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HEARING ON A REVIEW OF THE TECHNICAL, SCIENTIFIC, AND LEGAL  
BASIS OF THE WOTUS RULE

Wednesday, April 26, 2017

United States Senate

Committee on Environment and Public Works

Washington, D.C.

The committee met, pursuant to notice, at 10:19 a.m. in room 406, Dirksen Senate Office Building, the Honorable John Barrasso [chairman of the committee] presiding.

Present: Senators Barrasso, Carper, Inhofe, Fischer, Rounds, Ernst, Sullivan, Cardin, Whitehouse, Gillibrand, Booker, Duckworth, and Harris.

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

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

On February 28th, President Trump signed an Executive Order directing EPA and the Army Corps of Engineers to review the Obama Administration's Waters of the United States, or WOTUS Rule, and to publish a proposed rule that would rescind or revise that rule. While this action was both correct and important, the long saga of the WOTUS Rule is not yet over. This fundamentally flawed rule is still on the books and needs to be withdrawn.

The Supreme Court has decided to rule on whether or not circuit courts have the jurisdiction to hear challenges to the Rule. If the Supreme Court decides that these cases belong in district courts, then the nationwide stay that the Sixth Circuit Court of Appeals issued will go away.

If that happens, this Rule, that is terrible and unlawful, will go into effect and the EPA and the Corps will be able to regulate isolated ponds and dry streambeds that have no impact on navigable water and were never intended to be covered under the Clean Water Act.

As we will hear from our witnesses today, the justification for withdrawing the Rule is overwhelming. General Peabody is a

decorated retired member of the military who was the Commanding General for the Civil and Emergency Operations at the Corps of Engineers until he retired in the fall of 2015. He will tell us that the definitions in the WOTUS Rule are not based on the Corps' expertise and experience. In fact, the Corps was shut out of the process of writing the final Rule and the support documents for the final Rule.

The Corps is the agency that performs the on-the-ground inspections that identify what water is federally regulated. If the Rule is not based on their experience, that means it has no technical basis; it is, instead, a blatant government power grab.

Dr. Josselyn is a Ph.D. and a professional wetlands scientist who was a member of the Science Advisory Board Panel that was put together by the EPA that reviewed EPA's "Science Report." This report is a scientific literature review on water connectivity.

The Obama EPA claimed that the WOTUS Rule is based on the conclusions of this report. Dr. Josselyn will tell us that, in fact, this report does not address the issue of where federal regulators should establish jurisdiction.

EPA Science Report looks at connections to water, but fails to examine whether connections are significant, and most of the studies in the report do not address navigable water. Instead,

this report concludes that all water is connected. Our children learn that in fourth grade when they learn about the water cycle. But that has nothing to do with federal jurisdiction, and it means that the EPA's Science Report can't be used to justify the WOTUS Rule.

Mr. Tseytlin is the Solicitor General for the State of Wisconsin and he works with the 31 States that are all challenging the WOTUS Rule. Mr. Tseytlin will tell us that the final rule included new definitions that were created without public input and even without public notice. This means that the WOTUS Rule is arbitrary and capricious, and violates the Administrative Procedure Act.

We also will hear from Mr. Kopocis. He was the Deputy Assistant Administrator for the Office of Water in the Obama Administration. He will tell us that the Obama Administration met with States and other stakeholders during the rulemaking process. But that doesn't change the fact that between the proposed Rule and the final Rule the Corps was arbitrarily or deliberately shut out of the process. The end result is the Obama Administration wrote a RULE that is not supported by agency expertise, by agency experience, or by the science or the law.

Finally, we will hear from Mr. O'Mara, who is President and Chief Executive Officer of the National Wildlife Federation.

The National Wildlife Federation is very interested in protecting wildlife habitat. The right way to do this is to form partnerships with landowners, not to expand federal control over private property. In fact, in 2014, the Fish and Wildlife Service issued a report that notes that the Service works with landowners to employ cooperative conservation measures to preserve isolated wetlands like prairie potholes, measures that let farming continue.

If the WOTUS Rule goes into effect, instead of working cooperatively, the Federal Government could simply take control of private land and shut down farming activity. We have already had attempts to do this in my home State of Wyoming, where Mr. Andy Johnson, who EPA threatened to fine \$37,500 a day for simply building a stock pond on his property.

After looking at this record, the only course of action that makes sense is to withdraw the Rule and start over. I hope we can see quick action to lift this threat to farmers and other landowners that have been created as a result of the WOTUS Rule.

I now turn to Ranking Member Carper for his testimony.

[The prepared statement of Senator Barrasso follows:]

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

Senator Carper. Thanks, Mr. Chairman. Thanks for bringing us all together.

I spoke with the witnesses before we began and I said, this is an issue, as you are going to hear from the Chairman's opening remarks, that brings out strong feelings on several sides. One of the things that I hope might happen here today is that the panel this diverse and this smart could actually help provide some consistency and maybe some consensus before we walk out of the room, so thank you all for joining us.

This hearing also represents a valuable opportunity to consider the critical elements of any sound rulemaking to address the definition of water that receives federal protection, including rulemaking that would be required to rescind the rule that we are considering today. Fortunately, we have a panel of experts to help us sort through the nuance of law and science. We welcome all of you very much, appreciate your contributions to our discussion. Before we dive into the details, though, I would like to step back just a little bit and recall how we got to this point with the definition of waters of the U.S.

You will recall that the passage of the Clean Water Act was a product of horrific water quality in many parts of the

Country. I went to Ohio State University, and just north of us, in Cleveland, there is a river flowing through Cleveland that caught on fire. And it wasn't just the Cuyahoga River that was contaminated, there were a lot of others as well. Frankly, there still are too many. But there was broad, national concern over the state of our waters then, and there was consensus that we needed to do something comprehensive to fix the problem.

Congress was not confused or uncertain about what it was seeking to protect when it passed the Clean Water Act in 1972. The first sentence of that Act passed in 1972 says this: "The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." That is what it says. When Congress reported out that legislation, this Committee acknowledged that "it is essential that discharges of pollution be controlled at the source. At the source. So the Act defined the term "navigable waters" broadly, as "all the waters of the United States." Congress clearly understood that cleaning up our waters involved controlling pollution discharges in a lot of places where ships don't go.

While broad, the coverage of the Act was clear. And while demanding on cities and industries, farmers, ranchers, and developers, the benefits of the Act were dramatic. More than 60 percent of the lakes and 55 percent of the rivers were able to

achieve the Act's water quality goals of being fishable and swimmable by the year 2003.

I believe that all of us understand that protecting wetlands and reducing pollution requires active participation from farmers and ranchers. They live closest to our land and to our waters, and they have every reason to be good stewards of these resources; and for the most part they are, really good stewards in most cases. Indeed, that is one reason why farmers in my State of Delaware celebrate their investments in, and successes of, no-till farming and all other kinds of conservation measures that I won't get into today.

While those farmers love their land, traditional farming practices often ended up sending some of their best soils down a ditch or maybe away with the breezes on a windy day. Their land was eroding from under their feet. And then science showed them a better way. They were not blinded by science; they were guided by science. Their commitment to the land and their livelihoods allowed them to embrace new practices that preserve their future and a foundation of rural life and the economy. I think we need that sort of agreement for clean water, along with a commitment to make this collective effort as predictable, simple, and inexpensive as possible.

No one was pleased with the confusion, uncertainty, and burdensome bureaucratic processes resulting from the Supreme

Court's decision in the 2001 SWANCC case and 2006 Rapanos case. Without the Clean Water Rule, though, EPA and the Corps of Engineers would have to undertake a burdensome, time-consuming, expensive, unpredictable, and confusing process to determine what is covered by the Clean Water Act and what is not. That is no way to do business, which is exactly why there was broad and diverse interest in having both the EPA and the Corps develop clear guidance, through regulation, to cut through the morass. That, I believe, is the motivation behind, and I think the result of, the Clean Water Rule.

If I were to take on that very important task, here are some things that I would want to focus on: I would analyze all the peer-reviewed science I could get my hands on; I would host hundreds of public meetings across our Country; I would ensure that all who wish could have their say; I would review a million comments, if I had to; and I would consult with the States, with affected industries, with farmers, with fishermen, and the best water minds around. And that is exactly what went into developing the Clean Water Rule that we are discussing today.

To tell you the truth, I don't believe that I have ever met anyone who thinks the Rule is perfect. I don't, and I have not met anyone who thinks that it is. It is too hot for some, too cold for others, but it will protect the water we all need.

The Rule has been a long time coming, as you know. It is

well informed by science and by experience, it treads a moderate line between the extreme desires of interests at both ends, and it is the product of a massive public engagement effort. So I would ask this Administration and detractors of this approach to show us your work. Just show us your work. Give the rest of us the same rigor, the thoughtfulness, the engagement, the transparency, and science that underlies this effort, and show us, with the same degree of dedication to the task, to the law, and to our health and environment, that you have something better to offer. Otherwise, I am afraid that you risk, you being the Administration, risk failing all of our people and spending an awful lot of time and taxpayer money subsequently in court. This Rule has all the basis in law, has technical merit, and the science that it needs.

Thank you, Mr. Chairman. I would ask unanimous consent, if I could, to insert into this hearing record letters that I received from The Southern Environmental Law Center and Clean Water Action supporting the Clean Water Rule. Thanks so much.

[The prepared statement of Senator Carper follows:]

Senator Barrasso. Without objection, those are admitted to the record.

[The referenced information follows:]

Senator Barrasso. Thank you very much, Senator Carper.

We will now hear from our witnesses. And I would like to remind the witnesses that your full written testimony will be made part of the official record today. I please ask that you keep your statements to 5 minutes so that we may have some time for questioning. I look forward to hearing the testimony of each and every one of you, and I would ask Major General John Peabody to begin.

Thank you so much for being here.

## STATEMENT OF MAJOR GENERAL JOHN PEABODY (RET.)

General Peabody. Thank you, Mr. Chairman, Mr. Ranking Member. I appreciate the invitation to appear here today.

I am testifying based on my personal knowledge related to the Waters of the United States, or Clean Water rulemaking, while serving as the Deputy Commanding General for Civil and Emergency Operations in the Army Corps of Engineers from October 2013 through August 2015. I retired 20 months ago, so I am testifying as a private citizen who does not speak today for the Corps in any way. However, my testimony reflects my best recollection of this rulemaking process and the professional advice I received from Corps experts during that period.

