# REGULATORY OVERREACH: IS EPA MEETING ITS SMALL BUSINESS OBLIGATIONS?

## HEARING

BEFORE THE

## COMMITTEE ON SMALL BUSINESS
## UNITED STATES
## HOUSE OF REPRESENTATIVES

ONE HUNDRED THIRTEENTH CONGRESS

SECOND SESSION

HEARING HELD
JULY 30, 2014

Small Business Committee Document Number 113–079
Available via the GPO Website: www.fdsys.gov

U.S. GOVERNMENT PRINTING OFFICE
88–925 WASHINGTON : 2015

For sale by the Superintendent of Documents, U.S. Government Printing Office
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# REGULATORY OVERREACH: IS EPA MEETING ITS SMALL BUSINESS OBLIGATIONS?

**WEDNESDAY, JULY 30, 2014**

HOUSE OF REPRESENTATIVES,
COMMITTEE ON SMALL BUSINESS,
*Washington, DC.*

The Committee met, pursuant to call, at 1:00 p.m., in Room 2360, Rayburn House Office Building. Hon. Sam Graves [chairman of the Committee] presiding.

Present: Representatives Graves, Chabot, Leutkemeyer, Tipton, Hanna, Huelskamp, Schweikert, Collins, Velázquez, and Payne.

Chairman GRAVES. Good afternoon, everyone. We will bring the hearing to order. I want to thank everyone for being here.

The mission of the EPA is to protect human health and the environment. Lately, the EPA has ventured well beyond its mission. Its recent rulemakings are an unprecedented power grab that are infringing on the rights of both the individual and small business owners. The results on our economy are potentially devastating and the EPA needs to reevaluate its decisions.

These rules have real and direct consequences for small businesses, and the American public deserves to have a complete picture of the costs and benefits of all these rules. Unfortunately, EPA seems focused on telling one side of the story and ignoring the other.

What the EPA is not revealing is how its rules will affect small businesses. The EPA is required to tell that story by the Regulatory Flexibility Act or RFA. The RFA requires EPA to go through the common-sense process of assessing how its rules will affect small entities and whether there are less burdensome ways to meet their objectives.

Instead of complying with the law and getting input from small businesses through formal panels and analyzing small business impacts, the EPA has ducked these rulemaking requirements.

Unfortunately, small businesses won't be able to duck the power plant regulations or "Waters of the United States" rule once they are finalized. They are being required to comply with the rules, pay the costs, and face the consequences.

While all small businesses want clean air and clean water, they also want rules that are very clear and rational. Small businesses want to know what they will be required to do, what the costs are expected to be, and how their operations will be affected. And last but not least, small businesses want to be treated fairly in the rulemaking process.

I hope this hearing is going to be a wakeup call for the EPA. Avoiding its obligations under the RFA is just simply not acceptable. For the past year, the Committee has been working to get the EPA to testify on this topic, and I very much want to thank Deputy Administrator Perciasepe for joining us today and I look forward to discussing this issue. And I, again, want to thank you for being here.

And I yield to Ranking Member Velázquez for her opening statement.

Ms. VELÁZQUEZ. Thank you, Mr. Chairman.

A clean environment and economic growth go hand in hand. Between 1970 and 2011, air pollution dropped 68 percent, private sector jobs increased by 88 percent, and GDP grew by more than 200 percent. This is not a coincidence as studies continually show that environment stewardship is not only good for our families, but also for our businesses.

Today, the EPA plays a vital role protecting public health and safety by implementing a vast array of environment laws, which in turn support our economy. Through its implementation of the Clean Air Act, we have seen significant improvements in our nation's air quality. In a given year, enforcement of the Clean Air Act has saved 160,000 lives, prevented 1.7 million asthma attacks, and stopped 13,000 heart attacks. It is estimated that 13 million missed workdays are prevented thanks to the cleaner air we enjoy, boosting economic productivity.

We have also seen similar benefits from the EPA's enforcement of water regulations. Since the enactment of the Clean Water Act, billions of pounds of pollution have been kept out of our waterways, doubling the number of safe areas for swimming and fishing. As a result, Americans are healthier, our waterways are being remediated, and industries like tourism, fishing, and recreation, which are dominated by small businesses, are seeing greater opportunities.

While it is fair to say that these outcomes are positive and that EPA is justifiable in pursuing such goals, the agency must always be mindful of how new rules and regulations impact our nation's small firms. To this point, our committee has already examined several EPA regulations and the agency's obligations under the Regulatory Flexibility Act.

What these hearings have shown is that the small business impact can vary from rule to rule. When it comes to electricity generation, it is clear that the direct costs are borne mainly by large utilities. However, with regard to the discharge of certain chemicals into the water, small businesses and farms are likely to bear more of the actual costs associated with the regulations. Yet, EPA determined neither rule will have enough of an economic impact on small firms to trigger RFA analysis.

During today's hearing I hope to hear how the EPA is implementing its obligation under the Regulatory Flexibility Act, as well as conducting outreach to small firms. Perhaps most importantly, I want to know how it determines not to meet the full requirements of the act. There is no doubt that small businesses want to protect our environment and should in many regards be an ally of the EPA. Not only are they leading the way when it comes to environmental technologies, but they can also help the EPA craft regu-

lations that promote clean air and water without overburdening the industry.

It is my hope that today's hearing will help bridge the gap between the EPA and the small business community, resulting in a cleaner environment and a stronger economy.

With that, I thank EPA Deputy Administrator, Bob Perciasepe, for his participation today, and I yield back the balance of my time. Thank you.

Chairman GRAVES. Thank you.

In 2009, the Honorable Bob Perciasepe was appointed by President Obama and confirmed by the Senate to serve as the Environmental Protection Agency's deputy administrator, and for nearly four decades he has worked on environmental issues from both within and outside the government. Mr. Perciasepe previously served as the head of EPA's water office and later its air office, and prior to becoming deputy administrator, he was the chief operating officer for the National Audubon Society. Mr. Perciasepe has also served as Secretary of Environment for the State of Maryland.

Director Perciasepe, thank you for taking the time to be with us today, and your written statement is going to be entered into the record. So please give us your oral statement.

**STATEMENT OF HON. BOB PERCIASEPE, DEPUTY ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY**

Mr. PERCIASEPE. Chairman Graves, thank you. Ranking Member Velázquez, thank you for those comments. And thank you for the opportunity to testify and answer questions of the members.

I am here today to talk about EPA's actions on the president's Climate Action Plan, and also under the EPA and U.S. Army Corps of Engineers' recently proposed rule that would clarify jurisdictional scope of the Clean Water Act.

Climate change is one of the greatest challenges of our time, threatening human health, welfare, and our economic well-being, and if left unchecked, will have devastating impacts on the United States and businesses.

That is why President Obama laid out a Climate Action Plan in June 2013, in which he directed EPA and other federal agencies to take steps to mitigate the current and future damage caused by carbon dioxide emissions and to prepare for the anticipated climate changes that have already begun to be set in motion.

EPA plays a critical role in implementing the plan's main—one of its first pillars, which is cutting carbon pollution.

The president asked EPA to work with states, utilities, and other key stakeholders to develop the plans to reduce carbon pollution from future and existing power plants, the largest source of carbon dioxide emissions in the United States.

In June of this year, the EPA proposed a Clean Power Plan for existing plants. The plan is built on advice and information from states, cities, businesses, utilities, and thousands of people about the actions they are already taking to reduce carbon dioxide emissions, and it aims to cut energy waste and leverage cleaner energy sources by using a national framework to set achievable state-specific goals, and it empowers the states to chart their own customized path to meet those goals.

The EPA's stakeholder outreach and public engagement in preparation for this rulemaking was unprecedented. Starting last summer, we have virtually met with thousands of people and had hundreds of meetings with a broad range of stakeholders, including small entity interests such as municipal and rural electric cooperatives.

Now, we are in the second phase after the proposal of our public engagement, and it has already begun. We have already had dozens of calls and meetings with states and other stakeholders, and more formal public process includes a comment period that runs through October 16th of this year. Public hearings are being held this week in Atlanta, Denver, Pittsburgh, and in Washington, D.C.

In addition to the president's action plan, I also want to take a minute to talk about the recently proposed jurisdictional rule under the Clean Water Act. In recent years, several Supreme Court decisions have raised complex questions regarding the geographic scope of the Clean Water Act. And for nearly a decade, members of Congress, states, local officials, industry, agriculture, environmental groups, and the public have asked our agencies—the Corps of Engineers and EPA—to make the existing rules on the book more consistent with the Supreme Court's rulings.

For the past several years, EPA and the Corps have received input from the agricultural community while developing the proposed rule. Using this input, the EPA and the Corps has worked with USDA to ensure the concerns raised by farmers and agricultural industry were addressed in the proposed rule. The proposed rule does not change in any way the existing Clean Water exemptions associated with agriculture, ranching, and forestry activities.

EPA also sought wide and early input from representatives of small entities, while formulating a proposed definition of this term that reflects the intent of Congress consistent with the mandate of the Supreme Court's decisions, and that was reflected in our proposed rule.

EPA has prepared a report summarizing the small entity outreach to date, the results of this outreach, and how these results have informed the development of the proposed rule. Since publishing the rule, the agencies have met many times with small businesses and other entities. Most recently, the agencies participated in an SBA-sponsored roundtable on July 21st. We look forward to continuing these efforts into the future, and before we finalize the rule, and during the remainder of the public comment period as we write the final rule.

Thank you again, and I will be happy to answer your questions, Mr. Chairman.

Chairman GRAVES. Thank you, Administrator. I appreciate it.

Administrator McCarthy recently came—was in Missouri, my home state, and she was talking about obviously "Waters of the United States," and she made the statement that the concerns of farmers and others—I want to make sure I say it right—that the proposed rules and the concerns about the proposed rules were silly and ludicrous, which I submit that the concerns of farmers, and small businesses, and everybody out there are certainly not silly or ludicrous. And I think a lot of these concerns may have been identified if the EPA had complied with the RFA. And that is my basic

question here today, is why the EPA did not convene small business advocacy review panels. That is what it requires. They are formal panels, and you have said your statement that you have gotten input from the Ag community. I would like to know what that is. And when you say small entity outreach, what does that mean in terms of—and why did you all not do what the RFA does require? Because informal outreach is not small business review panels.

Mr. PERCIASEPE. Under the RFA, we are required to—I am sorry. I will get the hang of that in a second here, Mr. Chairman.

Under the RFA, whatever the regulatory agency is, not just EPA, is required to look at the small entities subjected to the rule. And this is the interesting thing about the Waters of the United States rule. It is a definitional rule. It defines where the other parts of the Clean Water Act will actually apply. So it does not directly impose any requirement on anybody if they are not discharging pollution. So it does not directly impact large businesses or small businesses in any direct way.

So the jurisdictional determinations of whether the Clean Water Act would apply or not, and whether a state agency who is implementing the Clean Water Act under the arrangements under the law, would have to require an entity, small or large, to get any kind of permit would only be related to whether or not they were going to discharge pollution. And this regulation does not regulate discharges of pollution, just where the existing permit programs would have to work.

But also, more importantly, we are reducing the scope of where the Clean Water Act applies from the current on-the-books regulations that the Supreme Court was acting on in the last decade, and so we are not expanding where permits would be required.

And so when we looked at all of that together, we did not see the applicability under the Regulatory Flexibility Act. However, we did see a desire, as we almost always have, of being able to engage all stakeholders, including small entities, and we have had a process underway to do that. And we will continue. We are planning more roundtables, as well.

Chairman GRAVES. When you say no discharge, discharge can include dirt and sand runoff. Water, rainwater.

Mr. PERCIASEPE. Rainwater is not a pollutant.

Chairman GRAVES. Well, when it interacts with dirt and sand and you are carrying dirt and sand, that is considered a pollutant by the EPA.

Mr. PERCIASEPE. It would have to be—let me just be clear. The jurisdiction of the Clean Water Act is where the existing laws and regulations would apply, not in any new requirement. So if you have to get a permit now, you would have to get a permit under this. But if you do not have to get a permit now, most likely you will not need a permit under this. If you plow, plant, and harvest, walk cows across a field, all these other things that you do in normal conduct of agriculture, if you do that now, you will be able to do that under this rule without any additional requirements from EPA or the Corps of Engineers.

Chairman GRAVES. We go back to my original question. Before we do, you did say that you are reducing the scope in terms of the Clean Water Act, did you not?

Mr. PERCIASEPE. Reducing.

Chairman GRAVES. In your economic analysis, the EPA's economic analysis, you say there is a 3 percent increase in jurisdiction.

Mr. PERCIASEPE. So the existing regulations were done in the 1970s and modified in the 1980s, and they have a very broad definition of what waters of the United States are. And essentially, we are asking field biologists to go out and determine whether any place on the landscape where water may be running has some impact downstream or on interstate commerce. That is what the current—the Supreme Court said we cannot use interstate commerce as a way to do this. It has to be based on some kind of scientific basis. I think they use the term of art "of significant nexus."

Chairman GRAVES. Significant nexus.

Mr. PERCIASEPE. So when we went back and looked at 20,000 different determinations that were done in the last five years, and we applied it as strictly as we could, we saw somewhere where the applicability would go away, and we saw some where they had made the wrong call on the ground, even with the old regulations. So we were being conservative and said this looks like it could increase the amount of positive determinations for jurisdiction by 3 percent. But the existing regulation is much more expansive than that and has not been applied completely uniformly around the country. So this will actually constrict that.

Chairman GRAVES. Well, why did the EPA not do small business, you know, the formal small business advisory review or advocacy review?

Mr. PERCIASEPE. Well, we did not do it because—and it is not that we did not want to talk to small businesses, but we did not have the formal panel because the panel is for the direct impact on a significant number of small entities—a significant impact on a substantial number of small entities. The direct impact is not here from this rule. The impact, if any—and we think there will be not much, if any—is from the existing regulations that would apply.

Chairman GRAVES. So what you are saying is that you determined, or the EPA determined that there was not going to be an impact so you did not have to comply with the RFA, which is the process of determining if there is any impact?

Mr. PERCIASEPE. Well, we went through that analysis.

Chairman GRAVES. You are supposed to get input from small businesses to help make that determination.

Mr. PERCIASEPE. Yes. I believe we are required to lay out our rationale for what I just said in more detail in the proposed rule.

Chairman GRAVES. Well, I think this is, you know, is far-reaching. In fact, the term navigable waters is used some 80 times in the Clean Water Act, and when you come back and you do something as so far-reaching and we use new terms like "significant nexus" or in one of the expansions of this, too, is now a jurisdictional rate, a water that is adjacent to a jurisdictional water, which I do not even know what that means in terms of how expansive that could be. That could include anything. And it comes back to, as well, when you are making that determination on discharge or what that significant nexus is, that is an extraordinarily subjective determination. Obviously, going to be made by the EPA. I think

with the impact that is out there with this, you know, it really bothers me that you all determined that this is not going to have an impact because we believe it does, you know, in a big way. And to say that we do not have to comply with the RFA because we do not think there is an impact I think is wrong.

I have called on you all to withdraw this rule. I am asking again. I think the EPA needs to withdraw this rule and go through the process the way it should be gone through and follow the law. And I am very disturbed by that. And I am very disturbed by some of the things that have been brought out just now. I was not expecting some of your answers.

With that, I will turn to—I will have some other questions later but I will turn to Ranking Member Velázquez.

Ms. VELAZQUEZ. Thank you, Mr. Chairman.

Deputy Administrator, the Clean Power Plan provides states with some flexibility to meet emissions reduction goals as they see fit. What happens if states fail to submit their plan by the deadline or EPA concludes a plan is not satisfactory?

Mr. PERCIASEPE. It is our full hope and aspiration that that will not happen. That is why we are spending a lot of time with every state. We have tailored this rule so that it is tailored for every state, and we are meeting with every state to try to work through how they can make their plan successful. So, you know, the law has provisions in it that when states fail to do plans under the Clean Air Act, the EPA has the authority to propose a plan. We do not want to do that, and that would not be our objective.

Ms. VELAZQUEZ. Okay. In your testimony, you highlighted that many industries, including agriculture and forestry will continue to be exempt from most permitting. Do you expect the new rule will necessitate additional industry exemptions?

Mr. PERCIASEPE. You are talking about the water rule?

Ms. VELAZQUEZ. Yes.

Mr. PERCIASEPE. Yes. Well, under the Clean Water Act, agricultural activities are exempt from the rule—from the jurisdiction of the Clean Water Act, so that even if a water is jurisdictional under the proposal, if you are doing agricultural activities, you are exempt. You do not need to comply with any permitting processes, and we are not changing any of that.

One of the things we have tried to do is clarify issues that farmers have brought up to us concerning ditches, where they may do some ditching to drain some upland areas when it rains, or even industry may do some on their industrial lot. Or some ditches at the side of highways. For the first time, we have never made it clear that those are not jurisdictional. Those would not be under the jurisdiction of the Clean Water Act.

Ms. VELAZQUEZ. Okay, Deputy Administrator, I guess you understand by now that there is frustration in this Committee regarding the fact that we have the Regulatory Act that would allow for agencies to compel or create a panel review process so that it will give a voice to small businesses. And I think that if you do that, the agency wins and small businesses also win because you will issue better regulations when you have input from small businesses. And small businesses will be more satisfied because they feel that you have been able to listen to them. I do not know why

the reluctance. I just do not understand how you conclude or come to the conclusion that there is no direct impact on small entities because you have not provided us the process upon which you arrived to that conclusion.

Mr. PERCIASEPE. Well, certainly, I want to be able to provide that to the Committee, and we will endeavor to do that. But whenever we do a rulemaking and we make a decision in our proposal that the direct impact—there may be indirect impacts, but the direct impact is not from the EPA rulemaking, then the law prescribes that that does not require a panel to be set up. But I want to be clear. That does not mean we should not reach out to small businesses.

Ms. VELAZQUEZ. And I understand you did.

Mr. PERCIASEPE. And work with them.

Ms. VELAZQUEZ. I understand you did.

Mr. PERCIASEPE. And we did.

Ms. VELAZQUEZ. Right? But my understanding is that the outreach took place three years ago and the language now is different.

Mr. PERCIASEPE. On the water?

Ms. VELAZQUEZ. Yes.

Mr. PERCIASEPE. Yes. We had a whole bunch of sessions a couple of years ago when we were working on guidance. People told us not to do a guidance, do regulation. We have proposed a regulation, which was built on some of the work we did back at that point. But since that time we have been working with SBA to do roundtable discussions. And as I mentioned, we had one on July 21st and we are planning to have more before we would finalize the rule. Roundtable discussions with small businesses.

Ms. VELAZQUEZ. So will you please share with us what you learned from that SBA roundtable?

Mr. PERCIASEPE. Well, on the water side, believe it or not, we are learning that small businesses really want clean water, and it is really becoming clear. In fact, there was a recent poll done by the American Sustainable Business Council that found that 80 percent of small business owners want protection similar to what we are talking about; that 71 percent said clean water is necessary for their businesses.

But we are also finding that they want to be clear when they are in, when they are out of that jurisdiction. And so one of our objectives is to take the existing regulations, which are—and see, one of the issues we have is people have not looked at those old regulations back in the 1970s and 1980s for a long time, and so when we put out a new one that is trying to replace it, they are only looking at the new one, and the old one is even vague. It is very vague. You know, downstream, interstate commerce, it is not a scientific principle, so we are trying to pull it back into a more defined place to provide that increased certainty, and that would be our objective, and we are hoping to get more comment on that.

Ms. VELAZQUEZ. Thank you.

Chairman GRAVES. To clarify real quick, because you keep bringing up the exemption, the Ag exemption, but that is only section 404, dredging. There is no exemption for Ag under section 402.

Mr. PERCIASEPE. If they are discharging pollution, like from a point source of solution.

Chairman GRAVES. Okay. That can include, again, rainwater.

Mr. PERCIASEPE. If it is runoff rain, it is nonpoint source pollution and it would not be covered under section 402. It would actually have to be in a pipe and be something that they are discharging, and Congress in 1987 asked that large animal feeding operations that discharge into a point source would be covered under 402. That is in the 1987 Clean Water Act amendments.

Chairman GRAVES. Mr. Luetkemeyer?

Mr. LUETKEMEYER. Thank you, Mr. Chairman.

Administrator Perciasepe here, I want to thank you first. I know that one of the things I am working on is the proposed rule that is out there with regards to wood burning heaters. I have offered a bill to stop the nonsense of what you are trying to do, and I understand that there is some discussions going on between you and industry folks which I am very thankful for, and I hope that proceeds. I understand the need for conformity across the spectrum of this, but to go down the direction that we were going down there is pretty problematic for me. So I thank you for the willingness to work with industry.

With regards to the other issues before us today, it is stunning to me when you make your statements that you did not see the effect on small business from trying to define a word in the law. To redefine or clarify is going to have dramatic impact. When you say, if you just define the word "customer," if you redefine that suddenly you have from a very small group of people to a very large group of people. To take the word "navigable" out of this is unbelievable to me. And to not then go through the process of checking out the—doing the due diligence and the small business report and analysis before this is either extremely naïve and incompetent or it is arrogance in its highest to be able to flaunt your authority by ignoring the laws, the rules, the process, the procedure. This is unacceptable. Absolutely unacceptable, especially whenever you look at the fact that within this law there is also the word "hydrologically connected," which means that all the waters, whether they are above ground, below ground, wherever, they are hydrologically connected, and the rain situation, it connects everything. This is extremely important. Extremely important. I cannot stress it enough, especially for rural parts of our country. I offer you an opportunity to discuss it.

Mr. PERCIASEPE. Well, thank you for that question. You know, you are getting at the crux of the issue under the Clean Water Act, and we have to look at the body of everything that has been going on, not just old rulemakings of the Corps of Engineers and EPA, but also the Supreme Court rulings and what they have been telling us to do. And they have consistently been clear that it is not just navigable in the traditional sense. Particularly when you are dealing with clean water, the stuff that flows into the navigable, if it is polluted, it will pollute the navigable. And so everybody from Justice Scalia to Justice Kennedy have made it clear that it is more than just the navigable. It could be seasonal. I think that is a quote from Justice Scalia. Justice Kennedy uses the words "significant nexus."

And to go back to your question, and I think this, Mr. Chairman, may get at some of your questions, yours as well, significant nexus

is a new thing that the Supreme Court gave us. So we are trying to find out the purposes of the executive branch putting out a proposed regulation, and I have dicta here Chief Justice Roberts telling us to do these regulations.

Just one more second. I promise.

So nexus is definitely hydrology, as you just pointed out. And what is the connection? Well, you could make the argument as the chairman made that rain falling is connected somehow. And so one of our jobs in this rulemaking, and one of the things that we are most interested in trying to get more input on, is how do we define significant? Everything might be connected but it is not all significant. So back in the old regulation it said if it had any impact, probable or any impact on downstream interstate commerce, what we are trying to use is the science of hydrology and say it has to have certain characteristics that are identifiable by a hydrologist that there is enough flow in that water course that it is frequent enough, and enough that it creates these characteristics on the landscape. Otherwise, it is not significant. So we have tried to do that in this rule.

Mr. LUETKEMEYER. You just made my point though, sir, of why did you not have—why did you not go through the rulemaking process that you are required to? Because you just admitted it is a tremendously impactful situation you are discussing here. And you do not think it is not going to impact small businesses when you just said it is huge. You have got the Supreme Court involved in trying to define things and sort of direct you in some of your activities. And it is not worthy of going through the process that you are required to do, to go through and figure out the impact on small business? That is what the chair was talking about and what this hearing is all about today.

Mr. PERCIASEPE. And we are working with small businesses and with the Small Business Administration.

Mr. LUETKEMEYER. Yeah, but you just talked about how important it was and how big a problem it is, and yet now we still did not go back and do what you were supposed to do, which is determine the impacts based on the defects of it.

I see my time is over. Stunning. Absolutely stunning.

Chairman GRAVES. Mr. Tipton?

Mr. TIPTON. Thank you, Mr. Chairman.

I would like to be able to submit for the record a letter from the Waters Advocacy Coalition. It is signed by 39 different organizations, among those the American Farm Bureau, the American Gas Association, Foundation for Environmental and Economic Progress, National Association of Home Builders, National Pork Producers Council, many others. The basic content of the letter is objecting to the insufficient analysis offered by the EPA on the impacts that this rule will have.

Chairman GRAVES. Without objection, submitted.

Mr. TIPTON. Thank you.

Mr. Perciasepe, I am sorry.

Mr. PERCIASEPE. Bob.

Mr. TIPTON. Okay, Bob. As the letter that I am just referencing from the Waters Advocacy Coalition is noting, the agency certified the Waters of the United States rule as one that will not have sig-

nificant economic impact on a substantial number of small entities, yet the agency did not provide any factual basis for that certification as required under the RFAs. Did the EPA simply fail to do this because a factual basis did not actually exist?

Mr. PERCIASEPE. We provided an analysis to make the determination that the rule itself, looking at direct impacts, which is what we are required to do under the RFA, would not have a significant impact on a substantial number of small entities.

Mr. TIPTON. What do you qualify is a substantial number?

Mr. PERCIASEPE. Well, it is more the direct impact than the number.

Mr. TIPTON. So we do not even know what the number is when we are talking about who is going to be impacted?

Mr. PERCIASEPE. Well, we are not expanding the jurisdiction of the Clean Water Act. So any small entity that is currently covered by the Clean Water Act will continue to be covered by the Clean Water Act. We are not making more of them covered.

Mr. TIPTON. Actually, you are saying not making more covered, but in your testimony you stated that people want to be clear whether they are in or out of jurisdiction, but under the determinations you are making you clearly can expand jurisdiction.

Mr. PERCIASEPE. But that is not what we are proposing. We are proposing to not add any new waters to what is covered in jurisdictional. We are trying to exclude certain things.

Mr. TIPTON. Is there connectivity between all waters?

Mr. PERCIASEPE. There is, but they are not all significant.

Mr. TIPTON. So does that, in fact, give you complete control?

Mr. PERCIASEPE. They are not all significant and we make it clear in the rule that they are not all significant.

Mr. TIPTON. What is significant?

Mr. PERCIASEPE. We have defined some hydrologic characteristics that would make a water significant.

Mr. TIPTON. What are they?

Mr. PERCIASEPE. In the science of hydrology, if you look at a flowing area, whether it is flowing all the time——

Mr. TIPTON. Flowing year round?

Mr. PERCIASEPE. I said whether it is flowing intermittently——

Mr. TIPTON. What is intermittently?

Mr. PERCIASEPE. Not all year round.

Mr. TIPTON. Not all year round. So it could be 10 minutes?

Mr. PERCIASEPE. Well, let me—it could be enough that water flows there frequently enough——

Mr. TIPTON. What is frequently?

Mr. PERCIASEPE. All right. You are not going to let me answer?

Mr. TIPTON. No, I am just trying to get down to the actual definition because the arbitrary nature of this rule——

Mr. PERCIASEPE. It is not arbitrary, sir. And if you let me answer I can give you some clarity.

Mr. TIPTON. Go ahead.

Mr. PERCIASEPE. In the science of hydrology, you can look at a flowing—a depressed area where water would flow, whether it flows full-time or part-time—let us use those plain English words—it will exhibit characteristics on the ground. There will be a bed.

There will be banks. There will be an ordinary high water mark. These are things identifiable to hydrologists. And if you do not have those characteristics, then there is not enough frequency of flow or volume of flow that would make it jurisdictional under the Clean Water Act. That is what we propose. That is limiting to anything that might have an impact downstream to interstate commerce.

Mr. TIPTON. What you have just described to me—I live in the southwestern United States, in Colorado—we get one rainstorm, and with the lay of our land, you could have a high water marked caused by a 10-minute flow that then disappears. So under what you are describing to me, a 10-minute flow that happens once a year then becomes——

Mr. PERCIASEPE. An ordinary high water mark is not something from being wet 10 minutes ago. It is something that can be seen on the rock in terms of debris or discoloration of the rock.

Mr. TIPTON. Or a cut in the bank of dirt?

Mr. PERCIASEPE. Erosional features are not covered. Erosional features. We excluded those.

Mr. TIPTON. I would like to be able to move on just a little bit here and move in a little different direction.

If you put out a rule under EPA, do you expect it to be followed?

Mr. PERCIASEPE. Well, yes.

Mr. TIPTON. You do? Should you comply with the RFA and with NEPA?

Mr. PERCIASEPE. Yes, we do.

Mr. TIPTON. You do? So is it appropriate right now under section 104 of the existing Clean Water Act that both retroactively and preemptively you are shutting down projects before determinations have been made under NEPA and the RFA?

Mr. PERCIASEPE. I cannot answer that question because I am not sure what you are——

Mr. TIPTON. Are you preemptively shutting down projects right now based off of the proposed rules, saying that you cannot proceed?

Mr. PERCIASEPE. We have not done that.

Mr. TIPTON. What about—I am sorry?

Ms. VELÁZQUEZ. They have not issued the rule.

Mr. TIPTON. But we have got a proposed rule.

Mr. PERCIASEPE. Right. But we have existing regulations that are more expansive than the proposed rule.

Mr. TIPTON. Okay. You know, up in Alaska, I just read—is it the Prebble Mine? Is that right? Pebble Mine?

Mr. PERCIASEPE. Bristol Bay.

Mr. TIPTON. Crystal Bay. Have you shut that down before the analysis has been done?

Mr. PERCIASEPE. Our regional administrator made a finding that is out for public comment.

Mr. TIPTON. Does that comply with NEPA?

Mr. PERCIASEPE. There has been no action taken on that.

Mr. TIPTON. No action. So it is not allowed to move forward until the action takes place?

Mr. PERCIASEPE. They can do whatever they want while that action is under consideration. And that action is to look at an area of water that we would not want to see discharge into.

Mr. TIPTON. Okay. Thank you, sir. I do not know if we are going to have a second round. I am way over time, Mr. Chairman.

Chairman GRAVES. We can.

Mr. Collins?

Mr. COLLINS. Thank you, Mr. Chairman.

Mr. Perciasepe, I have got to give you credit. I think you knew you were coming into the lion's den today and here you are. So I do give you a lot of credit. It is hard to defend the indefensible. And that is what your agency has sent you here to do.

And for full disclosure, Mr. Perciasepe and I participated in a hearing a week or so ago on this very same issue on the Science Committee, and I will admit I concluded that hearing by saying to Bob that the public does not trust EPA. Farmers do not trust the EPA not to overreach. Congress does not trust the EPA. And at that point in time I pointed out the rule should be withdrawn, plain and simple and the EPA should start over.

What we had in our Committee hearing in Science was we kept hearing words like confusion, uncertainty, misunderstanding, clarification throughout that hearing, and this was democrats and republicans alike. And I would like to also point out we all know about gridlock in Washington. There is only one agency that unites democrats and republicans, and that is distrust of the EPA. Your agency has united us where it is very hard to do so.

Ms. VELAZQUEZ. Please do not talk. Do not represent me. Okay?

Mr. COLLINS. Okay. Well, here is what I can say factually to our ranking member. A majority of Congress, a majority of Congress, 240-plus members, republicans and democrats signed the letter that I authored to the EPA saying we do not trust you; withdraw the rule. That was a majority of the members of Congress. And your agency has continued to disrespect Congress, to go down your own road, and again, continue in this rulemaking when a majority of Congress—democrats and republicans—and on the Science Committee, the harshest questioning came from the democrat side about this particular rule. And I just came from a hearing in Science on the Clean Air Act and the war on coal. And a former Obama administrative official from the Department of Energy summed up the EPA this way, to paraphrase, the arrogance of the EPA is beyond pale. The Department of Energy was not legitimately asked to participate in the sum of this rulemaking. And in fact, he called it a political agenda by the administration and the EPA. This is a former Obama administrative official less than two hours ago.

So my question is very simple. Given the facts, the majority of Congress has asked you to withdraw this rule, why will the EPA not withdraw the rule, start over? There is no rush. You are not under a deadline. There is no judicial deadline. What is the harm in listening to Congress and withdrawing this rule, clarifying all the misunderstandings and confusion and everything else, and come out with a clean rule? Why will the EPA not do that? Or will you do that?

Let me start with will you withdraw the rule? Yes or no?

Mr. PERCIASEPE. The agency——

Mr. COLLINS. Yes or no?

Mr. PERCIASEPE. No.

Mr. COLLINS. Okay. Why not, given that Congress has asked you to do so?

Mr. PERCIASEPE. You know, you all have put the agency in a very difficult situation. We are trying to improve the situation out there given the Supreme Court constantly——

Mr. COLLINS. But let me go back to why will you not withdraw the rule and start over? What harm is there in withdrawing the rule and starting over when a majority of Congress is on the record asking you to do so, republicans and democrats? What is the harm in doing that and do the RFA? What is the harm? Is there any harm? Is there something we do not see?

Mr. PERCIASEPE. We continue with the uncertainty that everybody——

Mr. COLLINS. What is the harm in withdrawing the rule?

Mr. PERCIASEPE. The harm would be in maintaining the uncertainty that currently exists, and we are not going to—we are going to continue to try to solve that problem. This is just a proposal.

Mr. COLLINS. So, again, let us just be clear. You do not care that a majority of Congress——

Mr. PERCIASEPE. I do care.

Mr. COLLINS.—who sets the laws——

Mr. PERCIASEPE. I do care.

Mr. COLLINS.—has asked you to withdraw the rule?

Mr. PERCIASEPE. I do care very much.

Mr. COLLINS. Then why do you not withdraw it?

Mr. PERCIASEPE. Because I need to fix the rule.

Mr. COLLINS. No, you need to withdraw the rule. Congress has asked you pointedly, withdraw the rule. You have just said no. There is no legitimate reason. There is no timing. There is nothing but the arrogance of the EPA.

Mr. Chairman, I yield back.

Mr. PERCIASEPE. You know——

Chairman GRAVES. Go ahead.

Mr. PERCIASEPE. I mean, I have a Supreme Court Chief Justice——

Ms. VELÁZQUEZ. That was my question.

Mr. PERCIASEPE. Who is saying why do the agencies not do this?

Ms. VELÁZQUEZ. Yes.

Mr. PERCIASEPE. And so, you know, there are three branches of government. I have got one branch who wrote me when I was the acting administrator saying please do a rulemaking. Now I have that branch saying maybe we should withdraw it. I have another branch of the government—you know, I am going right back to the Constitution here. I have another branch of the federal government saying when are the agencies going to get their act together and do a rulemaking? So, I would propose that it would be in everybody's interest for us to take the comment, get a——

Chairman GRAVES. I just thought it would be in everybody's interest for us to take the comment——

Ms. VELÁZQUEZ. Would the gentleman yield?

