAPOLITANO. Thank you.

Mr. Mauck.

Mr. MAUCK. I am sorry. Could you repeat the question.

Mrs. NAPOLITANO. Well, the question to you would be the opponents of the rule argue that the process was flawed, that the concerns of the State and local governments were not adequately addressed.

Were you given ample time and opportunity? I know that they have held—like Mr. Srolovic was indicating, there were over 400 meetings, et cetera. Was there ample opportunity for input?

Mr. MAUCK. Yes. You know, these discussions have been ongoing for a number of years now. But there was a very lengthy—200 days for public comment. I believe we have received—there have been submitted about a million comments. I feel like I have had adequate time. I have been able over the past year to actually address this through letters to the editor, as a matter of fact. So absolutely.

Mrs. NAPOLITANO. Thank you, Mr. Chair. I yield back.

Mr. GIBBS. I yield 5 minutes to myself.

Mr. Srolovic, you were talking about that tough name. In your testimony, you talk a lot about the need for clarification, and I think there is all agreement on that on CWA.

But, however, I find it interesting. I am looking at the comments made by New York State from the environmental department and the agricultural department filed on November 13th, 2014, and they are very concerned about the definitional concerns in the proposed rule that prevents New York from providing meaningful comments, the impact of the proposal, economic impacts, a one-size-fits-all approach to redefine the regulated waters will only lead to legal challenges, cause unnecessary harm to farmers, and could lead to other unintended consequences, and they question the process was inadequate because they weren't consulted enough.

So I guess my question is: Are you aware of those comments? I think you are. Did you consult with these State agencies, besides being the representative in the Attorney General's Office in the State of New York?

Mr. SROLOVIC. We do represent the State agencies in court and on other legal issues. I think the fundamental point raised by the commissioners in that letter was that, while there is a need for a rule, it is very important for that rule to have as much clarity in its terms as possible and, at the same time, maintain a flexibility that reflects regional differences.

In New York, we have a lot of water. We are blessed with a lot of water. We have a lot of wetlands. Other states, Colorado, a very different circumstance.

Mr. GIBBS. Yeah. A one-size-fits-all policy I don't agree with, especially with water.

But do you agree with these State agencies in your State, that this proposal would be an expansion of the regulatory authority of the U.S. EPA under the Clean Water Act?

Mr. SROLOVIC. We do not see it as a significant expansion of the jurisdiction of the waters of the United States. We think it codifies the principles that have been applied, that it properly interprets the guidance that a majority of Justices have provided from the U.S. Supreme Court, and is an important step forward.

Mr. GIBBS. OK. I guess for the other panelists, costs to the counties, States. If this rule, as proposed, goes into effect, what is it going to do to the cost, cost of government—for local governments?

Ms. CLARK. Thank you, Mr. Chairman. I will try and go first and be brief.

Financially, actually, it is—I mean, it is reaching farther out based on the ambiguity and the confusion that has been placed on the rules.

If you look at the Small Business Administration's Office of Advocacy and the analysis that they did, there would be a cost not just to small businesses, but to small counties, 50,000 or less, and that makes up about two-thirds of the Nation's population.

In addition to that, if we look back and look at—the delay of projects is a cost to us locally. The longer we delay, then it puts safety at risk. It puts water at risk, frankly, and water quality.

And then the other component of that really is to look back and see when the EPA did their analysis and what data they used. And it was older data. It wasn't based on today's costs in place. So, yes, there is a significant cost.

Mr. GIBBS. I want to get to one more question here.

So I am a firm believer that the CWA was put into place because we had major problems—I mean, it is what you saw in the earlier panel, the Cuyahoga River and all that—and it was structured to be cooperative federalism between the States and the Feds and with the Federal Government in oversight and guidance. That is why the States had to submit the 3-year plan of action.

So maybe Mr. Pruitt or Mr. Putnam might want to comment on how that partnership has been working or not working or what the process has been, you know, just of implementing and enforcing the Clean Water Act.