The Corps is the primary agency responsible for administering Section 404 of the Clean Water Act through more than 1,200 Corps regulators who process over 99 percent of all Section 404 actions in this Country, consisting of tens of thousands of regulatory actions each year. Contrary to common belief, the vast majority of all applications, about 80 percent, receive a decision within 60 days from receipt of a policy-compliant application.

Corps professionals are the face to the public regarding this program across many different circumstances involving a complex array of multiple environmental and administrative laws, policies, and procedures. In my opinion, the Corps' 40-plus

years of experience involving over 2 million actions -- that is my estimate -- make it the best organization to advise policymakers on what should constitute waters of the United States.

Beginning in November 2014 and continuing through the Rule's finalization in May 2015, Corps involvement in the rulemaking was limited to a few engagements primarily regarding discreet aspects of draft Rule language. In that period, the Corps did not regularly or substantially participate in draft final Rule changes as they occurred, was excluded from routine Rule text development and policy discussions, had little direct engagement with EPA counterparts, and was only engaged by those developing the Rule on a periodic and constrained basis.

I do not consider the Corps to have been a member of a collaborative and substantive joint process that included serious consideration of Corps concerns and recommendations. On the contrary, in my opinion, Corps involvement was superficial during that period.

Despite this, Corps staff made every effort to propose options that would address policy considerations and ways that met central characteristics: that it be one, scientifically based, two, technically implementable, and three, legally defensible. These three criteria, and the duty to ensure policymakers clearly understood the implications of the Rule

language, were the only motivation behind my personal actions.

The Corps' key concerns centered on new definitions, terms, and approaches in the draft final Rule that would cause changes to jurisdictional scope, as compared to the 2013 proposed Rule and then currently operating procedures. These key concerns addressed the subjects of tributaries, other waters, adjacency, neighboring isolated water bodies, the 4,000-foot jurisdictional limit, and ditches, among others. These concerns went largely unaddressed.

Further, it was the Corps judgment that key policy decisions, especially the 4,000-foot jurisdictional limit, but also decisions related to the definition of tributaries and the treatment of isolated water bodies, were not based on scientific analysis contained in the Connectivity Report, nor part of the proposed Rule that was available for public comment.

When the final draft Rule and Preamble were provided for interagency coordination in early April 2015, Corps staff discovered that the final Rule still did not address these key concerns. The Preamble also mischaracterized the Corps as jointly developing the Rule and as supporting its key judgments. This is inaccurate.

A few weeks later, the technical support document and economic analysis were published, and had analyzed Corps technical data without Corps involvement. In broad terms, they

both misapplied Corps data out of context to generalize broad nationwide conclusions unsupported by the underlying data.

Because Corps experts believed the draft final Rule and supporting documents were so untenable, I asked Corps staff to provide a thorough, but rapid, analysis of only those issues in the Rule documentations which they identified as potential fatal flaws. Given limited Corps involvement during the rulemaking and the Corps judgment that the Rule was fatally flawed, I became unsure whether we had adequately conveyed Corps concerns to the policymakers. The internal deliberative memoranda I forwarded to the Secretary were intended to fulfill my duty to be certain to communicate the Corps' serious concerns clearly and unambiguously before an irreversible final decision.

In my professional opinion, this Country and federal regulators like the Corps need clear, objective, bipartisan policy direction that is well founded on facts, science, appropriate expertise, and clearly articulated laws, regulations, and policies.

It remains my sincere hope that this Nation's policymakers, including this Committee, can find common ground based on science and objective analysis to develop a bipartisan solution on this important and, in my judgment, much needed matter. I hope that my testimony has provided some value for the Committee and I thank you for your time.

[The prepared statement of Mr. Peabody follows:]

Senator Barrasso. Thank you very much, General Peabody.  
We appreciate your comments and your testimony. Appreciate it.

Next I will turn to Michael Josselyn, who is a Principal at  
Wetlands Research Associates, San Rafael, California.

Thanks so much for being with us today. We appreciate you  
coming and we look forward to your testimony.

STATEMENT OF MICHAEL JOSSELYN, Ph.D., PWS, PRINCIPAL, WETLANDS  
RESEARCH ASSOCIATES

Mr. Josselyn. Thank you, Mr. Chairman, Mr. Ranking Member, and members of the Committee. I am Michael Josselyn, Founder and Principal with the environmental consulting firm Wetlands Research Associates, with offices throughout California and in Colorado. I am primarily responsible for assisting our federal and State private clients in compliance with Section 404 of the Clean Water Act, and I have 38 years of experience and am a Certified Professional Wetlands Scientist.

I served on the Environmental Protection Agency's Science Advisory Board Expert Panel to review the EPA's Connectivity Report which was prepared during the rulemaking process for the 2015 WOTUS Rule. I want to make three points in my introductory remarks.

First, the Panel's focus was on the Connectivity Report and whether the Report reflected the current status of the science on rivers, streams, and wetlands. We were charged with making recommendations to improve and clarify the Report. The draft Report confirmed the basic hydrologic principle that all parts of a watershed are connected to some degree.

The Panel was not tasked, nor did it consider, the policy and legal questions on which waters should be federally regulated. The Panel made numerous recommendations on the

content and interpretation of the literature. The Panel asked the EPA to evaluate the strength of the literature in various topic areas and the uncertainty associated with it.

As you can see from the table here on my right that was published in the final Report, the scientific literature is strongest for those drainages that have perennial and intermittent flows as being connected, as shown by the larger dots on the chart. But the effect to downstream waters is less known for intermittent streams.

We also know a great deal about riparian wetlands, that is, wetlands that are directly connected to rivers. But when it comes to ephemeral streams and non-floodplain waters, the literature is very limited, as shown at the bottom of the graph in the small dots.

The final Report is an encyclopedia of what we know about the science, but is also limited by what we don't know.

Second, the Panel found that "the review of the scientific literature strongly supports the conclusion that streams and bidirectional floodplain wetlands are physically, chemically, and/or biologically connected to downstream navigable waters; however, these connections should be considered in terms of a connectivity gradient." The presence of a gradient that defines the effects on downstream waters became a foundational element in the discussions by the Panel. The Panel stated that

connectivity should "recognize variation in frequency, duration, magnitude, predictability, and consequences of these connections" and developed a figure as to what that meant. And this is the figure that I am showing right now that was published in the science report.

In the upper portion of the figure, the Panel concluded that there was a high probability, as shown by the width of the blue bar, that perennial streams and intermittent streams will have a high degree of connectivity to downstream waters given their high frequency and duration of flow, and the amount of material that could be transported to those waters.

Similarly, for biological factors, the scientific evidence shows that perennial and intermittent streams transported materials downstream are also high, but had considerably less probability associated with ephemeral streams. Importantly, as the frequency, duration, and magnitude of flows decrease, ephemeral streams, as shown as you move to the side where the smaller arrow, that the probability for an effect on the downstream waters is much lower, as the chart states, and may not have a discernible effect.

The Panel repeatedly recommended that the EPA develop more quantitative measures and criteria to assess this connectivity gradient. The Panel concluded that although connectivity is known to be ecologically important, the frequency, duration,

predictability, and magnitude of connectivity will ultimately determine any consequences to downstream waters.

Third, there are a number of concepts and issues included in the WOTUS Rule that were not elements of the Panel's review. For instance, distances set by the WOTUS Rule were not considered by the Panel and, in fact, the Panel stated distance should not be used as a metric for determining connectivity. Furthermore, the approach set forth in the WOTUS Rule for determining significant nexus is based on the selection of any one function and does not consider the connectivity gradient discussed in the Panel's report and shown on this graph. Finally, the Panel did not review, nor did the Connectivity Report discuss, the aggregation methods in which similarly situated tributaries would be combined in order to reach a significant nexus finding.

In my experience in making jurisdictional determinations, these elements of the WOTUS Rule have the effect of expanding the scope of jurisdiction compared to past guidance by the Corps and the EPA.

Thank you.

[The prepared statement of Mr. Josselyn follows:]

Senator Barrasso. Thank you so very much for your testimony. We appreciate you being here with us today, Mr. Josselyn.

I would like to now turn to Misha Tseytlin, who is the Solicitor General for the State of Wisconsin, from Madison, Wisconsin. I appreciate you making the trip to Washington, being with us, and I look forward to your testimony.

STATEMENT OF MISHA TSEYTLIN, SOLICITOR GENERAL, STATE OF  
WISCONSIN

Mr. Tseytlin. Thank you, Chairman Barrasso, Ranking Member Carper, and members of this Committee. I am grateful for the opportunity to appear before you today. My name is Misha Tseytlin and I serve as the Solicitor General for the State of Wisconsin.

My State, led by Attorney General Brad Schimel, has played an important role in the multistate coalition litigating against the WOTUS Rule. Our 30-State coalition is broad and geographically diverse, comprising States from Wyoming to West Virginia, from Ohio to Oklahoma, from Alabama to Alaska and beyond.

The reason for the breadth of this coalition, to my knowledge, the largest such coalition challenging any regulation issued by the prior administration, is that the WOTUS Rule is a deeply intrusive invasion upon traditional State authority. Under both the United States Constitution and the Clean Water Act, States have the lead role in regulating most waters and lands within their borders. The Clean Water Act states this explicitly, explaining that it is "the primary responsibility and rights of States to plan the development and use of land and water resources." The Federal Government, in contrast, only has limited authority to protect the Nation's "navigable waters."

The WOTUS Rule is an overbroad assertion of federal authority over local waters, which are rightfully subject to State, not Federal, regulation. The Rule claims federal power over streambeds that are dry most of the year and water features connected to navigable waters only once every 100 years. And I think a small example will illustrate this point. If you are a Wisconsin farmer and you have a small pond on your land, that pond is automatically subject to federal jurisdiction if, after a once-in-a-century rainstorm, that pond is within five football fields of any tributary, any navigable water.

This Rule was also adopted without meaningfully consulting the States about their water protective programs. Such consultation would have revealed that States already protect these local features, making federal regulation unnecessary. Indeed, I would argue that the process that led to the adoption of the WOTUS Rule involved one of the most significant procedural failures in the history of the Administrative Procedures Act.