It is kind of cynical. And look, I am a member of this committee for 22 years. I have been fighting the administration, whether republican or democrat, when I feel that things are not done right on behalf of small businesses. But I have to say that when it comes to repealing Obama Care, the Supreme Court is the law of the land. When it comes to the issue of water, the Supreme Court, is telling them that they have to address the issue. There's just no winning in this house.

Chairman GRAVES. Just to clarify, was there a judicial deadline? I just ask to clarify. Was there a judicial deadline?

Mr. PERCIASEPE. No, sir.

Chairman GRAVES. Mr. Schweikert?

Mr. SCHWEIKERT. Thank you, Mr. Chairman.

I would like to submit to the record, from a roundtable we held in Arizona about a month and a half ago, the transcript.

Chairman GRAVES. Without objection.

Mr. SCHWEIKERT. Thank you, Mr. Chairman.

Mr. Perciasepe, and from future—from now known as Administrator Bob. How is that?

Mr. PERCIASEPE. Deputy Administrator Bob.

Mr. SCHWEIKERT. Excuse me, Deputy Administrator Bob.

And there is a rumor going around you are going to be leaving us in a few weeks. Is that true?

Mr. PERCIASEPE. Yes, it is correct.

Mr. SCHWEIKERT. And this is how you celebrate your departure, is hanging out with us?

Mr. PERCIASEPE. I know that I am trying to represent my position of my agency and the president correctly here but I view this as my solemn duty to do so.

Mr. SCHWEIKERT. And you were in front of the Science Committee a couple of weeks ago, and as I even shared with both my staff and even some of the members on the other side, I thought you treated me particularly fairly because some of the discussion, having spent a lot of time digging into this Waters of the U.S. rule, it is complicated. But you do understand our stress level, particularly for those of us from the arid southwest, what some of these rules mean.

I am going to ask a favor of you.

Mr. PERCIASEPE. Yes, sir.

Mr. SCHWEIKERT. Because rumor is you are leaving in about three weeks. In the Science Committee there was a request from Mr. Webber from Texas specifically asking for any of the maps that Fish and Wildlife—and I know you provided some of the maps but we would really like to get our hands on any of the mapping that was provided by Fish and Wildlife in helping sort of design the impacts and the calculations, particularly economic impacts of this rule.

Mr. PERCIASEPE. Okay. I think we may have provided those maps earlier this week, but if not, I will absolutely make sure that they go in there.

Mr. SCHWEIKERT. My notes may be a little bit——

Mr. PERCIASEPE. That is fine. You know, there is always a running back and forth between all of us. But let me just say that

when I did look into that, I did discover that the maps were created as far back as 2005, and they have been updated since then. And they were not for regulatory purposes. But I think all the maps that I think we had, if they are not at the Committee now, they are going to be there this week.

Mr. SCHWEIKERT. Well, Deputy Administrator Bob, one of our concerns is was the mapping also used in trying to do some of the economic analysis and trying to understand its impact of the rules?

There was one scenario that I left from last week, and I really wanted to sort of walk through because you have personal experience on this. When you were with—was it Sierra Club before?

Mr. PERCIASEPE. No. No, sir. I was with the National Audubon.

Mr. SCHWEIKERT. Oh, sorry.

Mr. PERCIASEPE. Bird conservation.

Mr. SCHWEIKERT. And one of the projects was in our Dry Salt River.

Mr. PERCIASEPE. Yes.

Mr. SCHWEIKERT. And it is a beautiful project. You know, the rehabilitation using the gray water.

Under this updated Waters of the U.S. rule, do you believe you would have to get a 404 permit to do that project today?

Mr. PERCIASEPE. The actual restoration?

Mr. SCHWEIKERT. The actual retention, the movement, the capturing of the water, the actual project, would that project, from beginning to end, today require a 404 permit? Particularly, also, some of the—there was some environmental damage. I mean, old batteries in there.

Mr. PERCIASEPE. There was a brownfield site across there. And I think as I mentioned to you I worked with the former mayor of Scottsdale, Sam Campagna, to do that project. And it may have gotten a 404 permit. I think it was the Corps of Engineers that did that restoration.

Mr. SCHWEIKERT. Actually, I think they actually did some of the water channeling. I think the project was separate. I am reaching back in my mind.

Mr. PERCIASEPE. Well, down in the stream bed, where I have actually gone birding and looked at where there has been some water brought into there and some vegetation is now growing, in that streambed, if there was a disturbance of the streambed——

Mr. SCHWEIKERT. It would have required, particularly under——

Mr. PERCIASEPE. But up on—yeah.

Mr. SCHWEIKERT. Because there are two mechanics, and I have only like 45 seconds to try to run this through. One was in many occasions where we have actually tried to do good acts, my fear is if this gets an expansive interpretation, all of a sudden the good acts, I am now going to be required to get a 404 permit and go through those hoops. So in some ways is there a potential we are creating a barrier to there?

And I am going to sort of leap and let you sort of combine the answers. The last time I sort of walked through a scenario of, okay, this is not about the water, it is about anything that is a pollutant in the water. So our little scenario of the dry wash behind my

home, and I put fertilizer and plant and the sediment, you know, and that 14 inches of rain I get a year that all come on a Tuesday, it is running down the wash and hits the Verde River, and the Verde River hits the Salt River, and runs into the rehabbed riparian area, I use fertilizer. I move dirt. It potentially got washed down that dry wash into a running river. Did I potentially need a 404 permit in planting my tree? And what is my exposure that may not be your intent today, but the way this is drafted, there is a whole new cause of action and future litigation that is coming at us that the lawyers now get to spend the next decade moving that direction?

Mr. PERCIASEPE. Well, the quick answer is, without—and I want to put the asterisks next to this. I would love to go to your house and look at this project myself, but I would say it is highly unlikely it is significant under the way we prepared this rule. Whereas, the existing regulation, the law on the books that the Supreme Court has been opining about, it has no such clarity of what is significant. It just simply says anything the field biologist thinks might have an impact downstream.

Mr. SCHWEIKERT. Mr. Chairman—because I am way over time—litigation exposure.

Mr. PERCIASEPE. Yeah. I mean, I think it would be less than what currently exists.

Mr. SCHWEIKERT. Thank you, Mr. Chairman.

Chairman GRAVES. Mr. Payne?

Mr. PAYNE. Thank you, Mr. Chairman.

And I will follow Mr. Schweikert's lead and call you Deputy Administrator Bob. And also, based on, hearing that you are going to be leaving, probably after today you figure you should have left three weeks and a day earlier. Well, we are going to try to just get some questions answered.

There has been a lot of discussion about how the EPA's new rule can negatively affect. Can you just list or describe ways that it can positively affect small business?

Mr. PERCIASEPE. Well, I will just do something very quickly here.

On the water definitional rule, or the Waters of the United States, we firmly believe—and we heard this from the discussions we have had with small businesses that (a) they want to make sure that the law is interpreted correctly because they want clean water; but second, they want to be able to have clarity or the certainty of what is in and what is out. And you know, we are struggling to do that. And that is our intent to try to do that. And we will continue to endeavor in that.

On the Clean Power Plan rule that we have talked about a little bit here, one of the things that EPA has laid out there is that we want states to really seriously consider energy conservation as an important part of what their plan might be. And I know for sure that the whole sector of energy conservation, whether it be smart grids or how to make things better in your house is going to be very oriented to small business opportunities.

Mr. PAYNE. As a matter of fact, through Homeland Security and the Cyber and Security Bill, I have a piece of legislation that was amended into that bill and to do a smart grid study for upgrading

the grid across the country and benefitting areas that tend to have natural disasters and also looking at manmade. So that is right up my alley.

Now, why are you having such a hard time getting small business to understand these issues?

Mr. PERCIASEPE. Well, I think that we are spending a lot of time with small business. I know that one of the issues the Committee has is why not do that under the Regulatory Flexibility Act, and it is because a lot of the impacts that may or may not accrue, and a lot of the benefits that may or may not accrue, depending on how these proposals unfold, will be indirect impacts or indirect opportunities, and the Regulatory Flexibility Act deals with direct impacts. So we are not regulating somebody who does an energy conservation project, you know, with a new kind of thermostat. We are not regulating those people, but they may have an opportunity to provide more business.

So we have reached out to small businesses. We have roundtables underway with the SBA on the water rule. We are in the process of finishing up our formal hearings this week on the Clean Power Plan, and then we plan between now and when the rule is finalized, and even way before that, to spend even more time with small businesses, whether it is small co-ops or small municipals, or even the indirectly impacted small businesses.

Mr. PAYNE. Okay. And, you know, around the whole issue around the complexity of all of this, you know, the Clean Water Act, you know, increase the amount of time it takes to make jurisdictional determinations. In your estimation, how much shorter time will these jurisdictional determinations take with the proposed rules as opposed to the old ones?

Mr. PERCIASEPE. The current one, because of the way it is written, requires almost every request for—or any project that might be near water, for them to go through a process on a case-by-case basis with the Corps of Engineers. The other thing we are trying to do here, and the intent is to have enough definition, so along the lines we were talking about earlier, Congressman, that it would reduce the number of case-by-case determinations and therefore make it more quickly apparent whether they will have a jurisdictional issue or not.

But I also want to point out, if you are not going to discharge pollution or put fill into the water, it would not matter one way or the other.

Mr. PAYNE. Okay. Thank you very much, and I yield back.

Chairman GRAVES. Mr. Hanna?

Mr. HANNA. Hi, how are you?

Mr. PERCIASEPE. I am fine.

Mr. HANNA. Good.

You know, if you are trying to prove that you are trying to make things easier, you are not really doing it. As you can sense, the cynicism in this room is, at least on our side of the aisle, profound. And I do not think that it is borne out of some disinterest in the environment or anything like that. I think for one thing, your former administrator, Lisa Jackson, her comment that it was not her job, to paraphrase, to worry about the economy, if you remember that, was, I think, a scary thing to hear for everyone in the

country. And the subjective nature of the conversation here today and the notion that so much about this has the potential to be arbitrary and capricious and the concern that the farmers and builders and contractors that I deal with daily—I was in construction for many years—it is not in any way—and I am not surprised that you said that businesses are concerned to have clean water, I mean, who is not? That is really not much of a statement with all due respect, or a surprise.

The problem your organization has is nobody believes you. You have no credibility here because, frankly, people feel put upon and the burden—I just went through almost 13 years in our community to get a 404 permit through the Army Corps of Engineers for something that was a relatively simple process and it would appear to a lot of people I know, and I am sure you hear this, too, that the EPA is now our enemy, not our friend. That somehow everything has become so burdensome, so complicated, so drawn out that the growth that we look for in our economy, the opportunities that lie in front of people, that you are an obstructionist organization and not someone who ushers them through the process. And for people in business, you know, every bureaucrat that walks through the door, it feels like they are throwing an obstacle at their feet. And here you are, one more, but yet you are bigger than all the rest and you people assume that you can in some way interfere in everything, everywhere, all the time.

And when I hear the definition of navigable waterways, you know, and people want to believe—people are inclined to believe that it means the water off their roof. So when you explain that it does not, and I am just telling you what the people I work for feel, they do not believe you, and they are concerned. And if the concern seems disproportionate to your intent, which I am listening to you, and I believe you are earnest in what you are saying, you need to back up because frankly the outcome that you desire is going to be pushed back by this entire country, not because it is not an outcome that we might all want and even agree on, but because frankly, nobody believes you.

I wonder how you feel about that. Or if you even agree.

Mr. PERCIASEPE. Well, I have not, and nor does EPA do polling to determine who believes us or who does not believe us——

Mr. HANNA. But you do not have to.

Mr. PERCIASEPE. Let me just say what I believe. Okay?

I do not believe that most people do not trust EPA. The polling I have seen, for what it is worth, back in the past by others, show that people prefer EPA to be setting standards. And, you know, but I do not have enough data on what every person in the United States things about——

Mr. HANNA. No, but preferring to have them set the standards is not the same as trusting them.

Mr. PERCIASEPE. Yes. So this trust thing is a problem, particularly if Congress has it. This is not an idle problem, and we need to work on that. And I am here today trying to explain what our intent is, and to try to build a bridge.

Mr. HANNA. I appreciate that, but you are not going anywhere with the presentation I see today. Backing up and blaming the Supreme Court, or using them as a crutch, that also is not helpful be-

cause at the end of the day this place has the ability to do what it would like to see done. We have the capacity to make mistakes here, to undo what you might regard as good work and may very well be good work, but if you cannot make us trust you in that regard, you are going to have an outcome that you do not like and that potentially we do not like.

My time is up. Thank you, Chairman.

Chairman GRAVES. Mr. Huelskamp?

Mr. HUELSKAMP. Thank you, Mr. Chairman. I appreciate that, Deputy Administrator, for being here today. And if I have asked a question that has been asked before, if you would restate the answer, I would appreciate that.

One thing that many of my constituents are asking and I share the same concerns as my other colleagues here, but trying to understand the claim from the EPA administrator in Kansas City a couple weeks ago, and similarly yours here, this would provide more certainty compared to your current regulations.

Can you tell me if this regulation would allow the federal control or regulation of ephemeral streams?

Mr. PERCIASEPE. It would make ephemeral streams jurisdictional if they exhibit those hydrologic characteristics that would be an indicator of significant and frequent enough flow to be significant.

Mr. HUELSKAMP. Let me get the definition of what is significant, and I have been through this at the state level. Would this increase or decrease the amount of Clean Water Act jurisdiction compared to current law or regulation?

Mr. PERCIASEPE. We believe it would reduce.

Mr. HUELSKAMP. It would reduce that.

Have any states suggested otherwise in their comments?

Mr. PERCIASEPE. I have not read the state comments yet.

Mr. HUELSKAMP. Have you read any comments about the rule?

Mr. PERCIASEPE. Well, the comment period is open until I think October.

Mr. HUELSKAMP. You have not peeked at them a little bit early?

Mr. PERCIASEPE. I have been out talking to some states.

Mr. HUELSKAMP. Have these states indicated that they disagree with the assessment that it reduces jurisdiction?

Mr. PERCIASEPE. I have not heard that.

Mr. HUELSKAMP. Well, I will give you a clue. In Kansas, the state of Kansas, the estimates are from our state, it increase the jurisdiction by 400 percent—400 percent more jurisdiction under the proposed rule. Instead of regulating 32,000 miles of stream miles, it would increase that to 134,000 miles. How could they be that wrong? You are claiming the jurisdiction goes down. The state of Kansas actually lives there, and we were a better environment. As a farmer myself I consider myself the first environmentalist. How could they be so wrong in misunderstanding of your rule?

Mr. PERCIASEPE. I would love to see their analysis and I would love to get our staff to sit down with them and understand why we see such a different situation. I know that more than half the states already cover ephemeral streams themselves. Including Kansas.

Mr. HUELSKAMP. Not under the Clean Water Act, sir.

The issue here also I want to ask about is navigable. Can you describe or define navigable for the Committee, please?

Mr. PERCIASEPE. Navigable in the Webster Dictionary——

Mr. HUELSKAMP. No, in the Clean Water Act.

Mr. PERCIASEPE. In the Clean Water Act, navigable has been defined by Congress as waters of the United States. That is what the definition is in the Clean Water Act of 1972, and the Supreme Court——

Mr. HUELSKAMP. No, navigable is an adjective. Not describing the Waters of the U.S. It is a limit on the jurisdiction of the Clean Water Act. It does not describe every water of the U.S., sir. You are clearly wrong.

Mr. PERCIASEPE. Well——

Mr. HUELSKAMP. Can you define navigable? Because that is a limit on the power.

Mr. PERCIASEPE. Navigable waters include waters that flow into traditionally navigable waters that can have an impact on the biological, chemical, and physical integrity of those navigable waters.

Mr. HUELSKAMP. So navigable water is water that flows into a navigable stream? So nonnavigable waters by that definition become navigable?

Mr. PERCIASEPE. No. Waters of the United States——

Mr. HUELSKAMP. Waters of the U.S. do include nonnavigable waters. Is that correct?

Mr. PERCIASEPE. Yes.

Mr. HUELSKAMP. Okay. So there is a distinction.

Mr. PERCIASEPE. They include the waters—the Clean Water Act is looking at controlling water pollution. And controlling water pollution, even if——

Mr. HUELSKAMP. The authority of the federal government is limited to navigable waters.

Mr. PERCIASEPE. And controlling water pollution that could enter it.

Mr. HUELSKAMP. Under navigable waters.

Here is a question for clarification. Water pollution enters——

Mr. PERCIASEPE. From other streams.

Mr. HUELSKAMP. You believe this is going to bring some certainty.

Here is a body of water in Western Kansas. It actually rained once upon a time. This was a few weeks ago. Is this a navigable stream?

Mr. PERCIASEPE. It is neither navigable or waters—or jurisdictinoal under the Clean Water Act.

Mr. HUELSKAMP. You can guarantee me today that this will not be under the jurisdiction of the EPA?

Mr. PERCIASEPE. I am just not going to go any further than what I just said because that is just unfair. I would have to go out and look at that, but it looks like wetness in a field which would not be navigable—which would not be jurisdictional.

Mr. HUELSKAMP. It might flow down the road ditch to a navigable stream.

Mr. PERCIASEPE. It does not matter. It does not exhibit the characteristics that I mentioned earlier, or the hydric soils or the hydric vegetation. That is a puddle in a field and it would not be covered.

Mr. HUELSKAMP. So you can absolutely guarantee me a puddle in a field, a road ditch in western Kansas will not be covered—guaranteed not covered under this new regulation?

Mr. PERCIASEPE. A road ditch that is not a channelized stream would not be covered. Some road ditches actually are channelizing a stream, but putting that aside, road ditches, the vast majority of them are not going to be covered, not be jurisdictional, and wet fields are not going to be jurisdictional. They are not going to be jurisdictional.

Mr. HUELSKAMP. I yield back, Mr. Chairman.

Chairman GRAVES. Ranking Member Velázquez.

Ms. VELAZQUEZ. Yes. Mr. Chairman, I would like to ask unanimous consent to submit for the record a report from the American Sustainable Business Council that found that small business owners are concerned about climate change—57 are concerned about carbon pollution, 53 percent are concerned about climate change, and 53 percent believe that climate change will adversely affect their businesses.

Chairman GRAVES. Without objection.

Ms. VELAZQUEZ. Thank you.

Chairman GRAVES. Mr. Luetkemeyer?

Mr. LUETKEMEYER. Thank you, Mr. Chairman.

Just a couple questions, sir. With regards to power plant oversight, I know that apparently—correct me if I am wrong here—it appears that the agency, when they figure the costs of the rules and regulations in power plant rules, that they considered it on a global scale. Is that correct? The cost benefit on a global scale?

Mr. PERCIASEPE. Well, I am not exactly sure of the term there, but when we look at——

Mr. LUETKEMEYER. Do you take other factors besides what would we could consider domestic? Things that would affect only the United States? Do you take into effect whatever cost savings or costs otherwise may be affecting other areas of the world? Our neighbors to the north, south, east, west?

Mr. PERCIASEPE. I do not know the answer to that. I am going to say generally no, but here have been instances where, obviously, we have cooperated with other governments, like Canada on acid rain, where we have done joint work together. But I would generally say that we were looking at the impact in the United States.

Mr. LUETKEMEYER. Well, what I have been told is that you do take into account calculating benefits on a global scale for coal referenced rules, which have a dramatic impact on coal-fired electrical generation plants, of which I have got a couple in my district. In fact, one closed up as a result partially of the rules that have come down. And I am just kind of curious why you included the costs of savings or other benefits of other countries over what should be, I would think, only the cost benefits that would be for us domestically.

Mr. PERCIASEPE. I really apologize. I should know what you are asking, but I do not want to guess. So if it is okay with the Committee and the chair, I would like to research that——

Mr. LUETKEMEYER. Sure. We can follow up.

Mr. PERCIASEPE.—and provide the answer.

Mr. LUETKEMEYER. Sure.

Other than that, just one other concern. When you go down the road with these different rules and regulations that you are looking at, basically, the president seems to be trying to implement carbon tax rules around the Congress by implementing some of the rules through your agency. I think it is very, very concerning. I think, you know, again, when you do this, you need to go through the RFA process to find the effect on small business, and it is very concerning to me that we are even going down this road when you look at what Australia just did. Australia implemented the carbon tax two years ago and found it increased costs significantly, over 15 percent, and it affected thousands and thousands of jobs, and they now have withdrawn that. I think we need to be very careful down the road that we are going down and we need to make sure we continue to adhere to the process and the procedures that are in place which today we are talking about, the Regulatory Flexibility Act. It is a very, very important tool for analysis, not only for you but for us, to make sure that the rules that you are putting in place are something that we can go along with, that we believe our constituents, our small businesses are having to live under and would be beneficial to them rather than costing them. Again, when you see what is coming out of other countries with regards to the kind of power plant rule and regulation that is being proposed, and they are backing off, it should give us pause. And for certain, to be able to—I would think it would be a red flag to make sure you adhere to the process of procedures.

With that, if you want to respond, fine, sir.

Mr. PERCIASEPE. Sure. Just a couple of quick comments.

First of all, I want to be really clear to the Committee. We believe that we should be looking at the impacts of all different segments, whether it is small business or large business. I just want to be really clear about that. And somebody at EPA did make the statement earlier that it is not in our job description—but it was not Lisa Jackson, I can assure you that. It was not. It was a lower level EPA employee who made a mistake. That is all I want to say. Made a mistake.

Mr. LUETKEMEYER. Now, to follow up on that, sir, before you move on to your next comment, that is why it is important that you do the RFA, because that affects the economic concerns that we have. And when you have a comment like that, that gives us pause.

I am sorry. Go ahead.

Mr. PERCIASEPE. So, there are two things. I want to make it clear that we are not trying to implement a carbon tax or anything like that here. The Clean Air Act gives us very specific authority to look at sectors, and so in the last term we did a light duty vehicle regulation that reduced the greenhouse gases from light duty vehicles. We worked with the Department of Transportation on that to make sure it aligned so the automobile manufacturers only had one thing to implement between the CAFE and the carbon

rules. We reached consensus with the automobile manufacturers. We had a process with the small automobile manufacturers. We exempted them from the rule completely. And then they came back to us and said, you know, we want to be able to opt in if we are making really efficient cars because we want to sell our credits to the other automobile manufacturers. And so we actually have an opt-in for small businesses in that rule. So I do not want you think we do not really think about this.

And the two big carbon—so-called carbon rules that EPA is working on—one was the automobiles, which is in the process of being implemented now and has those kinds of provisions I just mentioned, and the other one, which is the power plants, which we have not implemented yet, which is going to be something we are going to have to work out with states, where we are going to be continually looking for ways that we can incorporate ideas and opportunities like that to be able to deal with small businesses, and we hope that many small businesses will capitalize on some of the business opportunities as well.

But we do look at this. I want you to believe that and not not trust us.

Mr. LUETKEMEYER. Thank you for your comments.

I yield back. Thank you, Mr. Chairman.

Chairman GRAVES. Mr. Tipton?

Mr. TIPTON. Thank you, Mr. Chairman.

I would like to associate myself with many of the questions and comments of Mr. Luetkemeyer because one issue, and Deputy Administrator, does it disturb you a little bit when you were just talking about—and that is admirable that they were able to achieve this, but some of the small car companies wanting to be able to sell their carbon credits back, does it disturb you when we talk about the sense of Congress—which created the EPA, by the way—had rejected cap and trade? And effectively now we are seeing it moving forward in a regulatory action?

Mr. PERCIASEPE. I missed——

Mr. TIPTON. I was just quoting you. You were just saying that they wanted to be able to use their credits in regards to——

Mr. PERCIASEPE. Oh, we always do this in our rules. In all of our automobile rules. If one automobile manufacturer does a better job of pollution control than others, they can move those credits around between the automobiles. But they cannot sell it to, you know, a power plant or vice versa. It is inside—market mechanisms has been something EPA has used in rulemaking going back to the early 1980s.

Mr. TIPTON. Yes, sir. I understand that. I guess my point is Congress had rejected under a democrat administration cap and trade.

Mr. PERCIASEPE. This is not a cap and trade program. This is the ability to trade credits in between. But again, we have been doing it since the 1980s.

Mr. TIPTON. And I think that is really part of the concern is we see stepping stones to movement.

If we go back to water, when Secretary Salazar, secretary of interior was intiating—were you familiar with the Blueways program?

Mr. PERCIASEPE. No, sir.

Mr. TIPTON. Blueways was coming out of the Department of Interior, which is effectively a precursor to the waters of the U.S. And I would invite you or your successor to make sure that they read the reports that were coming out of the Blueways program, effectively citing pollutants coming from faraway farmlands in the Midwest. And it effectively really goes to Mr. Schweikert's point in terms of once water is put on the picture that Mr. Huelskamp had shown you, we may not define that as navigable, but as it flows down effectively, that backflow becomes all navigable waters.

And that is really the concern people have is once you start regulating, it does have impacts, and those costs that are going to be associated with it. Through this Committee, we actually have the empirical evidence that through regulatory costs in this country right now, Americans are paying $1.8 trillion in regulatory costs. And no one is suggesting we get rid of all regulations. But those are real costs.

Right now in Colorado, yesterday, you held EPA hearings, and unfortunately, you held them in Denver. We sent two letters to the director requesting that the hearing actually be held in the impacted area over in Craig, Colorado, Moffat County in my district. We received no response from the EPA. Would it be appropriate when we are holding these hearings, and I think you heard loud and clear the importance of these RFAs, to actually go to the impacted communities rather than just going to urban areas for hearings?

Mr. PERCIASEPE. The hearings are just one aspect of our outreach, and we have tried to distribute them around the country in different parts of the country so people have an opportunity. Let me just say this categorically. EPA will meet with anybody who wants to meet with us on this, and we are going to reach out to virtually every state and the constituencies in each one of those states, and we are in the process of doing that.

Mr. TIPTON. Great. Can we get a hold of you, and you will help facilitate with us for Director Jackson to be able to come to Craig, Colorado, and we will meet with him?

Mr. PERCIASEPE. You tell me who it is they are meeting. I will try to figure out——

Mr. TIPTON. We are going to be able to meet with community members, with county commissioners, state legislators, the impacted private entities in rural Colorado that are going to impacted by proposed EPA rules.

Mr. PERCIASEPE. So we would want to work with the state of Colorado because they are the ones who are going to have to implement it.

Mr. TIPTON. And you will be willing to come to Colorado?

Mr. PERCIASEPE. I am willing to get on the phone and get with the governor and try to figure out how we do that.

Mr. TIPTON. Great. We would love to be able to have you come in. And I think when we are talking a little bit about——

Mr. PERCIASEPE. We will have a meeting. I do not know where the meeting will be, but we will have a meeting.

Mr. TIPTON. I think that is part of the problem. We just had rural Coloradoans had to drive four and a half, six hours to be able to go to the meeting in Denver, Colorado. It is important that when

we are talking about outreach, I think not to discard rural America because these are where the real impacts.

And when we are talking about the states are going to have to implement it, do you share with me some of the concern when we are looking about some of the carbon credits? If you want to be able to see blue skies and a coal-fire power plant, come to Craig, Colorado with me. We will be able to see that. But the concern that we are hearing, and these is out of senior citizens that are on fixed incomes, young families that are just trying to be able to get started, they are seeing taxation via regulation to where those utility bills continue to climb. Is this taken into consideration at all by the EPA?

Mr. PERCIASEPE. Our economic analysis shows that energy bills will decline.

Mr. TIPTON. When?

Mr. PERCIASEPE. Between now and 2030, the energy bills will——

Mr. TIPTON. If I am paying $100, it is actually going to go down?

Mr. PERCIASEPE. Our national estimate—remember, we are doing a national estimate—is that energy bills will decline 8 to 9 percent.

Mr. TIPTON. I would love to see that study.

Mr. PERCIASEPE. It is in our Regulatory Impact Analysis. And we can point that out if the Committee would need to have that.

Mr. TIPTON. Great. Thank you, Mr. Chairman. I yield back.

Chairman GRAVES. Mr. Collins?

Mr. COLLINS. I will be brief here.

In looking through some of the rules and use of terminology, I think what seems to be bothering a lot of people, words like significant. And here in the proposed rule in the Federal Register it says for an effect to be significant it must be more than speculative or insubstantial. So when we use that word, is there any data behind that that would suggest what that means?

Mr. PERCIASEPE. That is one of the things we are trying to deal—I believe—I may be wrong, and somebody behind me may be able to clarify—I believe that that is just the language that the Supreme Court used and what we are trying to do with the rest of the rule is actually try to put a boundary on that.

Mr. COLLINS. Yeah, this is actually out of the regulatory text.

Mr. PERCIASEPE. We were probably writing that in there, but Justice Kennedy's opinion. So, what we have done with the rest of the rule is try to say, well, what would that be? And it gets back to trying to do it on a scientific basis as opposed to does it affect——

Mr. COLLINS. The problem is small business in trying to adhere to something in reading through this, they are not going to know where to take something using a word like significant.

So I guess I would conclude simply in saying—well, let me also go to another point today. Too many times in Congress with the public it looks like the EPA has a "solution looking for a problem.—So today in our Science Hearing on the coal plants, a data point came out that said if the United States industrial complex and the United States power generation complex produced no CO2 whatso-

ever, none, they were all shut down, how would that impact the amount of CO2 going into the atmosphere in the world? And the answer was 2 percent. So here we are. So we could shut down all the power plants, we could stop all of our production that emits any CO2. The impact in the world is quite insignificant, negligible, de minimis. Two percent is not going to have an impact, not given what we are doing. So that is part of the issue, and I say the frustration on our side is the need for jobs, the growing economy, and then having the EPA overreach for something that is not needed. Again, a solution that is looking for a problem; a problem that does not exist, certainly not that we could have an impact on.

So it was just interesting. I believe you admitted there is a trust factor between the EPA and Congress, clearly. There is a trust factor between our farmers. And I always have a saying, do not bring me a problem without a solution. The EPA has a real problem. Congress does not trust you. Farmers do not trust you. The public does not trust you. So what is the solution? Do not bring me a problem without a solution. It is a simple solution. Withdraw the rule. Start over. Understand what you have done wrong. Reach out. Study the small business. Do the RFA. That would mean so much to I think this Congress and the country for the EPA to say we were wrong. We got ahead of ourselves. We admit that there is misunderstanding. We are going to withdraw the rule, take all this into account. And since there is no judicial deadline, we will move forward on another day. We screwed up. Do you know what that would do for your trust factor in Congress? It would take you a long way.

So all I would say, I know you are leaving, but for my two cents worth, if you could convince your superiors to withdraw this rule, your credibility would skyrocket in the EPA, and I would suggest you seriously consider it.

I yield back.

Chairman GRAVES. Mr. Schweikert?

Mr. SCHWEIKERT. Thank you, Mr. Chairman.

Deputy Administrator Perciasepe, sort of a continuation on a bit of the thought exercise here. Significant nexus. Ultimately, I believe in your testimony, the discussion was this rewrite, this update of waters of the U.S. has been driven because of multiple Supreme Court rulings?

Mr. PERCIASEPE. Right. Keep in mind it is a definitional rule, so it is defining something. We had it defined in the 1980s and the 1970s in a very broad way. The Supreme Court has several times said you cannot use that approach. You need to come up with a different approach.

Mr. SCHWEIKERT. And some of the significant nexus language actually came out of the Supreme Court language?

Mr. PERCIASEPE. That is right.

Mr. SCHWEIKERT. I am going to ask you actually for a personal opinion, and I know this is a little awkward, instead of your hat as the deputy administrator, but you are leaving in three weeks so you are allowed to have a personal opinion.

Mr. PERCIASEPE. I am a citizen of the United States.

Mr. SCHWEIKERT. Over the next decade, your personal opinion, how much litigation is ultimately going to take place in defining

significant nexus? Because the regional differentiation of that is incredible if you think about our lives out in the desert southwest compared to other parts of the country.

So where I am heading on this is your personal opinion, how much litigation are we going to look at in just, once again, if this rule goes into effect as written, in fixing these definitions or tightening them up or politicizing them or moving, what do we expect to see?

Mr. PERCIASEPE. You know, maybe it is sort of—and also a little bit towards Mr. Collins's—who just had to leave—answer, I can tell you that Gina McCarthy and Bob Perciasepe, as long as I am here, but certainly my immediate supervisor or boss, Gina McCarthy, want nothing more than to build credibility and confidence in the Congress.

So from a personal perspective, we would hope that we would be able to get out of the situation we have been in for 40 years with everything keeping going to the Supreme Court and try to get that to stop. And at some point, you know, I do not see—if we do nothing it will continue to keep going up there and they will continue to keep——

Mr. SCHWEIKERT. But if you also do this, I mean, in many ways the term "significant nexus" is a new term of art, and now we have to define it.

Mr. PERCIASEPE. Right.

Mr. SCHWEIKERT. And is a significant nexus different in Oregon compared to the desert southwest? Is it different——

Mr. PERCIASEPE. Yes.

Mr. SCHWEIKERT.—you know building that box. And where you are hearing a lot of stress in our voices is for places like Maricopa County, Arizona, you know, one of the third, fourth most populous county in the country, we recycle every drop of our water. Every drop of it. We think we do some of this really, really well. Is there going to be litigation that is being driven on another, you know, how water—the significant nexus of water in Delaware and all of a sudden we find out that the way we operate in our region, we are back in court having to redefine for a definition that works for us.

In my minute and a half I have left, you actually just touched on something. You have heard the credibility discussion, distrust discussion. Could you share with Administrator McCarthy two things from me if you have the chance? One is stop giving speeches where you vilify us, where in your language you say you are going to go after those of us who have questions, that only real scientists are worthy. And those are quotes from articles. You did not say them but the administrator did.

And the second part of that is transparency. It is not good enough to tell us what your study says. We need the data sets. It is unacceptable to have proprietary data saying, well, we hired a contractor to do it. If you are going to make public policy, public policy needs to be done by public data. The public deserves the right—right, left, activists, researcher—to see the base data sets and model it. Because I think actually some of the distrust comes from the inability to see that baseline data and know you could stress it and reproduce it.

So that is more of an editorial comment, but I actually think it would take us a long ways to openness, transparency, and rehabilitating the relationships between the agency and the public.

Thank you, Mr. Chairman.

Chairman GRAVES. Thank you, Mr. Perciasepe, for coming in. And I might suggest, because you have said on several occasions today, you know, you are seeking input. You want to, and we have been talking about credibility and transparency and you want to hear from the business community. I would suggest that you comply with the RFA. And why not do it voluntarily? Why not go through the steps that are laid out? And help your credibility out considerably and do it through the process, because that is really what this hearing is about—is why the EPA does not follow the Regulatory Flexibility Act, which is what this Committee is all about. And it does require all agencies, the EPA included, to conduct outreach and assess the impacts of rules on small businesses. And hearing from those small businesses early in the rulemaking process is going to identify these problems that come up, and hopefully, as has been pointed out, produce better solutions and better rules. But unfortunately, EPA is not complying with the RFA. And the result, it is confusing. It ends up badly crafted regulations and you get into situations like you are in. But the Committee is going to continue to engage with the EPA to make sure it fully complies with the EPA or with the Regulatory Flexibility Act.

