

HEARING ON OVERSIGHT OF THE ARMY CORPS OF ENGINEERS'
PARTICIPATION IN THE DEVELOPMENT OF THE NEW REGULATORY
DEFINITION OF "WATERS OF THE UNITED STATES"

Wednesday, September 30, 2015

United States Senate

Committee on Environment and Public Works

Subcommittee on Fisheries, Water, and Wildlife

Washington, D.C.

The subcommittee met, pursuant to notice, at 10:32 a.m. in room 406, Dirksen Senate Office Building, the Honorable Dan Sullivan [chairman of the subcommittee] presiding.

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

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

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

And just for the record, it is, according to my clock, 10:32. So we have been trying to gather up all the members here, but we also want to be respectful to the witnesses to start this relatively in a timely fashion.

Good morning. The purpose of this hearing is to explore whether the experience and expertise of the Army Corps of Engineers provides support for the recently finalized rule that changes the regulatory definition of "waters of the United States" under the Clean Water Act.

Congress has the constitutional authority, indeed the obligation, to conduct oversight actions of Executive Branch agencies, particularly on issues as controversial as the waters of the U.S., which now is opposed by 31 States.

For too long, many of us believed that the Congress has not focused on these important issues, and in some ways looked the other way with Executive Branch agencies taking actions that do not conform with the law. We are changing that.

Oversight is particularly important when we have a pattern of behavior from certain agencies, like the EPA, of consistently issuing rules that completely disregard the limits of their

authority imposed by Congress. In fact, on June 26, just three days before the Supreme Court overturned the EPA's Mercury and Air Toxic Rule under the Clean Air Act, EPA Administrator McCarthy literally bragged on TV, on an HBO show, that the Supreme Court's decision ultimately would not matter because it took three years to get to the Supreme Court and, by then, most people subject to the rule had to abide by it anyways.

"Investments have already been made," she said.

This is in addition to an agency that consistently loses court cases in the Supreme Court and constituents certainly across Alaska, but I think all across America, Democrats and Republicans, believe that the EPA is a rogue agency accountable to no one. We see it in my State on issues like CD-5, GMT-1, where other agencies are told by the EPA what to do.

Now, I have the utmost respect for the Corps of Engineers. I have worked with them for years, the civilian and military members of that organization. But the arrogance and disregard for the law that is evident in the WOTUS rule is something that is imperative that the Congress conduct oversight hearings with regard to that rule.

It's no secret that many of us think that the final WOTUS rule goes far beyond the authority granted by Congress. At a hearing back on March 4th, I asked Administrator McCarthy for her legal analysis that supports the rule. There was no

response. On July 14th, the chairman of this committee, Chairman Inhofe, and my Republican committee colleagues joined in a letter asking again for the legal analysis of the WOTUS rule. No response. We received nothing.

All of my colleagues, whether Republicans or Democrats, on this committee and in the United States Senate should be concerned about such arrogance with regard to our constitutional duties to conduct oversight of this agency.

Today, we are focusing on the factual record for the WOTUS rule. Whatever your views on the limit of authority under the Clean Water Act, we should all be able to agree that an agency rulemaking must be supported by a factual record. This might sound like a technical issue to some, but it is not.

In numerous places, the preamble of the final WOTUS rule states that the rule's requirements are based on the science, agency expertise and experience, and case-specific jurisdictional determinations. To understand what documents the preamble is referring back to, in July, Chairman Inhofe sent a letter to the EPA asking for copies of the scientific studies that agencies relied on with regard to supporting this rule in a letter to Secretary Darcy asking for examples of the case-specific determinations the agencies relied on.

EPA has not yet identified any specific scientific studies in response to Chairman Inhofe's letter. We are waiting a

response, as well as a response to our longstanding request for a legal analysis before scheduling a hearing with the EPA.

Secretary Darcy has responded to Chairman Inhofe's letter by candidly admitting that the WOTUS rule is not, I repeat, not based on the case-specific jurisdictional determinations of the Corps, even though the preamble to the rule makes that claim. She had to make that admission because, as we now know from memoranda prepared by Corps career staff that have been provided to the EPW Committee, case-specific jurisdictional determinations that provide a basis for the WOTUS rule do not exist.

I would hope that all members of this subcommittee agree that when agencies make claims about a rulemaking record that are flatly contradicted by senior staff within an agency, that is a cause for concern. That is a cause for concern on how our Federal Government functions. That is a cause for concern that is worthy of the oversight of this committee. In fact, it strikes at the heart of the integrity of the rulemaking process and, I believe, our representative form of Government.

I am not talking about legal interpretations or policy disputes. What we are focused on today are statements that the agencies presented as facts that, according to memoranda written by technical experts in the Corps of Engineers, are simply not true.

I understand that this hearing puts Secretary Darcy in a somewhat awkward position, and I appreciate her willingness to testify today. We recognize that the EPA may have been in the driver's seat in developing the legally questionable WOTUS rule, but Assistant Secretary Darcy signed the rule, along with Administrator McCarthy. She, as well as EPA, is responsible for the veracity of the claims that the rule makes that is of concern to literally millions of Americans right now.

I was surprised to learn of the degree of conflict between the two agencies. To me, this is further confirmation that the EPA is truly an agency that answers to no one. That needs to change.

I appreciate Ms. Darcy's willingness to do the right thing by sharing those memoranda with the committee as part of our oversight responsibilities. I also appreciate her willingness to appear before the subcommittee, a committee that she knows well, to discuss the Corps' participation in the waters of the U.S. rule.

Finally, I want to remind her, respectfully, that we expect her to be candid in her answers. This subcommittee will not accept any attempts to evade answering questions based on claims of Executive Branch confidentiality interests, deliberative process privilege, or ongoing litigation. While these excuses may work in responding to FOIA requests or in defending

litigation, they are not the basis of withholding information and truthful answers from the Congress of the United States.

It is important that Congress hear directly from you, Secretary Darcy, about why the views of your technical experts at a very senior level, as we all know, were largely ignored, and why the record of the WOTUS rulemaking and the Corps memos contradict statements made in the final rule published to the American people.

I am placing the Corps' memos in the record for this hearing. Without objection, so ordered.

[The referenced documents follow:]

Senator Sullivan. Mr. Chairman, you are recognized, if you would like to make an opening statement.

[The prepared statement of Senator Sullivan follows:]

Senator Inhofe. Well, this is a subcommittee hearing, so it is probably not appropriate to make an opening statement. I think perhaps we can just move on.

I would like to make a comment, however. This is the second time now this week that this has happened, that we don't have any of the minority showing up for this meeting, and I think that is regrettable. Hopefully, they will come, and I hope that the staff who is here from the minority will talk to the minority and see if we can get their presence here.

I think it might be appropriate to just go ahead and hear from Ms. Darcy.

Senator Sullivan. Secretary Darcy, why don't we begin five minutes with your opening statement? And if Senator Whitehouse or others come, we will hear from them.

STATEMENT OF JO-ELLEN DARCY, UNITED STATES ASSISTANT SECRETARY
OF THE ARMY

Ms. Darcy. Good morning. Chairman Inhofe, Chairman Sullivan, members of the committee, I am Jo-Ellen Darcy. I am the Assistant Secretary of the Army for Civil Works. I want to thank you for this opportunity to come before the subcommittee this morning to discuss with you the Army's participation in developing the final rule entitled Clean Water Rule: Definition of Waters of the United States.