Earlier testimony from General Peabody demonstrated how EPA cut the Corps out of the process of designing the WOTUS Rule. But that is just the tip of the iceberg. EPA cut the entire public, including the States, out of that process. That is because the final Rule that the Agency adopted departed very significantly from the proposed Rule, in a way that the public

had no idea about and was not informed about. In particular, EPA formulated many of the central concepts of the Rule behind closed doors and sprang them on an unsuspecting public without public input.

The lack of record support and procedural illegalities of the WOTUS Rule can be summarized with one simple point. When the prior administration filed its 245-page brief before the Sixth Circuit seeking to defend the Rule, it could not cite a single public comment on the central features of the WOTUS Rule's adjacency or case-by-case waters category, either for or against. That is because EPA simply invented those central concepts of the WOTUS Rule out of whole cloth, without any record support or without any public input. That is against the law.

It is, thus, unsurprising how poorly the WOTUS Rule has fared in court. On October 9th, 2015, our broad coalition of States secured a nationwide stay of the WOTUS Rule from the United States Court of Appeals for the Sixth Circuit. As the Sixth Circuit explained, the States demonstrated that they had a "substantial possibility of success on the merits" in their arguments that the WOTUS Rule violated the Clean Water Act and violated the EPA. The United States District Court for the District of North Dakota reached the same conclusion and thus issued a preliminary injunction blocking the WOTUS Rule.

Our coalition of States was extremely pleased that the new Administration heeded the message of the federal courts and has moved forward with rescinding the Rule.

The work that this Committee is doing here today provides a valuable public service. Given the current Administration's laudable and swift movement toward repealing the WOTUS Rule, the federal courts are unlikely to have an opportunity to declare, finally, what the Sixth Circuit and the District of North Dakota concluded preliminarily: the Rule is unlawful. This hearing is therefore vital to establish for the public what the States were already well on their way to proving in court.

Thank you for the opportunity to testify before you today. I look forward to answering any questions you may have.

[The prepared statement of Mr. Tseytlin follows:]

Senator Barrasso. Thank you very much, Mr. Tseytlin. We are very grateful for your testimony.

I would like to now turn to Ken Kopocis, who is Assistant Professor, American University Washington College of Law, Washington, D.C.

Thank you very much for joining us today.

STATEMENT OF KEN KOPOCIS, ASSOCIATE PROFESSOR, AMERICAN  
UNIVERSITY WASHINGTON COLLEGE OF LAW

Mr. Kopocis. Thank you. Chairman Barrasso and Ranking Member Carper, thank you for the request to appear today to discuss the Clean Water Rule, a rule issued jointly by the U.S. Environmental Protection Agency and the Department of the Army to clarify the scope of the Clean Water Act. I appear today in my personal capacity.

In 1972, Congress enacted the Clean Water Act and made clear that the objective of restoring and maintaining the Nation's waters would best be achieved by controlling pollutants at their source. The Clean Water Rule assists that effort by making the scope of the Clean Water Act easier to understand, more predictable, and more consistent with the law and peer-reviewed science. The Rule interprets the Clean Water Act; it does not expand it.

It is critical to note that the Clean Water Act permitting requirements are triggered only where there will be a discharge of a pollutant into a jurisdictional water. If a jurisdictional water is not going to be polluted or destroyed, the Clean Water Act does not affect the use of that water.

The Supreme Court has considered the scope of waters protected by the Clean Water Act from pollution and destruction three times: Riverside Bayview, SWANCC, and Rapanos. In each

of those cases every Justice has supported that the term navigable waters applies to waters beyond those considered to be traditionally navigable.

In *Rapanos*, no opinion could gather a majority, and the nine Justices wrote five separate opinions. That confusion evident on the Court carried over into the regulated community and the two agencies. In both *SWANCC* and *Rapanos*, the agencies' regulations were left intact by the Court.

Interested parties demanded that the agencies take regulatory action to clarify which waters would have their water quality protected by the Clean Water Act and which would not. Every interest group that approached the agencies, and this includes agriculture, property development, environmental groups, resource extraction, hunters, fishers, conservationists, mayors, governors, federal and State legislators on both sides of the aisle, and countless others, all recommended that the agencies take action to address the post-*Rapanos* confusion. No one argued for the agencies to do nothing.

In response, the agencies spent several years developing the Rule, and its development included countless conversations with all of the interested parties I previously mentioned.

The Rule is informed and supported by the best available peer-reviewed science on the relationship of waters and the impacts of protecting water quality, or not protecting water

quality, on downstream and adjacent waters. EPA's Office of Research and Development prepared an exhaustive synthesis of peer-reviewed science on how waters are connected to each other and how they impact downstream waters. The Science Report was peer-reviewed by EPA's independent Science Advisory Board and subject to public comment. Science was reviewed by the board, not policy.

The final Science Report provides several key conclusions in support of the Rule. Additionally, the Science Advisory Board indicated that available science provided an adequate basis for key components of the Rule.

The Rule recognizes three categories of jurisdiction: waters jurisdictional in all instances, but limited by definitions that address issues such as connectivity and significance of nexus; a narrow category of waters that will continue to be subject to case-specific significant nexus analysis of SWANCC and Rapanos; and an expanded list of waters that are excluded from jurisdiction. The Rule also establishes transparency and how the agencies will make significant nexus determinations, rather than leaving that to the discretion of an agency employee.

Because of the Clean Water Rule's greater clarity and specificity compared to the rule it replaced, no longer would many waters need a time-consuming individual analysis to

determine whether there was a significant nexus to a downstream jurisdictional water. The Rule carries forward the jurisdictional exclusions and adds several new ones. People would, for the first time, be able to read the Rule and better know that a water body or feature was not subject to the Act without the need for an expert or individual analysis.

For greater detail on inclusions and exclusions, I attached the Rule to my testimony.

The Clean Water Rule is a carefully considered rule that was developed with unprecedented public engagement and comment. It was available for public comment for over 200 days, and during that period EPA held over 400 public meetings and calls. I personally attended about 70 of those in my prior capacity.

The Rule applies the law as written by Congress and interpreted by the Supreme Court. It relies upon the best available peer-reviewed science and it is a product of over 40 years of technical expertise of the U.S. EPA and the Army, working with the Corps of Engineers on the Clean Water Act.

Unfortunately, the Rule's benefits of clarity, predictability, and consistency have been put on hold by the Sixth Circuit, but that will ultimately be resolved. While I personally am very aware of the controversy surrounding the scope of the Clean Water Act, I also believe that it is a disservice to the public that the current Administration has

indicated that it will undertake a new rulemaking to repeal and replace. That effort is guaranteed to continue the post-Rapanos confusion for many, many years to come.

The work of the Clean Water Act is far from finished. State-generated water quality reports indicate hundreds of impaired waters in need of reduced pollution and increased protection. Narrowing the scope of the Act does not advance these joint federal and State efforts.

In my 30-plus years in water law, I have never heard that the water in our rivers, lakes, streams, and ponds is too clean; that there are too many healthy fish to catch and eat; that our drinking water is too clean and abundant; or that we need more beach closures due to pollution.

The Clean Water Rule advances the cause of restoring and maintaining the integrity of our Nation's waters. Thank you again, and I am pleased to answer any questions you may have.

[The prepared statement of Mr. Kopocis follows:]

Senator Barrasso. Thank you, Mr. Kopocis, for being with us today and sharing your testimony.

I would like to now turn to Collin O'Mara, who is the President as well as the Chief Executive Officer of the National Wildlife Federation from Reston, Virginia.

Thank you very much for joining us. We look forward to your testimony.

STATEMENT OF COLLIN O'MARA, PRESIDENT & CHIEF EXECUTIVE OFFICER,  
NATIONAL WILDLIFE FEDERATION

Mr. O'Mara. Thank you. Mr. Chairman, Senator Carper, members of the Committee, on behalf of our six million members of the National Wildlife Federation, our more than 50 State and territorial affiliates, our millions of hunters and anglers, thank you for holding this hearing and talking about ways we can improve water quality. We are committed to finding bipartisan, collaborative solutions to making sure that we avert the wildlife crisis that we are facing so we can all enjoy the great outdoors.

I think we would all agree that clean water is absolutely essential for public health. It is essential for wildlife; it is essential for local economies. And as I have traveled to all 50 States across this Country, Americans of all backgrounds, of every zip code all agree that they are united on the need for safe drinking water and healthy rivers. We have seen, unfortunately, in the past few years what happens when we don't take care of our water supplies. We saw this in Flint, Michigan and Toledo, Ohio. We saw this in Eden, North Carolina and Charleston, West Virginia. We saw this in the Animus and in the Yellowstone River. And where I live in Delaware, more than 90 percent of our waterways have excess nutrients and legacy pollution.

One of the best ways to clean up America's waterways is to reduce pollution at its source. I think we knew this in 1972, when Ed Muskie was in this very Committee thinking about how to clean up America's waterways, and the National Wildlife Federation was proud to stand along at the Anacostia River, at the boathouse, as the Earth Conservation Corps, our D.C. affiliate, when the Clean Water Rule was finalized.

Today I would like to cover four points about the Clean Water Rule: the underlying science of connectivity, the case law, the economic benefits, and the importance to wildlife and sportsmen.

First, the science of connectivity. There is broad scientific agreement, as I think you have heard from this panel, that keeping America's rivers healthy starts upstream. Just like the tree that depends on its roots, the healthy river is tied to the health of the streams that feed into it. Aquatic systems are interrelated and interconnected, as Senator Howard Baker once said. This makes common sense. As this Chairman said, we learn this at an early age, about the water system and that the pollution enters into small tributaries and makes its way into the main stems. Pollution that is added to the Schuylkill River in Pennsylvania affects my Delaware River downstream. Nebraskans that depend on the Platte can't ensure the health of the Platte unless they reduce the pollution coming

from Colorado through the Southern Platte tributary.

As Wendell Berry once said, we should adopt the water golden rule, if you will: do unto those downstream as you would have those upstream do unto you. Cleaning up America's waterways has to start with headwaters and tributaries.

Now, the Science Advisory Board overwhelmingly confirmed this fact, and I think you have heard this. Although there are disagreements about the gradients, there is broad consensus that the definition of navigable waterways needs to extend into these headwaters.

That brings me to the law. EPA and the Army Corps developed the Clean Water Act because the Supreme Court directed them to do so. From both Chief Justice Roberts and Justice Breyer, they clearly called for the agencies to act in the Rapanos decision and in subsequent decisions, and there is agreement that the jurisdiction extends beyond just navigable waterways into these tributaries.