And with that, I would ask unanimous consent that all members have five legislative days to submit statements and supporting materials for the record.

With that, without objection, that is so ordered.

And with that, the hearing is adjourned. Thank you.

[Whereupon, at 2:34 p.m., the Committee was adjourned.]

# A P P E N D I X

**Testimony of Bob Perciasepe**

**Deputy Administrator**

**U.S. Environmental Protection Agency**

**Hearing on EPA Actions Under the Climate Action Plan and Waters of the U.S.**

**Committee on Small Business**

**U.S. House of Representatives**

**July 30, 2014**

Chairman Graves, Ranking Member Velázquez, members of the committee: thank you for the opportunity to testify today on EPA's actions under the President's Climate Action Plan, and on EPA and the U.S. Army Corps of Engineers' recently proposed rule which would clarify the jurisdictional scope of the Clean Water Act (CWA), simplifying and improving the process for determining waters that are, and are not, covered by the Act.

EPA Actions Under the President's Climate Action Plan

Climate change is one of the greatest challenges of our time. It already threatens human health and welfare and economic well-being, and if left unchecked, it will have devastating impacts on the United States and the planet.

The science is clear. The risks are clear. And the high costs of climate inaction are clear. We must act. That's why President Obama laid out a Climate Action Plan in June 2013 in which he directed EPA and other federal agencies to take meaningful steps to mitigate the current and future damage caused by carbon dioxide emissions and to prepare for the anticipated climate changes that have already been set in motion. The Plan has three key pillars; cutting carbon pollution in America; preparing the country for the impacts of climate change; and leading international efforts to combat global climate change.[1]

EPA plays a critical role in implementing the Plan's first pillar, cutting carbon pollution. Over the past our years, EPA has begun to address this task under the Clean Air Act. Our first steps addressed motor vehicles and, working with the National Highway Traffic Safety Administration, resulted in greenhouse gas and fuel

[1] More information on the Climate Action Plan at: http://www.whitehouse.gov/sites/default/files/image/president27sclimateactionplan.pdf. While EPA is involved in many of the Plan's efforts, including those addressing emissions of methane, hydrofluorocarbons (HFCs), and other short-lived climate pollutants, this testimony will focus on the efforts to reduce carbon pollution from new and existing power plants.

economy standards for Model Year 2012 to 2025 light-duty vehicles, and standards for model year 2014 through 2018 heavy duty trucks and buses.

Building on this success, the President asked EPA to work with states, utilities and other key stakeholders to develop plans to reduce carbon pollution from future and existing power plants.

Power plants are the largest source of carbon dioxide emissions in the United States, accounting for roughly one-third of all domestic greenhouse gas emissions. While the United States has limits in place for the level of arsenic, mercury, sulfur dioxide, nitrogen oxides, and particle pollution that power plants can emit, there are currently no national limits on carbon pollution levels.

In September 2013, the EPA announced its proposed standards for new natural gas-fired turbines and new coal-fired units. The standards reflect the demonstrated performance of efficient, lower carbon technologies that are currently being used today. They set the stage for continued public and private investment in technologies like efficient natural gas and carbon capture and storage. The proposal was published in the Federal Register on January 8, 2014, and the formal public comment period closed on May 9, 2014. We have received more than two million comments on this proposal and will carefully consider them as we develop a final rule.

On June 2, 2014, EPA issued its proposed Clean Power Plan for existing plants. The plan is built on advice and information from states, cities, businesses, utilities, and thousands of people about the actions they are already taking to reduce carbon dioxide emissions. It aims to cut energy waste and leverage cleaner energy sources by doing two things: First, it uses a national framework to set achievable state-specific goals to cut carbon pollution per megawatt hour of electricity generated. And second, it empowers the states to chart their own, customized path to meet their goals.

The EPA's stakeholder outreach and public engagement in preparation for this rulemaking was unprecedented. Starting last summer, we held eleven public listening sessions around the country. We participated in hundreds of meetings with a broad range of stakeholders, including small entity interests such as municipal and rural electric cooperatives, across the country, and talked with every state.

Now, the second phase of our public engagement has begun. We've already had dozens of calls and meetings with states and other stakeholders. The more formal public process—both a public comment period that runs through October 16, 2014, and public hearings this week in Atlanta, Denver, Pittsburgh, and Washington, DC—will provide further opportunity for stakeholders and the general public to provide input.

There has been tremendous public interest in the proposal: already, we have received nearly 300,000 written comments on the proposal. At the public hearings this week, we anticipate hearing oral comments from about 1,600 people, many of whom represent small businesses.

In drafting the power plant proposals, we have been mindful of its effects on small businesses and careful to ensure we are complying with SBREFA and all applicable requirements. Outreach and public comment are an important component of our rulemaking process, and we have often designed our rules to ensure that they do not impose an undue burden on small entities.

Waters of the U.S. Proposed Rule

The foundation of the agencies' rulemaking efforts to clarify protection under the CWA is the goal of providing clean and safe water to all Americans. Clean water is vital to every single American—from families who rely on affordable, safe, clean waters for their public drinking water supply, and on safe places to swim and healthy fish to eat, to farmers who need abundant and reliable sources of water to grow their crops, to hunters and anglers who depend on healthy waters for recreation and their work, to businesses that need a steady supply of clean water to make their products. The range of local and large-scale businesses that we depend on—and who, in turn, depend on a reliable supply of clean water—include tourism, health care, farming, fishing, food and beverage production, manufacturing, transportation and energy generation. Approximately 117 million people—one in three Americans—get their drinking water from public systems that rely on seasonal, rain-dependent, and headwater streams—the very waters this rule would ensure are protected from pollution.[2]

In recent years, several Supreme Court decisions have raised complex questions regarding the geographic scope of the Act. For nearly a decade, members of Congress, state and local officials, industry, agriculture, environmental groups, and the public have asked our agencies for a rulemaking to provide clarity. This complexity has made enforcement of the law difficult in many cases, and has increased the amount of time it takes to make jurisdictional determinations under the CWA. In response to these implementation challenges and significant stakeholder requests for rulemaking, the agencies developed the proposed rule.

We believe the result of this rulemaking will be to improve the process for making jurisdictional determinations for the CWA by minimizing delays and costs and to improve predictability and consistency for landowners.

The agencies' proposed rule helps to protect the nation's waters, consistent with the law and currently available scientific and technical expertise. The rule provides continuity with the existing regulations, where possible, which will reduce confusion and will reduce transaction costs for the regulated community and the agencies. Toward that same end, the agencies also proposed, where consistent with the law and their scientific and technical expertise, categories of waters that are and are not jurisdictional, as well as categories of waters and wetlands that require a case-specific evaluation to determine whether they are protected by the CWA.

[2] A county-level map depicting the percent of the population receiving drinking water directly or indirectly from stream that are seasonal, rain-dependent or headwaters is available at http://water.epa.gov/type/rsl/drinkingwatermap.cfm.

The agencies' proposed rule continues to reflect the states' primary and exclusive authority over water allocation and water rights administration, as well as state and federal co-regulation of water quality. The agencies worked hard to ensure that the proposed rule reflects these fundamental CWA principles, which we share with our state partners.

For the past several years, the EPA and the Corps have listened to input from the agriculture community while developing the proposed rule. Using the input from those discussions, the EPA and the Corps then worked with the USDA to ensure that concerns raised by farmers and the agricultural industry were addressed in the proposed rule. The proposed rule does not change, in any way, existing CWA exemptions from permitting for discharges of dredged and/or fill material into waters of the U.S. associated with agriculture, ranching, and forestry activities.

I want to emphasize that farmers, ranchers, and foresters who are conducting these activities covered by the exemptions (activities such as plowing, tilling, planting, harvesting, building and maintaining roads, ponds and ditches, and many other activities in waters on their lands), can continue these practices after the new rule without the need for approval from the Federal government.

The scope of the term "waters of the U.S." has generated substantial interest within the small business community. In light of this interest, the EPA determined to seek early and wide input from representatives of small entities while formulating a proposed definition of this term that reflects the intent of Congress consistent with the mandate of the Supreme Court's decisions. This input was sought voluntarily, as it was certified in the preamble to the proposed rule that the proposed rule will not have a significant economic impact on a substantial number of small entities, as defined by the Regulatory Flexibility Act (RFA).[3]

The small entities outreach process has enabled the agencies to hear directly from small business representatives, at a very preliminary stage, about how this complex issue should be approached. EPA has also prepared a report summarizing the small entity outreach to date, the results of this outreach, and how these results have informed the development of this proposed rule.[4] Since publishing the proposed rule, the agencies have met many times with small businesses and other entities to hear their perspectives on the proposed rule and to identify potential opportunities for further clarifying CWA jurisdiction in a final rule. Most recently, the agencies participated in an SBA-sponsored roundtable on July 21st. We look forward to continuing these efforts both during the remainder of the public comment period and as we write a final rule.

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[3] Because fewer waters will be subject to the CWA under the proposed rule than are subject to regulation under the existing regulations, this action will not affect small entities to a greater degree than the existing regulations. As a consequence, this action if promulgated will not have a significant adverse economic impact on a substantial number of small entities, and therefore no regulatory flexibility analysis is required. Additional background regarding the agencies' compliance with the RFA is available in the preamble to the proposed rule. See 79 FR 22220.

[4] This report is available in the docket for the proposed rule at http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OW-2011-0880-1927.

The agencies published the proposed rule in the Federal Register on April 21, and the public comment period on the proposed rule will be open for 182 days, closing on October 20. During this period, the agencies have launched a robust outreach effort, holding discussions around the country and gathering input from states, local governments, small businesses, and other stakeholders needed to share a final rule. We welcome comments from all stakeholders on the agencies' proposed rule. At the conclusion of the rulemaking process, the agencies will review the entirety of the completed administrative record, including public comments and the EPA's final science synthesis report, as we work to develop a final rule.

Thank you again, and I will be happy to answer your questions.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OFFICE OF CONGRESSIONAL AND
INTERGOVERNMENTAL RELATIONS

DEC 19 2014

The Honorable Sam Graves
Chairman
Committee on Small Business
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

Thank you for the opportunity to respond to the questions for the record following the July 30, 2014, hearing on "Regulatory Overreach: Is EPA Meeting Its Small Business Obligations?" Enclosed are the EPA's responses to the questions.

If you have any further questions, please contact me or your staff may contact Denis Borum in my office at borum.denis@epa.gov or (202) 564-4836.

Sincerely,

Laura Vaught
Associate Administrator

Enclosure

**Questions for the Record**

**Committee on Small Business**

**Hearing: "Regulatory Overreach: Is EPA Meeting Its Small Business Obligations?"**

**July 30, 2014**

**Chairman Graves**

**1. The Regulatory Flexibility Act, 5 U.S.C. §§ 601–12 (RFA), requires the EPA to make a threshold determination whether a proposed rule is likely to have a "significant economic impact on a substantial number of small entities." EPA refers to this threshold analysis as "screening analysis" in its own RFA compliance guide.[1] The screening analysis informs EPA whether or not it has enough information to be able to certify that a rule does not require it to conduct an initial regulatory flexibility analysis.**

**a. Did the EPA conduct "screening analysis" for the proposed rule that would set separate CO2 emission standards for new power plants?[2] If so, please provide the screening analysis to the Committee.**

Response: The Regulatory Flexibility Act (RFA) generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

After considering the economic impacts of the proposed Carbon Pollution Guidelines for New Power Plants on small entities, the Administrator certified that this action will not have a significant economic impact on a substantial number of small entities.

We did not include an analysis of the illustrative impacts on small entities that may result from implementation of this proposed rule because we do not anticipate any compliance costs over a range of likely sensitivity conditions as a result of this proposal. EPA typically uses a comparison of costs as a percentage of sales or a "cost-to-sales ratio" as the metric to determine whether a small entity is significantly impacts by a proposed regulation. For the proposed Carbon Pollution Guidelines, the cost-to-sales ratio for all affected small entities would be zero, indicating no impact. The EPA believes that electric power companies will choose to build

[1] ENVIRONMENTAL PROTECTION AGENCY, FINAL GUIDANCE FOR EPA RULEWRITERS: REGULATORY FLEXIBILITY ACT 9–30 (2006) [hereinafter EPA RFA Guidance], available at http://www.epa.gov/sbrefa/documents/GuidanceRegFlexAct.pdf.

[2] Standards of Performance for Greenhouse Gas Emissions From New Stationary Sources: Electric Utility Generating Units, 79 Fed. Reg. 1430 (Jan. 8, 2014).

new EGUs that comply with the regulatory requirements of this proposal because of existing and expected market conditions. (See the RIA at http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OAR-2013-0495-0023 for further discussion of sensitivities). The EPA does not project any new coal-fired EGUs without CCS to be built. Accordingly, there are no anticipated economic impacts as a result of this proposal.

**b. Did the EPA conduct "screening analysis" for the proposed rule that would revise the definition of "waters of the United States" for all sections of the Clean Water Act?"[3] If so, please provide the screening analysis to the Committee.**

Response: The Regulatory Flexibility Act generally requires an agency to prepare a regulatory flexibility analysis for any rule subject to notice-and-comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. As part of their "Waters of the U.S." rulemaking, the EPA certified that the proposed rule will not have a significant economic impact on a substantial number of small entities.

Under the RFA, the impacts of concern are significant, disproportionate adverse economic impacts on small entities subject to the rule, because the primary purpose of the initial regulatory flexibility analysis is to identify and address regulatory alternatives "which minimize any significant economic impact of the rule on small entities." 5 U.S.C. 603. The scope of regulatory jurisdiction in this proposed rule is narrower than that under the agencies' existing regulations. Because fewer waters will be subject to the CWA under the proposed rule than are subject to regulation under the existing regulations, this action will not adversely affect small entities to a greater degree than the existing regulations. The agencies' proposed rule is not designed to "subject" any entities of any size to any specific regulatory burden. Rather, it is designed to clarify the statutory scope of the "waters of the United States," consistent with Supreme Court precedent. This action if promulgated will not have a significant adverse economic impact on a substantial number of small entities, and therefore no regulatory flexibility analysis is required.

**2. In the "Waters of the United States" proposed rule, the EPA certified the rule as one that will not have a "significant economic impact on a substantial number of small entities" under the RFA. In the RFA certification, the agency compared the proposed rule to the existing regulation. However, in the Economic Analysis, the EPA and Corps compared the proposed rule to the agencies' 2009–2010 field practices that were based on the 2008 guidance.[4] Why did the agencies use two different baselines to assess the costs of the regulation?**

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[3] Definition of "Waters of the United States" Under the Clean Water Act, 79 Fed. Reg. 22,188 (Apr. 21, 2014).

[4] UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ECONOMIC ANALYSIS OF PROPOSED REVISED DEFINITION OF WATERS OF THE UNITED STATES 2 (2014).

Response: The appropriate legal comparison for the proposed rule is the existing regulatory language. The scope of regulatory jurisdiction in this proposed rule is narrower than the agencies' existing regulations. Because fewer waters will be subject to the CWA under the proposed rule than are subject to regulation under the existing regulations, this action will not adversely affect small entities to a greater degree than the existing regulations. The agencies' proposed rule is not designed to "subject" any entities of any size to any specific regulatory burden. Rather, it is designed to clarify the statutory scope of the "waters of the United States," consistent with Supreme Court precedent.

As a practical matter, however, the agencies recognize that implementing this rule will result in changes when compared to current field practice, and this comparison can be useful in informing policy decisions. As such, the draft economic analysis quantifies the potential costs and benefits that could result from the implementation of the proposed rule which would result in new protected waters as compared to current guidance and practice. The draft economic analysis will be updated and published along with the final rule using the Corps 2013 and 2014 field data from the Section 404 program. The final economic analysis will reflect the way in which the final rule will be applied.

**3. At the July 30, 2014 hearing, Deputy Administrator Perciasepe stated the vast majority of road ditches would not be jurisdictional under the "Waters of the United States" proposed rule. How many ditches has EPA or the Corps surveyed or assessed to support this assertion? Does the EPA or the Corps have any data that supports this assertion? If so, please provide that data to the Committee.**

Response: Deputy Administrator Perciasepe's statement at the July 30 hearing referred to the fact that the proposed rule would exclude ditches from Clean Water Act jurisdiction that are excavated wholly in uplands, drain only uplands, and have less than perennial flow. Those roadside ditches that are excavated in uplands and have the primary purpose to drain runoff from roads, such that they drain only uplands, would not be jurisdictional under the proposed rule if they have less than perennial flow. The ditch exclusion applies to all ditches that fit the exclusion language, including many roadside and agricultural ditches. The agencies believe the proposed rule actually reduces regulation of ditches compared to the 2008 Army/EPA Jurisdiction Guidance that is currently in effect, which allows for the regulation of both intermittent and perennial flow ditches).

**4. The EPA has issued statements, blog posts, tweets, articles, and other documents about the "Waters of the United States" proposed rule. Can small business owners and small governmental jurisdictions rely on statements in those EPA documents as a defense to a CWA enforcement action or lawsuit?**

Response: At this time, jurisdictional determinations are being made under existing Corps and EPA regulations and guidance, and applicable case law not under the proposed rule. To help inform the

public regarding the proposed rule, the EPA has also taken steps to translate the legal language and scientific principles of the proposed rule into easier-to-understand communications documents. This is the case for any major regulatory action taken by the EPA or any other federal agency. Such documents help explain the proposed rule to the regulated public but do not substitute for it. The agencies would suggest that the small business owner or small governmental jurisdiction contact their local EPA or Corps office for specific questions about Clean Water Act jurisdiction.

**5. EPA contends the "Waters of the United States" proposed rule provides greater clarity and certainty and will not result in a significant expansion of CWA jurisdiction. If that's the case, will EPA agree to publish jurisdictional maps similar to the current National Wetlands Inventory maps showing what water bodies would and would not be jurisdictional under the proposed rule before publishing the final rule?**

Response: The agencies' proposed rule does not include a specific delineation and determination of waters across the country that would be jurisdictional under the proposed rule. Consistent with the more than 40-year practice under the Clean Water Act, the agencies make determinations regarding the jurisdictional status of particular waters almost exclusively in response to a request from a potential permit applicant or landowner asking the agencies to make such a determination., The agencies are currently considering a number of options for the treatment of "other waters" under the final rule. Once the rule is finalized, the agencies will work to develop outreach materials for the public to make it as clear as possible which waters are jurisdictional and which are not. Depending on the option(s) selected for the final rule, the agencies may consider including maps as part of these materials if they determine that these will increase clarity for the public.

Within the existing framework, the agencies' proposed rule would provide clearer categories of waters that would be jurisdictional, as well as a clearer list of the waters and features that are not jurisdictional. The agencies' proposed rule would not protect any new types of waters that have not historically been covered under the Clean Water Act and is consistent with the Supreme Court's more narrow reading of Clean Water Act jurisdiction. Providing a clearer regulatory definition will streamline the process of making jurisdictional determination and provide additional clarity and predictability to this process.

**6. The RFA requires EPA to assess the impacts of its rules on small governmental jurisdictions, which are those with a population of 50,000 or less. EPA previously estimated that there are 40,000 small governmental jurisdictions in the United States.[5] What steps did the EPA take to specifically consider the burdens that the "Waters of the United States" rule will impose on these small entities?**

[5] EPA RFA Guidance, supra note 1, at 46–7.

Response: The Regulatory Flexibility Act generally requires an agency to prepare a regulatory flexibility analysis for any rule subject to notice-and-comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. As part of their "Waters of the U.S." rulemaking, the EPA certified that their proposed rule will not have a significant economic impact on a substantial number of small entities.

At the same time, the agencies recognize the substantial interest in this issue by small governmental jurisdictions and other small-entity stakeholders. In light of this interest, the EPA and the Corps determined to seek early and wide input from representatives of small entities while formulating a proposed rule. This process has enabled the agencies to hear directly from these representatives, at an early stage, about how they should approach this complex question of statutory interpretation, together with related issues that such representatives of small entities may identify for possible consideration in separate proceedings. The EPA has also prepared a report summarizing their small entity outreach to date, the results of this outreach, and how these results have informed the development of this proposed rule. This report is publicly available in the docket for this proposed rule. Finally, on October 15, 2014, the agencies hosted a second roundtable to facilitate input from small entities, which included participants from two small government jurisdictions. A summary of this roundtable is also available in the docket for the proposed rule.

**Congressman Mick Mulvaney (SC-5)**
**Congressman Tom Rice (SC-07)**
**Congressman Scott Tipton (CO-03)**

**1. I am concerned that the EPA's Lead Renovation, Repair, and Painting (LRRP) Rule could impose regulatory costs that are so high they would offset any financial benefit of energy-efficiency projects. This would discourage renovations and upgrades that are otherwise within the EPA's priorities of lowering power consumption, reducing greenhouse gas emissions, and creating green jobs. Current market estimates say the rule has increased the cost of a project upwards of 30 percent. In developing the LRRP rules, has the EPA considered the negative potential impacts on our other national environmental priorities? If so, what were those considerations and conclusions?**

Response: EPA aimed to keep costs reasonable in developing its requirements for lead-safe work practices. In fact, EPA heard from industry that many of the practices were already in use by some contractors even before the rule as promulgated, because lead-safe work practices also have ancillary benefits of reducing overall dust during and after a job. In most general terms, the costs to comply with the lead-safe work practices required by a rule depend on the size of the job; on average, the costs can be up to a couple hundred dollars. For contractors who were already using some of the lead-

safe work practices, however, the incremental cost would be lower. Overall, the benefits of the LRRP rule and amendments, in terms of avoided health, medical, and educational costs, are expected to significantly outweigh the cost of improved work practices.

During the development of amendments to the LRRP rule, EPA considered how complying with the rule could potentially affect the federal government's Weatherization Assistance Program (WAP) and the Home Star program, both of which were aimed at improving energy efficiency in homes (i.e., whether there would be enough trained and certified renovators to do the work in the WAP and Home Star programs). EPA concluded the capacity in 2010 would be sufficient. As recently as June 2014, there were 566 training providers accredited for LRRP (including 361 traveling trainers) and 115,370 certified firms (137,256 firms including those approved by authorized states), and more than 510,000 individuals have been trained as Certified Renovators.

**2. Based on previous fines for violations of the LRRP Rule, it seems that the EPA relies on retroactive record examination to audit compliance rather than site visits. This puts a heavier burden on properly filling out paperwork than actually following the LRRP rules. And, it applies an additional burden upon contractors that utilize subcontractors for elements of a job that may be under the LRRP rule. Has the EPA considered more accurate means of ensuring LRRP compliance? If so, what? If not, why not? Is the EPA more concerned with issuing fines or ensuring safety compliance?**

Response: The recordkeeping checklist for the Lead Renovation, Repair and Painting (LRRP) Rule is very straightforward and easy to complete. When the EPA discovers a firm is in violation of the LRRP Rule we may also review that firm's records to determine if there is a pattern of non-compliance or if the violations we discovered are limited to that inspection. General contractors who use subcontractors are not required to fill out or keep the records of the subcontractors, but must be able to provide those records from the subcontractors if requested. The EPA has found the record review process to be an effective means of determining the overall compliance status of contractors conducting renovations subject to the LRRP Rule. The EPA's first concern is ensuring compliance with the work practice safety standards of the LRRP Rule to protect the health of the occupants, especially the young children, of the houses or child occupied facilities undergoing renovation.

**Congressman Mick Mulvaney (SC-5)**

**1. This past January, Congress restored funding for the Centers for Disease Control and Prevention's (CDC) Childhood Lead Poisoning Prevention Program. Does the EPA consult with the CDC on results of the agency's lead paint monitoring? If not, why not? If so, are we seeing a measurable decline in lead paint health issues for children?**

Response: Over the years, EPA and the Centers for Disease Control and Prevention (CDC) have partnered on various lead initiatives. For example, CDC participates as an active member on the

HUD and EPA-chaired Federal Lead-Based Paint Task Force and EPA served an en ex officio member of CDC's former Federal Advisory Committee on Childhood Lead Poisoning. Additionally, the EPA and CDC continuously work together on outreach efforts such as National Lead Poisoning Prevention Week and activities related to the Global Alliance to Eliminate Lead Paint.

Regarding monitoring, as described in EPA's Air Quality Criteria for Lead document (2006) there are many sources that contribute to lead exposure, thus any measure of blood lead will reflect all sources of lead exposure. EPA is unaware of any national data set that directly measures only the reductions of those lead hazards in homes caused by lead-based paint. The best currently available data set for assessing population level blood lead statistics is the CDC's National Health and Nutrition and Examination Survey (NHANES).

Based on the NHANES 2014 data (sampling period 2009–2012), 2.1%, or an estimated 535,000 children, have BLLs greater than or equal to 5 micrograms per deciliter (μg/dL), levels known to put their academic and later life success at risk. This demonstrates a decrease from previous years (sampling period 2005–2008 at 3.0%, sampling period 2003–2006 at 4.1%). While overall decreasing BLLs are favorable, CDC's blood lead surveillance data, collected from state and local health departments, continues to identify a disproportionate share of cases in low income and minority communities. There is no known safe blood lead level for children, CDC, EPA and other federal partners continue to work together to control or eliminate lead hazards before children are exposed.

**2. From June 4, 2014 through July 21, 2014, there were less than 20 companies nationwide who were listed on the EPA enforcement website at being cited for violating the Lead Renovation, Repair and Painting Rule. It is my understanding that EPA, itself, has shared its concern over its enforcement plan, most notably its inability to identify contractors operating without certification, registration or ethical standards. How is the agency currently targeting those contractors who are either in violation of EPA rules or contractors who never received certification in the first place?**

Response: The EPA is most concerned about renovation contractors who are not following the work practice safety standards. Certified firms have also been found to be out of compliance with the work practice safety standards of the Lead Renovation, Repair and Painting (LRRP) Rule. The EPA often receives tips or complaints from home owners, renters or neighbors about renovation work practices which are not containing dust and debris. This information can lead to inspections of worksites or records inspections depending on the quality and timeliness of the information provided. The EPA may also work with local health and building permit and inspection departments to identify ongoing or projected renovation projects in housing built before 1978 and may conduct joint inspections of those worksites. The EPA is currently analyzing other methods to more effectively identify and prioritize potential non-

compliance in areas with the highest level of "at-risk" populations, (i.e. children under six).

**3. The EPA's Greenhouse gas rule will have significant impacts on businesses and consumers in my state, particularly manufacturing. If this rule is not implemented properly, electricity rates could climb by as much as 50 percent. The EPA has gone to great lengths to talk about how states have an abundance of choices in the proposed rule. But, the rule discriminates against South Carolina and other states that have made proactive investments in new nuclear production. South Carolina utilities and ratepayers have spent billions of dollars to build the new reactors at the VC Summer plant- two reactors that will deliver 1100 megawatts of carbon-free electricity to South Carolina when they are completed in 2017 and 2018.**

**However, after reviewing this rule, I have learned that South Carolina will get no credit for this carbon reduction. The rule assumes that these plants are already online. Yet if these plants were win, or solar, they would get credit under the rule. Isn't a metric ton of carbon avoided a metric ton of carbon avoided, regardless of where it comes from? Why isn't all carbon-free generation treated the same? Is this something the EPA intends to change before it issues the final rule?**

Response: The EPA is conducting unprecedented outreach about this proposal and encouraging robust public comment and participation in the formulation of the final Clean Power Plan. We are hearing substantial input on the treatment of new nuclear in goal setting and will consider those comments carefully as we work toward a final rule. The comment period on the proposal is open through December 1, 2014.

Under the Clean Power Plan, the EPA sets the goals and states get to decide how to meet the goals. States can use the under construction nuclear units in their compliance plans to meet the goal. To set the goals in the proposal, the EPA considered nuclear units that currently have permits for construction and operation. The proposal assumes a 90% capacity factor in generation for the new nuclear units. However, it will be up to states to decide how and to what extent to rely on these units in their plans. For example, if the under construction units perform better than a 90% capacity factor, these units could help states get even closer to their goals.

**Congressman Scott Tipton (CO-03)**

**1. I continue to hear from constituents who have serious concerns over regulations already imposed upon them by the EPA. Specifically, I hear from small business remodelers about the EPA's Residential Home's Lead Renovation, Repair and Painting (LRRP) rule that became effective April 2010. In July 2010, the EPA eliminated the opt-out, which doubled the number of homes affected by the rule. This action increased first-year compliance costs from $800 million**

**to $1.3 billion and affected approximately 7.2 million renovation events per year.**

**Training and certification requirements for contractors and employees performing renovation, repair and painting work on residences built prior to Jan. 1, 1978 apply to painters, plumbers, contractors, window and door installers, electricians and similar specialists. Estimated costs to obtain certification for a remodeling company are at least $300. Initial courses for certified renovators are $300–$500. In addition, the employer is required to pay that employee for the day.**

**We all want children and families to be safe in their homes. However, if we impose a rule on business, we should at least make sure the cost and burden of compliance is worth the benefit. This past January, in a bipartisan effort, Congress restored funding for the Centers for Disease Control and Prevention's (CDC) Childhood Lead Poisoning Prevention Program. The 2014 Consolidated Appropriations Act included $15 million for the CDC program. Does the EPA regularly consult with the CDC on results of the agency's lead paint monitoring? If not, why not? And if it does, are we seeing a measurable decline in lead paint health issues for children? What percentage of childhood lead paint health issues have decreased since the 2010 rule was put in place?**

Response: Over the years, EPA and the Centers for Disease Control and Prevention (CDC) have partnered on various lead initiatives. For example, CDC participates as an active member on the HUD and EPA-chaired Federal Lead-Based Paint Task Force and EPA served as an ex officio member of CDC's former Federal Advisory Committee on Childhood Lead Poisoning. Additionally, the EPA and CDC continuously work together on outreach efforts such as National Lead Poisoning Prevention Week and activities related to the Global Alliance to Eliminate Lead Paint.

Regarding monitoring, as described in EPA's Air Quality Criteria for Lead document (2006) there are many sources that contribute to lead exposure, thus any measure of blood lead will reflect all sources of lead exposure. EPA is unaware of any national data set that directly measures only the reductions of only those lead hazards in homes caused by lead-based paint. The best currently available data set for assessing population level blood lead statistics is the CDC's National Health and Nutrition and Examination Survey (NHANES).

Based on the NHANES 2014 data (sampling period 2009–2012), 2.1%, or an estimated 535,000 children, have BLLs greater than or equal to 5 μg/dL, levels known to put their academic and later life success at risk. This demonstrates a decrease from previous years (sampling period 2005–2008 at 3.0%, sampling period 2003–2006 at 4.1%). While overall decreasing BLLs are favorable, CDC's blood lead surveillance data, collected from state and local health departments, continues to identify a disproportionate share of cases in low income and minority communities. There is no known safe

blood lead level for children. CDC, EPA and other federal partners continue to work together to control or eliminate lead hazards before children are exposed.

**2. Second, how is EPA enforcing this rule? For example, from June 4, 2014 through July 21, 2014 there were 15 companies nationwide who were noted on the EPA enforcement website as being cited for violations. Four of those companies were trainers of the certified lead paint course for renovators. Of the remodeling companies noted, all but one were uncertified. The National Association of the Remodeling Industry (NARI) has been tracking violations on the EPA's website since March 2013. There have been a total of 68 violations posted by EPA since March 2013. Given the number of remodelers who are uncertified in the nation, this is a poor showing of enforcement. It is my understanding that EPA, itself, has shared its concern over its enforcement plan, most notably its inability to identify contractors operating without certification, registration or ethical standards. How is the agency currently targeting those contractors who do not even bother to get certified?**

Response: The EPA is most concerned about renovation contractors who are not following the work practice safety standards. Certified firms have also been found to be out of compliance with the work practice safety standards of the Lead Renovation, Repair and Painting (LRRP) Rule. The EPA often receives tips or complaints from home owners, renters or neighbors about renovation work practices which are not containing dust and debris. The EPA may also work with local health and building permit and inspection departments to identify ongoing or projected renovation projects in housing built before 1978 and may conduct joint inspections of those worksites. The EPA is currently analyzing other methods to more effectively identify and prioritize potential non-compliance in areas with the highest level of "at-risk" populations, (i.e. children under six).

CHAMBER OF COMMERCE
OF THE
UNITED STATES OF AMERICA

R. BRUCE JOSTEN
EXECUTIVE VICE PRESIDENT
GOVERNMENT AFFAIRS

1615 H STREET, N.W.
WASHINGTON, D.C. 20062-2000
202/463-5310

July 29, 2014

The Honorable Sam Graves
Chairman
Committee on Small Business
U.S. House of Representatives
Washington, DC 20515

The Honorable Nydia Velazquez
Ranking Member
Committee on Small Business
U.S. House of Representatives
Washington, DC 20515

Dear Chairman Graves and Ranking Member Velazquez:

The U.S. Chamber of Commerce is the world's largest business federation representing the interests of more than three million businesses of all sizes, sectors, and regions, as well as state and local chambers and industry associations, and dedicated to promoting, protecting, and defending America's free enterprise system. The Chamber applauds the Committee's decision to hold a hearing on Regulatory Flexibility Act (RFA)[1] compliance issues related to the U.S. Environmental Protection Agency (EPA). The Chamber is particularly concerned about EPA's RFA compliance effort as it relates to the revised definition of "Waters of the United States" proposed by the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (COE).[2]

Many of the Chamber's members, including our small business members, have determined that they would be significantly adversely impacted by the expansion of federal Clean Water Act jurisdiction that would be brought about by this revised definition. Inexplicably, however, EPA certified, with no factual basis whatsoever, that the proposed definition change will not have "a significant economic impact on a substantial number of small entities."[3] As described in detail below, EPA has utterly failed to meet its responsibilities under the RFA. The agency should not be allowed to finalize this revised definition without fully complying with the RFA.