As you know, the final Clean Water Rule was published in the Federal Register on June 29th of this year and became effective in all but 13 States on the 28th of August. In those 13 States, the U.S. Army Corps of Engineers continues to implement Clean Water Act section 404 responsibilities under the prior regulation when making jurisdictional determinations and issuing permits.

The process leading to the June 15th publication of the final rule started years ago, when members of Congress, key local and national stakeholders, and the American public spoke loudly and clearly, demanding that the Environmental Protection Agency and the Department of the Army deliver a new common-sense set of rules that would add clarity and predictability to the implementation of the Clean Water Act following the United States Supreme Court's SWANCC decision in 2001 and the Rapanos

decision in 2006 which called into question the agencies' decisions over which waters were considered to be waters of the United States.

President Obama therefore called upon the administrator of the EPA and the secretary of the Army to clear up the confusion by issuing a rule that would not only protect our Nation's waters as contemplated under the Clean Water Act, but also improve regulatory predictability, certainty, and transparency. That was our charge and that is what the new rule accomplishes.

Alongside EPA Administrator Gina McCarthy and her predecessor, the Army was an active partner in developing the rule. The rule, however, affects all programs established by the Clean Water Act, one aspect of which is the U.S. Army Corps of Engineers' permit program for the discharge of dredge or fill materials, commonly referred to as a 404 Program.

As Assistant Secretary of the Army for Civil Works, I am responsible for setting the overall strategic direction for the civil works program. I am responsible for developing policy and guidance for administering the 404 Program. When undertaking these responsibilities, just as with my other assistant secretary responsibilities, I coordinate with senior leadership at the U.S. Army Corps of Engineers.

The exercise of my discretionary authority is always informed by, among other valuable inputs, the technical

expertise offered by the experienced regulators and program officials at the Corps and my staff. This is precisely the process I established and used in formulating the Army's position on many of the policy decisions that arose during the drafting and vetting of the proposed final rule. The inevitable internal differences of opinions encountered in the course of this rulemaking process were not unusual.

The final rule was not only the product of EPA and Army collaboration, but was improved by a lively and productive interagency process when numerous agencies actively engaged in the formulation and development of the final rule. The decisions I made on behalf of the Army were reached after receiving the Corps' input. I have personally spoken with the Chief of Engineers, Lieutenant General Thomas Bostick, and he has confirmed that the Corps is unequivocally committed to implementing the new rule as effectively and efficiently as possible.

The final rule reflects many changes as a result of listening to the public and carefully considering the interests of all Americans, including our Nation's farmers and ranchers. The public demand for a common-sense rule was heard. The Clean Water Rule represents years of scientific study, as well as public outreach.

The Clean Water Rule addresses the tens of millions of

miles of the Nation's streams and millions of acres of wetlands whose protection against pollution had become confusing and complex following the SWANCC and the Rapanos decisions.

The Clean Water Rule will protect those streams and wetlands that have been scientifically shown to have the greatest impact on the water quality of downstream traditional navigable waters and that form the foundation of our Nation's water resources. The rule ensures that waters protected under the Clean Water Act are more precisely defined, more predictable, easier for landowners and businesses to understand, and consistent with law and the latest science.

Clean water is vital to our health, to our communities, and to our economy. We need clean water upstream to have healthy and vibrant communities downstream. Almost 117 million Americans, that's one in three people in this Country, get their drinking water from streams impacted by the types of waters whose jurisdictional status has been clarified by the Clean Water Rule. Our cherished way of life and our economy are dependent on having access to an abundance of clean water.

I want to thank you again for the opportunity today and I will answer any questions you have that do not involve matters in litigation. Thank you.

[The prepared statement of Ms. Darcy follows:]

Senator Sullivan. Thank you, Secretary Darcy.

Look, just for the record, we do this every time in this committee. We all want clean water. My State has the cleanest water probably anyplace in the world, and, to be perfectly frank, it is not because of the EPA. So we all want water, we know that. But we also want agencies that are accountable to the people and to this body.

So let me just ask the very obvious important question. You have seen the memos from Major General Peabody. And these are not small level Corps officials. Again, I have the utmost respect for the Corps. These are well thought-out memos. I am just going to read a couple excerpts from these memos. And these are right at the moment in which the rule is going to be finalized, so these are big, big disputes from a key agency. Not just any agency, a key agency, with regard to WOTUS.

The April 27, 2015 memo to you said, talking about the preamble and the rule, states, "Those statements," where you guys supposedly are supportive of the rule, "are not accurate with respect to the draft final rule, as the process followed to develop it greatly limited the Corps' input, a practice that has continued thus far in the interagency review process."

The May 15th memo, "The documents can only be characterized as having been developed by EPA and should not identify the Corps as an author, co-author, or substantive contributor."

The assistant chief counsel for the Corps, "It will be difficult, if not impossible, to persuade Federal courts that the implicit effective determination that millions of truly isolated waters do not in fact have a significant nexus with navigable interstate waters. Consequently, the draft final rule will appear to be inconsistent with the Supreme Court's decision in Rapanos and SWANCC." This is why we have been asking Administrator McCarthy for the legal opinion, which she refuses to give us because of concerns like this.

Finally, on 15 May, a few weeks before the final rule was promulgated, this is from, again, General Peabody, "To the extent that the term 'agencies' includes the Corps of Engineers, any such reference should be removed. Finally, the Corps of Engineers logo from the final rule should be removed from these documents."

You have said the final rule represents the Corps' and EPA's experience, the Corps' support. These documents dramatically tell a different story. Who are we supposed to believe? Where are the documents to support your claim that the Corps supported the rule? And did the EPA pressure you, as the head of the Corps, to sign the final rule when your senior leadership obviously wanted nothing to do with it?

Ms. Darcy. I was under no pressure to sign any rule, Senator. This has been a collaborative, joint development of

this rule starting several years ago.

Senator Sullivan. Can you explain the response? These are dramatic documents. The senior-most officials in your agency were essentially saying the rule is untrue; we want nothing to do with it; take our name off it. Literally, take our name off it; we do not support it; we think it is against the law. How do you respond to that? And this is on the eve of the rule. How do you respond to that?

Ms. Darcy. Senator, those documents and those memos were a snapshot in time.

Senator Sullivan. No, no, no, they weren't a snapshot in time. They were at the end of a long process by which several agencies, and again, let's face it, it is the EPA, and the Corps is the key agency here, the key agency. This was not a snapshot in time; this was at the end of years and months of working on this rule. Your final civilian leadership and military leadership said we have had nothing to do with this, we don't agree with this; literally, take our name off it.

How did you then ignore that advice? I mean, literally, the rule was issued about a week later. Not a snapshot in time. We are not going to buy that.

Ms. Darcy. Senator, those comments were on the draft final rule. The final rule that was published reflects some additional changes to the proposed and the draft rule that some

of which the comments in those memos have been addressed.

Senator Sullivan. Some?

Ms. Darcy. Some, yes, sir.

Senator Sullivan. But not all.

Ms. Darcy. Yes, sir.

Senator Sullivan. And, again, I don't see how you can claim that the Corps even supports the rule and the technical aspects of the rule, and the Administration, according to its brief in the Sixth Circuit, opposing the motion by 18 States that are now challenging the WOTUS rule, were talking about the technical support documents, "the TSDs that explains that 'the agencies are using their technical expertise to promulgate a rule that draws reasonable boundaries in order to protect the waters that most clearly have significant nexus, while minimizing the uncertainty of the scope of the WOTUS rule.'"