The approach that is most widely accepted by the U.S. Court of Appeals is Justice Kennedy's significant nexus test. This requires showing the ecological linkages between smaller and more remote water bodies and the navigable waterways. The Clean Water Rule closely tracks Kennedy's test, grounding its definitions of which waters are included in its science-based finding to show the connectivity between tributaries to

traditional navigable and interstate waters, wetlands and lakes and other water bodies that are adjacent to these tributaries that provide critical filtration.

Also the Rule is very clear, both the Corps and the EPA were very clear about which waters are excluded and which activities are not under the jurisdiction of the Act. This clarification is incredibly important; it is actually essential to providing regulatory certainty. As the former Secretary of Natural Resources for the first State of Delaware, I can attest to the uncertainty on the ground and how the uncertainty leads to confusion because of the court decisions and the previous regulations that are just completely confounding to the average landowner.

Businesses and landowners need predictability. They need a way to make decisions, and having these ambiguous decisions that they are trying to hire experts to hope that the recommendations are given will hold up in court is creating a lot of paralysis on the landscape. This Rule clarifies which waterways are covered and strengthens those exemptions in a way that is much more narrow than the scope of the included waterways prior to 2001.

That brings me to my third point, which is economics. In addition to increasing predictability, the Rule supports America's \$800 billion outdoor economy and the millions of jobs

that depend on the health of American waterways. These jobs, retail outfitters, fishing and river guides, bate shops, hotels, restaurants, they are important in rural communities like where I grew up in upstate New York. Many of these communities are struggling with high unemployment and they depend upon healthy waters for boating, fishing, hunting, and wildlife watching. Fishing alone supports \$200 billion in economic activity and 1.5 million jobs, and that requires clean water.

Finally, for wildlife and sportsmen, clean water is exceptionally important. More than 50 million Americans, including many on this Committee, hunt and fish. It should come as no surprise that duck hunters and anglers care deeply about water quality. More than 8 in 10 hunters and anglers across this Country support federal protections for smaller streams and wetlands. Further, restoring wetland and waterway health is an important way that we can proactively solve America's growing wildlife crisis and recovering aquatic species that are at risk of potential extinction, things like amphibians, bivalves, mussels, and oysters, and a range of freshwater fish.

So, in conclusion, in our lifetime we have the potential to fulfill the promise of the Clean Water Act, when 45 years ago this Committee said that they were going to make sure that America's waters were fishable, swimmable, and drinkable. It will take a combination of common sense protections, as well as

collaborative conservation efforts like the Chairman mentioned. We need things like good conservation programs in the Farm Bill, the State Revolving Funds, efforts like the Great Lakes Restoration Initiative, efforts like the Chesapeake Bay Program, the Delaware Bay Conservation Act.

There are a lot of things that we need to do to make sure we are enhancing collaborative conservation. But we also need common sense protections. The Clean Water Rule is an important part of this effort and it is a product of years of transparent scientific and public deliberations, and it protects the drinking water for more than 117 million Americans.

Thank you for the time. We encourage you to support the Rule.

[The prepared statement of Mr. O'Mara follows:]

Senator Barrasso. Thank you very much for your testimony.

I thank each and every one of you for being here today.

We are going to ask the members now to join in the questioning, and I will start with you, Dr. Josselyn, if I may.

We have gotten to the point where the WOTUS Rule is a punchline. As you can see, cartoonists are joking about navigable water on Mars. It says Nassau discovers evidence of flowing water on Mars, federally protected wetland, EPA, Clean Water Act advisory. And here we have this as a punchline because Mars has erosion features. So do a lot of other places. So water creates erosion when it runs downhill.

The second picture is of a highway project in Indiana where the WOTUS sign, an Indiana highway project, it says: Notice Waters of U.S. It is an actual sign in Indiana. The contractor put up the sign because they were concerned that the EPA and the Corps would consider this hillside a water of the United States because the WOTUS Rule could regulate the hill as a tributary, as there are real streams somewhere maybe nearby. What you can see is the issue related to adjacent water.

So my question is does the EPA Science Report support the conclusion that these kinds of erosion features, both on Mars and here in Indiana, have a significant nexus to navigable water?

Mr. Josselyn. Thank you, Senator. I look at that figure

and I have to say that I have seen that similar situation in other areas of the U.S. where the EPA and the Corps have taken jurisdiction over what look like very ephemeral features.

Obviously, the presence of an ordinary high water mark is the only indicator that they use there. And as I testified, the science doesn't support that type of feature as having a significant nexus, and it goes back to the chart which I showed earlier, is that the probability of a significant nexus when coming to features that have very infrequent flows, low magnitudes of flows indicates that the probability downstream of an effect is very minimal. So this was something that was found by the Science Panel in their review.

Senator Barrasso. Thank you so much.

General Peabody, is it true that the Corps of Engineers was really cut out of the process of drafting the final WOTUS Rule and that you asked that the Corps' name be taken off of the technical support document and the economic analysis that were supposed to be used to justify the Rule?

General Peabody. Sir, I believe I characterized it in my written testimony that the Corps was marginalized, but the time period is important because when I arrived at the headquarters in late 2013, the process was already underway. The Rule had just been proposed and the proposed Rule was promulgated in April of 2014. Throughout that period, based on the advice I

got from Corps professionals, the Corps was involved. We certainly didn't always agree on everything, but I think that is normal. People have reasonable disagreements based on their perspectives.

My characterization of the Corps' involvement starting in approximately November of 2014 is that our involvement was limited, distinctly limited, I would say. And it was unclear to us whether the efforts we made to have our concerns understood were in fact understood. We clearly had opportunities to comment on various aspects of the Rule. We sought a couple of opportunities to talk to Secretary Darcy about the Rule, and she heard us out, but our concerns went largely unaddressed.

Senator Barrasso. Because in many places the Preamble, the technical support document says that the Rule is based on agencies' experience and expertise. So it is my understanding that the Corps, not the EPA, performs the vast majority of the determinations of which waters are federal. So if the Corps is kind of cut out or marginalized from the process, is it fair for me to conclude that the statements that the Rule is based on the agency's experience and expertise aren't accurate?

General Peabody. The Corps did not believe at that time, and I want to continue to emphasize I do not speak for the Corps today. I only speak for the Corps to the extent that I understood it at that time. We did not believe that our

judgment and experience was adequately incorporated into the Rule to reflect the experience you reference. And, yes, it is also true that we had no role, the Corps had no role in analyzing the technical support document or doing the analysis, I should say, for the technical support document or the economic analysis.

Senator Barrasso. So, Mr. Tseytlin, you have heard what General Peabody said; you heard what Dr. Josselyn has said. Can the WOTUS Rule definition, from your role as Solicitor General involved in the suits, can the WOTUS Rule definition of adjacent water actually hold up in court, then?

Mr. Tseytlin. No, I do not believe it can. And I think the clearest way to describe why it cannot is that in the Rapanos decision Justice Kennedy specifically said that one of the things the Court tried to do there was it tried to base federal jurisdiction on adjacency to tributaries. And Justice Kennedy specifically said, whatever else you think, you can't base it on adjacency to tributaries.

Remarkably, in the WOTUS Rule, EPA once again attempted to base adjacency to tributaries for federal jurisdiction. There are many other problems with the adjacency definition, the five football field thing that we talked about before, but that is just the most obvious one, that Justice Kennedy clearly said you couldn't do this and then EPA went ahead and did it.

Senator Barrasso. The 1,500 feet that they used, the arbitrary number that has been grasped.

Mr. Tseytlin. Absolutely. That is exactly right.

Senator Barrasso. Thanks.

Senator Carper.

Senator Carper. My understanding, in 1972, in this room they were debating the Clean Water Act. I was over in Southeast Asia, not following very closely what was going on, but I had a chance to read up on it a little bit since then, and my understanding of the intent of the Congress and then-President Nixon was to clean up water. And they are pretty expansive in their scope of doing so.

We have ended up, over the years, my time as governor of Delaware -- I want to especially welcome Collin today and thank him for his service to our State and the good work that he is doing today. But what I heard from folks in Delaware was farmers, we have quite a few farmers in the little State, a lot of developers, and what I heard pretty consistently was it was hard for them to know what they could do or could not do, and they just wanted some certainty, some predictability, some clarity.

And it is not just a few people, a few developers, a few farmers that were saying this, this was like the message from all over the Country. And when you look at what the Supreme

Court did, what was the decision, one to four, a plurality?

There is not a whole lot of guidance there. And when I listen to this testimony and try to read my briefing notes, this is not an easy thing to understand, so I can understand why the Supreme Court might have wrestled with the issue of clarity too.

I want to ask Mr. Kopocis what was your role in all of this as this Rule was being developed? Just very briefly what was your role?

Mr. Kopocis. Well, initially when I went over to EPA, I was serving as a senior advisor as the President's nominee to be the AA for the Office of Water. When the Rule was finalized, I was the Deputy Assistant Administrator for the Office of Water, effectively running the Office of Water.

Senator Carper. All right. Now, I might be mistaken, but I was under the impression that the EPA did a pretty good job in terms of listening. They asked folks who had views on this, give us your opinion. And my recollection is about a million people, businesses, farmers, did just that.

I understand that there were hundreds of meetings in the States across the Country, maybe as many as 400. I was under the impression that this was a partnership between EPA and the Army Corps of Engineers, and General Peabody's comments today are troubling to me. I was under the impression that the Army Corps had actually felt that the Rule was not rigorous enough

based on the Army Corps' analysis of science. That might be wrong.

Could you give us some clarity on that point?

Mr. Kopocis. Thank you. Yes, we did have countless discussions with all the interested groups, as I said in my testimony. In particular, with the States, we had special meetings with the States during the pendency of the consideration of the Rule. We met with ECOS, the environmental commissioners, Aqua, the people that actually run the water programs, and also the State wetlands managers. We convened special panels of their representatives so that they could participate in our conversations, and we also formed a special subcommittee of the local government advisory committee to go around the Country and listen to governmental concerns on the Rule.

We did coordinate extensively with our colleagues of the Department of the Army and the Corps of Engineers. Ultimately, when it became time to decide what was going to be in the Rule, Administrator McCarthy coordinated with Assistant Secretary Darcy as to what would be in the Rule. The concerns that General Peabody has talked about that were raised in the memos we were made aware of very late in the process. Those were internal items to the Department of the Army and the Corps of Engineers. Those documents were never brought to our attention

in a time where something could have been changed.