The Regulatory Flexibility Act covers three distinct types of small entities: small businesses, small not-for-profit organizations, and small governmental jurisdictions.[4] Before formally proposing a new rule, EPA must identify small entities that are likely to be impacted and estimate the magnitude of the economic impact. If this analysis indicates that no (or very few) small entities would be impacted, and that the economic impact would be negligible, the RFA allows the agency to certify that there would not be "a significant economic impact on a substantial number of small entities."[5] EPA can only make such an RFA certification if it has

[1] 5 U.S.C. §§ 601-612.
[2] "Definition of "Waters of the United States" Under the Clean Water Act," 79 Fed. Reg. 22,188 (April 21, 2014)
[3] *Id.* at 22,220.
[4] 5 U.S.C. §§ 601(3)-(5).
[5] 5 U.S.C. § 605(b).

performed an analysis and has developed enough information to support a determination of no- or low-impact.[6] Significantly, if an agency does not have the factual data to support a certification, it cannot certify and must comply with detailed RFA impact analysis requirements.[7] EPA is specifically also required by the RFA to convene a Small Business Advocacy Review (SBAR) Panel, in order to consider the views of affected small entities and evaluate alternative regulatory approaches that could lessen rule's impact while still achieving the goal of the agency.[8]

Unfortunately, EPA did not follow these requirements. The agency's published certification asserts that "[t]he scope of regulatory jurisdiction in this proposed rule is narrower than that under the existing regulations. Because fewer waters would be subject to the CWA under the proposed rule than are subject to regulation under the existing regulation, this action would not affect small entities to a greater degree than the existing regulation."[9] EPA's own economic analysis of the proposed definition change contradicts this argument, however. That analysis reports that the revised definition would ***increase*** overall Clean Water Act jurisdiction by roughly 3 percent.[10] Other analyses suggest that the land areas that would fall under Clean Water Act jurisdiction for the first time would actually increase by orders of magnitude.[11]

The most accurate estimates of the revised definition clearly show that the expanded definition would have widespread regulatory impacts on small businesses and small governmental jurisdictions. Many ordinary activities undertaken by small businesses would immediately become subject a wide variety of federal regulation, including permitting requirements, notifications and recordkeeping, modeling and monitoring, and use approvals. These requirements would impose direct costs, delays, and uncertainty in planning. Likewise, small governmental jurisdictions such as small towns, counties, water systems, irrigation districts, transportation departments, and municipal utilities will be profoundly impacted by the shift from state and local control of water-related land uses to federal control.

Adding to these concerns is the fact that the actual text of the proposed definition change is vague and confusing. Key terms that are vital in understanding the true scope of the definition are absent. Despite repeated assurances by EPA officials that the agency does not "intend" to expand its regulatory and enforcement reach over specific types of land uses, the language of the definition will have legal effect, not spoken assurances.

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[6] Small Business Administration, Office of Advocacy, *How to Comply with the Regulatory Flexibility Act: A Guide for Government Agencies* (May 2003) at 10-11.

[7] 5 U.S.C. § 603.

[8] 5 U.S.C. § 609(b).

[9] 79 Fed. Reg. 22,220.

[10] EPA and U.S. Army Corps of Engineers, *Economic Analysis of Proposed Revised Definition of Waters of the United States* (March 2014) at12.

[11] For example, the state of Kansas has estimated that the inclusion of "ephemeral" streams as "waters of the U.S." would increase the amount of jurisdictional stream miles from 32,000 miles to 134,000 miles, more than 400%. See Letter to Nancy Stoner, Acting Assistant Administrator for Water, U.S. Environmental Protection Agency from Sam Brownback, Governor of Kansas (July 14, 2011) ("For Kansas, we can easily see where this [the WOTUS definition] would bring up to 100,000 miles of ephemeral drainages under the purview of the Clean Water Act and subject those drainages to its numerous mandatory requirements – requirements producing little if any demonstrable improvement is water quality."). A similar survey in one portion of Kentucky found that jurisdictional stream miles would increase from 143 miles to 527 miles (368%). See Waters Advocacy Coalition maps, based on National Hydrography Dataset of surface waters of 48-square mile area of Northern Kentucky, near the suburbs of Cincinnati (available from the Waters Advocacy Coalition).

For all of these reasons, EPA's certification is invalid. The agency failed to provide a factual basis for its RFA certification. Moreover, even a cursory analysis indicates that the revised definition would indeed have a significant economic impact on a substantial number of small entities. Accordingly, the RFA requires EPA to conduct a SBAR Panel for the proposal rule.

EPA should immediately withdraw the waters of the U.S. proposal and go back to the drawing board. A revised definition of this term—which is critical to determining the scope of federal, versus state and local, control of land uses—must be written in a way that is clear and understandable. EPA must explain why such a revision is necessary, and what environmental benefits, if any, the revision would yield. EPA must also conduct a formal SBAR Panel and consider alternative regulatory approaches. Had EPA conducted a Panel on the current proposal, it would have known early on that the public considers this revised definition to be confusing, not well thought out, and an unprecedented assertion by a federal agency of sweeping authority over land uses across the country.

All of the Chamber's members want clean water—and in many cases depend on it for their businesses to survive. What they are concerned about with the proposed waters of the U.S. definition is EPA's overarching attempt to replace longstanding state and local control of land uses near water with centralized federal control. EPA and the COE need to withdraw the proposal and do a better job of understanding and avoiding the impacts a revised definition would have on small entities everywhere in the U.S.

Sincerely,

R. Bruce Josten

cc: Members of the Committee on Small Business

Joint Field Hearing on EPA Water Grab

"The EPA's Unauthorized Usurpation of State and Tribal Water Rights:
Cleaning up the Clean Water Act"

Participants:
**DAVID SCHWEIKERT** (R-AZ), Member of Congress from 6th District of Arizona
**PAUL GOSAR** (R-AZ), Member of Congress from 4th District of Arizona
**LAMAR SMITH** (R-TZ), Member of Congress from 21st District of Texas
**MATT SALMON** (R-AZ), Member of Congress from 1st District of Arizona
**TRENT FRANKS** (R-AZ), Member of Congress from 8th District of Arizona
**GAIL GRIFFIN**, Arizona State Senator from 14th District
**MARICELA SOLIS DE KESTER**, District Director for U.S. Congressman Ron Barber

Witnesses:
**MICHAEL LACEY**, Arizona Department of Water Resources
**GOVERNOR GREGORY MENDOZA**, Gila River Indian Community
**JAY JOHNSON**, Central Arizona Project
**DR. KIRSTEN ENGEL**, University of Arizona
**STEFANIE SMALLHOUSE**, Arizona Farm Bureau
**BOB LYNCH**, Irrigation and Electrical Districts Association of Arizona
**SPENCER KAMPS**, Home Builders Association of Central Arizona
**MATTHEW HINCK**, Arizona Rock Products Association
**NICOLE LaSLAVIC**, Arizona Association of Realtors

Chairman:
**TOM VAN FLEIN**, Chairman of EPA Joint Field Hearing, presiding

10 a.m. to 1 p.m.
Monday, June 2, 2014

Arizona State Capitol
Phoenix, Arizona

**CHAIRMAN:** Take a seat, and welcome to the congressional and joint hearing and roundtable entitled "Full Disclosure: What the EPA's Water Rule Means for Arizona." We have with us a full panel today and a full discussion. The purpose of this hearing is to find out from members of the public and from various constituent groups the impact of the proposed water rule from the EPA. We have various witnesses that will be introduced as they come forward, and we have various Members of Congress and one State Senator with us, who I will introduce momentarily, but we are going to start first with our invocation. Donna Kafer, are you here? There she is.

**ATTENDEE**: Everybody stand.

**CHAPLAIN DONNA KAFER**: Almighty God, we've come this morning with grateful hearts and spirits as we look to you for guidance in all that we say and do. Thank you, Father, for the words of the Psalm that admonishes us to serve you in gladness, for it is through you that we have our very being. It is in you that we live, move, and breathe. Give us the ability, Father, to remain grateful, for gratitude is the key of living a life of lasting significance. Remind us today, Father, that our work is an honor, that our duties are given first to you, then to each other. Lord, give each person here today a renewed sense of purpose in service, and instill in them a fresh optimism for their calling.

Now, Father, I ask that you bless each one, pouring out your infallible love, mercy, and grace on them. Thank you, Father. We pray this in your perfect name and in the name of our Lord and Savior. Amen.

**ATTENDEES:** Amen.

**CHAIRMAN:** Now we will have the Color Guard, presented by the Cub Scouts, Troop 951 from Mesa, led by their den leader, K.D. Eisen [ph].

**CUB SCOUT**: Please stand for the Presentation of the Colors. Cub Scouts, attention. Color Guard, attention. Color Guard, advance. Color Guard, hold. Color Guard, post the colors.

**CHAIRMAN**: Please join us for the Pledge of Allegiance.

[Pledge of Allegiance.]

**CUB SCOUT**: Color Guard, retreat. Color Guard, hold. Color Guard, dismissed. Cub Scouts, dismissed.

**CHAIRMAN:** Thank you. Please be seated. We are now going to start with opening statements from the various members who are present here today. In addition, we will have a statement read on behalf of Congressman Ron Barber by Maricela Solis de Kester, but we start with the first opening statement by Congressman Paul Gosar.

**REP. PAUL GOSAR:** Good morning, everybody. We've got some seats. This has kind of tightened up, so everybody gets a chance to have a seat, please. And good morning, everybody, and thank you for joining us. This hearing will come to order.

Your engagement today reflects the spirit of Arizona and our common goal of creating a more prosperous nation. I want to thank each and every one of our witnesses for being here today, and taking time out of their busy schedules. We look forward to your testimony. Also joining us today is Congressman Lamar Smith of Texas, who is Chairman of the House Science, Space, and Technology Committee. Lamar, thanks for coming to Arizona.

[Applause.]

**REP. PAUL GOSAR:** Your participation is truly appreciated. I also want to give a special thanks to Congressman Schweikart and his staff for joining us in getting this event organized, so thank you, David, very much.

[Applause.]

**REP. PAUL GOSAR:** I want to also thank all my other colleagues on the dais for taking time to attend this hearing, as we closely examine the recent proposed rule released by the U.S. Environmental Protection Agency, or EPA, and the U.S. Army Corps of Engineers, known as the Corps of Engineers, which seeks to expand the definition of the navigable water of the United States. I will note that the entire Arizona delegation was invited to participate in the hearing. While none of the members on the other side of the aisle chose to participate in person, I am pleased that Congressman Ron Barber recognized the importance of this hearing and sent his District Director, Maricela Solis, to read a statement on his behalf, so thank you for attending today, Maricela, and we look forward to Representative Barber's statement.

I would also note that witnesses were invited to participate from the EPA and the Corps of Engineers. Deplorably, both agencies declined to send a representative. Their absence is unfortunate for a variety of reasons. All too often, bureaucrats in Washington fail to consider the potential negative consequences of these very regulations they put forth by their respective agencies. In hopes to remedy this neglect, Congress passed the Regulatory Flexibility Act to ensure that federal agencies meet certain obligations and consider the economic impact of any new regulation and how it will have an effect on small businesses in our economy. Unfortunately, compliance with the Regulatory Flexibility Act has all too often been the exception rather than the rule, and few agencies are worse at compliance with this law than the EPA.

On March 25, 2014, the EPA and the Corps of Engineers released a proposed rule that would asset Clean Water Act jurisdiction over nearly all areas, with even the slightest of connections to water resources, including manmade conveyances. So, once again, we find ourselves at the crossroad of a Federal Government overreach and overburdened Americans struggling to stay afloat in this ocean of bureaucracy. This rule, as currently written, will broaden the regulatory reach of the EPA and the Clean Water Act to thousands of small ditches, ponds, and other isolated water, some of which have little or not previous connection to traditionally navigable waters, under the control of the Federal Government. Despite the fact that the U.S. Supreme Court has previously heard two separate cases on this topic, and determined that the EPA has no legal authority to expand the definition of navigable water under the Clean Water Act, the EPA is falsely claiming that this new rule will increase clarity as to which waters are subject to Clean Water Act jurisdiction.

Let me be clear. Nothing can be further from the truth. This proposed water grab runs contrary to state and tribal water laws, and would have devastating economic consequences

for farmers, ranchers, small businesses, and water users in Arizona and throughout the country. This would impact everything from local governments trying to expand infrastructure projects to the construction of community gardens, and undermines the constitutional role of Congress, not the EPA, as the lawmaking body of the United States. What makes this proposed rule even worse is the lack of accountability from the EPA and the Corps of Engineers, and their research for proposing this new law.

According to a recent report by economists and University of California, Berkeley faculty member, David Sunding, the Environmental Protection Agency's proposed Clean Water Act rule is rife with errors and lacks transparency. Dr. Sundling goes on to document how the EPA excluded costs under represented jurisdictional areas, and used flawed methodology to arrive at a much lower economic cost for the proposed rule. Dr. Sunding concluded that the errors in the EPA's analysis are so extensive that it should be rendered useless for determining the true cost of this proposed rule. His report underscores the need for the EPA to withdraw the rule, and complete a comprehensive and transparent economic review that complies with federal law.

As we will hear today, administrative applications and regulatory overreach by executive fiat are being used to seize power and control from state, tribal, and local jurisdictions. The bottom line is Arizonans can't afford more economic hurdles and the thieveries of precious water supplies from an overzealous, unaccountable Federal Government operating in a hyper mode.

There is an old adage in the West – whiskey is for drinking and water is for fighting over. Rest assured that I'm committed to that fight, as are my other colleagues on this dais, and the majority the people in this room. The good news is there is widespread support in Congress for rolling back this overreach. Two hundred thirty of my colleagues and I recently demanded the EPA and the Corps of Engineers immediately withdraw this flawed rule. I look forward to hearing from the witnesses today, and gathering a local perspective with regard to potential impacts associated with the proposed rule for the citizens of Arizona, and with that it gives me great pleasure to yield to my friend and my colleague, Congressman Lamar Smith, for his opening statement. Lamar, once again, thanks for coming to Arizona for your trip. The floor is all yours.

**CONGRESSMAN LAMAR SMITH:** Paul, thank you for that introduction, and thank you for including me at today's roundtable discussion about a very, very important subject. And I want to say to everyone here, it's just a distinct pleasure for me to be with so many outstanding colleagues. David Schweikert to my left, Paul Gosar, who just introduced me, Matt Salmon, and Trent Franks are all just special friends and all, as I say, outstanding members of Congress, and I'm always privileged to be in their company.

I also want to mention a connection that I have to your great state. I know you're infiltrated quite frequently by Texans, but in the case of my family, my uncle, Uncle Mac, MacDonald Smith, was a professor at Arizona State University for many, many years, before, I admit, moving to the University of Texas in Austin, so I cross bridges with both states in that regard.

One thing I remember about visiting Uncle Mac years and years ago, and I've never seen it before, it's sort of a natural phenomenon as far as I was concerned, and that is he used to water his yard by flooding it, and I think that only occurs in Arizona, and it probably only occurred many, many years ago, but it was an indelible memory that I have from that particular time.

Let me get to my opening statement and say, again, to you all, thank you for attending, thank you for your interest in this subject, and thank you for helping us try to, I hope, restrain the unnecessary and burdensome regulations that are oftentimes promulgated by this administration. Several hours ago, the administration announced costly climate regulations under the Clean Air Act. Behind the flashy rollout there is nothing new—it's all pain and no gain. EPA mandates will hit struggling workers and families the hardest. The Chamber of Commerce says these rules could kill hundreds of thousands of jobs and cost $50 billion every year.

This administration is simply out of control. The EPA's proposed Waters of the U.S. rule, under the Clean Water Act, which is what we're discussing here today, is yet another example of an agency driven by partisan politics instead of sound science. When the EPA unveiled this rule, Administrator McCarthy claimed that it will, quote, save us time, keep money in our pockets, cut red tape, and give certainty to business, but I haven't heard one farmer or small business owner who agrees. The only certainty is an agency that is undertaking one of the largest expansions of federal power in our nation's history.

In its rush to implement the President's radical agenda, the EPA published this new rule without even waiting for expert advice. The Science Advisory Board exists to provide independent advice to the EPA and Congress. It is the job of these experts to review the underlying science. But either EPA doesn't care what the scientific advisors have to say, or they are worried that the experts don't agree with them. Not only did the EPA publish its rule before the Advisory Board's report was completed, but the agency also prevented the Science Advisory Board from responding to questions from members of Congress. What is the EPA trying to hide?

The Obama administration continues to undermine scientific integrity in order to fast-track a partisan regulatory agenda. However, the law that establishes the Science Advisory Board, the EPA's own policies, require expert review. Giving science advisors a chance to influence EPA decisions isn't just a good idea—it happens to be the law. But the EPA didn't want to wait for that scientific advice. Instead, the EPA wrote itself a blank check. The rule is so vague that the EPA can claim authority over just about anywhere wet enough to breed mosquitoes. Is the EPA going to claim someone's backyard pond? This mosquito rule may go even farther than that. In the pages upon pages of definitions, the one thing EPA fails to define is water. This is where the rule gets tricky. The sole purpose of the rule was to clearly define Waters of the U.S., but it never actually defines waters. The rules defines broad tracts of land as riparian areas, and seems to look for little more than a rainstorm to trigger federal control.

Let me show you a map EPA is considering, and it's on the screen to my right here. This is a map from EPA's draft report, showing tributaries in red and blue that the EPA is considering claiming in the West. As you can see, the red area is almost 99 percent of the land that would be impacted. The Clean Water Act was supposed to be about water, but not land. Common sense tells you that if it's not wet, it's not water. The American people didn't ask the EPA to invade their backyards, yet that may be what they're getting. It's time to put a stop to the EPA's overreach and to protect the private property of all Americans.

Thank you, Mr. Chairman, and I'll yield back.

**CHAIRMAN:** Thank you, and our next opening statement is from Senator Gail Griffin, who is Chairman of the Water, Land, and Rural Development Committee for the State Senate. Thank you.

**SENATOR GAIL GRIFFIN:** Thank you very much, Congressmen Franks, Salmon, Gosar, Schweikart. Special thank you for Congressman Smith for making his trip, and honored guest. My name is Gail Griffin. I am a State Senator representing District 14, which includes all of Cochise County, all of Greenlee County, most of Graham County, and the eastern portion of Pima County. These counties are some of the most rural areas of the state, and the residents of these counties are ranchers, farmers, miners, small business people, and families. They, along with millions of other Americans, are deeply concerned with this rule and its potential impact on their lives and their livelihood. It's for this reason that I'm proud to be standing with you in opposition to this proposed rule.

As I'm sure you'll hear by others today, the EPA's proposed rule is nothing less than an unlawful expansion of federal regulation over routine farming and ranching practices, as well as other common private land uses such as homebuilding. The rule is contrary to the intent of the Clean Water Act and outside the scope of the EPA's authority. Congress has never authorized EPA to expand its authority over dry streams and washes, and I suspect that if EPA were to try, Congress would quickly and overwhelmingly reject this request.

As we all know, the proposed rule would significantly expand the scope of navigable waters and non-navigable waters, subject to the Clean Water Act, by jurisdiction, by regulating small and remote waters, many of which are not even wet, or considered waters by any current legal definition. What's more, this rule has the potential to interfere with the process that's been underway in Arizona for many years, to determine the navigability of rivers and streams throughout the state. This process, we hope, will be completed this year, as to whether the rivers in the state were navigable at time of statehood, February 14, 1912. Does the EPA's rule override those findings? Will the EPA have control over every dry wash or stream in the state, even though the state has determined them to be non-navigable?

Also alarming is the fact that EPA's rule has been prepared based on a report that has not even been finalized or scientifically peer reviewed. How can the EPA justify a rule that expands the authority over private property throughout the country, based on a study that is in draft form

and has not be commented on by the public? The EPA should allow for public comment on the report before it proposes any rule, not after, and should suspend the current comment period and reopen it when the report is finalized and published. Why is it important for the public to review and comment on the report? Because, for the first time in history, this rule would give federal regulators authority over irrigation ditches, storm water systems, roadside ditches, waters located within riparian and flood plain areas, and dry washes. All of these so-called waters, even if they don't have water in them, could be subject to EPA regulations under this proposed rule. It takes a special kind of arrogance to assert that a wash or an irrigation ditch, with no water, should be subject to the Clean Water Act, yet that is exactly what EPA is proposing.

As a result of this rule, if adopted, everyday activities like grazing cattle, plowing a field, applying fertilizer, managing weeds, or building a home could now require a permit from the Federal Government. What this means is that a regulator from San Francisco or Washington, D.C. would decide whether a farmer tilling his field in rural Arizona is a threat to the water quality of a dry river. How does it benefit the people of Arizona to require property owners, farmers, ranchers, and homebuilders to obtain a permit for everyday activities? I have the answer. It does not. The EPA's proposed expansion of the Clean Water Act is just the latest in a series of federal attacks on private property, water rights, natural resource industries of rural America. These federal actions have had devastating consequences for both the environment and the economy of rural Arizona, and, in particular, consider the following examples.

The Mexican spotted owl. The extreme environmental groups to end commercial logging in northern Arizona resulted in many fires, over a million acres of forest and 500 homes destroyed. The Environmental Protection Act recently rejected the state's implementation plan for regional haze, and required Arizona to comply with the federal implementation plan, mandating several Arizona power plants to install selected catalytic reduction equipment, at the cost of near $1 billion. Arizona residents cannot afford to have $1 billion taken out of their wallets for technology that will not even have visible impact on air quality.

More recently, EPA threatened to require the Navajo Generating Station to install similar technology at its plant, which would have forced owners to shut down the plant. The Navajo Generating Station provides electricity for Central Arizona Project and such a shutdown would have raised water rates for Arizona residents, estimated at 15 to 20 percent. In addition, the EPA carbon rule announced this morning would have devastating effect on the economy, both locally and nationwide. Arizona's economy simply can't afford that.

These are just a few examples, but I could go on all day—expansion of the Mexican wolf habitat and violation of the 10j rule, designation of critical habitat of jaguars, which my home happens to be in, objections to cuckoos, garter snakes, travel management plans, wilderness area designations, and the Endangered Species Act. Each of these represent an expansion of federal regulatory authority at the expense of private property rights and state sovereignty.

I feel compelled to point out that the western states like Arizona are particularly vulnerable with these regulations because of the Federal Government's ownership of the majority of land in the western United States. How can a state thrive when primary landowners is the Federal Government? And I have a map, that red and white map over in the corner. What you see in white is all we have in private hands, and in your package that you have before you today, the Arizona Farm Bureau did a study back in 1997, that showed Arizona only had 13 percent of land in private ownership in Arizona.

Finally, I would like to sound the alarm about a growing practice that is having ever-greater consequences for our economy, and that is the Federal Government's implementation of new environmental and land use regulations through sue-and-settle agreements with extreme environmental groups. According to the U.S. Chamber of Commerce, there have been 71 successful sue-and-settle negotiations from 2009 to 2012, that have resulted in more than 100 new federal rules, carrying estimated compliance costs of more than $100 million annually. These agreements deny local governments, affected parties, and members of the public a seat at the table. They also leave few opportunities to protest. It's time for Congress to rein in EPA and other federal agencies before it's too late. Federal environmental regulations are killing rural America. Arizona's economy, especially its natural resource industries, can only absorb so much.

To conclude, as I have said many times before, it's a sad day when the greatest threat to America's economy comes not only from Europe and China and the Middle East, but from Washington, D.C. Thank you for your time, for being here today. We look forward to working with you and the citizens of Arizona and the United States. Thank you.

**CHAIRMAN:** Thank you, senator. Our next opening statement will come from the representative from Arizona's Fifth Congressional District, Matt Salmon, who is a member of the House Foreign Affairs Committee and the House Education and Workforce Committee.

**CONGRESSMAN MATT SALMON:** Thank you. Congressman Gosar, when you quoted that oft-quoted quotation about whiskey is for drinking and water is for fighting, and you wanted to get in the fight, I'm worried the *Republic* is going to say tomorrow you want to get into some drunken bar fight.

[Laughter.]

**REP. MATT SALMON:** The way they do things, you know. Lamar, Congressman Smith, I'm just thrilled to have you out here. Thank you for taking the time to come out here. We really appreciate it.

We're proud to be fighting the fight alongside our state legislators, brave leaders like Gail Griffin, who have tried to fight the fight for common sense, and too bad. This is not about the environment. This is about a power grab. This is about asserting their authority. Just like the Clean Air—the only way that we ever come into compliance in Maricopa County with the Clean

Air Act is if we pave the desert, and they don't get that, that these rules sometimes are really silly.

The Clean Water Act states that its objective is to restore and maintain the chemical, physical, and biological integrity of the nation's waters. This is to be accomplished by eliminating the discharge of pollutants into navigable waters. The current definition of navigable waters applies to Waters of the United States, including the territorial seas. Since the Clean Water Act's inception in 1972, this definition has left businesses across the country struggling to define what does and does not constitute a Water of the United States, under the Act? Unfortunately, many court battles have been fought because of the lack of clarity provided by the current language within the Clean Water Act.

Recently, the EPA proposed a new rule, that we're here to talk about today, and new definitions within the Clean Water Act, that promise to harm small business yet one more time, and private landowners. According to the EPA, the new rules do not expand the types of water protected under the Act but further clarify what constitutes a navigable water of the U.S. under the law. Unfortunately, I think we all know this is not the case. The vague terms used in this bill promise to subject everyday Americans to invasive, burdensome regulations that could very well crush them, through lengthy court proceedings and exorbitant litigation costs, just like it did to the timber industry here in this state, and what's the end result of that been? The very thing that they're trying to do, protect the spotted owl, has made them more endangered because of the terrible wildfires that have nearly destroyed their habitat, because of the lame policies coming out of Washington, D.C.

The new rule would include much smaller bodies of water that few would consider to be navigable—maybe for my grandson's little toy boat, but other than that, not navigable by our standards. These small bodies of water that the new rules would control would include local streams, river banks, wetlands, and flood plains that may have access to larger bodies of water. Additionally, the proposed rule could also prohibit ranchers and farmers from lawfully making necessary, on-the-spot decisions that are essential to the success of their herd or their crops.

For the first time ever, EPA is defining ditches as tributaries, which would subject private landowners to whole new slew of complicated regulatory penalties. Here in Arizona, water is scarce, and irrigation ditches are often used to transport water from one field to the next. Under the EPA's proposal, new regulations on landowners could result in them having to purchase costly permits and face lengthy delays in order to secure permission from the Federal Government to conduct their own affairs on their own land. That's not just unreasonable, it's crazy. Furthermore, it's completely counter to the EPA's claim that these new rules do not expand federal authority.

The reality of this proposed rule is that while it does modify the existing definition of navigable waters here in the United States, it fails to offer clarity that the EPA promised, and, instead, expands the Federal Government's power to regulate, even on private property. Furthermore, this continued lack of clarity will allow regulators to persist in venturing into murky territory,

especially as it relates to agricultural land use, and cause undue harm to American farmers, ranchers, and business owners. Small business owners and lawmakers alike warn that the new rules will subject farmers, ranchers, homebuilders, and other entrepreneurs to complicated and costly regulations. In fact, as seems to be a trend with the EPA, the agency appears to have downplayed the regulatory and economic impact this rule will have on small businesses.

As is common with Federal Government top-down approach to regulation, the agency failed to conduct proper outreach, which resulted in a lack of proper input from small business owners. That's why we're here today. This missed opportunity has resulted in poor, short-sighted policies that will inevitably have adverse effects on everyday Americans, and do nothing—nothing—to provide clean water to our communities and families. At the very least, the EPA and the Army Corps of Engineers should rescind the rule until economic impact on businesses, especially small businesses, has been determined as required under the Regulatory Flexibility Act. This administration's track record of ignoring or only paying lip service to the cost benefit analysis, as required by law, for new regulatory regimes, is not only troubling, it's downright irresponsible.

I want to thank my Arizona colleagues, Congressman David Schweikart and Paul Gosar, for organizing this roundtable, and, as always, it's great to see your bright and smiling face, Congressman Franks. I'm really thankful Lamar Smith came in from Texas, and I think you guys think we're part of Texas, don't you? Okay. All right.

[Laughter.]

**REP. MATT SALMON:** Anyway, and Gail, thank you for all your great work. We really appreciate it. I'd like to thank the other panel participants, those that are here to testify today. Your real-world expertise is critical as we examine the actual impacts of the EPA's proposed rule and take steps to protect our nation's small businesses from more government overregulation and growth-destroying policies, and I look forward to our discussion. Thank you.

**CHAIRMAN:** Thank you, Congressman. Our next opening statement is from the Representative from Arizona's Eighth Congressional District, Trent Franks, who is a member of the House Armed Services Committee and the House Judiciary Committee.

**CONGRESSMAN TRENT FRANKS:** Well, thank you, Mr. Chairman, and I want to certainly thank all of the people here that have come to witness this hearing, and also to our distinguished panelists. Let me especially express gratitude to all of the people here on the dais. You know, we love every one of you. I would call out Lamar Smith for special gratitude, for coming all the way from Texas. You know, I had the privilege of serving on the Judiciary Committee when he was Chairman, and I don't want to embarrass him but there's not a finer man in Congress. He's just a truly great man and we're very fortunate to have him there, and, again, I appreciate it. I'm in the enviable position here, in this hearing titled "Cleaning Up the Clean Water Act." What a great title. I don't know who came up with that, but they should be applauded. But I'm in the

enviable position of having agreed with every phrase that's been spoken here already this morning, so it affords me the opportunity to make my comments fairly brief.

Mr. Chairman, on March 25th of this year, the EPA and the Army Corps of Engineers issued a proposed rule to change the scope of water subject to federal jurisdiction under the Clean Water Act. This hearing will examine the egregious effects this proposed rule would have on our state. The Clean Water Act limits federal jurisdiction to navigable waters, and in 2001 and 2007, the U.S. Supreme Court reaffirmed those limits. But the regulatory structure of the Clean Water Act depends upon the definition of navigable waters. Once a body of water has been determined to be a navigable water of the United States, the permitting requirements of the Act are triggered.

This proposed rule would assert a Clean Water Act jurisdiction over nearly all areas with any hydrologic connection to downstream navigable waters, including ditches, drainages, ponds, prairie potholes, flood plains, and other seasonally wet areas. This rule will pose a regulatory nightmare for small businesses, our farmers, our construction aggregate industries, and our land developers here in Arizona. It represents, ladies and gentlemen, a complete bypassing of Congress and two Supreme Court decisions, and it is yet another prime example of the Obama administration's complete disregard for the Constitution and the rule of law.

And with that happy statement, I would look forward to hear from the witnesses and would yield back.

**CHAIRMAN:** Thank you, sir. Our next opening statement will come from Arizona's Representative for the Sixth Congressional District, Congressman David Schweikert, who is Chairman of the Subcommittee of Environment for the Space, Science, and Technology Committee, which has jurisdiction over the EPA, and also Congressman Schweikert is a primary and principal author of the Reform Act, HR-4012, on secret science.

**CONGRESSMAN DAVID SCHWEIKERT:** Thank you, and thank you, Paul, and to my fellow members, I hope we continue to tease people from Texas, reminding them that they're Easterners to us.

[Laughter.]

**REP. DAVID SCHWEIKERT:** Somehow, everyone else laughs except for the folks from Texas on that. One of the reasons we're holding this discussion today is about a month and a half ago, we did a roundtable with a bunch of lawyers, and we've done this on other issues, where you bring in folks that specialize in an area, you sit them around a table, and you sort of read through the rule, and you discuss it. And then you turn to the one really smart person over here and say, "How far could you take it, as an attorney? Okay. Well, how would you interpret that? How far do you take it?" What was fascinating was the number of times in this roundtable discussion where someone would say, "We think they mean this, but I promise you, I could litigate it to say this." And for those of us that live in the Desert Southwest, where we

may only get 14 inches of rain a year, but it all comes on a Tuesday, when you read through the rule, I'm not sure that the EPA, the rule-writers, understand rural Arizona, the Desert Southwest, how different we manage our water resources. In the Phoenix area, we recycle every single drop.

I'm not going to read the whole opening statement, but I will submit it for the record, but there are a couple of points here. The rule states, "The agency proposes that other waters, those not fitting in any category previously listed, could be determined to be Waters of the United States, though a case specific showing that other, either alone or in a combination with similarly situated waters." When you start to read through the way the rule is written, and then you see terms like "significant nexus," does that mean the wash behind your house, that washes to the Indian Bend Wash, that eventually goes to the dry Salt River, that if the dry Salt River was running, that would run down to the Gila, and then the Gila eventually runs to the—?

Terms like "significant nexus" and how they're defined, and how they'll be defined in the section of the rule that allows rather broad litigation over time, even if we all came to an agreement on what it meant today, heaven knows what it would mean a decade from now. And with that I yield back.

**CHAIRMAN:** Thank you, Congressman. Our final opening statement will be read on behalf of Congressman Ron Barber by his district director, Maricela Solis de Kester. Congressman Ron Barber represents the Second Congressional District—if you could take the podium, thank you—and is a member of the Armed Services Committee and the House Small Business Committee.

**MARICELA SOLIS DE KESTER:** Good morning, everyone. On behalf of Congressman Ron Barber, Congressman Ron Barber would like to thank you for hosting today's meeting. This discussion is important to ensuring that all stakeholders are heard from and included in this process, and that is something that the Congressman is very much committed to. The Congressman is monitoring the proposed rule closely, and looks forward to working with all of the stakeholders to ensure the best possible outcome. And he sends his regrets for not being able to attend today, as he's traveling in district. Thank you very much, and I will submit this for the record.

**CHAIRMAN:** Okay. Thank you. With that, that concludes the opening statements from the members and participants on the panel. We will now have two series of panels with witnesses that will provide testimony and opening statements and then respond to one question each from members of the panel up here, and the first panel of designated witnesses will be with Governor Mendoza, Mr. Lacey and Ms. Engel—they're all seated—and Mr. Johnson. So we will proceed with the Governor of the Gila River Indian Community, Governor Mendoza, if you could proceed with your opening statement, and welcome.

**GOVERNOR GREGORY MENDOZA:** Good morning. Welcome to the indigenous lands of my ancestors, the Huhugam. My name is Gregory Mendoza, and I am the Governor of the Gila River Indian Community. On behalf of the community, I want to thank Congressman Gosar and

Congressman Schweikert for holding this roundtable, and for inviting me to speak about this proposed rule concerning the waters of the United States.

My community shares many of the same concerns as other tribes, developers, and private landowners, regarding the proposed rule. In the name of clarifying the definition of Waters of the United States, EPA and the Army Corps of Engineers are, in reality, seeking to bring new waterways under federal permitting jurisdiction. For this, this means that my community development projects that do not require a federal permit today could require one under this proposed rule. This could subject our projects to additional costs and delays, exacting federal standards, the possibility of a permit being denied, and the potential for expensive and time-consuming litigation.

By far, the most significant impact that this proposed rule could have on my community concerns the community's receipt and conveyance of Central Arizona Project, or CAP, water. This is water that the United States holds in trust for the benefit of my community, and which the community is guaranteed to receive under the Arizona Water Settlements Act of 2004. The community's CAP water allocation travels 250 miles to the reservation, and is then conveyed and dispersed through the reservation by a system of canals and irrigation and drainage districts, known as the Pima-Maricopa Irrigation Project, or P-MIP. This is vitally important to my community that the proposed rule does not revoke or modify any of the current Clean Water Act-permitting exemptions, exclusions that apply to P-MIP or CAP water delivery. These exclusions exempt most, if not all, P-MIP's construction and maintenance work from federal permitting.