Then DOJ argues that the technical and scientific determinations should get the highest level of deference, which is normally the case in a Chevron litigation. But that might be true if the record to support those technical determinations came from the Corps. The only technical determinations in the record are statements in the technical support document. But according to the Corps, this is a quote, "The Corps was not part of any analysis to reach the conclusions described." This is a quote from your agency. Let me say that again: "The Corps was

not part of any analysis to reach the conclusions described. Therefore, it is inaccurate to reflect that the agencies did this work or that is reflective of the Corps' experience or expertise."

This is incredibly, incredibly damning. The Justice Department can't rely on this agency deference when the agency itself is saying it had nothing to do with it. How do you respond to that?

Ms. Darcy. Senator, the agency had some input.

Senator Sullivan. Not according to this memo. Can I repeat that? "The Corps was not part of any type of analysis to reach the conclusions described. Therefore, it is inaccurate," so please don't be inaccurate with us, "to reflect that the agencies did this work or that it is reflective of the Corps' experience or expertise."

Your senior people, who are probably closer to this than you are, are saying you had nothing to do with it. So be careful when you are telling the Congress of the United States that you did, because right here in writing there is a memo saying you didn't.

Ms. Darcy. Senator, you are referring to the technical analysis. Some of the information that was included in the analysis was provided by the Corps. The Corps did not do that analysis, that is correct.

Senator Sullivan. I see my time is up here for questions. I am going to turn it over to Ranking Member Whitehouse.

We waited quite some time to get this going, so I apologize for starting without you.

Senator Whitehouse. No, you should feel free to start without me.

Senator Sullivan. But I would appreciate if you want to make an opening statement and then ask questions. She has already given her opening statement.

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

Senator Whitehouse. Yes. Thank you very much.

Ms. Darcy, thank you very much for being here once again. This committee is a forum in which every regulation that would help the environment receives opposition. Every pollutant regulation receives opposition. Every time, every member. It is an absolute sure thing that from stage right over every pollutant, every member, every time, every regulation; and it is very unfortunate that here we are again on another regulation.

Rhode Island is a downstream State, so what goes in the rivers upstream makes a big difference to us, and the pollutants that go in the water upstream come down to our rivers, come down to our bays. The Blackstone River is one of Rhode Island's most important rivers; it has an industrial history, and a great deal of the bottom of the Blackstone River is industrial waste from Massachusetts from decades and decades ago.

Not too long ago, Narragansett Bay, up in the North, was unfishable and unswimmable, and it is a really important resource to our State of Rhode Island to have Narragansett Bay be fishable and swimmable. And the Clean Water Act and the Waters of the United States rule have been essential to that progress, and while there can be argument over the scope and the details of the rule, that hasn't been what has been the issue.

There has been just a full-on, party-wide, absolute attack on this rule, and I think it is very regrettable, because I think the Clean Water Rule has been very effective at helping particularly States like Rhode Island that tend to be downstream States, and it is a big deal for us.

So if my colleagues want to address technical improvements that we think we should make, of course I am always open to that. But the conversation on this has been largely preposterous. Doc Hastings, the former representative, said that no body of water in America, including mud puddles and canals, wouldn't be at risk of job-destroying Federal regulation. It is the historic power grab that poses a fundamental threat to our way of life.

You hear this extreme rhetoric about a rule whose purpose is to keep our waters clean so that pollutants aren't dumped into a ditch and then the foreseeable next big rainstorm washes them down into our bay.

Now, the Supreme Court cases are challenging; they give EPA and the Army Corps some very difficult responsibilities. I think that the rule is, by and large, pretty consistent with the Supreme Court decisions. If you wanted something different, well, the Supreme Court kind of has set the ground rules for this.

So, like I said, we are open, I think, on this side of the

aisle to considering technical adjustments to make this a more effective and fair rule, but that is not what I detect here in this room today; it is, once again, every regulation, every pollutant, every member, every time from the Republican side.

I yield back my time.

[The prepared statement of Senator Whitehouse follows:]

Senator Sullivan. Do you want to ask questions?

Senator Whitehouse. Let me just ask Ms. Darcy if there is anything that she would like to say. She got cut off a couple times in the last questioning and didn't get a lot of time for her answers.

You remember the chairman's questioning. Perhaps you would like to provide some positive answers to what he had to ask you.

Ms. Darcy. Thank you, Senator Whitehouse.

I would just like to clarify that when you asked about the Peabody memos, the content of those memos were things that were considered during the development of the rule. And as I said earlier, some of the considerations and changes that were made to the final rule between the draft final rule and the final rule are reflective in some of the concerns that the Army Corps of Engineers had.

But it is my job as the Assistant Secretary of the Army for Civil Works to oversee the policy development of the 404 Program, along with all of the other responsibilities, and I had to make some decisions in making the final rule decisions. Some of those agreed with the Corps of Engineers recommendations; some did not.

Senator Whitehouse. But in your position as the Assistant Secretary, do you feel comfortable that your position was heard, considered, and reflected in the final rule?

Ms. Darcy. Yes, I do.

Senator Whitehouse. Thank you very much.

Senator Sullivan. Senator Barrasso?

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

Senator Inhofe. Let me explain first. I would normally be next. Senator Barrasso has a commitment, so it is fine if you want to go ahead and go, and I will go back into my turn after Senator Cardin.

Senator Barrasso. Well, thank you very much, Senator Inhofe. I appreciate the opportunity.

Madam Secretary, I want to read the story that was on the front page of The New York Times September 18th of this year. The story is entitled Family Pond Boils at Center of Regulatory War In Wyoming. Regulatory war in Wyoming.

The story highlights the plight of a young man, Andy Johnson. He is 32, he is a welder, he is a part-time caterer, he is a father of four girls, lives in Fort Bridger, Wyoming. The article talks about a pond that Mr. Johnson built on his property the EPA now says violates the Clean Water Act, and that he should have gotten a permit from the Army Corps of Engineers. Now, Wyoming has already said it is okay to do this, but this is the Army Corps of Engineers.

The article says, "Mr. Johnson and his wife spent \$50,000, most of their savings, to create a pond of water to help his 10

head of cattle and 4 horses." Now, this is the front page of The New York Times because of what is going on with the regulatory war in this Country. "Mr. Johnson and his family have been threatened with fines, \$37,500 a day, thanks to the EPA and the Corps' heavy-handed management of water policy."

The article states the family has accrued fines of as much as \$16 million. He sold off most of his livestock to pay his legal fees, environmental studies.

Something is terribly wrong with the EPA and your agency where you destroy people's lives over a pond. A pond. You may claim your rule and regulatory approach is based on science, but it certainly is not based on common sense.

And I don't want to see this happen to any more Wyoming families, families anywhere in the Country. Why should any family trust the EPA or the Corps with this Waters of the United States rule that will ultimately empower unelected, unaccountable bureaucrats to steamroll families, take their college savings, clean out their retirement accounts. This is abysmal. And when the EPA, through its actions, gets talked into the front page of The New York Times with an article about Wyoming, you can tell how much overreach there is here.

Any answer to this?

Ms. Darcy. Senator, I believe that the Clean Water Rule that we have promulgated will help to improve the clarity for

those people who have questions about the reach of the Clean Water Rule. I think the science has demonstrated that there is connectivity between different bodies of water, and that is an important consideration when we decide whether an activity should be permitted or not in a jurisdictional water.