But we looked to the head of the Corps, the Assistant Secretary of the Army, I should say the political person responsible for policy, to see whether the path that the agencies were following was one that they agreed with or not. And as I believe Jo-Ellen Darcy, Assistant Secretary Darcy testified at this Committee that she agreed with the final recommendations and the final text of what was in the Rule.

Obviously, there were differences of opinion within the Corps. There were differences of opinion at EPA as well. As you said in your opening remarks, nobody has characterized it as a perfect rule, and different people, depending on whether they could write it by themselves, would have written it differently.

Senator Carper. All right. I hope we have a chance for another round. My time has just about expired. Thank you all.

Collin, I hope I have a chance to ask a question of you.  
Thank you.

Senator Barrasso. Thank you, Senator Carper.

Senator Inhofe.

Senator Inhofe. Thank you, Mr. Chairman.

First, I have a document here from the American Road and Transportation Builders. This Committee is very familiar with them as we passed our FAST Act and all of our highway bills, and I ask that their comments on this, Mr. Chairman, may be made a

part of the record.

Senator Barrasso. Without objection.

[The referenced information follows:]

Senator Inhofe. I have to say this about the whole WOTUS thing. I go back to Oklahoma when it was first proposed. The head of the Farm Bureau of the State of Oklahoma, Tom Buchanan, said of all the problems that farmers and ranchers are facing in America right now, it really has nothing to do with anything that is in the Ag bill; it is overregulation of the EPA. And they single out the WOTUS Rule as being the greatest concern. We are talking about this is nationwide. This is how significant people feel about this.

I remember also, General, back when we were putting this thing together, I was chairman of the Committee in 2009 when they established this database called DARTER, which keeps track of the permits and it provides the EPA with the ability to constantly look over the Corps' shoulders. I said at the time that it seems to me that the EPA employees are not trained to do jurisdictional determinations, so it doesn't make sense for them to be second-guessing the decisions the Corps has made.

Now, isn't this a duplication of effort, in your opinion?

General Peabody. Senator, I believe the DARTER database is for enforcement actions. It is an EPA database, and I would defer to Mr. Kopocis to talk about that in more detail. However, the Corps database that tracks permitting actions and jurisdictional determinations is called ORM2.

Senator Inhofe. But my question is are they really --

well, I would ask you, Mr. --

General Peabody. So I believe they are two different databases for two different purposes. That is my understanding.

Senator Inhofe. Okay.

Any comments, Mr. Josselyn?

General Peabody. I am sorry, sir?

Senator Inhofe. Okay, never mind.

We are interested in removing barriers to building infrastructure. Do you have any recommendations, General, for us how to streamline the 404 permitting process?

General Peabody. Sir, the first thing I would say is that the process is much more streamlined than most people give it credit for thanks to the general permit. There are several general permit provisions that enable that. As I indicated, about 80 percent of all actions are permitted within 60 days from finalizing a policy-compliant application.

The trouble gets into because the volume is so high, there were approximately 79,000 actions in 2016, that it doesn't take a small percentage to result in a large number of actions that are not processed efficiently.

One of the things I think that could be done is that our partner agencies have time limits associated with their input into these actions. The Corps must coordinate with them to ensure that their responsibility, statutory responsibilities are

addressed adequately. And sometimes on-the-ground, figuring out the science to address endangered species and the like takes a lot of time.

I would recommend putting a limit on a period of time for an individual permit action, some number of years, short number of years, two, three, or four, and then elevating those for processing above the level of the --

Senator Inhofe. From every five years to maybe every 10 years?

General Peabody. Sir, the time period I would defer to the Corps and the EPA to make recommendations, and other natural resource agencies to make recommendations. But there are actions that have gone on for over 10 years.

Senator Inhofe. Yes, I know.

General Peabody. To me, that is unconscionable.

Senator Inhofe. There is one out in California.

Mr. Tseytlin, there is a lot of confusion around the staying of the courts on this Rule, and after hearing from the testimony about the lack of technical and scientific jurisdiction for the Rule, do you think that -- well, when the stay came on, it didn't talk about the merits of the Rule. How do you think that would hold up in court?

Mr. Tseytlin. A necessary prerequisite for the issuance of a stay is a finding of likelihood of success on the merits. The

Sixth Circuit has already found that the States are likely to succeed on the merits, proving that the WOTUS Rule is illegal under both the Clean Water Act and the EPA. And I think a final judgment on that would have been finalized if the Rule had --

Senator Inhofe. That is very clear. Thank you very much.

Let me just say, Mr. O'Mara, that a comment that was made by the Chairman during his line of questioning, and I have a great deal of respect for your organization, but it was to have more of the landowners' participation in these decisions than you normally get out of a bureaucracy. He called to your attention the Fish and Wildlife Partnership Program that has been tremendously successful, and I assume that you agree with that, with that concept and what has made that successful.

Mr. O'Mara. Absolutely. We have enjoyed working with you and your team trying to promote those kinds of collaborative vehicles. I think the one thing that we see is that if there is a way to reduce pollution at the source, again, not regulating activities that aren't affected by it, and then combining that with some of the collaborative efforts, we could actually achieve the water quality goals. But collaboration is always best.

Senator Inhofe. Thank you very much.

Senator Barrasso. Senator Duckworth.

Senator Duckworth. Thank you, Mr. Chairman. I also thank

the Ranking Member for convening this very important conversation.

My constituents in Illinois are concerned about how WOTUS or the Clean Water Rule will affect public health and the economy. It is our responsibility and duty as public servants to ensure that these objectives are balanced and that one does not outweigh or thrive at the expense of the other.

And I am really glad, General Peabody, that you mentioned the role of the Corps, especially in dealing with endangered species as well. It is why I also urge the Trump Administration to make strong science and robust public engagement as the foundation of WOTUS as we move forward.

WOTUS is about water quality, and we will have a water quality crisis in Illinois if the Great Lakes Restoration Initiative is not prioritized. Today's discussion is fundamentally about water quality. WOTUS does play a factor with the GLRI. In my State and all across the Midwest, the Great Lakes Restoration Initiative is the program that protects and safeguards the quality of the largest system of fresh surface water in the world, and WOTUS feeds into that.

Mr. O'Mara, the Trump Administration's skinny budget includes a proposal to completely eliminate the Great Lakes Restoration Initiative. In your view, how would eliminating this Initiative challenge our ability to protect drinking water

across the Great Lakes region?

Mr. O'Mara. One of the most successful water quality programs in American history has been the Great Lakes Restoration Initiative, and I think the Chairman summed it up perfectly in his comments at the beginning, that we want to foster collaborative activity on the ground. If you cut that program, the \$400 million that has gone to collaborative partnerships on the ground making good habitat projects, water quality projects, trying to reduce invasives, you will see a deterioration of water quality quickly for the most important freshwater supply in our entire Country.

And it is not just that. The proposal to remove the headquarters of Region 5 out of Chicago, the idea that the place where we just had the Flint water crisis, the place where we had the sheen on the Chicago River, the place where we just had the challenges in Flint. To not have an important center and the resources to take care of the Great Lakes would be devastating for the Country's resources.

Senator Duckworth. Definitely. Can you speak a little bit to the economic impact of the Great Lakes Restoration Initiative? I mean, we talk about just the quality of the water, but we are talking about a region in this Country that spans all across the Midwest, goes all the way up into New York, and really was the place where so much of our economic growth

happened in the last century. Let's talk about the economic impacts of the Great Lakes Restoration Initiative.

Mr. O'Mara. Sure. The return on investment of the Great Lakes Restoration Initiative is one of the highest of any government investment you can make. You are talking about a 5:1, 10:1 kind of return when you look at the millions of people that are employed because of the freshwater in the Great Lakes, because of the number of companies that locate in the region because of access to that, the tourism industry that comes from it.

The thing that excites me about the Great Lakes, as much as any place in the Country, is that you have a bipartisan consensus for action, and the fact that when proposals are made to reduce funding, Republicans and Democrats come together because it is a value. It is not a partisan football. But the economic impact is as big as any region in the Country, in the billions, hundreds of billions of dollars of benefit.

Senator Duckworth. Thank you. You mentioned the proposed closing of EPA Region 5 office, which is the office that oversees the entire Midwest region. My constituents across the region are deeply concerned, not just those in Illinois, but those across the Midwest, about this potential closing of this office and how it would undermine EPA's ability to do its job. I believe that more than our policy, our people are the backbone

of the environmental and public health protections; scientists like Miguel Del Toral, the EPA Region 5 scientist who raised the red flag on the Flint water crisis, all of the teams that come out that are the rapid response teams.

We are about to get into tornado season in the Midwest. Actually, we are in it already. And with tornado season comes the effects of disaster, follow-up with disasters. The EPA actually has people who come out as part of a disaster response team that responds when anything like this happens. And to not have an office in Chicago would literally add days of travel to any team that must come in from outside the Midwest region.

Mr. Kopocis, in your view as a former Acting Assistant Administrator for EPA, how can we reasonably expect EPA to deliver on its mission of protecting public health if regional offices like Region 5 are eliminated or consolidated?

Mr. Kopocis. EPA's regional offices are a key component of accomplishing the mission of the Agency. They are the front line that deal with State and local issues. The examples that you have raised throughout the Midwest are key. The Chicago office, in particular, played a key role in making sure that the Great Lakes Initiative was carried out in the most effective and responsible way. They were also on the front line in dealing with State issues as they come up. Most States don't initially contact the EPA headquarters office; they contact their regional

office, so that role is invaluable.

Senator Duckworth. Thank you. I am running out of time.

Mr. Chairman, I would like to submit a letter for the record on behalf of the Healing Waters Coalition, which works on the Great Lakes issues.

Senator Barrasso. Without objection.

[The referenced information follows:]

Senator Duckworth. Thank you, Mr. Chairman. I yield back.

Senator Barrasso. Thank you very much for your questions.

Senator Rounds.

Senator Rounds. Thank you, Mr. Chairman.

In my State and others in the Prairie Pothole Region, farmers plant in prairie potholes in dry years and plow around them in wet years; keeps the land in production. But under the WOTUS Rule, those voluntary efforts would be swept aside by regulation.