The agencies cannot be allowed to reverse or modify this by rule-making. If the proposed rule were to include all or parts of the P-MIP system as a water of the United States, our efforts to irrigate our tribal lands and utilize CAP water could be significantly hampered by additional permitting requirements, costs, delays, and litigation, and the cost of any new regulatory requirements on delivery of water to our community would likely be passed on to the community, making CAP water more expensive, so that the community could be hit in two ways.

We are also concerned about the impacts that the proposed rule could have on our development projects. The community's reservation is approximately 372,000 acres, and is crossed by the Gila River, the Salt River, and the Santa Cruz River, as well as numerous washes. We are constantly engaged in economic development, agricultural expansion, and community planning projects that could very well impact waterways and washes that are not jurisdictional today, but could become jurisdictional under this proposed rule. Impacts of this kind could add significant cost and time burden to our very important community projects.

This proposed rule also goes against to reduce federal regulation on tribal lands and to expedite environmental permitting. For example, Congress recently passed the HEARTH Act, to allow tribes to lease their own tribal lands and implement their own streamlined environmental review process in lieu of federal approvals and reviews. At a time when federal policy is moving

toward reducing federal regulation over Native American tribes, the proposed rule goes in the complete opposite direction.

As a final point, I would like to touch briefly on another recent circumstance where EPA is seeking to expand its regulatory authority. EPA is initiating a process to control land use and development in the Bristol Bay region of Alaska, by preemptively blocking the Army Corps of Engineers from even considering a Clean Water Act permit for a mining project. It does not appear that EPA has ever sought to exercise its Clean Water Act authority so broadly, and doing so could set dangerous precedents, especially when coped with this proposed rule. This precedent could lead EPA to attempts its preemptive veto in other places, such as our reservation. We encourage that the House Committee on Oversight and Government is now investigating EPA's activities with regard to the Bristol Bay project.

In closing, I would like to thank you again for this opportunity to testify on this very important matter. Thank you.

**CHAIRMAN:** Thank you, Governor Mendoza. Now, for purposes of questioning the witness who just gave a statement, we'll be starting with Congressman Smith, moving to Representative Schweikert, then Senator Griffin, Salmon, Franks, and Gosar.

[Pause.]

**CHAIRMAN:** In the interest to make sure everyone has a chance and we don't go over time, we'll do all witness statements, then. So, we'll move forward to Mr. Jay Johnson, Director of the Central Arizona Project.

**JAY JOHNSON:** We're pleased to be here, and thank you, Congressmen and Senator, for giving me the opportunity to be here today on behalf of the Central Arizona Project. I am here to answer any questions you may have with regard to CAP, but we do not have a prepared statement this morning.

**CHAIRMAN:** Okay. Then, at the end of the testimony, they may have some questions for you. Mr. Michael Lacey, Director of the Arizona Department of Water Resources.

**MICHAEL LACEY:** Thank you. Members of Congress, Senator Griffin, it's an honor to be here. Just over a year ago, Governor Jan Brewer instructed then-director Sandy Fabritz Whitney of the Arizona Department of Water Resources to prepare "Arizona's Next Century: A Strategic Vision for Water Supply Sustainability." The vision was published in January 2014, and is designed to provide a solid foundation for Arizona's economic development for its next century. It builds upon the legacy of the leaders that came before us and demonstrates the continued need to invest and develop water supplies to support economic growth and protection of Arizona's unique natural environment that we all cherish. The collective foresight of these visionary leaders has positioned Arizona very well as compared to our neighboring states.

Our current successes rely on the development, storage, and transfer of water. Additional water supply development and transfers will be required to increase water supply resiliency for our current citizens and to meet the needs of a growing Arizona. Specific opportunities and strategies identified in the vision include exploitation of in-state water transfers, water supply development or augmentation to revised watershed management practices, rainwater harvesting, storm water capture, and importation of water supplies from outside of Arizona.

EPA's proposed rule may serve to jeopardize the viability and resiliency of Arizona's existing water portfolio and water delivery infrastructure, and threaten development of additional water supplies that will be necessary to sustain Arizona's economic development. We are both puzzled and troubled as to why EPA has not worked with the states in this rule-development process.

That concludes my remarks, and I yield back to the Chair.

**CHAIRMAN:** Thank you, Mr. Lacey. Our next statement comes from Professor Kirsten Engel with the University of Arizona. She is the author of an environmental law treatise, and is going to provide some information. Thank you.

**DR. KIRSTEN ENGEL:** Thank you very much. Congressman Schweikert, Congressman Gosar, honorable members of this committee, my name is Kirsten Engel and I'm very honored to be asked to testify before you today.

In my remarks I wish to make three points related to the Clean Water Act rule-making being proposed by the Army Corps of Engineers and the Environmental Protection Agency. First, it's my view the agency should step aside and let Congress address the important question of the proper reach of federal authority over our nation's waters. Second, at a minimum—and this has already been mentioned here today—the Corps and EPA should delay finalizing this rule until a panel examining the scientific soundness of the rule has completed its review and the public has had an opportunity to comment on the panel's findings.

Third, because the issues are inextricably related—we've already heard about this from some of the other testifying witnesses—the Corps and EPA should, in this rule-making, clarify the applicability of the Clean Water Act's permitting and treatment requirements to water supply facilities and transfer of water between water bodies meeting the definition of waters of the United States.

So allow me to elaborate on each of three points, so that we can better understand their implications generally, and for Arizona, specifically.

Congressional action, not agency action, may be what is needed to bring more certainty to this complex area of the law. The Corps and EPA justify the Waters of the United States rule-making as necessary to clear up the confusion regarding the Act's jurisdiction in the wake of the Supreme Court's decisions in *Solid Waste Agency of North Cook County v. U.S. Army Corps of*

*Engineers* and the *Rapanos v. United States* case, and these were referred to by Representative Salmon.

This goal is laudable, but it merits noting that both cases were prompted by assertions of federal authority by the agencies themselves. In the *Solid Waste Agency* case, the Court vacated the migratory bird rule, a Corps and EPA interpretation that brought isolated wetlands within the definition of the waters of the United States. In *Rapanos*, the Court vacated lower court decisions supporting Corps and EPA jurisdiction over wetlands adjacent to non-navigable tributaries of navigable waters.

Thus, it appears we are locked in something of a vicious cycle. The Corps and EPA issue regulations that prompt litigation, which then prompts more regulation. To break this cycle, Congress should consider amending the Clean Water Act's broad and very indefinite jurisdictional language, and state exactly what waters the American people wish to be subject to federal authority. This will bring greater certainty to regulated parties, as well as less litigation.

In the absence of a Congressional amendment, it's important that the agency's determination of waters of the United States reflect the best science currently available. EPA has submitted its analysis of the connectivity between traditionally navigable waters and other waters, to peer review by an external panel of scientists. In doing so, EPA has taken an important step to support its regulation with solid science. Inexplicably, however, the agencies are soliciting public comments on the rule prior to the panel's publication of their findings. EPA should extend the public comment period so that all stakeholders can provide input on the scientific review process.

Finally, in the Western United States, as important to the reach of federal authority as the definition of waters of the United States is the question of whether transfers between covered waters are subject to the permitting provisions of the Clean Water Act. The Clean Water Act requires any addition of pollutants to navigable water to obtain a permit, and in many cases the discharges are treated to reduce pollutant levels. To the extent movement of water through the canals and aqueducts of western water supply systems constitute, under this rule, discharges into waters of the United States, they may require permitting and treatment. Nevertheless, this may be unnecessary to the protection of human health and the environment since water in these systems is already being treated prior to being supplied to homes and businesses.

In 2008, EPA issued an exemption from the Clean Water Act's permitting requirements for transfers of waters between waters of the United States in the absence of "intervening industrial, municipal, or commercial use." This is an important rule for the West, because regardless of the scope of the Waters of the United States, these transfers are exempt under this rule. However, EPA's Water Transfers Rule was recently invalidated by a New York Federal District Court, a ruling that adds to the mixed response the rule has received in the courts since promulgation. Although this court decision is now being appealed by the western states,

including Arizona, and also, interestingly enough, by the EPA, a split between appeals courts circuits could eventually trigger a challenge to the rule to the Supreme Court, where its reception is unclear.

The bottom line is that the Water Transfers Rule is of immense importance to the West, the rule is in trouble, and in its absence, the effect of the rule being considered today may sweep within Corps and EPA jurisdiction many parts of western water transfer systems. That would not be for the benefit of society or the environment.

In sum, the scope of the federal jurisdiction under our nation's waters is a complex issue with complex history of regulation by EPA and the Army Corps of Engineers, and responsive rulings by the Supreme Court of the United States. To enhance regulatory certainty in this area, we may need congressional action and not more agency action. In any event, EPA and the Corps should delay finalizing the rule until the scientific review process is complete, and should take this opportunity to address clearly the applicability of the Clean Water Act's permit requirements to water transfers.

Thank you.

**CHAIRMAN:** Thank you, Professor Engel. Now we will go to member questions. Each member has a total of 5 minutes for the entire panel. We start with Congressman Smith.

**REP. LAMAR SMITH:** Five minutes—I'll try to be quick. Governor Mendoza, thank you for your very informative testimony, and I particularly appreciated your specifics when you talked about the adverse impact on the project. You said it was going to add to cost, cause delays, permits would be denied, and so forth. In regard to CAP, you said the water would be more expensive. That sounds to me like not much positive is coming out of these regulations when you talk about the impact on tribes or others, in general.

My quick question for you is, how do these regulations specifically affect tribal rights? And to the extent they do, maybe you could file a suit, but how do they affect tribal rights?

**GOVERNOR GREGORY MENDOZA:** Thank you, Congressman Smith. You know, we had the same similar problem with the EPA with regard to the Navajo Generating Station issue. With regard to your question, with regard to our community, you know, as I stated before, we have the Pima-Maricopa Irrigation Project on our reservation and it's responsible for the water delivery system. That particular system is essential to meeting our community's water needs under the Arizona Water Settlements Act, and for other purposes. The operation and expansion of this very important project has not been traditionally required, the Clean Air Water Act permits, and this exemption must be preserved, because not only does it impact just that, our particular water delivery system, but it may impact some of our other ongoing projects that we have, such as our Council just recently approved the construction of new homes for our community members. These homes will require new infrastructure including electricity, sewer, and storm drains, which the community will provide. But also, on top of that,

we are going to be constructing a new hospital with federal funds that have been allocated for a project called the Southeast Ambulatory Care Center near Chandler. These types of developments are very critical to providing services to our members, and they should not be delayed because of federal regulations.

We don't like litigation, sir, but in order to protect the interests of our community and the ongoing projects that we have, again, we believe that, as a sovereign nation, we have the interests. We have an interest in minimizing federal regulation and federal overreach on our own tribal lands.

**REP. LAMAR SMITH:** Governor Mendoza, somehow I think you were ready for that question.

[Laughter.]

**REP. LAMAR SMITH:** Thank you for that response. Mr. Lacey, you made the good point that there had been no consultation with the Federal Government. By the way, you're not alone in that regard. I'm not aware of the Federal Government consulting with any jurisdictions or states or communities that would be adversely impacted. But, real quickly, what would be the impact of these proposed regulations on Arizona's water supply?

**MICHAEL LACEY:** It does jeopardize the operation of existing water delivery infrastructure. So we have canals, ditches. It has the potential for impacting water users, agricultural interests, landowners, ranchers, and as we're moving forward and looking at developing additional supplies, it really does put some of those plans in jeopardy, with regards to what—there's folks that are looking at land modification to increase yields off of watersheds. Also, there's an added benefit of fire resiliency that may come with some of these activities, and we think there's some potential that those activities may be hampered by this rule.

**REP. LAMAR SMITH:** Okay. Thank you, Mr. Lacey, and Professor Engel, thank you for emphasizing the absence of comment by the Science Advisory Board. As I mentioned in my opening statement, that's not optional. That's required by law, and it was ignored by the EPA. Why they think they can get away with that, I don't know, and why they did not wait to hear what the scientific experts had to say makes me wonder, are they worried about disagreement or do they just not care? Whatever, there's no good reason for ignoring the law and ignoring the requirement that they consult with the Science Advisory Board.

I appreciated your mentioning and emphasizing that these regulations should reflect, you used the words "best science" or "good science," and they do not necessarily reflect that. I have had an ongoing battle with the EPA to try to get them to give the Science Committee the data they use as a basis for these regulations, not only Clean Water but also Clean Air, and, in fact, I was the first Science Committee chairman in the last 21 years to issue a subpoena directed at the EPA, just a few months ago, in fact, to try to get them to show us the data. What are they afraid of? If the data shows what they say it does, why don't they make it public and allow us to review it, and allow independent scientists to review it, as well.

So, basically, I just want to thank you for your statement. Do you have anything to add about the Science Advisory Board or using good data? You're welcome to make an additional comment.

**DR. KIRSTEN ENGEL:** Well, I do think it's important. I think it's important to point out EPA has said that it will not finalize the rule until the panel is done with their review, but I think it's important that that review be subject to the public.

**REP. LAMAR SMITH:** I agree. May they never finish their review, then we won't be subjected to the regulations, I don't think.

[Laughter.]

**REP. LAMAR SMITH:** To the extent I have another 30 seconds, Mr. Johnson, do you want to make any comment on the adverse impact of these proposed regulations on CAP?

**JAY JOHNSON:** Certainly, Congressman. There could clearly be some deleterious impacts on the CAP being classified as a Water of the United States, which certainly, looking at the expanded definition, particularly that of tributaries, we could be reeled, we would be reeled in. Certainly that would expose us to the risk of having to have certain permits, especially under Section 404, the dredge and fill provisions, if we have any kind of work that has to take place in or around our canal, and that specifically draws me back to a couple of years ago when there actually was a breach of the canal, and while that was shut down for only 3 weeks and no water was failed to be delivered by the CAP, having to acquire a 404 permit could jeopardize that. We're talking about money, on the one hand, but, perhaps more importantly, time, on the other hand.

And, secondly, we could be required to have Section 402 permits, which are the so-called NPEDES, National Pollutant Discharge Elimination System permits for discharging water into a water of the United States. Ms. Engel referred to the Water Transfers Rule, which is currently under litigation, which provides somewhat of a shield from those permits, but the actual impact of the Clean Water Act definition could be extremely problematic if that Water Transfers Rule were to disappear. We could have to treat water, get permits for not just putting water into Lake Pleasant, like we do, or other areas. Even bringing water into the canal could require that.

**REP. LAMAR SMITH:** Okay. Thank you. Thank you all for your comments, too.

**CHAIRMAN:** Thank you. Now Congressman Schweikert, you have 5 minutes for the panel.

**REP. DAVID SCHWEIKERT:** Thank you. I want to walk through a couple of the outliers and make sure I'm understanding some of the discussions we've had with counsel on this, and, Mr. Johnson, let's first take a look at scenarios of CAP. I'm sure you've already had conversations

with legal counsel in regards to what could be. Feeder canal, where you need to repair it or move it around—does it fall now under these new definitions?

**JAY JOHNSON:** Actually, I did consult with counsel and I am counsel, actually.

**REP. DAVID SCHWEIKERT:** I wasn't going to disparage you that way.

[Laughter.]

**JAY JOHNSON:** Yes. The rule is so terribly broad, it's not clear exactly what all may or may not be included within the definition. We would look at it as being so broad that, it talks about any line or unlined ditch or canal, reels in an awful lot of potential.

**REP. DAVID SCHWEIKERT:** Now, one of the staff we were working with was saying that if this was fully implemented the way—they could see a time where it could take a year, 2 years to get your 404 permit. Is that your experience? Is that the world of—

**JAY JOHNSON:** It is possible that it could take that long to get a 404 permit. There are certain expedited ways to get a 404 permit, but whether CAP would be able to engage in that, whether we would be able to get what's called a national or regional permit, that could perhaps expedite the process, is certainly unknown.

**REP. DAVID SCHWEIKERT:** Now what happens in a situation—this one might be for Mr. Johnson and Mr. Lacey—something like Lake Pleasant, where actually, in many way, we have a mixing situation. We have both sort of our natural snowmelt runoff, but we also drop our CAP water in there as a depository. Does that mixing—doesn't that start to cause an issue?

**JAY JOHNSON:** Yes, sir. We actually take Colorado River water and we transfer it into Lake Pleasant, as a storage unit. Without the protection of the Water Transfers Rules, and if we are indeed a water of the United States, we could be subject to permitting and potentially treatment of water that goes from the CAP canal into Lake Pleasant, but also in the reverse.

**REP. DAVID SCHWEIKERT:** Even though it's on its way to go to a place that may be treated?

**JAY JOHNSON:** Yes, sir. Mr. Lacey, when you look particularly at the Desert Southwest, and somewhat how unique our water and irrigation systems are here, do we have a specific problem in the way the rule-makers look at us, or don't even look at us, and don't understand what we do, how we do it? I mean, it is just they don't understand the Southwest?

**MICHAEL LACEY:** I think, across the board, it's a generalization but I believe that statement is largely true. The unique circumstances we find ourselves in are not often captured in the sort of national rule-making.

**REP. DAVID SCHWEIKERT:** Professor, you started to touch on it, and it's bounced up here in a couple of places. In these definitions—and this may be a little bit of the theater of the absurd, but would you walk a scenario with me? And you're in beautiful Tucson, right?

**DR. KIRSTEN ENGEL:** I am.

**REP. DAVID SCHWEIKERT:** Okay. And we'll forgive you for—it's not a Sun Devil.

**DR. KIRSTEN ENGEL:** I'm very happy to be here.

**REP. DAVID SCHWEIKERT:** Okay. Welcome to the grand imperial state of Maricopa County. For our rural folks, that's really funny. But let's take a typical neighborhood, whether it be in Pima County, and you have a piece of property, and part of your property is in a flood plain. Do you now, does your property now start to fall under this examination? How about if that property also has a wash in it that occasionally runs during monsoon season. Does that fall under here? If it does, wouldn't that mean, when you want to go in your back yard and plant a palo verde tree, that you're about to dig into the ground, that you might need a 404 permit?

**DR. KIRSTEN ENGEL:** I hesitate to speculate. Certainly, the scope of this rule is extremely broad, so I, that's definitely the case.

**REP. DAVID SCHWEIKERT:** And for everyone, and my fellow panel members, that's actually where, on a personal level, I'm trying to get my head around, is how much of our life out here in the Southwest, particularly if this rule, and over a decade of litigation, which seems to happen where these federal rules get expanded and expanded and expanded through litigation, what will this look like? It may be well-intended today, but it doesn't work for those of us that live in the Desert Southwest. And with that I yield back.

**CHAIRMAN:** Four minutes and 55 seconds.

**REP. DAVID SCHWEIKERT:** I'm trying to hit exactly 5 minutes.

**CHAIRMAN:** Congressman Franks, you have the floor.

**REP. TRENT FRANKS:** Thank you, Mr. Chairman. You know, one of the things I think that those of us that have the privilege of trying to make the law has also an obligation, and that is clarity, and if there's anything here that I think is at issue it's clarity. Part of the challenge that you have, of course, is that bureaucrats who have very little accountability or any mechanism to hold them accountable, not only are able to exploit that lack of clarity but they're able to inject a lot of arbitrary perspectives of their own.

Under the proposed rule, a tributary is broadly defined and includes ditches. Now, do you have concern—first of all, I'll throw it out to the whole panel—do any of you have concerns with ditches being subject to Clean Water Act jurisdiction? Mr. Johnson, I'll start with you first, sir.

**JAY JOHNSON:** Before today, sir? We would be very comfortable and argue vociferously that the CAP was not a Water of the United States, and that ditches, as you refer to, would not be—there would have to be some extreme circumstances to consider that to be a Water of the United States.

**REP. TRENT FRANKS:** So you think it would be tough, even for a bureaucrat, to suggest that the CAP is a ditch?

**JAY JOHNSON:** Yes, sir.

**REP. TRENT FRANKS:** Well, let's hope they feel that way.

**JAY JOHNSON:** That it's a Water of the United States.

**REP. TRENT FRANKS:** Yes, sir. Governor Mendoza, any thoughts on your part, sir?

**GOVERNOR GREGORY MENDOZA:** Thank you, Congressman. Just to remind everyone, the Huhugam were the first irrigators. They created the modern irrigation system that you see in the Valley here. My ancestors were the first that, were the ones that created that system here, we have.

**REP. TRENT FRANKS:** I wonder what they would think of this discussion.

**GOVERNOR GREGORY MENDOZA:** That's why I'm here.

[Laughter.]

**GOVERNOR GREGORY MENDOZA:** But, again, your question with regard to dirt ditches, yes, it does. It does convey that water through the dirt ditches, yes.

**REP. TRENT FRANKS:** Obviously, in your position, my greatest concern would be that of clarity, that of certainty. Can you—we'll just go down the panel here—can you give me some sense of how the lack of certainty or the lack of clarity affects any area in your particular section or sector?

**MICHAEL LACEY:** Congressman Franks, we participate with our fellow agencies, our fellow natural resource agencies, and we don't have sort of a clear vision amongst us as to what this means, so we have different interpretations of this from DEQ and Game and Fish, State Land Department, Department of Agriculture, and the Department of Water Resources. It's not something that impacts my agency directly, but it really impacts those that we, our water right holders and the folks that really are the constituency of our agency, and we've heard a broad spectrum and there's not real clarity as to what all this means from those folks.

**REP. TRENT FRANKS:** I don't want to overemphasize a particular point, but, Ms. Engel, you were struggling a moment ago. You said you don't want to speculate. But, really, it occurs to me that when it comes to trying to keep the, trying to comply with the law, that speculation shouldn't be a big part of it. You shouldn't have to say, "Well, what in the world does this mean?" Can you give me any idea as to what the lack of certainty, how that affects you or how that affects the area that you have the greatest concern with?

**DR. KIRSTEN ENGEL:** Well, I specialize in environmental law and I have to say I can teach many classes on just this topic, of what is the definition of Waters of the United States? There is really an awful lot of case law out there, and it really, truly has been this back-and-forth between the regulators and between the courts, as they go back and forth, and that is really the product of the rule here. It is a reflection of a fairly old regulation, that the Army Corps of Engineers and EPA put out in the 1970s, and the sort of chipping away at that, that has happened through these court decisions. So it's something I think of a vicious cycle, and it definitely creates a lot of legal uncertainty.

**REP. TRENT FRANKS:** Mr. Chairman, I just would add here, in closing, that I think that's the greatest challenge here. We had that little unpleasantness with England over this thing called the rule of law, and the notion that people can't understand the law or that they're subject to bureaucratic reinterpretation or complete obfuscation, I mean, we're in a situation now where some of our bureaucrats may start calling drug dealers "unlicensed pharmacists," and my concern here is that there's nothing that people can put their hands on anymore, and it is vitally important for all of us, in, really, a host of different areas, as a people, to begin to say we are a rule of law, not an arbitrary rule of man, and that to suggest that it's in name only is where we're headed, and I hope we can focus on that. So thank you, Mr. Chairman.

**CHAIRMAN:** Thank you. Very good point, sir. Congressman Salmon, you have the floor for 5 minutes.

**REP. MATT SALMON:** Well, thank you very much. You know, it's no wonder a lot of us are concerned about trying to analyze what exactly this means. There are some in the government that even have a problem understanding what the word "is" means, so it's clear that this could be a problem.

Ms. Engel, you stated in your testimony that it really is Congress's responsibility to define, under the Clean Water Act, this provision. Are you familiar with the REINS Act?

**DR. KIRSTEN ENGEL:** The REINS Act?

**REP. MATT SALMON:** Yeah.

**DR. KIRSTEN ENGEL:** No, I'm not.

**REP. MATT SALMON:** Let me share it with everybody. We passed it out of the Congress several months ago, and I think it's one of the single most important pieces of legislation that's gone through Congress in a very, very long time. Unfortunately, it's languishing in Harry Reid's desk, but the REINS Act basically says this, because the problem with good intention laws is always agency overreach, and the devil is always in the rule-making detail, after Congress passes a well-meaning law, whether it be the Endangered Species Act or the Clean Water Act or the Clean Air Act. Those are all great-intentioned pieces of legislation, but the problem always occurs when the rule-making happens.

The REINS Act basically says that once Congress passes a law and the agency then promulgates the rules, that the rules then have to come back to Congress for a vote, to say, yeah, that's what we meant. Do you think that would clarify some of this stuff?

**DR. KIRSTEN ENGEL:** I like that. I think it might, and I know proposals similar to that have been suggested, so that's interesting to know. I didn't know that that was a law.

**REP. MATT SALMON:** It's not the law. In fact, it's not the law because—it did pass the House of Representatives with bipartisan support, I think for the second year in a row, but it's now sitting in Harry Reid's desk, because it's one of about 40 jobs bills. You know, we get this do-nothing Congress thing all the time. Well, the do-nothing place is the Senate and they're not moving on a lot of good legislation. They keep it in his drawer because the President doesn't want it on his desk, because he doesn't want to have to face a decision. But, anyway, I think that would go a long way.

Governor Mendoza, you stated that it's going to impact your tribe immensely, or it could impact your tribe. What about other tribes?

**GOVERNOR GREGORY MENDOZA:** Yes, because like our community, many tribes are land developers, and we're considered municipal governments and business owners. So, yes, it definitely could, and, on top of that, as sovereign nations, all tribes have an interest in minimizing federal regulation and federal overreach on tribal lands.

**REP. MATT SALMON:** Thank you. Mr. Lacey, does Arizona regulate waters that aren't currently subject to the Clean Water Act?

**MICHAEL LACEY:** We do.

**REP. MATT SALMON:** You do?

**MICHAEL LACEY:** Yes.

**REP. MATT SALMON:** Do you want to elaborate on that at all?

**MICHAEL LACEY:** Well, we regulate groundwater. There is water in canals that we regulate that are not subject to the Clean Water Act, so the water in the Central Arizona Project, by example.

**REP. MATT SALMON:** Okay. Well, thank you. All panelists, I'd like your thoughts, and this will be my last question. Under the proposed rule, tributary is broadly defined and includes ditches. Do you have any concerns with ditches being subject to the Clean Water Act jurisdiction? I'll start with you, Mr. Johnson.

**JAY JOHNSON:** Well, certainly we do. As the tributary is defined, it is a pretty easy argument to say that the CAP is included in that language, so certainly that's a direct interest to us.

**REP. MATT SALMON:** Governor Mendoza?

**GOVERNOR GREGORY MENDOZA:** Yes. That particular—as I stated about our ancestors, we were the first to dig the modern-day irrigation systems that you see today. Yes, it will help us move that, move our water through.

**REP. MATT SALMON:** Thank you. Mr. Lacey?

**MICHAEL LACEY:** Yes. The state of Arizona is very concerned about water in ditches being regulated as under the Clean Water Act.

**REP. MATT SALMON:** Ms. Engel, do you have any thoughts. I know you have lots of thoughts, but on this.

**DR. KIRSTEN ENGEL:** Well, ditches are covered to the extent that they contribute flow to navigable waters, under the act, so I think that's a very important caveat. Obviously, we'll have to see how that is actually implemented. I reiterate that it's very important that this Water Transfers Rule is upheld, because I think that does address the water supply issue.

**REP. MATT SALMON:** Finally, I just wanted to say to Ms. Engel, I'm sorry that Mr. Schweikert beat up on you about the Sun Devil thing. I'm a Sun Devil, too, but it's hard not to be a U of A fan after their incredible performance this year in basketball. Thank you.

[Laughter.]

**DR. KIRSTEN ENGEL:** I'm glad you brought that up.

**CHAIRMAN:** Thank you, Congressman. Senator Griffin, you have 5 minutes for the panel.

**SENATOR GAIL GRIFFIN:** Thank you. Go Wildcats.

[Laughter.]

**SENATOR GAIL GRIFFIN:** Mr. Lacey, we're involved in many water issue and I'm familiar with the study that was done last year, or this past year, and water conservation is very important to the state of Arizona, and all of us, whether we're an individual homeowner or a development, or whether we're in ranching or farming, and we have individual wells, are all very conscious of the water that we use. And so if we're trying to take advantage of the rains that we get, when information in the past has said we only save 5 percent of the rains that we get—the rest of it evaporates, goes down hard surface roads and such—what impact do you see this rule having on individual water conservation projects that are so important to individual communities and to the state?

**MICHAEL LACEY:** And just to clarify, I think we're talking about sort of rainwater harvesting as a water augmentation method. That typically involves some modification to the landscape in order to redirect water and keep more of it on site, and certainly there's some possibility that those land modification practices might fall under the jurisdiction of the Clean Water Act and be precluded. There is also the line that we need clarity within our state statutes with regards to what's appropriable and non-appropriable water, as we sort of look at this issue, as well. As you know, there was a rainwater harvesting legislative study committee that would have taken all these issues on that has not yet met. So there is lots of, I think, interest in the topic, and we really do need to figure out how significant a local practice this can become and how important it will be for us, moving forward. I suspect it's certainly going to be a lot more important as move forward than it is to us today.

**SENATOR GAIL GRIFFIN:** Yes. Thank you. Ms. Engel, the importance we brushed on was the importance of good, blind, peer review based on scientific data that we have, and cost benefit analysis, and facts rather than fiction, and facts rather than emotion. And so this rule, how would you see that it would affect good decision-making in scientific data?

**DR. KIRSTEN ENGEL:** Well, I think the process is there. I think we just have to be vigilant in commenting and putting pressure on EPA and the Corps of Engineers to make sure that the process is subject to public comment and review. So I think the process has been started, but it needs to be finished.

**SENATOR GAIL GRIFFIN:** Thank you. That's all I have.

**CHAIRMAN:** Thank you, ma'am. At this point, we are going to recess.

**REP. PAUL GOSAR:** No, me.

**CHAIRMAN:** How could I forget my boss, Paul Gosar.

[Laughter.]

**CHAIRMAN:** This will be my last day working for him.

[Laughter.]

**CHAIRMAN:** Congressman Gosar, you've been very patient. I was thinking of the tacos.

**REP. PAUL GOSAR:** Ms. Engel, are you aware of the comment, "If Congress won't act, I've got a pen and a phone"?

**DR. KIRSTEN ENGEL:** It's a great comment.

**REP. PAUL GOSAR:** Who is it attributed to?

**DR. KIRSTEN ENGEL:** I'm not sure.

**REP. PAUL GOSAR:** That would be Barack Obama. Now, he's not sole responsible in regards to the EPA. I think that was a Republican that actually built the EPA and I think that would be Richard Nixon. But what we've got is we've got a problem with the rule-making apparatus in regards to administrative law, and we're out of whack. So your comment in regards to, should Congress be involved, no, Congress must be involved, absolutely no dictation other than that, because when Mr. Johnson was talking about permitting, I'm from outside the great state of Maricopa, so when we get a permit, it's, as Buzz Lightyear would say, "To infinity and beyond." And this is about power play. It's going to cost you more, won't it, Mr. Johnson?

**JAY JOHNSON:** It would, yes.

**REP. PAUL GOSAR:** How much more do you think that it would cost?

**JAY JOHNSON:** It would be difficult to speculate, given the fact that to obtain certain permits such as Section 404 is much more than just filling out a form and paying a permit fee. There are a lot of ancillary studies that may have to be done to obtain a permit.

**REP. PAUL GOSAR:** Are you familiar with the Endangered Species Act?

**JAY JOHNSON:** Yes, sir.

**REP. PAUL GOSAR:** Do you know how much it actually costs us, as constituents, on the average?

**JAY JOHNSON:** I don't know the specific number, no, sir.

**REP. PAUL GOSAR:** It's huge.

Ms. Griffin, let's be a little different. You're very involved in our forest health. That's one of the principal reasons why we have the problems with our forest health, is it not? Yeah. You know,

because trust is a series of problems that's kept, and the Federal Government has told us exactly what they're going to do. It's not about if, it's about what they're going to do in that rule-making process.

So, Ms. Engel, I'm going to come back to you. We actually had two court cases, and it seems to me like we're going backwards. You know, constitutionally, was it supposed to be easy to pass a law?

**DR. KIRSTEN ENGEL:** No.

**REP. PAUL GOSAR:** Absolutely. Mr. Johnson, would you agree?

**JAY JOHNSON:** I would.

**REP. PAUL GOSAR:** Governor Mendoza, would you agree that passing a law is supposed to be a little bit arduous?

Mr. Lacey, why is that?

[Laughter.]

**MICHAEL LACEY:** It's by design to create stability for the populace.

**REP. PAUL GOSAR:** Very thorough. You want to see all the multiple aspects of jurisdiction and make sure that what Congress a law is germane in its application, and that's why I thank Congressman Salmon for bringing up the RAINS Act. But I think, from that standpoint, coming back to those two jurisdictional aspects, they actually define and hinder the application of the EPA in regards to its water jurisdictions, one, tributary aspects, and then engaging or enlarging the definition to the migratory bird act, if I'm not mistaken. Right, Ms. Engel?

**DR. KIRSTEN ENGEL:** I'm not quite sure.

**REP. PAUL GOSAR:** They struck down their enlargement of the process of jurisdiction by those two rulings.

**DR. KIRSTEN ENGEL:** Yes. Those narrowed. Those narrowed the jurisdiction.

**REP. PAUL GOSAR:** So it tells me—I guess what it tells me, I mean, I'm a science guy, is it tells me that we're going the wrong way, that the court is bringing it back to Congress in regards to the germaneness and applicability of what was intended by the law. So this gives me a foundation, constitutionally, to bring it back towards Congress in regards to the jurisdiction of what it means by navigable water.

Mr. Lacey, the government, the proponents of the Clean Water Act are going to say, "This is all about clean water. This is about the Federal Government knows better than everybody else." I would say that's absurd. Would you agree with me?

[Laughter.]

**MICHAEL LACEY:** Yes. We try to do as many things with local control as possible in the way that we conduct our business.

**REP. PAUL GOSAR:** But that would be taking that you want dirty water? That would mean that because you're not placating to the Federal Government, that you agree that you want dirty water.

**MICHAEL LACEY:** Well, again, as we spoke earlier, Arizona is a unique environment that we believe is best regulated within the boundaries of the state, with ideas driven locally.

**REP. PAUL GOSAR:** I would agree with you. Governor Mendoza, did the EPA ever consult with you?

**GOVERNOR GREGORY MENDOZA:** No.

**REP. PAUL GOSAR:** Nobody within the government aspect?

**GOVERNOR GREGORY MENDOZA:** Nope, and that's the problem.

**REP. PAUL GOSAR:** Well, I see, constitutionally, the application for dialog on these acts is Congress's oversight, if I'm not mistaken. Would it not be?