Senator Barrasso. And a \$16 million fine against this Wyoming family, 32-year-old family of four daughters, wants to get them to college? You are going to provide better clarity to them, is that what you just said?

Ms. Darcy. That is what we intend to do in this rule.

Senator Barrasso. Well, it is pretty clear, when they have a \$16 million fine, that the EPA certainly thinks that they have the authority to do this.

You know, there is so much in these Army Corps memos that Senator Sullivan started, described how your agency was essentially out of the loop in a lot of the decision-making that went into developing this rule.

I have been very critical of how this rule has been drafted, very critical of how agencies like the EPA have applied a heavy hand to farmers, to ranchers, to small businesses in their management of water. I can only imagine how many families like the Johnsons have already been bullied by bureaucrats, having their livelihoods threatened simply putting a shovel into the ground.

Statements in the Corps memo about the EPA's conclusions like the Corps was not part of any type of analysis to reach the conclusions described means the EPA was really driving the train, not the Corps. And without the Corps' involvement, it appears to me the rule that was developed is completely arbitrary.

I mean, the Corps' own memo says, "In the Corps' judgment, the documents contain numerous inappropriate assumptions, with no connection to the data provided, misapplied data, analytical deficiencies, logical inconsistencies. As a result, the Corps review could not find a justifiable basis in the analysis for many of the documents' conclusions."

So I want to give you the opportunity to state whether you feel your agency was pushed around, marginalized by the EPA, because that is what your own people are saying about these memos.

Ms. Darcy. I do not believe that we were pushed around, bullied, or marginalized by any other Federal agency during this process.

Senator Barrasso. So the people that work for you are wrong.

Ms. Darcy. No, the people who work for me who are in the Corps of Engineers had some differing opinions on some of the final decisions that needed to be made in order to finalize this

rule.

Senator Barrasso. So a District Court judge in North Dakota concluded that the process used to develop the rule is inexplicably arbitrary and devoid of a reasoned process. The judge issued a preliminary injunction preventing the rule from going into effect in 13 States, including Wyoming. And if you truly want to provide certainty and clarity, you will withdraw this rule and start over with a process that reaches out to States and local governments, and is not arbitrary and devoid of a reasoned process.

That is why I would ask that you support bipartisan legislation that we have introduced. Bipartisan; we have Democratic co-sponsors, it is not just those on the right side of the panel, bipartisan co-sponsors. It is called the Federal Water Quality Protection Act. It gives your agency a chance to go back, write a rule, reaches out to States, protects vulnerable farmers, ranchers, families, and communities.

Ms. Darcy. We are currently implementing the rule as proposed in those 13 States, Senator, and we stand behind that rule.

Senator Barrasso. Mr. Chairman, I am going to continue to work with the majority leader and getting a vote on this bipartisan legislation so we can get it to the Floor and rewrite the rule. Thank you, Mr. Chairman.

Senator Sullivan. Thank you.

Senator Cardin?

Senator Cardin. Thank you, Mr. Chairman.

Ms. Darcy, thank you very much for your service and thank you for being here. I have listened to the hearing and I am somewhat perplexed with what the purpose of the hearing is. Those who are listening to this, I am not sure they are gaining much other than a debate among the members about the implementation of the Clean Water Act.

I agree with Senator Whitehouse. It seems to me that it would be one thing if we were talking about the merits of a rule. We can argue the specifics, but it seems to me what we are arguing about here makes little sense.

I would hope we are not arguing about the merits of the Clean Water Act. The Clean Water Act has been responsible for improving the public health of the people of this Country. In my own State of Maryland, the Chesapeake Bay, which I have talked about frequently to the members of this committee, is critically important to our life. It is our economic life, it is our social life, it is iconic to Maryland's history, and the Clean Water Act is a critical part. And knowing what waters are going to be protected that lead into the Chesapeake Bay is critically important.

I also hope it is not being disputed that the reason why

the Obama Administration initiated a rule is because of two Supreme Court decisions that confused the definitions of what are regulatory waters of the U.S. and required a response. And we have been waiting for a response, and the Obama Administration has taken the initiative to bring forward a rule, and that is what it should be.

I listened to Senator Barrasso's concerns about a landowner. Those concerns exist under the circumstances prior to this rule being formulated. That is nothing new. And it has been difficult for landowners because they don't know whether they are going to be regulated or not until we had some clarity from the rules that have been proposed. So I think clarity is very, very important in this regard.

So we are not talking about the merits; now we are talking about the process that was used between the Army Corps and the Environmental Protection Agency. And my understanding of the disagreement, to the extent there is a disagreement, during the consultation process, is the Army Corps wanted a broader definition of waters that would be regulated.

I don't know the internal discussions, but it seems to me EPA ultimately issued a regulation that was narrower, and that seemed to be the public comment that took place during the process of erring on the side of caution, rather than broadness. And my guess is if the rule would have been broader, my

colleagues who are being critical of the process would have been more critical of the result.

So I am somewhat confused as to the focus of this hearing.

Ms. Darcy, as I understand it, I am reading from your testimony and I want to make sure I understand this correctly from your position. The final rule was not only the product of EPA and Army collaboration, but was improved by a lively and productive interagency process. Is that your testimony?

Ms. Darcy. Yes, Senator.

Senator Cardin. And that was stand shoulder-to-shoulder with our colleagues at EPA in support of the merits of the final rule and the process used to develop it.

Ms. Darcy. Yes, Senator.

Senator Cardin. Thank you. Thank you, Mr. Chairman.

Senator Sullivan. Senator Wicker?

Senator Wicker. Thank you, Mr. Chairman.

Ms. Darcy, this hearing is about whether this rule is legal. There is, of course, an appeals court in one section of the Country who has expressed serious doubts as to whether it is legal. I share those doubts. But in order for it to be legal, it has to be signed off on not only by you and by the administrator of the EPA, but it has to be based on certain criteria developed by the two agencies.

Now, in the preamble, which I take it you subscribe to, the

preamble?

Ms. Darcy. Yes.

Senator Wicker. Thank you. You say the emersion of science along with the practical expertise developed through case-specific determinations across the Country in diverse settings. Case-specific determinations across the Country in diverse settings. What does that mean?

Ms. Darcy. It means that in making determinations across the Country, that individual cases were considered when the discussions with the Corps staff and EPA were being developed to put this rule together.

Senator Wicker. Individual cases.

Ms. Darcy. Yes, sir. In order to make a determination, you have to look at the on-the-ground conditions in many instances, so those were some of the cases that were discussed.

Senator Wicker. All right. But in your letter, dated August 28, back to Chairman Inhofe, you state your letters seek field observations relied upon by the Army for certain statements in the technical support document and the rule. The letters suppose that there are specific field observations in the administrative record that correspond to each statement. In fact, rather than relying on individual field observations, the rule was the product of yields of collaborative decision-making, and so on and so forth.

It seems to me that your letter, which I just quoted, contradicts the statement in the preamble that there were case-specific determinations across the Country.

Ms. Darcy. Senator, the case-specific determinations that were discussed and included in the conversation in developing the final rule were part of the examples that our technical folks discussed when developing the rule.

Senator Wicker. But they were not field observations or specific field observations in the administrative record, because that's what your letter just said.

Ms. Darcy. The field observations that were discussed as part of the development of the rule aren't like a specific condition in one specific area.

Senator Wicker. I noticed you turned to counsel on that question. Can you supply to the committee, on the record, what the case-specific determinations across the Country and in diverse settings actually is in this case?