Dr. Josselyn, in your testimony you state that the threshold for establishing a significant nexus under the WOTUS Rule is very low. Under the Rule, could any prairie pothole be regulated?

Mr. Josselyn. Yes, sir. The Rule does take prairie potholes as a group and says that those areas, not just a single area, but all of those prairie potholes, similarly situated is the term that they use, and that can combine into then making a test that is positive for significant nexus.

Senator Rounds. Is that result consistent with the recommendation of the panel of scientists who reviewed the Rule?

Mr. Josselyn. No, on that particular element, where wetlands of a particular characteristic are all combined, was not reviewed by the Panel.

Senator Rounds. General Peabody, the Corps has not

regulated any geographically isolated wetlands since the 2001 Supreme Court decision in SWANCC. Isn't it true that Corps counsel raised concerns about how the WOTUS Rule treats isolated waters? In fact, didn't the Corps counsel say that "this assertion of CWA jurisdiction over millions of acres of isolated waters undermines the legal and scientific credibility of the Rule"?

General Peabody. Yes, sir.

Senator Rounds. Just curious, as chairman of the subcommittee on regulatory oversight, we had extensive hearings on making certain that the EPA is using the best science available in the regulatory process and would take into consideration public comments, especially those from scientists and State and local officials.

Gentlemen, do you believe the Agency adequately took scientific opinion into consideration and relied on sound science when crafting this Rule? Do you believe the Agency properly incorporated public, agency, and other scientific comments into its review?

Dr. Josselyn?

Mr. Josselyn. Senator, the Science Panel was really focus on establishing whether systems are connected, but when it came to the Rule itself, they looked at arbitrary distances and they set those up, and those were not issues that the Panel in fact

strongly argued against. So I believe that the WOTUS Rule as finally published was not something that the Panel could have supported at that point.

Senator Rounds. General Peabody, did that come into the discussion with regard to the Corps of Engineers and their analysis?

General Peabody. Yes, sir, it did. One of our greatest concerns was that notwithstanding incredible effort led by EPA to amass all this science, do this report, bring in all of these peer review experts and put them to the Science Advisory Board review, some of the final judgments in the Corps opinion at that time did not reflect what the science said. So, for example, in my personal view, the most stark example of this was the 4,000-foot jurisdictional limit that was proposed. I definitely understood the desire to provide clarity; I think that is a laudable goal. The challenge is that under the significant nexus standard, which legal counsel told me and I understood to be the common view of the administration to be the overriding legal standard that would apply, that you cannot have such a clear distinction, a fixed distance that is not supported in the underlying science. So that was of great concern to us that was making the Rule legally vulnerable.

Senator Rounds. Thank you.

I want to change subjects just a little bit.

Mr. O'Mara, I am just curious, are you familiar with the Conservation Reserve Program?

Mr. O'Mara. Absolutely.

Senator Rounds. I think one of the finest conservation products this Country has ever had. Set-aside land, many of it some of the least productive farm land, the most at risk with drought or flood, and basically you put it back into grassland and you set it there for a period of up to 10 years. Farm bill coming up. Would you give me your thoughts about the value with regard to water resources and what it does for water if the Conservation Reserve Program and whether or not it is an effective way to actually help in a cooperative effort to make for clean water and basically a good sound conservation practice?

Mr. O'Mara. Thank you, Senator. As someone who pheasant hunts in your great State, I appreciate it greatly. The water benefits are huge. If you are able to protect lands through those types of programs and not have additional nutrients coming onto the landscape, it is a great way to prevent pollution in a very collaborative way. One of the challenges is that in the last few farm bills we have seen those programs cut, and the amount of dollars going to the Dakotas has gone down precipitously. So I would much rather have folks getting a little bit of incentive to have their land growing ducks and

pheasants, as opposed to being marginal and kind of hard to make commodity prices. So we would love to work with your office to make that a lot bigger in the next farm bill.

Senator Rounds. Thank you.

Thank you, Mr. Chairman.

Senator Barrasso. Thank you, Senator Rounds.

Senator Whitehouse.

Senator Whitehouse. Thank you, Chairman.

Professor Kopocis, if you look at the Supreme Court decisions on point, the three major ones are Riverside Bayview, the Northern Cook County decision, and Rapanos. Across all of those three decisions has any Supreme Court Justice ever held that actual navigability is the proper standard under the Clean Water Act?

Mr. Kopocis. No, sir.

Senator Whitehouse. Not one.

Mr. Kopocis. Not one.

Senator Whitehouse. So if an administrative agency were to try to follow that standard and then there was a challenge in court, how would it predictably turn out?

Mr. Kopocis. Well, I assume it would not be upheld because it would be contrary to the views of the three times the Supreme Court has spoken.

Senator Whitehouse. We can agree that the Rapanos decision

left much to be desired in terms of clarity. It was a plurality situation with no majority decision, and you have to decipher the different parts to pull the meaning out of it. But it is my understanding that every single circuit court that has looked at this has decided that the Kennedy rule, the significant nexus rule, is the operative rule to extract from the Rapanos decision. Is that your view of the law as well?

Mr. Kopocis. Every circuit court that has opined has said that the Agency's use of the Kennedy test was appropriate.

Senator Whitehouse. Okay. So significant nexus is obviously something different than actual navigability. If we are to hypothesize a seasonal stream, and you know every year in the rainy season it is going to run down into the navigable water, is it not necessary and logical and shouldn't the people who live and recreate in the navigable water be able to count on the Federal Government saying, no, you can't dump pollutants in the dry season into that streambed, when we all know perfectly well that when the rains come it is all going to be washed down into the navigable waters?

Mr. Kopocis. Yes. It is simply physically impossible and technically impossible to protect the water quality of the navigable waters without protecting at least some of the tributaries that feed into it.

Senator Whitehouse. And from a practical point of view,

Mr. O'Mara, that is what the hunters and the fishers and the people who live by and swim and boat in our lakes and other freshwater resources expect, is it not?

Mr. O'Mara. Absolutely. Because if you look at the millions of jobs and the billions of dollars of economic activity, if there is no water quality, there is no fish. If there is not healthy wetlands, there is no ducks. I mean, it comes down to the basics.

Senator Whitehouse. And if the Federal Government sat by and let polluters dump pollutants into a streambed when everybody would know perfectly well that when the rains came that would go down into the navigable and recreational waters and ruin the public's enjoyment of that, how would your millions of members feel about how responsible the Federal Government had been in letting that happen?

Mr. O'Mara. We have done polling on it among sportsmen and women across the Country, and more than 80 percent of sportsmen and women support protecting those streams for that reason, because they don't want to have the places they love and the places they depend on economically being destroyed by the pollution.

Senator Whitehouse. Foreseeing rain is not too challenging a project to expect the Federal Government to be able to achieve, correct?

Mr. O'Mara. And more of it to come.

Senator Whitehouse. Yes, more of it to come.

Now, we also have something in common from your previous life. You are a Delawarean, if that is the right word, and I am a Rhode Islander. Both of our States are coastal States and both of our States are downstream States. If the EPA is not actively defending upstream conditions outside of our States, who looks out for us in our small downstream States?

Mr. O'Mara. The challenge we have, as Senator Carper often says, we are kind of the tailpipe on the air emission side and kind of the sewer on the water side. I mean, the State of Delaware could eliminate every single source of pollution in its States that is winding up in its waterways and still not have a healthy estuary for the Delaware or for its part of the Chesapeake. So unless you are having like regional compacts and basically voluntary agreements with adjacent States, there is no way to make sure that we actually have healthy waterways.

Senator Whitehouse. So, Professor Kopocis, back to lawyering again. In my hypothesis that a foreseeable rain is going to wash a known pollutant into navigable waters, do you think that a WOTUS Rule that failed to protect against that foreseeable event would pass scrutiny under the significant nexus test?

Mr. Kopocis. No, sir, I do not.

Senator Whitehouse. Wouldn't make any sense, would it?

Mr. Kopocis. No, sir. In fact, those kinds of concepts were specifically rejected by Justice Kennedy, saying that they made little sense and were unpersuasive.

Senator Whitehouse. So, to some extent, a lot of the complaining that has been done about the EPA rule here is actually complaining about the significant nexus test, but that is the law, correct?

Mr. Kopocis. Yes, sir, it is.

Senator Whitehouse. Okay. My time is up.

Thank you, Chairman.

Senator Barrasso. Thank you very much, Senator Whitehouse.

Senator Ernst.

Senator Ernst. Thank you, Mr. Chairman, and thank you very much, everyone, for this great discussion today.

I do want to point out we still have the Clean Water Act, and I hope that within that Act we are not allowed to dump pollutants willy-nilly. I think what we are talking about right now is the expanded definition of waters of the U.S., not the original Clean Water Act. So I hope we are protecting our citizens without that expanded definition. I think that is what we are dealing with today.

Mr. Josselyn, as part of the propaganda campaign that the Government Accountability Office found to be illegal, the Obama

EPA tried to get people to believe that unless they regulate ephemeral water, which, by definition, is a stream that flows only briefly during and following a period of rainfall, so essentially rainwater runoff, that the drinking water of 117 million people would be at risk. Mr. Kopocis and Mr. O'Mara repeat this claim in their testimony.

EPA put up a map on their website to support this claim, and this is this chart right here. However, if you read EPA's summary of the analysis, which is, of course, buried on a different web page than this map, you find out that EPA based this claim on a study of streams that are visible at medium resolution, which is what you see behind me. At this scale, you are only going to see major streams.

Does a study of those major streams at that scale have anything to do with ephemeral streams?

Mr. Josselyn. Thank you, Senator. In response to your question, the map scale is about 100,000 scale. You know, when I was a Boy Scout, I used 7.5 minute quadrangle maps, and they have a scale of 24,000. So the scale is quite large, so that is a problem with that.

Also, the database that they used I am very familiar, the NHD database plus. That database really only maps perennial and intermittent streams. In fact, the definition that they use is any stream that flows more than after immediate rainfall.

Ephemeral streams are defined as streams which flow only after rainfall. So the NHD database that they used ignores those kinds of features.

So the study really, although provides useful information, it is not accurate in its conclusion.

Senator Ernst. Yes. Thank you very much.

And, Mr. Tseytlin, as a legal matter, is it correct to say that EPA has to regulate ephemeral streams to protect drinking water?