Mr. PUTNAM. I will be brief.

In answer to your first question, we know from urban counties just on stormwater and from an agricultural perspective the number is easily in the billions, easily in the billions. Twenty percent increase in jurisdictional wetlands minimum.

We know from the previous study that is now 12 years old that it costs over \$300,000 to get a 404, and we know the wetlands mitigation is \$100,000 per acre to mitigate.

So when you grow the impacted areas and you add the regulatory cost and you add the mitigation factors, it is easily in the billions not only for ag, but also for our counties.

And I will let my Attorney General friend speak to the partnership issue.

Mr. PRUITT. You know, Mr. Chairman, I think that that is the concern that you have identified. I think, historically, the relationship has been strong. I mean, in Oklahoma, we have water quality issues. The Illinois River in the eastern part of our State, there have been ongoing concerns between Arkansas and Oklahoma about phosphorus load in that body of water.

Both the EPA has been concerned about that, but so has the State of Oklahoma. We have actually negotiated a memorandum of understanding with Arkansas, and we have worked on both sides of the border to take regulatory steps to reduce phosphorus levels in the Illinois River. And so I think you see examples both at the State level and at the Federal level of concern about water quality.

But here my comments to the panel and to the committee are focused more upon this expanded view of the definition that gives the EPA jurisdiction to interpose itself into those areas that are traditional, historical, and, I believe, lawful to the States on primacy. And that is what we are seeing on this expanded definition, Mr. Chairman.

Mr. GIBBS. Thank you.

Mr. Duncan, you are recognized.

Mr. DUNCAN. Thank you, Mr. Chairman.

The Rapanos Clean Water decision was mentioned when I was here this morning briefly. Let me read what the Federal district judge said in that case.

He said, "I don't know if it is just a coincidence that I just sentenced Mr. Gonzales, a person selling dope on the streets of America. He is here illegally. He is not an American citizen. He has a prior criminal record.

"So here we have a person that comes to the United States and commits crimes of selling dope and the Government asked me to put him in prison for 10 months.

"And then we have an American citizen who buys land, pays for it with his own money, and he moves some sand from one end to the other and the Government wants me to give him 63 months in prison."

And this Federal district judge said, "Now, if that isn't our system gone crazy, I don't know what is. And I am not going to do it."

Well, he was reversed. But it shows you can take any of these laws too far. And I can tell you no one is talking about doing away with the Clean Water Act or going back to where we were in 1970.

But it is also ridiculous to act like we haven't made any progress and that things are worse now than they were in the 1970's. So we have to make these rules even tougher.

And I remember, when I chaired this subcommittee, the mayor of Los Angeles came to me and he said the EPA was coming down with some new regulations about grease.

And he said, "We have got over 10,000 restaurants in Los Angeles." He said, "Most of them are small mom-and-pop restaurants." He said, "This is going to run several thousand of those small mom-and-pops out of businesses." And we got that stopped.

But I can tell you that people sit up here in Washington and they write these rules and regulations. They are mostly people who have spent their entire careers in government. Many of them have spent their entire careers here.

They don't realize the effect that these rules and regulations—most of them help the big giants in the industry, but they really hurt the small farmers and the small ranchers and the small businesses.

And, in fact, the SBA said of this rule that we are talking about—the SBA Office of Advocacy put out this statement and said, "Small businesses are extremely concerned about the rule as proposed. The rule will have a direct and potentially costly impact on small businesses. The limited economic analysis which the Agency submitted with the rule provides ample evidence of a potentially significant economic impact."

And, you know, I noticed in the biographies—I was here for an hour this morning and I listened to Administrator McCarthy and Secretary Darcy. And I noticed in their biographies neither one of them has ever managed a farm or a ranch or been in a small business.

They just don't understand the pressures and how difficult these positions—these jobs are and how tough it is when you have to fight ordinary competition, but then you have to take on your Government that has unlimited funds when you have to take them on, to boot.