Ms. Darcy. I will consult with counsel, but if at all possible we will provide that for the record.

Senator Wicker. Okay, why wouldn't it be possible?

Ms. Darcy. This rule is undergoing litigation, so within the parameters of the litigation is what I would have to be mindful of.

Senator Wicker. Okay, we will deal with you on that.

Also, the preamble is also contradicted by the assertions of General Peabody in his letter dated April 24, which the chairman has already pointed out. General Peabody seems to underscore and support the statement in your letter dated August 28 when he says the preamble of the proposed rule and the draft final rule state that the rulemaking has been a joint endeavor by the EPA and the Corps, and that both agencies have jointly made significant findings, reached important conclusions, and stand behind the final rule. Those statements are not accurate with respect to the draft final rule, as the process followed to develop it greatly limited the Corps' input, a practice that has continued thus far in the interagency review process.

It just seems to me, Ms. Darcy, that this statement contradicts the preamble and that we have a situation here where the political appointee to the Corps of Engineers does indeed support the rule, but that the great body of fact-finding behind it is not there. What would you say to that assertion?

Ms. Darcy. I would say that what is reflected in the Peabody memos are considerations that the Corps had which had been raised to me, those considerations and concerns. Many were decisions that had to be made as to what was going to be included in the final rule, and those decisions were mine to make.

Senator Wicker. But not based on field observations?

Ms. Darcy. Much of the technical expertise and experience of the Army Corps of Engineers was considered when making many of these decisions.

Senator Wicker. Thank you. Thank you, Mr. Chairman.

Senator Sullivan. Senator Rounds?

Senator Rounds. Thank you, Mr. Chairman.

Secretary Darcy, since 2001, the Supreme Court decision in SWANCC, no isolated wetland has been found to be jurisdictional. However, under the new WOTUS rule there are five categories of isolated wetlands that you now expect to regulate, because the final rule makes a legal determination that these categories are similarly situated. This means that you will look at aggregate impacts when deciding whether there is significant nexus to navigable waters.

The Prairie Pothole Region, which includes South Dakota, encompasses 5.3 million acres of land in the Midwestern United States. Can you tell how many acres of land in the United States are impacted by all five categories of this new provision?

Ms. Darcy. I don't have that number with me, Senator, but I would be happy to try to find it for you.

Senator Rounds. I would appreciate it if we could get that. Just an assumption: pretty significant amount of land in the United States. Fair statement?

Ms. Darcy. Yes. But, again, the exact number we will provide to you.

Senator Rounds. Okay. What is the basis for determining that all wetlands in these categories within a watershed are similarly situated?

Ms. Darcy. Senator, during the scientific consideration that we did through the connectivity report that was reviewed by the science advisory board, the potential for connectivity of those kinds of water bodies and the impact that they might have a connection to a downstream navigable water is present, which means that it is a possibility. That's why you can do a significant nexus test. That if it is determined that there is a significant nexus between that kind of water and its impact to a downstream navigable water, if that determination is made, then that would be a jurisdictional water.

Senator Rounds. You recognize that this rule would make some significant changes in the definitions of waters of the United States?

Ms. Darcy. It is possible that if there is a significant nexus between those five similarly situated types of waters, that there could be some impact to downstream waters, and that is the ultimate goal, is to try to prevent negative impacts to the downstream waters.

Senator Rounds. But you also understand, and in your

testimony you indicated that 404 permits are a critical part of the responsibility of the Corps in terms of determining the issuance of those and that they impact not only quality of water, but it also impacts because they want certainty, economic activity as well. Fair statement?

Ms. Darcy. Yes.

Senator Rounds. So you understand how critical. And the reason why it is so important for a lot of people out there, the business community, a lot of people depending upon the availability of access to the shores, the waterways and so forth, this is a pretty important economic decision, isn't it?

Ms. Darcy. Yes, and the health of the water is also a very crucial economic decision.

Senator Rounds. But this was not made in a vacuum. The Corps of Engineers clearly understood how important this decision in determining what is and what is not included in the waters of the United States, this was not something that you took on lightly. You understood the significance of it.

Ms. Darcy. Yes, sir.

Senator Rounds. I am just curious. You indicated litigation. Do you know how many different lawsuits you are involved with right now on this particular rule?

Ms. Darcy. I know that 31 States have sued. I think there are an additional I think maybe 60 to 70 cases.

Senator Rounds. I think right now, if I could, I think right now, according to our information, I think there are like 22 different lawsuits involving 31 separate States of the United States right now on this particular rule. Clearly, the impact of this rule for these States, I think you were right in your determination that this was a very important rule that you have made some interpretations on. Fair to say?

Ms. Darcy. It is a very important rule. I think it is a generational rule for the Clean Water Act.

Senator Rounds. If we look at not just the combination of literally what is in this particular case the political outlook for all of these States, when you have this many bodies all sitting side-by-side challenging what has been done in this particular case, and then you look at the impact economically in terms of the significant changes it could make with regards to the number of 404 permits, the number of individuals, whether they are farmers, ranchers, this is one of the biggest, perhaps, political and economic deals you have been involved with in perhaps a generation?

Ms. Darcy. I think it is one of the most important rules in order to protect the water quality of this Country, yes.

Senator Rounds. Not only for our water quality, but in terms of the political impacts, the political challenges involved, and the economic impact as well? Fair to say?

Ms. Darcy. There are challenges, yes, Senator.

Senator Rounds. But would you agree with my statement?

Ms. Darcy. That it is the largest?

Senator Rounds. One of the largest. Very, very important in terms of economic impact and very, very important in terms of the political impact.

Ms. Darcy. Yes, it is.

. Senator Rounds. Thank you. Appreciate it.

Thank you, Mr. Chairman.

Senator Sullivan. Senator Fischer?

Senator Fischer. Thank you, Mr. Chairman.

And thank you, Secretary, for being here today.

In Nebraska, we are blessed with wonderful natural resources, and we want to make sure that we manage our water resources in an appropriate manner. I agree with Senator Whitehouse; the Clean Water Act is an important piece of legislation. It has been very beneficial across the United States. We differ on this rule, however.

In Nebraska, our natural resource districts, we have different basins in Nebraska that are resource districts. They work to help manage groundwater. The State manages surface water. And together I think we manage our resources very well. We also work with the Corps very well in Nebraska.

For example, we had a levee system in the eastern part of

the State where we worked with the Corps, and it was completed last year. And that protects the drinking water in basically our urban areas on the eastern part of the State, the drinking water for over half of our population. It is important that we work together in being able to manage those resources and protect our citizens to make sure they do have clean drinking water.

We had a hearing of this committee in Nebraska in March on waters of the U.S., and a great panel of Nebraskans came to speak on the issue and presented good information. In Nebraska we have a broad consensus of varied groups that are opposed to these rules. It is not just the usual suspects of farmers and ranchers. We hear that all the time: farmers and ranchers are going to be hit by this rule. You bet they are. My neighbors are going to be hit by it.

But also our natural resource districts are opposed; our cities are opposed; our counties are opposed; our homeowners are opposed; our home builders are opposed; our associated general contractors are opposed. So it is a wide group of stakeholders.

Twenty-five percent of the cost of a new home right now is due to rules and regulations, and our home builders know that we are putting an American dream out of reach by adding more rules and regulations, because most of us aren't going to be able to afford to own our own home in the future if the Government

continues on in this way.