Mr. Tseytlin. Absolutely not. And also with regard to the drinking water point in particular, of course, federal law outside the Clean Water Act, the Federal Safe Drinking Water Act is the primary federal protection. I believe that the focus on drinking water is part of that GAO found illegal propaganda campaign, which was meant to drum up, illegally again, support for the WOTUS Rule.

Senator Ernst. Yes. Thank you.

And, Mr. Tseytlin, the Obama EPA claimed that farmers did not need to worry about the WOTUS Rule because it exempted "ordinary farming activities from permits." Are you familiar with the Duarte case in California?

Mr. Tseytlin. I am.

Senator Ernst. In that case, the Corps and the Department of Justice claimed that a farmer needed a permit to plow his own

land because the tops, again, right here, the tops of the plowed furrows dry out in the sun and constitute, and no jokes, folks, mini mountain ranges. Mini mountain ranges. So plowing doesn't qualify as an ordinary farming activity. My farmers would beg to differ.

Here is a picture of those mountain ranges from the report written by DOJ's expert witness. I guess under this definition Iowa is one of the most mountainous States in the United States.

What is left of the ordinary farming exemptions if you can't even plow your own soil?

Mr. Tseytlin. You are exactly right, Senator, and that is exactly the danger of expanding the jurisdictional reach of the Clean Water Act, which is what the WOTUS Rule tries to do, which is why the American Farm Bureau and the Wisconsin Farm Bureau and farmers all over the Country oppose very strongly the WOTUS Rule.

Senator Ernst. Yes. And by these definitions, the entire expanded definition, 97 percent of the State of Iowa is regulated by that expanded definition and considered waters of the U.S.

Thank you very much.

Thank you, Mr. Chair.

Senator Fischer. [Presiding.] Thank you, Senator Ernst.

Senator Harris.

Senator Harris. Thank you.

I have three committee meetings all scheduled at the same time this morning.

Mr. Kopocis, thank you for being here. The Clean Water Act is very important to me, and the Act ensures, of course, that there will be environmental justice for all communities. It ensures that all Americans have access to clean and safe drinking water. However, the Clean Water Act has lacked clarity in defining jurisdiction for federal agencies to protect the sources of drinking water.

During your tenure at the EPA, I understand that you also worked closely on the Clean Water Rule. Do you believe that the Clean Water Rule was promulgated to provide clarity to the Clean Water Act?

Mr. Kopocis. The primary purpose of issuing that rule was to provide greater clarity, certainty, and predictability that was lacking in the post-Rapanos world.

Senator Harris. Thank you.

The Obama Administration finalized the Clean Water Rule after extensive analysis of legal statute, after multiple agencies' technical expertise, millions of comments during the public comment period, and the best available peer-reviewed science. This past Saturday Americans from all over the Country marched in support of science and its value in creating sound

policy like the Clean Water Rule.

Could you please explain to me the extent to which the EPA, during your tenure, used science-driven research into the final determination of the Clean Water Rule? And in the event that this Administration decides to reevaluate the Clean Water Rule, what must the EPA do to guaranty that any future version of the Clean Water Rule is held to the same standard?

Mr. Kopocis. The agencies looked at what the Supreme Court has said and recognized that they needed to do a better analysis of the science of how waters were interconnected with each other and the impacts of upstream waters on downstream waters. So the Agency challenged its Office of Research and Development to do an extensive research on the literature as to what existed to inform the Agency. ORD looked at about 1,200 different peer-reviewed documents in coming up with its synthesis of the Science Report.

Unfortunately, science does not address issues such as significant nexus. Science talks about how waters are interrelated to each other. And as Mr. Josselyn said earlier, one of the recommendations of the SAB is that the Agency needed to recognize that waters are connected on a continuum, that there is not a single point that you can place on that continuum if you are looking at it from a purely science background.

However, the agencies use science to inform its policy

decisions. Science was not going to decide the issue necessarily for the agency because the Agency had to operate within the confines of a statute and the guidance from the Supreme Court. So science was the informative information that the Agency used to come up with Rule going forward.

Senator Harris. And do you have any instruction for the EPA, or guidance or good advice, if they should reevaluate the Clean Water Rule?

Mr. Kopocis. Well, my first recommendation would be to don't do it, but they have announced that they are going to.

Senator Harris. They seem intent on doing it.

Mr. Kopocis. But absent that, then I would suggest that they take a look at the science. If there is new and better science, then I would encourage the Agency to look at it. If what the Agency chooses to do instead, as is stated in the Executive Order, is rely on Justice Scalia's plurality opinion, that will greatly narrow the scope of the Clean Water Act over what it is, and that will be a narrowing that is contrary to the science that was developed by us in the prior Administration.

Senator Harris. Thank you.

Could you describe the process of public engagement that was followed in proposing and issuing the Clean Water Rule, and what feedback the EPA received? And could you share with the Committee your understanding of what sort of process the current

Administration has committed to it in its efforts to replace the Rule? Emphasis here on the public process.

Mr. Kopocis. What we did, we had extensive meetings with all interested parties, State and local governments, etcetera, before the Rule was drafted and put out for public comment. During the public comment period, which lasted over 200 days, we met with interested parties again. We had over 400 public meetings or phone calls, teleconferences. I personally, in my capacity, attended about 70 of those. We visited farms; we went out in the field to talk to people. We evaluated about, I believe the final number was close to 1.3 million comments on the Rule. We responded to those comments in a several hundred page long response to comments document that was prepared jointly by us and the Army Corps. And we took all of that information to develop what is the final Rule.

I cannot speak to the plans of the current Administration; however, I have not yet seen signs that there is that same level of public involvement because those meetings have not yet occurred.

Senator Harris. Thank you.

Thank you all.

Senator Fischer. Thank you, Senator Harris.

Dr. Josselyn, today, General Peabody has testified that the Corps staff were concerned that the bright line geographic tests

in the WOTUS Rule could include water that should not be regulated and could exclude water that should be regulated. So I want to focus on whether the WOTUS Rule would actually exclude any water.

You note in your testimony that the EPA found "the vast majority of the Nation's water features were located within 4,000 feet of a covered tributary, traditional navigable water, interstate water, or territorial sea." That finding is supported by the analysis performed by Geosyntec for the American Farm Bureau Federation in a sampling of States. Specifically, Geosyntec analysis shows that 100 percent of the land area of Virginia is located within 4,000 feet of something that meets the WOTUS Rule definition of tributary. The same is true for 99.7 percent of Missouri, 99 percent of Montana, 99 percent of Pennsylvania, as Senator Ernst said, 97 percent of Iowa, 95 percent of Oklahoma, 95 percent of California, and 92 percent of Wisconsin.

You are from California, so I would like to use that as an example. Based on the definition of significant nexus, which we have tossed around here today, but based on that definition in the WOTUS Rule, and assuming that the Geosyntec analysis is correct, would you agree that any water located in 95 percent of the land in California could be regulated under that Rule?

Mr. Josselyn. Yes, Senator. Thank you. We also did an

analysis in the San Francisco Bay area, and we found that all the land in the San Francisco Bay area would be covered under that 4,000-foot standard, except for the core urban areas of San Francisco, Oakland, and San Jose. So it is quite true, and the significant nexus test itself has a very low threshold in terms of what would be required to have a significant nexus, so most of those areas would be regulated.

Senator Cardin. Could I ask my colleague to just yield for one moment? I am not going to be able to ask questions because of time restrictions. I would just ask consent that the American River statement be made part of the record, and I will ask my questions for the record.

Senator Fischer. Without objection.

[The referenced information follows:]

Senator Fischer. What about States that are not included in that analysis? Nebraska wasn't included. Can you conclude that over 90 percent of the State would be regulated under that final WOTUS Rule?

Mr. Josselyn. In fact, in the WOTUS Rule, in the Preamble, they talk about the fact that the 4,000-foot limit was meant to include most all of the wetlands in any State.

Senator Fischer. Mr. Tseytlin, do you believe that the Clean Water Act regulates all water in a State?

Mr. Tseytlin. That is not within the coverage of the Act. The Act applies to navigable waters and, under Justice Kennedy's approach, waters that have a significant nexus to those navigable waters.

Senator Fischer. Dr. Josselyn, in November 2015, four months after the final Rule was published, EPA added a review of 199 jurisdictional determinations to the WOTUS Rule docket, and in this review EPA found that only 2 positive jurisdictional determinations would change to negative, affecting approximately 1 acre of wetlands. EPA used this analysis to show that the Rule would not cut off jurisdiction.

However, the EPA's analysis also shows how the Rule expands federal control over land, and of the 199 jurisdictional determinations EPA evaluated, 57 were negative. In 47 of those 57 negative jurisdictional determinations, the Corps concluded

that federal jurisdiction did not exist because there was no surface connection to navigable water.

So based on the definition of significant nexus under the WOTUS Rule, the new one, do you agree that most of the 47 negative jurisdictional determinations evaluated by the EPA could become positive jurisdictional determinations under the final Rule?

Mr. Josselyn. Senator, I did look at that study and the WOTUS Rule also includes shallow subsurface groundwater connections as a potential, so that could make some of those features that had isolated surface water to be connected.

Secondly, the WOTUS Rule expands the definitions of tributaries, so there could be far more tributaries mapped in proximity to these features and that could also expand the jurisdiction for those areas.

Senator Fischer. Thank you.

Mr. Tseytlin, the Department of Justice used the November 2015 document to defend the Rule in the brief that they filed on January 13th of this year. Would the EPA's post hoc rationalization of their 4,000-foot threshold be credible to a court? What is your opinion on that?

Mr. Tseytlin. It would not be legally permissible to be stated in court under the Supreme Court's Chenery case. A rule can only be upheld on the basis of the record that was before

the Agency wanting to issue the final Rule.

Senator Fischer. Okay. Thank you very much.

Mr. Chairman, I hand you back your gavel. Thank you.

Senator Barrasso. [Presiding.] Thank you, Senator Fischer. Appreciate your line of questioning and taking the chair.

Mr. Tseytlin, Mr. Kopocis just testified that the EPA relied on the Corps' political appointee instead of the Corps' experts. So if the Rule isn't based on agency experts, is it arbitrary and capricious?