**GOVERNOR GREGORY MENDOZA:** That's correct.

**REP. PAUL GOSAR:** So it's a two-fold plenary, jurisdictional violation versus the tribes?

It would be interesting to note that I actually introduced a bill that looked at the trust obligations with the tribes and the Federal Government to relook at that and that jurisdictional application between Congress and the tribes. Are you aware of that?

**GOVERNOR GREGORY MENDOZA:** Yes.

**REP. PAUL GOSAR:** I think that I'm done with my questions, so thank you very, very much.

**CHAIRMAN:** Thank you, and sorry about that, boss.

We are now going to recess for 10 minutes. We'll be back. We have one more panel, and after the second panel concludes, there will be some time for a few public comments, as well, for

those of you who may have some comments to make to the Members of Congress. And I understand, Mr. Salmon, that, Congressman Salmon, you may have to leave early?

**REP. MATT SALMON:** I have to leave now.

**CHAIRMAN:** Okay. Well, thank you for joining us.

[Applause.]

[Recess.]

**REP. PAUL GOSAR:** Let's bring this committee back to order.

**CHAIRMAN:** We will now be commencing with the second panel of the hearing today, "Full Disclosure: What the EPA's Water Rule Means for Arizona." The first witness to provide testimony is Ms. Smallhouse. Are you prepared to go forward?

Thank you. You may read your statement.

**STEFANIE SMALLHOUSE:** Thank you very much. Thank you, Congressman Gosar and Congressman Schweikert and distinguished members of the committee for the invitation to comment on this very important issue. I'm speaking today on behalf of thousands of members of the Arizona Farm Bureau and serve as first vice president of the organization. My family has been farming and ranching the same land in the Lower San Pedro River Valley for 130 years. We raise beef cattle, grow forage crops, mill mesquite lumber, and have a saguaro nursery. The newly proposed EPA rule for Waters of the U.S. would be devastating to my family's farming operation, as well as hundreds of others in Arizona agriculture.

The agriculture industry contributes over $12 billion to the Arizona economy and is heavily dependent upon the functions of an efficient canal system and the ability to carry out ordinary farming and ranching activities. The rule is ambiguous and will do very little to enhance our water quality or our environment, in general. The definition of tributary has already been discussed today.

Every dry desert wash, riverbed, or manmade canal which might have geographical connectivity, but very little flow connectivity to navigable waterways, would be micromanaged by the EPA on our farm and ranch. There are dozens of ephemeral waterways and hundreds of dry drainages which crisscross the ranch, and at least half of our farmland exists within the 100-year floodplain of the San Pedro River. These dry desert washes might run twice a year, in a good year, for only a couple of hours, and are no more navigable than a puddle here on the Capitol lawn, yet, according to the proposed rule, would now be subject to EPA oversight before I could carry out ordinary farm and ranch activities, as is the same for all Arizona agricultural families.

The agricultural exemptions included in the proposed rule are very disingenuous. The EPA has made claim that agricultural exemptions included in the rule are sufficient to keep Arizona's agriculture unaffected. This is simply not true. The exemptions are narrow, do not apply to many normal farming and ranching activities, only apply to farms and ranches in existence since 1977, and create a regulatory framework for conservation standards which were previously voluntary. It should be noted that these conservation practice standards of the NRCS are Cadillac standards and workable only under farm bill programs, because there is cost share available to assist with their implementation. The exemptions are confusing, as in on my irrigation field, the ditch might be exempted if it's in the right year, but not the field.

The proposed rule would essentially give the Federal Government and environmental litigants veto power over normal agricultural activities necessary to grow food. To farm and ranch is to be at the mercy of Mother Nature, not the whims of regulators at the EPA or the Army Corps of Engineers. When it's time to plant, it's time to plant. When it's time to move cattle, it's time to move cattle. We must be flexible, depending upon the weather, and we cannot wait 3 weeks, a month, or even a year for a permit which is not even guaranteed to us. It would likely be stacked with erroneous, inflexible, and illogical compliance criteria. The newly proposed rule would have us applying for multiple permits, multiple times a year, for ordinary land use activities, or face thousands of dollars in fines.

Something that has not been discussed today is this also unnecessarily opens us up in our daily lives to EPA compliance with the Fish and Wildlife Coordination Act, so now, in order to build a fence, not only would I need to get a permit from the Army Corps of Engineers but I would also have to wait on a biological opinion from the Fish and Wildlife Service in order to be granted that permit. I have at least ten critical habitat designations on my property. The ambiguous wording of the rule is ripe for litigation as left to the interpretation of agency enforcement and environmental litigants, which now can file citizen suits at their whim.

The economic analysis is severe flawed. The proposed rule would have far-reaching negative economic impacts related to food costs, the vitality of rural communities, and dissolution of family farms. There is no way a family farm such as ours would be able to withstand the hefty fines which would be enforced as a result of this rule. I have no doubt that my family, and hundreds of other Arizona farming families, will be forced to break this rule on a daily basis, given that it is unavoidable to manage a farm or ranch without the ability to make critical decisions on the hour, based upon the changing weather conditions. There is no possibility we could account for these costs in our operation. I would love to speak more specifically to the economic impacts just to Arizona agriculture, in general, but this would be very difficult to do, considering the broad ambiguity and unknowns in implementation of the rule itself.

If there is a need for further regulation outside of the Clean Water Act, or clarification, it should be at the local level within the state departments. The proposed rule is an example of federal agency overreach and regulating because they can, and not because they should. How is the Lunt family, the Smallhouse family, the Knight family, the Haas family, or the Sharp family—and

I could go on and on—how do we stand up to the EPA when the EPA has already bypassed the power of Congress and the power of the Supreme Court of the United States?

All of those in agriculture take their use of water resources and water quality very seriously. I would like to be very clear. My kids drink water from a well, which I have direct control over. I have just as much concern over their health as any Arizona mom for her kids, but this rule has nothing to do with clean water. My daughter, Hannah, is 10 and my son, Johnny, is 7. They live, work, and play on the land where five generations of family have lived and worked before them. In 130 years, we have overcome adversity in everything from the fight over territorial land, decades-long droughts, to extreme commodity price swings. We have done this through determination, hard work, and ingenuity. Now we face a new challenge for which I am determined to fight, but it pains me to think that after all those hard-fought battles, our own Federal Government wants us to fail, and take away the rights and desires of my children to grow food.

Thank you.

**CHAIRMAN:** Thank you, Ms. Smallhouse, for that compelling testimony. I'm sure the panel will have several questions for you. Our next witness testifying is Mr. Robert Lynch. He is counsel for the Irrigation and Electrical Districts Association of Arizona. Thank you.

**BOB LYNCH:** Good morning, Chairman Smith, Chairman Schweikert, Congressman Gosar, Senator Griffin. I am counsel to the Irrigation Electrical Districts Association of Arizona. Our 25 members and associate members serve electricity and water in both urban and rural environments to about half the population of the state, and about two-thirds of the irrigated agriculture in Arizona, primarily in the desert counties.

I have a prepared statement which I forwarded to your staff. I noticed this morning a small typo in it and I would, with your permission, ask that I be able to submit a substitute for that, and then I ask that it be placed in the record. I'm not going to read it. I want to answer some questions for you that you haven't asked.

First of all, as my statement says, they started saying they were going to give guidance, the two agencies, in 2001, after the *SWANCC* decision in January of 2001. There's just not a guidance; it's a regulation. They admit, in their preamble, that none of the Supreme Court cases have said there is anything wrong with the regulatory definition they have now, but they're going to change it anyway, and the reason they're going to change it is they have figured out a way to play semantics with the significant nexus test. That term was first used in the *SWANCC* decision, and then Justice Kennedy, as you know, and *Rapanos* and *Carabell* expanded on it, in the plurality decision, in that case. And they say it's not a scientific term, so they come up with "connectivity."

Well, if you're going to a bunch of scientists and say, "Is a tributary connected to the water course it feeds into?" of course they're going to say that. If you go to a lawyer, "Well, is this law

important to that law?" what lawyer is going to say no? What doctor is going to say pills are not important, medicines are not important? What they've done is collect up a study where they say all this stuff is important and it's connected and therefore it must be jurisdictional. They've put everything backward. Justice Kennedy's opinion was intended to draw a legal distinction, not a scientific one. It was intended to draw a line between what the Federal Government would regulate and what it would not.

Now, Arizona can regulate everything—groundwater, surface water, you name it. I helped write our law in 1975, and our definition of waters of the state is just everything you can think of, and several things you probably never did think of. But the point being, we would have a permit program, so we'd get delegation, which we have, and if something else came up, we were all ready to attack the problem. Guess what? That was 1975. Nothing has come up. What we've got here, in this proposal, is a solution where there's a problem. Where is the crisis in Arizona over water quality? I can't find it. I don't think you can find it. Why do we need this? We don't need it. Are we taking care of business? Of course we're taking care of business.

And one of the odd things about this proposed rule is, they're dealing with two cases—there were two more last year, in 2013, they haven't bothered to mention, in which environmental groups sued to try to enforce the Clean Water Act in situations that the Supreme Court of the United States said, nope, that's wrong. The United States appeared in front of the Court, amicus curiae, in both cases supporting the narrower definition. So now we have four U.S. Supreme Court cases, starting in 2001, trying to narrow the overreach of EPA and the Corps in administering this law, and they are turning all of that on its head in this proposed rule.

To Congressman Schweikert's plant-a-tree example, if you have a wash on your property, and it is a tributary—and guess what? Everything in Arizona is a tributary except the Willcox Playa, and a couple of other little potholes—and you plant the tree next to the wash, and you put the dirt from the hole next to the wash where, if it rained, which would be nice, some of it might get in the wash, you need a 404 permit. I know. I'm dealing with one of those for a client right now. The event took place in 2007, in the spring. I got called in, finally, by their regular counsel in the fall of 2009. We're not done. It's a national permit. Jay Johnson talked to you. He didn't know—it might take a year to get it. This was 2007. This is 2009. This is now 2014. This is a national, after-the-fact permit, a 404, and we're not done.

Now, one of the problems—the guy handling it for the Corps is a retired Corps employee from New Mexico, working on part-time contracts, because they don't have the money and the staff to have somebody full-time working these issues here, in Phoenix. How are they going to deal with all the rest of this? How are they going to go down to Cochise County every time they want to move cattle? What happens when our lineman have to drive a pickup across a wash, because they've got to go check the power lines? They've got to check the transformers. They've got to put the radar guns up there to see if there's leakage. You know, work has to get done, and if we're dragging this out now, where are they going to get the people? How are they going to administer this overreach? They don't have enough people in either agency to do

this work, and then they're going to tell us, "I'm sorry. You can't do your work until we've done ours"? It's insane, absolutely insane.

And I will say, though, that at least the Science and Advisory Board may have heard you. They're having a phone call on June 19th. In case you want to join in, you can tell them by the 16th that you want to be on the call. And I found out that there is something at EPA called the Local Government Advisory Committee, and it has a Protecting America's Water workgroup, and they are starting to have meetings about this rule. They had one in St. Paul on the 28th of May, and I found out about it by reading the Federal Register notice about it, on the 29th of May.

So they're scrambling, and I hope you keep up the pressure, because this isn't the only place where we're getting attacked on our water rights. The Forest Service is after us. The BLM is after us. You all, thank you, passed H.R. 3189, the Water Rights Act, that if I remember correctly, you were a cosponsor of, Congressman Gosar. They are now coming out with their own Clean Water Act guidance. I just spotted it in the Federal Register. The Forest Service is getting in the Clean Water Act business, and they're getting in the groundwater business.

So this is just a piece of the puzzle, but it is a huge piece, and thank you for paying attention.

**CHAIRMAN:** Thank you, sir. There will be some follow-up questions for you. Our next witness is Nicole LaSlavic, representing the Arizona Association of Realtors.

**NICOLE LaSLAVIC:** Thank you and good afternoon. Like stated, my name is Nicole LaSlavic. I'm the Vice President of Government Affairs for the Arizona Association of Realtors and thank you for having me speak today. I appreciate it.

I will keep my comments brief. As the National Association of Realtors submitted a letter to Representative Shuster on April 25th, the letter has been passed along to Congressman Schweikert's staff, and everyone else should have received a copy of it as to date. The National Association of Realtors strongly opposes the proposal as a thinly veiled attempt to expand the Federal Government's reach to almost any property with a wet area in the country. Though the EPA asserted their proposal is narrower than the existing regulations, these agencies unapologetically add new categories and catch-all definitions to those regulations, including all tributaries, all adjacent waters, and other waters, all of which are broadly defined.

It is all but safe to say that regulators will claim that all new definitions and catch-alls will provide brighter lines for what is and what's out, and the benefit to property owners. What they are really saying is the draft rule would save bureaucrats time in denying more permits applications to property owners who are seeking to improve their very own property. The reality is the proposed rule will subject more activities to the Clean Water Act permitting requirements, and EPA analysis, mitigation requirements, and citizen suits challenging the application of new terms and provisions. On a statewide level, it is the fear that regulators will use any excuse to stop ranching activities on public as well as private lands. To that end,

allowing the opportunity for people to challenge an unclear rule could potentially tie up a farmer or a rancher who simply wants to modify a stock pond or waterway that they created in the first place.

Also, anyone who may be on a waterway—and we have lots of them in Arizona—like the Verde River, would be subject to a 404 permitting expense and review to improve or rebuild an already existing structure that may not be on the water but is considered in a waterway. We have a lot of dry streams here, and without a clear rule could unknowingly subject a property owner of permitting before they take action to improve their property.

While we have not had a lot of experience in Arizona, there are Gulf states and wet states in the east and south, where property owners literally lose their property because they had to fight the government on finding out that they needed permits to do minor changes to their own property. The potential adverse impacts on the economic activity have been largely dismissed by the agencies and are not reflected in the EPA's flawed economic analysis for the proposed rule.

With that, I would thank you for holding today's roundtable, and I appreciate it.

**CHAIRMAN:** Thank you, ma'am. Our next witness is speaking on behalf of the Home Builders Association of Central Arizona, Mr. Spencer Kamps.

**SPENCER KAMPS:** Thank you, and good afternoon. The association would like to thank you for holding this hearing and the opportunity for us to express our concerns over the new proposed rule, offered by EPA and the Corps of Engineers. Just to let you know, the association is preparing detailed comments for the current deadline, which is July 21st, and while these agencies are promoting this proposal as merely a clarification that simplifies the process of determining jurisdiction, in fact, the proposal is quite broad and would return jurisdiction to where it was before the U.S. Supreme Court addressed it in both the *SWANCC* and *Rapanos* cases.

The proposed rule, if adopted, will have a particularly harmful impact on Arizona and the slowly recovering home building industry that we represent. Because of the proposed rule relies on a draft report that has significant, substantive shortcomings, the proposed rule should be withdrawn until these shortcomings can be addressed.

The scope of jurisdiction under the Clean Water Act, particularly over marginal aquatic features such as desert washes and arroyos, or ephemeral streams, in EPA parlance, is of vital concern to our members. Many of the HBACA members are home builders and real estate developers. In connection with developing and improving their land, HBACA members regularly construct streets, roads, install utility lines, related improvements, and grade and improve lots and other parcels of private land. In many cases, these activities cannot be conducted without impacting desert washes and other drainage features, which are common throughout the Sonoran Desert and are found on many parcels of developable land, including land owned by our members.

Due to broad agency approaches to jurisdiction, these features are often deemed to be navigable waters, subjecting these projects to expensive and time-consuming process of securing permits pursuant to Section 404 under the Clean Water Act.

In addition, EPA regulates storm water emanating from construction sites and discharge to the Clean Water Act navigable waters under the NPDES program and associated state programs, and this same approach to jurisdiction makes it often impossible to construct a project in a manner that avoids these discharges. Compliance with storm water permit requirements is likewise burdensome, expensive, and time-consuming. It is particularly troublesome to us that this program, designed by EPA on a national level, is primarily designed at limiting sediment charges to streams and rivers when virtually all of our construction sites, if they discharge at all, discharge to ephemeral systems, which naturally carry high sediment loads. In fact, these ephemeral channels can be damaged by discharge of low sediment water, which encourages channel erosion.

The proposed rule represents as substantial expansion of jurisdiction. If adopted, it will have a significant adverse impact on the development industry in the form of increased regulation, the primary reason for this rule's approach to tributaries. Prior to the *SWANCC* and *Rapanos* decisions, the agencies routinely regulated desert washes as tributaries, regardless of distance and amount of flow, contributed to downstream traditional navigable waters. *SWANCC* and *Rapanos* stand for the proposition that a hydrological connection is not enough. There must be a significant nexus to a traditional navigable water for the Clean Water Act jurisdiction to apply to these features.

Current guidance, formulated in 2007, requires an analysis of individual washes to determine whether significant nexus exists. This approach has led the Corps to disclaim jurisdiction on many smaller, ephemeral washes, due to the lack of a significant connection between such washes and traditional navigable waters. Yet the agencies are now proposing a blanket rule that would extend jurisdiction over all tributaries, regardless of the significance of the relationship of the specific tributary to the downstream navigable water. This will subject small desert washes that are remote from and have no significant nexus to a traditional navigable water, under the Clean Water Act jurisdiction. If these smaller washes are properly recognized as non-jurisdictional, the regulatory burden of this program would diminish substantially.

The basis for this expansion is the U.S. Environmental Protection Agency's draft science report entitled "Connectivity of Streams and Wetlands to Downstream Waters: A Review, a Synthesis of the Scientific Evidence." This report is yet to be made final and was subject to a peer review process that criticized the report's binary approach to the relationship of headwater streams to downstream navigable waters. We have previously submitted comments on the report, criticizing its tendency to treat all intermittent and ephemeral systems as a class, when, in fact, there are substantial differences in function and flow, between intermittent and ephemeral streams, and, more importantly, within ephemeral systems themselves.

In short, while large ephemeral systems can have a significant nexus, small washes generally do not. The report fails to analyze this issue, and, therefore, cannot support the agency assertion that all tributaries have a significant nexus. We believe that the proposed rule should be withdrawn until concerns with the report are addressed.

We have other concerns with the proposed rule. For example, ditches and other manmade features can qualify as tributaries and hence be regulated. While there are exemptions for certain types of ditches, these exemptions are quite narrow, and we are concerned that, as drafted, there will be a significant new regulation of manmade features, further adding to the regulatory burden.

The proposed rule also includes a new approach to non-tributary waters and so-called adjacent waters. We have relatively little experience with the type of waters under consideration here, and are concerned with how these provisions may be interpreted. The proposed rule also includes a significant expansion of interstate waters, a category of waters rarely relied upon by the agencies to assert jurisdiction in the past, to include all tributaries to such waters as a class. This, too, has the potential for a substantial expansion of jurisdiction.

Finally, the proposed rule is silent on implementation in how existing permits and jurisdictional determinations will be affected. We believe that there will need to be a robust grandfathering provision that protects existing permits and determinations from having to go through a redelineation process under the new rules. Moreover, many permits and jurisdictional determinations were issued for a period of 5 years, and are, under current practice, routinely extended. Because of the substantial investments made on the basis of these approvals, the grandfathering provision should extend not only to existing approvals but also to extensions of those approvals.

The proposed rule is not just a clarification. It represents a complete sea change in approach to jurisdiction, in terms of tributaries, from current guidance, and introduces numerous new jurisdictional hooks that are likely to result in expanded Clean Water Act regulation. The HBACA supports sound environmental protection but believes this rule advances an over-broad approach to federal regulation. Due to the flaws in the report, underlying the rule itself, the proposal should be withdrawn until the report's shortcomings are addressed.

Thank you.

**CHAIRMAN:** Thank you, Mr. Kamps. Our next witness is Matthew Hinck. He is an environmental manager with CalPortland and has chaired an environmental committee for the National Stone, Sand, and Gravel Association, and is also testifying at the request of the Arizona Rock Products Association. Welcome.

**MATTHEW HINCK:** Thank you. Chairman Smith and members of the Committee, thank you for inviting me to testify on behalf of Arizona Rock Products Association at this hearing, regarding EPA's proposed Waters of the United States rule. My name is Matthew Hinck. I'm an

environmental manager for CalPortland Company. Additionally, I chair the National Stone, Sand, and Gravel Association's Subcommittee on Water Issues and the Washington Aggregates and Concrete Association's Environmental Committee.

Arizona Rock Products Association has been providing representation for over 41 member companies in the state of Arizona for 57 years. ARPA represents well over 6,000 employees at 584 facilities. CalPortland Company produces construction aggregates, asphalt, ready-mix concrete, and Portland cement, with facilities across the western United States, and is a key player in the construction materials market. CalPortland is proud to have been awarded EPA's EnergyStar for Sustained Excellence for 10 consecutive years, from 2005 to 2014.

Aggregates are the chief ingredient in asphalt, pavement, and concrete, and are used in nearly all residential, commercial, and industrial building construction, and in most public works projects, including roads, highways, bridges, dams, and airports. Aggregates are a high-volume, low-cost product. Due to product transportation costs, proximity to market is critical. Generally, once aggregates are transported outside a 25-mile limit, the cost of the material rises exponentially.

Over the past 8 years, the construction materials industry has experience the most severe recession in its history. Since 2006, production has dropped 39 percent nationally and close to 60 percent locally. This expansion of the EPA and Corps jurisdiction will have a severe impact on our industry. The EPA claims this rule is needed because so many waters are unprotected, but that is not true. States and local governments have rules that effectively manage these resources. For example, states and many municipalities regulate any potential negative impacts of storm water runoff and required detailed storm water pollution prevention plans. These plans are required for every project, both during construction and continuously after an operation begins.

The jurisdictional uncertainties in this rule are particularly problematic in the arid West. For example, the proposed rule fails to define the distinction between ephemeral tributaries and gullies or rills, which are exempt. The proposed rule also exempts vegetated swales, which differ from dry washes and other features of the arid West only in that they occur in more humid parts of the country, and are therefore more likely to contain water.

Similarly illogical is the proposed rule's definition of jurisdictional tributaries, using the Corps' definition of the ordinary high water mark. That concept is excessively broad as applied to the arid Southwest, where the land is crisscrossed with lines or cuts on the ground, caused by water flow during infrequent by high-intensity storms. The mere presence of physical signs of water, that water flows across desert lands from time to time, is insufficient to establish Clean Water Act jurisdiction, yet the proposed rule unjustifiably extends jurisdiction to these areas.

Having a clear jurisdictional determination, JD, for each site is critical to the construction materials industry. These decisions impact the planning, financing, constructing, and operating costs of our aggregate facilities. JDs cost CalPortland between $25,000 and $50,000 per site. If

we have to more forward with the Corps 404 permit, our costs go up to as much as $500,000. Now under the proposed revisions, many previously non-jurisdictional areas, like ephemeral streams, dry washes, and other riparian areas, could be considered jurisdictional. As a result, nearly any area we try to access will now be regulated and require additional permits.

EPA should undertake a full evaluation of the effects this rule will have on businesses. The proposed rule will put businesses at risk of fines up to $37,500 per day if a permit is required and not obtained. This could wipe out a business that did not realize a permit was needed for work, far from navigable waters. This is especially true in the arid West, where ephemeral streams and other waters can be considerable distances from traditionally navigable waters. We feel the EPA is required to comply with the Regulatory Flexibility Act and must seek input from small businesses before proposing a rule. EPA claims this rule is based on sound science, yet the Science Advisory Board, the group of independent scientists reviewing it, has not completed its review.

The proposed rule has no clear line on what is in and what is out. It is so encompassing, however, that the EPA felt it necessary to specifically exempt residential swimming pools. Clearly, this is going to make it very difficult for our industry and other businesses to plan new projects and make hiring decisions. If we cannot clearly determine whether development of a site will take too long or cost too much in permitting or mitigation, we cannot move forward with that development. Taken further, a significant cut in construction materials production could lead to a shortage of construction aggregates, raising costs. NSSGA, our national association, estimates that material prices could escalate from 80 percent to 180 percent as supplies become limited.

Given that infrastructure investment is essential to the economy recovery and growth, and unwarranted change in the way land use is regulated, places needless additional burdens on the constructional materials industry, and would adversely impact aggregate supply and vitally important American jobs. ARPA and CalPortland appreciate this opportunity to speak on the devastating effects of a broad expansion of the Clean Water Act jurisdiction on the aggregates industry.

Thank you, Mr. Chairman.

**CHAIRMAN:** Thank you. We will now turn the questioning over to Congressman Schweikert. You have 5 minutes, sir.

**REP. DAVID SCHWEIKERT:** Thank you, and we'll keep a little clock close by. Bob, or Mr. Lynch, do you want to play lawyer for a couple of minutes?

**BOB LYNCH:** Are you going to try to play lawyer, or am I?

**REP. DAVID SCHWEIKERT:** No, no. I'm going to let you play lawyer. Okay. Ms. Smallhouse is running cattle, and they're marching across one of their dry washes. If you were to take the new set of the rule and expand it as far as you can, mentally, does she have an exposure?

**BOB LYNCH:** Unless it's in the Willcox Playa, which is a closed basin, unless they find connectivity there underground, that's the only place I can think of, anywhere near the San Pedro, that isn't jurisdictional. Yeah, they'd be altering a water course by going across it. It's no different than a lineman driving his pickup across it, because he's got to go check on a power line.

**REP. DAVID SCHWEIKERT:** Okay. What if I an aggregate mine over here in the dry Salt River bed, but it's dug fairly deep and it has some groundwater seepage in there. When we're all on the 101 or 202 freeway and we look down and we can see some water sitting down there. Well, would that water expose them, also?

**BOB LYNCH:** Yes. That's outside the scope of the *SWANCC* decision, and that *SWANCC* decision was essentially a borrow pit for a waste disposal site. They tried to use a migratory bird rule in their Corps regulations to claim jurisdiction under the—

**REP. DAVID SCHWEIKERT:** But under this rule, that would expose them?

**BOB LYNCH:** In this situation, they would find connectivity to that excavation with the subflow of the Salt River, and it would be jurisdictional.

**REP. DAVID SCHWEIKERT:** Let's say I'm a new homeowner and I had a wonderful realtor sell me a house. It happens to be up in North Phoenix, where I'm not only in a general flood plain but I have this nice wash in the back, and the previous owner has gone along and put up a little retaining wall, put some trees up along that wash, but obviously moved soil, put fertilizers, and other things. Do I retain, as the new homeowner, liability for something that the previous property owner did in touching that wash?

**BOB LYNCH:** Yes. In a word, yes.

**REP. DAVID SCHWEIKERT:** So I buy a property, and I would have legacy liability for something that had had happened before I was even the property owner?

**BOB LYNCH:** That's true.

**REP. DAVID SCHWEIKERT:** Let's say I am building a subdivision, or let's say I live in one. My homeowners association has a retention basin, that also overflow into it. I'm picturing ones along the Indian Bend Wash, but they're all over, and eventually that retention basin will overflow into the wash, which flows towards the Salt River. Does my homeowners association need to be paying attention to those areas?

**BOB LYNCH:** Yes.

**REP. DAVID SCHWEIKERT:** And, therefore, the liability to every homeowner in that subdivision?

**BOB LYNCH:** There is a scenario in which, in order to buy a home in many places, especially in the desert parts of the Phoenix metropolitan area, you would need an environmental attorney to examine the purchase before you made it, much as people have to worry about cleanup costs under CERCLA, or the leaking underground storage tank provisions of federal environmental law. Buyer beware becomes much more frightening.

**REP. DAVID SCHWEIKERT:** Mr. Lynch, you've been practicing in this area for how many years?

**BOB LYNCH:** Fifty.

**REP. DAVID SCHWEIKERT:** God, you don't look that old.

[Laughter.]

**BOB LYNCH:** I am that old.

[Laughter.]

**REP. DAVID SCHWEIKERT:** We were teasing earlier. I was a page here in the State Senate in 1980, and he was around.

[Laughter.]

**BOB LYNCH:** And had been quite a long time.

**REP. DAVID SCHWEIKERT:** The reason for this series of questions, and to our witnesses, to our audience, to our fellow panelists, is to try to understand. This isn't sort of a theoretical discussion. There really is an exposure to every single one of you in this room, in the way it's written, and to every one of us, to every piece of our lives, and it may be exposure you don't even know you have, but yet it's here. And with that I yield back.

**CHAIRMAN:** Thank you. We will now have Congressman Franks ask questions for the panel.

**REP. TRENT FRANKS:** Mr. Lynch, since you've been around here for so long I'll direct my first question to you, sir. In your view, did the EPA and the Corps conduct the regulatory analysis that is required by law in a matter that minimized the potential cost to a small business? This is the blooming obvious question I'm asking you, and if you could elaborate.

**BOB LYNCH:** I searched the preamble for some explanation of how they analyzed cost in this, and I couldn't find it, and I think it's one of the major deficiencies of the process that they've undertaken, and they've made a mockery out of their denial of impact on small business. It's a travesty.

**REP. TRENT FRANKS:** Let me follow up. I know hitting this one point pretty hard, but, again, I think this rule of law question is a big one. The Supreme Court has determined that the agency's interpretation of the Clean Water Act jurisdiction has gone too far, and Congress has failed to support legislation that would expand the act's jurisdiction. Isn't this proposal, this rule, which will expand jurisdiction by executive fiat, a complete end run around Congress and the courts?

**BOB LYNCH:** Yes.

**REP. TRENT FRANKS:** Yeah, that's a good answer.

[Laughter.]

**REP. TRENT FRANKS:** Mr. Hinck, if I could turn my attention to you. You raise very excellent concerns, I think, about the vagueness or the vague terms and undefined concepts to the Clean Water Act regulation that this rule represents. Do you believe, number one, that's more likely that businesses will seek jurisdictional determinations for all of their potential activities, and how expensive are CWA consultants, and how long can the evaluation process take place? How long does it take it to happen?

**MATTHEW HINCK:** Well, you'd be wise to seek jurisdictional determinations in any property you develop. The fines are $37,500 a day if you don't seek a permit where you need it, so you have to get a JD before proceeding. The determinations, we spend $25,000 to $50,000 for the determination, and if we have to proceed with a Corps permit, that's a big uncertainty for us. It can take years, so there's no defined time frame in which you can get a 404 permit, which affects our ability to plan for business.

**REP. TRENT FRANKS:** Ms. Smallhouse, you did an excellent job, but, I mean, if you could just reiterate how the washes and river dynamics on your ranch, related to these activities, how are these washes related to navigable waterways, from your perspective, and how does this affect you?

**STEFANIE SMALLHOUSE:** They're related very little. If I could call your attention to the photos over there, the posters, the top poster is the very bone-dry San Pedro River. The bottom poster is what's called Redfield Canyon, which is a major tributary or drainage on our ranch, which then goes into the San Pedro River. The San Pedro River would then flow into the Gila River, which would then flow into the Colorado. So the distance and the ability for water, when we actually get rain, we have to get at least, I would say, an inch of rain in a very short amount of time for any of that water to actually reach the Colorado River. Probably those pictures right

there reflect areas that might run, maybe the bottom one, that wash might run for a couple of hours one day a year, if we're lucky. The San Pedro, a couple of days a year, if we're lucky.

**REP. TRENT FRANKS:** Mr. Chairman, I would just suggest the point I've been making here all day is that, number one, this proposed rule is an end run around Congress, it's an end run around the courts. It's a complete misreading of the existing law and legislation, and it has real effects on real people, and if it should become the norm, this process should become the norm, it literally threatens the very fabric of a republic. So I would just hope that somehow that this concern that's exhibited so obviously by the people that are here today would be an ongoing and growing process in America, because so much is at stake, and I yield back.

**CHAIRMAN:** Well stated, Congressman. Mr. Smith, you have the floor.

**REP. LAMAR SMITH:** Thank you. This panel has been very interesting. Four of you all have testified about the impact on property, and then Mr. Lynch gave us the legal overview, so this was all very, very helpful. Let me direct my first question to Ms. Smallhouse, and it's pretty impressive that your family has been ranching for 130 years. That's five or six generations, I assume. But it's a tribute to you and to, shall we say, persistence in the face of sometimes adversity when it comes to droughts and everything else.

You mentioned the problem of not necessarily being able to wait when you needed a permit. You can't always anticipate needs and so forth. But I also wanted to ask you about the problem that I think a lot of farmers and ranchers and individuals would face who are not necessarily going to read the 370 pages involved with this regulation, and that is you might not even know if you need a permit. You've already said the problem might be delayed if you needed a permit, but you may not even know if you need a permit, and then suddenly you find yourself subjected, perhaps, to paying fines of as much as $37,500 per day, per infraction.

To me, that's a major flaw in any kind of proposed regulation, when people are not going to be aware of how it applies to them. I don't know if you want to add anything to that, but that, to me, is a major concern for a lot of individuals, and it also, I think, comments unfavorably on the government's constant overreach. It seems to me that part of their motivation is nothing more than to control more of the lives of the more of the people in the country, and that's also going the wrong direction. But do you have anything you want to add to the problems created by this proposed regulation?

**STEFANIE SMALLHOUSE:** Well, I envision, as I said, that pretty much every family farm, ranch in Arizona will be in violation of this rule, at least one time during the year, and none of us can afford to pay $37,000 for that violation. We have some situations in Arizona where, because of the Clean Air Act, we have many farmers doing best management practices like applying fertilizers through their water, that are trying to comply with the Clear Air Act, which will now be in violation of the Clean Water Act. So it pits, basically, one compliance issue that you're trying to deal with against another, and I'm fairly sure that most of those farmers feel like

they're doing the right thing and will be very surprised when they find out that they've violated the Clean Water Act.

**REP. LAMAR SMITH:** Violation of the regulation. Thank you. Mr. Lynch, not everybody here may know that your daughter, Caroline—and this will be familiar to Trent Franks, who is on the Judiciary Committee, but your daughter, Caroline, is the Chief Counsel for the Crime Subcommittee in Congress, and we appreciate her great work over the years, and she has done a wonderful job. So, Trent will back that up, I am sure, but thank you for being her father, shall we say. I'm sure all the good she does is directly attributable to your wonderful example and influence. Is that right?

[Laughter.]

**BOB LYNCH:** This is going to cost me.

[Laughter.]

**REP. LAMAR SMITH:** My question is this, though. You mentioned various court cases, particularly Supreme Court cases, that have rejected an expansion of the Clean Water Act. Why should the government get away with a proposed regulation that, if promulgated by a lower court, would be rejected by the Supreme Court? There's something wrong with that picture, from a legal point of view. What's the justification, or why is it that the proposed regulation would be legal, whereas if it were a court saying the same thing, it would be shut down by the Supreme Court?

**BOB LYNCH:** Well, there isn't any justification, Chairman Smith. The simple answer is that—and others have said it—is that they've tried to take a legal standard, significant nexus, first announced in *SWANCC* and then announced in *Rapanos*, in the plurality opinion of Justice Kennedy, which is a legal standard, and turn it around, and say, this isn't scientific. We have to be scientific, so we're going to talk about strength. We're going to talk about integrity. We're going to talk about connectivity, and then we're going to say that all tributaries and all adjacent waters—a new definition, not in any of the case law—are all per se jurisdictional.