In your August 28th letter to Chairman Inhofe, you said that the EPA made changes to the final WOTUS rule to address the Corps' concerns. But the only substantive changes made were to expand the jurisdiction. No changes were made to address the regulatory overreach identified by the Corps.

Did you raise with the EPA the Corps' concern that "many thousands of miles of dry washes and arroyos in the Desert Southwest, even those ephemeral dry washes, arroyos, etcetera, carry water infrequently and sometime in small quantities"? Were any changes made to address that?

Ms. Darcy. In the final rule?

Senator Fischer. Yes.

Ms. Darcy. I don't believe so.

Senator Fischer. Did you raise with the EPA the Corps' concern that the new definition of adjacent used arbitrary distances to establish jurisdiction that according to the Corps "are not supported by science or law"? Were any changes made to address that concern?

Ms. Darcy. We did raise that concern with EPA, as we did with the other concerns in the Peabody memo and, yes, there was an addition made to the final rule that would take out to the 100-year floodplain the waters that could be considered when doing a significant nexus test.

Senator Fischer. Did you raise with the EPA the Corps' concern under the rule prairie potholes, vernal pools, and certain other isolated wetlands must be evaluated in the aggregate even though "the Corps has never seen any data or analysis to explain, support, or justify this determination"? Were any changes made to address that concern?

Ms. Darcy. That concern was raised with EPA and, as a result, as you can see in the final rule, those five types of waters, including the Delmarva, were considered to be similarly situated for purposes of making a significant nexus determination, so that addition to the final rule in that memo was not supported, but was included in the final rule, and I am aware of what the Corps' concerns were.

Senator Fischer. And I know there is a lot of uncertainty out there. You said your hope was that this rule would clarify it. So I would like to go over just a few questions that were raised by the Corps in an April 24th memo that General Peabody sent to you. These are questions that people all across Nebraska certainly have.

First, how is water defined? According to the Corps, you need a definition to avoid regulating puddles. Is that true?

Ms. Darcy. I am sorry, I didn't hear the last. To regulate what?

Senator Fischer. Puddles.

Ms. Darcy. Puddles. There is an exemption of puddles in the final rule, that they will not be regulated.

Senator Fischer. How is water defined in the rule?

Ms. Darcy. The definition of navigable waters of the United States has not changed in the final rule.

Senator Fischer. How can you tell if a category of water is similarly situated?

Ms. Darcy. The determination was made for the similarly situated five kinds of water based on the science that was provided through our connectivity report.

Senator Fischer. Thank you.

And if I may, Mr. Chairman, how do you define a roadside ditch?

Ms. Darcy. I believe it is defined in the exclusions, but actually I would have to check on the definition of roadside ditch. Other ditches are defined and exempt in the final rule.

Senator Fischer. I am over my time, but I would like to submit some questions for the record, please. Thank you.

Thank you, Mr. Chair.

Senator Sullivan. Senator Markey?

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

And thank you, Assistant Secretary Darcy, for being here today as the committee adds to the already very extensive consultation and review that the Army Corps and the

Environmental Protection Agency have undertaken in crafting the recently finalized Clean Water Rule.

But before I get to the Clean Water Act, I wanted to thank you and the Army Corps for your work on the Boston Harbor dredging. That project will be critical as the Port of Boston continues its 385-year history in the 21st century. Thank you. I also appreciate the Corps work on the Muddy River project. I think you know there are some ongoing discussions about how we can ensure that the project will provide flooding protection over the long-term, especially factoring in climate change, and I would like to have an opportunity to speak with you more about those concerns at a later time.

The drama of rivers in the United States catching on fire compelled the enactment of the Clean Water Act, which gave the Government broad authority to limit water pollution. As the 1972 Conference Report and two Supreme Court rulings have made clear, the EPA and the Army Corps have the authority to address pollution beyond traditional navigable waters. The Clean Water Act is one of America's great successes. It has supported improvement in our economy and eco systems, and it continues to work. Our rivers don't catch fire anymore, and people can even swim in the Charles River now, which was impossible for most of my life.

But given litigation in the last decade, the EPA and the

Army Corps needed to update their implementation of the Clean Water Act, which leads to the new rule that we are discussing today.

Now, some say that the new Clean Water Rule does not go far enough, while others, like the National Farmers Union, prefer this rule over its previous iterations. So I want to ask you, Secretary Darcy, a few questions about the development of this rule.

First, the memos being discussed today reveal conflicting opinions within the Corps on the policy decisions made in the rule. Isn't it true that internal discussions are an important part of the rulemaking process?

Ms. Darcy. Yes, Senator.

Senator Markey. I assume many people in the Army Corps worked on this rule. Shouldn't we expect that some would feel that the rule should be made more stringent?

Ms. Darcy. Yes, Senator.

Senator Markey. Do the memos reflect the official opinion of the Army?

Ms. Darcy. No.

Senator Markey. Were the issues raised by the memos covered in the final rule?

Ms. Darcy. Some of the issues were addressed and changed as a result of that, yes.

Senator Markey. Critics of the rule have voiced concern over the agency's provision of a legal rationale for the rule. But isn't it true that the rule, while proposed, included an entire appendix entitled Legal Analysis, which spoke to those concerns?

Ms. Darcy. That's correct.

Senator Markey. And, similarly, isn't it true that the first section of the final rule's technical support document entitled Statute, Regulations, and Case Law, that the legal issues also spoke to those concerns over the span of 86 pages?

Ms. Darcy. Yes.

Senator Markey. So I think it is pretty clear that there was a very thorough consultation process; that there was a very thoughtful set of discussions that took place; that there was in fact a supporting set of documents to back up the basis for the decisions which were made, as the concerns had been raised.

So I think that the Army Corps did a good job. It is a tough job, but it is one where, it seems to me, that you balanced the interests that were at stake and tried to come down with good judgments. And I think you did it, and I think you also did it legally and you did it with the backup analysis, which is required under the law. So I just wanted to compliment you on your very good work.

And I thank you, Mr. Chairman, for having this hearing.

Ms. Darcy. Thank you, Senator.

Senator Sullivan. Thank you. Senator Inhofe?

Senator Inhofe. Thank you, Mr. Chairman.

Let me put something in perspective here. I have enjoyed listening to both sides, and this has been a discussion that has been going on for a long time. This Administration has a policy of, if you can't get something passed by people who are answerable to the people of America, then do it through regulation. In other words, what you can't get done through legislation, do through regulations.

Well, this has been through that. I think we can all say historically the States have had jurisdiction over the water. The exception has always been navigable. I understand that and I agree that that exception should be there. And I think everyone up here does agree with that.

But I would say this. It was about six years ago that there was an attempt to do this legislatively. It was Senator Feingold and Congressman Oberstar, from Wisconsin and Minnesota. Not only was the legislation defeated, resoundingly, but both Senator Feingold and Congressman Oberstar were defeated at the next election.

I am saying this is a huge issue. That was a prominent issue in that election. And to say that consultation took place with farmers and ranchers, they weren't farmers and ranchers

from Oklahoma. And to give you an idea of the significance of this issue in terms of property rights, in terms of just what is right and wrong, the chairman or the president, I guess his title is, of the Farm Bureau in Oklahoma is Tom Buchanan. Tom Buchanan was making a speech and in his speech he said, of all the problems that farmers and ranchers in Oklahoma, the Ag Committee doesn't really handle these, it is the overregulation by the EPA. That is what his statement is, the overregulation by the EPA.