Mr. Tseytlin. Well, the arbitrary and capricious nature of Rule reviews the entire record, and as I believe the testimony of some of my fellow colleagues here says, the record does not support the underpinnings of the Rule. But, furthermore, as Professor Kopocis conceded, the science that EPA relied upon cannot be the basis for significant nexus finding because that was not what the Science Report was doing. With regard to the significant nexus finding, that is a legal conclusion. And as the Sixth Circuit preliminarily concluded and as the District of North Dakota preliminarily concluded, the legal basis for the Rule was lacking.

Senator Barrasso. And Mr. Kopocis also testified that Justice Kennedy's opinion controls the definition of waters of the United States. Is the WOTUS Rule consistent, do you

believe, with Justice Kennedy's opinion?

Mr. Tseytlin. It is not consistent. I gave an example earlier, the most obvious example, which is that Justice Kennedy said in no uncertain terms in *Rapanos, Corps*, you can't base federal jurisdiction on adjacency to tributaries. They did the exact same thing here and they doubled-down on it by adding the 100-year floodplain concept, which, to be clear, the connection is based on a connection that happens on a once in a century rainstorm.

Senator Barrasso. Mr. Kopocis, I see you wanting to join in.

Mr. Kopocis. Yes. Yes, if I could. I wanted to draw the distinction, though, on Justice Kennedy's opinion. Justice Kennedy said that in the situation that was presented to him, that the Corps had asserted jurisdiction based solely on the grounds of adjacency to a tributary. He said that that was not the basis on which they should have made their decision; instead, they should have made their decision based on the significant nexus presence or lack of presence, and that he suggested that that was the correct test.

So I do not look at Justice Kennedy's opinion in the same way in saying that he said that you could not look at adjacency to tributaries. What he said was you should not have solely relied on that and you looked at the wrong test.

Senator Barrasso. Mr. Tseytlin, anything else that you would like to add?

Mr. Tseytlin. Right. So this is what Justice Kennedy said. He said, "Drains, ditches, streams remote from entering navigable in fact waters and carrying only minor volumes towards it are not a sufficient basis, especially when it is done on adjacency."

The Rule, on its face, covers drains, ditches, remote streams remote from entering navigable water and carrying only minor volumes. It couldn't be clearer.

Senator Barrasso. General Peabody, your written testimony says the Corps does not believe that the Rule and Preamble, as ultimately finalized, "were viable from a factual, scientific, and legal basis." And then you went on to say it would be incredibly difficult for Corps leaders, regulatory and legal staff, to advance and defend this Rule.

You have also testified that statements and characterizations of the WOTUS Rule as a joint product of EPA and the Corps are flat out wrong. Given these facts, do you agree that the WOTUS Rule should be withdrawn?

General Peabody. Senator, I believe a lot has transpired since I retired almost two years ago. It is now in litigation and I think the facts of the litigation would have to be considered to make that policy judgment. It was my position

that the Corps is responsible for executing policy decisions before they are made. It is also the responsibility of Corps leaders to ensure that the Corps' professional judgment is clearly understood, and that was my primary motivator in writing those memoranda.

Senator Barrasso. Because it is not just the final Rule, to me, that needs to be withdrawn, because on January 13th of this year the Department of Justice filed a brief that makes the same statements about the Corps' involvement in the Rule, and I believe that brief also needs to be withdrawn.

General Peabody. And, sir, to be clear, it was the Corps' opinion, and I believe this is unanimous of all the people I consulted with, that the Rule needed to be changed in order to be scientifically supportable and legally defensible.

Senator Barrasso. The Rule is going to regulate any water that meets the new definition of adjacent water. In a stark departure from current practice, this means that water or wetlands don't need to be connected to any other water to be regulated, just needs to be within a certain distance.

General Peabody, on April of 2015, a memo from the Army Corps counsel to you says, "Federal courts may find that common sense dictates that a water body located 1,500 feet from a stream" -- and I think, Mr. Tseytlin, you referred to this as the five football fields that you have been referring to in your

testimony as well as your answering of questions -- "1,500 feet from a stream is too far away from that stream to be defined as neighboring and, thus, adjacent to that stream." And it went on to say that "non-science based tests based on distances from other water makes the draft final Rule legally vulnerable."

So are you aware of any analysis by anyone that says that any water or wetland located five football fields away from any other regulated water has a significant nexus to that navigable water?

General Peabody. Is this for me, sir?

Senator Barrasso. Yes, sir.

General Peabody. Sir, the only analysis I am aware of, and I would defer to Dr. Josselyn, but in the Connectivity Report I believe it states that there is scientific evidence that 300 feet can establish connectivity for a variety of scientific reasons. That is the only analysis I am aware of that addresses a specified distance.

Senator Barrasso. So 300 feet, but not five times that.

General Peabody. Sir, I wasn't aware at that time, and I am not aware now, of any basis for a 1,500-foot or 4,000-foot or other distance beyond the 300 feet I just discussed.

Senator Barrasso. Thank you.

Senator Carper.

Senator Carper. Thanks so much.

I am going to ask a question of Collin O'Mara. Collin O'Mara did a great job as our Secretary of the Department of Natural Resources and Environmental Control, a role previously filled by the fellow sitting right behind me, Christophe Tolou, so we are sort of getting the band back together here this morning.

One of the things that Collin and Christophe talk a lot about are secrets to being married for a long time. When Collin got married, he sent a handwritten note with a gift to he and his wife last year, I think, and I think I recommended him to keep in mind the three Cs: communicate, compromise, collaborate. The secret to a long marriage. It is also the secret to a vibrant democracy.

And I listened to the testimony here today, and we are talking, but I don't know that we are in a collaborative mood here. I don't feel a sense of compromise. This is kind of like we are talking past each other.

Collin, with that in mind, one of the things we tried to do in Delaware with our friends from other States, things we try to do in Delaware is like embrace the three Cs. We kind of call it the Delaware way and it is part of the secret for our success.

Am I just misreading this or is there something to what I am saying?

Mr. O'Mara. This is incredibly complicated. There is a

reason why the Supreme Court had five different opinions in a single decision. There is a reason why it has taken years to get to this point.

The science, I think, is fairly clear, and I think the clarity that is offered through the Rule does offer a path forward. I am not going to say there aren't enforcement mistakes that are made. I am not going to defend every single action of the agencies. But I do think if we could get to a conversation about the focus of the scope of where the pollutants are coming from and how we can actually have healthy water in this world and then complement that work with investments and things like the State Revolving Funds and collaborative programs where you could actually achieve healthy water. But I think at the end of the day it is going to take good folks being around the table.

I do think that the EPA process was exhaustive. I think they did a very good job going out. It is something that affects a lot of people, though.

Senator Carper. They came to Delaware. We actually had a meeting on a farm and a bunch of farmers around us. We had the leadership of the Delaware Farm Bureau and I thought it was pretty amazing. My guess is it is probably not the only farm they went to among those 400 stakeholders they met with.

Thank you.

Let me ask a question of Mr. Kopocis. I think I may have been out of the room when Senator Ernst asked this question, but I think she may have cited a number of examples of farming activities that she believes cannot be conducted under the Clean Water Rule that we are discussing today. I would just ask is plowing allowed under the Rule?

Mr. Kopocis. Yes. Yes. The statute specifically provides a permit exemption for normal farming practices, including plowing.

Senator Carper. All right, thank you. Is the definition of waters of the U.S. more expansive than it was prior to the 2001 and 2006 court decisions? Is it more expansive or less?

Mr. Kopocis. The new Rule is less expansive than the prior Rule.

Senator Carper. Why do you suppose we hear so much from around the Country that would suggest otherwise?

Mr. Kopocis. Well, Senator, it is difficult to say. I do think that some of that is based on while the prior Rule itself was more expansive in a post-SWANCC and post-Rapanos world, the agencies were perhaps administering it in a more narrow way. The Bush era guidance in the post-Rapanos world allowed for the assertion of jurisdiction over isolated waters, but created an incredibly cumbersome way to do it, and that is why earlier the Committee heard that the agency had not asserted jurisdiction

over those waters. But those waters were still able to be analyzed for jurisdiction; they simply weren't in fact being done.

Senator Carper. All right. A question, if I could, Mr. Kopocis, for you and General Peabody. Would a new rule based on Justice Scalia's opinion be more expansive or more restrictive than the Clean Water Rule?

Mr. Kopocis. Well, a rule based solely on Justice Scalia's opinion would be considerably narrower than the Clean Water Rule, and in our many conversations with the Department of Army and the Corps, what we heard repeatedly was a concern that in fact the limitations that were being written into the Clean Water Rule made the Rule too restrictive. So it seems to me that a rule written solely on the Scalia opinion would be even more restrictive than what is currently out.

Senator Carper. Okay.

General Peabody, would you take a shot at the same question? I will just restate the question. Would a new rule based on Justice Scalia's opinion be more expansive or more restrictive than the Clean Water Rule?

General Peabody. Senator, I believe that the Corps would need to analyze that based on all the jurisdictional determinations that it has made; however, I do think that it is probably fair to draw that supposition. But I would want to see

the evidence before I was sure of that one way or the other.

Senator Carper. All right.

General Peabody. And I don't have any evidence one way or the other.

Senator Carper. Okay.

My time has expired again. I have some questions I am going to submit for the record, and would appreciate the time to respond. Did you want to say something, Ken?

Mr. Kopocis. Well, I just wanted to make sure that the Committee understood that EPA and the Army and Corps worked very closely together. Obviously, there were some differences of opinion as the Rule was coming to an end. We still, on behalf of my time at EPA, we still worked very hard to try to maintain a collaborative effort. But I don't want the Committee to go away without remembering that since 1979, when Attorney General Civiletti issued his opinion, that the final, the final responsibility for determining what is a water of the United States, the jurisdiction of the Clean Water Act, belongs to EPA.

Senator Carper. All right, thanks.

General Peabody. Senator, if I could add to that. I also want to clarify that Mr. Kopocis and I worked many issues during the time that we served in government, and we didn't always agree, but we always worked hard to try to find solutions to those issues. And the limited nature of the engagement of the

Corps in this particular instance was atypical of my experience working in government.

Senator Carper. Well, I appreciate that clarification.

Thank you so much.

Senator Barrasso. Well, I want to thank all the witnesses for being here today. If there are no more questions, members are also allowed, as Senator Carper just mentioned, will be submitting follow-up questions for the record. The hearing record will be open for two weeks.

I want to thank all of you for being here.

The hearing is adjourned.

[Whereupon, at 12:05 p.m. the committee was adjourned.]