And then people wonder why so many small- and medium-sized businesses go out of business, and all of these college graduates wonder why we have so many of them working as waiters and waitresses in restaurants because we sent millions of good jobs to other countries for the last 40 years or so.

And a lot of it—an awful lot of it is because of the environmental rules and regulations and red tape. And if we don't wake up and realize that, we are going to keep hurting these small businesses, these small ranches, these small farms.

And I just get sick and tired of these bureaucrats sitting up here coming up with these rules and regulations that they have no understanding of who it is going to hurt, how much effect it is going to have.

I remember, when I chaired this subcommittee, we had a cranberry farmer from Massachusetts who broke down in tears talking about the effect that some of these EPA Clean Water rules were already having on his farm.

And to come in and expand them at this point now is just wrong, in my opinion. And so I am opposed to it. And I notice that almost

all the small business groups and almost all of the agriculture and farm groups are opposed to it, too.

Finally, I will just say I think I am the only one here that has served with Secretary Putnam. He was a great Member of Congress, and he has got a great future ahead of him in the State of Florida.

I also had the privilege of serving, General, with your, governor, and she was a fine Member and outstanding Member of this body, also. And I am real proud of the work she is doing as your governor.

Mr. Chairman, thank you very much.

Mr. GIBBS. Mr. Rokita, 5 minutes.

Mr. ROKITA. Thank you, Chairman.

It is great to be on your subcommittee. I appreciate being here. As you can tell, I am new to the Transportation and Infrastructure Committee. That might explain the gap here.

Mr. GIBBS. This is a full committee hearing here.

Mr. ROKITA. Right. Right.

Panel 1, where all of the hubbub was, which, Secretary, that is where I had the plague. I had the plague earlier this morning, but I am here now.

I really enjoy being this close because I get to really focus in on each of your testimonies and appreciate them. As the former Indiana Secretary of State, I really looked to county government to help solve our problems, just like I think Washington should be looking to the States to do the same.

In fact, I was in Colorado, where I learned about vote centers from one of your counties, and I know several Indiana clerks are members of NACo. But we took vote centers back to Indiana and implemented them there. It was good stuff.

In that vein, I am surprised to hear a local official like you, Commissioner Mauck, look to the Federal Government almost solely to solve your problems. And that is what I got from your testimony, whether it was the Clean Water or the wildlife that helps—that the water helps flourish.

I couldn't understand when I was listening to your testimony why you, as a reelected elected official, feel powerless to solve these problems yourself or to go to your State legislature.

Now, remember, before you answer, unless Senator Gardner was wrong—and feel free to correct him—all water flows out of Colorado. Right? So you are in almost a unique or particularly good situation to take care of the situation.

Why won't you?

Mr. MAUCK. Well, like I said in my testimony, Clear Creek County does. We do take an opportunity—we work with the Watershed Foundation to clean up a lot of our water.

Mr. ROKITA. What is the need to expand this definition?

Mr. MAUCK. The need is the regulatory uncertainty in terms of what waters are in, what waters are out, the delays in the permitting as we work through the—

Mr. ROKITA. Yeah. I want to talk about the testimony about the delays in the permitting.

This expands the jurisdiction of the Agency over water. So, by definition, you are going to get more permits. So how is getting

more permits—because there is going to be more water under jurisdiction—going to speed up the permitting process?

The last thing we want to give these agencies—and I don't just mean the EPA. But they all seem pretty inept in terms of turning work product around. Why would we give them more paperwork?

Mr. MAUCK. It is my understanding that this does not expand the jurisdiction of the Clean Water Act.

Mr. ROKITA. Oh. It doesn't expand the jurisdiction.

Mr. MAUCK. Does not, is my understanding.

Mr. ROKITA. Yeah. You state that in your testimony, too.

But, on the other hand, you suggest that the rule would protect intermittent ephemeral streams and wetlands that are currently not federally regulated.