Now, he was talking about endangered species, talking about a lot of other things, certainly cap-and-trade, but he said the number one concern of all the problems we are having with the overregulation that is killing us, and this is the Farm Bureau talking, is the WOTUS issue. This is the one that they are most concerned about. And when you read it, you can talk about all these things, adjustments you are making, but in reality it didn't happen.

On May the 15th, just 12 days before you signed the final WOTUS rule, General Peabody, and a lot of us have been talking about General Peabody. He is a Major General and his title is the Deputy Commanding General for Civil and Emergency Operations. He is way up there at the top. You would agree with that, wouldn't you?

Ms. Darcy. Yes, sir.

Senator Inhofe. General Peabody sent you a memo saying that the economic analysis and technical support document for the final rule made inappropriate assumptions, misapplied data, and included analytical deficiencies and logical inconsistencies. Was he right?

Ms. Darcy. I don't agree with him.

Senator Inhofe. All right. "As a result, the Corps' review could not find a justifiable basis in the analysis for many of the documents' conclusions."

General Peabody went on to tell you the Corps name and logo should be removed from these documents. This is a quote, it is not me talking, this is General Peabody: "To either imply or portray that the United States Army Corps of Engineers is a co-sponsor, co-author, or contributor to these documents is simply untrue."

Now, if the Corps refused to claim authorship of these documents, why did you put the Army's name on them?

Ms. Darcy. Because the Army does support the rule and the documents in the development of the rule.

Senator Inhofe. Isn't it the job, though, of the Corps of Engineers to make the statements on which their support is going to be based?

Ms. Darcy. It is the job of the Army Corps of Engineers to inform me, as well as others, as to their experience and

expertise, and it is up to me to make a final decision on behalf of the Army.

Senator Inhofe. And you disagreed with the statements that he made.

Ms. Darcy. I disagree that the analysis was flawed.

Senator Inhofe. So you disagreed with him?

Ms. Darcy. I had economists in my office review the economic analysis and the technical analysis.

Senator Inhofe. I really regret this, but these things have to be talked about.

On August 27th, Judge Erickson, of the District of North Dakota, issued an injunction that prevented the WOTUS rule from going into effect in 13 States, as we have been talking about, because the rulemaking record is inexplicable, arbitrary, and devoid of a reasoned process. Is that Federal judge wrong?

Ms. Darcy. I disagree with that finding. I think the process was legitimate. I think it is defensible in both law and in process.

Senator Inhofe. In fact, she said, Judge Erickson noted, "On the record before the court, it appears that the standard is the right standard because the agencies say it is."

Now, it doesn't do any good to ask you if you agree with that or disagree with that, but is everybody wrong here except you? We have talked about General Peabody, we have talked about

federal judges. We have talked about the overwhelming number of people in the United States, 32 of the States coming out overtly opposing it. Is everybody wrong?

Ms. Darcy. I don't believe everyone is wrong, Senator. I believe that the rule is going to show that we are going to provide protection for the waters, which is what our responsibility is under the Clean Water Act.

And I think that this rule brings clarity to a rule that had confusion. We were asked by the Supreme Court, Justice Roberts encouraged both agencies to develop a rule. We were encouraged by Congress, by stakeholders to develop a rule to clarify the impact of those court decisions, as well as what the impact should be on covered waters.

Senator Inhofe. A lot of the statements that were made by General Peabody, he was making recommendations of changes. He would say, no, I don't want my name attached to it. But in doing so, he was recommending making changes in the final document. And I know there has been some discussion about this, maybe you can find one or two that was made, but they really weren't. The things that he found issue with were not changed in the final document.

We will be talking about this, as we have in the past, for a long period of time. Hopefully, we will be able to stop this again. This is considered to be, by the people in my State of

Oklahoma, the most significant raid that they have ever had, and they are very much concerned about it. So I regret that you are in the position that you are in, but I am glad I am in the position I am in.

Thank you, Mr. Chairman.

Senator Sullivan. Thank you, Senator Inhofe.

I think Ranking Member Whitehouse and I are going to conclude with a few additional questions.

Senator Inhofe. Could I interrupt just for a moment?

Senator Sullivan. Sure.

Senator Inhofe. I am sorry. I was reminded by my staff. I would like to ask for a copy of the analysis by your economists and the technical experts you used, who advised you. I would like to have a copy of that advice. Is that all right?

Ms. Darcy. Sure.

Senator Sullivan. So, Secretary Darcy, thank you for answering the questions and being the sole witness at this hearing. It is an important hearing and I am going to address a little bit what Senator Cardin had mentioned, hey, what is this about. It is about oversight. But let me ask you a couple additional questions here.

There is kind of a theme and Senator Markey was focused on it, that, hey, look, this is internal policy debates. You are kind of making the same kind of narrative here. And we

understand when that is the case, right? Agencies have internal policy debates; there is a pushing, to-ing, fro-ing on what the right decision is. And when that happens Senator Markey used the term balance of views, policy discussion. You are kind of insinuating, hey, there are reasonable alternatives here that we had the option to deal with. And I think that sounds good.

I think what has really concerned so many of us is that it is actually not true. It is not true. This is not one of those examples of, hey, on the one hand, on the other hand. Let me give you just a few. There are a lot. I will just mention a few.

In the May 15th memo from the Chief of the Corps Regulatory Program, he stated to you, so this is like two weeks before the final rule is going to be issued, "It is patently inaccurate." This isn't gray. It is patently inaccurate. The final rule states that the action the rule does not have any tribal implications. That is in there.

He states that is patently inaccurate because both the expansion and loss of jurisdiction of the waters of the U.S. may have significant affects on Tribes and their resources. And certainly in my State. Like Senator Fisher, I held a hearing on the WOTUS rule in Alaska, and one of the most powerful witnesses was the mayor of the North Slope Borough saying that this would have an enormous impact on their borough, tribal entities on the

North Slope of Alaska. Enormous.

So this isn't kind of a balanced, hey, you know, maybe we got it right, maybe we got it wrong. I am going to thread the needle here. Patently inaccurate.

Let me give you another example. In the April 24, 2015 memo, "Arbitrary limits within the definition of neighboring," when he is talking about the extent of the rule, "are not rooted in science and beyond the reasonable reach of defining adjacency by the rule."

So these are your experts, whom I assume have a lot more expertise on the science than you do. And they are not low level guys; they are senior guys. And they are saying that the limits you are defining in the rule are not rooted in science. There is a lot of talk on this committee about, hey, we have to base things on science. Your experts, and, again, this isn't black and white; they are saying this is not rooted in science.

Let me give you a third example. This relates to the issue of adjacent waters, where the final rule automatically regulates all waters within 100 feet of a tributary or other water and all waters within 1,500 feet of a tributary or other waters if located in the 100-year floodplain.

The final rule and the preamble says, "The adjacency provision," which your expert said was not rooted in science, "is based on the best available science." That is what the

preamble of the rule says. Your top scientist and expert, probably a lot more experienced than you, says that is not true. The adjacency provision is based on the best available science, the intent of the Clean Water Act, and case law, and is consistent with the experience of the agencies in making case-specific nexus determinations. That is what the rule says.

So, again, General Peabody comes back to you and says, actually, that is not true. Based on how many feet there are between bodies of water, it cannot be based on the Corps' expertise and experience because the Corps does not record distances in their jurisdictional determinations.