Well, I don't know how they do that when last year, twice, the Solicitor General of the United States, on behalf of the United States, appeared amicus curiae in two cases, saying, "No, the plaintiffs are wrong. This is not jurisdictional." This activity won in Oregon on drainage of forest roads, and the other, L.A., because poor old L.A. managed to concrete part of the L.A. River, and therefore they needed a permit. The Supreme Court twice said no. The United States twice said no, that's not jurisdictional. So now we've got four cases in the last 13 years, which has said to EPA, in the court, "Stop," and it's as if they just throw them in the trash.

**REP. LAMAR SMITH:** And yet they're not stopping. Nothing seems to deter this administration from trying to impose more regulation on the American people. But I agree with you. Thank you for that. Ms. LaSlavic and Mr. Kamps, both of you all made the point that the impact of the

proposed regulation is not just on rural areas but on urban areas, as well. Ms. LaSlavic, you mentioned homeowners. Mr. Kamps, you mentioned investment and developers. What is going to be the impact of the regulation, say, on home prices, or on the willingness of individuals to invest, and on the way to your answer, let me also agree with and point out what was said a while ago, by Congressman Schweikert, that everybody in this room is going to be impacted by this regulation. Sometimes we don't think of that, but David Schweikert made that excellent point.

Ms. LaSlavic do you want to answer? I think my time is coming to a close, so if you'll give a very brief answers to the impact of either private property prices or the investment and development of properties, as well.

**NICOLE LaSLAVIC:** Certainly, Representative Smith, Chairman. I would anticipate that it would have a negative impact on the home prices moving forward. I believe that Spencer could probably speak to the price of development and what impact that would have on it. But from a perspective of a home buyer purchasing the property, whether it's through a developer or through a realtor, where it's a property that's being resold, I would anticipate there would be a negative impact on the pricing, and there could be the potential for it to increase.

**REP. LAMAR SMITH:** Okay. Anything to add as far as investments go, or development?

**SPENCER KAMPS:** Well, as it relates to our storm water permits, those control measures cost anywhere from about $1,000 to $2,000 a lot, depending on the control measure employed, but the greater cost is the uncertainty on the 404 permitting side. Right now we suffer from a lack of improved lots, and that is a permit you seek to develop and improve lots, and right now that is a challenge in these economic times, as lot prices, or the cost of putting lots into production doesn't necessarily correlate to the end cost of the product, the home sale at the end of the day. So the time and money and effort put into the 404 permit process would be substantial, number one. But number two, as has been mentioned, everybody is going to get one, because you need to know whether you're in jurisdiction or not, and you're not going to take the risk of not having a permit.

**REP. LAMAR SMITH:** Thank you, Mr. Kamps. Mr. Hinck, my time is up, but let me just say you made a good point, both in saying the impact of the regulation on both current businesses and future businesses, I thought, was a good one, as well as the problem with interpretation of what it even means, so thank you for your testimony, as well. I yield back.

**CHAIRMAN:** Thank you, Congressman Smith. Senator Griffin, you have 5 minutes.

**SENATOR GAIL GRIFFIN:** Thank you. I just wanted to make a comment to Mr. Lynch. I got notified of that meeting on the 29th of May, for the meeting on the 28th of May, so that was, I think, probably we got notified at the same time. Ms. Smallhouse, I know the San Pedro River quite well, and there is no mention of where the San Pedro starts. It starts in Mexico, and I've been to where it started, and I asked people that lived and worked along the San Pedro River

about water in the river, and their comment is the same as what we hear, on the American side—when it rains, we have some water in the river, and when it doesn't rain, we don't have so much. So there is no regulation in Mexico as far as crossing the border and what we'll be looking at.

The housing market, for the realtors, the liability for the homeowners and the home builders, whether you're selling or buying, is something we haven't addressed, and our property disclosure statements will get longer because of that, and it is a definite concern. The American dream that we have eliminated, almost, in rural Arizona—it's tougher there than it is in metropolitan areas—will be a challenge, definitely.

This isn't about clean water. It's about control of our lives. It will affect everyone in this state, whether directly or indirectly, and the consequences really are not defined. It's our freedoms that are at stake, the ability to use our properties and our lands as we wish. We all want clean air and clean water. As I go around the state in my district, I haven't met one person that wanted dirty water and dirty air, and the 90-day comment period is insulting. It's just a shame that we continue the battle, whether it be—as I mentioned, our natural resource industries have made this country wealthy, and we live in the best country in this world and yet we continually have a battle with this administration, and the rules and regulations that come down that affect every one of us.

So I don't have any additional questions for the panel, but I'd like to say thank you for inviting me to be a participant today, and thank you.

**REP. PAUL GOSAR:** I'm not going to let Tom even intercede here, because I'm taking my turn.

**CHAIRMAN:** You may proceed.

**REP. PAUL GOSAR:** Mr. Kamps and Ms. LaSalvic, so the economy of the builders is vibrant and vivacious right now, is it?

**SPENCER KAMPS:** No. It's challenging.

**REP. PAUL GOSAR:** That's kind of what I thought. So even new construction would be severely handicapped. I mean, people who purchased property would look secondly at whether I invest or develop that land. Would you agree?

**SPENCER KAMPS:** I would agree.

**REP. PAUL GOSAR:** So it would have a significant application. I want to give you some statistics that I think will—I'm glad most people are sitting down. The average cost of a rules and regulations to a large employer is over $9,000, to a small employer is over $11,000. What we're going to see is a massive increase. What we're actually going to see is Obamacare on water. This is called the individual mandate, so all people will actually see these implications in the

cost. So you're going to see this explode. That means all individuals will have their actual application.

Mr. Lynch, you made a comment. "It's about money. No, it's not." The agency has plenty of money. Their problem is prioritization. Now, they don't work appropriately with local and state jurisdictions. You actually made that comment. And so from that standpoint I would slightly disagree with you. Let me ask you a question. You were very articulate in regards to putting forward the Arizona Water Rights bill. During that time, have you found any application in which water has been subjugated to a less-than-standard quality or pristine quality, in that application?

**BOB LYNCH:** You mean in dealing with water rights—

**REP. PAUL GOSAR:** In outcomes and quality.

**BOB LYNCH:** Well, as Senator Griffin said, I don't know anybody who wants dirty water. I mean, you can't farm with dirty water. You're growing things for people to eat. I mean, it's raw water, as we call it, but it's got to be good water, and you don't want your children, or your grandchildren, for that matter, drinking bad water. We're all very water conscious in this state, and I think we do a fantastic job. As I said earlier, there are no horror shows. Why do we need this here? What's going wrong in Arizona? Who's dying? Nobody. Things are working, and we can take care of these issues without all this help from inside the Beltway. But I don't know of any application, with anybody I deal with in this whole state, where there is a dirty water issue now.

**REP. PAUL GOSAR:** Would you agree with me that what we're doing here with the expansion of the definition here is that we're trying to validate our jobs at the federal level, within the agency of the EPA? You made earlier mention that we're looking for a problem that doesn't exist.

**BOB LYNCH:** I think EPA thinks it has found a very clever way to approach this whole issue on the basis of science rather than law, and to say this test, this significant nexus test, has to be based on science—and, of course, everything has a significant nexus, in their view. So, yeah, I mean, I don't know. Maybe they're planning on building a second building.

**REP. PAUL GOSAR:** Are you familiar with the Sandy Johnson case up in Wyoming? This is a gentleman that actually got his permits to build a pond through the Wyoming Department of Environmental Quality, and now is being fined $75,000 a day—not $35,000 but $75,000 a day—and this is before the Clear Water Act. Are you aware of that case?

**BOB LYNCH:** I'm not, no.

**REP. PAUL GOSAR:** This is a gentleman that actually went through the State of Wyoming's jurisdiction of ADEQ, or their equivalent of ADEQ, getting permits to do such, for a holding stock

pond, and is now being threatened by the EPA to sue. So if you want jurisdiction about what's coming, here it is on the individual basis.

Last but not least, you're actually engaged in water and power, are you not?

**BOB LYNCH:** Yes.

**REP. PAUL GOSAR:** So about that science about regional haze? How about that science up there at the Navajo Generation Station? Their science actually defined their ruling. It actually complements it. It had no significant implications in the regional haze on the Grand Canyon, and yet we're still quoting science. That's what's frustrating.

**BOB LYNCH:** I understand. The problem is that the fix that was proposed wouldn't give you any kind of actual result you could see. It was beyond the scope of human eyesight.

**REP. PAUL GOSAR:** And, once again, that application for regional haze is primacy federal or primacy state.

**BOB LYNCH:** Well, it's federal.

**REP. PAUL GOSAR:** State.

**BOB LYNCH:** Well, not in EPA's eyes.

**REP. PAUL GOSAR:** Well, but that's my whole point is, coming back to Ms. Engel's comments, this is an issue that needs to be mandated back to Congress for jurisdiction and oversight. I really want to thank everybody for their testimony today. Thank you.

**CHAIRMAN:** Yes. Thank you, panel members, and that concludes the Q&A for the panel.

We now will turn it over to public comment. Where is Penny Pew? Penny, if you could go over the podium. Anyone who would like to give a comment on the rule, what the members here would appreciate is if you propose or if you favor the proposed regulation or you're against it and a brief explanation as to why. You'll have to give Penny your name, and there's 90 seconds per person to give their comment at this point. And she has a list already with some names on there, so please see her if you'd like your name added. We will start the public comment in just a minute or two.

[Pause.]

**CHAIRMAN:** We're on.

**PENNY PEW**: Okay. Test.

**CHAIRMAN:** There you go. Now we can hear you.

**PENNY PEW:** I thought it was me. Okay. We'll start out. I have a list of five names so far—Andrew Walter, Andy Groseta, Doyel Shamley, Michael Curtis, and Kelly Norton, and then we'll go from there.

**CHAIRMAN:** Okay. Mr. Walter. Welcome.

**ANDREW WALTER**: Thank you. I think I'm a little too tall for the microphone. Can everybody hear me? Okay.

**CHAIRMAN:** Please proceed:

**ANDREW WALTER**: Thank you. I'd like to thank the members of the committee for your leadership on this important issue that's incredibly important to the people of Arizona. Please know there are millions of hard-working Arizonans, middle-class families counting on you to shed light on this harmful proposal, which I disagree with.

I have serious concerns about this proposal and the new EPA proposal coming out that we're discussing today. At its core, this controversial new rule will do three things: destabilize America's goal for energy independence; kill hundreds of thousands of jobs, if not more; and bust the budgets of struggling middle-class families. Unfortunately, this new federal power grab does little to advance public health, but does much to further consolidate power in an unelectable, unaccountable federal agency. Supporters of this controversial new EPA proposal, claim the changes will produce jobs, cut electric bills, and save lives due to a cleaner environment. Unbiased observers will note many of these same people made conspicuous claims about the Affordable Care Act, that proved false—lessons learned, in my humble opinion.

This controversial new proposal by the Obama administration completely disregards our democratic process, which must be held sacred by those in elected office. The President seeks to bypass Congress, and in so doing, the will of the people. This hyper-partisan style of governing is not constitutional or right. I'd like to suggest, for the record, that these new EPA proposals have very little to do with protecting the environment and have everything to do with consolidating power in Washington, away from the free men and women who make this country great, just trying to provide for their families.

And one final question I think is at the core of this debate—will this help or hurt struggling middle-class families at a time that our economy shrunk by 1 percent in the first question? I think the answer is clear this proposal will further hollow out the American middle class, the backbone of our economy, and I think that's unacceptable.

I yield my time.

**CHAIRMAN:** Thank you, sir. I need the next witness, Mr. Groseta.

**ANDY GROSETA:** Andy Groseta, President of the Cottonwood Ditch Association and, first of all, I want to read a letter addressed to the committee from our ditch association. First of all, thank you for conducting this joint field hearing in Phoenix. On behalf of the 325 shareholders of the Cottonwood Ditch Association, I am strongly opposed to EPA's and the Army Corps of Engineer's proposed definition Waters of the U.S. This newly proposed rule, if implemented, will adversely impact the landowners in our irrigation association. In addition, it will adversely impact farmers, ranchers, and other businesses in the Verde Valley.

EPA's proposed definition and jurisdictional assertions could conceivably extend jurisdiction far beyond Congress's intent, as it was shared with your group this morning. If implemented, this new rule would be regulating areas that never have been jurisdictional under current regulations. Case in point, EPA proposed to include, for regulatory purposes, natural, manmade, or man-altered in the new definition of a tributary. The majority of all irrigation canals and ditches in Arizona, and even throughout the West, are manmade and were built during the late 1800s or the early 1900s. Our association, our canal, our ditch, namely the Cottonwood Ditch, was built December 10, 1877. Even some canals such as the Central Arizona Project, who testified here earlier this morning, they would be classified as a manmade canal and can be under the jurisdiction of this new regulation.

With the creation of irrigation associations and/or districts, millions of acres of wildlife and bird habitat corridors have been created in Arizona and other western states. We do not need the EPA or the Army Corps of Engineers to be throwing another blanket of regulations on private property owners who are producing our nation's food supply. Arizona's farmers and ranchers know the importance to protect and manage our precious water resources. We do not need the Federal Government's guidance and assistance to restrict our ability to provide the food and fiber of this great nation. We, as landowners, do not need to have increased regulations and possible fines up to $37,500 per day.

In closing, given the significant flaws in this new proposed rule, and supporting scientific analysis, the Cottonwood Ditch Association strongly urges the EPA to withdraw its current proposed rule.

Thank you for your time, and thank you for hosting this field hearing in Arizona.

**CHAIRMAN:** Thank you, Mr. Groseta. Penny, the next witness.

**PENNY PEW:** Next we have Doyel Shamley, Apache County Natural Resource Director.

**DOYEL SHAMLEY:** Again, Doyel Shamley from Apache County. Thank you, Committee, for being here today and for having me speak. Most of the obvious flaws in this plan were brought out by the fine panelists today, so my comments will be very brief. There is obviously a total lack of jurisdiction on the part of the EPA to be able to do this mechanism. I would have to

question not only their general jurisdiction, but they're exceeding anything in the Clean Water Act, and that is a definite fact.

Now, when I look at people, different entities and elected bodies from soil and water conservation districts, the county commissioners and supervisors, that range from Arizona all the way up to Montana, that I'm having to work this issue for them right now, to write the substantive commentary to turn in to the EPA, there are some other things that continually come up. Many people on the ground, these soil and water conservation directors, the people that manage and are the real stewards of our water of our western states, and these county supervisors and commissioners, what they urge is that Congress begin to push back on these agencies, as you have done on many fronts, but start considering these Fifth Amendment-style takings, because when these agencies do a ruling that impacts the ability of a person to perfect upon a property right, which water is, and the use of that water is a property right, it is a Fifth Amendment taking, and we need to start looking at this in a broader view, not just how bad the science is, because I almost feel that's a given. Dealing with natural resources from the agencies anymore, I thought I would see the worst of the worst on the last plan. I always told myself, nothing could be written more poorly, and then another plan comes out from an agency. And I had to be so smart-alecky about it, but it's a fact.

So please consider those Fifth Amendment takings, and I am glad you're here, because it seems, as normal, I don't see my congressional representative here, for up in that region, but I can also tell you that on current projects right now on the ground, when I don't see the EPA out restoring the watersheds after the agency-mismanaged fires destroyed them, our county is. And I can tell you right now this ruling would alleviate all those, because there's no way Apache County could encumber—[audio break].

[End of videotape recording.]

NATIONAL ASSOCIATION of REALTORS®



July 29, 2014

The Honorable Sam Graves
Chairman
House Small Business Committee
Washington, DC 20515

The Honorable Nydia Velázquez
Ranking Member
House Small Business Committee
Washington, DC 20515

Re: Definition of "Waters of the United States" under the Clean Water Act (CWA), 79 Federal Register 22188 [April 21, 2014]

Dear Chairman Graves and Ranking Member Velázquez:

One million members of the National Association of REALTORS® (NAR) thank you for investigating the Environmental Protection Agency's (EPA) compliance with the Regulatory Flexibility Act (RFA) in the above captioned rulemaking. Section 609 of the RFA generally requires that the EPA convene small business panels to review draft rules and explore major regulatory alternatives which minimize small business impacts while still achieving statutory objectives. To date, EPA has conducted more than 40 small business panels, including for many of the industries subject to the proposal before the Committee today. We believe that all these panels have not only produced more cost effective rulemakings but also proven that the EPA can protect the environment and preserve competition at the same time; both are equally valid public policy goals and neither is mutually exclusive.

Yet for the "Waters of the U.S." proposal, the EPA chose not to convene a small business panel and instead certify that "the rule will not have a significant economic impact on a substantial number of small entities." This requires that the Agency provide a factual basis for the decision. According to SBA's Office of Advocacy which monitors RFA compliance, "factual basis" means "at a minimum … a description of the number of affected entities and the size of the economic impacts and why either the number of entities or the size of the impacts justifies the certification."[1] EPA's RFA guidance provides a similar definition and goes further by directing its rule writers to conduct a "screening analysis" of potential small business impacts, even if the Agency does not believe the RFA applies.[2]

Here, the sole basis for the RFA certification is

> "Because fewer waters will be subject to the Clean Water Act under the proposed rule than are subject to regulation under the existing regulations; this action will not affect small entities to a greater degree than the existing regulations."[3]

[1] See page 13 of http://www.sba.gov/sites/default/files/rfaguide_0512_0.pdf
[2] Page 11 of EPA's "Final Guidance for EPA Rulewriters: Regulatory Flexibility Act:" "…[A]s a matter of Agency policy, even if your rule is not subject to the RFA, to the extent that you foresee that your rule will have an adverse economic impact on small entities, you should assess those impacts and make efforts to minimize them through consultation with the small entities likely to be regulated, while remaining consistent with applicable statutory requirements." The EPA devotes an entire chapter (2) to how to conduct a screening analysis, and the full document may be found at: http://www.epa.gov/rfa/documents/Guidance-RegFlexAct.pdf
[3] 79 Fed. Reg. 22220.

EPA does not provide an estimate of the number or even attempt to narrow the universe of potentially affected small businesses. If the Agency conducted a screening analysis pursuant to its own RFA guidance, it is not evident from the certification. EPA simply refers to any one of 28 million "industrial small entities" that meet the SBA's size standards. There is no description of what "significant economic impact" means in this context, even if only to show how impacts have been reduced. Apparently, the EPA does not see the value of the RFA in this instance. On page 22220 of the Federal Register notice, "This question of CWA jurisdiction will be informed by tools of statutory construction and the geographical and hydrological factors… *which are not factors readily informed by the RFA*" (emphasis added). While questioning the RFA's importance, the EPA nevertheless notes that it conducted one small-entity outreach meeting back in 2011, when it was drafting a separate guidance document. We are concerned that an agency summary of a single meeting could never achieve the same results as a SBREFA panel or fulfill the RFA's requirements.

According to Oxford, a "fact" is "a thing that is indisputably the case,"[4] but the only thing indisputable in this certification is the amount of disagreement between EPA and the small business community over the scope of the proposed regulation. Here are NAR's concerns regarding the facts about this U.S. waters proposal:

- **In fact, the proposed rule makes it easier for EPA to regulate more small businesses near "waters of the U.S., including wetlands."** Currently, before issuing most letters finding U.S. waters/wetlands on private property, the Agency must first physically visit the site and collect data showing that regulation could prevent significant pollution to an ocean, estuary, lake or river that is navigable. Because site-specific data analysis is "so time consuming and costly," the EPA is not now able to enforce the CWA in places like Arizona and Georgia, according to the Agency's own website. For this reason, the proposed rule would eliminate the site specific analysis for two broad, new categories of water – i.e., "all tributary streams" and "all adjacent waters including wetlands." According to the Federal Register notice,[5] "waters in these categories would be jurisdictional "waters of the United States" by rule – no additional analysis would be required." It is puzzling how the EPA can propose to remove what it considers to be THE barrier to regulation but still maintain that there will be less regulation under the proposal.

- **In fact, the proposed rule does not clarify which small businesses will be regulated.** According to EPA, not all owners of property with U.S. waters are subject to regulation, only those who engage in regulated activities around them. Yet, nowhere in the proposed rule is there a list of what a property owner can or cannot do without a federal permit. On the other hand, the EPA identifies more than 50 land-use activities, such as digging, planting, mulching and clearing, that are specifically exempted for those involved in on-going normal farming as part of the proposal. Many of these activities do not appear to be uniquely agricultural, yet the small businesses who engage in them would not be expressly exempted and therefore could be regulated under this proposal. In fact, many property owners have already been sued under the CWA for engaging in these very same activities without first obtaining a federal permit. Property buyers require information about permitting restrictions, costs and delays before they can make informed decisions at

[4] http://www.oxforddictionaries.com/us/definition/american_english/fact
[5] See 79 Fed. Reg. 22,189.

the closing table, yet U.S. water/wetlands letters could introduce another variable into already complex real estate transactions. We believe that, had EPA conducted a small business panel, it would have discovered this and considered some regulatory alternatives such as streamlining the permitting process that could have helped to provide some certainty to the small businesses.

- **In fact, the proposed rule would impose significant and direct economic impacts on small businesses.** The EPA appears to be playing a regulatory shell game by separating the "who is regulated" from the "what is regulated." By dividing the regulation into two parts – this first part defines which waters are jurisdictional, a separate, second rulemaking will be necessary to determine which activities are regulated and what is required of owners of property with jurisdictional waters. It also places small business owners in the untenable position of having to comment on a proposed rule without knowing its full impact or being able to make recommendations regarding a range of regulatory flexibility alternatives (such as streamlining the 404 permitting process).

- **In fact, changing who could be required to get a permit would have a direct permitting impact on the regulated small business community.** Contrary to the agency citations, neither Mid-Tex vs. FERC (773 F.2d 327 [DC Cir 1985]) nor American Trucking Association vs. EPA (175 F.3d 1027 [D.C. Cir. 1999]) applies to the U.S. waters proposal.

    1. These regulations are directly set and imposed by the federal government, not the states. In fact, 48 states do not have primacy under CWA Section 404, for instance.
    2. The impacts are reasonably foreseeable, even if all that may be required is a ½-hour federal consultation over whether a permit is required for each real estate project. However, the transaction costs are likely to be much higher for many development or construction projects.

  Even the general permit can cost tens of thousands of dollars for the application alone, according to EPA's low-range estimates. This does not include the cost of project redesign, for instance. U.C. Berkeley Professor David Sunding also found that one of these lower cost permits can take an average of 6 months to obtain.[6] According to an Environmental Law Institute report, it is not uncommon for small businesses to go through a year-long federal permitting negotiation, only to learn that the federal staff has turned over, the new staffer has different ideas about the permit, and the small business owner must start the negotiation over again.[7] And all this is for a nationwide permit that is not allowed unless the project's environmental impact is *de minimis*. In other words, it's potentially all cost for little environmental benefit. EPA claims that part of the rationale for this proposal is to save businesses money, yet there appears to be no attempt to reduce the real delays and uncertainty caused by the lengthy negotiation and broken permitting process that will be directly triggered by this proposed rule.

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[6] http://areweb.berkeley.edu/~sunding/Economics%20of%20Environmental%20Regulation.pdf
[7] ELI's full report may be read here: http://www.eli.org/sites/default/files/eli-pubs/d18_03.pdf

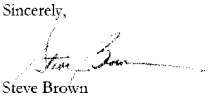
- **In fact, this proposal shifts the CWA burden of proof to small businesses**. Currently, it's up to the federal agency to conduct site-specific analysis proving that the Clean Water Act applies before it can regulate most small businesses, according to the U.S. Supreme Court. Under this proposal however, the presumption would flip for "all tributary streams" and "all adjacent waters including wetlands." Private property with one of these waters would be categorically regulated unless the owner somehow proves the CWA does not apply. In fact, under this proposal the Agency could regulate any "other water" that has more than a "speculative or insubstantial" impact on jurisdictional water, according to the best professional judgment of staff. Yet, nowhere in this proposal does the EPA provide an appeals process for small businesses to contest U.S. water determinations. Nor does the proposal define for small businesses precisely what level of analysis or types of data the owner would need to provide in order to prove that there is only an "insubstantial or speculative" impact. Defining this appeals process would be another important issue that a SBREFA panel could effectively address and provide recommendations.

Appended to this letter, please find NAR's written statement to the House Transportation and Infrastructure Committee on the proposed rule. It applies more broadly to all property owners and buyers (including small businesses) but includes important details on the impacts which have only been summarized above.

In conclusion, we believe that the EPA has improperly certified the proposed "U.S. waters" rule and it will have a significant economic impact on a substantial number of small entities. There are enough questions about the factual basis for the certification to justify withdrawal of the proposed rule until EPA convenes a small business panel in accordance with the RFA. NAR respectfully requests that the House Small Business Committee urge EPA to conduct a SBREFA panel before the Agency moves forward with this unjustified regulatory proposal.

Thank you for the opportunity to submit these comments. We look forward to working with you, the Congress and EPA to find meaningful ways to protect high value wetlands while at the same time, preserving small businesses and all the benefits that competition provides the U.S. economy.

Sincerely,



Steve Brown
2014 President, National Association of REALTORS®

NATIONAL ASSOCIATION of REALTORS®

500 New Jersey Avenue, N.W.

Washington, DC 20001-2020

Steve Brown
2014 President

Dale A. Stinton
CAE, CPA, CMA, RCE
Chief Executive Officer

GOVERNMENT AFFAIRS
Jerry Giovaniello, Senior Vice President
Gary Weaver, Vice President
Joe Ventrone, Vice President
Scott Reiter, Vice President
Jamie Gregory, Deputy Chief Lobbyist

# STATEMENT OF THE

# NATIONAL ASSOCIATION OF REALTORS®

## SUBMITTED FOR THE RECORD TO

## THE UNITED STATES HOUSE OF REPRESENTATIVES
## COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE
## SUBCOMMITTEE ON WATER RESOURCES AND ENVIRONMENT

## HEARING TITLED

## POTENTIAL IMPACTS OF PROPOSED CHANGES TO THE CLEAN WATER ACT JURISDICTIONAL RULE

## JUNE 11, 2014

## INTRODUCTION

On April 21, 2014, the Environmental Protection Agency (EPA) and the Army Corps of Engineers (Corps) proposed to reduce the amount of scientific analysis needed in order to declare a "water of the U.S." including wetlands on private property across the country. On behalf of 1-million members involved in all aspects of commercial and residential real estate, the National Association of REALTORS® (NAR) thanks you for holding this oversight hearing and for the opportunity to submit these written comments for the record.

Currently before declaring a water of the U.S., the agencies must first conduct a "significant nexus" analysis for each stream or wetland to determine that regulation could prevent significant pollution from reaching an ocean, lake or river that is "navigable," the focus of the Clean Water Act. Because, in the agency's view, a full-blown scientific analysis for each water or wetland is "so time consuming and costly," the agencies are proposing instead to satisfy this requirement with a more generic and less resource intensive "synthesis" of academic research showing "connectivity" between streams, wetlands and downstream water bodies. On this basis, the agencies believe that they can waive the full analysis before regulating most of streams and wetlands, and reduce the analysis for any "other water" that has more than a "speculative or insubstantial" impact. We disagree.

NAR opposes this vague and misguided "waters of the U.S." proposed regulation. While perhaps an administrative inconvenience, site-specific data and analysis forces the agencies to justify their decision to issue wetland determinations on private property and focus on significant impacts to navigable water. By removing the analytical requirement for regulation, the agencies will make it easier not only to issue more determinations but also force these property owners to go through a lengthy federal negotiation and broken permit process to make certain improvements to their land.

At the same time, the proposal does not 1) delineate which improvements require a federal permit, 2) offer any reforms or improvements to bring clarity or consistency to these permit requirements, or 3) define any kind of a process for property owners to appeal U.S. water determinations based on "insubstantial" or "speculative" impacts. The resulting lack of certainty and consistency for permits, or how to appeal "wetland determinations," will likely complicate real estate transactions such that buyers will walk away from the closing table or demand price reductions to compensate for the hassle and possible transaction costs associated with these permits. We urge Congress to stop these agencies from moving forward with this proposal until they provide a sound scientific basis for the regulatory changes and also streamline the permitting process to bring certainty to home- and small-business owners where wetlands are declared.

**PROPOSED RULE ELIMINATES THE SOUND SCIENCE BASIS FOR U.S. WATER DETERMINATIONS**

Today, the EPA and Army Corps may not regulate most "waters of the U.S.," including wetlands, without first showing a significant nexus to an ocean, lake or river that is navigable, the focus of the Clean Water Act. "Significant nexus" is a policy and legal determination based on a scientific site-specific investigation, data collection and analysis of factors including soil, plants, and hydrology.

The agencies point to this significant nexus analysis as the reason they are not able to enforce the Clean Water Act in more places like Arizona and Georgia.[1] On its website, EPA supplies these "representative cases" where it's currently "so time consuming and costly to prove the Clean Water Act protects these rivers." EPA also documents the "enforcement savings" from the proposal in its economic analysis.[2] None of these major-polluter examples involve home or small business owners, which typically do not own significant acreage (the typical lot size is a ¼ acre)[3], let alone disturb that amount of wetland with a typical home project.

Under this proposal, the agencies would waive the site-specific, data-based analysis before regulating land use on or near most streams and wetlands in the United States (see table 1). The proposal:

- Creates two new categories of water – i.e., "all tributaries" and "adjacent waters."
- Adds most streams, ponds, lakes, and wetlands to these categories. "Tributary" is anything with a bed, bank and "ordinary high water mark," including some "ditches." "Adjacent" means within the "floodplain" of the tributary, but the details of what constitutes a floodplain, like how large an area (e.g., the 5-year or 500 year floodplain), are left to the unspecified "best professional judgment" and discretion of agency permit writers.
- Moves both categories from column B (analysis required for regulation) to column A (regulated without site specific data and analysis).

[1] http://www2.epa.gov/uswaters --for links to the examples, click "Enforcement of the law has been challenging."
[2] http://www2.epa.gov/sites/production/files/2014-03/documents/wus_proposed_rule_economic_analysis.pdf
[3] American Housing Survey, 2009.

**Table 1. Proposed changes to "Waters of the U.S." regulatory definition**

| **Column A**<br><br>**(Regulated without analysis)** | **Column B**<br><br>**(Analysis required for regulation)** |
|---|---|
| Navigable or Interstate<br><br>• The Ocean<br>• Most Lakes<br>• Most Rivers<br><br>Non-Navigable and Intrastate<br><br>• **All** ~~**Some**~~ Tributaries (Streams, Lakes, Ponds)<br>  o Perennial<br>  o Seasonal<br>  o **Ephemeral**<br>• **Most** ~~**Some**~~ Wetlands<br>  o Adjacent to navigable water<br>  o **Adjacent to** ~~**Directly Abutting**~~ covered stream | Non-Navigable and Intrastate<br><br>• ~~**Rest of the Tributaries**~~<br>  ~~o **Ephemeral**~~<br>• Rest of Wetlands<br>  ~~o **Adjacent to tributary**~~<br>  o Not adjacent<br>• Any other water<br>  ~~o **Adjacent to navigable water**~~<br>  ~~o **Adjacent to tributaries**~~<br>  o Not-adjacent |

For any remaining or "other water," the agencies would continue regulating case-by-case using a significant nexus analysis. However, the amount of analysis is dramatically reduced. Under this proposal, all agency staff would have to show is more than a "speculative or insubstantial" impact to navigable water. If, for instance, there were many wetlands within the watershed of a major river, no further analysis would be required to categorically regulate land use within any particular wetland with that river's watershed. Also, the data and analysis from already regulated water bodies could be used to justify jurisdiction over any other "similarly situated" water without first having to visit the site and collect some scientific data.

Contrary to agency assertions, this proposal does not narrow the current definition of "waters of U.S."

- While technically not adding "playa lakes," "prairie potholes," or "mudflats" to the definition, the proposal does remove the analytical barrier which, according to EPA, is preventing both agencies from issuing U.S. waters determinations on private property in more places including Arizona and Georgia.
- Codifying longstanding exemptions (prior converted crop land and waste treatment) does not reduce the current scope of definition; it simply writes into regulation what the agencies have already been excluding for many years.
- Giving up jurisdiction over "ornamental" (bird baths), "reflecting or swimming pools" is not a meaningful gesture, as it's doubtful that any court would have let them regulate these, anyway.
- It is not clear that many ditches would meet ALL of the following conditions – i.e., wholly excavated in uplands AND drains only uplands AND flows less than year-round -- or never ever connects to any navigable water or a tributary in order to qualify for the variance. Also, the term "uplands" is not defined in the proposal so what's "in or out" is likely to be litigated in court, which does not provide certainty to the regulated community.

## LITERATURE REVIEW AND SYNTHESIS DOES NOT SUPPORT THE PROPOSED RULE

In lieu of site-specific, data-based analysis, the EPA and the Corps are proposing to satisfy the significant nexus requirement with a less resource intensive "synthesis" of academic studies. The agencies believe these studies show "connectivity" between wetlands, streams and downstream water bodies, and that's sufficient in their view to justify and waive the full analysis for land-use regulations on or within the floodplain of one of these waters.

However, this synthesis is nothing more than a glorified literature review.[4] EPA merely compiles, summarizes and categorizes other studies, and labels them a "synthesis." EPA conducts no new or original science to support or link these studies to its regulatory decisions. Three quarters of the citations included were published before the Supreme Court's decision in Rapanos v. U.S. (2006), and the rest appear to be more of the same. It breaks no new ground. The Supreme Court did not find this body of research to be a compelling basis for prior regulatory decisions, either in Rapanos or SWANCC v. the Army Corp (2001). Putting a new spin on old science does not amount to new science.

[4] For EPA's synthesis: http://cfpub.epa.gov/ncea/cfm/recordisplay.cfm?deid=238345

In addition, scientists with GEI Consultants[5] reviewed the literature synthesis and concluded that these studies do not even attempt to measure, let alone support a significant nexus finding. According to GEI,

> "Most of the science on connectivity … has been focused on measuring the flow of resources (matter and energy) from upstream to downstream. …[T]hese studies have not focused on *quantifying the ecological significance* of the input of specific tributaries or headwaters, alone or in the aggregate, and ultimately whether such effects could be linked directly and causally to impairment of downstream waters." [6]

Knowing how many rocks downstream came from upstream won't tell you what the Supreme Court determined needs to be known, which is how many times rocks can be added before downstream water becomes "impaired" under the Clean Water Act. Asking the Science Advisory Board if the synthesis supports the first conclusion (i.e., some rocks come from upstream) doesn't answer the second (how many times can rocks be added downstream before significantly impacting the water's integrity?). EPA is asking entirely the wrong set of policy questions. As GEI puts it,

> "The Science Advisory Board (SAB) charge questions were of such limited scope that they will do little to direct the Synthesis Report toward a more useful exploration of the science needed to inform policy … The questions will not provide the SAB panel with needed directive to require substantive revisions to the report such that it … inform(s) policy with regard to Clean Water Act jurisdiction."[7]

**THERE IS NO SUBSTITUTE FOR SITE-SPECIFIC DATA & ANALYSIS TO DETERMINE U.S. WATERS**

Here's how EPA's synthesis of generic studies stacks up against a more targeted study specific to and based on data for each stream or wetland.