Don't these arguments contradict each other?

Mr. MAUCK. They were once regulated before, and I think there was more certainty back then with the 2001 and 2006 court rulings. We have kind of entered this gray area now where we don't understand what is and what is not.

Now, I am dealing with a small business community that is outdoor recreation-centric and the small mom-and-pop delis and ice cream shops that operate on the backs of the rafting companies, the outfitter companies, the people that come into camp and recreate and fish and angle.

Not having certain protections in place and not being clear, to me, is rolling the dice on that outdoor recreation industry. And, for me, that is all I have after the Henderson Mine for my community. But it is a very robust economic engine for not only Colorado, but also the rest of the United States.

Mr. ROKITA. Why couldn't a county commission ordinance take care of this? Why can't you legislate this yourself?

Mr. MAUCK. I can't speak to the legalities. I am not an attorney.

Mr. ROKITA. That is not a legality. It is called sovereignty of a state and, in your situation, sovereignty of a county.

And you have been elected by people to act. And it sounds like what you are doing is saying exactly what Attorney General Pruitt was trying to get at where there are people in this country that unfortunately think they have to be vessels of the Federal Government.

And I am going to let Attorney General Pruitt comment on it and Secretary Putnam. We have about 30 seconds, if you can divide that. And I appreciate your testimony. I want to see if you have anything to add to this exchange we just had.

Mr. PRUITT. Well, I do want to provide a comment with respect to the case law just momentarily. You know, there has been two recent decisions, the Solid Waste Agency of Northern Cook County and, also, the Rapanos decision that has already been highlighted.

And in the SWANCC decision, the court held that the Corps of Engineers exceeded its authority by attempting to regulate non-navigable, isolated, interstate waters.

In the Rapanos decision, they held that the Corps waters must be navigable waters or at least reasonably made to be so. There is a reason for that. It is called the Interstate Commerce Clause.

And this body, Congress, has the authority with respect to issues that involve interstate commerce as it relates to water. If you are

dealing purely with intrastate water that cannot be regionally connected to an interstate body of water, the jurisdiction is exclusively within the States. And that is the tension here.

And so, when you talk about issues of federalism, I agree with you, Congressman. I believe that the States are taking and, in fact, have taken—I know Oklahoma has done this. We have a robust regulatory regime. I have mentioned the Water Resources Board and the DEQ working together to deal with land use and management and water quality issues.

There are issues—and I mentioned one, the Illinois River—with phosphorus load that is affecting us from Arkansas, where the EPA has jurisdiction, that we should be very leery of an approach that yields to the Federal Government a takeover of that land use and water quality issues that are reserved to the States presently.

Mr. GIBBS. OK. Thank you.

Mrs. Napolitano, do you have something to enter for the record?

Mrs. NAPOLITANO. Yes, Mr. Chairman.

There was a statement by Ms. Clark, I believe, that the SBA Advocacy was concerned about the impact this has on small business.

So I have a release dated October the 2nd from the American Sustainable Business Council stating that it appears the SBA is arguing that polluting industries have the right to externalize the pollution and harm downstream businesses and communities. This organization apparently has 200,000 businesses, 325,000 entrepreneurs, executives.

I would like to introduce it into the record, please.

Mr. GIBBS. So ordered.

[The information follows:]***** COMMITTEE INSERT

Mr. GIBBS. I would like to thank our witnesses for your testimony today. Your contribution to today's discussion was very insightful and will be very helpful. Hopefully, we are going to address some legislation and we can get something passed. I do believe it is the role of Congress to address this.

I ask unanimous consent that the record of today's hearing remain open until such time as our witnesses have provided answers to any questions that may be submitted to them in writing and unanimous consent that the record remain open for 15 days for additional comments and information submitted by Members or witnesses to be included in the record of today's hearing.

Without objection, so ordered.

Any other Members have anything else? If not, then the meeting is adjourned.

[Whereupon, at 3:03 p.m., the committees were adjourned.]