So again you have a senior expert who is saying it is not true. So this narrative of, hey, we are threading the needle, one side is saying one thing, reasonable people can disagree, your senior people. And this wasn't a snapshot in time, this was at the end of a year's long process with the top experts in your agency. They are coming out saying this is not a gray area.

Make the call, Madam Secretary. You are the political leader. They are telling you it is black and white. They are telling you it is black; you are saying it is white.

That is why we are so concerned here. That is why we are so concerned here. How do you respond to the patently inaccurate? May 15th, your top expert says that the rule says

this is not going to have any tribal implications. He comes back and says that is patently wrong. How do you explain that? How do you then go, no, you are wrong; I am right? How do you do that?

I am just curious, because it seems to me this is not a judgment call, this is not a policy call; this is black and white. Your senior people are saying black; you are saying white. I think because you are being told by the EPA to do that, but you have said that you weren't. So how do you explain that?

How do you explain these other ones? How do you say that it is based on science when your top official who knows the science probably better than you do says, no, don't say it is based on science because it is not? How do you explain those away?

Ms. Darcy. Senator, the adjacency determinations are based on science.

Senator Sullivan. And the general said, "Arbitrary limits within the definition of neighboring are not rooted in science."

Ms. Darcy. The definitions for neighboring, as well as adjacent, were based on the connectivity report that the science advisory board provided, and there needed to be a decision made as to where the bright line would be drawn as to what was going to be jurisdictional and considered to be an appropriate water

body to be considered for significant nexus test.

Senator Sullivan. Are you more of an expert on these issues than General Peabody or the people who drafted those memos?

Ms. Darcy. I don't believe that I am more of an expert. I believe that it is my responsibility in the position where I sit that I have to make decisions as to what should be included in the rule in order to carry out our obligations under the Clean Water Act.

Senator Sullivan. So you have the authority as a political appointee to look at your folks not on a judgment call, but just say, hey, general, I know you know more about science than I do, but you are wrong; I am right.

I think Senator Inhofe made a really good point that it seems like everybody is wrong with the exception of you in this case, and the EPA.

Ms. Darcy. I don't believe everyone is wrong. I believe that if there is a difference of opinion and it is my responsibility to make a call, that is my job.

Senator Sullivan. Look, I am not trying to badger you here, but there is a broader issue at play; it is the issue of what I am sure you are familiar with, it is called Chevron deference. And the Congress, through the courts and the Supreme Court and through our roles here, provides agencies a lot of

deference. We do it in laws. I actually think we do it too much. The courts certainly provide that deference, that Chevron deference to agencies.

So when an agency makes a call and it is reviewed by a court, the court says, hey, we are going to give the agency deference because we know that the rule was based on the unique expertise and experience of the agency.

That is what Chevron deference is, isn't it? That is why your rules are not considered arbitrary and capricious, right?

Ms. Darcy. Correct.

Senator Sullivan. But the problem here is that we have memo after memo from the top people in your organization saying this was not based on our expertise or our experience. So it kind of undermines the whole idea of Chevron deference that we grant to agencies like you.

And that is why I think you are going to continue to lose in the Federal courts, because if the rule is not based on the expertise and experience of senior Corps officials, you may have made the call that black is really white when your team is telling you that is not the case, but I think you are going to have a hard time convincing a court that you deserve Chevron deference when the expertise and experience of your agency, according to your own experts, was not part of this rule.

Do you have a comment on that?

Ms. Darcy. The final rule is based on the Department of the Army being the agency. The fact that the memos are now part of the public record in some of the court cases that are being developed, I will wait to see what the courts do as far as Chevron deference with regard to those memos.

Senator Sullivan. Okay. It is a very serious issue and that is why we are holding a hearing.

Let me just ask a final question. There are a lot of concerns on the Federal regulatory process. I think we in the Congress need to do a lot more in terms of oversight on this process, whether it is in the development of rules, and this is what we are focused on here, the development of rules; whether it is in the legality of rules, and not the Corps, but the EPA. Two Supreme Court terms in a row, big rules that they have issued, the Supreme Court has said have violated the Clean Air Act.

In the application of rules, and in a stunning statement, and I mentioned at the outset, but I am just stunned by it, the Administrator of the EPA essentially said, hey, whether we win or lose in the Supreme Court, it doesn't really matter because those American people who they are supposed to be represented, that we represent, they have to do what we say anyways.

I am amazed that my colleagues on the other side of the aisle don't look at that statement by the EPA administrator and

just drop their jaws in shock. That is the most arrogant thing I have seen.

Do you agree with that? Because right now WOTUS, there are a lot of people who don't like WOTUS. There are a lot of problems with WOTUS from a legal perspective. The Corps even said so. Again, I read the memos. They think it is not going to pass muster. Of course, the administrator thinks it does, but she probably doesn't even care because millions of Americans are going to have to abide by it before the Supreme Court finally rules on it.

Do you think that that is the way the regulatory system in America should work? And do you think the administrator's comment that drips with arrogance about what her role in the Federal Government is, do you think that is appropriate?

Ms. Darcy. I believe the administrator was commenting on her situation, and my comment here on the waters of the U.S. rule is that we are acting within the legal framework that we have been presented with, partly because the Supreme Court recommended that the Department of the Army and the EPA develop a rule under this Clean Water Act, and that is what we have done.

Senator Sullivan. But your own chief counsel thinks that this is likely not going to pass constitutional muster.

Ms. Darcy. No, sir. My chief counsel believes it does.

The deputy chief counsel for the Army Corps of Engineers at that point in time believed it would not.

Senator Sullivan. Okay. Okay.

Senator Whitehouse.

Senator Whitehouse. Madam Secretary, is it a novelty for there to be lively, even intense disagreements, in the internal agency deliberations and in the interagency process that lead up to a regulatory recommendation?

Ms. Darcy. Are they unusual, is that what your question is?

Senator Whitehouse. Would it be a novelty for there to be lively and even intense disagreements within the internal agency process and within the interagency process as the Federal Government prepares a regulation?

Ms. Darcy. No.

Senator Whitehouse. It happens pretty often, doesn't it?

Ms. Darcy. Yes, sir.

Senator Whitehouse. And let me ask you one other question, in the context of this being this like massive outreach of Federal power that is going to forbid a farmer from clearing his ditch and so forth. Are there any activities that you can identify, any at all, that were exempt from permitting requirements before this final rule that now the rule reaches out to and grabs where it wouldn't have before?

Ms. Darcy. No.

Senator Whitehouse. Thank you very much.

Senator Sullivan. Thank you, Secretary Darcy. We appreciate your willingness to answer these questions. This is, as I mentioned, an important issue.

Senator Cardin asked, what is this about? This is about oversight. This is about oversight. This is about our constitutional role with regard to agencies. The American people clearly want more oversight of agencies like the EPA.

And, again, I am a big fan of the Corps, but on these kinds of issues they are critical, and what is really critical is that the agencies and our Federal Government take action and promulgate rules that are based on the intent of Congress and statutes, and that is what we are trying to continue to focus on. I think my colleagues on both sides of the aisle would agree with that.

What we are trying to do, and Senator Barrasso mentioned it, if the rules don't do that, then what we should do is to work to pass a law. And we are working to pass a law, and we have bipartisan support on a new clean water rule law, and I would encourage my colleagues on both sides of the aisle in this committee to co-sponsor that important piece of legislation by Senator Barrasso.

Thank you again. This hearing is adjourned.

[Whereupon, at 11:59 a.m., the subcommittee was adjourned.]