[5] For GEI's credentials, see: http://www.geiconsultants.com/about-gei-1
[6] For NAR's summary and link to GEI's comments: http://www.realtor.org/articles/nar-submits-comments-on-draft-water-report
[7] For NAR's summary and link to GEI's comments: http://www.realtor.org/articles/nar-submits-comments-on-draft-water-report

**Table 2. EPA synthesis of research versus significant nexus analysis**

| Significant Nexus | Synthesis of Research |
|---|---|
| Proves that regulation of a stream or wetland will prevent pollution to an ocean, lake or river | Shows *presence* of a connection between streams, wetlands, and downstream, and not *significance* |
| Shows how much matter/energy can be added to a tributary or wetland before the Act applies | Shows how much of the matter/energy moved from upstream to downstream |
| Based on site specific data and analysis of soil, plants, hydrology, and other relevant factors | Dependent upon whatever data and analysis academics have used for their connectivity study |
| Requires an original scientific investigation, data and analysis for each water body to be regulated | Includes no new or original science by agencies; it's a literature review |
| Relies on timely and water-body-specific facts, data and analysis | Relies on substantially the same body of research which the Supreme Court didn't find compelling |

The EPA may not want to "walk the nexus" and collect data on soil, plants and hydrology, but it's forced the Agency to justify their regulatory decisions, according to the staffs' own interviews with the Inspector General:[8]

- "Rapanos has raised the bar on establishing jurisdiction."
- "…lost one case … because no one walked the property…"
- "…have to assemble a considerable amount of data to prove significant nexus."
- "…many streams have no U.S. Geological Survey gauging data."
- "…need several years of biotic observations…."
- "…there is currently no standard stream flow assessment methodology."

[8] Congressionally Requested Report on Comments Related to Effects of Jurisdictional Uncertainty on Clean Water Act Implementation, Report No. 09-N-0149 (April 30, 2009). For a link: http://www.epa.gov/oig/reports/reportsByTopic/Enforcement_Reports.html

- "…biggest impact is out in the arid West, where it is comparably difficult to prove significant nexus."

As a result, many U.S. water determinations (which would not previously have been questioned) are now being reviewed and are not holding up to either EPA or Justice Department scrutiny. Again, from the EPA interviews:

- "Of the 654 jurisdictional determinations [in EPA region 5] … 449 were found to be non-jurisdictional."
- "An estimated total of 489 enforcement cases … [were] not pursued … case priority was lowered … or lack of jurisdiction was asserted as an affirmative defense…"
- "In the past, everyone *just assumed* that these areas are jurisdictional" (emphasis added).

"Walking the nexus" may be an administrative inconvenience, but the data don't support an approach based on 'just assuming.' The main reason for the site-specific, data-based analysis is that it provides a sound scientific basis for agency regulatory decisions. Analysis also raises the cost of unjustified U.S. water determinations. It forces the agencies to do what Congress intended, which is to focus on waters which are either a) in fact navigable or b) significantly impact navigable water. It also prevents agencies from regulating small businesses or homeowners that are not major contributors to navigable water quality impairment.

**PROPOSED RULE WILL OVERCOMPLICATE ALREADY COMPLEX REAL ESTATE TRANSACTIONS**

Small-business and homeowners are not the problem. Few own enough property to be able to disturb a 1/2-acre of wetland, which is how the Nationwide 404 Permit Program defines *de minimis* impact to the environment. The typical lot size is a ¼ acre with three-quarters having less than an acre.[9] None of the big polluter examples EPA presents involves a homeowner or small business. Yet, by removing the analytical barrier to regulation, agencies will be able to issue more U.S. water determinations on private properties in more places like Arizona, Georgia or wherever else it's now "too time consuming and costly to prove the Clean Water Act protect these rivers," according to the EPA.[10]

The home buying process[11] will not work unless there is sufficient property information to make informed decisions. This is why buyers are provided with good faith estimates and disclosures about

[9] American Housing Survey, 2009.
[10] http://www2.epa.gov/uswaters -- for the examples, click on "Enforcement of the law has been challenging"
[11] In previous comments, the International Council of Shopping Centers, National Association of Homebuilders, NAR and others have thoroughly documented the commercial and homebuilding impacts of the U.S. waters proposed rule. In this statement, NAR focuses on the impact to existing homeowners which have not been documented.

material defects and environmental hazards. It is why they are entitled to request a home inspection by a professional before making decisions. It is also why there's such a thing as owner's title insurance. Contracts and legal documents have to be signed to ensure that buyers receive full information and understand it. Later, you can sue if the property isn't as advertised or there are misrepresentations.

The "waters of the U.S." proposal introduces yet another variable – letters declaring wetlands on private property – into an already complicated home buying process. By removing the analytical requirement before issuing one of these letters, the agencies will make it easier to issue more of them and in more places. The problem is each letter requires the property owner to get a federal permit in order to make certain improvements to their land. But they don't know which improvements require a permit. Those aren't delineated anywhere in the proposal. If on the other hand, they take their chances and don't initiate a potentially lengthy federal negotiation as part of a broken permit process, they could face civil fines amounting to tens of thousands of dollars each day and possibly even criminal penalties.

Also, what's required can vary widely across permits – even within the same district of the Corps. No one will inform you where the goal posts are; just that it's up to you and they'll let you know when you get there. Often, applicants will go through this year-long negotiation only to submit the permit application, find that staff has turned over and they have to start over with a new staffer who has completely different ideas about how to rewrite the permit.

While more U.S. waters letters could be issued under this proposal, the agencies do not provide the detailed information needed for citizens to make informed decisions about these letters. The letter could state for instance: "the parcel is a matrix of streams, wetlands, and uplands" and "when you plan to develop the lot, a more comprehensive delineation would be recommended." Real estate agents will work with sellers to disclose this information, but buyers won't know which portion of the lot can be developed, what types of developments are regulated, or how to obtain the permit. They may consult an attorney about this but will most likely be advised to hire an engineer to "delineate" the wetlands without being told what that means. And even if this step is taken, there is no assurance that this analysis will be accepted by the agency or that a permit will ever be issued.

The potential for land-use restrictions and the need for costly permits will increase the cost of home ownership and make regulated properties less attractive to buyers. Of two homes, all else equal (lot size, number of rooms, etc.), the one with fewer restrictions should have higher property value.[12]

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[12] There is strong empirical data to support this proposition, although economists may disagree. For instance:

- E.L. Glaeser, and B.A. Ward, The Causes and Consequences of Land Use Regulation: Evidence from Greater Boston. Journal of Urban Economics 65 (2009) 265-278.

However, before buying, the buyer will want to know in exactly which ways the property could be restricted as well as how much those restrictions could cost (time, effort, money). They will need this information when weighing whether to come to the closing table and deciding how much to ask in reducing listing price in order to compensate for the hassle of a potential federal negotiation for each unspecified improvement on the property they're considering purchasing.

To illustrate the point, after Congress revised the flood insurance law, many buyers refused to consider floodplain properties not due to the actual insurance cost but because they read in a newspaper about $30,000 flood insurance premiums. Others negotiated reduced sales prices because they feared the property was "grandfathered", and they could potentially see their rates skyrocket, even when, in fact, the home was not grandfathered and the provision of concern had not taken effect and would not for several years. While it may be entirely true that the proposed rule will not cover all homes in a floodplain (only those where a U.S. water is filled) nor regulate such normal home projects as mowing grass and planting flower beds, the takeaway from the flood insurance experience is that buyers make decisions based on fear and uncertainty, both real and *imagined.*

In the case of wetlands, buyers have legitimate reason for concern. Many will have heard the horror story of the Sacketts in Priest Lake, Idaho, who were denied their day in court when they questioned a wetlands determination.[13] Others just south of here in Hampton Roads, Virginia, will read the cautionary tales of buyers suing sellers over lack of wetlands disclosures[14] or neighbor-on-neighbor water wars for mowing grass or planting seedlings.[15] Some might even have a neighbor to two who've been sued over the years for tree removals or grading (e.g., Catchpole v Wagner[16]). This all reinforces the need for the EPA and the Corps to provide more information rather than less about the rule, what it does and does not do, and provide as much detail as possible all upfront.

So far the agencies have responded by breaking up the rulemaking process into two parts, and putting forward only the first. This proposal, which clarifies "waters of the U.S.," determines "who is regulated." The issue here is whether site-specific data and analysis is required before a wetlands letter is issued. "What is regulated" is not a part of this proposal. Nor does the proposal lay out the full range of home projects that trigger a permit. The wetland permitting process itself is an entirely separate rulemaking. The issue there is what exactly I must do when I get one of these letters and how to appeal it.

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- K.R. Ihlanfeldt, The Effect of Land Use Regulation on Housing and Land Prices. Journal of Urban Economics 61 (2007) 420-435.

[13] For the chilling facts of case, see: http://www.pacificlegal.org/Sackett

[14] http://hamptonroads.com/2010/05/cautionary-tale-wetlands-violations-will-cost-you

[15] http://hamptonroads.com/2012/05/newport-news-gets-swamped-wetlands-dispute

[16] 210 US Dist LEXIS 53729, at *1 (W.D. Wash. 2010)

Based on a report by the Environmental Law Institute (ELI),[17] that permitting process is broken and needs reform and streamlining to provide some consistency, timeliness, and predictability. But any comments or suggestions about this have been deemed non-germane and will not be considered by the agencies in the context of a "waters of the US" proposal. Because the agencies have decided to play a regulatory shell game with the "who" vs. the "what," property owners have been put in an untenable position of commenting on a regulation without knowing its full impact. Those who own a small business will be denied the opportunity under another law to offer significant alternatives that could clarify or minimize the proposed "waters of U.S." impact while still achieving the Clean Water Act's objectives.[18]

These are some property buyer questions which are not answered by the immediate proposed rule:

- What is the full range of projects that will require a federal permit?
- What can I do on my property without first having to get a permit?
- What do I have to do to get one of these permits?
- What's involved in the federal application process?
- What information do I have to provide and when?
- How long will the permit application take?
- How will my project and application be evaluated?
- What are the yardsticks for avoiding or minimizing wetlands loss?
- What are the full set of permit requirements and conditions?
- Are there changes I can make in advance to my project and increase my chances of approval?
- Can I be forced to redesign my home project?
- What kinds of redesigns could be considered?
- What if I disagree with the agency's decision, can I appeal?
- What exactly is involved in that appeal?
- What do I have to prove in order to win?
- Will I need an attorney? An engineer? Who do I consult?
- And how much will all this cost me (time, efforts, money)?

The "Waters of the U.S." proposal creates these uncertainties into the property buying process.

Uncertainty #1: The "waters of the U.S." proposal does not tell me what I can and cannot do on my own property without a federal permit.

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[17] http://www.eli.org/research-report/wetland-avoidance-and-minimization-action-perspectives-experience

[18] For EPA's justification against conducting a small business review panel under the Regulatory Flexibility Act, see: 79 Fed. Reg. 22220 (April 21, 2014).

Not all property owners in the floodplain will be regulated, only those who conduct regulated activities. Again, that information is not found in the "waters of U.S." proposal, and there is not much more in the decision documents from the previous regulation for the "nationwide" (general) permit program (2012). The general permit for commercial real estate (#39) is separate from residential (#29), but both include a similarly vague and uber-general statement about what's regulated:

> "Discharges of dredged or fill material into non-tidal waters of the United States for the construction or expansion of a single residence, a multiple unit residential development, or a residential subdivision. This NWP authorizes the construction of building foundations and building pads and attendant features that are necessary for the use of the residence or residential development. Attendant features may include but are not limited to roads, parking lots, garages, yards, utility lines, storm water management facilities, septic fields, and recreation facilities such as playgrounds, playing fields, and golf courses (provided the golf course is an integral part of the residential development)."[19]

However, construction projects are not the only ones that may require a permit. For example, home owners have been sued for not obtaining one to perform these activities:

- Landscaping a backyard (Remington v. Matheson [neighbor on neighbor])
- Use of an "outdated" septic system (Grine v. Coombs)
- Grooming a private beach (U.S. v. Marion L. Kincaid Trust)
- Building a dam in a creek (U.S. v. Brink)
- Cleaning up debris and tires (U.S. v. Fabian)
- Building a fruit stand (U.S. v. Donovan)[20]
- Stabilizing a river bank (U.S. v. Lambert)
- Removing small saplings and grading the deeded access easement (Catchpole v. Wagner)[21]

Also, the proposal includes exemptions for specific activities performed by farmers and ranchers, but not homeowners or small businesses. The agencies would not have exempted these activities from permits unless they believed these activities could trigger them. Yet, none of these "normal

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[19] http://www.usace.army.mil/Portals/2/docs/civilworks/nwp/2012/NWP_29_2012.pdf

[20] Note: The defendant lost because he couldn't finance an expert witness to refute the Corps' wetlands determination; under this proposed rule, the Corps would no longer have to provide any data and analysis at all to support its future determinations; the burden would be entirely on the property owner to come up with that data and analysis on their own.

[21] There is an extended history between Catchpole and Wagner over activity on this easement, and the Corps has been repeatedly drawn into the dispute. In one instance the Sheriff was called, and the Corps had to step in and referee that "normal mowing activity" was not a violation that the Corps would pursue under the Clean Water Act. NAR would expect more of these kinds of disputes to arise, should the proposed rule be finalized.

farming" practices appear to be uniquely agricultural, opening up the non-farmers to regulation. Here are a couple of the listed exemptions but the full set can be found on EPA's website.[22]

- Fencing (USDA practice #383)
- Brush removal (#314)
- Weed removal (#315)
- Stream crossing (#578)
- Mulching (#484)
- Tree/Shrub Planting (#422)
- Tree Pruning (#666)

While the proposal could open up more properties to wetlands letters, permits and lawsuits, it does not in any way limit who can sue over which kinds of activities for lack of permits. It does, on the other hand, reduce the amount of data and analysis the Corps or EPA need in order to declare U.S. waters on these properties, and shifts the entire burden to the property owner to prove one these waters do not exist on their property before they can win or get a frivolous case dismissed.

Uncertainty #2: The proposal doesn't tell me how to get a permit, what's required and how long it will take.

Again, the permitting process is not a part of the 'waters of the U.S.' proposal, denying home owners and small businesses an opportunity to comment on the proposed rule's full impact or offer reasonable alternatives that could minimize the impact while protecting navigable and significant nexus waters. EPA's economic analysis on page 16 does provide an estimate of the average cost for a general permit ($13,000 each).

Costs go up from there. The estimate of $13,000 is only for a general permit and for the application alone; it doesn't include re-designing a project to obtain permit approval or the conditions and requirements which can vary widely across permits. While not providing an estimate of the time it takes to get one of these permit, U.C. Berkeley Professor David Sunding found based on a survey that the "[general] permits in our sample took an average of 313 days to obtain."[23] Individual permits can take even longer and be significantly more expensive.

The reason that general permits have the lowest price tag is because they are intended to reduce the amount of paper work and time to start minor home construction projects that "result in minimal adverse environmental effects, individually or cumulatively." One of the conditions for the permit is

[22] http://www2.epa.gov/sites/production/files/2014-03/documents/cwa_404_exempt.pdf
[23] http://areweb.berkeley.edu/~sunding/Economcs%20of%20Environmental%20Regulation.pdf

a project may not disturb more than a ½ -acre of wetlands or 300 linear feet of streambed, the Corp's definition of *de minimis*. However, transaction costs and requirements may vary.

The Environmental Law Institute studied the process, and found very little consistency, predictability or timeliness across permits.[24] The process begins with a letter from the agency declaring U.S. water on the property. Home owners may be given a copy of the law, told to submit any "plans to develop the lot", and be reminded that the burden of proof is entirely on them. No examples of how to comply are offered. There might be a check list (which is widely frowned upon) but there is no single definition or yard stick or practical guidance of any sort for the key compliance terms "avoidance," "minimization" and "practicable."

If you ask "which part of my property can I develop?", the answer is "hire an engineer and delineate it." "What if I make these changes to my project before applying?", the answer may be "I'll know it when we see it." There is no standard approach that the Corps follows to evaluate the project. According to the ELI's interviews, it is common for applicants to go through an entire negotiation and upon submitting an application, find staff turned over and the new individual has a completely different concept of what's most important to avoid and the best way to minimize.

The following are more actual quotes by regulators documented in the ELI report:

- "The question is, how much is enough? It's all judgment. It depends on the person's mood and is extremely variable."
- "We ask them to document plans and show how they get to where they are. If I think you can do more, I'm going to show you. The burden is on the applicant to show me where they've been in the journey."
- "I like to be a rule maker with regard to work I've done, but the more I standardize, the more I restrict myself with regard to find possible solutions."
- "[B]ecause judgments on which impacts are more avoidable or more important exists in a grey area, a lot of the decision making within the Corps depends on professional judgment, causing a lot of variability."
- "There are times when the agency will pressure the applicant to do more avoidance or minimization during the permitting process."
- "There are times when they won't sign off because they want a certain thing. That's the subjective aspect and I think that is the way it ought to work."

[24] For ELI's report, http://www.eli.org/research-report/wetland-avoidance-and-minimization-action-perspectives-experience

Permit decisions appear completely subjective, iterative and not uniform across individual applicants. It seems that whatever the agency assumes is necessary to avoid or minimize wetlands loss, goes. If you refuse to provide a single piece of information or don't go along 100% with a proposed design modification, your permit is summarily denied. In at least one example (Schmidt v. the Corps), the agency denied the permit to build a single family home on a lot in part because the Corps identified other lots the land owner owned and his neighbors didn't seem to be objecting to construction on those lots (yet).

For these reasons, the ELI recommended several reforms to the wetlands permit process, including developing guidelines identifying common approaches and quantifiable standards. But at this time, the agencies don't appear interested in sensible recommendations like these, even if it brings some consistency, certainty or reduces the burden on small business or homeowners while still protecting the environment. "Nationwide permits do not assert jurisdiction over waters and wetlands .... Likewise, identifying navigable waters ... is a different process than the NWP authorization process," according to the Corps.[25]

Uncertainty #3: The proposal doesn't tell me what to do if I disagree with an agency decision, or how to prove the Clean Water Act does not apply to my property.

The proposal asserts jurisdiction over any U.S. water or wetland with more than a "speculative or insubstantial" impact on navigable water. Yet, nowhere does this proposal define those terms or a process for how a homeowner may appeal a U.S. water determination based on "insubstantial or speculative" impacts.

The proposal will eliminate the need for agencies to collect data and perform analysis to justify regulation for most water bodies. Before, it was up to the agencies to prove the Clean Water Act applies, but under this proposal, the burden would shift 100% to the property owners to prove the reverse. And the cost will be higher for property owners because (1) they don't have the expertise needed, (2) there is no guidance for delineating "insubstantial/speculative" impacts, and (3) they have not been learning-by-doing these analyses as the agencies have for decades.

Ironically, the rationale for the proposed rule is these agencies cannot justify the taxpayer expense of site specific data and analysis, yet the proposal is forcing individual taxpayers to hire an engineer and pay for the very same analysis themselves or else go through a broken permit process.

[25] 77 Fed. Reg. 10190 (Feb. 21, 2012)

Administrative inconvenience is not a good excuse. If it's too hard for the federal government to do some site visits, data collection and analysis in order to justify their regulations, then perhaps it's simply not worth doing.

**Conclusion**

Based on the forgoing, NAR respectfully requests that Congress step in and stop these agencies from moving forward with a proposed rule that removes the scientific basis for "waters of U.S." regulatory decisions. It does not provide certainty to taxpayers who own the impacted properties and will complicate property and home sales upon which the economy depends.

Thank you for the opportunity to submit these comments. NAR looks forward to working with committee members and the rest of Congress to find workable solutions that protect navigable water quality while minimizing unnecessary cost and uncertainty for the Nation's property owners and buyers.


**July 29, 2014**
**House Small Business Committee Hearing on EPA & Corps' proposed rule expanding Clean Water Act jurisdiction**

**Written Testimony from RISE (Responsible Industry for a Sound Environment)**

Thank you for the opportunity to submit our written testimony on the Environmental Protection Agency's and the Army Corps of Engineers' proposed rule defining "waters of the U.S." under the Clean Water Act. RISE is the national association representing the manufacturers, formulators, distributors and other industry leaders in the specialty pesticide and fertilizer industry. We are also a member of the Waters Advocacy Coalition. Many of our members and their customers are small, local businesses providing pest, turf and lawn control solutions around the United States.

Due to the proposed rule's complexity and unintended economic burdens on small businesses, we recommend the House Small Business Committee requests "navigable" remains as the defining term of "waters of the U.S." under the Clean Water Act.

EPA's and the Army Corps of Engineers' proposed rule expanding the definition of waters of the United States under the Clean Water Act will have a profound and significant negative impact on small businesses including turf and landscaping, vector control services, sports turf management, vegetation management, and structural pest control. The costs of pesticide application permits near waters that would be defined as a "water of the U.S." will create additional burdens for small green industry and pest control businesses, and some business owners may not be able to afford these additional fees. The cost of permitting fees will also be reflected in customers' fees as businesses will have to increase prices to cover the new costs of their services.

Currently, all professionals in vector control must acquire NPDES permits to apply larvicides in water covered by the CWA. These applications are vital to helping protect the public from vector-borne diseases like West Nile Virus, Dengue Fever and more recently, Chikungunya. West Nile Virus claimed some 286 lives in 2013 and the proposed rule would make it more difficult for professional applicators to obtain permits and treat high risk areas.

The cost of NPDES permits already has effect on small businesses and cities. Cities like Brewerton, Alabama, Orchard City, Colorado, and Cedaredge, Colorado could not spray for mosquitoes due to the high costs and liability associated with NPDES permits. Western Slope and Delta County, Colorado, have expressed concerns about citizen lawsuits along with issues finding aerial spraying companies to perform vector control due to liability and costs. The city of Laramie, Wyoming, struggled with increased costs of mosquito control due to the increase its applicators had to charge due to NPDES permits. Oregon's Department of Environmental

Quality had to halt invasive species treatments for the same reason as Brewerton and other jurisdictions. We are concerned EPA and the Corps' proposed rule will cause even more small businesses applying pesticides to struggle with high permit costs.

One lawncare professional we know believes EPA's proposed rule will have a serious impact on his Baltimore county-based business. Most of the work done by his company, Pro-Lawn-Plus Inc., consists of pesticide and fertilizer applications in residential areas, and most customers live near ditches, swales, and creeks that would now be considered a "water of the U.S." The proposed rule would cause this company to significantly increase its service fees in order to keep his business operating with the new permitting costs.

Small businesses will also be at risk for costly citizen lawsuits that could significantly impact the way these companies operate and service customers. For example, a small landscaping company may no longer want to apply a perimeter treatment for ticks around a customer's property if they have a ditch or water nearby, due to the potential of being brought into a citizen lawsuit by a neighbor or activist group that believes the application is unlawful. These companies could no longer be able to provide routine services to customers, therefore affecting revenue and the businesses' ability to operate and grow.

Well-maintained lawns are important for the environment. Properly-cared for lawns reduce run-off of sediment and other materials into nearby waters. We believe one of the unintended consequences of EPA's proposed rule would be more soil erosion and run-off into many connected water bodies. Spot-pesticide treatments on properties made by small businesses like Pro-Lawn-Plus Inc., help protect the public from harmful pests like ticks, which cause dangerous diseases like Lyme disease. These companies also protect the environment with targeted herbicide applications to invasive and noxious weeds like poison ivy, oak and sumac. Many states have laws requiring land owners to control invasive plants on their property. Applications to meet state law requirements by lawn and landscape companies or landowners near any vaguely-defined "waters" would now be subject to CWA jurisdiction, fines, and lawsuits.

The turf and landscape industry is already highly regulated under the Federal Insecticide Fungicide Rodenticide Act. Professional applicators currently pay annual recertification and training fees and additional permitting fees due to the proposed rule would be costly and have an enormous economic impact on small businesses that apply pesticides and fertilizers. Currently, many businesses are not required to obtain 402 permits for the work they do. Under expanded CWA jurisdiction, these small businesses would now have to obtain 402 permits for any pesticide treatment near waters not originally regulated.

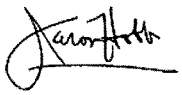
The label language on all pesticide products today instructs applicators which products can be used near different types of waters. If the definition of water is changed to be more expansive, then these products' labels may become more confusing or contradictory due to the proposed rule. For example, if a certain pesticide label says the product can be used near water, but the proposed rule expands CWA jurisdiction and contradicts this label statement, then professional applicators will not be able to use products in the manner they were intended for before the rule. Congress never intended for pesticide applications to be regulated under the CWA. However, a court decision resulted in the regulation of pesticides as "point sources," requiring NPDES

permits. The court decision did not reflect Congressional or EPA's intent. FIFRA requires all pesticides to undergo rigorous risk assessments for use on or near water before registrations can be approved. We believe EPA and the Corps' proposed rule is an overreach for this reason.

RISE recommends the House Small Business Committee requests "navigable" remains as the defining term of "waters of the U.S." under the Clean Water Act. Expanding CWA jurisdiction will cause significant economic burdens to small businesses applying pesticides and fertilizers due to costly pesticide permitting, and make it more difficult to treat harmful pests on private and public property if any water is nearby. Small businesses, public health and the environment will all be impacted.

Thank you for the opportunity to submit our testimony and please contact us if you have any questions or need additional information.

Sincerely,



Aaron Hobbs
President
RISE (Responsible Industry for a Sound Environment)
1156 15th St. N.W.
Suite 400
Washington, D.C. 20005

WATERS ADVOCACY COALITION
WAC

July 30, 2014

The Honorable Sam Graves
Chairman
House Committee on Small Business
Washington, D.C. 20515

The Honorable Nydia Velázquez
Ranking Member
House Committee on Small Business
Washington, D.C. 20515

Dear Chairman Graves and Ranking Member Velázquez:

The Waters Advocacy Coalition (WAC) supports the House Small Business Committee's attention to the impact on small business of the proposed Clean Water Act (CWA) rule redefining "Waters of the United States" (WOTUS). WAC is a multi-industry coalition representing the nation's construction, real estate, mining, agriculture, forestry, manufacturing, and energy sectors, and wildlife conservation interests—many of which include a substantial number of small business entities.

The Environmental Protection Agency and the U.S. Army Corps of Engineers ("the agencies") proposed the rule to "clarify" which waters are federally regulated and which waters remain under the jurisdiction of their respective states. The agencies assert, "Because fewer waters will be subject to the CWA under the proposed rule than are subject to regulation under the existing regulations, this action will not affect small entities to a greater degree than the existing regulations."[1] We believe the agencies have dramatically underestimated the impact of the proposed rule on small business entities. In reality, the proposed rule establishes broader definitions of existing regulatory categories, such as tributaries, and regulates new areas that are not jurisdictional under current regulations. For example, the new definition of adjacent waters based on their location within riparian areas and floodplains or subsurface connections to jurisdictional waters is a significant change. Furthermore, the agencies' proposal to aggregate similarly situated waters to bootstrap jurisdiction is ill-conceived, potentially expanding jurisdiction beyond historical interpretations and negatively impacting all CWA programs.

**Agencies Fail to Comply with Regulatory Flexibility Act**

The agencies have bypassed the safeguards of the Regulatory Flexibility Act (RFA) by certifying the proposed rule. Under the RFA, Congress clearly intends for federal agencies to carefully consider the proportional impacts of federal regulations on small businesses. WAC members believe that the agencies should have conducted an initial regulatory review through a Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA) panel. A more thorough, small business-focused, analysis of the proposed requirements would have revealed the disproportionate burdens that the rule would place on small businesses.

[1] 79 Fed. Reg. 22,188, 22,220 (Apr. 21, 2014).

In the docket for the proposed rule, the EPA has provided a "Summary of the Discretionary Small Entity Outreach for Planned Proposed Revised Definition of 'Waters of the United States,'" which details an outreach meeting that the EPA held in 2011 to discuss the 2011 Draft Guidance. This meeting should in no way be seen as a substitute for a SBREFA panel on the proposed rule. The 2011 meeting was open to only a limited number of participants, the topic of the meeting was not the proposed rule but a previous draft guidance, and the EPA has wholly ignored all of the feedback from those who were able to participate. The agencies have not given the small business community a real, meaningful opportunity to discuss the burdens of the proposed rule as the RFA requires.

**Agencies Rely on Flawed Economic Analysis**

The economic analysis of the proposal prepared by the EPA is seriously flawed. It does not provide a reasonable assessment of the proposed rule's costs and benefits as required by Executive Order 12866. Economist Dr. David Sunding, the Thomas J. Graff Professor at the University of California-Berkeley's College of Natural Resources, has identified several of the most significant flaws with the analysis.

Dr. Sunding explains how the EPA excluded costs, underrepresented jurisdictional areas and used flawed methodologies to arrive at much lower economic impacts. He also examines how the lack of transparency in the report makes it difficult to understand or replicate the calculations, evaluate the underlying assumptions, or understand discrepancies in the results. Dr. Sunding concludes that EPA's analysis results in an artificially small increase in jurisdictional waters because of how it selected and analyzed data from the Section 404 (dredge and fill) program and did not include new categories of waters that would be jurisdictional under the proposed rule. The distortion caused by an artificially low estimate is magnified when EPA examines costs and largely ignores the impacts for non-404 CWA programs.

According to Sunding, "the errors and omissions in the EPA's study are so severe as to render it virtually meaningless."[2] The use of the flawed methodology as a basis for claiming a *de minimis* impact on small businesses conveys an inaccurate picture of the impact of the proposed rule. A full copy of his report is available online.

**Agencies Misjudge Unintended Consequences of Proposed Rule**

Under the proposed rule, more waters would become a WOTUS. As a result, fewer projects will qualify for nationwide permits and, instead, applicants will need to obtain an individual permit from the Corps. The costs of obtaining Corps permits are significant: averaging 788 days and $271,596 for an individual permit compared to 313 days and $28,915 for a nationwide permit. Over $1.7 billion is spent each year by the private and public sectors on administrative costs to

[2] Sunding, David, "Review of 2014 EPA Economic Analysis of Proposed Revised Definition of Waters of the United States," May 2014, *available at* http://www.nssga.org/economist-reviews-epas-economic-analysis-proposed-waters-united-states-rule/

obtain wetlands permits.[3] Importantly, these ranges do not take into account the cost of required mitigation.

Additionally, with more WOTUS dotting the landscape, more section 404 permits will be needed. Section 404 permits are federal "actions" that trigger additional companion statutory reviews by agencies, other than the state permitting agency, including reviews under the Endangered Species Act, the National Historic Preservation Act, and the National Environmental Policy Act. Not only are these reviews costly, but project proponents do not have a seat at the table during these additional reviews, consulting agencies are not bound by a specific time limit, and there is potential for activist litigation. Longer permit preparation and review times combined with the higher costs associated with additional reviews place small businesses in a no win situation, as they lead to higher costs overall and greater risks that can ultimately jeopardize a project.

The potential effect of the proposed rule directly conflicts with the Administration's stated commitment to expedite infrastructure projects.[4] The agencies' proposal can be expected to forestall energy company progress towards meeting state and federal-level environmental and other requirements. For example, small businesses associated with the natural gas pipeline and distribution industry, subject to state and federal pipeline mandates, are concerned about the potential impact on pipeline testing and replacement work (which usually require Clean Water Act permits when affecting a WOTUS) as more areas are treated by the agencies as WOTUS. Similarly, electric cooperatives, which are overwhelmingly small businesses, are concerned about how permitting delays and increased costs could affect the viability and timely development of new generation, including generation from renewables.

The negative impact on real estate transaction processes is another example of the negative practical effects of the proposed rule. Increased permitting requirements will cause delay for site modifications, and landlords, who often have specific time incentives built into lease agreements, may be unable to fulfill time obligations or predict certainty in those lease agreements. This would jeopardize their ability to retain and attract future tenants. In addition, tenant companies seeking to expand or relocate their operations will be impacted by project scheduling uncertainty and increased time and cost. This would change the calculation and potentially put at risk the capital investment necessary to support such projects. These consequences are not limited to the real estate sector; rather, these practical implications would affect everyday business transactions in the manufacturing, construction, transportation, energy and agriculture industries. For example, small businesses could now have to meet water quality standards for ditches, ephemeral streams, or other features on their property that were not previously considered WOTUS.

WAC respectfully requests that the members of the House Small Business Committee take steps to assure that the agencies do not advance a proposed rule that does not consider the needs of small businesses. The proposed rule will disproportionately disadvantage small businesses and increase their compliance costs at a time when they already face significant economic

[3] David Sunding and David Zilberman, "The Economics of Environmental Regulation by Licensing: An Assessment of Recent Changes to the Wetland Permitting Process," 2002
[4] Executive Order 13604: Improving Performance of Federal Permitting and Review of Infrastructure.

headwinds. WAC looks forward to working with the Committee and to find workable solutions that protect our nation's waters while minimizing unnecessary cost and uncertainty for America's small business community.

Sincerely,

Agricultural Retailers Association
American Coke & Coal Chemicals Institute
American Exploration & Mining Association
American Farm Bureau Federation
American Forest & Paper Association
American Gas Association
American Public Gas Association
American Public Power Association
American Road & Transportation Builders Association
Associated Builders and Contractors
The Associated General Contractors of America
CropLife America
Edison Electric Institute
The Fertilizer Institute
Foundation for Environmental and Economic Progress (FEEP)
Industrial Minerals Association – North America
International Council of Shopping Centers (ICSC)
Interstate Natural Gas Association of America (INGAA)
Irrigation Association
Leading Builders of America
NAIOP, the Commercial Real Estate Development Association
National Association of Home Builders
National Association of Manufacturers
National Association of REALTORS®
National Cattlemen's Beef Association
National Council of Farmer Cooperatives
National Industrial Sand Association
National Mining Association
National Multifamily Housing Council
National Pork Producers Council (NPPC)
National Rural Electric Cooperative Association
National Stone, Sand and Gravel Association (NSSGA)
Portland Cement Association
Public Lands Council
Responsible Industry for a Sound Environment (RISE)
Southern Crop Production Association
Texas Wildlife Association
Treated Wood Council
United Egg Producers

cc: Members of House Small Business Committee

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